THE RULE OF LAW ORAL HISTORY PROJECT

The Reminiscences of

Stephen H. Oleskey

Columbia Center for Oral History

Columbia University

2012

PREFACE

The following oral history is the result of a recorded interview with Stephen H. Oleskey conducted by Ronald J. Grele on January 24 and February 5, 2012. 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: Stephen H. Oleskey | Location: Boston, MA

Interviewer: Ronald J. Grele | Date: January 24, 2012

Q: This is an interview for the Columbia University Oral History Research Office with Stephen Oleskey. The interview is being conducted in Boston, Massachusetts. The date is January 24, 2012. The interviewer is Ronald J. Grele.

The first question I want to start with is something about your biography. I read in an interview that you gave for the NYU [New York University] Law School Alumni that you came from a middle-class household.

Oleskey: Yes.

Q: Where?

Oleskey: Concord, New Hampshire.

Q: In Concord, New Hampshire. And your family did what? What made you middle class?

Oleskey: My father was a salesman who wanted to go to law school and couldn't, because it was the Depression. My mother was a teacher and, most pertinently, worked as a clerk in the county court clerk's office in Concord.

Q: In that interview you say that in your teenage years you were impressed with activism.

Oleskey: I was. New Hampshire was a very conservative place then, and I was raised in a household that was progressive. New Hampshire was a place that was very prone to the excesses of McCarthyism in the 1950s, so various former political figures or activists were being prosecuted for failing to testify about their previous political activities—usually of many years before—in front of grand juries. Lawyers were the only people who were, seemingly, doing much to stand up for them when they were prosecuted for perjury, contempt, or for failing to cooperate. I thought that was a pretty important thing to do, and that would be a good way to spend your life.

Q: This was when you were in high school?

Oleskey: This was when I was in junior high.

Q: In junior high. Did your family have a history of activism?

Oleskey: My parents had grown up during the Depression. They'd gone to school in Boston. They were both progressive people, they were interested in these public issues, and they interested me in them.

Q: Were they involved in any movements like the peace movement or civil rights? Things like that?

Oleskey: I can't recall that they had time to do that very much, but they were committed to those causes in general, and, as a result, I became committed. I recall in a straw poll in my sixth-grade class everybody wanted Robert [A.] Taft, the conservative senator from Ohio, to be the nominee for president. Nobody wanted [Dwight D.] Eisenhower, and I wanted [Adlai E.] Stevenson [II] .

Q: Was your family particularly religious?

Oleskey: No, they were Congregationalists, and later, Unitarians.

Q: So this activism didn't come of a religious tradition.

Oleskey: Yes, the Congregationalists and Unitarians have a long history of social activists. I think my activism came out of a long-standing New England commitment to causes. My mother is from an old Yankee family. My father was an immigrant. From their several perspectives, they were very interested in improving society.

Q: When you were in high school, what were you reading that informed that activism?

Oleskey: I read, widely, novels and historical books. I principally read American writers. On the fiction side I remember a lot of [Charles] Dickens. We had the *New York Herald Tribune* on

Sundays, which was somewhat unusual in New Hampshire. I don't think you could get *The* [*New York*] *Times* there at that point. I read *The Atlantic, The New Republic*, a magazine called *The Reporter*—that was edited by a fellow named Max Ascoli, who later became quite conservative and supported the Vietnam War. At some point I began to read *I.F. Stone's Weekly*.

Q: You went to Wesleyan?

Oleskey: I went to Wesleyan.

Q: Why Wesleyan?

Oleskey: There was a lawyer in New Hampshire who had gone to Wesleyan and to New York University Law School. He came to Concord High [School] and spoke, and essentially said, "I did well going to Wesleyan. I think you'd like it a lot."

Q: Who was that?

Oleskey: His name was Kimon Zachos, and he was by then practicing law in New Hampshire. He'd been a White House Fellow before that. He encouraged me to apply to Wesleyan and later NYU [New York University School of] Law, and essentially led me to believe I could get a scholarship to Wesleyan. I certainly wanted to leave New Hampshire. It was cold, it was very conservative, and it was time for me to get a change by moving to a larger world, even if the larger world was a school of one thousand students in the middle of Connecticut.

Q: The widest main street in New England.

Oleskey: Next to Keene, New Hampshire.

Q: Next to Keene, New Hampshire. You were at Wesleyan at a particularly yeasty moment in the history of the school.

Oleskey: That's true.

Q: There were a lot of changes. Were you aware of that at all?

Oleskey: I remember coming and being astounded that there was only one black student per class, and being very appalled by that. I got together as a freshman with some other students who were older, and we arranged an exchange with Tuskegee Institute in Alabama for a week. We went there for a week, and they came to Wesleyan for a week, so we'd have some contact with African-American students our own age. I have a picture over here of my friend David Skaggs—later a Colorado congressman—and I holding up signs saying, "No More Nuclear Testing." We went to Washington and did that. I was in a program called the College of Social Studies [CSS], which focused on an inter-disciplinary approach to the study of history, government and economics. We had three years of colloquia and seminars. We wrote one or two research papers a week.

Q: That was a new innovation.

Oleskey: Yes, it was. I think I was in the second or third class. Martin Luther King [Jr.] came several times to speak to the CSS. We had lots of economists, philosophers, and historians come and speak.

Q: That was the new school—

Oleskey: It was a college plan built around what was going on—or what had gone on—for many years at Oxford and Cambridge, where you had tutorials and colloquia instead of sitting listening to lectures all week. That was great because you wrote two papers a week and you had a chance to learn how to write and think. The downside was that, at the end of three years, you had one exam that determined how you did for those three years—which was quite a pressure-packed event, I found.

Q: They also began admitting women.

Oleskey: Not until afterwards, unfortunately. I think around 1969 women were admitted, and there was a major effort to recruit African-Americans.

Q: There were some Wesleyan students who went on the Freedom Rides. Were you at all aware of them doing that?

Oleskey: I think I might have been vaguely aware, but I was on a scholarship and had two jobs, so my chances to do things like that were somewhat limited by the economics of my life at Wesleyan.

Q: What were your jobs?

Oleskey: For a time, I was the person who cleaned the fraternity. I vacuumed and cleaned the toilets and the sinks. For two years I lived with a professor's family, and did the dishes and cleaned the house. I worked in the library. Things like that. I always had summer jobs, so it was hard to do those things like freedom rides in the summertime. I was somewhat frustrated by not being able to do those things, or feeling that I couldn't do those things. When I got to law school, I was able to do more of those things.

Q: You knew that you would be going to law school?

Oleskey: Yes. I decided when I was in the seventh or eighth grade that I wanted to go to law school because of these political events that had happened that I mentioned growing up in New Hampshire. I wanted to be someone who could try to change things and be an agent of justice.

Q: Did you have any idea of what lawyers really did day to day?

Oleskey: I thought that, mainly, lawyers day to day worked for people who paid them, so they could, in turn, pay their own mortgages and buy cars, food and so on. But I also thought it was an

opportunity either to work full-time as a public servant or go into a firm—as I eventually did—where you could also have a public-service practice that was part of what you did at the firm. I was able to do that. I've always been very grateful for that.

Q: Why NYU?

Oleskey: The same kind mentor—Kimon Zachos—encouraged me to go there. He got me a good scholarship.

Q: Did you apply other places at all?

Oleskey: I did. I applied to [University of] Chicago, Harvard, and Yale. I had applied the year I graduated, and then I went and taught school in Brazil for a year, so I had to re-apply.

Q: That's an interesting experience. How did you arrange that?

Oleskey: I had no money and I wanted to travel. A friend of mine and his wife were going to teach in Recife, Brazil, and in August they decided they'd rather be in Italy for some reason. Suddenly the Brazilian job became available and I thought, "This is it. Once I go to law school, it will be harder to take a year off. I'm going to take a year off, go to Brazil, and see something of the rest of the world and another culture." So I did. The week after the opportunity came up, I was in Brazil. It was all very sudden.

Q: In Recife.

Oleskey: Yes.

Q: How did you relate to the people in the north of Brazil?

Oleskey: In my bad Portuguese, as well as I could. I was teaching in an American school. I was teaching English, learning Portuguese, and became very friendly with a Brazilian guy my own age who was from a wealthy family. I socialized with him. I had no car, so I took public transportation, and did the things that you do at night and on weekends when you're in that kind of an environment. It was quite interesting, particularly because the northeast of Brazil at that time was the place that Bobby [Robert F.] Kennedy and Jack [John F.] Kennedy had discovered and decided was, quote, "going Communist." There was a great American effort, both through USAID [United States Agency for International Development] and through the CIA [Central Intelligence Agency], to promote what was characterized as "democracy and stability," and undermine what was feared to be radicalism in the interior of the country. That was going on around me, and I became more aware of the covert part after I had left and remained friends with a woman who had taught with me, and whose husband turned out to have been a covert CIA operative. I had always wondered about that because he was described as being an “agricultural consultant” for the Cooperative League of the United States, working for some foundation I'd never heard of, yet he graduated from Princeton. That struck me as being anomalous—to be an agricultural advisor in the interior of north east Brazil, if coming from a Princeton background.

Q: Who were you working for?

Oleskey: I was working for something called, in English, the American School of Recife, or, in Portuguese, "L' Escola Americana do Recife"—which was, in turn, funded by [US] AID so that American government officials who were coming there had a place for their kids, and then to be someplace also for international students in the community.

Q: This was your first experience in another culture?

Oleskey: It really was.

Q: Any culture shock?

Oleskey: I think the culture shock was that I was vaguely aware that Brazilians spoke Portuguese and not Spanish, but it had never really meant anything to me until I got on a plane from Rio to Recife, and they were offering me "matte"—Brazilian tea—in Portuguese. I didn't speak Spanish. I spoke some French. I thought, "Wow, this really is a different language," but it's a beautiful language, particularly as spoken in Brazil.

Q: You were teaching mainly English.

Oleskey: Yes, in English.

Q: What were you teaching?

Oleskey: History, government, English, eighth-grade math—which is about the level of my math—so they figured that one out. And I was the soccer coach, which meant that the kids taught me the rules of soccer and then I coached them.

Q: Had you played sports at all before?

Oleskey: Yes, but never soccer.

Q: When you came back, you came back then to go to NYU on scholarship?

Oleskey: Yes.

Q: What was your impression of NYU and New York?

Oleskey: It was exciting to be in New York.

Q: Back in the 1960s. Yes.

Oleskey: I was living on the Lower East Side, so that was the time of Fillmore East, the Hare Krishnas, drugs, and people on soap boxes in Washington Square Park all the time. It was a pretty exciting time to be there, but again, since I was perhaps more focused than I should have

been—I had no money again. I wasn't going to the Met Opera and I wasn't going to the theatre. I was working in the library for Mobilization for Youth—a legal and advocacy group on the Lower East Side—trying to get good grades, and get as much substance as I could out of my law school years.

Q: I would imagine that the first year you took the pretty standard courses—contracts, procedures, etc.

