

THE RULE OF LAW ORAL HISTORY PROJECT

The Reminiscences of

Thomas B. Wilner

Columbia Center for Oral History

Columbia University

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PREFACE

The following oral history is the result of a recorded interview with Thomas B. Wilner conducted by Ronald J. Grele on February 4 and 20, and March 24, 2009. 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: Thomas B. Wilner

Date: February 4, 2009

Interviewer: Ronald J. Grele

Washington, D.C.

Q: This is an interview with Thomas Wilner, taking place in Washington, D.C. on February 4. If you would just say who you are.

Wilner: My name is Tom Wilner. I am a lawyer at Shearman & Sterling in Washington, D.C.

How does it sound?

Q: Terrific. It's coming through. I just have to turn this down a little.

You sent me an e-mail saying that you would like to start with an overview, which I take to mean a few, general propositions about what your experience has been.

Wilner: Looking back on the last seven years, there are a number of general themes that I think are interesting about Guantánamo, the first of which really has not been really looked at.

[INTERRUPTION]

Wilner: That was Gary Isaac. He's the guy I am trying to help get the job.

Anyway, there are really some fascinating themes. One that has not been covered as much as I would want is the intricacies of the legal arguments that went on. Frankly, the fact that the Supreme Court ruled in our favor two times was not inevitable. It was really a question of carefully thought out legal arguments. And even if they would not have ruled in our favor, despite our efforts, it really raises terribly interesting issues of the law and the way lawyers approach the law. That is one theme that we can get into.

Another theme is the story of how the hysteria of 9/11 caused the country to lose its way, and lose it for a pretty long time. For a long time I have always expected that we had checks in our society that would stop real excesses. Maybe I was naïve about that, but I was surprised at the way the press did not work as a check. They really, by and large, did not question the [George W. Bush] administration. There was no opposition party willing to stand up; the law schools and student bodies were silent at the time. People didn't give a damn. It has been very interesting to me why that happened, whether there was a change in the education system in the country, a change in the understanding of what the country stands for, or something that has made the country more concerned with individual incomes than with principles.

Also, for me, my involvement with Guantánamo became a story of the difficulty of managing people. It would have been nice if we would have been able to litigate these cases by ourselves, making our own decisions, in an ivory tower. But because there were six hundred, five hundred, four hundred, then three hundred detainees who became individually represented after we won the *Rasul* case [*Rasul v. Bush*] in 2004, efforts before the Court had to be coordinated. I think a lot of lawyers will tell you that in cases where you have a lot of people, your worst enemies are your own

allies—the people on your side who can say things that will compromise your position. The continuing struggle to get a first-rate product and put it out, both in the courts and otherwise, to not compromise it to its lowest common denominator, and to avoid disaster as we were going through very different things, was a story in and of itself.

Looking at it, it was extraordinary to me. There are so many good lawyers and other people who became involved in Guantánamo. Ninety percent of them were great and five percent of them were really bad and created a problem for everyone with bad motivations or whatever it was. It just became terribly troubling.

So those are interesting themes. The case involved not just legal work because it was an effort to really change a government policy to throw people in an offshore prison and deny them access to the courts and the law. To try to change that policy was a multi-pronged process where we really fought in the courts. We tried to get the story out in the press. We fought in Congress. The battle went directly into Congress after we won in the courts, and then Congress revoked the right to habeas corpus. So those are the general overviews of how I see what happened.

Q: I have some particular questions that your overview raises immediately. I think we will get them as we go along. I've made some notes here that will catch them. But I want to move chronologically by asking when you became aware of all this, and got involved.

Wilner: I first became aware of Guantánamo shortly after it opened in January 2002. I saw these guys in orange jumpsuits being crowded into cages in Guantánamo and my first reaction was,

"Thank god we got these guys, these guys who did this horrible thing to us." That was the way it came across to us. Then I did not really think that much about it until about March. In March I was contacted by a woman, a headhunter in Washington, on behalf of some Kuwaiti families to see if I would be interested in representing them. It was pretty much portrayed to me that they did not know where their kids were. I think at that time there were nine Kuwaiti kids and brothers and they did not know where they were. They thought they might be in the custody of the United States, and wanted to find out—would I represent them? There was a very elaborately drawn up retainer letter that had been drawn up, as I later found out, by an American lawyer in Abu Dhabi who was friendly with the lawyer for these Kuwaiti families.

Q: Now, why would they have come to you?

Wilner: This lawyer in Abu Dhabi had advised them that this was an issue where they should get a reputable lawyer. I found out that they had actually approached Warren Christopher, the former Secretary of State, at O'Melveny & Myers, and he had turned them down. They had approached Lloyd Cutler, at Wilmer Cutler [Wilmer Cutler Pickering Hale and Dorr, LLP], and he had turned them down as well. I do not know whether they approached others—I think they might have—and they finally got down to me. [Laughs]

Q: Why would they have found your name?

Wilner: I think I was recommended by somebody at Wilmer Cutler as somebody who was experienced in dealing with the U.S. government in a number of different facets. But I am not sure

of the whole recommendation process.

So they came to me. I looked at it and said, "Sure." I didn't see any problem with it at the time. Part of the very carefully drawn retainer agreement said that if we found out that any of these guys were terrorists we could drop out. But they wanted help. Part of it was that I would go to Kuwait and meet the families, review the files, learn the facts, and try to find out where these fellows were. At that time I enlisted the help of two other people at the firm—Neil Koslowe, who had worked in the Justice Department all his life, and a female associate here, Kristine Huskey, who was interested in working on it. I tried to make some contacts in the government, to see if we could find out anything. Neil tried to make some contact through the Justice Department. We were basically told nothing, and we were told that we would not be told anything.

Q: Now did you have to go to the firm to get an okay to take this on?

Wilner: Well, at that time what we had was a conflict form. Now it has been changed after that, because of this case—they call it the "Wilner change"—to identify whether a case might be very controversial. So I put in a conflict check. There was no conflict.

Q: Now, you are a full partner.

Wilner: I am a full partner—a fairly senior partner. The main office of the firm is in New York, as was the head of the litigation department. He did call me to ask me what it was about and I told him, "We have been retained by these Kuwaiti families to try to find out where their kids are." He said,

"Sounds interesting." And I didn't think of it as a controversial sort of thing. I really didn't. But then what happened—.

I went to Kuwait with Kristine Huskey. We found some things out in Kuwait. First, we met with the families. We met with the Kuwaiti lawyer, with this American lawyer from Abu Dhabi—

Q: What was his name?

Wilner: William Brown. And the Kuwaiti lawyer was named Abdul Rahman Al-Haroun. He was actually close friends with a guy—

[INTERRUPTION]

It might be the president coming down Pennsylvania Avenue here. Anyway, Abdul Rahman was very friendly with a guy named Khalid Al-Odah. Khalid Al-Odah's son, Fawzi, was one of those missing. Khalid and Abdul Rahman had tried to go in to meet with the U.S. Embassy and were stiffed. I mean, insultingly stiffed. They wouldn't meet with them.

[START SIDE CONVERSATION]

Wilner: Look at this! Look at the president coming down the street, going to the Capitol. Until three weeks ago, when this happened in front of my window, it was George [W.] Bush. Now, thankfully, it is not.

Q: Which one of those cars—?

Wilner: You don't know. But you always know it's the president if the ambulance is there, because the ambulance follows them.

Q: Aha. But you would not know, among the twenty or thirty cars there—

Wilner: Well, you know it is one of the middle ones.

Q: Yes. Sure.

Wilner: Isn't that great, though?

Q: There is a big, black truck, as well.

Wilner: Yes. This is something. Anyway—

Q: Only in Washington.

Wilner: Only in Washington, when you are sitting right here on Pennsylvania Avenue. It is a great view, isn't it?

[END SIDE CONVERSATION]

But they had been stiffed by the embassy over there. It was insulting to me. When we went over there, we met with the families. Khalid and Abdul Rahman had gathered members of the families and they had also gathered files on the people who were missing.

Now, when we got over there, the U.S. government told the government in Kuwait that eight of these people were in Guantánamo. The Red Cross subsequently told us—by that time there were twelve Kuwaiti families who were missing people—that the other four were also in Guantánamo, so we learned at that time what was happening.

As I said, we met with the families, who had built up files on the backgrounds of their kids, many of whom had a long history of going to different Muslim countries to do charitable work.

Somebody at that time had called in from Pakistan, and said that three or four of these people were sold for bounties—they were selling Arabs for bounties. It was the first time I had heard about the bounties. I obtained a copy of a bounty leaflet, which was distributed by the United States in the area. We had it as part of our Supreme Court brief both times. It said, "Feed your family for life. Turn in an Arab terrorist," and we found out they were paying between \$5,000 and \$25,000 dollars for "Arab terrorists"—a huge amount of money where the average income is \$200 dollars a year.

Q: You picked this up in Kuwait?

Wilner: We picked that up in Kuwait and picked up further ones. They are part of our Supreme

Court brief. We put them all over. Many of these families' people had a history, on every vacation, of going away to some Muslim country. One of the guys who is still down there today—Fouad Al-Rabiah—was a forty-year-old vice-president of Kuwait Airlines. He had run a charitable organization somewhere else and, according to his brother, was establishing another in northern Afghanistan. He had been down there.

Anyway, we also met with a number of Kuwaiti charities, for whom these people were going over for. I am not experienced in Muslim countries, but I was impressed that Kuwait has a big emphasis on charity and doing charity in real ways—going places, digging wells, helping with schools. The whole feeling of charity is that you do not give a gift and name a building after yourself. You do it personally and try to go there. Particularly in Kuwait, it was explained to me that, "We are a country blessed with wealth that we had nothing to do with, and we owe it to others."

So I found these things. When Kristine and I were in Kuwait we were in touch with Neil Koslowe, who was here. Neil had looked into it and found out that the Center for Constitutional Rights [CCR] had already filed a case in the District Court for the District of Columbia. It was languishing; nothing was happening. But we talked over the phone and we felt that the decisions were going to be made as part of this case, and we needed to file as well. We talked with the Kuwaitis over there—Abdul Rahman and Khalid—and they agreed that they needed to file a case.

I'll tell you about one of the most moving experiences of my life, as a lawyer. At the end of the meetings with the families and everyone else, Khalid Al-Odah—let me say a little bit about him. Khalid was a pilot, a colonel in the Kuwaiti Air Force. He trained in the United States. During the

last Gulf War—he was out of the Air Force, he had retired—he was an underground fighter with the United States against Saddam Hussein. He was highly complimented as a hero, by the United States, for fighting against him.

He looked at me at the end of this. He was, I thought at that time, a tough guy—a nice guy. He looked at me in the room and he said, "You know, Tom, my whole life I have wanted us to be like the United States and to follow the principles of the United States. For four months I have tried to just have a meeting so my son, Fawzi, can get simple justice," and he started to cry. He said, "I had lost faith in the United States, and, Tom, you restored my faith in the United States." It put a huge obligation on me, but it was so moving, this tough guy—

That was the end of April 2002. Kristine and I, on the way back, stopped in London and we went to Amnesty International, which was gathering files on Guantánamo at that time. We learned more information that a lot of these people really may not be the right guys.

So we came back. We drafted and filed a complaint in District Court. The Center for Constitutional Rights' complaint had been a straight habeas corpus complaint, asking for immediate release. We thought it was wiser to file a normal civil action suit. This is a distinction which only lawyers understand, but a normal civil action asks for basic due process rights—the right, first of all, to have lawyers; to have contact with families; and, for a fair hearing. That relied on habeas corpus, the essence of which is a fair hearing before an independent tribunal. We did not ask for release. We asked for a fair hearing to see whether there was a basis for detaining them because we did not want to confront the release issue. The government said we were trying to do that, to avoid a case

having to do with habeas corpus, but it really wasn't for that.

Q: It really wasn't?

Wilner: It was not, and this is complicated. The case that the government relied primarily on was *Johnson v. Eisentrager* [1950], which had held that a habeas case challenging convictions in a military court, by Germans overseas who had never been in the United States, could not go forward. The government said that by styling our case as something other than habeas we were trying to avoid that ruling. It really wasn't for that reason; it was because we did not want to ask for immediate release. We thought that people would be released because there was no basis for them to be held.

From the beginning, we saw our strategy as multi-pronged. We wanted a fair day for these guys in court, although I really did not think that the court tactic was the solution because it would take so long and would be hard-fought. I really thought what we were fighting for was just this basic American principle that everyone has a right to defend himself and that you cannot throw somebody in prison without giving them a fair hearing. I honestly thought, "We have got to press. We are going to change the government's mind." And I thought, to do that, the Court was one way to pressure them. We would pressure them diplomatically on behalf of the Kuwaitis and, hopefully, other countries would also pressure for their citizens. I also thought that Europe would pressure because it was so outrageous, and that the press would be trying to teach people that there was reason to doubt that these were all bad guys, and the essential right to a hearing was at stake. Everybody should have a fair hearing. If they are bad guys, hold them.

So we embarked on all those things, and each of them was very hard. I'll deal with the diplomatic aspect to start with because, in a way, it is the simplest, and it was disappointing.

The government of Kuwait has a fabulous ambassador here, who is a member of the royal family, extremely bright, sophisticated, and well-connected in Washington—very popular with the Bush administration. Kuwait had tremendous influence because when we went to war in Iraq, we used Kuwait to tremendous leverage. They were basically told and assured by the U.S. government that, "These guys at Guantánamo are bad guys. Stay away." They would feed them this information and make it very difficult for the Kuwait government. At first, I think they simply believed their friends in high authority in the U.S., who assured them that, "We've got these bad guys. You don't want them." At first they tended to believe that. They really did. If you ever talk to the ambassador now, he says he was so misled by it.

So it became very tough to get them to do anything. And, of course, a country like Kuwait is totally dependent on the United States, although we depend on them to invade Iraq and do other things. Their security and defense depends on the United States, and it depends on these very people who were telling them things. That was tough, and we never got far with that. The Kuwaiti ambassador, later, pressed very hard.

The press part was very difficult. I have always been disappointed in that. It was strange to me because there were, from time to time, some great stories done. But they were never enduring. You would have one great story and then they'd fall. Six months later there might be another one, and

they would not even know about the one that had occurred before. I'm lucky because I am friendly with some people in Washington. For instance, I'm very friendly with Tony Lake, who was National Security Advisor under Bill Clinton. I spoke with Tony about this early on, and he was appalled that people weren't getting a fair hearing. I asked if he would write an Op-Ed on it. He enlisted [Abner] Mikva, and together they wrote an Op-Ed. Here was Lake, the National Security Advisor, and Mikva, the Counsel for the President and former Chief Judge of the D.C. Circuit, and a well-known congressman. It was a terrific Op-Ed saying, "We cannot act this way and expect other people, other countries, to come to our aid. Our principles are at stake."

I had great hopes for this Op-Ed. It now shows how naïve I was. I thought when things like this come out, everybody is going to realize that the government should change its policy. Well, the *New York Times* and the *Washington Post* refused to print this Op-Ed. It just shows the terror, the fear, at the time. It was finally printed in the *Boston Globe*, but with very little caring, and it was sort of ignored.

Q: Did you ever find out why?

Wilner: I did not ask. I never asked the *Times* or the *Post* about that, and I know people at the *Post* very well. Normally, when the former National Security Advisor and the Counsel to the President write a joint Op-Ed, it is going to be published in the *New York Times* or the *Washington Post*.

Q: This might be a good point to interject a bit of your personal biography about growing up in Washington, as an explanation of why you would have believe that would have worked.

Wilner: I am a Washingtonian, although I was born in Toronto during World War II. My mother was from Canada and my father was off serving in the war. I lived three months in Canada, then I came to Washington, and I have lived in Washington all my life, except for college and law school. I went to St. Alban's School for Boys, where Al Gore went. My classmates were Don Graham, the publisher of the *Washington Post*; Cliff Case, Senator Case's son. Senator [George A.] Smathers' sons were a year ahead of me. I grew up very friendly with David Brinkley, when he was here, and Brit Hume. Frank Rich grew up down the street. Bo Jones, who is the publisher of the *Post*, was my younger brother's best friend. Don was one of my best friends. I just had lots of contacts that way. I would never intrude upon them to influence the press, but I always had a faith that, somehow, the press would step forward and condemn bad things when they happened, as they did in the Pentagon Papers and Watergate. That the press would be tough and that they would stand up. I always thought there were controls like that. As I said, I was friendly with David Brinkley, who was a curmudgeon, but you were not going to tell David Brinkley not to say what he thought about something, on the air.

So when people would not stand up and say things, I was surprised. I knew Don Hewitt, who was the executive producer of *60 Minutes*. He is gone now. I didn't have faith that they would always get things right. I know that the press has their own motives for doing things, but when the government acted badly and in violation of principles, I thought they would stand up. I hadn't been alive during the McCarthy era, but I thought the lessons of that had been learned, and that people wouldn't be intimidated by government threats, or hysteria.

Tony Lake and Ab Mikva's piece wasn't printed. We worked hard to get *60 Minutes* to do a piece on this. Eventually, a year or two later, *60 Minutes II* did do a piece. But we had a producer lined up at *60 Minutes* to do a piece in 2002, and she wrote me back and said, "I'm sorry. The network has killed it because it is too political." Unbelievable! Too political to talk about somebody's right to a hearing? It was extraordinary. I was shocked. I was sort of sickened.

But we kept working away on the press side. As I said, there were some great stories. Roy Gutman, who at that time was at *Newsweek*, got in contact with me. Roy had won a Pulitzer Prize at *Newsday* for stories on Bosnia, and he did a wonderful story on five Kuwaitis who are at Guantánamo who clearly were wrongly detained. They had been asked to a Pakistani tribal leader's house for dinner, where he sold them all for bounties. It was clear, and it was documented. They had a guy who went in and interviewed people. That came out. It caused a stir for about a week, and then it was ignored. We tried to get it out. Through my contacts, I was able to meet with the editorial board of the *Washington Post*. Frank Rich put me in touch with the editorial board. Frank was terrific. Frank said he just didn't feel expert enough to understand the issues, and he wanted to put me in touch with somebody who would. He put me in touch with Adam Cohen, who is at the *New York Times*, and after that with [Andrew] Rosenthal, who is now the editorial editor. They wrote terrific editorials from the beginning.

The *Washington Post* was more nuanced. I went in and had a meeting with the editorial board and Ben Wittes, who at that time was the editorial writer on this. Ben is a very bright guy, but he is very pro-government. From the beginning, he bought onto the line that you need to have a system in place to separate the wheat from the chaff—the bad guys from the wrongly detained. But he

always took the view—which screwed us later—that Congress should come in here and do this and that it should not be tried in a court system. Which, of course, is now what we are seeing. That was the *Post's* line, pretty much. It was tough.

I will say that the day before we argued the *Rasul* case, I went in and met with Don Graham, who has separated himself from the management of the newspaper. Both he and Bo Jones, who was a publisher, let the editors do their work in the Editorial Department and the News Department. I told him about the case, how important it was, gave him our briefs, and didn't ask for anything. I said, "You know, it is just so important to *not* get an editorial killing us on this." And there was no editorial. Now, I don't know whether he did anything, but I think it would have been Ben's inclination at the time to write something like, "This should not be decided by the courts. There should not be habeas corpus."

I went on a campaign to try to write Op-Eds, to try to get on news shows. Actually, let me back up. This is a press side.

When we decided to file the case—this should be part of the history of it.

Q: The *Odah* case [*Al-Odah v. United States*, consolidated with *Habib v. Bush* into *Rasul v. Bush* for Supreme Court review in November 2003, later consolidated with *Boumediene v Bush* in 2007].

Wilner: Yes, the *Al-Odah* case. When we were in Kuwait, we decided we needed to file a case. It

was the end of April. We drafted the case and filed it. Before doing that, I did go and inform the firm that this was different from just the original representation, which was just looking for people. I met with the senior partner at the firm. The firm was having its retreat, which they have every year. I forget where we had it.

[INTERRUPTION]

Wilner: Okay. Where was I?

Q: You were talking to your partners. You realize that this is much more complicated.

Wilner: And that it was going to be a controversial case.

I can't remember where the partner's retreat was. I think it was someplace in New York. It was about two hours from here. I drove there. And I had told somebody before—I think the managing partner of the Washington office. These things are more administrative titles, but the senior partner is the guy who really runs the firm.

It was an interesting time because we were in another sort of depression. Remember, after September 11, the senior partner of the firm was fairly new.

Q: How many partners are there?

Wilner: Two hundred and something. Shearman & Sterling is a big firm, one of the biggest, largest, international firms, originally from New York. It is a financial transactional firm, known for that around the world, primarily for banking and financial banking issues.

So, I came in and I said to them, "We represent these people. I think we should move to another stage. We need to file a case in court." Before I got there, since the word had gone around, the litigation department had met and had a debate about whether we should do this.

I should say, by the way, that the Kuwaitis insisted on paying. I had said to them, "I think this should be a pro bono case. We're really dealing with important policy issues." They said, "No, we want to pay." I learned later, the government helped them pay. And I had asked in the beginning, "Is there any government involvement?" because that has certain requirements under the Foreign Agents Registration Act. They said, "Nope. We are going to pay for this ourselves and collect money from other Kuwaiti families, and pay for it." But they said, "We want the best. We want to pay for it. We don't want charity."

And I should mention something on that. In a way, if you've got the money, it is better to pay because I've seen with some of the other firms that have gotten in it afterwards, a lot of times the people who do pro bono cases at big firms are people who are not getting other work. At a lower level, it is easier for a big firm, if they're busy, to put their least capable associate to the task and say, "You can go do pro bono work because we're not using you for anything else."