Oleskey: Correct.

Q: What stands out about New York, NYU, and the law school in your mind after all these years?

Oleskey: The law school, at that time, was somewhat insular compared to what it is today. It was mostly men.

Q: [Robert B.] McKay was the dean?

Oleskey: McKay was about to become the dean. The dean was a guy named Miguel [A.] de Capriles, who seemed to be mostly noted because he was the secretary of the U.S. Olympic Fencing Team, and whose main preoccupation with the students seemed to be sending a guard through the library to tap you on the shoulder when you took off your suit coat or sports coat. It was explained that, if you were going to be a lawyer, you had to wear a suit or sports coat, and

you'd better start learning how to do it then. I thought it was a surprisingly provincial and small-minded approach in the largest city in the country.

So there was that. But it was exciting to be there. I lived right near Café la Mama, on East 4th Street, for two years, and walked across the Bowery in the morning. There were these poor guys who needed money, and I didn't have much money, but they had even less than I did, so I'd usually give them fifty cents for whatever.

Q: That was the time of running battles between the police and activists down in that area.

Oleskey: I think so, but you never felt it because you were just walking back and forth between law school and your apartment. I'm sure other people did. I got a job at some point working for Mobilization for Youth, which was the OEO [Office of Economic Opportunity] anti-poverty legal program in New York. That exposed me to what I wanted to be exposed to more directly, which was the legal problems of poor people in a great urban city people who were really struggling.

Q: At one point in time there was a movement among the law school students to organize a course called the "Military Threat to Civil Liberties." Do you recall that at all?

Oleskey: I don't recall that at all.

Q: Norman Siegel. Do you recall him at all?

Oleskey: I remember Norman, who was in my class and in my section. I've followed his career, but I haven't really seen him since 1968. He went on and did the things that he was interested in.

Q: As I read about it, it was organized in such a way as to bring scholars and other lawyers in because they felt that NYU was too provincial.

Oleskey: As, indeed, it was.

Q: Other than the Mobilization for Youth, were you at all involved in other things in New York City?

Oleskey: It was work, that job, or other jobs, and some time for social life. I met a woman I married.

Q: Was she a student at NYU too?

Oleskey: She had been an undergraduate at NYU. We were introduced through mutual friends.

Q: And she was working there?

Oleskey: No, she just lived in New York with her parents.

Q: Then you had to graduate.

Oleskey: I was graduating and had to decide, if I went back to New Hampshire, where I had worked for a law firm—in fact, the law firm that David [H.] Souter had been working in. He had been a couple years ahead of me in high school. So that was attractive. Then I had two job offers in Boston, one from Hale & Dorr, as it then was, and the other from the Attorney General's [AG] office, which was headed by a fellow named Elliot [L.] Richardson, whose deputy was a fellow named Levin [H.] Campbell. Richardson obviously went on to do the things he did, and Campbell went on to become Chief Judge of the First Circuit. That was very attractive, but I was concerned about the kind of training I'd get. The salaries, in those days, were pretty competitive in the AG's office and in private law, or if you were beginning as an assistant professor in universities. You were all getting paid around $8,500. Then, at the time I started, one of the New York firms increased their salary range to $12,500, so I got an instant thirty-three percent raise before I even got here, which was rather amazing.

The reason I came to Hale & Dorr was that the trial department was known as being extraordinary, and I was attracted to the place because Joe [Joseph N.] Welch had been here, and he had been one of my heroes in the 1950s. A man named Jim [James D.] St. Clair was here, and went on to represent President [Richard M.] Nixon. A lesser known fellow named Jerry [Jerome P.] Facher—who became one of the subjects of a book called *A Civil Action*, about a major environmental case—was here, and some other people who weren't as well known but who were outstanding trial lawyers. But it seemed like you could get a great trial practice experience, and

then I could decide what I wanted to do. I was also led to believe you could have an active pro bono practice at Hale & Dorr.

Q: Had the idea that you wanted to do a trial practice been gestating while you were at NYU?

Oleskey: Yes, really all the way back to eighth grade. Nothing else in law really interested me. I had been heavily involved in debate and drama in high school, and the debate practice was very good—as Newt [Newton L.] Gingrich seems to be showing everybody today.

Q: At that point in time, what did you think a litigator was? What was in your mind or your imagination?

Oleskey: That you went into court to represent people who had problems, and through your skill and advocacy, you helped them resolve their problems—which I found to be generally true, even today, forty-three years after beginning practice.

Q: In a couple things you've written and a couple things you've talked about, you talked about the way in which you had to balance your pro bono work with billable hours when you were at Hale & Dorr. What was it that you did at Hale & Dorr that was at the other end—the billable hours? What were your specialties?

Oleskey: I always had a general litigation practice in the days before there were specialty practices that were as important as they are today. I generally worked for Jerry Facher, Jim St.

Clair, or the others, on whatever case they had. It might be, occasionally, a criminal case. It might be an anti-trust case, a securities case, a probate case, a tort case, or a contracts case. Whatever it was, I did it because that was the way the firm operated. When I came, there were seventy-four lawyers, I think, in the history of the firm, because my internal number was—and is—seventy-four.

Q: What was the Hale & Dorr view of pro bono work?

Oleskey: The fall I arrived—in the fall of 1968—two associates had been fired, let's say on Monday, for taking on a pro bono case without authorization the previous Friday. Then they were rehired on Tuesday when it was decided that the assisting managing partner who did that had over-reacted. That seemed to all of us who wanted to do pro bono to be something that needed to be straightened out in view of the firm's history of public service. So we went to the partners and said, "Let's have a policy. Let's have a procedure. Let us know what the rules of the road are, because lots of us are here because of the pro bono history of the place and we want to make sure that we can be part of the future of pro bono here if we're going to stay here."

The partners responded and created a policy which, I think, became one of the first pro bono policies in the country, and created a committee that would help to develop and articulate that policy, and also decide what cases would be approved as pro bono cases. That started around 1969, and they put two associates on the committee, which had never happened before, I think, and I became one of those associates. About the same time, one of the partners who was very involved in the Massachusetts Bar Association and bar activities generally said, "You seem

interested in all these things. Why don't you become a Hale & Dorr director at Boston Legal Aid Society?" The Boston Legal Aid Society—which had been founded by a lawyer named Reginald Heber Smith, who then became the managing partner at Hale & Dorr; it always has a Hale & Dorr director. That would not happen today, because you don't generally appoint second-year associates as representatives of large firms in important local organizations, but it happened then. That got me started working as a private lawyer to advocate for legal services for the poor in Massachusetts, which I've continued to do through today. I thought that was a good sign that the firm had that amount of confidence that they would send a second-year associate to do that.

Q: What were a couple of the cases you worked on to make money?

Oleskey: Cases involving claims of theft of trade secrets. A case involving a man who was being sued for what was then called alienation of affections. If you were claimed to have interfered with somebody else's marriage—

Q: It sounds like another world.

Oleskey: I remember being very impressed that the client came in to interview with St. Clair and myself, and he started telling what seemed to be a very unlikely story about his relationship with the wife of the plaintiff whose affections he had allegedly alienated. We went on for a while, and St. Clair looked up at the man and said, "Look Mr. So-and-So, if I'm going to represent you, you need to come clean with me. I understand if you don't want to come clean with me. Not everybody feels comfortable doing that. That'll be fine. We'll just call it a day, and you can find

somebody else who you feel can represent you more effectively. But if you want me, I have to know the whole story, and not the story you're telling. Do I make myself clear?" That was a very good lesson for me about how a lawyer needs to pierce through a story, whether it's the client's story, a third-party's story, or the adversary's story, and try to get as close as you can to some version that might approximate what really happened.

Q: Do you think that that was tinged with a little bit of New England rectitude?

Oleskey: Well, St. Clair was from Ohio, so it would have to be Midwestern rectitude. But, possibly. He had impressed me, even though our politics were somewhat different, because he had represented William Sloan Coffin in a famous case in Boston involving men who, including Coffin, were alleged to have counseled draft evasion—after which Coffin famously said of Mr. St. Clair, who had helped to get him acquitted, "The trouble with St. Clair is he's all case and no cause." St. Clair, never commented on that, but I think he would have considered that a badge of honor, because he considered that a trial lawyer was someone who represented somebody with a problem, and as long as you could represent them effectively—because they would, for example, level with you about what you needed to know—it didn't necessarily bother him whether you were accused of being a draft-dodger or anything else. That was why he had gone to law school, and that's what he was doing as a lawyer. I liked that approach.

Q: This is a little off the topic, but in doing these interviews, I've really become intrigued by the kind of balance between the individual's attitude toward pro bono—why they get into it, the

affirmed tradition of pro bono, and how one is intersected with the other—the individual and the collective.

Oleskey: When I was interviewed here in 1967. I was interviewed mainly by partners, but what I really remember is being interviewed by lots of young attorneys who—if I was twenty-five, they were twenty-eight or twenty-nine, and they were involved in projects like the Robert F. Kennedy Action Corps and Democratic politics in the state. They were pretty yeasty. They said, "What attracted us was Joe Welch, Reginald Heber Smith, and the tradition of doing pro bono and public service, for which this firm stands." I came to understand, as I don't think I had before then, that the Army-McCarthy hearings representation by the firm had been pro bono, not paid for by the Army or anybody else. I thought that was pretty terrific, and I also thought that, in addition to learning how to be a good trial lawyer, a place that had, had this commitment might well go on having this commitment, in which case that could be a place I could practice for a while, while I figured out what I really wanted to do. There definitely was a link, in my case, between the tradition and the apparent, present commitment of the place, and why I was attracted to come here.

Q: How far along the promotion ladder were you when it became WilmerHale [Wilmer, Cutler, Pickering, Hale & Dorr]?

Oleskey: That was in 2004. I became a partner in 1979.

Q: So you were—?

Oleskey: Decades earlier.

Q: Had you talked pro bono with that merger?

Oleskey: Yes, it was an important conglomeration for both firms which had very strong pro bono traditions. The thing that happened was that we had a thousand lawyers instead of five hundred each, so we could consider that we had the resources to represent six men in Guantánamo, instead of thinking, "Boy, that could be a big case for a law firm with offices only in Boston, New York, and Washington. Can we afford to do that?" We thought about it. I don't think we thought about it in alternate resource terms—at least nobody told me that we did—and we approved it in thirty-six hours as a case to take on the month after we had merged. I thought that was pretty impressive, and a reaffirmation of the Welch-St. Clair-Reginald Heber Smith commitment to public service. That was a very good sign for the new firm starting out. Indeed, both firms had very strong pro bono traditions because [John H.] Pickering and [Lloyd N.] Cutler were national leaders in public service and pro bono work, as I'm sure you know.

Q: What were a couple of the pro bono cases you took on before Guantánamo?