Anyway, the litigation department had debated it back and forth. Some felt we should do it, others

felt we shouldn't do it. One guy apparently said, "We should not do this case, because I am an American patriot, and we don't stand against our government!" I don't even know if he was that articulate. He said, "I'm an American patriot. We can't do this case."

Which was so funny to me, because I thought it was so essentially American.

Anyway, I went to the firm's senior partner, a guy named David Heleniak, who I was very friendly with. He was furious. I said, "David, you're furious."

He said, "You should have told me about this!"

I said, "I'm coming to tell you about it!" He said that his feeling was that I had sandbagged him by taking on the representation in the first place. I said to him, "That certainly was not my intent. I did not see controversy at the time. I see it now, because we're going to bring a case. So I'm telling you about it." He was so furious, and I said, "I need to do this case because I am personally committed to these people in Kuwait. But the firm doesn't need to do it. I'll withdraw as a partner—I'm perfectly happy to do that. It might make me more comfortable in doing it," and he said, "No!" Then he was angry at that. He said, "No! That will look badly for the firm, your withdrawing to do the case. It'll look like we're chicken."

I said, "I'll say nice things about the firm," and he said, "No! Do the case." But he was furious.

This was a tough time for David because the firm, of which he had recently become senior partner,

was under stress. When I say "under stress"—New York firms, now, are hugely profitable, more profitable than lawyers ever expected them to be when they first grew up. Lawyers never expected to make all the money they're making, but there is now a competitive nature of firms. If one firm does worse than another firm, they're no longer the top firm. It is almost like guys in investment banks. If they're not making their billion-dollar bonus and somebody else is, they're not as good. That was the sort of stress the firm was under.

Shearman & Sterling is a financial firm centered in the Wall Street banking world. There were people at the firm who knew people killed in 9/11, and were devastated by it. There were people who were simply worried about the business. It was interesting to me because having grown up in Washington, litigation and taking on government policy is what I do. And there is nothing wrong with that—that is what lawyers do. But the sensitivity in New York—guys who make their money doing financial work always want to be below the radar screen. They don't want to cause waves. In retrospect, I really wish I had left the firm at that time and done it. But I had Neil and Kristine working with me here, so I stayed.

I'll tell you the firm story a little bit. People make more of this than it is.

Q: Did you meet with the two hundred partners, and they debated it?

Wilner: No. That was the litigation department. I arrived back from Kuwait and London, drove up there, met with the senior partner, and met with the litigation partners after they had debated it. They basically were neutral.

After I met with the senior partner, he did two things. First, he assigned somebody to monitor my work on the case. Nice guy, but, frankly, not as good a litigator as I am. From the outset, I thought that defending these people required defending them in the press and undertaking a press campaign. The government chose not to try them in court—they were trying them in the press. They were saying, "These are horrible guys. We can mistreat them." I had to get the story out, and I had to appeal to the public opinion for fairness.

The firm prohibited me from doing press. First, they insisted that we hire a PR guy. I think their reason was—and it shows that they really don't understand PR—that they did not want me to be the focal point. I had to tell the Kuwaitis, "I am going to stay at the firm, but one of the conditions is getting a PR guy." They said, "Fine. Get a PR guy." I got a PR guy named David Henderson, who was a wonderful guy. He had been a correspondent with CBS, then went out on his own. I know people in Washington. I knew Mike Deaver. Mike was a superb PR guy. It is funny how good people are at advising others, and then don't follow that advice themselves. When he left the Reagan White House, pictures of him were taken for the front of *TIME Magazine*, and he got in trouble. But that had long passed and when I talked with him, he had become high profile, promoting his PR business and running Edelman [International]. He was a great guy. He said, "We can't do it." I think he ran it up, but he said, "It is too controversial for us to take on." I actually checked with a few other firms that told me the same thing, "We're not going to get into this. This would tar us." But Mike recommended David Henderson. He said, "He's very bright, he's very good. He's a lone wolf, but why don't you contact him?"

I contacted David. Like a hero, David went immediately over to Kuwait to do things. Of course, anyone who does get involved in this sort of work realizes that—as David would say, "First off, the press doesn't want to talk to a PR guy. They want to talk to the guy who knows." So, of course I was the focus of the press. Also, I had so many personal contacts with the press. So I ended up doing press. The firm prohibited me, again, from doing press.

Most lawyers are very uncomfortable doing press. Most litigators litigate in the courts, and they are very uncomfortable dealing with the press. I, thankfully, had had experience with the press, and had grown up with the press all my life. And I said, "The canons of ethics say you must vigorously represent your client in all the ways he needs to be represented. You really would be violating them if you refused to do press, or say 'No, I'm not going to do that.'" So I told them that, and I resigned again. But I said, "I understand your view. Why don't I just step away? I think it's better." The firm said, "Okay, you can do the press." But they appointed two guys to oversee when I talked to the press. And, they said, "Do not mention Shearman & Sterling's name," whenever I was in the press. I said fine. Of course, other firms would have loved to have had their names mentioned, but, anyway—

I always need to say that! "Don't say I'm with Shearman & Sterling."

We undertook a vigorous press campaign writing Op-Eds and trying to get interviews. That was the press angle. Of course, on the press side, I don't know when press coverage of Guantánamo changed. In a way it did not change. Guantánamo became a story that the press was more and more willing to cover and to criticize the Bush administration about. Even to this day, it is very hard to

get the press to really dig into the facts or to carry factual stories. There were a few great stories done. As I said, in 2002 Roy Gutman did that great story in *Newsweek*, which had a little play, and then dropped. The *National Journal*, years later, did a piece by Corine Hegland that really examined the hearing records and said, "Most of these people shouldn't be there." I think people have forgotten about that. When people wrote the next story, they did not read the old one, so there was no continuum. Jane Mayer did some fabulous, detailed pieces in *The New Yorker*, which were the basis for her book, *The Dark Side*.

It became a chic thing to criticize Guantánamo, but not to question the factual basis for the government detention. I would have conversations with people about Guantánamo all the time. I became the "Guantánamo guy." I couldn't go to a dinner party without somebody raising it. I became sort of obsessed about it. I remember, at one party, somebody saying to me, "Tom, it is very hard for us to know. You say the facts are that there is nothing on these people. But the government keeps telling us that these are all bad guys." Without the press or Congress investigating it, there was no way for the public to know. It was like shouting in the dark. I tried to get some facts out, for example, about the bounties. I also found out from an insider from the NSC [National Security Council] in 2004, six months before the presidential election, that the CIA [Central Intelligence Agency] had done a report in 2002 which showed that most of these people at Guantánamo shouldn't be there. It was closeted; nobody could get to it. I got the name of the person who wrote the report—a CIA agent, an expert—who would not testify voluntarily. He was prohibited from doing it. But he could be subpoenaed. I tried to get Congress to subpoena this person and they wouldn't—even the Democrats. I spoke to Jane Harman, who was ranking member on the House Intelligence Committee, whom I know, and to her staff, to try to get them to

do it. They never subpoenaed that guy for closed session so they would know the facts.

It was very hard to get the facts out. Still, to this day, people do not know.

Now I'm going a little bit off the press, but it was so important to try to get the information out there. I'll tell you a few dinner stories. I went to a dinner in early 2003 for some charity here, and there were lots of law school people there.

[INTERRUPTION]

I sat at a table with two young law school professors. I looked at them and said, "I'm from the Vietnam generation. If something like this were happening, our law schools would be exploding. We wouldn't tolerate this. Why aren't you complaining? What's going on?" I was accusing him and his wife. I'm an obnoxious guy in these ways. But I said, "What's going on?" After a while he looked at me and said, "You're right. But we've got two young kids, and we're afraid." I thought—I read stuff on the rise of Nazism in Germany, and it just chilled me. Because if you read that, what it talks about are people whose lives in Germany had been destroyed. Their financial well-being had been destroyed, and then Hitler came up and they looked the other way. It was almost as if, "We know bad things are happening, but maybe they need to happen. We don't want to know." I saw that in a lot of people, and it scared me. It really scared me.

I did become sort of obnoxious at the time. I would go to cocktail parties and people would sit around drinking and laughing, and I'd have the sense—I know this seems crazy—but what were

people doing in Nazi Germany, as Hitler was coming up? Were they all laughing and drinking, as these things were going on? I knew we had people in a fucking concentration camp, innocent people, and we're sitting and drinking. I ruined a few cocktail parties and dinner parties. I remember one. A very nice guy was talking about some silly incident happening at St. Alban's School, or the National Cathedral School, and they were asking my view and I said, "It's hard for me to give a shit about something as minor as that when we're holding innocent people in concentration camps, and nobody cares."

But I'll tell you another one—and Jane Mayer tells this story in her book—but it was meaningful to me at the time. It was December 2002 or December 2003, pretty early on. We traditionally had sort of a holiday dinner with this fellow, Tom Green, and his wife, Pam; Bob Mueller and his wife, Ann; and some other couples. I can't remember who was there. But we were sitting around a little dinner table and Tom—who is a great guy and a great litigator, an ex-Marine, a Democrat—was saying, "God damn it, why are you standing up for these people? Give the government some sway. Let them do this." My wife, basically, felt the same way. Of course, Pam Green, Tom's wife, was with me. But Bob Mueller stood up and said, "I want to toast Tom Wilner. He's doing just what an American lawyer should do." And he was the head of the FBI [Federal Bureau of Investigation]. So I thought, when people are doing an act of political courage, for him—I don't know what he was doing from inside the government. I'd like to find out. It was a great thing.

Shall I get to the legal?

Q: Well, just one more thing on the press. You did get Peter Jennings.

Wilner: Oh! Yes. First of all, the producer of the Peter Jennings piece, Sherry Jones—now a good friend and a wonderful, capable woman—put that together with Peter. That raises some other issues, too. They put it together and based it on the same story that Roy Gutman had done on Fawzi Al-Odah, how five Kuwaitis were asked to dinner by a Pakistani tribal leader and then sold into captivity for bounties. They used the same guy to go to Pakistan and track the story of these Kuwaitis. It was a great piece. But it was shown at 10 PM on a Friday night, and almost no one saw it.

I had a number of people who would come to me—sort of Deep Throats—from the inside. As I mentioned, someone from the National Security Council told me that the CIA had done a report saying that many of the Guantánamo detainees were wrongly held. I had other people from counterintelligence, saying, "You're right, many of these people are innocent." Under the laws of war adopted by our military, you are allowed to hold people who fight against you until the end of the fight so they don't return to the battlefield. Normally, it is easy to see who those people are, because they wear uniforms. You know that a guy dressed in a German uniform is part of the other side. The problem comes when they are not wearing uniforms. Our government said that they were bad guys because they were not wearing uniforms! Well, a lot of people who dress like civilians are not bad guys! The Geneva Convention says that if you have doubt, you hold a hearing. Our military regulations specify that. In the last Gulf War, we had 1,200 of these hearings. Eighty percent of the time the people were found to be innocent civilians and let go. The military was going to do these hearings, and the White House said no.

I found this out early on. This is what the counterintelligence guy told me. He said, "They nixed the hearings." It has just now come out that every Arab taken into custody was sent to Guantánamo—there were no hearings. I found that out from the inside. One of the guys who was on the Peter Jennings show—a very interesting guy, Tony Christino—was a lieutenant colonel in counterintelligence. He was appalled by what was happening. I came across Tony because his wife, Adrienne Goynes, worked in the firm. We were at a party for someone when I met Tony. I asked, "What do you think of this stuff?" And he was embarrassed. He'd probably be embarrassed that I tell this, but he is a hero and people should know it. Tony, with Adrienne's help, would set up meetings when we would need to meet somewhere else. Tony had retired from the military and agreed to be interviewed for the Peter Jennings show. He would never talk to the press again. He was so sensitive to it, and he thinks there were a few little misquotes, but his overall theme was exactly right, that we have got a lot of people in Guantánamo who should not be there. They did nothing wrong, they have no intelligence value, and they should not be there.

The Peter Jennings piece, I still think, was one of the best pieces done on Guantánamo. Sherry and Peter were great. Peter talked to me all the time, Sherry talked to me, and we put it together. She wisely said I should not be on the show. It wasn't a lawyer-thing but a factual thing. Very few people have ever seen that. As I said, it was shown at ten o'clock on a Friday night, the lowest ratings period. It was terrific. It was amazing to me. That was 2004. It was shortly before the decision in *Rasul*. All the people who wrote stories afterward had not seen it. People who now do television shows about Guantánamo haven't seen it. It is not part of the fabric of the story of Guantánamo.

There were some big interviews. We did get on *60 Minutes II* in 2004, which was very good, about Guantánamo. *60 Minutes II*, unfortunately, does not have the carry of *60 Minutes*, but it had some impact. So we kept doing those things, and I think eventually there was some change.

At first, I got enormous amounts of hate mail and e-mails. People e-mail you right away. I don't know how everyone finds an e-mail, but I guess it's out there. It was very hard for me, not because I was hurt, but because I felt this compulsion to answer people, and I didn't.

Q: That's the problem with e-mail.

Wilner: It is. But I felt a compulsion to argue with them and ask, "Don't you believe in a fair hearing?"

But I didn't and I erased most of them. I've kept some. I got one yesterday. I don't know why. I haven't done anything for a while, and I still get hate mail. But they clearly slowed down after that.

We kept trying in the press. I can talk about the press. We got attacked in the *Wall Street Journal*. That was a funny thing. I know exactly when it was because it was my wife's birthday, March 8, about two years ago. We were taking a short vacation at her sister's place in Arizona. Her sister is a right-wing Republican who gets all of her news from Rush Limbaugh. It drives me crazy. That day, the *Wall Street Journal* attacked Shearman & Sterling and me for Guantánamo with a lot of bullshit stuff. That, of course, sent the firm into a panic again.

Q: There are a number of ways to move forward, but one of the ways I would like to move is to begin to talk about the lawyering. When did you make contact with the Center?

Wilner: When Kristine and I were in Kuwait, Neil had called Joe Margulies, who is really the lead lawyer in the case. We told them that we were going to file a case. As I said, we had a slightly different way we were approaching it. We then filed our case and we pushed. We wanted a prompt hearing, we wanted this happening very quickly. The government filed a response. The government's argument was very straightforward. The government argued that because the detainees were non-U.S. citizens and were being held outside the United States, they had no rights and no right to go to court. They based that argument primarily on *Johnson v. Eisentrager*, a 1950 Supreme Court case which had involved the case of twenty-seven Germans who were convicted of war crimes after World War II. Their war crime was that they had been in China and had continued to do things against the United States after their country, Germany, had surrendered, but before the surrender of Japan. It is a war crime to continue fighting after your country has surrendered. They were tried by a military commission in China, at which time six of them were acquitted and twenty-one were convicted. They were then imprisoned in the Landsberg prison in Germany, and one of them filed a writ of habeas corpus before the United States Supreme Court, challenging the right of the government to convict them through military commission—not challenging the fairness of their trial by military commission. Justice [Robert H.] Jackson, one of my favorite justices, whose picture is on the wall behind me—

Q: You have quoted that in four or five pieces.

Wilner: What's that?

Q: His whole argument about *Eisentrager*.

Wilner: His opening argument?

Q: The argument he made that they had been provided with a fair trial.

Wilner: Yes, that's the whole point. That's why they missed everything else. The point is that the fairness of the procedures by which they were convicted was not challenged, which people didn't realize. But the whole case is a question of—Justice [Benjamin N.] Cardozo would have loved this, and [Oliver Wendell] Holmes [Jr.]—formalism versus practical justice. Jackson ruled, in a very confusing opinion—I mean, it is *very* confusing. I think Justice [Sandra Day] O'Connor said, from the bench, she can't understand the opinion and she has read it ten times. Well, there is something to it.

Basically, he said, "These guys do not have a right to habeas corpus. At no time have they been present in a place over which the United States has jurisdiction. They are outside the sovereignty of the United States." Confusing language. The government said, "These people are like in *Eisentrager*. They are outside the United States. They have never been inside it." The interesting thing about this to me was the formalism. The government's argument really played into the weakness of lawyers. Lawyers tend to think in boxes, and there is a conventional assumption in the United States among most lawyers that all rights come from the Constitution of the United States.

It would be interesting to go into it. There has been a debate, through the years, "What constitutional rights do aliens have?" It has always been accepted that aliens in the United States have constitutional rights, but there is a question—if they are outside the United States, do aliens have constitutional rights? What rights do they have?

That misses the point. The point is fairness. Before there was a Constitution, there was the right to a fair procedure and a fair hearing. The fundamental rule of law was established in the Magna Carta, that "no free man can be deprived of his liberty or property, except in accordance with the law." Habeas corpus was developed by the courts to enforce that—you cannot be thrown in prison except in accordance with the law, which means there needs to be a law you are accused of violating, and there has to be a factual basis for thinking you did it. That existed long before the Constitution.

This is terribly legalistic, but there was a great debate about whether we needed a Bill of Rights. Basically, Alexander Hamilton and the framers of the Constitution at first said, "We really don't, because habeas corpus and the court system ensure fairness and justice." But then they put in the Bill of Rights, and that has been assumed to be the source of all rights. Well, you know, court review and reasonableness is what gives rights.

So the issue for me was, why do people need to have constitutional rights to have a right to a fair hearing? That was a right under the common law before there was a Constitution. And I used to say to people, "I don't get it. If we were in England, these people would have a right to a hearing no matter where they were. Does the Constitution deprive them of this right? Does it take away rights

they would have had before it was adopted" And people would say, "Ah, you know—." But that, to me, was it.

So, anyway, that was the first issue.

Q: So that was the difference between what you and Neil were doing, and what the Center was doing.

Wilner: In a way.

Q: When did you first meet them? Had you known them, prior?

Wilner: No, I didn't know Joe or Michael Ratner. Actually, I knew Michael's cousin but I didn't know Michael. The first time we met was just prior to our argument before the District Court, Judge [Colleen] Kollar-Kotelly, Colleen. We met the day before in our conference room upstairs on the ninth floor. Each of us was struggling with all these terribly confusing Supreme Court cases about the rights of aliens outside the United States. It really had not been developed before. There were cases on Guantánamo before, having to do with the Haitian refugees. Michael Ratner had been involved in those cases. They had won before the Second Circuit, lost before the Eleventh Circuit, and then they had withdrawn the Second Circuit case. There wasn't a precedent because they had settled the case. That was the only case really on point about Guantánamo and it was about the extension of constitutional rights.

There had been, back and forth, cases that were sort of analogous. There were issues about what rights people had in the Canal Zone. But they were not cases where people were being held and deprived of their liberty. This is where it became more confusing. Let's say when we acquired Puerto Rico—and we had sovereignty over it, technically—and somebody commits a crime or is alleged to commit a crime and is tried for that crime. Under the prior Spanish system they were not entitled to a jury trial. Now that they were part of the United States, or controlled by the United States, should they have a jury trial? The courts developed this idea, "If the rights are really fundamental, you do, but you don't give it in all these times." People were always debating how far constitutional rights go and which were "fundamental."

So we tried to pull these cases together for Colleen. Our argument differed from the Center for Constitutional Rights in one way. There was a case in the District of Columbia Circuit twenty years before, written by Spottswood Robinson, a unanimous panel decision called *Ralpho v. Bell* [1977], which dealt with the rights of somebody challenging the taking of their property in Micronesia after the war. Micronesia was not a U.S. territory. It was a trust territory, but the United States clearly did not have sovereignty.

Q: In the Marianas?

Wilner: Yes. Judge Robinson used to write these long, long opinions. The U.S. didn't have sovereignty but he said the residents there had constitutional rights. That was D.C. Circuit law. Now, interestingly, there is other D.C. Circuit law that nobody cited at that time. But we felt that we should talk about what is at stake; that this case is right on point. The government did not deal

with that case. The transcript of the argument is interesting. I really think we beat the hell out of the government at the argument.

We met with Joe and Michael the night before. Barbara Olshansky came down, and so did Stephen Watt, who is now with the ACLU [American Civil Liberties Union]. I advocated that we should rely on this case. We argued it, they didn't. I think it really threw the government for a loop, the way we emphasized it. They couldn't answer it. Nevertheless, Judge Kollar-Kotelly, clearly in the climate of the time, ruled against us. We needed press coverage. We needed to give the courts room to do the right thing. This was also very soon after the Ninth Circuit had ruled that the Pledge of Allegiance was unconstitutional because of "under God." It was roundly criticized. It was a time when the courts, to rule in our favor, needed a little public breathing room.

So Kollar-Kotelly ruled that way. Terrible decision, I thought. We then went up to the D.C. Circuit Court of Appeals.

Q: Now who made that decision to appeal? You just automatically said you were going to appeal?

Wilner: No, no. We recommended appealing, the Kuwaitis agreed, and then we went up.

This was very tough, because we wrote our briefs, went up to the Court of Appeals, and in a way it was the worst oral argument I ever delivered. The panel—not that it mattered—was Ray Randolph, Steve Williams, and Merrick Garland.

Q: December 2, 2002.

Wilner: Yes. December 2, 2002. Randolph was the senior judge on that panel. I'll give you some background.

Ray Randolph and I were classmates at the University of Pennsylvania Law School. We were good friends. Ray is a brilliant guy, a right-wing conservative, and a hard-ass guy. I haven't had lunch with him in forever because of all these cases. Merrick Garland worked for me at Arnold & Porter. I was at Arnold & Porter before. I did not know Steve Williams, who was a senior judge at the time. They gave us ten minutes to argue the case—ten minutes for both Joe Margulies and me. I remember Joe's argument because Joe becomes very fascinated with words, and he kept relying on Justice [John Marshall] Harlan's and Justice [Anthony M.] Kennedy's statement that "due process depends on the process that is due in the situation," which is, of course, true. It is a flexible concept. The question, of course, for the court was, "are they entitled to due process?"

I got up to argue and I had the five minutes that they had assigned me. As it turned out, they gave more time. I had done this once before in an oral argument, but I said, "You have read the briefs. What questions do you have? Let me answer." Well, the most embarrassing thing was—and this is the strangest thing that has ever happened to me and it apparently came out okay. Randolph said, "Why haven't you cited these two cases, which are right in the government's brief? You have never dealt with them. These are two D.C. Circuit cases." Well, you want to know the truth? And this was amazing—I had never read those two cases. Nobody on our entire side—at CCR, Joe Margulies, or my entire team—had read those cases. The reason was that there were so many

complicated Supreme Court cases that these were not even explained. They were just sort of cited in a string cite. Nobody read them. In fact, they were two cases by Ray Randolph! Ha! They were organizations that had been put on the terror watch list and they were saying, "This is unfair. We have rights. You have deprived us of an ability to do this, without even giving us a hearing or anything." And Randolph had said, "Aliens—non-U.S. citizens—without property or presence in the United States have no constitutional rights," relying on *Eisentrager*. Just like that. He loved that—"without property or presence in the United States." They were D.C. Circuit law, contrary to *Ralpho v. Bell*, by the way.

Anyway, as I said, I had not read these decisions. So I distinguished them to Randolph without reading them. And the transcript actually reads very well. I said, "Well, this is a different situation. You have people held and deprived of their liberty by the United States." But I'll never forget—I sat down, and I said, "Joe, have you read these cases?" He said "No." None of us had read the cases! They were clearly going to rule against us.

I must say, I was very disappointed by Merrick Garland in that case. Merrick is a bright guy and, clearly, the issue was one of formalism. *Eisentrager* was a different case. In *Eisentrager*, people had gotten a fair hearing. It wasn't a question of a fair hearing; it was a question of whether they could use habeas to appeal the results of the hearing to courts. It was formalistic. Formal distinctions were being used to deprive people of a fundamental fairness—a fair hearing. Somebody could reach beyond that. I had no doubt that the judges who used to be on that Court, not just liberal judges but good judges—the Cardozos, the Holmeses, the Frankfurters—would have cut through this.

We lost, although the argument went not as badly as we thought. I said it was the worst oral argument because I had not read these two cases. I still look at it like that.

I just need to make a call, then we can go as long as you want.

[INTERRUPTION]

Wilner: Okay. Where were we?

Q: In 2003, when the Court of Appeals turned you down. I have a question. What were your first impressions of Michael Ratner and Joe Margulies, as lawyers and as partners in what was going to be a long, drawn-out litigation?

Wilner: Very nice people, committed people. Michael, honestly, worried me a little bit at the beginning. They both worried me a little bit, more by their image than what they said. I thought that, to convince the government to change policy and to get public opinion on our side, we could not be perceived as left-wing radicals. We had to be serious Americans, concerned about protecting the security of the United States and protecting American values. I was always concerned that Michael's image was too lefty.

Q: Well, it is the reality, too.

Wilner: Well, except Michael is a very smart, actually very reasonable guy.

Q: But he is a heavy lefty.

Wilner: Oh, he is a heavy lefty, but he is very flexible in his thinking and very practical in presenting a case. A number of people on his staff at CCR would push arguments that were absolutely irritating to the courts, and have no chance of winning. For instance, Geneva Convention arguments. No matter how strongly you might believe in them, the U.S. courts are not going to simply defer to international law. Now, that is one of the great issues I would like to be involved in, in the future. They would push for space and emphasis in briefs, for these arguments that had no chance and were counterproductive to the cause. It became much more of a problem when we had to share briefs with them or others. But Michael saw right away, "That's not a winning argument. Don't do it." The problem I had with the CCR team was that as time went on, and particularly after the *Rasul* decision in June 2004, Michael dropped out. Michael did not write these briefs and was very deferential to the others. It became more difficult without him. The others were much more rigid and doctrinal than Michael. Michael's image, though, as an image matter, worried me. And Michael did one thing that I think he'd probably say now was a mistake.

There was a Style profile of Michael in the *Washington Post* that was probably damaging. The Style section is not the substantive section; it's sort of the fluff section. Of course, people who write there will kill me about that. The image was, "Michael, left-wing radical, gleefully attacking the Bush administration," rather than the themes we wanted, like "protect our security, but you don't hold people without a hearing." That was probably harmful. A lot of people told me it was. But

Michael was very bright, always helpful to us.

Joe is a wonderful guy, a thoughtful guy, a very good person. I kid him that sometimes he tends to speechify a bit. But he's a wonderful guy, thoughtful, and listens. So my overall impression was that these were very good people, and easy to work with, particularly when we did not need to come together on one product.

Q: Meeting him for the first time the day before you had to make the arguments—you really had to sit down and get things done.

Wilner: Yes, we did, and we got together. Joe disagreed with us and made a different argument, but we got to make the argument anyway. I don't think that hurt.

Q: Did you meet Clive Stafford Smith at that time?

Wilner: I didn't meet Clive at that time. Clive was never really involved in the litigation. He was involved in going to Guantánamo when we got to do that and doing stuff in the press, primarily in Britain.

Q: And getting names.

Wilner: Getting names, yes. Getting names of people to represent. Organizing resistance. He is a wonderful, dedicated guy. But I really only got to know him later.

So we made the argument and lost in the District Court and the Court of Appeals. In between that, we were still pushing the press angle. My view was that this court battle was going to take too long. The fact that we lost was disturbing because rather than putting pressure on the administration, it confirmed that they could do what they were doing.

After we lost, I was a little disturbed in my clients at that time, because we—me, Michael and Joe—began consulting with a few professors about the possibility of getting cert [certiorari] on the case.

[INTERRUPTION]

We worked with three professors in particular—Tony Amsterdam at NYU [New York University]; Doug Cassel, who at that time was at Northwestern; and Eric Freedman at Hofstra. We would consult a lot about the idea of Supreme Court practice and how to get cert accepted.

It was interesting for me. I had gone to the University of Pennsylvania in large part because Tony Amsterdam was there. When I graduated from Yale, I really had no desire to be a lawyer. I never thought I would be a lawyer.

Q: What year was this?

Wilner: 1966.

Q: A yeasty time.

Wilner: A yeasty time at Yale, particularly, because it was a rebellious time, with Staughton Lynd and Reverend William Sloane Coffin, and two years before the Tet Offensive. Yale was leading the opposition to the war. John Kerry was my classmate. He wasn't a very popular guy, I must say. Another friend of his and mine, Dick Pershing—Black Jack Pershing's grandson, what a great guy—went off and was killed. One of the first guys killed in Vietnam. But I didn't go to law school totally to avoid the draft. I looked at law school as a way to train myself to get into the government. I didn't really want to do another real status-y thing. I had a connection with Penn and I did very well at Yale.

Tony Amsterdam was a leader. At that time he was at Penn, a brilliant young professor, teaching criminal law and trying to make the law relate to problems of poverty. He was just one of the most famous guys around, and he was brilliant. I went there, took criminal law, didn't like it, and never took it again. I didn't know him well there. Then he left Penn—he got a divorce—went out to California, then he came back to NYU. I had not seen him in years. He was sort of this legendary guy. He still is.

He is the most extraordinary figure I have ever seen in the law, and one of the most neglected. It's extraordinary. You can have meetings with the most famous professors in the country, and Tony Amsterdam—he's a man with no ego and no agenda, other than trying to rid the United States of the death penalty. When Tony speaks, everyone else stops. He is said to have—and I've heard it

before, from so many people, but I have seen him quote things—a photographic memory. But his analytical abilities and his judgment are just beyond other lawyers I've ever met. And I am somebody who does not have heroes in the law. I think most people don't. He is just extraordinary.

Throughout this case, when I was writing briefs, the only one whose view I would really value would be Tony's. I would say to Tony, "I'm struggling with something." Other professors will pontificate, but Tony will come back with a suggested paragraph with a quote or with a change. He doesn't just pontificate, he "does." And he stays up all night, every night, still working on briefs. He's just extraordinary, an extraordinary person.

Let me go back to what happened with our clients at that time. This guy, William Brown—at times he had become intrusive. He is a very odd person, who did a wonderful thing by telling the Kuwaitis, "I think you need a serious law firm," but then he became almost crazy in some of his advice. He intruded himself into the details of the case. He fired David Henderson, who had been there earlier, because David was recommending things that should be done for PR, and got in fights with William. David knew PR, and William didn't. For instance, there was this picture that came out of detainees flying on the plane to Guantánamo, strapped in. When it first came out, David saw this and said, "We should get this out everywhere." It was just a devastating picture. William stopped us from doing it, so it didn't hit the press for weeks after we had it. David went crazy. William had no idea of the "power of pictures." As I pointed out, one of the things that turned the public against the Vietnam War was the picture of the general shooting the guy on the streets of Saigon. A picture is worth a thousand words, as Abu Ghraib proved. Anyway, William became intrusive and, I think, actually harmful to the case.

Now the Kuwaitis, although they insisted on paying, were then having trouble and not paying. The firm was on me all the time, asking "What's going on?" At the same time, I didn't think we should even be paid for it, so I wasn't really pushing the Kuwaitis that much. But I know they were having trouble. William came in and said, "We've got to hire another firm, to get a second opinion about whether we should go for certiorari." I said, "Wait a second. Of your limited funds, why spend them on that? If you want second opinions, there are four professors." Larry Tribe was doing things, too. I said, "Ask them. They will tell you, for free, what the chance is."

But William insisted, and they hired Arnold & Porter. That was my former law firm. There were two guys there—Doug Dworkin, a wonderful guy, and a guy named Ron Lee, who had clerked on the Supreme Court. They wrote a memorandum—Ron Lee probably did most of the work—that basically said, "You have almost no chance of getting cert, and even if you get cert, you're going to lose." I said, "I think the chance of certiorari is thirty percent, forty percent, but I think there's a chance. The key is going to be Justices O'Connor and Kennedy. But I think if we get cert, we have a good chance of winning because the real issue here is that the government is telling the Court that it has no jurisdiction, that it's powerless. If they take it, they're going to rule in our favor. But we *need* to get cert—we need to do things to *get* them to take cert."

In fact, I think one of the great accomplishments of the whole legal effort was getting the Supreme Court to take cert in *Rasul*. There was a very carefully thought-out strategy that had two parts. One we did with CCR, Doug Cassel, and Eric Freedman, to get a number of amicus briefs in support of certiorari. That was very unusual at the time—now everyone is doing it, on all these cases. We got

seven amicus briefs. That was when these guys like Gary Isaac first came in. Doug Cassel coordinated the effort to get amici briefs. We got former judges, former diplomats, former military guys, and then we got Fred Korematsu. It was an amazing effort. And we got former U.S. POWs.

There's a great story about that. Kristine Huskey is a charming, beautiful woman. She is half Filipino and half Anglo. Both her parents have been in the military, but her grandfather had been in the Philippine army and fought in World War II. Kristine connected with a guy who was the head of the POW organization, American Ex-Prisoners of War. Little known fact—his organization had voted not to do it. She went out, charmed him, and got him to sign the brief for former POWs. It was a powerful brief.

We, and really Doug, then got lawyers to write the briefs. A guy in Gary's firm wrote the brief for the former military guys and they got some former admirals and generals, former JAGs [Judge Advocate General], to sign a brief. The keys to that were two people, John Hutson and Don Guter, the former Navy JAGs. Then we also got amicus briefs from international and foreign organizations, such as the Houses of the United Kingdom Parliament. Doug really did that.

In order for the Supreme Court to take a case, it needs to raise a major issue. Also, we tried to make the case a major public issue. So we tried to get press. We were lucky. We got a break—the *60 Minutes II* interview aired just about that time. Also, I got an Op-Ed in the *Wall Street Journal* about that time, too.

Finally, the petition we wrote for certiorari, I am told, was very influential. We took a tack in it

which is interesting, because it's very similar to the final *Boumediene* opinion [*Boumediene v. Bush*, 2008] that came down four years later.

We tried to emphasize a few things to the Supreme Court. One thing is that, if you accept the government's argument, you allow the executive to be able to manipulate the law. You give it the ability to say when the Court can and cannot review a case. Just simply by moving across a geographic line, the government could deprive the Court of jurisdiction and deprive people of constitutional rights. In other words, you give the executive branch the unilateral power to manipulate the jurisdiction of the courts and to avoid judicial review of its own actions. That violates the basic separation of powers concept established by the Constitution.

Before writing this brief, of which I wrote every single word, I read almost every O'Connor and Kennedy opinion ever rendered.

Q: Kennedy is particularly interesting to you.

Wilner: Yes. I like his rejection of formalism; his flexibility in trying to be fair and do justice. We really emphasized two themes in our cert petition. One was that the government's position would allow it to manipulate the law. This is absolutely unregulated, what they could do. We put the same thing in the next Supreme Court brief. They could do whatever they want to a foreigner outside the U.S. It doesn't depend on war. There is no limit on the time they can hold them. No limit whatsoever on what they can do to them. The courts are deprived from ever coming in. If they hold them forever, if they torture them, if they execute them, there is no power to appeal. It's not

because it's a time of war, it's just because the prisoners are foreigners outside of the United States. It gives the government as much right to snatch a Canadian citizen off the streets of Toronto in times of peace, as an Arab off the streets of Islamabad in time of war, and the courts cannot do anything about it.

When it came to the argument, Solicitor General [Theodore B.] Olson started off with, "We are in war!" [John Paul] Stevens looked at him and said, "Does your argument depend on there being a war?"

He said, "Well, no. But we are in a war."

Stevens said, "Thanks."

The other theme we tried to emphasize, and these Supreme Court justices travel around the world, was to tell them that if they approved this, the United States would become an outlier among the community of civilized nations. Rather than being the standard, you're going to be embarrassed—it recognized around the world that it's wrong to deprive people of hearings, of a chance to defend themselves.

The *Eisentrager* decision, upon which they depended, was written by Justice Jackson. Justice Jackson, a few years later, had written a dissent in a case called *Shaughnessy v. Mezei* [1953]. This was during the Communist scare of the 1950s. The government had passed a law allowing the government to deprive immigrants of entry into the United States without due process. Mezei

came back to Ellis Island. He had been away, he had lived in the United States, and they would not let him back in. Didn't give him a hearing. No one else would take him, because the government said he was a bad guy. Most of the courts said, "Well, he's not being deprived of his liberty, he's just not being allowed to immigrate into the United States."

Jackson said he had been deprived of his liberty, and then he wrote one of the greatest opinions ever. Jackson was one of the best writers ever. That was when he talked about the Magna Carta, that "John, at Runnymede, was forced by nobles to say 'No free man shall be deprived of his liberty except in accordance with the law.'" Then he went on and he said, "There were many people in Nazi Germany held without hearing and they say it is necessary." Then he goes on and talks about the Communist scare and that he's as disgusted by those people who see no danger in Communism as those who see no danger in anything else. He addressed the fundamental right of someone deprived of his liberty to a fair hearing where he could confront the accusation against him, and he said, "It is inconceivable to me that this measure of simple justice and fair dealing would menace the security of this country. No one can make me believe that we are that far gone." A great analogy. Anyway, we relied heavily on Justice Jackson's opinion in that case.

We also made another argument that I think resonated with the Court. And it really came to me because of an interview I had done with CBS. Sometime after the Court of Appeals had ruled against us and before we wrote the petition for certiorari, I had done an interview with *60 Minutes II*. At the time, of course, I had never been to Guantánamo. But the CBS producers from *60 Minutes II* had been there, and during one of the breaks, one of them told me how it was amazing because iguanas are only safe in Cuba if they are on the base at Guantánamo. If they wander off the

base, they are eaten. It struck me, “Damn it, the iguanas down there are protected by U.S. law.” And they are. Neil Koslowe researched it and found out that they are in fact protected by the Endangered Species Act—anyone, including a government official, who harms an iguana at Guantánamo can be prosecuted. Here the government was arguing that the detainees down there were not protected by U.S. law, but the iguanas were. I put that in the petition for certiorari. It clearly had some impact. In fact, later, in the actual argument before the Supreme Court, when Solicitor General Olson was arguing that the detainees don’t have protections, Justice [David H.] Souter looked down on him and said, “What do you mean? Even the iguanas at Guantánamo are protected by U.S. law.” So we emphasized that in the petition for certiorari.

One of the great compliments of my life—now, you see, I'm bragging! I shouldn't do this. Linda Greenhouse, afterwards, said to me that before she read our petition for cert she thought there was no way the Supreme Court would grant cert. She said that, after reading it, she thought there was no way they could not.

So I felt good about that. We got cert, and then we had debates about who should argue the case. The Supreme Court does not favor split arguments. CCR and our cases were consolidated—*Rasul v. Bush*, *Habib v. Bush* and *Al Odah v. Bush*. I felt we shouldn't split the argument and that we should find somebody else to argue it. I asked Tony Amsterdam to argue it. Tony is considered to be the best oral arguer alive, but he apparently got into a fight with [Antonin G.] Scalia in an oral argument, fifteen years ago or so, and has not argued a case since. He thought about it and said he wouldn't do it, but he recommended John Gibbons, who had been the Chief Judge of the Third Circuit Court of Appeals. It's funny, because I had known John Gibbons a little bit, too. I clerked

on the Third Circuit for Bill Hastie, who was Chief Judge, and John Gibbons was appointed by Richard Nixon. He came on the Court when I was there. I saw him and met him a little bit.

John is a very interesting guy. He is not really an oral advocate, he's a judge—thoughtful, but absolutely passionate. My view, by the way, now that I've been involved in more of these big cases, is that oral argument is not so important with the Supreme Court, because they have the briefs and the nine judges each have many clerks. They use oral argument to argue among themselves. And the time for oral argument—half an hour—is too short. John, because of his recognized integrity, was terrific. In fact, he's a Republican, and he was standing up for the rule of law, which was a terrific image for him. We won the case. That ends the story through *Rasul*.

Q: Had you ever gone to the Supreme Court with a case before?

Wilner: Yes, early on. I had written a brief to the Supreme Court in a case challenging the National Railroad Passenger Corporation [Amtrak]. I wrote the winning brief in that case years ago, when I was with Arnold & Porter.

Q: What was the nature of the questioning? You said they use the attorney to argue with one another.

Wilner: Well, the Supreme Court is sort of different. First of all, each Supreme Court Justice has four clerks. They don't have that much work, so they read and study everything. On cases such as this, it's sort of predetermined how they'll vote, and they have their arguments. [Stephen G.]

Breyer is actually quite analytical. A lot of people here, who had clerked on the Supreme Court, said, "I think you're going to lose nine to nothing." Stevens was an ex-Marine, a Republican. Often the Justices use lawyers as foils, asking questions to make their argument. It goes back and forth. That's the way they use the argument. The briefs are critical; I don't think the oral argument is nearly as important.

In these cases, particularly when *Boumediene* came up, I think that there's a style of argument that could help a great deal. Oral argument can be very helpful when you're talking about certain basic things. It's why oral history is interesting. I've had cases, including this case, where you can look somebody in the eye and explain something to them, when even if they've read it on a flat piece of paper, they don't get it. There are basic things you can do in oral argument that you can't do otherwise. That's when it can be important. Most Supreme Court arguments are extraordinarily technical, and most of the Supreme Court Bar, in the Solicitor General's office, is used to making tiny little, fine technical arguments that the justices go off on. These Guantánamo cases, in the end, really presented something much more basic, when you had to say, "Get out of that. We're talking about basic fairness and justice here."

That wasn't necessary for *Rasul*. I think we had the justices in *Rasul*.

Q: There is a section in Stevens' opinion where he talks about Justice Jackson in *Eisenberger*, essentially making the same point you make. Did he pick that up from your brief?

Wilner: Maybe. But that was a basic argument. The interesting thing about Justice Stevens'

opinion—in a way—and what he went off on, more than anything, was that *Eisentrager* really is no longer good law because *Braden* [*Braden v. 30th Judicial Circuit Court of KY*, 1973] had reversed *Ahrens v. Clark* [1948]. A very technical argument.

Ahrens v. Clark said that habeas was only available in the jurisdiction where the prisoner is. If the court is outside that jurisdiction, it has no jurisdiction. The lower court, Judge [E. Barrett] Prettyman of the Court of Appeals, said, "Given *Ahrens v. Clark*, there is no jurisdiction here, but there is a constitutional right to habeas corpus that goes beyond this." *Eisentrager* reversed that. Stevens said, "*Ahrens v. Clark* has been reversed by *Braden*, so *Eisentrager* no longer applies." It's a very technical argument. Stevens clerked for Clark, who dissented in *Ahrens v. Clark*, saying that it should not apply, it should be reversed. That is something that's been on his mind forever.

Interestingly, we had made that argument before the District Court. It went nowhere there. So we dropped it when we got to the Supreme Court. But it was something peculiar to Justice Stevens. He had a personal reason to sort of crap on *Ahrens v. Clark*.

I wanted to win that case 7 - 2. I knew we were going to lose Scalia and [Clarence] Thomas. But we also lost [William H.] Rehnquist. I thought we could win Rehnquist. There is a great book by Rehnquist, *All the Laws But One*, which is about the application of the law in times of conflict. I used phrases in the brief that were straight from Rehnquist's book. For instance, "during times of stress, the executive will push its power to the limits and beyond. The only one who can stop him is the Court." I really wanted to get him. And I think had Rehnquist really been intellectually honest, he would have gone with us. What was critical for Rehnquist—and I think for Scalia too, but not

articulated as much—was that they just don't think aliens have rights. The Constitution is a compact among citizens, and these guys are aliens! So it's not as analytical, and that's what it came down to.