Oleskey: We represented a man who was accused of first-degree murder, who had no one to advocate for him, when I was an associate. I did representation through legal services—bread and butter, divorce, and landlord/tenant matters. Then I came to do a lot of cases that weren't

public-service cases as such, but were public-interest cases, which I found to be fascinating. We represented a place called Mashpee, Massachusetts—

Q: Oh, right.

Oleskey: —in a suit brought by descendants of American Indians who claimed that, at that time in the early 1970s, they were an Indian tribe and entitled to federal recognition as such.

Q: We used to vacation on Cape Cod. That was a long case, over many years.

Oleskey: Yes. We represented the Boston School Committee in the school racial desegregation cases, which I found fascinating because we were on the side that was going to lose, and the issue was whether you could advocate a principled position for the City of Boston in an instance where some of the school committee members were clearly unprincipled by most people's standards. I also represented the city in a case where the Boston School Committee overran its budget and the question was, would the schools be closed down in April because they were out of money, or would some loophole be found to keep them open but still give the city budget control? I represented the city in an electoral districting case.

Q: Hundreds of stories there, aren't there?

Oleskey: Cases like this—some of which originally came to us because of St. Clair, and no other young attorney was interested in working with him on them. But I thought this was why I

became a lawyer, and I will acknowledge that, like St. Clair, I was willing to represent the School Committee in order to work on a case that I thought was so important, and see if lawyers could represent the city in a difficult case in an appropriate way so that, at the end of the day, the citizens would have confidence that even if the result was different than many of them or their political leaders might want, they could understand that there was a process that had been gone through that was part of how our democracy works that would give them some confidence in the outcome. I'm not sure that happened in the school desegregation case because many white citizens then took their kids out of the schools, and today the schools are ninety-percent African-American and Latino. But it was something the city had to get through, and it did.

Q: I read somewhere that you first became involved in Guantánamo when you got an email.

Oleskey: Yes. A partner I didn't know, who was from the Wilmer side of the firm, who had just been—

Q: I was just going to ask you—who sent the email?

Oleskey: I believe it was the Center for Constitutional Rights [CCR]. Somehow, some of the wives of these men from Bosnia had gotten in touch with CCR and said, "Can you get representation for our husbands if your courts and your government are ever going to allow representation for anybody in Guantánamo?" So we were contacted by CCR just before *Rasul* [*v. Bush*, 2004] and *Hamdi* [*v. Rumsfeld*, 2004] were decided in June of 2004, which, to its credit, seemed to think those cases were going to be won, at least enough, so that people could bring a

whole new round of habeas cases. They said, "If the court comes our way, would you be willing to take on a case?" Our partner Dave [David] Bowker, who had gotten the inquiry—and I think was recused because of his federal government former employment from doing anything like that himself for a while—sent this around to the litigation department. I thought, "Yes! That's why I went to law school."

Q: Had you had any contact with the Center before?

Oleskey: No.

Q: Had anyone here? Did they pick WilmerHale, or did they send this out broadly?

Oleskey: I don't know. You'd have to ask somebody who was there at that time, like Michael Ratner.

I thought, "I want to do it. This could be a very big case." It's not as if I have much habeas experience. I went down the corridor to one of my friends who has no habeas experience either—he's an environmental lawyer, Rob [Robert C.] Kirsch—and I said, "This looks like a two-partner case but I think we should do it. What do you say? This is why we went to law school, right?"

He said, "Okay, let's do it."

We put in the request to the same public service committee that I had helped to found in 1969, and thirty-six hours later the committee said, "That's fine," with one of the managing partners saying, "But please, let's not have young associates running around unsupervised in Guantánamo." That seemed like a reasonable caution under the circumstances. Indeed, we never did let young associates go to Guantánamo unsupervised. One of us has always gone with the younger lawyers.

Q: What were some of the first things that you did?

Oleskey: We got in touch with the wives in Bosnia through CCR to get their approval to represent their husbands as next friends. We wrote letters to the six men in Guantánamo introducing ourselves and indicating that we hoped to be there to visit them soon. We started to learn about the law of habeas corpus, and filed one petition for the six men in the federal district court in Washington in July of 2004, where it was assigned to Judge Richard J. Leon. I think we asked for an injunction from Judge Leon to restrain the government from convening Combat Status Review Board hearings for the men, which was the first time we appeared before him. He was not sympathetic to the injunction and denied it. All the cases were then assigned, for general purposes for working out these very unusual procedures, to determine how people would go to Guantánamo, how they would deal with classified evidence, and how they could take notes and bring notes back to Judge Joyce Hens Green, who was a senior judge in the District Court in Washington, who we've always assumed was chosen because she had been on the FISA [Foreign Intelligence Surveillance Act] court, and had, therefore, passed upon thousands of applications for warrants for national security purposes. We've always assumed that her colleagues thought,

“Who better than Judge Green would understand something about these things that most of us here, as district court judges, may have touched on occasionally, but were not immersed in the way that Judge Green probably was?”

She began convening a steering committee of lawyers, including Rob and myself, who needed to know how we were going to get to Guantánamo and when, and to hammer out procedures which led to orders by Judge Green that she intended and I think generally were consistent with existing law in the field. By December we were in a position to go to Guantánamo to visit our new clients.

Q: Now she would have negotiated with the government, or she would have represented the government on that?

Oleskey: She was essentially a mediator, as I viewed it. I don't know if she saw it that way. I think she did essentially mediate between the government and habeas counsel. The government wasn’t terribly eager to have us go. After all, it was only because of a footnote in one of the June Supreme Court decisions saying that if the facts that were pleaded could be shown, then there would either be a statutory, constitutional, or common law habeas claim that could be made out that gave us a toehold to demand visits to begin to interview and counsel our clients. We all took that footnote to mean that we could go and talk to our clients in order to try to get the facts that would eventually either prove the footnote to be correct or not.

We finally got there in December, I—among the very earliest of the counsel by happenstance—with a translator. We had understood that you needed to bring an Arabic translator. We found someone who had had some experience at Guantánamo, and since it was difficult enough to arrange the trip, we took that translator—which turned out to be a mistake on our part, as we came to realize.

Q: Why?

Oleskey: Unknown to us, he had been there translating previously for the military interrogators and one of our clients recognized him. That made beginning to develop a rapport with our clients much more difficult than it already was, because they thought—not unreasonably—"We're not sure who these new lawyers really are. We're not sure what they're doing here. We're not sure if they're really who they say they are. But when they come in with an interrogator's interpreter, that tells us that they may well not be who they say they are or present themselves to be."

Q: The situation is fraught with all kinds of ominous possibilities.

Oleskey: Right. One client was sufficiently wary that he put a piece of paper in front of me and said, "Sign your name on the back of the paper." I didn't look to see what the front was, I just signed my name. Then he turned over the piece of paper, and it was the letter of introduction I'd written. He said, "The signatures don't match." I looked, and I realized that the signatures didn't match. I actually scrawl my signature, because my signature was once forged by a lawyer in an estate case, and I determined after that that I would make it hard to copy. It's really a scrawl

signature. I realized that, although I had written and approved the letter to the clients, it had been signed when I was in court by another lawyer who didn't know that I scribbled my signature, so she signed it as a proper signature. Of course, they were very different, and I had to explain it to him. I don't think he was necessarily quite accepting of my explanation, and that became another issue of “Who are these people? They say they're people who send us letters, but then when they get here, their signatures don't match. That sounds suspicious."

Fundamentally, they had been held there since January 20, 2002, and they had been badly abused. By most standards—not those of the [George W.] Bush administration—but by most standards, they had been tortured. We were the first people, other than interrogators or one delegation from Bosnia—which had come and been notably unsympathetic and gone away, and, possibly, I think, delegations from other Middle Eastern countries who had come to interrogate them. We had been the first friendly faces who they had seen since January 20, 2002, and this is the middle of December 2004, almost three years later.

Q: I remember reading something that was published by the Tipton Three that talked about the Algerians getting particularly rough treatment down there.

Oleskey: Since we were coordinating loosely with other people, other lawyers, and all kinds of restrictions, all we could tell each other, except on a, quote, "need to know" basis—I think, from what I've read, our people had a very rough time. I think they would say it was rougher than others. There were a lot of the things that we all have come to understand happened in Guantánamo—not water-boarding, as far as I know, but stress standing, interrogation for many,

many hours, force feeding, exposure to freezing temperatures in air-conditioned rooms, exposure to extreme heat, solitary confinement—part of which didn't stop after we came, particularly in the case of one client—solitary confinement for about fifteen months. That happened either in 2005 or 2006.

Q: We've done a couple of interviews with former detainees, and they have a bit of difficulty putting their stories together, still. The experience has been so difficult for them.

Oleskey: Yes. Well, of course, we have all of our interview notes from our series of interviews, insofar as they were cleared, and I suppose it's not out of the question if, particularly Mr. [Lakhdar] Boumediene, whom you intend to interview, gave permission for me to release my notes to you. I think those would be quite instructive because both Rob and I are very verbatim note takers, so there's a great deal of detail in there, starting with December of 2004.

Q: When you first went to Guantánamo, who did you go with, and what were your impressions of the place?

Oleskey: As was true for many of the earlier trips, I went with Rob Kirsch, my partner, because we didn't think we should take young lawyers, and who knew what was going to happen, and what it would be like? The ground rules were literally still being worked out. You had to fly on a prop plane from Fort Lauderdale—which, I discovered, since I was then in my sixties, was not so great, because there were no toilets on prop planes from Fort Lauderdale.

Q: Right. Everybody mentions that.

Oleskey: It's a three-and-a-half-hour flight. We possibly took Melissa Hoffer, who was a young attorney who worked with us. She certainly came on one of the earlier flights. We might have taken two younger lawyers on that first trip, because we always did want to have two of us interviewing each client. You like to have two lawyers interviewing clients in every stressful situation so that one of you gets the story right, and nobody can later say, "I told you such and such," or, "I didn't tell you such and such," and you can't be clear about it because it was only you, and you were too busy asking questions to take notes.

Also, I didn't serve in the military. I was deferred from Vietnam for medical reasons and then for law school, so I didn't have the experience of going on a military base. I don't think I'd ever been on a military base. To fly in there, in that very odd landing pattern where you fly along the coast of Cuba, down to the southeast corner, then the plane takes a ninety-degree turn to go into what must be a fairly narrow slice of American air space. Then it takes a ninety-degree turn pretty much over the Guantánamo airfield to land. Then people are coming out to meet you in military fatigues, carrying loaded shotguns. The previous experience I had had that it evoked was when I was a summer law student in Mississippi, and the Mississippi State Police picked me up, and they were carrying shotguns and tossing shotgun shells. The situations were comparable only in that here were two groups of armed men with menacing shotguns and I had to do what they wanted because those are the rules of the game.

They went through our bags with very extraordinary care, and then we were released to go to this place called the Bachelor Officers' Quarters where, it turns out, we have stayed ever since, on the airport side of the island. I guess it's the leeward side of the island. As Clive [Stafford Smith] has pointed out in his book, the other side is the windward side, but you wouldn't necessarily know that unless you were a sailor.