So I was disappointed we lost Rehnquist. I wanted to get Rehnquist, because I aimed at him. We really aimed at Kennedy and O'Connor, but we also aimed at him.

Now we can stop here. We can go beyond *Rasul* in the next session. Or what do you want to do?

Q: It's up to you.

Wilner: Let's see. I'm just wondering. Let me see what's happening.

[END OF SESSION]

VJD

Session Two

Interviewee: Thomas B. Wilner

Date: February 20, 2009

Interviewer: Ronald J. Grele

Washington, D.C.

Q: This is an interview with Mr. Thomas B. Wilner for the Columbia University Oral History Research Office. Today's date is February 20, 2009. The interview is being conducted in Washington, D.C. The interviewer is Ronald J. Grele.

Wilner: I will say a few words about whatever is important and useful. How does that sound? Shall we start?

Q: And then when the sandwiches come, we can break.

Wilner: Had we reached *Rasul*?

Q: Because of the telephone call, I never got to the end of the story about you and your clients going for cert. Your clients were unsure whether to go forward, and the lawyer in Abu Dhabi had recommended that they not. We didn't get to the end of that story.

Wilner: Actually, the Kuwaitis brought in a second law firm, Arnold & Porter, to give them an opinion as to whether it was worthwhile going ahead with certiorari. Arnold & Porter wrote a memorandum, basically saying that the chances of getting cert—

Q: You were just starting to talk about the closing of the case.

Wilner: Well, after we lost before the D.C. Circuit Court of Appeals the first time, the Kuwaiti families retained another law firm, Arnold & Porter, to give them a second opinion as to whether they should apply for cert in the case.

First of all, I was a little concerned that they do that, not because I cared about a second opinion, but the Kuwaitis had made a very big deal that they wanted this to be a paying case—to pay for it, and not do it pro bono—and they were way behind in payments. I knew they were very tight for money. I was billing them way less than the real cost. There were lots of alternatives available to give them a second opinion, other than retaining another law firm that would cost money. There were a number of professors involved, so I encouraged them to consult the professors for free. I was concerned that if they spent their limited budget, they would make choices which were not good and would not do what they needed to in the case.

Anyway, Arnold & Porter wrote an opinion that basically said there was basically no chance that the Supreme Court would grant certiorari, and if it did, almost no chance they would win. They actually called us to a meeting in London to discuss this. Abdul Rahman Al-Haroun, the lawyer for the Kuwaiti families, came, and so did William Brown, who worked for the Abu Dhabi Investment Authority in Abu Dhabi. He was a close friend of Abdul Rahman and was advising him. He was the guy who was pushing for a second law firm.

We went over to London and discussed the case. I had written them a separate memorandum,

saying that I also thought it was a long shot that we would have cert granted but we had a chance. It was a very easy case for the Supreme Court to avoid. But I did say that if we got cert granted, I felt we had a very good chance of winning. I analyzed several opinions by Justice O'Connor and Justice Kennedy, saying where I thought we had to aim our arguments.

In any event, we met in London. I was a bit insulted because they had two people from Arnold & Porter, and they just let me go over, not Neil or Kristine. I was kept waiting in an anteroom while they talked with the other people. But we met, and I don't think they ever seriously considered not applying for cert. I don't know what all the money was spent for, really, but it was decided that we would petition for certiorari. I was instructed to go back and write the petition for certiorari, which I did, and we got cert granted. So it was a good thing, and that's the end of that story.

Q: Did they come up with the money?

Wilner: Well, they apparently reached an agreement so that the Kuwaiti government would provide them with money for legal fees. I hadn't known that. I had initially asked them, when we were retained and when they insisted on paying, if they were going to get any money from the government. They said no, they were going to collect it all privately. At that time, it was sort of important because they had suggested, as I recall, a contingent fee arrangement which I rejected. Their first retainer had some sort of contingency in it and I don't think that is allowed if you have government money. So I asked them, and they said no. When the government eventually provided funding to them later, I was actually surprised and it put me in a bit of a conflict situation because I was in the position where we were trying to apply different levers. One lever was the legal one, in

court. Another was the press, and another was diplomatic. So I was pressing the Kuwaiti government to be more active and aggressive with the U.S. government, and I didn't know that they were paying me. Actually, at one time in the embassy, as I was pressing the ambassador and saying we needed to get more aggressive—and we were doing it all very nicely—his assistant said, "I don't know why the families are getting so aggressive with us. We are paying all the costs." I simply had not known that.

So, there was a problem later on because for some reason the Kuwaiti Family Committee didn't forward all our bills to the government. So there was a confusion in all that, as it went on.

Q: Eventually the firm decided to donate the money. The Regional Plan Association? That kind of intrigues me.

Wilner: I mentioned early on that I was in Kuwait and the case had to be filed. I came back, and I told the senior partner at the firm—the firm was on a retreat at the time. He decided that the money should be donated to a charity. I had to ask the Kuwaitis whether they would consent to that, and they did. All of the initial money was donated to a 9/11-related charity. The later money that had come in was donated generally to charity. But I've never seen a dollar-for-dollar breakdown.

Q: That's right. Yes.

Well, now that we've cleared that up, we can move to *Rasul*. Right after *Rasul*, you faced the problem of going back to the Court.

Wilner: Yes. *Rasul* is a breaking point in this saga. In many ways, the case changed dramatically after *Rasul*. First of all, we didn't have the same cast of characters anymore. Michael Ratner, who had never actually written the briefs but had been very active intellectually in discussing the case, pulled out more. Michael basically stepped down at the Center for Constitutional Rights, and gave his role over to younger people. Joe Margulies, who had been their chief lawyer, became much less active. Joe went off to write a book, then he eventually took a sabbatical, so he would come in intermittently. So it was a whole new cast of characters.

Just to give sort of an overview of it, previously it had just been a Shearman & Sterling team and these people from CCR. We really didn't need to coordinate with them so much because we each filed our own separate briefs. After that, there was a flood of cases filed. Courts require you to consolidate your briefs in the cases, so it became a huge issue, not only figuring out what to do and what arguments to make, but dealing with all the other people and to try to coordinate it. Michael and I also had another—maybe we should cut. Let me ask you a question.

[INTERRUPTION]

Wilner: It was very easy to work with the Center for Constitutional Rights and Joe Margulies earlier. We really didn't need to coordinate so much because we filed separate briefs. There were some issues on which we needed to coordinate. For example, in a petition for certiorari the first time, we worked together. We did an awful lot, but so did they, in trying to get amicus briefs in our favor. Michael Ratner had worked many years ago with Harold Koh on the earlier Guantánamo

cases, where Haitian refugees were taken to Guantánamo. They had worked together on trying to get relief for them.

Michael had built up a rapport with Harold Koh, and one of the amicus briefs we wanted to get in support of our petition for certiorari was from former distinguished diplomats in the United States. Harold had promised to do that for us, at Michael's request. As it came time to do it, I called Harold, and Harold was backing away. He told Michael and Joe Margulies that he didn't want to support our petition for certiorari if we were asserting not only the right to habeas corpus, but a right under what is called the Alien Tort Claim Act, for relief. Then he got on the phone with me, Michael, and Joe, and said he would not author an amicus brief on behalf of former diplomats unless I agreed to drop this claim from my case. Michael and Joe agreed with Harold. Harold said that it was an important issue, but he didn't want to bring it to the Court in this case. I refused to drop the claim, so Harold wouldn't write the brief, and I got someone else to do it. Bill Rogers, at Arnold & Porter, took the lead and wrote a wonderful amicus brief on behalf of former diplomats. By the way, nothing I have said should be taken as critical of Harold. He is a wonderful guy and a terrific lawyer. He was doing his job as a human rights advocate trying to preserve the Alien Tort Claim Act argument so that it would be presented to the Supreme Court in the most favorable light. I may have done the same in his position. But I just couldn't give up the argument for my clients in our case. And, by the way, we won that argument before the Supreme Court.

Anyway, other than that, Michael and Joe and I really had very few disagreements. After *Rasul*, I think there was one very large strategic disagreement. Michael felt that, after winning *Rasul*, we should get as many cases filed as possible on behalf of as many people at Guantánamo as possible

and overwhelm the government with those cases. I felt that we should really just try to progress as far as we could with our cases. The *Rasul* petitioners were being released from Guantánamo, so that case did not exist anymore. My Kuwaitis were still there. We had a judge who seemed favorably disposed to move ahead with the cases. I felt that filing a lot of cases would confuse it, make multiple judges come out and delay the whole process, and would give the government an excuse to say, "We're being overwhelmed. We need time." I wanted to move ahead.

I have no doubt, theoretically, that I was correct. But as a practical matter, it was very hard to convince people not to file cases. It's unfortunate. The filings of dozens and hundreds of cases clearly slowed down the resolution.

Right after *Rasul* we really thought we had won the case, that we had won what we were after—a fair hearing before a neutral judge for the people at Guantánamo, to see whether there was any basis for holding them there. The story after *Rasul* is the legal story. I'll tell that first. Then there is a legislative story, and then there is just a whole morass of dealing with people.

The day after *Rasul* came down, we had a telephone conference with Judge Kollar-Kotelly, trying to set up meetings for us with our clients in Guantánamo. She seemed very receptive to that. The government, at first, did not take a position. They said they would get back to us. Then, as time went on, they stalled. The first position the government took, formally, was that the detainees did not have the right to lawyers, but they would allow us to go down and meet with them if we abided by certain conditions. One condition was that, for the detainees designated as particularly dangerous, we could only talk to them if the government could listen in on our conversations. They

designated three Kuwaiti detainees, and no one else, as particularly dangerous.

Q: How many did you have?

Wilner: We had twelve detainees. Three of the twelve they designated as particularly dangerous. Interestingly, all three are still there. There are four Kuwaitis still at Guantánamo. Other lawyers, including Joe Margulies, went down. The conditions didn't bother him. Well, it's not that they didn't bother him. He didn't want it to stand in the way of visiting people. We said this is wrong, this is wrong, and we shouldn't do it, so we went to court and argued the case in court before Kollar-Kotelly. We got an affidavit from a guy named Larry Fox, who is a legal ethics expert in Philadelphia, a great guy, saying that this was unconscionable; that people have an unfettered right to unmonitored conversation with their lawyers. He has been teaching the last few years at Harvard. Judge Kollar-Kotelly—Colleen wrote an opinion that came out on October 20, 2004, agreeing with us and giving unfettered right of access to counsel. That has been the basis for all the lawyers' trips since then.

While that was pending before her, the government did two other things. First of all, the Department of Defense instituted—and this was just nine days after *Rasul*—a sort of administrative review process at Guantánamo called the Combatant Status Review Tribunals [CSRTs]. Deputy Secretary [Paul D.] Wolfowitz issued an order saying they were doing this as part of internal management, and set up panels of three officers—colonel and lower level—to review the decisions that these people were enemy combatants. It made clear that the decision had already been made that they were all enemy combatants, but this process would review those

decisions. From the outset it was clear that these were very sham proceedings, but the decisions had been made by the higher-ups in the Department and the generals. You cannot expect lower officers to overturn them. Anyway, they started conducting these proceedings.

Some of the new lawyers in the case filed to enjoin those proceedings from happening. We opposed that, for three reasons. First, we said they were going to lose. Second, in losing, it would sanctify the process as meaningful. And third, there may be a few people who were cleared. In fact, eight percent of the people were cleared, even by these panels. It since came out that in most cases where somebody was cleared, the government would have a do-over panel.

So they started that administrative process. Then they filed a motion in court to dismiss the cases.

Q: It was August.

Wilner: August 2004?

Q: Yes.

Wilner: They argued, "Although you may have the right to go to court under the *Rasul* decision for habeas corpus, in order to obtain relief for habeas corpus you need to show that your constitutional rights have been violated. And because these detainees are foreigners outside the U.S., they have no constitutional rights. They should be thrown out of court." And, in any event, they said, "Whatever due process rights they have are more than satisfied by these Combatant Status Review

Tribunals."

As I said, the argument was premised on a different box that lawyers fall into, which was a real lack of understanding of what habeas corpus meant. Habeas corpus, since the Civil War, had really been to protect freed black men from being held by a state in violation of the Constitution. Before that, it was what I call the "Tower of London" habeas, where somebody is thrown into the Tower of London. Habeas preceded the Constitution—it had nothing to do with the Constitution. You went to a court to ask, "Is there a legal and factual basis for holding the person? Is there a law that says you can hold this category of people, detain them, and is there a factual basis to say the person fits within the category?"

But, interestingly, most lawyers—as did the courts—fell into that trap—that to win in habeas, you had to show a violation of the Constitution, because habeas proceedings in the United States for the past 150 years had been conducted in the presence of a violation of the Constitution.

When the government filed its motion to dismiss in August 2004, at that time there had been twelve habeas cases filed—*Al Odah*, *Rasul*, and ten new ones. The District Court, for jurisdictional purposes, decided to put them all before Judge Joyce Green, a very well-respected judge who came out of retirement to look at these cases. It was interesting. The first thing that happened was that some of the other lawyers for those other cases wanted a delay to respond to the government's motion to dismiss. I and my team, on the other hand, had been in this case for two and a half years. It was not a new case to us. Our guys had been sitting down there for all that time, so we did not want a delay. We filed a separate brief quite quickly, yelling at the government's motion in

language just saying it was outrageous. The other people in the new cases filed a brief a month later.

We did take a somewhat different tack in the briefs. We took a tack based on the *Rasul* opinion that it was clear that these people in Guantánamo did have constitutional protections because the Court had determined that Guantánamo was in the territorial jurisdiction of the United States. It is well established, or at least we argued it was, that constitutional rights apply to people within the territorial jurisdiction of the United States. On that issue of constitutional rights the other briefs, then and later, took a different sort of argument. They relied a lot on a footnote in the *Rasul* opinion, which I think is not very reliable.

More importantly, we had this other argument that the petitioner's right to habeas does not depend on constitutional rights. The right to habeas was antecedent to, and not dependent on, the Constitution.

Q: That was your argument.

Wilner: Yes. That was our main argument. Before Judge Green, I argued, Joe argued, and Barbara Olshansky argued a part in the consolidated cases under the name *Al Odah*. That became ten cases that went forward as *Al Odah*, ever after. We argued before Judge Green. I argued two points—that the Constitution applied to these people and, in any event, they didn't need constitutional rights. Joe argued that the CSRT process was a sham and Barbara Olshansky, from the Center for Constitutional Rights, argued that international law applies.

Judge Green ruled in our favor. Most importantly, she ruled that the Constitution did apply, that the detainees were entitled to due process, and that the CSRTs did not provide it. But one judge broke his case off.

Q: Judge Leon?

Wilner: Judge Leon. Judge Dick Leon broke his case off. That was the case that people from the Hale Dorr part of WilmerHale handled [Hale and Dorr, now WilmerHale] and Judge Leon ruled against them.

Now, in fairness, I should say that they did not make the argument that I just described—that it doesn't matter whether you have constitutional rights; the right to habeas precedes the Constitution. That was a very controversial argument for some reason. Yet, I think it's the only argument that could have convinced Dick Leon. I was always convinced that these judges, particularly conservative judges, would say that the Constitution does not apply based on other precedents, but we really should be able to win on the other argument.

In any event, they didn't make that argument, and Leon ruled against them.

Q: Who was the lawyer from Hale and Dorr?

Wilner: WilmerHale. Steve Oleskey and Rob Kirsch, very nice guys, and good lawyers.

At that point, Judge Green entered a stay of all the cases, pending the outcome of the appeals. We fought against that—she should not have entered a stay. That really stopped the cases. Then we had to go up to the Court of Appeals and it was an amazing process. I think we had three separate arguments before the Court of Appeals because of all the things that developed in the cases. I should say, again, a great controversy within our group was over this argument that you do not need constitutional rights to get habeas relief. I would write these briefs, and the *Boumediene* people—that was the WilmerHale case—were always separate. They could write for themselves. Now, whenever we wrote, we had to write for nine other cases and fifteen other law firms, plus all the others who were now filing cases and were interested in it. This argument, which I wanted to be our key argument, that you really do not need constitutional rights to get habeas relief; this was Tower of London-type habeas—the Court was under the obligation to determine whether there was a legal and factual basis for the detention; it has nothing to do with the Constitution.

For some reason it caused tremendous controversy among our own set of lawyers. I'll tell you that one well-known constitutional law professor who had one of the cases wrote me something and said, "Everyone knows that you obtain habeas relief only for a violation of the Constitution."

Q: Who was that?

Wilner: Erwin Chemerinsky, a nice guy, and he probably regrets that. But it was just confusing to me because it was so clear.

Anyway, we wrote the briefs and we got them through. We had an argument on September 8, 2005. It was really an extraordinary argument. I argued for the *Al Odah* group of cases, and Steve Oleskey argued for the *Boumediene* ones. It was a seminal argument on what happened in the case and, to me, it shows one of those few times when oral arguments can really make a difference. Although we had very clearly written why you did not need constitutional rights to be able to have habeas relief, it was clear to me when we got up to argue that the court of three judges—Judge Randolph, Judge [David B.] Sentelle, and Judge [Judith A.W.] Rogers—were trapped in the same conventional wisdom that habeas relief requires a violation of constitutional rights. Judge Sentelle and Randolph are very conservative, and Judge Rogers is a moderate. I said, "All we are asking here is for the right to have a fair hearing, the right to get a return—that is, an explanation—from the government on why we are being held, and for us to put in our answer and go forward. The government said we cannot even do that, because we have no constitutional rights," and I said that was wrong.

Despite everything we had written, the judges seemed to assume that we needed constitutional rights to win. I've never seen a court change so dramatically in an argument. I'll tell you the argument I made. It was very tough to get them, but I really gave them two hypotheticals. I said, "Let's say the government passes a law saying it can arrest and detain all red-headed people. You could challenge that as being unconstitutional, but you can also go in and say, 'I'm not red-headed. You've made a factual mistake.'" It had nothing to do with the Constitution. They started to get it. I said, "Let me give you another example. Let's say we're in a war with Japan, and the government passes a law saying we can detain anyone of Japanese descent." This is, of course, the *Korematsu* case [*Korematsu v. United States*, 1944].

Q: Right.

Wilner: I said, "Let's say somebody goes into court and says, 'That is unconstitutional. It's a violation of equal protection,' and the court says, 'It's allowed', which it did in *Korematsu*. Now, let's say another guy comes in and says—I remember looking Randolph in the eye—'I don't care about the Constitution. You've got the wrong guy. My name is not Hara, it is O'Hara. I am Irish, not Japanese.'" This is purely a factual question. It has nothing to do with the Constitution. That's what habeas does. I saw all their jaws drop, and they got it. The government came up next in argument, and Randolph said to the government lawyer: "He's got to have the right for a hearing. Habeas existed before the Constitution." We clearly won the argument.

After I argued, Oleskey got up to argue for the *Boumediene* people. The first thing Randolph asked him was, "You have not made this argument in your brief. Are you precluded from making this argument?" And Oleskey said, "Well, we have it in a footnote here." It was just amazing. But it clearly won. Everyone in the courtroom could just feel that we had won the case.

I went down to Guantánamo after that to visit the detainees. That is another story, visiting the detainees. A whole other story. I remember telling them that this had been a significant argument, that we thought we were going to win, and that they would have the right to a hearing. We argued in September, and we were probably down in Guantánamo the beginning of November. While we were down in Guantánamo, I heard that a provision had been introduced in Congress to revoke the right to habeas corpus. I came back and fought it. What happened subsequently, I understand, is

that the government also thought they had lost the argument. They went into Lindsey Graham, who put an amendment onto the Defense Appropriation Authorizations bill at that time, November 2005, to revoke the writ of habeas corpus for detainees at Guantánamo. He had originally raised that in a bill earlier and that portion had been cut out. Then he put it on as a floor amendment. That started a whole new part of the process, on the legislative side.

I had always feared this. I remember we had had a call earlier, with all the new habeas corpus lawyers, as we often did, talking about the brief. Somebody was saying that, "We should go to Congress and press them on this," and I said, "Let Congress alone. It's a Republican majority. I don't want to stir them up. Let the courts handle this. I'm confident that if they ever get the courts to rule, we can win on this," and I remember this woman saying, "Oh! They're not going to revoke habeas corpus. It's one of the most ancient writs there is." I said, "These guys can do anything!"

Of course, I had dealt off and on with Congress on international trade issues and cases. I came back from Guantánamo in November and almost immediately got involved in this issue on the Hill. At first, the feeling was that the Graham amendment would lose. It came to a vote on the Thursday before Veterans' Day, and our initial indication was that John McCain, who everybody fancied the great defender of human rights, would oppose the amendment. He voted for the amendment, and when he voted for it, it carried. He was that influential. It carried. Senator [Jesse Francis "Jeff"] Bingaman [Jr.] and Senator [Carl M.] Levin had an amendment prepared to offer that would have cut out the habeas-stripping portion of the Graham amendment. I understand that certain prominent Democratic senators went up to them—Hillary Clinton included—and said, "Don't offer the amendment. It will make us look weak on terrorism. We need a compromise."

Over the weekend, taking the lead of Senator Levin, Senator Bingaman, and Senator [Edward P.] Kennedy, we tried to craft a compromise amendment. Many compromise amendments were tried. One would give a better CSRT hearing as a substitute for habeas corpus. At the end of that process, what happened—we helped them with it but it was his idea—was that Senator Levin crafted a change and made a compromise with Graham on changing the language and the effective date provision of the bill. He got an agreement that he would make a statement about the meaning of that change, and Graham would not contradict him. The change took out some language in the effective date provision dealing with habeas corpus that was in the other parts of the bill. The change gave us the argument that the revocation of habeas corpus was prospective only, and did not apply to existing cases. I advised Senator Levin's staff and others that I thought we could win that argument.

Wilner: The compromise was passed by the Senate and was included in the bill. It was included in both the Defense Authorization and Defense Appropriation bills. There were more things that went on after that, but that was basically the compromise.

It was interesting. It put certain senators in a difficult position. I was asked to advise certain senators if they should they vote for this or against it. I actually told them I would vote for it because I thought we would win in the courts on the argument that the legislation was not retroactive. Also, if the bill lost, I was afraid that Graham would do something worse. There was a Republican majority and, frankly, the Democrats did not have a lot of strength or the will to stand up to being accused of "aiding terrorists."

So, the bill passed. Then, the first thing that happened then was that the *Hamdan* [*v. Rumsfeld*, 2006] case came up to the Supreme Court. The *Hamdan* case challenged the military commission system that was set up by the president to try certain people for war crimes. Very few people had been charged before the military commission.

Q: These were the CSRTs?

Wilner: No, not the CSRTs. The CSRTs—and it's become so confusing—were to review the determinations that had been made that people could be held as enemy combatants. Of all the people at Guantánamo, all of them were being held as enemy combatants. In addition to that, some of them were charged with crimes. If you're a terrorist, it means you're devoted to killing innocent civilians. That's a crime. It's a crime in the U.S. and under international law. You can try and prosecute people who are engaging in crimes and, if they are convicted, you can execute them. But the people you hold as enemy combatants are really not accused of doing anything wrong. They may be perfectly nice people fighting in a war against you. You can hold them so they don't return to fight against you. I don't think the Bush administration ever understood all this. So the CSRTs were to see if these people are enemy combatants. The military commissions were to try those few people accused of crimes. This guy, Hamdan, was accused of a crime, his crime being participating and supporting terrorism—al Qaeda—because he was Osama bin Laden's driver.

The *Hamdan* case challenged the constitutionality of these “criminal” military commissions. But the first issue the Court had to decide was whether Hamdan's right to go to court had been revoked

by Congress—had his right to habeas corpus to obtain court review been revoked? We wrote the amicus brief on behalf of normal Guantánamo detainees in that case, arguing that the bill had not revoked existing habeas cases, and that is only applied prospectively.

I'll tell you a funny thing in this, and I'm not ashamed of talking about this. Hamdan was represented by a guy named Neal Katyal, who is a professor at Georgetown Law School. The first thing that the Supreme Court decided in the *Hamdan* case was that the legislation, the Detainee Treatment Act, only applied prospectively and not to existing habeas cases. Katyal had argued in that case that the Act applied retroactively to revoke everyone else's right to habeas corpus, but not those people who had been charged by a military commission. He spent a lot of time in oral argument trying to screw us over, and arguing that our rights to habeas corpus had been revoked retroactively but that his had not. The Supreme Court, thankfully, rejected his statements in oral argument.

I just want to do an aside. At every stage in this case, Katyal did a similar thing. When we first went up to try to get cert in *Rasul*, he was representing *Hamdan* at the time. He filed a document opposing our petition, saying, "They should not have cert. They are not entitled to habeas corpus. My guy is entitled to habeas corpus because he's been charged." Later on, in the *Boumediene* case, he took the same position—that his person, who has been charged, is entitled to certiorari and his right to habeas corpus is protected by the Constitution, but ours is not. Those arguments were destructive in a number of ways. Thankfully, the Supreme Court paid no attention to him. For his own case, they were actually harmful rather than helpful because they made a distinction that would hurt him. But they also fell into the trap—which his own mind was in—that habeas really

only applies to test a conviction, to see if it is in violation of the Constitution. It's not for somebody thrown in the Tower of London. I want to say that because he is one of the very few people in this case, I think, who just did bad things.

Anyway, so, in the *Hamdan* case the Supreme Court decided that the revocation of habeas only applied prospectively. It also decided that the military commissions system, as set up, was constitutionally deficient and contrary to other laws already on the books. So it said, "If Congress wants to do this, it's got to change the laws."

That's what Congress did. It went right back and revoked habeas corpus retroactively in the Military Commissions Act. There were still some loopholes we could try to go through. But they revoked habeas corpus retroactively and changed the military commissions system.

While all this was happening, our cases were still pending before the Court of Appeals. After the first act was passed, we had to argue about its meaning to the court.

We then argued again about the meaning of the Military Commissions Act. Now there was another dispute among habeas counsel. At that point, we all knew we were going to lose before this Court of Appeals, It was a conservative panel of judges and Congress had revoked our right to be in court. We had one very technical argument that Congress had still not been sufficiently clear in revoking habeas—you need to be very clear about it. That wasn't a great argument. The more important argument was the argument that Congress cannot revoke habeas for these people because their right to habeas is protected by the Constitution. We knew that a majority on this Court—Randolph

and Sentelle—would not accept that argument because they believed the detainees had no constitutional rights. My team, and also Professor Amsterdam, advocated just trying to get through the Court—not briefing it, just going right through it—so we could try to get right to the Supreme Court as quickly as we could.

We lost on that. A number of the other lawyers said—I'll never forget it—said, "I've got to tell my client that I've done everything I can for them. We want to brief it." There was a big argument, "Are you doing everything you can when you're wasting time? Let's get quickly to the one court where we can win!"

Q: That raises a really interesting question about the internal contradictions in the ideology of the law. Because it's firm that you do everything possible for your client, and then you're in a situation in which you have to make a collective decision.

Wilner: It was very tough. To me the most difficult thing after *Rasul* was not being able to make decisions that I was convinced were in the best interest of the client because the Court was requiring us, on behalf of these ten cases, to file one brief. We couldn't split into a separate brief. We had to make one argument, file one brief. We had to do all these things. I thought, as I always said, not to compromise the quality or the decisions to the lowest common denominator. A lot of people are much more willing to get a compromised product; I wasn't. This was the one issue that I lost on. Because you're supposed to do everything possible for the client doesn't mean you do everything that can be done, even if it is counterproductive. What it means is you do what is most productive for the client, not the easiest. So, in my view, making this argument before the Court of

Appeals, writing more briefs, having another four, five, six months, and delaying the Supreme Court term was counterproductive and against the client's interest. But I lost on that. We did have another series of briefing and arguments to the Court of Appeals. As expected, we lost on that 2-1, with Sentelle and Randolph voting against us, and Judy Rogers voting for us.

Q: This was February 2007.

Wilner: Yes. We then applied for cert. We petitioned for cert, again to the Supreme Court. We promptly filed our petition for cert, and the Supreme Court denied it at the beginning of April, 2007.

I was heartbroken. I thought the Supreme Court would grant cert, as everyone did. In a really unusual situation, six of the Supreme Court justices filed opinions on the denial of cert. Three of them—Breyer, Souter, and [Ruth Bader] Ginsburg—said cert should clearly be granted. Two others—Kennedy and Stevens—joined in an opinion, saying, "We think it is not ripe for a decision yet. The petitioner should exhaust administrative remedies." I need to back up and explain that. But they said, "We are going to pay attention to see how things progress." A very unusual denial of cert.

Let me tell you—in terms of exhausting the administrative remedies—I talked earlier about how the Defense Department had set up the Combatant Status Review Tribunals. The Detainee Treatment Act, and then the subsequent Military Commissions Act, which retroactively revoked habeas, did set up an alternative procedure. It was a sham procedure. It had a limited review by the

Court of Appeals of the determinations of the CSRTs. The standard of review was that the Court could not look at new facts or accept new facts. It could simply look and see whether the CSRTs had followed their own procedures in reaching their determination. The CSRTs really were a sham. In ninety-two or ninety-three percent of the cases they just confirmed the decisions that had already been made—that the people were enemy combatants. The detainees were not allowed to see any evidence against them that was classified, and almost all of it was classified. They were not allowed to present evidence on their own unless the CSRT panel said it was reasonably available, and they almost never found that it was reasonably available. Nobody was allowed to call a witness who wasn't in Guantánamo, and three-quarters of those at Guantánamo were denied. It was a joke. When the CSRT panel found that somebody was not an enemy combatant, the government had new panels convened until they found that they were enemy combatants.

So, it was an absolute joke. But that was the administrative review process that Stevens and Kennedy thought should be exhausted. In order to get cert granted, it takes four justices. If Stevens had joined with the other three—Ginsburg, Souter and Breyer—we would have had cert granted. Linda Greenhouse wrote in the *New York Times* afterwards that she thought Stevens joined with Kennedy because he feared that, if cert was granted, Kennedy would then deny relief on the merits, saying, "You should exhaust your administrative remedies," so at least they should do that upfront.

At that time, the *Boumediene* case was being handled not by Oleskey and Kirsch, but Seth Waxman and his team at WilmerHale. So we talked with Seth. We saw some slim hope in this opinion, so we petitioned the Supreme Court for a rehearing on the denial of cert. We did it not so much because we thought we would win at that point, but because we just wanted to keep our

options open. In retrospect, that was very smart. The Court did ask the government to respond. I was going to write this down someplace, because this really happened very quickly. They responded on the afternoon of June 19, and although the rules do not allow us to, Neil Koslowe and I decided we should file with the Court a reply to their response.

What had happened in between is that the government had taken some positions that we considered really outrageous. The administrative remedy couldn't be enough if it wasn't an adequate substitute for habeas. This is an interesting thing about the Bush administration. They were so aggressive and outrageous that I think they continually screwed themselves. None of this stuff needed to happen. One of the things they did was to say in court that the protective order which allowed lawyers to Guantánamo should be modified. They argued that, unlike habeas, the new statutory review procedures did not allow any review of the facts, so we should have a more limited access. To me, on its face, that shows the statutory procedure is not the same as habeas. Then the government said, "Furthermore, under the new procedures there can be no order of release of the defendant, only a remand for another CSRT." Well, habeas must always allow a court to order release.

The government also argued that we had the right to challenge the constitutionality of the review procedures, because the statute allowed such challenges "if the Constitution applies." But the D.C. Circuit had already said that the Constitution does not apply, so that was off the table. There was therefore no reason to wait any further to exhaust administrative remedies. So Neil and I said, "We're going to make these points."

That same day, another firm had filed an affidavit in the alternative statutory review proceeding from a reserve Military Intelligence officer, Colonel Stephen Abraham—who had sat on the CSRT panel—saying that the information before the CSRT panels is a joke, it’s really terrible, and that the whole process is a sham. This was filed the same day as the government’s response, June 19. We hadn’t known about it, but we saw it. I talked to David Cynamon, the lawyer at the Pillsbury firm, who told me that he had obtained this affidavit totally serendipitously. That was the word he used. He said that he, or his associate, had been giving a talk about the cases at their law firm, and one of the women who was a property lawyer in their Virginia office had seen it. Her brother was Stephen Abraham. She told him about it, and he gave this affidavit.

Neil and I decided that, in addition to making the points I just described, we would attach Abraham’s declaration to our brief. I also talked to Seth Waxman, saying, "You should consider attaching this." He said he would consider it. Then I had fifteen other law firms I had to get on board with our strategy. All of them agreed with the points we made in the brief. Some of them objected strenuously to attaching the Abraham declaration.

Q: What were their grounds?

Wilner: It is just a very unusual thing to do before the Supreme Court. It was new evidence, it’s not technically “in evidence.” Basically, Neil and I said—and we had support from Gary Isaac, who is with Meyer Brown in Chicago—“What do we have to lose, at this stage of the game?”

So we put in a very short brief. I think that was one of the most important briefs. It’s three or four

pages long, with Abraham's declaration attached. We asked for an outright reversal of the Court's decision on cert.

Now interestingly, the WilmerHale brief did not ask for an outright reversal, it asked for the Court to keep the issue open. They didn't mention the Abraham declaration. In any event, the Supreme Court reversed itself and granted cert. That was monumental! I understand that it was the first time in fifty years the Court had done so.

My own view is that the Abraham declaration, which has been credited with the grant of cert, was not the reason. I think it was really the government's performance in between. It had been so outrageous and overreaching that it irritated the Court, including Kennedy, who was the key vote.

The grant of cert was very important strategically. While it takes four votes to grant cert initially, it takes five votes to reverse a decision and grant cert. Five, of course, is a majority of the Court.

What this meant was that we had a very good chance of getting five votes on the merits. It was very important to decide what we wanted to get. There are two aspects to that. After the Court had denied cert, our only possible hope for relief was in Congress. We had been working in Congress very actively, with a group headed by me, Gary Isaac and Agnieszka Fryszman, to see what we could get. We had staged an event on May 1, National Law Day, with habeas counsel coming from around the country to visit their congressman and try to get the restoration of habeas corpus.

Q: You now have a Democratic Congress.

Wilner: We now have a Democratic Congress, as of May 1, 2007. But although we have a Democratic Congress, we also have a Republican minority in the Senate willing to filibuster the restoration of habeas corpus. You needed sixty votes for cloture, to cut off the filibuster. We also have a Democratic Congress made up, in part, of new members elected close to Blue Dog districts that were very vulnerable. We really had two attacks—one in the House and one in the Senate. In the Senate, we did everything we could to get sixty votes to stop a filibuster. I have a very close friend in town who is a big Democratic fundraiser, a woman named Elizabeth Bagley who is wonderful, a strong supporter of Hillary Clinton. This was the one payoff I made in my life. I was a strong supporter of Obama, because he had right away supported us in habeas corpus, and Hillary had waffled. But Elizabeth is able to get appointments with Democrat senators anytime she wants.

So I made a deal with her that I would max out giving to Hillary if she would get me appointments with five Democratic senators I had not been able to sit down with. She did. And I convinced them all to vote for the restoration of habeas corpus—good people, Bill Nelson and others, who really felt that way—so we shifted their votes for habeas corpus. We also got [Charles T. “Chuck”] Hagel. I don't think we got [Richard Green “Dick”] Lugar at the end. But we came up with fifty-eight votes in the Senate—two short. Two short. [Patrick J.] Leahy was supporting and Levin, of course, was pushing it.

Meanwhile, the House was much more difficult. Ike Skelton, who ran the Armed Services Committee, has a very conservative committee. They were trying to work a compromise. They were never going to restore habeas totally. And Carl Levin in the Senate was always ready with a compromise. At the end of the day, we were working in the House. We wanted the House to be

much stronger for habeas corpus. We wanted the Democrats to be stronger. Skelton really wanted to push his people beyond where they were comfortable. We were getting a compromise, which really would have been a half-assed compromise.

Then certiorari was granted. I thought we could win in Court. Congress wouldn't solve our problems and could only hurt us. I went to a meeting with the Democratic leadership staff and I said, "Stop. Don't do anything. If you pass something, you're going to screw us before the Court. We'll win before the Court. Stay out of it. The worst thing we could do is have a half-assed bill. We are going to go forward." I said—although it sickened me that people in this Congress, a Democratic Congress after all these years, couldn't stand up for a fundamental right—"If you cannot do it the whole way, the right way, don't do anything. Don't do anything."

But the staff, of course, was on board. They didn't do anything. There was a big meeting in the House with the staff of the House leadership.

Then we got certiorari. It's funny. I really haven't talked about it. It raises huge questions. Let me draw back.

Q: The case is now *Boumediene*.

Wilner: Well, and I'll tell you the story about that. When we filed for certiorari, the case was really *Boumediene/Al Odah*. The *Rasul* case is *Rasul/Al Odah*. But people refer to it by the first name. In the *Rasul* case, we had decided that *Rasul* should file first, and that the case should be named *Rasul*

because they had filed their case a month before we did. More importantly, they represented two Brits and two Australians, very sympathetic sort of people, our closest allies. For the Court's perception, you weren't talking about Arab nations—you were talking about Britain. That was strategic for *Rasul* to go first.

[INTERRUPTION]

The reason the case is *Boumediene*—this was before we petitioned for cert the first time—we had a discussion about whether the case should be *Al Odah* or *Boumediene*. I really felt it should be *Al Odah*, not because of any personal glorification, but these were the people who had won in *Rasul*. It was *Rasul/Al Odah*. The Court knew them, and I thought you could say to them, "Here it is, four years later, and they still have not had the hearing!" The Court had talked about the *Al Odah* petitioners in the *Rasul* case. This goes back to earlier. Remember, Harold had wanted me to drop our Alien Tort Claims statute. The Court upheld our claims under that statute. We won on that issue. It expressly said the *Al Odah* people have a right to pursue that.

Anyway, we voted that it should be the *Al Odah* case. I then got a call from Tony Amsterdam, for whom I have total respect. He said that Seth Waxman had called him—they are very close—and Seth had convinced him that it was better if the *Boumediene* case went first, because *Boumediene* had such outrageous facts. I told Tony that there were other facts that I didn't like in it, but he thought their facts, with our arguments, would be better. And the facts were that the *Boumediene* guys had been captured in Bosnia and accused of planting a bomb at the U.S. embassy. They had been held in Bosnia, cleared by a court set up by a U.S. commission in Bosnia, and then kidnapped

by the United States and taken to Guantánamo. Those facts were so outrageous. And again, they are not Arabs. So I said to everyone who had voted that we go first, I'd say, "Let *Boumediene* go first," and I did that because of Tony. *Boumediene* filed a half hour before we did, so the case is *Boumediene v. Bush/Al Odah v. the United States*. So that's how it happened. In retrospect, there were some problems about those facts which came up in argument.

Anyway, the Supreme Court had now reversed itself and granted cert. Here was another huge argument, which really split our team. Some of that was probably personality as much as anything else. Soon after the Court granted cert, David Cynamon from Pillsbury circulated a draft for a brief. This was surprising because we had written every brief that had been written since the beginning. He also said that Seth Waxman should argue the case, which is sort of funny. It was probably a personality thing. He had taken over the Kuwaiti representation, and I think he was under pressure from his clients.

Q: I was going to ask you how that happened.

Wilner: Let me come back to that because it is really a separate story. But this continues on.

Frankly, I thought—and most other people thought—that his draft brief was not very good. When we first argued *Rasul/Al Odah*, we took a very narrow tack. I always thought that if we got before the Supreme Court, we would win. And the attack should be that the government is saying that you simply have no jurisdiction—as soon as they take a foreigner outside the United States, the Court has no jurisdiction under any circumstances. Certainly, a court must at least have jurisdiction to look at this.

This time we could have argued the case a number of ways. First of all, there was still a narrow little argument that Congress had not effectively revoked habeas corpus; they had not been clear enough. We had originally made that argument for the Court, if they had wanted a quick way to get rid of it. This brief Cynamon circulated made *that* a centerpiece argument. I thought that was a mistake because that would really throw it back in Congress again, and I thought there was an opportunity here to state a rule of law, to go further. Also, we could have relied on the unique status of Guantánamo. We could have argued that, "I'm not saying everyone has a right to habeas corpus, but these people at Guantánamo, which is just like U.S. territory, have the right to habeas corpus." Another argument could be, "We are only talking about habeas corpus. You don't need to consider whether they have other rights."

Those are traditional, lawyer-like arguments. I really thought there was an opportunity here, with the five votes and Kennedy alongside, to try to get at the heart of the whole problem of what had happened.

I said from the beginning that the whole problem with this case was this debate of how far the constitutional protections extend to foreigners outside the United States. There was this doctrine that had come through—particularly by Rehnquist, in a case called *Verdugo-Urquidez* [*United States v. Verdugo-Urquidez*, 1990]—saying that the Constitution does not extend to foreigners outside the United States and that, certainly, the Fifth Amendment doesn't. I think that is absurd. I agreed with earlier opinions by Justice Harlan and Justice Kennedy which rejected that notion. Kennedy had gone along with Rehnquist in the *Verdugo* case, but on a very different rationale. I

think I read every opinion Kennedy ever wrote, and I was convinced that he abhorred this idea of rigid territorial limitations on the Constitution, that what he really believed in is the Constitution applied flexibly wherever the United States asserted control over individuals. You wouldn't apply it at all times and in all circumstances. It was a flexible concept. You wouldn't apply it on the battlefield. But when people came to rest in a safe place, it should apply, whether that place was Guantánamo or someplace else.

I was also convinced that—and these were the same arguments we had made in our initial petition for certiorari in *Rasul*—that if you applied strict territorial limits on the Constitution, you allowed manipulation by the executive branch. It would allow the executive to avoid limits on its authority, violate the concept of separation of powers and the purpose of court review and habeas corpus. We wrote a brief that way. We wanted to obtain a ruling that rejected strict territorial limits on the Constitution and left it open to us to argue that these rights applied in places like Bagram. We were also worried if we argued that legal rights depended on the unique status of Guantánamo, that this administration might move the detainees somewhere else.

Cynamon and David Remes at Covington & Burling broke off and would not go along with those arguments. They wrote a separate, very narrow brief. They felt, "Why do we need to take on the broad rule? Let's be narrow", and they made narrow arguments.

As we had hoped, Kennedy wrote the opinion, and he wrote it very broadly. It rejected strict territorial limits on the reach of the Constitution. He said, "It is a flexible concept. Otherwise, you would allow manipulation." The opinion is almost straight from our brief, all the way through. So

that was good.

Now I can go back on the other things. That's basically the whole legal story.

Q: So that is where we are today.

Wilner: Yes. Bagram is still an open issue. But that is a separate case. Maybe I should go back to the Kuwait thing so I can explain what happened. In a way, it was the final irony in the case. The cases were stayed, we were arguing back and forth before the Court of Appeals, and Congress had acted to revoke habeas corpus. I can't remember when the *Hamdan* case came down [June 29, 2006], whether it was before this or after it. In any event, we were working in Congress and preparing our arguments in the Court. I could feel a frustration among the Kuwaiti clients. That wasn't the Kuwaitis at Guantánamo. This was the families in Kuwait. In a sense, we lost a bit of credibility with them, through no fault of ours.