You begin to get used to the rhythm of the island. You always have a non-enlisted officer who's in charge of you. I think of them as minders, but they're escorts, technically, I guess, from the military's point of view. The first escort we had was a guy named "Gunny" Santana who had been there for several years and knew everybody in the military apparatus. It was very informal because of who he was, and because no ground rules had been set. He would take you to the officers' club for meals, and if you missed the ferry he would somehow commandeer a "fast boat" through the system from the Coast Guard or the Navy, and have you taken back to the leeward side of the island. You got a sense that when you're outside the gates of Guantánamo prison, just in the Naval base area itself, it wasn't as restrictive as it later became when the military suddenly realized that some of us were going to the officers' club, and thought, "What are these guys doing here, having dinner in my club, when I'm imprisoning the people that they're here to help?" At least, that was my construction of what must have led to our sudden exile from the officers' club and from other places, and for the rules that you were never allowed on your own, whatsoever, when you were on the windward side of the island, except occasionally when you're in the NEX—the Navy Exchange—getting groceries. Then your escort usually sits outside in the vehicle, and doesn’t shadow you inside the NEX. But they're sitting

outside in a chair when you come out, or they're in the car, and you're not supposed to go off on your own—not that there's anywhere to go off to without a car on your own.

Q: Did you find that the guards down there could be thought of individually, or was there a general pattern to them?

Oleskey: Well, their name tags are always masked for security reasons, so you never know their names. Early on, the more relaxed atmosphere that I've been describing seemed to exist inside the camp as well, because we had a lunch table with an umbrella out in the area where we interviewed at Camp Echo. I'll think of the interview camp in a moment, but you can probably remind me, also. We would sit down and have whatever we brought for lunch, always, to save time—because if you leave and go off out of the prison to have lunch, you've lost an hour and a half or two hours. We didn't want to do that, so we would bring whatever we could cobble together—carrot sticks, saltines and peanut butter, whatever—and have lunch outside. Often, the guards would come and sit with us and talk with us. After about a year, that stopped because the military obviously decided they didn't want fraternization between the habeas lawyers and the guards.

That was too bad, because it was clear that they might have things to tell us that were just of general interest about prison conditions. We had a lot more to tell them that would potentially be of interest to them about who these prisoners were—why they were there, in general, and the importance of the habeas process and habeas lawyers in the justice life and the political life of the country. But that was cut off. After that, your main contact was at the gate, going into the

camp for the interviews, where it became more and more formal as they spent more and more time going through your notes—which is a very uncomfortable practice for a lawyer, because your notes are supposed to be confidential, and here they were looking at them ostensibly to make sure that you didn't bring anything in that was contraband.

Then you'd see the guards when they took you out to go to the bathroom during the interviews, and brought you back for lunch or after lunch. By and large, you had no contact with the guards except for those fleeting moments. You did have contact with the Judge Advocate General [JAG] lawyers who were in charge of you at the supervisory level, but they typically wouldn't show up unless there was some issue they needed to sort out, such as, "We think the guards are going overboard in being overly zealous in reading our notes, not just flipping through our notes to make sure there's no contraband," or, in a case of a so-called refusal by a client to see you—which is always reported just as "He refused," with no ability on our part to know what that really meant—the JAG officer of the day would come down and you would talk about what was going on. They were largely reservists, they weren't career military, so they sometimes seemed to be more empathetic to what you were there to do than career military. Then you might be able to find out something about what the "refusal" really meant.

In one case, when our client was in solitary for those fifteen months and he was, quote, "refusing"— which we suspected had only to do with the fact that he was in 24/7 solitary with a light on to simulate a constant condition of light, all day, every day, with very little time outside, and meals through a slot—we thought he was probably so near a condition of complete emotional collapse that the notion and the report, "Your lawyers are here to see you," probably

had very little meaning to him. But they wouldn't let us see him in solitary. We were never able to see any client in their prison conditions—only in the visiting cells where they are brought for our visits, usually in Camp Echo.

In this particular instance, this JAG officer, who was a woman, went and said, "I saw him. He's lying in the cell. He's staring at the wall. He's unresponsive," which confirmed our view that he was probably in some state of psychological collapse—as I would have been much sooner than he was in the circumstances in which he found himself. I never felt that I wanted to ask him about the precise details of it afterwards—"Do you know how many times we came? Did you know they said you 'refused?"' Because that would mean reliving, for him, what he'd been through, and that would seem to be both cruel and unnecessary, so I didn't do it. But it was pretty clear to me what had happened.

Q: Yours is the kind of experience I had interviewing, at one point in time—I just couldn't ask about certain kinds of things because it was still too raw.

Oleskey: Right.

Q: Do you think those changes happened when General Geoffrey [D.] Miller came in?

Oleskey: I think if you told me when he came in, I could track it. I think he had left by the time we first went there in December 2004. He might have started the changes, but my sense was by 2004, that it was just the military in general wanting to have more regularity and more of a

military-type discipline existing than had occurred in the early days of our visits. I tend to look for process explanations rather than conspiratorial explanations since it accords more with my own view of reality. That's the best I can do here.

Q: You talked about having lunch with other lawyers who were there.

Oleskey: Well, my team, usually.

Q: Just your team.

Oleskey: We seemed to be the only people who would stay for lunch. Everybody else would leave and go back to what I'll call "downtown Guantánamo Bay," where there is a Subway and a McDonald's.

Q: I was trying to figure out if you had any informal contact with other lawyers from Covington & Burling, CCR, or the ACLU [American Civil Liberties Union].

Oleskey: You became friendly with those people in several ways. One, you'd meet them in Fort Lauderdale, and fly down with them. Two, you'd meet them in the morning at the PX—the mess hall—for breakfast, if they had breakfast. Then you'd meet them on the bus to the ferry, on the ferry, and some number of you—depending on what camp you were being taken to for interviews—would be with the same escort, so they'd drop you all off at the same place, or maybe make two stops. Then you'd meet them on the bus on the way back to the boat, at night,

then on the boat, and then you'd have dinner with them. Because Rob and I like to cook, when we were there, we always tended to offer to cook for everybody. That's another way to get to meet people because generally, they were responsive to the fact that you were cooking them a nice meal and not simply say, "Shall we go to the mess hall tonight and get the standard military fare?" which was pretty bad.

Q: Did those kinds of informal contacts give you a chance to share experiences and strategize?

Oleskey: Well, that, and, obviously the intra-net that the Guantánamo habeas lawyers have had that CCR set up at the very beginning. That's been quite invaluable, I think. But I like putting a human face on it. I don't think I ever met Tom [Thomas B.] Wilner there, but David [H.] Remes was there a lot. Joe [Joseph] Margulies was there. Clive was there. People from CCR.

Q: Gita [Gitanjali S. Gutierrez].

Oleskey: Gita. Cori Crider. I once said, "I never knew whether you were a gal or a guy."

She said, "Thank my parents. It's been an issue for me all my life." All those folks. Yes. You felt, despite all the joking about the Guantánamo Bar Association—which, of course, is a hypothetical construct—that there really was a camaraderie, because you were taking on the most powerful government in the world to do something that was very unpopular with that government, and who knew how it would all end? Whether you'd have success in getting your clients out, or whether you'd just be going there and bringing them hope, which, over time, they

would increasingly dispute with you—which our clients did, as the years wore on, and essentially say, "Thanks for coming here and telling me what you're doing, but it's not getting anywhere, and I'm willing to acknowledge that, even if you're not." In fact, just before the Supreme Court decision in our case, one of the clients—Mustafa Ait Idir wrote me a letter that's quite remarkable—that he's given me permission to release, so I have released it to people—in which he said, "You and Rob are great guys, and we really appreciate what you're doing, but you're very naïve. You don't understand that the judges, who are appointed by the guy in charge—the President—are not going to rule against the guy in charge. I know that because I've lived around the world in places where it happens like this, and I know this is the way the world is. We don't want you to think that we're not grateful. We are grateful. But we're not naïve, and it's touching that you're naïve, but we're not. So thanks for what you're doing, but we're under no illusions about where it's going to lead."

Q: We talked about their possible impressions of you. What were your impressions of them? There's a tendency in some of these cases to say Boumediene and then ignore the other five people.

Oleskey: We divided up the clients early on for convenience and for relationship-building. I had three clients whom I always saw after the first couple of trips, and Rob had three clients whom he mostly saw. If one of us couldn't go then that might deviate, but basically I had Mohammed Nechle, Lakhdar Boumediene, and Sabir [M.] Lahmar. He had Hadj Boudella, Mustafa Ait Idir, and [Bensayah] Belkacem, and that's pretty much the way it went throughout. I got to know the other clients who were dealing mostly with Rob, but not as well as I got to know my three

clients. You discover—as you do with any client in any circumstance when you're representing them—that there is no reason that they would be alike. The alikeness here was that they had all grown up in Algeria, they all had left Algeria, and they were all living in Bosnia. Many but not all of them were married to Bosnian women, and they had all been made a "group" by American intelligence, for its own shorthanded purposes, as "The Algerian Six." They were a six-degrees-of-separation group in that there was some connection that some of them had to the others, even though all of them were not connected at all as a group—notwithstanding the sobriquet in the press, "the Algerian Six."

Once you realize after a couple of trips that all of this is a construct of prosecutors, as many things are—since they're trying to create some version of reality that the intelligence apparatus, military and the courts can someday accept as being something like what may be fact—your job as a lawyer is to deconstruct that as much as you can, to create a more accurate version of reality, so as to help your clients. Then you just bear down as much as they're comfortable allowing you to do, to try to figure out what it is about their individual stories and personalities that will be helpful in getting them out of there.

In this case, unlike, I think, a lot of other counsel—since all the wives were in Bosnia, we were able to go to Bosnia, meet with the wives, meet with the children, and develop a bond there that led the wives in turn to write letters to the husbands that would say, as far as we could tell, "We met with Steve in Bosnia. He came to the house. He met your daughter. As far as we can tell, Steve's on the up-and-up. I want you to cooperate with Steve, insofar as what I have to say has any bearing for you down in Guantánamo. We asked these guys to do this because you needed to

have lawyers. We think you should trust them." That seemed like it had happened before we got here. Then it seemed like that was happening both as we went to Bosnia, which we did three or four times, and also as we would brief the wives by phone once our notes of our conversations were cleared when we came back. We engaged—and still have engaged today— a person in Bosnia who was a journalist and human rights figure, whom we met when we started to look and see who could be an intermediary in Bosnia who spoke Bosnian and who could help us deal with the wives and the families. We found this guy, Senad Slatina, whom I think you would enjoy interviewing as well. I should have mentioned him previously. He had covered our clients' arrests as a journalist, so he had some familiarity with the background. He turned out to be quite invaluable to us, both in interpreting for us and credentialing us with the families, and, also, helping us as we investigated between 2004 and the habeas trial in November 2008 to figure out what we needed to know about the lives of our clients in Bosnia—how did they happen to be arrested? How did they happen to be ordered released by the Bosnian courts? Why did the Americans order them turned over anyway, to be taken to Guantánamo instead of being released?