After we won the *Rasul /Al Odah* case and we were pushing for the right to counsel visits, they wanted the Kuwaiti lawyer, Abdul Rahman Al-Haroun, to accompany us to Guantánamo. And William Brown, his advisor, was especially adamant on that. One of the reasons is that, "How can you imagine the detainees trusting us? They don't know us. He is a Kuwaiti lawyer, they will have more faith in him." We did everything we could to get Judge Kollar-Kotelly to allow him down. The government objected. He is a foreign citizen, and they said, "On matters like this, we have the right to say who we will give security clearance to." It was clear that Judge Kollar-Kotelly was not going to order him down, and go against the government. It was also clear, based on our research,

that it was very unlikely that we could win an appeal on that. The courts defer to the executive on issues like who they can give clearance to. We felt we could win on the larger issue that we could have unmonitored conversations with our client, and that we would lose our credibility if we pushed too far on this other issue.

Nevertheless, William Brown was furious. He said we had to push and to appeal this decision, we had to do all this. So I was put in this position, saying, "Look, I don't think it's a good idea." I think somehow, with the Kuwaitis and Abdul Rahman, it was like we were not standing up for them. In any event, it was our best advice.

After we won the *Rasul* case—and I think he took this wrong, too, but sometimes good intentions go badly—I said to him, "Now we've won the case." Wrongly, I said, "I think the great issues for which you were paying us—maybe you don't need us anymore. Now we're going to get into individual hearings for individual people, and that's normal for criminal lawyers. That is not our expertise. Anyone can do it, and you can save a lot of money if you want to go to someone else. I can get people to do it pro bono for you because the Center for Constitutional Rights is getting all those lawyers." Well, once again, dealing with another culture—I think he took that, in some way, as if we wanted to abandon them. I kept saying, "No. I will help you any way you want. But I want you to know where you can save money. You are paying too much. I never wanted you to pay for this."

So, anyway, those two things maybe hurt our credibility with them. Also, in all honesty, William Brown had done a wonderful thing at the beginning by telling them they should get a reputable law

firm. But he is a very odd guy. He's not a litigator. He has no sense of Washington—he was always pushing on the wrong issues. He would come in and micromanage, and then drop out for months and months. The whole process—when there was a stay, and suddenly we were dealing with all these other law firms we had to coordinate, and then Congress came in—very frustrating for them and, of course, for us. I don't think they paid attention. After he had David Henderson fired, he hired another PR firm, without telling me or coordinating with me. It was so silly and counterproductive. Everyone thought it was silly. I wrote to Abdul Rahman, who then blasted me for complaining.

Anyway, this new PR guy, Gene Grabowski, was put in charge of PR. But he also found that the press wanted to talk to the lawyers. Any request I received from the press, I ran by Grabowski. I had heard from him that Brown was very upset about all the publicity that was coming to me. I didn't care. At one point I was asked to write—this was after visiting Guantánamo—an Op Ed in the *Los Angeles Times*. Grabowski actually reviewed and approved it before I submitted it. After it was printed, Grabowski told me, "Brown is very upset about that." I had no idea why, because it was exactly the sort of thing we were supposed to do. When somebody asked me to do it, I immediately called the PR guy, who said, "Great! Let's do it." He reviewed it before I submitted it. He thought it was great. Dick Durbin, by the way, read the *LA Times* piece and called me about it to say how moved he was by it.

I got a call from a BBC reporter named John Manil, whom I had dealt with before, and he said, "Tom, I have an idea." Have I told this story before?

Q: No.

Wilner: John said, "We reporters are not allowed to interview the detainees at Guantánamo, but you're allowed to interview them. Why can't you interview them, and I'll broadcast the results of your interview?" I said, "John, you've got to understand that when I interview them, my notes are written down. It takes about two weeks for them to get back from Guantánamo to the secure facility out in Arlington. After that I submit them for clearance." We had a procedure where we couldn't say whatever the detainees said to us, but if the notes were cleared by a U.S. government security team as not containing classified information, we could then say them. I said, "That takes another two weeks to four weeks. So there will be that delay."

He said, "I don't care."

I said, "Let me run it by our people." I called Gene Grabowski. Gene said, "This is a great idea. Please do it. This is a breakthrough idea."

So I went to Guantánamo. The BBC guy sent me some questions, but they were the typical questions I always ask anyway—"How are you? How are you feeling?" Grabowski also gave me questions. I went in and asked Fawzi Al-Odah the questions I normally ask, wrote down the notes. I came back from Guantánamo and had the notes cleared. I wrote them up in the form of an interview. I put them down and sent them to Grabowski. He said, "This is great." I then sent them over to John Manil in London, and they did a broadcast. It was an interview with Fawzi Al-Odah, who had just had his hunger strike broken. Such a sad thing. They hired actors to be Fawzi

Al-Odah and me, and played it on the BBC.

Two things happened. Fawzi Al-Odah's father, Khalid Al-Odah, heard it and was shocked—and, for some reason, irritated. He then called Grabowski. Grabowski and Khalid were supposed to be the PR committee. I wasn't part of it. They were supposed to discuss things. He apparently yelled at Grabowski, he said, "Why hadn't I known about this!" And Grabowski denied knowing anything about it. Grabowski called me and said, "Don't tell them I knew anything about it. They may fire me." I said, "Gene, I can't lie to them. Why don't you tell them the truth? This is just the sort of stuff that's supposed to be happening. This is just the sort of press you said we should be getting."

Then the U.S. government—they're such asses—wrote us a letter saying that they were not going to let us go down to Guantánamo again because we had broken the rules. I said, "What rules?" We hadn't. We had done everything by the book. But they did this. Of course, I had to send the letter over to the Kuwaitis, who basically abandoned us. They said, "How could you have gotten us into this trouble?" I said, "That's absurd." I wrote responses to the government which, of course, backed down because the only information disclosed in the interviews was information obtained and cleared according to their rules. There was no threat to the U.S. It was bullshit. I wrote a letter to this woman, the head hunter, who had initially contacted me about representing the Kuwaitis. I had consulted with her about it because the Kuwaitis kept asking, "Explain how you did this." And I wrote these long memos to Abdul Rahman, explaining it, and she said, "Apologize to them." I said I shouldn't apologize, but I did put in a little apology—"I'm sorry."

And, basically, on May 1, 2006, Abdul Rahman came over and fired us. He said, "We're replacing you with another law firm, Pillsbury Madison & Sutro. I could probably have you stay on," and he could not have been nicer. He said, "This is very tough for us." It was clear that William Brown had had this done. He said, "This was very hard for Khalid and me. You came in here when no one else would." But he was very nice. I said, "Well, we have always tried to do the best." He said, "No one could have done a better job, in every aspect of it. We couldn't have been anywhere like where we are, but this is it." He said, "Please tell me how you think we should go forward," and I did. I advised all sorts of things. I said that the detainees at Guantánamo are not going to meet with people unless we introduce them. We canceled another trip. I wrote it in a memo, he agreed with everything, and then they did nothing like that. It was terrible.

I had two minds of it at the time. They had become so difficult. They would not respond and they had not paid for years. Meanwhile, the firm had made commitments to charities that were going out and we could not get the money. I was caught in between. They asked me to do these unbelievably detailed budgets. I first did a sort of budget estimate and then Brown came back and said, "This isn't the sort of budget I need. I need a detailed, line item budget." Very nasty. I did a detailed budget. It took a lot of time to do and I did not hear from them. I did another detailed budget, and we just didn't hear from them. I did another. Same thing. They were just becoming so difficult, in a way I was relieved.

But it put us in a difficult position in the case.

Q: Right. It left you without clients.

Wilner: It left us without clients and it also left us—what were called the *Al Odah* cases actually combined ten cases and fifteen different law firms—without a lead lawyer. We were the lead lawyer. We were always the lead lawyer. There was sort of a panic.

I called up Michael Ratner, and he said, "Oh my god. You've got to take on one of the clients and maintain your position as the lead lawyer. If you're not there, it will all break apart. Nobody will be able to write a brief." So we joined Brent Mickum in representing Jamil El-Banna and three other Brits. Meanwhile, Pillsbury technically handled the Kuwaitis, but we were still the lead lawyer. The reason Cynamon broke off in the final brief was because, I think, there was pressure from the Kuwaitis, saying "We brought you in, and Wilner is still doing everything."

I felt that it was really unfortunate. Things have happened since then, some of which are classified and I can't talk about now.

Q: In November 2005, five Kuwaitis were released. That was before all this happened?

Wilner: Yes.

Q: What was the story there?

Wilner: Well, it goes in the story of the Kuwaitis. I have a list somewhere of the times I went down. I went to Guantánamo twelve times. Neil might have gone twelve or thirteen times. Soon after my

first trip in January, the government announced that they were going to release one of these guys, Mohammed Al-Daihani.

But his release was a shock to me. He had been injured when he came to Guantánamo. We saw him briefly, and we thought he was going to be released. We weren't sure. We didn't tell him or any of the others. We were told not to and were afraid, if we did, that the U.S. government would backtrack. The other detainees were angry at us for that. Why the U.S. government decided to release him, I don't know. He had been injured earlier. He was, I think, the only Kuwaiti down there who had been captured carrying a firearm. He had said he had been standing patrol in a defensive position against the Northern Alliance. He said, "I'm really not an enemy combatant," but he was the only one who had a gun.

Then, in October 2005, the government announced that it was going to release five others. There was no rhyme or reason why they picked that guy, initially, or the other five. We still, to this day, don't know. One of them was the least likely I would have released, a guy named Abdullah Al-Ajmi, about whom there will be an article in the *Washington Post* this Sunday. He went off and a year later became a suicide bomber in Iraq. I really think he was probably nothing when he went to Guantánamo. I don't think he was an enemy or anything, but I think Guantánamo made him crazy, turned him absolutely crazy, and we saw the progression of that. The other guys they released—Abdul Aziz Al-Shammeri—all the other guys were nothing. But there were people left behind. Of the six left behind, there were at least three who clearly should have been out. There was no rhyme or reason. We never understood why the government picked the people they did to release, and kept others there. As the detainees used to say, "At Guantánamo they release people

who are open supporters of Osama bin Laden, and we sit here."

So the government announced that. Actually, they announced it to the ambassador, not to us.

There are other interesting stories about it. At the end of 2004, maybe earlier, we proposed an agreement to the U.S. government to settle the cases, which we wrote up with the Kuwaiti families and others. It basically said that they should return all the Kuwaitis to Kuwait—that the Kuwait government would prosecute them all and would use any information that the U.S. government gave to them, but they could not hold them unless they were convicted. There was a Kuwaiti law, similar to a law we used to have, that you cannot fight against a friendly ally. But nothing ever really happened of it. I know that the Kuwaiti ambassador always pushed the U.S. government to release people to Kuwait.

I can tell the story of going and meeting the Kuwaitis, too.

Q: Oh, yes. We want to get to that. But you said we would come back to where we are now.

Wilner: Yes.

Q: Just to finish up. Where are we now?

Wilner: Okay. The Court, in *Boumediene/Al Odah* in June 2008, ordered that these people are entitled to prompt habeas hearings. About that time all my remaining new clients had been

released, which put me in sort of an odd position.

Q: They had gone back to—

Wilner: —to Britain. Yes. Of the original Kuwaitis, eight have been released. Four are still there. I do not technically represent them, although I am trying to do some things for them now, to get them out.

So the case went from the Supreme Court back to the District Court. At that time, there were well over two hundred habeas cases for individuals pending before the Court. All the District Court judges here are involved in the cases. The new chief judge of the Court, Royce Lamberth, decided, very much as they did last time after *Rasul*, that there should be a coordinating judge for the cases to decide common issues. So they scheduled a meeting with habeas counsel. I was asked to attend by other habeas counsel, along with a lot of others—a very diverse and unruly group. A number of them take the position that, "We don't want any coordination at all, we'll just tell the judges to go to hell." Others of them say, "Let's coordinate where we can." Others say, "Who knows? But let's not insult the judge. Let's try to get hearings as quickly as possible."

There is a first meeting with Judge Lamberth, the Chief Judge. He appointed Tom Hogan, a former Chief Judge, and we had a meeting with them attended by a very diverse group of lawyers.

Basically, Lamberth and Hogan asked, "Didn't coordination speed up the cases before?" And I said, "For my case, which was at the head of the line, it slowed it down terribly. Don't use coordination as an excuse to delay. People need just hearings promptly." The judges agreed with that. Then

somebody at the table said, "We don't want any coordination."

Now you've got to remember—they're going to do what they're going to do anyway, and they were clearly going to coordinate. He said, "Do you want to meet again and do this?" And I said, "Your Honor, we are happy to meet. Whatever you can do to speed up the cases, that's great. We want nothing to slow it down, so we are happy to meet with those goals."

So we end the meeting, and Cynamon and David Remes came up to me and said, "How dare you speak and say this?" Just unbelievable. Everyone else says to me, "These guys are crazy. Crazy." But at that point, I didn't have a client. I decided I was not going to these meetings anymore. So what I did at that point is become involved in advising on the Obama campaign, and afterwards, on how they should close Guantánamo and get rid of these people. In that regard, I'll tell you, it has been very interesting.

And the cases just go on. They are sort of screwed up. Some people take good positions, some people take bad positions, but it really is individuals litigating their own cases. My guys are gone. I have a continuing interest in the Kuwaitis who are still there. I had gotten information about eight months before the last presidential election, probably in the late spring of 2004. I had inside information that in 2002, the CIA was getting no information, no intelligence information out of the detainees in Guantánamo, although they were beating the shit out of them. And they were saying, "What's going on?" They sent down their top Arabist specialist and expert in Muslim fundamentalism to Guantánamo to find out what was happening. He interviewed dozens of them, reviewed their files, and came to the conclusion that, by and large, they had gotten the wrong

people. They had gotten the wrong people. With that report, Jane Mayer went further. She found and interviewed him. His report went into the White House, and [David S.] Addington, Cheney's counsel, and [Alberto R.] Gonzalez said, "Bury it. We don't care."

Jane found out that he, in his report, had identified individuals and said, "These guys are clearly innocent." He described them. It's in her book, at least one of them. One of them she described was a wealthy Kuwaiti, whom I know. I know who he is, and he is still there.

Anyway, I located this guy from the CIA who wrote the report. Jane would not tell me, but there was a hint in there of how I could locate him, and I located him. He's now retired from the CIA, but CIA people never really retire.

Q: Oh, yes.

Wilner: He could do this review right away. He confirmed that this guy is totally innocent, and he could do the review for the Obama administration. So I'm trying to push him on, and I'm trying to help in other ways. It's very interesting, though, all the uncovered things.

Okay. About going to Guantánamo—

Q: When did you first go? There was a long time before you could get to a client.

Wilner: I first went to Guantánamo in January 2005. That means that I had represented them from

April 2002 to January 2005 without ever having met them. As I always said, we were fighting—and still are, still were—for an American principle, the right to fairness and justice, habeas corpus. But I never met the people. Two people from our team went down in late December 2004. We could not go, or we really couldn't go openly, until the judge ordered that the government was wrong and we could meet them without having our conversations monitored. We then had to get clearance from the government, get secret security clearances.

Q: What is involved in that?

Wilner: Really, it's time. You apply, you fill out a form, the FBI investigates you and determines that you are not a significant threat.

Q: It's the same for any government employee.

Wilner: Well, no. This is secret, so it was high. We are allowed to see secret information. Anyway, we got the clearance. But that takes a month, month and a half. We got our clearances in the beginning of December.

You have to get your clearances. Then in order to go to Guantánamo, you needed to get in a queue. There were originally a limited number of places for lawyers down there, and you need to get in a queue to be there. We would normally get out of Guantánamo and then apply for the next trip. You can go, at most, about once a month. Neil Koslowe and Kristine Huskey, from our office, went right after Christmas 2004. I went at the beginning of January 2005—maybe the fifteenth. I think

Neil or Kristine came with me. They had just done a basic meeting with everyone.

So I went to Guantánamo. I'll describe the flight. It is really incredible. There are two small charters that go to Guantánamo from Fort Lauderdale—Air Sunshine and Lynx Air. First, it takes a hell of a long time to get to Fort Lauderdale—three hours. Then you need to wait to catch this charter. The charters are tiny little planes. They look like they are held together with rubber bands. Propeller planes, non-pressurized. We call Lynx the “Concord” of the two airlines. Lynx takes three hours, Air Sunshine takes three and a half hours, because Guantánamo is on the southeast tip of Cuba. You don't fly over Cuban air space, you go around it. For guys our age—there is no bathroom on the plane, of course. Three and a half hours without a bathroom.

So it's an exhausting flight. You get down to Guantánamo, usually in the early evening, on these planes. You're almost sitting on top of each other and all over. You get off and you come down a runway strip at Guantánamo.

[END OF SESSION]

VJD

Session Three

Interviewee: Thomas B. Wilner

Date: March 24, 2009

Interviewer: Ronald J. Grele

Washington, D.C.

Q: This is an interview with Thomas B. Wilner, for the Columbia University Oral History Research Office. Today's date is March 24, 2009. The interview is being conducted in Washington, D.C. The interviewer is Ronald J. Grele. This is the third session of the interview with Mr. Wilner.

Q: Where we left off was when you were going to Guantánamo. Your plane had just landed in Guantánamo, and you were telling me about your first impressions of the place.

Wilner: Well, as I said, it is a god-awful trip to get there. I'm worried more than anything, I think, about being able to take a three and a half-hour flight in a non-pressurized plane without a bathroom. Finally, after a very long time, you see Guantánamo in the distance, a thin strip of land far away. You get closer and closer, and it almost looks like a desert island from the way you approach it. And you land. Thankfully, I'm there. Now I'll have a bathroom! The plane, as I said, is a little prop plane. People have to climb over each other to get into it. It holds about twelve passengers on Air Sunshine. Off from where you land is a little area across from the runway, and there is a building next to it, where there is sort of not a tent, but something made of tent canvas material set up that would cover you from the rain. There are two tables and two guards standing behind them. You get off the plane, get your luggage and you stand in line to go through this security check. This was the first time, but it happened every time thereafter. The guards basically

go through your luggage with plastic gloves on. They are sergeant level or lower. They go through your bags to check that you do not have any contraband. They're looking for dangerous materials. They don't search your papers or things like that.

At that time, we were not allowed anywhere on Guantánamo without an escort, and that's still true. We had at that time a sergeant major, a very nice guy named Sergeant Schulman. I believe he was from Washington or Oregon, a tall guy. He then drove us in a little van about a mile and a half up the road to the Bachelor Officer Quarters. Guantánamo is a large base, about forty-five square miles. It is divided in half by Guantánamo Bay and to get across from one side to the other you use a ferry. We land at the airport, and where we stay is on the leeward side of Guantánamo where nothing is, except the airport, a few stores, and a few quarters for people to stay. They do have a NEXMART, sort of a grocery store, which closes early, and they have a mess hall that closes early. One of the problems was that they normally closed before we arrived. They also have, next to the NEXMART, a sort of bar with some horrible food you can heat up and cheap drinks. That's about a half hour down the road from the Bachelor Officers Quarters.

The first time I went was January 9, 2005. It was dark or pretty dark when we got there. The impression of it is that it is very dusty, surrounded by the ocean. In front of the Bachelor Officers Quarters, to the left as you go from the airport, is the little airstrip. I think I was accompanied on that flight by Neil Koslowe and Kristine Huskey. We had two translators at that time. The Kuwaitis had been very interested in interviewing them to make sure that their dialects were proper, so the detainees could understand them. One was a guy named Ashraf Michael, who stayed as our translator throughout. The other was John Katina. John was terrific, but he was all the way from

the West Coast, and we had to fly him in. It was too much trouble. Ashraf was in Chicago, and ended up being the main translator in Guantánamo. He was there, back and forth, a very interesting guy. He's an Egyptian. As it turns out, almost all Arabs understand the Egyptian dialect because most of the movies and music are in it. A very interesting guy, very smart. He had had a very successful travel agent business in Chicago which, of course, was dead after September 11. He started translating, and became very involved in it and concerned about it.

Anyway, we stayed at the Bachelor Officers Quarters. It looks like a decrepit motel from the outside, with a circle in front of it, then there are rooms. There is a reception desk. Most of the staff are Filipinos. I learned that they pay people on the base much less than minimum wage in the U.S. They get them from anywhere, so it is mostly Filipino guys, very nice guys. They give you a room, and you go schlep your bags up to a room. The individual rooms are interesting, because each room is two separate rooms with a bathroom in between them, with a shower, toilet, sink—two separate rooms, each of which has two beds. The furniture is white laminate furniture, much of which is falling apart and in disrepair. But you could see that when they have officers there, they will keep as many as four guys in a room, so it wasn't bad. We would have four beds. Because I don't sleep well, I would often alternate beds. On each bed there is a little basket that has soap, a wash cloth—things like that. Then there are towels in the bathroom. There is a television in each room, which works moderately well—sometimes they work, sometimes they don't work. There is a refrigerator in each room.

Q: What channels do you get?

Wilner: You get the Armed Services Network. You can sometimes get Miami and things like that. It's mostly the Armed Services channel that you get the best.

Anyway, I'm giving you the logistics of being there.

The prison, where they keep the people, is on the other side of the Bay, and in order to get there you need to get the ferry over. There is a mess hall on the other side of the Bay. Initially, what we did on the first trip was we got up about 6:00 AM, catch the bus which circles about every twenty-five minutes by the Bachelor Officers Quarters, and take that down to the ferry, which is about a mile and a half away. Then we took the ferry to the other side. The ferry ferries both vehicles and people, back and forth. The ferry ride is about a half-hour long and in the morning there are also a lot of people who stay on the leeward side but work on the windward side. Guys in the fire department of Guantánamo, mostly Jamaican guys—big Jamaican guys in the military uniform for firefighting would often be on the ferry, and some other people, too. We would get on that and go over to the other side.

At the other side, after about half an hour—it's a big ferry—your military escort picks you up. We went with him to the mess hall on that side, and got a very good breakfast. The breakfasts are great, for nothing. Then we went to the prison camp.

On the side where the prison is there is a really little town—not a great town. There is a Subway. There is a Starbucks now. There is a big NEXTMART, which is a military store, like a Wal-Mart. Then next to that they have some other little stores. Catty cornered across from this NEXTMART

complex is a library. The mess hall is behind that, a ways back.

We went from that, and our escort took us to the prison camp. We got there before 9:00 AM. As part of the rules, the fact that we were coming was known and the detainees with whom we were meeting was known. Each detainee is assigned a number, a prisoner number. We are not allowed to disclose, under the rules, anything classified to the prisoners. By the same token—and I'll tell you the basic rules—anything the detainees told us we could not disclose to others, including their family members, unless it was first cleared by a military security team. I can tell more about that later, but one of the odd things, to start with, was that the numbers for each detainee were classified and we were not allowed to divulge them to anyone. So we would go down there and we'd say, "We want to meet with Fawzi Al-Odah." They would say, "Who's that? I don't know. What's his number?" We were not allowed to tell the number.

Let me describe the camp. There is so much to tell, I don't know what to say. But at that time, for interviews, all the prisoners were taken into a place called Camp Echo. Camp Echo had previously—and has since—housed some people there permanently. But at that time it was basically a place where they put people for interrogations or interviews. It is right by the sea, all pea gravel, very dusty. There are high -- about twelve-foot -- double fences with razor wire on top of them. There are some guard towers on it. You enter through the first row of fences, and you come into an area where there are bathrooms. There are latrines off the left side and then on the right are two tables, where the guards would search what you were taking in and out. Sergeant Schulman, who was our first escort, would take us to that point and then leave. There were a course of other guards there, when he went home. The guards changed over time. At first I think it was

Army, then it was Navy, then it was Army again, and they would change the rules. Some of it was funny.

They search you out there. They don't search you physically, but they could. Some people were searched physically. You show them what you're carrying in. There were some disputes about that, because we weren't allowed to show any of the detainees newspapers or anything like that, only legal material in the case. These people were not allowed anything to read. All the fences were covered with a green camouflage mesh. We would go through a corridor between them, then we went into the camp.

The camp is made up of about fifteen or so huts. Each hut has two cells—meeting areas. There was a hut all the way down on the left that was open. I don't know if it was a show-cell or something. We could wait in there at that time. Later on, they stopped us from waiting in there. Later on we could not even go into the camp until the detainee was ready. They would change the rules. But initially we went into that cell and would wait for the detainee we were meeting with to be ready.

We broke into different teams. We had twelve detainees we were representing. As I said, the first time they had this terrible problem locating them because we couldn't say the numbers and they didn't know the names. It was just absurd. So Ashraf Michael, the translator, had to run around saying, "Are you so-and-so?" and then we would go in. And that happened not only the first visit, but for numerous visits! The Justice Department in Washington would handle the logistics of our traveling down there. We would communicate with them about problems, but the left hand didn't speak to the right hand in the government.

I'll tell you one interesting story. As I say, there are about fifteen of these huts. In the middle there is sort of a house where guards sit, but it's all pea gravel, this dusty pea gravel. On the right side that I'm talking about, there is also a cage where people could exercise. They would exercise one at a time, and initially it would be maybe once a week for fifteen minutes, oftentimes in the middle of the night. But it was a cage, a wire cage. I tell this story because one of our clients, who has been released now for about two years, was a member of the Kuwaiti National Volleyball team and a superb athlete [Abdullah Al-Kandari]. When I came out, he was in the cage. And he said, "Tom, look at this!" He could actually do a flip in the air, with his feet touching the top. He was a fantastic athlete. He could do all these things. He was showing off.

My first trip down there was in the beginning of January 2005. Kristine and Neil had been down there Christmas week and they had met with each of the twelve Kuwaitis very briefly, sort of a whirlwind trip to say, "We're here," and all that. One of our biggest concerns had been that the detainees had been there for three years already. They had been interrogated time and time again. Who the hell were we? Why would they trust us, or do anything? We had tried very hard to get the Kuwaiti lawyer, Abdul Rahman Al-Haroun, permission to go down there but the court had refused. So we convinced the court that we should at least be able to show tapes of the families to these people. Kristine and Neil had done that the first trip. It became a big issue. A lot of them asked to see the tapes again because they had not seen their families. It was so sad.

Q: It must have been emotional for them, at that point in time.

Wilner: Extraordinarily emotional. Extraordinarily emotional. Several of them would cry, seeing their families. They had not seen their families for years. This one fellow, the volleyball player, had not seen his daughter, who had been born after he had left, and had not seen his wife. There were many emotional things that happened. I had to tell a few detainees that their mothers had died, a brother had died, things like that.

Let me give you the picture. As I say, each hut is really divided into two rooms. The room, in turn, is divided in half. Half of it was where we would meet with them. There would be a small table. The detainee would be sitting behind it with his ankles chained to an eyelet that was in the concrete floor. The other side of it would be his cell, where he was waiting. I would say the entire room was about twelve feet by eighteen or twenty feet. So his cell was basically twelve feet by seven or eight feet and that, in turn, was divided again. About four feet on one side was a shower. The other part was a bed, a toilet, a sink. The bed is a metal slab that sticks out from the wall. It would have a mattress on it and depending on whether they had behaved or not, they would have a blanket. They were dressed in different colors to signify what camp they were in. Camp Four was the best camp—their permanent cells. Part of this was just to manipulate them. Sometimes there was not any reason they were in one or the other except to give them better benefits. Camp Four was the only camp where detainees were allowed to congregate with each other and have some meals together. I think they slept in a dormitory setting. Twenty percent of the people or less were in Camp Four; all the others were in Camp Five. They were all basically in isolation. I didn't see these. It's what they told me. In some of them, the isolation was a concrete room where they were by themselves. For many, isolation was in the form of a mesh cell where you could see the fellow next to you. The mesh was very close together, similar to the mesh in these rooms where we

interviewed them, steel mesh with the openings maybe a quarter-inch. As one of the guys said to me, very movingly, at one time, "In the five years I have been here, I have eaten every meal in my bathroom." He is never out of his cell.

But talking with them was a very emotional time for me. For three years I had been representing these people as an idea. It wasn't just an idea about them; it was an idea for American justice. Ultimately, I think that was probably what mattered the most to me—still does. But seeing them put meat on the bones of the concept. I was somewhat afraid. I didn't know what to expect. I didn't know whether these guys were good guys or bad guys. I had met their parents, and suspected they were probably good kids, and everything I'd read—some I wasn't sure about—but I didn't know. I did not know what Guantánamo would have done to them, and I didn't know how they would react to me. I was surprised because almost each of them took to us immediately.

Now one of the problems we had—and it became the focus of the initial meetings—was that the government's rules said that for us to represent these people, these people had to consent to us representing them, they had to sign a consent form, and they had two visits to do that. Neil and Kristine had been down once and a lot of people had signed up immediately, but a few did not. They wanted to think about it, and there were a number of considerations they had. Would it hurt them in getting out, or how they were interrogated, if they signed up with lawyers? How would it play out in the way people would treat them and their chances of getting out? Some of them were worried about that.

Q: How up were they on the Anglo-Saxon traditions of legal representation? Coming from my

background, I'd say, "Yeah, I want a lawyer." But that is not necessarily the case for people outside that tradition.

Wilner: Well, it's a good question. I didn't find—and it comes into my greatest disappointment about Guantánamo—that the Kuwaitis came from a tradition. They understood what lawyers were and they seemed to understand that lawyers were something they should have. I think seven or eight or so of them signed up immediately. The others were more concerned. One or two of them didn't ever know what to do, and they always looked to others. The two were unsure how it would affect their ability to get out. One of them, after the first two trips, rejected seeing us. He just did not want anything to do with any American. He thought we were all bastards now. That's what he said.

I was down there twelve times. I can't tell all the things, so I'm giving overall impressions. We did learn, later, that the interrogators really tried to make the detainees distrust us. Two of them asked, "Tom, do you mind me asking what religion you are?" I told them I was Jewish. He said, "Well, you know, the interrogators told me that my lawyers are Jews. Don't trust Jews." Another guy, independently—because the detainees couldn't talk to each other—told me very much the same story. He was given a long story about how Shearman & Sterling was a Jewish firm that represented the State of Israel, and when had Jews ever helped Arabs? "Beware of these guys." Amazing things—minor in comparison to all the things that happened at Guantánamo, but nevertheless just despicable.

So their distrust of lawyers was rife. Some of the detainees did not mind that at all. I can talk about

each of them, but one whom I became particularly fond of was Fayeze Al-Kandari.

[INTERRUPTION]

Wilner: —so feisty, in a way, but controlled. Some people say he may be the most dangerous guy there, but I really respected him. I'll never forget him telling me—well, let me tell you.

In the first trips we interviewed them extensively about what had happened to them—how they were captured, what happened, the experience they had gone through after they were captured. The only guy who said he had been carrying a gun was a guy named Nasser Al-Mutairi. Nasser had been injured when he was captured. Nasser said that he had been standing on the defensive line of the Taliban, but never intended to fight Americans. He was just helping the Taliban defend against the Northern Alliance. He was captured with a gun. Interestingly, we had learned just before our first trip down there that they might release Nasser Al-Mutairi. We could not tell him because we weren't sure. We were told by the Kuwaitis, "Don't tell him, and don't tell anyone." And we weren't sure, but that hint was there.

So the one guy who admitted to have been carrying a gun was the first guy they released. We never knew why they released somebody. Most of the other guys had been down there, they said—and, frankly, I believe it for most of them—that some of them never got to Afghanistan. They were in Pakistan, helping people. Some of them said Afghanistan was just a mess and they had an obligation, as rich Kuwaitis, to go down there and help. One guy said to me, "Fayeze Al-Kandari went to Bosnia! So it shows they go to terrorist spots." And Fayeze said to me, "Of course I went to

Bosnia. The people in Bosnia were suffering. I go where people are suffering, and I can do something. I don't go to make them suffer.”

When we first went down there we were extremely hopeful. We had won the *Rasul* case the end of June. We thought these people would be entitled to hearings. We went down there trying to get the evidence from them for hearings to dispute the reasons for their capture. But over time, my greatest disappointment was that these people came to lose faith in the American justice system, as did I. It was nothing but a joke. At the end, when the Kuwaitis decided to shift counsel and we stopped representing them, these guys were appalled by it. We had to convince them to do it, for their sake. I don't know whether we should have, in retrospect. But anyway, Fayeze said, "Well, Tom, honestly, I love you. You are a great guy, but the whole legal process is a sham so it doesn't matter. If it pleases my parents, I will do it. But that is not why we're ever going to get out. It is going to be totally political." And we finally won, but it was a shaming experience. It made me so disappointed that our legal system had not worked to get them released.

And the focus of our trips changed very much. The first two visits we were concentrating on getting them to sign the form consenting to our representing them so we could continue to visit them. We either got all of them to sign, or got it well enough so that the Department of Justice didn't challenge us, but we were really afraid that these people would be left totally isolated without anybody to talk to. I'll tell you a story that was mis-told to other detainees and turned at least one of them against me. Khalid Al-Mutairi would not sign the form, and his parents instructed me, "Go in and tell him he had better sign the form. Yell at him and tell him he's got to do it." I didn't yell at him. I said, "This is for your parents. If you don't sign, we may not be able to visit you

again." And he yelled at me, cursed at me, called me all sorts of names, and said, "Tell my parents to go to hell! I don't want it. Get out of here, and don't ever come again." He then relayed to another guy, Abdullah Al-Ajmi—the guy who was released and a year and a half after that blew himself up in Iraq. He apparently told Al-Ajmi that I had threatened that he would not be represented unless he signed the form. He turned them against me.

But those sorts of things were tough. Even with Al-Mutairi, the government didn't challenge our representation of him. We were very worried about that, then we were very worried about getting evidence we needed to rebut the government's allegations. In court, the government was moving to dismiss. Then the case was stayed. Our visits became different. They became more of showing these people that they had somebody who was looking out for them; not building a legal case so much, but looking out for how they were being treated. They were not being treated well. We could be there to improve their conditions and give them hand-holding.

By the second or third visit, that was what we were doing. We would go down to talk with them to try to find out what was happening to them. Then we would try to complain to the government to try to improve their conditions. For example, these guys were stuck in solitary confinement and had no reading material—no reading material! They were not allowed to read newspapers or anything current because, apparently, the view was that you should isolate them so they will be totally disoriented. Most of these people, after three and a half years, weren't even thought to have any actionable intelligence information. The bullshit that the government was saying—"They have intelligence"—was absolute bullshit. Peter Jennings, in his show that came out in June 2004, talked to this guy who was head of intelligence at Guantánamo [Esteban Rodriguez]. The guy I had

put up there, Tony Cristino, had said, "There are very few people with any intelligence." Cristino said maybe a dozen, and Rodriguez said, "No, many more. Many more." Like how many? "Three times that many." And Jennings said, "You mean thirty, forty, fifty people have intelligence, and you've got five hundred people down there?" It just never made any sense.

But these guys had no books, nothing to read. They were caught in their cells alone for years. Can you imagine that? So we tried to get books. There was a great story. None of these guys had books. I came out, and I complained to the military guy who was sort of the legal officer. I said, "These guys don't have books." He said, "Yes, they have books. We have a library here for them." But they didn't have books. He didn't know. All my fellows, in these initial interviews, indicated that they had been—you could only describe it as tortured. Most of it had occurred in the time after capture. They'd been taken to Bagram or Kandahar, held there in miserable conditions, and had the living crap beat out of them. All of them. They were turned over—you could see what happened. It's so understandable.

They were turned over to U.S. authorities as terrorists. Somebody had sold them. Almost all of them were sold into captivity. All that I know of, I should say, were sold into captivity. They were turned over to U.S. military guys who just beat the shit out of them because they thought they were bad guys. Al-Ajmi was just a schlunky kid. He told me this story where he was hung up by his wrists and they were hitting and hitting him, saying, "Are you Al-Qaeda or Taliban? Are you Al-Qaeda or Taliban?" He said, "I'm neither, I'm neither," and they kept hitting him. He said, "Okay, I'm Taliban," and they stopped. I'll never forget it. He looked at me and he said, "That was better than saying 'Al-Qaeda,' wasn't it?" But that was what happened.

Fayez Al-Kandari, again, gave the best explanation. I was going through it—I wanted to go back to the torture stuff. I think it was the second or third time I was there, and he said, "Tom, you know, I don't want to talk about that stuff anymore." I'll never forget him saying to me. This was four years ago, over four years ago. It was just unbelievable to me. He said, "This is the worst experience I have ever undergone. You cannot imagine anything worse than this, the way we were treated, what was going on." He looked at me and said, "But you know, it has made me so much stronger. When I came in here I was so angry. Steam was coming out of my head at the injustice. I have finally realized that that's how they control you. I have learned to control myself. If I ever get out of here, I am going to be so much a better person, so much more in perspective. I'll appreciate so much." That was four years ago, and I haven't seen him in many years. But that was extraordinarily mature, it seemed to me, much better than I would have been. He's also the one who said, at the end, "Look, I will miss you, but the law stuff is a joke."

He was also the first one who said they told him that his lawyers were Jews. I said to him, "Fayez, how did you answer?" Fayez was a classic case. He said, "I smiled at them and said, 'There are good people and bad people in every religion.'" [Laughter] I would have philosophical discussions with a number of these people. For instance, Fayez—I need to tell a lot of Fayez stories because it was so interesting. Fayez spoke a little English, but most of it was through a translator, and I swear, he was almost poetic in the way he would go. He could talk for a length about things. I said, "What did the interrogators ask you?"—and this is typical of Fayez. He said, "They asked me, 'Do you hate Osama bin Laden?'"

A lot of these guys were in Pakistan or Afghanistan during September 11. They didn't really know about it, and much of what they knew about Osama bin Laden was really pre-9/11—a lot having to do with fighting the Russians in Afghanistan. I remember Fouad Al-Rabiah, who was supposed to have met Osama bin Laden. I asked, "What did you think of him?" He said, "Well, you know, I didn't know much about him." He went to visit a village in Afghanistan where he wanted to set up a Kuwaiti relief agency, as he had done somewhere else. He said that he and the guy he was with ran into this guy, Osama bin Laden. I said, "What did you think of him?" and he said, "Well, I didn't know anything about him. He was a rich Saudi who had fought against the Russians. I sat there in the room listening to him." Over the course of the weekend while he was there, he saw him several times. He was a big-shot in this little town. But he said he thought bin Laden was scary. He [Osama bin Laden] said that the invasion of Kuwait, although brutal, had been necessary to throw out the Westerners. He said, "To me, if Saddam Hussein had come in and wrecked our country and everything—what does he mean, 'It was necessary?' He would go off on these tangents. I thought he was sort of crazy." But he said this other guy he had been with had heard of him as maybe a great prophet. He decided he wasn't a great prophet, either.

They had asked Fayeze, "Do you hate Osama bin Laden?" and he would say things that were so bad for him. He said, "No. I disagree with Osama bin Laden. I disagree with him because I do not believe killing innocent people is ever justified. I believe Osama bin Laden has perverted Islam, so I disagree with him. But do I hate him? He has never done anything to me." And then he looked at them and said, "George Bush I hate." [Laughter] Can you imagine this guy saying that? And in his file, it says, "Expressed dislike for George Bush." Can you imagine that? I thought, "My god, I'd be in prison." I did advise him, I said, "Fayeze, for my sake, if not your own, don't use words like hate,

and don't say you hate George Bush. Say you disagree with him too."

Ten days after we won the *Rasul* case, the government instituted this Combatant Status Review Tribunal procedure down at Guantánamo. The people were put before a hearing of military officers and most often not allowed to see the accusations against them. If you read the transcripts of these hearings, they are absolutely absurd. One of these guys, the volleyball player, Abdullah Al-Kandari, had said, "What is this? How can I rebut secret allegations? I've never done anything." Those kind of absurd, Kafka-esque things. But all of them went to these hearings, and they were excited to have the hearings. You can imagine. For three, three and a half years, they had been down there and not been able to have a hearing. So they got before the hearing, and the hearing had a devastatingly depressing effect on most of them. They just considered it an absolute joke. Fayeze Al-Kandari, Abdullah Al-Kandari and Fawzi Al-Odah were just depressed by it.

Following that, the government went through a series of what they called Administrative Review Board, or ARB procedures, which were supposed to be like parole hearings. We went down there. We put together all these submissions on behalf of their families—how they were good people and how they would be watched at home if they were released. We tried to convince them, the detainees, to go to these ARB hearings and, unanimously, they said, "These things are bullshit. We don't want to go. We don't want to do it." We convinced most of them, which probably hurt our credibility with them because they were a sham, an absolute sham, as everything done down there was a sham. We did not want them to not be released because they wouldn't even go to the hearing.

But I'll never forget—Fayeze told me this story. He's a very smart little guy, compact and muscular,

probably now thirty-something. He was probably captured at twenty-five or twenty-six years old. He said he went into the Administrative Review Board and suddenly, unlike his Combatant Status Review Tribunal, the charges against him had grown from five to twenty-five. He said he was given this thing to look at. ARB was not even supposed to be about whether you are a bad guy, but whether you were dangerous in the future. Nevertheless, they had this as an indication of dangerousness. He said, "There were allegations that on the same day I was seen in the presence of different Al-Qaeda operatives"—of course they never tell you their names—"thousands of miles apart." He looked at them and said, "What am I, Superman? I fly? Can't you see that this stuff is contradictory?" He looked at it and he said, "Rather than say anything nice, they said, 'What do you have to say for yourself?'"

He did something that I understand Arabs do, engaging in extreme sarcasm. He looked at them and he said, "Let me tell you a story that is going around Guantánamo. There are dangerous panthers in the village, and they bring in an American, a Frenchman and a Russian to find the panthers. They send them out, and the Frenchman comes in with a dead panther and the Russian comes in with a dead panther. They cannot find the American. They look around for him, they look around for him, and then they see him sitting behind a tree holding a little pussycat, beating him up, and saying, 'Admit you're a panther! Admit you're a panther! And that is Guantánamo.'" I said, "Fayez, what did they do?" He said, "They all laughed."

But he remains there. He is still there today. He said, "That's Guantánamo." That is Guantánamo. It's just absurd.

Shall I tell you a little about the hunger strike?

Q: Please.

Wilner: I'm going to get the dates confused. The Kuwaitis, my clients, were at the center of it. It's amazing to see how times have changed. Abdul Aziz Al-Shammeri was rebellious, rebellious only in the way—I used to say that my guys fell into three categories. There were some who were so angry—Khalid Al-Mutairi—that they couldn't even talk to you. Al-Ajmi turned from a sweet, young kid into this angry, crazy guy. There were some who were terribly depressed, in deep depression, who just sat there. They were clearly innocent, innocent people with no hope, no avenue to get out. A few of them were that way, some very bright guys. Omar Amin and Mohammed Al-Daihani were very bright guys, very depressed. Then there were these guys who were extraordinarily strong individuals. This had made them, in a quiet way, very strong. They would not give in to the interrogators in any way and basically said, "Fuck off. You want something? I'm not going to do it." But they had maintained their sense of identity and pride, and in a way, like Fayezi Al-Kandari, maybe even become stronger. Fawzi Al-Odah was that way. I think he changed a bit. I feel sick—I have not seen these guys in a few years. I feel sick about it.