We always knew, from the very beginning, that we had a very unusual batch of clients because we had the only people, as far as I know, who had ever been through a proper legal process in another country and who hadn't been seized on a battlefield, or anywhere near a battlefield. They'd been seized in an American ally, but they hadn't been seized in the military sense at all. They had been arrested not by the Americans, but by the Bosnians, and only because the Americans said, "Arrest them."

Q: What was the name of the person who was your contact in Bosnia? It might be someone we could interview.

Oleskey: It is Senad Slatina. I have his contact information. As I say, he's still employed by us. He's a fascinating guy because he lived through the siege of Sarajevo as a Muslim.

Q: What were your impressions of the stories when they started telling you about their lives and what had happened to them?

Oleskey: Well, you need a context. I like to think I'm pretty widely read on politics, and I had been aware that there had been a civil war in Algeria—that, as a matter of historical curiosity, happened exactly parallel to the war in Bosnia from 1992 to 1995—and that lots of people had left Algeria before that, or during that, to avoid being hamburger in a war machine of one or the other sides, but I hadn't really understood how widespread the Algerian diaspora was of young men around the world. I came to understand that my clients were part of that diaspora. They had gone off, not because they knew each other, but because there were no jobs in Algeria and there was a war. They had gone off and essentially had found jobs in various places in the Muslim world, because those were places where you could get a job as a Muslim from Algeria—often in Pakistan because there were many charities, often funded by people in Saudi Arabia, that were giving religious education, or secular or straight education, or doing social work in Pakistan, which put them in places which were not problematic when we were arming the Mujahedeen in Pakistan and Afghanistan to fight the Russians. But when some of those Mujahedeen later morphed into people who were or became associated with the Taliban, all of a sudden the same

links that could have meant that you were being paid, essentially, by the United States, or somebody working with the United States—Saudi Arabia became problematic because that group you worked for then became suspect—I began to see, as you do so much, that history is often what somebody chooses to call somebody else at a particular moment, which may or may not accord with the reality of what happened five or ten years earlier.

So we began to try to piece that together—to consult experts on Pakistan, to consult experts on Afghanistan and on Algeria, to really understand the social and political context in which the men had left Algeria, to create a narrative for them that would be more realistic than the one the government was constructing—that somehow they were young guys from Algeria who had gone and become radicalized in Afghanistan or Pakistan, and then presumably gone to Bosnia—in the government's theory of things—and become terrorists who were then planning to blow up the U.S. embassy right after September 11.

Q: Yet they're still individuals.

Oleskey: They’re still individuals, and you have to represent them as individuals. The more you buy into the narrative that it's the "Algerian Six" who are a terrorist cell, the more you're having to deconstruct and argue about whether it was a terrorist cell or not, rather than that they were six guys—some of whom knew each other in Bosnia, all of whom happened to get picked up because, arguably, unlike other people who got out of Bosnia or got out of Sarajevo, where all but one of them were living after 9/11, for whatever reasons. These guys were hanging around when American intelligence, which had always been nervous about Bosnia after the war was

over because, quote, "foreign fighters" under the Bosnian Accords in Dayton were supposed to leave the country but hadn't, in some cases because President [Alija] Izetbegovic was grateful that they had saved the Muslims from further genocide. I think that his government winked at people who had been there and said, "You don't have to leave, particularly if you have a Bosnian family," which two of the clients had, but, arguably, only two of the clients had been there in or near the end of the war. The others had come after the war in this great movement that the United States played a major role in, to reconstruct civil society in Bosnia because of the terrible destruction of the war.

One of the great ironies of the Boumediene case is that the United States was causing the arrest of people who were there helping to reconstruct a peaceful Bosnia after the terrible events of the war—the war we had helped to bring to an end, and which national reconstruction we were supporting. We always had the overlay of the American military being there to enforce the peace. As I came to understand from my reading, American intelligence was always saying, "Tut, tut. Anybody still here who isn't from Bosnia is potentially a terrorist. Anybody here who's a terrorist is potentially a part of a terrorist cell. Any terrorist cell is potentially only—" whatever it is "—seventy-five miles across the Adriatic from Italy. Italy is part of the EU [European Union]. The EU is part of Western Europe. My God! Terrorists in Bosnia are a spear pointed at the heart of the EU!"

In a crude, but I think in a realistic way, I felt from my reading and our consultation with some government figures or former government figures who would talk to us, that that scenario seemed to be behind the United States' decision to have our clients arrested. It was random in

that they, being people who were there—five out of six of them were doing social work when they got a summons from the local police station, "Come down, we want to talk to you." They walked down to their local station and said, "What's the story?" All but one were citizens of Bosnia. The other was a permanent resident. They had their families and their kids. Ait Idir was a soccer coach in Sarajevo. They weren't particularly involved at all with radical groups that otherwise might have been something that United States intelligence was concerned about.

One of them, Lahmar, had come from religious training in Saudi Arabia, so he'd worked at the mosque in Sarajevo that had been built by the Saudis—which meant that there was Wahhabism there, because that's who the Saudis are. To me, he was like myself in Brazil decades earlier. He was a guy who went off to college. He happened to go to college in Saudi Arabia, and got a particular kind of religious education—unlike what I'd gone through—and then got a chance to teach abroad. There was a job fair in Saudi Arabia, and somebody came from Bosnia and said, "We're staffing up the religious education department of our new mosque in Sarajevo. What do you think?" He went there, met a woman who was Bosnian, married her, and then he got involved in something that was criminal through his brother-in-law. He got put in jail for criminal activity—which Bosnians considered might have political terrorist overtones—so when he came out of jail he was essentially a marked man because of what had happened to him before. I think he went on their radar as somebody to watch.

I think Belkacem went on their radar as somebody to watch because he had come into the country under false pretenses—as a Yemeni, for whatever reason—and then got picked up perhaps because he got on the intelligence screen for other reasons. I'm not breaking any

confidences because this was printed in the American press after the men were arrested. It was said that he had been organizing to send men to and bring them from Afghanistan in advance of the expected American invasion, and that he had made many phone calls to a fellow named Abu Zubaydah in that connection. Abu Zubaydah, as we both know, was considered by the Americans, for years—and perhaps still is, I don't know. You'd have to ask Joe Margulies—to be the so-called travel master for Al-Qaeda. There seems to be a lot of debate over whether he was just a free-lancer.

Q: Were you ever given access to any real evidence that the government had?

Oleskey: First of all, when the case was ordered, we had access to the relatively slender file that had been used in the Combatant Status Review Tribunal [CSRT] proceedings in Guantánamo in 2004, almost all of which the clients never got to see because the ground rules were that if you were there, you were a terrorist, and if you were a terrorist, you couldn't see classified evidence. From the point of view of the government, it's all perfectly logical. It's just not a way that would make most Americans feel comfortable about our system of putting people in jail. Even Sandra Day O'Connor had said in 2004, "These guys could be there for the rest of their lives if we take the view that this is an endless war, for the first time," which is a view that the administration had taken.

So we got to see that CSRT information from 2004, but that was basically it from 2004 until 2008. After the *Boumediene* decision in 2008, the government had obviously had four years—actually, they'd had since 2001 when the men were arrested, based on the original intelligence—

to think about, "Does this narrative really make sense?" So they filed in August of 2008 something like a 672-page "return" or specifications sheet, plus backup narrative, and the return was not signed. No one in the Justice Department put their name on this narrative that held all the claims that they were then going to make. Judge Leon ultimately gave us about two months to respond, and we filed about a 1,700-page response to this 670-page government return claim because we took the judge at his word. Why wouldn't we? He said that we were going to have to really put aside vacations, holidays, family days, and work seven days a week. We did just that. We went out and talked to everybody who would talk to us, but by then, even though Judge Leon was pretty sparing on discovery for us, the government had to give us many classified materials that were in that original file. Then we got a few other materials that Judge Leon let us get in the discovery that went on between August and October.

We had a fair amount of classified material but we were only cleared to the secret level, and it seemed likely that, behind the secret-level material we got, there was a lot of top-secret SCI, as they love to say—special compartmentalized intelligence—that we were not getting to see, and we would never get to see unless we were cleared to that level.

Shall we take a short break?

Q: Sure.

[INTERRUPTION]

Along the way, what kind of coordination was there between what you were doing and what other people were doing?

Oleskey: First of all, you have to understand that although all the cases were assigned in about August of 2004 to Judge Green to coordinate, in about late September Judge Leon took back our case. Every other case stayed with Judge Green for certain pre-trial purposes, but Judge Leon took back our six clients' petition for the same purposes. So there was a motion to dismiss hearing in the fall of 2004 on the government's claim that these cases, under certain precedents from World War II, could not be brought. Judge Green and Judge Leon held separate hearings. Everybody's other petition was in front of Judge Green, and we were in front of Judge Leon. Judge Leon then issued his decision in the middle of January 2005 and dismissed the case, finding that there was no claim that would be asserted. Two weeks later, Judge Green denied the motion—the same motion the government had brought, obviously different facts but the same law—and found that there was a good cause of action. Then both those cases were appealed to the D.C. Circuit Court with our petition dismissed, and everybody else's petition not dismissed. Then from February 2005 until April 2007, we had four rounds of briefings and two sets of arguments in the D.C. Appeals Court, which just didn't decide the case every time something happened. The *Hamdan* [*v. Rumsfeld,* 2006] case got decided, or the Military Commissions Act [MCA] got enacted. The MCA was amended. The circuit asked for more briefing. Finally, in April of 2007, we lost two to one. In other words, Judge Leon was affirmed and Judge Green was reversed.

Then we all coordinated on filing a certiorari application and that was denied in February of 2007. We filed the certiorari application right after the decision. It was denied immediately. Then we filed a motion for rehearing, because Justice [Anthony M.] Kennedy and Justice [John Paul] Stevens had done something very unusual. They'd issued something called "a Statement with Respect to Denial of Certiorari," which was very short, but seemed to say, in substance, "We're troubled by the denial of certiorari, but we think it's premature because there is the Military Commissions Act, with this whole separate process for reviewing what happened in Guantánamo in the Combatant Status Review Tribunals. If that process proceeds as the government represents it will, that would seem to be a process, and we can review what comes out of that process in the fullness of time. But if it turns out that that process isn't expeditious, or doesn't seem to be fair, then we would reconsider the denial of certiorari, as far as the two of us are concerned."

So we're working with people in Washington at our office like Seth [P.] Waxman, who had been the solicitor general, and Paul [R.Q.] Wolfson, who had been, I think, deputy solicitor general. They had done this for a living, which Rob Kirsch and I had not, and they felt that this statement was so unusual that it was worth trying to file a motion for reconsideration, even though no such motion had been granted since the late 1940s, apparently.