But I guess there were others who were trying to do things to get out, to be good and all that.

Al-Shammeri was in between. He was a guy who would get enraged. He would tell the interrogators to fuck off, tell everyone to fuck off. A few times he refused to see us. "Nothing is happening." We needed to talk to him. He was also a guy, unfortunately, who would be angry at us because we wouldn't break the rules. We wouldn't sneak in newspapers. Some other lawyers did,

and in his view we were worse lawyers because we wouldn't do it. We couldn't take the risk. We were the lead lawyers.

But Al-Shammeri went on the hunger strike before anyone else. He just refused to eat. Then Fawzi Al-Odah went on the hunger strike. Fayezi Al-Kandari went on it for a little while, and he said, "What is the point? I'm not going to do it," so he began eating. Abdullah Al-Kandari, the volleyball player, went on it, too. We heard about the hunger strike in between one of our trips, and were worried about it. We wanted to go down and visit. Particularly as more lawyers were coming in, you needed to wait in line, and the line got longer. We were trying to go at least once a month. The government at first denied that there was a hunger strike. They denied it. They denied it to us, and we found out. We tried to get these guys' hospital records. Even—excuse me—the fucking court, sitting back here and biding by the government's representations, would not let us have the hospital records. One did; not our judge, another judge did—Judge [Gladys] Kessler. We wanted doctors brought in. The reason for this was that as time was going on, we saw them. Neil, Kristine, and I went down and Fawzi Al-Odah and Abdul Aziz Al-Shammeri had become skeletons, skeletons. Then the government forcibly fed them—

You've got to remember, all these guys were asking for was a hearing. That's all they were asking for, a fair hearing. They were accused, then, of engaging in warfare against the United States by being on hunger strikes. [Sigh] And we tried to get hearings before the court for them. We would get hearings, and the government would make all these representations which were often untrue! We tried to get doctors for them, and we weren't allowed to. Fawzi Al-Odah, who started out at about 148 or 150 pounds, went down to 92 pounds. He stole some of his hospital records, which

we took out and took to doctors up here. We said, "Look, this is very dangerous." We were put in a difficult position because Fawzi wanted to die. He said, "I really don't want to die, but if it will help other people, I want to die. All I want is a hearing." Al-Shammeri was very much the same way. He was just through with it. He said, "Why put up with this anymore? Life isn't worth living. This was it."

Their parents, of course, didn't want them to die. We represented the parents and we represented them. So we were in a difficult position. I have a number of affidavits that documented the way we observed people, and what we saw. They, the government, told us people weren't on a hunger strike. We went in and the guy was on a hunger strike. When we met with Fawzi and Al-Shammeri, they had had feeding tubes pushed up their nose. It was actually better leaving them there permanently than doing it each time they force-fed them. The first time, with Fawzi, blood was dripping from it. It was very, very tough, and there was nothing we could do. I remember a meeting with Fawzi where he said, "I want to die, this is it." I started to cry, it was just so emotional, with the little we could do to help them. He is an innocent kid and the court system had done nothing, and the bastard judges up here, everybody having their cocktails in Washington, talking about what they needed to do today—

Wilner: —and ignoring this. It was just disgusting. At the end we went through all sorts of emergency motions, and going down there to visit them and holding their hands, trying to get them to eat and they would not eat. We were allowed to go to the Subway and the Pizza Hut and bring pizzas and things into them. Of course, these guys wouldn't eat. Then there was one, Abdullah Al-Kandari, the volleyball player, who had always been up. He had always had good humor. He

wanted to get out; he wanted to see his family. But he had a positive spirit. They told us he was not on a hunger strike. I went in to see him, and I was aghast. He was on hunger strike and was just emaciated, gaunt-eyed, and in utter depression. I'll tell you a story about that. He had formed a close bond with Kristine, who is a gorgeous woman, and he clearly had an eye for the women. He was just so depressed. He asked to just hold Kristine's hand for a while—just sit there and hold her hand. He dictated his will to us. He wanted it to go back to his children. Under the government's rule, as I said, anything we took from the detainees had to first go through a security team to see if it was classified information. You know what the bastards did on that? They wouldn't allow us to send his will on. They never said it was classified or a security risk. They just said it was "inappropriate material." We tried to go back to court to say that is an improper classification. There is no such classification! But the court didn't do anything.

Q: When you say you went back to the court, that's in the District of Columbia?

Wilner: The District Court for the District of Columbia. All the cases were stayed, pending the appeal on the government's motion to dismiss. Our judge, Judge Colleen Kollar-Kotelly, still had jurisdiction over our cases. We filed a number of motions during this time—a motion that they should have reading material, which was characterized by Senator Graham before the Senate as “they wanted us to bring them comic books and things”; a motion that they should respect the religion of the Koran; a motion that they should be able to have halal food on Ramadan; a motion that they should not be abused.

A ruling on nothing. Nothing we did had any effect before the court. If they ever read this

transcript and sit there saying, "We were doing our job. We were deferring the judgment." The courts, and our judge—*now* she is doing a good job looking at these things, seven years afterward! They would not intrude. They would not act like judges. They were afraid. They were afraid to buck the government. They didn't act like judges. They should be ashamed.

But that had a tremendous impact on the detainees. We could deliver nothing to them. We tried. In the hunger strike, as I said, we tried to get doctors for them. She wouldn't even allow us to get their medical records. Disgraceful stuff.

I can't remember when it happened, but the government broke the hunger strike. They did it on purpose. They brought in these chairs. They had been, in a sense, "humanely" force-feeding people. As Fawzi said, "I am not going to eat. I'm not going to eat. But if they're going to do this, I am not going to reject this food. I am not going to have you sue to cut it off." As he told the story, both he and Shammeri—they brought in these chairs, put people in them, and shoved the tubes in and out in a very painful way. They said, "If you're going to continue the strike, we are going to make you suffer. We're going to make you suffer." Fawzi said they did it to a guy in the next room to him, who was screaming, and he said, "Fawzi, don't do it, unless you want to—." The guy next to him was one of the guys who committed suicide at Guantánamo.

But Fawzi said, "I didn't do this to be tortured." So he broke his hunger strike. When I saw him the next time, it had changed him. When he was on the hunger strike, he had control. He had exerted some element of control in this place where everything was hopeless. He could say that he would not eat this and they took it away from him. It really broke him. It was a very sad time. That's also

the time that I interviewed him and sent back his answers along with the questions I had asked. The BBC played it on a radio program, which is what got me fired by the Kuwaitis.

But it was terribly, terribly sad. That was basically the hunger strike.

There was another hunger strike. It went up to about eighty or ninety people on it before it was broken. We put out information on how it was broken brutally in the *New York Times* and everything, and nobody really cared.

Q: How many of the Kuwaitis are still there?

Wilner: There are four Kuwaitis still there. None have been released since we left the case. I think there were two who were going to be released about a year and a half ago, when Al-Ajmi blew himself up. They probably have not released them because of that. One of them is Fouad Al-Rabiah, who had run into Osama bin Laden on a trip to Afghanistan and, I think, has not been released on that basis. He has now been charged with a war crime. It's absurd.

In Jane Mayer's book she points out that in the summer of 2002 the CIA, since it wasn't getting any good intelligence information from the people at Guantánamo, sent down its top Arabist specialist. He interviewed a number of people down there, looked through their files, and wrote a report that went to the White House basically saying, "You've got the wrong guys here," and Addington and Gonzalez buried the report. I had actually given Jane Mayer this information. One of those guys is still there, Fouad Al-Rabiah, whom this guy interviewed six years ago and said, "This is an

innocent man." This is the top Arabist specialist. It's disgusting. Disgusting. That report is still not public, or even turned over to the courts.

Q: All along the line, they were purposely making it more and more difficult for you to do your job as a lawyer.

Wilner: Yes. There were extraordinarily difficult things. I said I was going to mention the library—it was indicative to me.

When we first went down there, we would interview the detainees from 9:00 AM to 12:00 PM and 1:00 PM to 5:00 PM. That was when the camp was opened and closed. Very little flexibility. Sometimes they let us stay a little longer, but usually they wouldn't. Often there was time wasted because they couldn't find the detainees. We didn't have the numbers, and they didn't do things to help.

[INTERRUPTION]

Wilner: Okay. Let's go. Where were we?

Q: We were just beginning to talk about the kinds of restrictions that they placed upon you, as a lawyer, and some of your thoughts on the ramifications of that. We talked about some of them.

Wilner: First of all, the protective order we negotiated allows for phone calls with the clients, at

least in emergency situations, but they were never allowed. And when we asked for phone calls, particularly in the hunger strike situation when we were concerned about their health and well-being and whether these people would live, the court did not allow it. We asked for, in those times, phone calls with the family members so that the father and mother could say to a guy, "Don't kill yourself." The court didn't allow it. So in order to have any communication with the client, you had to fly to Guantánamo. The number of times you could communicate with the client was limited.

Q: Well, the way you're talking, I really sense that you're much more upset with the court than the administration at Guantánamo.

Wilner: No. I'm upset with the court because the court put up with it. The court did not step in to make anything better. The court deferred to the government on everything even when the government, time and again, was proven to either be lying or at least not know what was happening. The court put up with it. So we were fighting the government, but the court put up with it at every stage. So I am terribly upset with the court. I think those judges should hang their heads in shame when they walk around today. Even Kollar-Kotelly, who is now doing good things and being tough on the government, after seven years when she deferred to the government as people were suffering in Guantánamo with no recourse whatsoever. Those people lost any faith in the American judicial system and, frankly, so did I. The courts were useless.

Q: I read something where you called it a "law-free zone."

Wilner: Well, that is a larger issue. The whole purpose of Guantánamo, in the administration's mind, was to create a law-free zone. The Bush administration proceeded from the premise that the laws were an impediment to fighting the war on terrorism. It's one of the reasons why what Obama said has been so right. They felt they had to avoid the law—and lawyers—in order to fight the war on terrorism. What they never got was that the laws are compatible with our security and that being a nation of laws and following the laws makes us stronger in fighting terrorism. Guantánamo is a symbol, a place where you can avoid the law. But that has stained our reputation and hurt us around the world. Embracing the laws allows you to do everything, if you just follow them.

If you want to hold people who are involved in terrorism, there are ways to do it when people fight against you. The law does require that if there is any doubt, you give them a hearing. Big deal. There's no problem holding Khalid Sheikh Mohammed. He has admitted everything. The only reason you don't have a hearing is because you're afraid the people are innocent. These laws protect the innocent.

But more than that, I was fundamentally upset that the courts tolerated law-free zones.

When we first brought the case, Judge Kollar-Kotelly was the first judge we went before. I think we beat the hell out of the government in oral argument, but she, nevertheless, held for the government. It was a time of extreme fear. It was hard to stand up to the Bush administration. But after we won the *Rasul* case, Kollar-Kotelly seemed to be moving to give us access to Guantánamo. She did move and reject the government's argument that the detainees were not entitled to lawyers. But on everything else we did—the right to have quicker access to them, to have phone access to

them, to have their medical records, to get them reading material—she deferred to the government. The judges did not want to interfere with the government, and I think that was a shame. From the time we won *Rasul*, for four years, those people sat down there in what was essentially a black hole, a law-free zone, and the courts allowed that. The government pushed on these things, and the Justice Department was very tough.

As I said, the rules themselves did not allow us—the only way you could talk to the clients was by visiting them. In order to get visiting rights, you needed to stay in line. You couldn't get down there more than once a month because there were all sorts of lawyers going down there. We asked the courts to make more space available where we could meet with the people, so we weren't confined to a few cells. The courts wouldn't do it. They didn't really push on that.

So that was extraordinarily difficult. Once we would get down there, we would take notes because all lawyers would take notes. We would then hand our notes over to the escorts from Guantánamo at the end of the trip. The escorts would then seal the notes and send them to a secure facility in Arlington, which holds the classified material. We could then go to the secure facility to see the notes. It would take two weeks for the notes to get from Guantánamo to the secure facility. We would go over there. If we wanted to speak to the families about what the detainees had said, we had to first clear the notes with the security team. That would take another two weeks. So the inability to have instant communication, to say to a father that his son is missing his eyeglasses—it's part of the lawyer's job to communicate back and forth. We couldn't do that, and those rules were accepted.

I think that the government did abuse the rules. They would not allow us to send out Abdullah Al-Kandari's will because, even though it was not classified, they didn't like it. When this thing happened with the BBC, I asked Fawzi Al-Odah questions. The notes were sent back, I then had them cleared, so after a month I sent them to the BBC. But they were all cleared. There was nothing secure in the notes. When the BBC came out with this, the government got furious because it embarrassed them, not because there was the release of any secure information. They said they would not let me go to Guantánamo again. An absolute violation of the rules—nothing to do but to intimidate us. Well, that probably broke my client, who said, "We need another lawyer." Even though, of course, their people had approved it.

The government's intimidation, in violation of their own rules, was unreasonable. They operated in pretty much a law-free zone and the press, by and large—the press was extraordinary. We would come out and tell them stories about what the detainees said, that they had been abused, that they didn't have reading material. The government would simply deny it. The press was left in a situation where they often did not know, so it was hard to get scrutiny on it. And who were we? We were just advocates for "terrorists."

I don't know whether I told you this. One of the things that Fawzi said to me at the time my notes were broadcast by the BBC—I said, "Fawzi, are things getting better?" This was after the hunger strike. And he said, "No. You know, they never really get better because these guards out here are just kids. They think we are terrorists. We're not terrorists. We have no way to prove it, but if you thought you were holding a terrorist, how would you treat them? They treat us like shit. They treat us like shit. They think we're terrorists. It's horrible." Nothing you could do.

So it was that sort of "nobody really knows what's happening" that was terrible. It was very hard. I'm getting angry when I think about it, but you go to Guantánamo and see press people or Congress people go. They never even talked to the detainees, so they never saw the people who were actually suffering the consequences of absolute injustice. I was surprised, when we were writing the brief for the Supreme Court, that some people told us that maybe their clients had done some things, even minor things. On all my Kuwaitis, I could find nothing that they had done. I have no doubt there are some people down at Guantánamo who did bad things—although I think, until they transferred these really bad guys down there, the people there were the lowest of lowly people. Most of them, I am convinced, were absolutely innocent.

But people who would go down there would not see these detainees. Maybe I've said it before, but it would strike me as I'd come back here and we would fight. We'd write the brief for the Supreme Court. We'd talk about other things, and life went on here in the United States. We were having enormous economic success. People were rich and they would go to all the restaurants, and we had people at Guantánamo who were absolutely innocent, who were being held in a hell hole and treated like shit, as bad as people in concentration camps. It would just infuriate me. Infuriate me. And I was infuriated that I could go to courts and they seemed not to give a damn.

Q: Just on a personal level, did the whole experience take you out of yourself? Out of what you would ordinarily be doing in terms of the law?

Wilner: Oh, I think that's right.

Q: As I listened to you on the phone, what you normally do has nothing to do with Guantánamo. This was exceptional for you.

Wilner: Well, yes. Clearly, you are right. Guantánamo is exceptional for any of us, and what we expect our world to be—a fair and just world running according to law. I think I was, and still am, most disturbed that in a country where people espouse fairness, which much of our life is really based on, how easily people turned away from it. It still amazes me.

Q: But the people at the Center, that is what they do. This is a variation on the typical work they do as lawyers. They are constantly defending people who are up against the government.

Wilner: That's right.

Q: You are an international lawyer.

Wilner: I see a lot of the people who do that day in and day out—they face injustice, but it is a justice where people were tried and may be innocent. They face a trial.

I'll never forget—Dick Durbin went down, and we tried to prep him. He said, "The population really isn't different from any prison population. There are people depressed in many prisons." The difference is that in other prisons, people have been convicted after a trial. These are people who are held in isolation without the hope of getting a fair chance to present their case. To me, the

outrage came from the way people normalized it, and the courts would not do it. I'm glad there are some judges now, like Judge Leon Sullivan and Judge [John D.] Bates, who are screaming. They are screaming, "Enough is enough." Kollar-Kotelly is now, a little bit. I was just frustrated.

Q: Do you now have any contact with any of your clients since that time?

Wilner: No, I have not, and it's a shame. I feel badly about that.

Q: Would you like to have some?

Wilner: Oh, yes. I was thinking about it the other day. Not just for me because I go on and I do all these other things. It's funny to me now. People recognize us and me for doing the Guantánamo cases and now it has become a chic thing to do, in certain parts of the society. But for a guy like Neil Koslowe, who worked with me from the beginning on it—Neil put his heart and soul into the work. He was most instrumental in the visits to Guantánamo. He established a bond with Fawzi Al-Odah. He took care of him like a father when Fawzi was on hunger strike. When the Kuwaitis fired us because this guy in Abu Dhabi advising them was jealous and wanted to do things, it really broke our hearts. It broke Neil's heart, and it was just a shame. Because we had established that bond with those people, and to see them now at times when we don't think they were being represented well is very, very tough. We continued on—we were still lead counsel for everyone—but that was very tough.

I always wonder—now I'm philosophizing—what do we learn from this? I do think that the chord

Obama has struck when he talks about it is always the right one. Our principles, the rule of law and justice, are not incompatible with protecting our security. They make us stronger in these things. That is the right chord. How we lost our way and how people do not care is amazing to me. I can understand the soldier in the field when a terrorist gets thrown into him—I can imagine him losing control. That is just why you should have control over situations like that. What frustrated me was the courts and the press not understanding this, and the law schools not standing up to it.

Q: After Obama's election, you were involved in trying to put pressure on and bring the issue before the president?

Wilner: I was and I am. Even now. Even as we speak. Yes.

Q: What parts of that can you talk about?

Wilner: I can't talk in specifics. I, along with some other lawyers from the habeas group and through some connections we have with people who are influential in the administration, gave our recommendations of what should happen. I think that, by and large, the Executive Orders of the first two days—abolishing Guantánamo and abolishing secret prisons—made it clear that we would not torture. The other one, most importantly, was wiping out the legal memoranda read in by the Office of Legal Counsel that justified the avoidance of the law.

Shakespeare, I think in *Henry VI*, said, "Kill all the lawyers." The lawyers were the root cause of this. My bet is that it wasn't so much Rumsfeld or people like that, it was more lawyers trying to

justify a view of absolute, unfettered executive power that authorized this mess and gave the justification. I think a lot of people, like Bush and Rumsfeld, were looking for how far they could go. Bush is a nothing. He just acted like a tough guy. I think he was very susceptible, that made him look like John Wayne. But other people, I think, were looking to see how far they could go, legally, and when the lawyers gave them the green light and encouragement, I think that set loose the dogs. So, wiping out those memoranda was a key issue.

I think the problem the administration faces is, no matter how well motivated you are to get things done at the top, you then need to get it done through the bureaucracy. I have not been as happy, frankly, about the Justice Department implementing those orders. It's taking longer than it should, and I am not sure they are doing it as effectively as they could.

Q: There are a series of court cases that pretty much stuck to the Bush line on a lot of issues.

Wilner: I see a subtle difference on it. The first one was the Binyam Mohamed case, where they stuck to the issue of state secrets. They refused to give over the information that Bush had claimed state secrets for, and yet they then released Binyam Mohamed. What the Obama administration wants to do is clean up this mess but preserve the discretion to do things. There is no doubt that there are such things as state secrets, which are terribly dangerous because you do not want them to be used improperly to cover wrongful actions. But there is no doubt that certain countries who do not want that information out may have helped you do something. It could jeopardize the bilateral relationship. I think they didn't want to disclose that information, and they released the guy.

There are other issues that are troubling coming up, an issue like Bagram. Guantánamo is so troubling. There is no doubt that the administration has to do a review of the people there, to see who it can easily release. That review should not just be a legal review—who might technically qualify as a “combatant.” There might be people who technically qualify as a combatant, such as a cook for the Taliban. Judge Leon just said somebody can still be held—he was, after all, a cook for the Taliban. But after seven years, there is no reason to hold them. The review should cover that. The problem is that these files, after seven years, are a mass of scattered raw intelligence data—accusations back and forth. You need to get people who know how to review those files to sift out all the crap. I’m not sure they are being very effective at doing that, and it’s driving us crazy.

So that's the problem they're facing there. We'll see how it shakes out, but we are getting anxious and angry about that, and other issues like Bagram. One of the problems here is that cases are going on, and sometimes, to be honest with you, the lawyers bringing some of these cases can be zealots or ideologues. You need to have practical solutions to these problems that preserve the rule of law, give people justice, and don't prevent the government from doing what it needs to be able to do, fairly, to protect the security of the nation. Those are hard balances. With the Bush administration you had ideologues who did not care about that balance. They wanted to do anything to establish unfettered executive power. Ideologues. We've got to work those issues through. This administration is facing—I'm not an apologist for it, but boy, the issues they are facing every day like the economy and everything—may cloud these other issues and take the attention of the president away. I am told at the top levels of the White House, that the president asks every day, "What is happening about Guantánamo?"

But you need to count on other people to carry through. And the administration is interesting, too, because they've got good motivation at the top but a lot of the people they are picking—they picked in Justice no one who was involved with Guantánamo, but a lot of professors and other people. In part they did that because they wanted to seem objective. But, as a consequence, they do not understand it as deeply, as intimately and in detail as some other people did. There are particular things going on that I can't tell you.

Q: I think that's the end.

Wilner: I think we've basically done it. Is there anything else, going back, that we missed?

Q: You'll get a transcript, and if there is—if it's substantial enough—I can come back down. If it's just minor, you can write it in or add to it.

Wilner: Okay.

Q: Do any kind of editing you want.

Wilner: Well, Ron, I hope it was helpful. As I say, it is history.

Q: I think it was terrific. Thank you very much.

[END OF INTERVIEW]

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