We filed that motion, and by then some of the proceedings that other people had been bringing along in the Circuit Court to challenge the CSRT results, which were being reviewed administratively there under the MCA, had proceeded far enough for there to be useful proceedings available. There was this fellow from the West Coast who was an Army colonel in the reserve who had been on his reserve duty in Guantánamo, Lieutenant Colonel Steve

[Stephen] Abraham, who gave an affidavit in one of those cases that said, essentially, that the deck was stacked in Guantánamo against the CSRT's being fair. He went into some detail as to the unfairness, and we were able to get that affidavit into our motion for reconsideration. It apparently didn't hurt, and presumably helped. You never know, obviously, what the Supreme Court thinks it's doing. But we did file that, and we did ask it to reconsider. Of course, the Justice Department said, "What's the big deal? You've just denied certiorari in February or March and it's now only April." But on the last day of the term in 2007 astoundingly, they said, "We'll hear it."

Then we were coordinating everybody to file lots of amicus briefs. Everybody agreed that, if Seth could do it, he should argue it because at that point he had argued, I think, forty-nine Supreme Court cases. He had just gotten the Supreme Court to agree that applying the death penalty to juveniles is unconstitutional, so it was clear that he was an extraordinary appellate advocate, and we would all be very lucky if he would do it. He agreed to do it, and he did.

Q: There were a lot of things happening.

Oleskey: Sure.

Q: Let's step back for a moment.

[INTERRUPTION]

When you describe going through the procedures—the shifting nature of the environment within which you're arguing new legislation, etc., different decisions at different levels—this means that within WilmerHale you were constantly working, and revising, and thinking—

Oleskey: Yes, and eventually moving from a trial team of myself and Rob Kirsch to involve people who were appellate specialists, including particularly Seth Waxman and Paul Wolfson, and here, Mark [C.] Fleming, who had relatively recently been a Supreme Court clerk and was establishing an appellate practice here in Boston at WilmerHale.

Q: And also a lot of associates who were doing this background research and drawing up the briefs?

Oleskey: Sure. I think I have calculated that we may have had twenty-five lawyers at one time or another working on the case.

Q: I saw the figure $25 million, which you estimated that WilmerHale put into it.

Oleskey: I think now it's probably $27 million, in terms of time, had we billed it, and about $3 million out-of-pocket.

Q: Does the firm ever come and say, "Oh, wow!"

Oleskey: No. All they ever do is ask once a year what the budget is going to do, and ask me, as they would in connection with any pro bono case, "We assume that you're running this as prudently and well as you would any other case."

I say, "Yes, we are. Here's what we're doing. I know that we're all paying for this, that it's a lot of money, and we are very appreciative that the firm stands behind it."

Q: This is an odd thing to say, but it must be a rich experience for the younger lawyers involved.

Oleskey: Well, it's even a rich experience for me. Sure. It is.

Q: It's terrible to think about that.

Oleskey: Well, one lawyer who became a friend of mine on the case left the firm two years after the trial, and he basically said that the case was the "high point of my life to date, and I couldn't just come back and practice law like I had been after that case. It just wasn't the same." But I think everybody's been transformed. Of course, some of the lawyers have met the families. Most of the lawyers have been at least once to Guantánamo, and they've met the clients. So they have the human connection, and not just the legal theory of what it's all about. I think it's made them very proud to be lawyers in this place, as it should.

Q: Were the meetings to say, “Let's work out a common response to [*Johnson v.*] *Eisentrager* [1950]—something like that—where you're meeting people from the CCR or other places?

Oleskey: When you're briefing in the circuit court or briefing in the appeals court, typically—as you might in any large public-interest case, whether it's involving a paying client or not—there is a group of people who are interested in the case, and you want their input to see what they think about how you frame the issues and the facts. You tend to circulate drafts of the briefs, ask for comments, and then, in each case of a Circuit Court argument or Supreme Court arguments you have two or three moot courts, where lawyers from CCR and the other advocacy groups—

Q: That's what I was trying to get at.

Oleskey: —and the major groups would all participate. I did two of those, because I argued twice in the Circuit Court from 2005 to 2006. Then I think we did three for Seth before the Supreme Court argument, and everybody really pitched in. You do them because they're so helpful. Maybe at the Supreme Court level the Supreme Court asks tougher questions than the mooters do, but generally the mooters ask tougher questions than anybody who's examining you because they're steeped in the case and they know every single issue.

Q: Did you have any contact with the Uighurs counsel?

Oleskey: [P.] Sabin Willett?

Q: Sabin. Yes. He's right down the street in Boston.

Oleskey: Yes, he is. Sure. He's in the same town with us here, and we all had dinner at Sabin's house one night and just debriefed with our spouses about what it was like—a context in which the spouses are usually only hearing tiny little pieces, but they're giving up a great deal of you to these cases because you're not there for them often.

Q: Actually, that's something I want to come back to next time, perhaps—how this affects you, personally.

But let's talk for a few minutes about Seth Waxman, and the ways in which he came to argue the case before the Supreme Court. Was that always a logical possibility?

Oleskey: I remember it was always a prospect as long as he was our partner, and could make the time in what is a very, very busy appellate practice, to do this. I think he spent seven hundred hours in 2008 on the case, which is an extraordinary commitment of time because most people can do 2,000 billable hours, say, or maybe 2,200 or 2,300. So here's a guy who, at that point, I think, is in his late fifties, who put in roughly a third of his time in the year on this case. I knew he was committed, and I could see that he was immersed in it, but I had no idea, until I looked at the case report at the end of the year, how much time he had spent—which was amazing.

Q: We'll get to the Supreme Court eventually on this. But the *Al-Odah* [*v. United States*] case was merged with your case. Did you have any previous knowledge of the history of the *Al-Odah* case?

Oleskey: Sure, because it had ultimately been the *Rasul* case, way back in 2002, and then at the Supreme Court in 2004. When we argued the dismissal motions appeals in the Circuit Court, Tom Wilner argued half of the time that we had allocated, and I argued the other half of the time. So I knew the general background, and we were trying, obviously, to make our legal arguments fully consistent.

Q: I've interviewed Tom Wilner and David Remes on this. The transition was not an easy or a happy one.

Oleskey: Which transition?

Q: When Tom left the case, or when he was let go, essentially. As I understand the story, the clients went over to Pillsbury [Winthrop Shaw Pittman LLP].

Oleskey: We always understood that his clients were—that his clients' case was being funded by their government, and he was anomalous, in that he was the only lawyer who was being paid, as far as I understood. And yes, something happened, and the case then went over to Pillsbury. Then Remes had been at Covington, and Remes left, and Remes was on his own. There were a lot of transitions within the case, and they are what they are. You have your clients to represent. You have the larger interests to keep track of, and you move on.

Q: Are we in to the ten minutes?

Oleskey: I think we probably should break. I apologize. I obviously didn't know my dog was going to be sick.

Q: I've done this for years and that happens all the time. All the time.

Oleskey: You'll never believe what he said. He said the dog ate his homework.

Q: Good note to leave on.

[END OF SESSION]

VJD | Session Two

Interviewee: Stephen H. Oleskey | Location: Boston, MA

Interviewer: Ronald J. Grele | Date: February 5, 2012

Q: This is an interview with Stephen H. Oleskey for the Columbia Center for Oral History Guantánamo project. This is the second session of the interview with Mr. Oleskey. Today's date is February 5, 2012. The interview is being conducted in Boston, Massachusetts at WilmerHale. The interviewer is Ronald J. Grele.

I know you haven't been able to look at the transcript, but I did, and I have a couple of fill-in questions I want to ask you. When you met with your clients for the first time, did they tell you about how they had been treated at Guantánamo?

Oleskey: I think they told us a little bit, but not very much.

Q: Not very much. When did it become apparent that they had been brutalized or tortured?

Oleskey: Over the course of the following year, probably starting with the third interview. I think the clients had varying degrees of trust with us at different times. Some trusted us earlier than others.

Q: What could you do about it? What was possible to do about it?

Oleskey: It wasn't possible to do very much. It was the effect of what had already happened. What you could deal with was to try to prevent it from happening again, and to take into account their state of psychological damage as a result of what they'd been through. On that latter point, besides whatever skills we might have brought after sixty or seventy years of practice collectively between Rob and myself, we could and did consult psychiatrists who specialized in victims of torture, to gain their insights about how to be most useful and effective.

Q: Was there anyone there at Guantánamo that you could protest to, to get them to stop?

Oleskey: By the time we got there at the end of 2004, I would say that the worst excesses had stopped, probably at the beginning of that year. We were in contact with the ICRC [International Committee of the Red Cross], which went regularly to Guantánamo to monitor conditions and see prisoners. With the exception of Sabir Lahmar subsequently being put into real solitary confinement for fourteen or fifteen months, I don't think we felt there was active mistreatment of the egregious sort going on, which had happened before. Another exception after that date would be Lakhdar Boumediene being force-fed for I think about two years before he was released because he was on a hunger strike. That's a very brutal and brutalizing treatment involving having a feeding tube inserted twice-daily through your nose. From listening to him describe it, I think it must be agonizing, particularly since he had only one nostril that could be used to do this, so that was the nostril that was always inserted.

Q: I read his piece in the *Times* where he talks about going on a hunger strike and being force fed. What were the effects on him as you saw them? He describes them to some degree, but tell me how you saw them.

Oleskey: As I saw them, it redoubled his conviction not to give in to the system, so in a way he became stronger and stronger in protesting being held indefinitely without charge or trial. We would also talk about the physical and emotional suffering that he went through. It was very plain to see that he was suffering greatly, but, perhaps paradoxically, the suffering seemed to strengthen his resolve.

Q: Prior to going to Guantánamo, had you met anybody in the Muslim community, or had any relations with Muslims before?

Oleskey: Not noticeably. I had brought Malcolm X as a speaker to my college when I was in charge of the college speaker series, and had dinner with him when he was guarded by the Fruit of Islam bodyguards. But that was a very glancing contact indeed, and a rather formalistic and ritualistic one. So I would have to say, essentially, no.

Q: That would have been before his conversion to Islam.

Oleskey: No, it was when he was very much in Islam, before he left the Nation of Islam group run by Elijah Mohammed, and went out on his own, and was assassinated. That was a quite interesting experience, but that hardly qualifies as much real exposure to people who are Muslim.

Q: How did you deal with that over the period of time?

Oleskey: There are various issues we experienced. One was making sure that you didn't interfere with the five daily prayers that the clients made, particularly. That was relatively straightforward because the camp command structure would always tell you when you came in what time prayers were, and if there was going to be a prayer in the middle of the morning or the middle of the afternoon. As the clients came to be with us, they had the option of either skipping prayers for that sequence or not. Usually, if it was within a period blocked out for conferencing with them, they would say, "Never mind," essentially, as I understood it, believing that "God will forgive me for missing this one because he wants me to get out of here." It would almost always be waived by them. I think there were issues that could have been there that I never sensed about expectations as to whether some or other of us on our team were Jewish, but that never surfaced in any way. We were told that the women attorneys should dress with particular modesty and always wear scarves, and they always did. But I think because these clients all had lived in other places than the Muslim world, or at least the Muslim world of their birth—Algeria—and, particularly, had lived in Bosnia for a number of years, which is a Westernized society, so they were more accepting of women counseling with them than some other clients I've been told about.

Finally, there's the issue of food. Since they're from Algeria, which is a big coffee-drinking society, the men generally liked us to bring big Styrofoam containers of coffee from McDonald's with lots of sugar. We also had traditional Middle Eastern halal foods shipped down that were

appropriate for Muslims—dates, pastries, and so on—and we would always bring those foods in. We initially brought in some magazines, particularly sports magazines, because they were all soccer fanatics. But after a fairly short time, we were not able to do that because of the government's claim that they needed to screen everything for security concerns, so we had to pre-submit everything, and we were never sure if anything got through. It appeared that it didn't get through; it was just put into general circulation for the camp prisoners. That you would send something to a particular client's attention apparently didn't make any difference.

In those respects, that's how we took account of the issues we were aware of, and not talking overtly about things that might offend their sensibilities, such as Christian holidays that we might be participating in. That's just a subset of a general sensitivity to not wanting to talk about things going on in your life that would be painful for them because they weren't going on in their lives. In that sense, the issues were more psychological than cultural.

Q: I ask the question because when I was in London interviewing former detainees, there was a way in which I was struck by not understanding where they were coming from in terms of their own religion, their modes of expression, and assumptions about the world that I was making that were all off in terms of what they were talking about. I was really very disturbed by those interviews. I was just not prepared.

Oleskey: I'm not sure this is responsive to your observation, but I'll offer it anyway. It was never clear to me, personally, how much praying five times a day was driven by genuine religious commitment on the part of any client, and how much it was the prevailing political norm at

Guantánamo that every Muslim prisoner—which was every prisoner—prayed five times a day. By the same token, I'm never sure how much beards were a matter of protest, or, rather, that they weren't allowed to have razors. I always thought it was the latter, but I don't ever remember asking. No one seemed to be shaved. Interestingly enough, now that Rob and I have visited with four of the five clients upon their release, the ones that I visited all seemed to be clean-shaven, as if they were shaving away their past at Guantánamo by shaving away their beards.

[INTERRUPTION]

Q: You did go to Bosnia to meet with the families.

Oleskey: Yes, twice personally.

Q: What was that experience like?

Oleskey: I'd never been to Bosnia, so the first impression is, what's this place that's so different than most places I've experienced? I was particularly interested because I knew that, in one sense at least, the First World War had begun at the bridge in Sarajevo with the assassination of the Archduke and Archduchess. I went to see that site as a matter of historical interest. Beyond that, the wives were living either in Zenica, which is about a two-hour drive, or in Sarajevo. On both occasions, the wives wanted to create a special meal for us where we could come and meet them and the children, enjoy their hospitality, and then discuss with them what our plans were and what we knew about their husbands.

That was very moving because here are these women who are bravely carrying on as heads of family in a society which I understood as being either Algerian or Bosnian-Algerian—the husbands being Algerian and the wives being Bosnian—creating circumstances in which they never would have been heads of family except for the fact that their husbands were in prison for so long and far away from them. They had to figure out how to support their children and themselves—where to live and how to bring up the children—with only general guidance from their husbands, with whom they could communicate only irregularly by mail through the Red Cross. Sometimes they would get a whole batch of letters from their husbands that covered a period of time over the last year or year and a half, as sometimes happened in World War II. It was never clear why letters would come so irregularly, but the assumption is that the government was holding them up because of inefficiencies or as punishment. Who knew?

I thought it was absolutely essential that we meet the wives and counsel with them because they were being victimized too, in a different way but very profoundly, as were the children. It was very personally and emotionally moving for me to meet women who were so courageous and who were in such great privation for lack of husbands and particularly financial support, and come away feeling reinvigorated in my efforts to do something about the plight of the men, if I needed it.

Q: Did you have any sense of how they might have thought about this process, or what had happened?

Oleskey: I think their thoughts were apparently cloudier than their husbands, because at least their husbands had the advantage of being in the prison environment where you could discuss what they were understanding about the American legal and political system with hundreds of other men. These women are in Bosnia—and in two cases, Algeria. Bosnia was faction and strife-ridden at that time—and still—between moderate Muslims, conservative Muslims, and more liberated Muslims among others. Our translator, Slatina, for example, was Muslim but very Western in his appearance and interactions with us. Some of these women were sophisticated women from Sarajevo, essentially a Westernized city. Some of them were from the countryside, and not particularly well-educated. I thought that the women from the countryside were more likely to have been influenced by a conservative brand of Islam—which their husbands, in some cases, had brought from Algeria—than the women in Sarajevo because they were better educated and more sophisticated, and had a stronger sense of cultural self-identity.

Q: We left off just about at the point where we were going to talk about the Supreme Court case and drawing up the brief. I've looked at the brief, and I have just a couple of questions about it. Was there a special way in which you wanted to influence Justice Kennedy? I ask the question because he's the only sitting judge quoted in the brief.

Oleskey: Well, the answer is "sure." It seemed obvious, or at least highly likely, that he would be the dispositive vote. Therefore, as you've observed, the brief was consciously pitched to winning his support as the critical fifth vote, which we ultimately did. Did we talk last time about the signing statement that he and Stevens had issued?

Q: Yes.

Oleskey: There he was publicly—

Q: That was the opening.

Oleskey: —stating that he was open to being persuaded if the new administrative review system that Congress had put in place in the MCA wasn't effective. When certiorari was granted, it seemed obvious that he must have been persuaded that that MCA review system was not effective. Then the question would be—well, not just a matter of being willing to hear the question, but as a matter of deciding the question our way—could we persuade him that this was not the adequate substitute for habeas corpus that the government was asserting?

Q: I was also struck by the ways in which you seem to have wrangled through the history of habeas for any kind of example you could find, from the Channel Islands in Scotland, and Northern Ireland, and India.

Oleskey: Absolutely. Since there are so few consequential decisions on habeas in the history of the country, and since the "originalists"—as they call themselves on the Supreme Court—were clearly going to key onto what was the state of habeas in 1789, when the Constitution was adopted, it was obvious that part of the battle in the briefs and before the court, on all arguments, would be fought over that precise issue. How could aliens held outside the continental United States—or, in the case of Great Britain before the Constitution, held outside the motherland of

Great Britain—be entitled to invoke the right of habeas? Hence, India, the Channel Islands, and other, similar, locales presented themselves as analogies. When it came to the actual argument, Justice [Antonin G.] Scalia and Justice [Samuel A.] Alito [Jr.] were particularly very strong in rejecting each one of those cases as an analogy that they could find compelling, for reasons that are laid out in the transcript of the Supreme Court argument.

Q: What was striking about the Kennedy opinion is that he picked up on it. The first pages are essentially that history that you presented to him.

Oleskey: Well, the way the argument flowed, as the transcript of the argument shows is that if—I think it went over an hour. They devoted an extraordinary amount of time to it—much more than would normally be the case. For the first part of the argument, the justices who we had expected would be unfavorable to our argument were pressing the historical points that you and I have been discussing about whether habeas would have existed for people like this in 1789. I began to wonder, in the course of the argument, what's happened to Kennedy, Stevens, and the other three justices—Justice [Ruth Bader] Ginsburg, [Stephen G.] Breyer, and whoever was the fifth judge at that time, I'm forgetting—

Q: [David H.] Souter.

Oleskey: Souter, yes. Thank you. Why aren't they saying anything? Why is it all the apparent opposition to our position that's asking all the questions? Then, in the course of the argument, I came to think that what was happening is that Kennedy and the four who are likely to be more

favorable are letting the opposition justices, if you will, kind of exhaust this argument on originalism before they get down to what these four-plus-Kennedy really want to hear about, which is, is the process put in place by Congress an adequate substitute for habeas, in which case, extending habeas would be—constitutionally speaking—unacceptable? Indeed, there was a very dramatic moment to me in the course of the argument where Justice Scalia is questioning Seth Waxman, our partner, and keeps on asking for examples of comparable settings for this principle at the time or before the Constitution was accepted—the very things you picked up on in our brief. Seth said, "Well, we've cited *Smith v. Rex* from 1655, in Bangalore, before the Raj, in India," and Justice Scalia would distinguish it satisfactorily for his own purposes and ask for another example. After four examples, Seth Waxman said—in the way that only someone who's been before the Supreme Court fifty times, both as a solicitor general of the United States and as an advocate on the other side, as he was here, could possibly have the nerve to do, and say—"Justice Scalia, at this point, as to your questions along this line, I must retire in exhaustion." The transcript won't show this, but Scalia then sat back in his big black armchair, smiled, and folded his hands. I thought, "Well, this is the moment in the argument when we're going to move on to the next two issues about whether habeas was suspended, and if it was suspended, was the military review procedure an acceptable substitute, and if not, is it unconstitutional to have done what Congress has done?" It was that palpable a break.

Then Seth turned the argument toward those other issues, as he had to, and the other justices began to engage. It was as if a wave had washed through the courtroom and the underbrush that was littering the argument—the originalist piece of it—was swept away and we were getting down to the meat of the argument. You could just feel that unfolding. I relaxed because I thought

we were on strong ground here, and the fact that Justice Kennedy hasn't really weighed in on originalism, but has been holding his questions for what must have led him to grant certiorari, to vote for granting certiorari, and what must have led him to believe that these other issues were the critical issues—now that's going to be argued. And that is, in fact, what happened.

Q: Tagged on the end of your brief is a discussion of Israeli policy. Was that put in the brief consciously?

Oleskey: Everything in a brief like that is put in consciously.

Q: What was the thinking behind that?

Oleskey: The thinking behind that was that the Israelis have been through four decades of security issues that are much more pressing and real than anything we've experienced in this country, save for 9/11. And even 9/11 was a single episode launched by people who had a one-time shot to do the country damage, but were not exactly sitting in New Jersey, waiting to re-attack New York—unlike what the Israelis see themselves encountering, and often do. We thought that if they had worked out a way to be more humane in their treatment of prisoners, then that would be seen as some kind of model—which wouldn't control the outcome in our case, but it might be of interest in our case to say that you can have both security and a fair process. That was the thought about why that was put in there.

Bear in mind that there were probably twenty-five amicus briefs on every other conceivable issue, expanding beyond what we could do in our brief, including extensive briefing on the issue that you brought up a moment ago about the state of habeas in 1789—a brief of law professors on that very issue. They could go on and on at great length, expanding on the points we had made.

Q: How did you organize the amicus briefs?

Oleskey: We worked with other groups coordinated by people like the Brennan Center [for Justice] at NYU Law and CCR, who said that these law professors would like to offer a brief, these former military officers would like to offer a brief, this human rights group would like to offer a brief—fine. That sounds like it would be useful. Why don't they talk about X, or Y, or Z, or sometimes they would just bring us pre-packaged, if you will, what they wanted to do, and we would say, "Okay. We're arguing these following four points. We're not going to be able to devote more than a page or two to such and such an issue, such as this issue of what the state of the law was in 1789. We would love to have an amicus just focusing on that issue. By this time, it's 2008 and this issue's been out there since 2002, so there's been an awful lot of thinking and researching done about it. There was quite a bit that could be offered. In the final analysis, that doesn't seem to change anybody's mind on either side at the level of the Supreme Court, not surprisingly. But I think we assumed that you have to show the four justices probably leaning our way, plus Justice Kennedy, that there's a creditable originalist argument so if they feel comfortable going by that to get to the meat, as opposed to having to be defensive about the

originalist point, and then weakening their commitment to deal with the major issues in the case, as we saw them.

Q: Had you observed the Supreme Court before?

Oleskey: Yes. In fact, I had argued there twice.

Q: Oh, really? What cases were these?

Oleskey: I argued a commercial case in the late 1970s or early 1980s [*United States v. Erika,* 1982] and I argued a civil liberties case there when I was about twenty-seven or twenty-eight.

Q: When you were at Hale & Dorr then?

Oleskey: Yes.

Q: It's off topic, but what—?

Oleskey: The case was called *Peteros v. Richardson*. Ms. [Lucretia] Peteros was a social worker in Massachusetts who was about to be offered a job in the state government as some kind of social worker, and she had to take a loyalty oath which involved, in particular, one oath that said she would support and oppose any attempt to do violence to the Constitution or Commonwealth of Massachusetts, resisting, if necessary, with force or arms. That's a paraphrase, but that was

what the state loyalty oath for employees said in substance. She said, "I don't think I should have to agree to take up arms to defend Massachusetts in these vague circumstances because that infringes my own conscience. That's not what I believe. I'm a loyal, abiding citizen and I shouldn't have to go beyond that." We took up the case as a pro bono matter when I was about a second-year associate, so that was around 1970. Then the older lawyer who had the case left the firm, and senior responsibility for it fell to me. A year later it was in the Supreme Court, and I was standing up, arguing it.

Q: That issue went all the way to the Supreme Court?

Oleskey: It did. We lost four to three, but that's where I learned that there are different ways to attack an issue, and that while you might lose in court, you can continue to work legislatively to have the underlying statute amended if you are persistent enough. The Massachusetts's Civil Liberties Union and others continue to advocate after we lost the case in the Supreme Court. The statute was eventually repealed, so we did win the issue for Mrs. Peteros-Richardson. *Cole v. Richardson* is what it was eventually called, and she was Ms. Peteros, who had married Richardson. That's it.

Q: When you went to court on the day of the argument, what did you feel? Were you optimistic?

Oleskey: First of all, it seemed that the four justices whom we assumed had been originally for certiorari, but had felt that they lacked Kennedy's votes on the merits, were still with us. We thought that if Kennedy's questioning was indicative of his state of mind about the merits, it

indicated he would be favorable to our position, and we might well win five to four. We thought that Seth had made a brilliant argument, particularly his rebuttal, which I might have described in the last session.

Q: No, I don't think you did.

Oleskey: No? I've talked about this case so many times.

Q: No.

Oleskey: Well, the night before the argument, in preparation, Seth had remembered that there was a case involving a former Guantánamo detainee who had come from Germany [Murat Kurnaz] and who was being held there in Guantánamo around 2006 or 2007, when his habeas lawyer was counseling with him on a particular occasion. The client said to the lawyer, "You know, the interrogators have finally told me that I'm being held because one of my close friends," a fellow Turkish-derived German resident or citizen [Selcuk Bilgin], "was a suicide bomber and blew himself up in an act of terrorism. They think I had something to do with that because I was close with him."

The lawyer said, "You never told me this before."

Kurnaz said, "I just learned about it in interrogation," so the lawyer went back on the flight to Fort Lauderdale, went back to his office, wherever that was, and called, through various

inquiries, and finally ended up with the lawyer for the suicide bomber in Germany, who said, "I'm glad you called to clarify this, because I represent X [Bilgin]. He is not a suicide bomber, he was never accused of being a suicide bomber, and he is in good standing as a resident or citizen of the Federal Republic." The lawyer, then, was able to prevail upon the U.S. government to have Kurnaz released by exploding this false story.

Somehow, Seth had tucked this away in his recollection, in the briefings that we had given him in the course of his work on the case, and he said, "Would you call the lawyer for Kurnaz and review this story again? I want to make sure in case it comes up." I think we must have touched on it in the brief, that I've got this story down cold. So that is what happened. Then, in the course of the argument, Seth had reserved five minutes for rebuttal, and the solicitor general had made this point—his major point, really—that the Combatant Status Review Tribunal procedure, coupled with the administrative review that Congress had mandated through the Circuit Court of Appeals, was the functional and legal equivalent of habeas corpus. Therefore, there was no constitutional crisis because Congress had done what it had done previously—enacted an adequate substitute for habeas corpus.

Seth decided, I believe in the spur of the moment—as you have to, as an appellate advocate during an argument—that the main thrust of his rebuttal, in his five minutes, would be to tell the story of this Turkish German prisoner—Kurnaz—and how it happened that the Supreme Court had said in 2004 that we could have the conditional right to pursue habeas. Therefore Kurnaz had a lawyer who went there, was able to find out why the government thought he was being held, and then to establish, beyond doubt, that he was being held for a reason that was not factually

accurate at all. If that was the only reason the government was holding him, he should be released. As Seth began to tell this story to the court in that packed, hushed courtroom, with all the flourishes that you can imagine that he had carefully established to be credible the night before, the courtroom became especially quiet and the nine justices sat back in their chairs and listened to the story. The red light went on, meaning that it was the end of Seth's time where he should have been cut off at the end of the sentence—and this was the last argument of the morning. You can see that the chief justice [John G. Roberts, Jr.] appeared to be impatient to call an end to the morning's proceedings so they could all go off to lunch, as they had every right to do, but the story was so compelling, so apropos, so effective, and so riveting that he let Seth finish the story, which took another thirty or forty-five seconds. Then the courtroom was silent, as much as that court can be silent at the end of a totally absorbing argument. The chief justice pushed back his chair, stood up, and said, "Thank you. That concludes the argument," and they all left.

We all thought, "Wow. Wasn't that really brilliant of Seth to have fished out that story last night, and then decided that that was the factual point to make about the key legal issue, that would be the most compelling thing he could say in rebuttal—to have done it, and to have done it so well?" I thought if there was anything that might have pushed Justice Kennedy over the line—if he needed it at that point—it would have been that example, so brilliantly remembered and told by Seth.

Q: Where were you when you heard about the decision?

Oleskey: I believe that we were at our annual partner's retreat in Washington. The decision came down, and we were able to talk about it. It was very exciting.

Q: The whole partnership of WilmerHale was there?

Oleskey: Right.

Q: That must have been a moment.

Oleskey: It was. It was gratifying because if they hadn't been supporting us, the trial and appellate team, in pursuing it, we couldn't have done it. If they had all decided it was costing too much financially or reputationally—because, from time to time, we were being attacked as lawyers who enabled terrorists, particularly in one instance that I recall—then we never could have done it. The result might well have been different, because of the amount of resources we were able to summon all the way through, including, and obviously especially, being able to write a brief that was effective enough to have certiorari granted, after it had originally been denied, and then to have Seth make this brilliant argument.

The one time I was a little nervous was when a man named Cully [Charles D.] Stimson, who was the Deputy Assistant Secretary of Defense for Detainee Affairs, went on some conservative talk show in January 2007 and, apparently by pre-agreement with the host, the host said, "So what have you to say as the principle official in the Defense Department responsible for dealing with the men in Guantánamo about these prominent American law firms that are enabling these men

to have counsel at a very sophisticated level—those men who are the worst of the worst, and who are dedicated to our destruction?"

Stimson, who was a lawyer and who could have said many things, said, "I'm glad you asked me that." Establishing, I felt, that this was not something that just happened to be brought up, but that he had been prepared for. He said, "The following firms are not doing this country any service, and I hope their clients will remember that when it comes to employing them for commercial cases." Then he reeled off the names of ten or so of the major firms that were involved, including ours. You wondered, in the next couple of days, what would happen as a result. What happened here, that I'm aware of, was that several general counsel of major corporations emailed either the people who dealt with them here or our management and said, "We didn't know you were doing this, but this is really terrific because it's in the best tradition of American lawyering. If you guys are tough enough to take on the Bush administration on this terrifically difficult issue where they are so aligned against you, then you're certainly tough enough to take them or other opponents on for us."

That was one thing that happened here. The other thing that happened, externally, was that lots of bar associations rallied around what I'll call the John Adams notion, coming out of the pride we all take here as Boston lawyers. Adams, in deciding to defend the British soldiers who had perpetrated what came to be known the Boston Massacre, said, "If no one else will defend them, I will. It's an unpopular cause, but this is all about a new country that we hope to create in which people will have representation even for unpopular causes." You felt that particularly strongly, lawyering in Boston. It was very satisfying to have bar associations all over the country reaffirm

that principle in the face of these remarks by Mr. Stimson, and to have newspapers all over the country editorialize along those lines. That was when I felt we were winning the battle for public opinion at the level of people who cared about the issue, in newspapers and in politics, and among the organized bar—which can be a pretty effective force on issues like this if it wants to. It did become a pretty effective force on this issue.

Q: How did you end up with Judge Leon again?

Oleskey: We ended up with Judge Leon because the case was randomly assigned to him when it came in, as other cases were randomly assigned to half a dozen or more other judges. Then, when they were pooled, before Judge Joyce Hens Green who was asked to sit on them all, for pre-trial coordinating purposes, just before motions to dismiss were going to be argued, Judge Leon pulled our case back so it wouldn't be heard by Judge Green who was hearing all the other cases, but he would decide, himself, on our motion to dismiss. He did decide fifteen days before Judge Green decided, and he upheld the government's position and dismissed our case. She denied the government's position and ordered the case to go forward, which was what then happened, from early 2005 until 2008, although mostly in the Court of Appeals.

Q: I got the impression, talking to Rob [Robert C. Kirsch] this morning that going before Judge Leon, the government opposed you at every step.

Oleskey: Yes. That's true.

Q: Formidable?

Oleskey: Well, the Justice Department is full of very skilled lawyers—the ones you see in court and the ones you don't see in court who are supervising and managing the cases. Then, beyond that, in this case, you knew that you had the Defense Department, the State Department, the CIA, and other intelligence agencies all supporting the government's effort, with all kinds of classified information and classified positions that you would never see except insofar as they were referred to a legal argument in your case.

It was pretty formidable, and it seemed clear, for the most part in the proceedings, up to the time that the trial began, that Judge Leon was more sympathetic to the particular positions that the government was advancing, than he was for our positions. It seemed formidable because he wasn't showing much sympathy for many of our arguments, or for much of our request for discovery, and the government was so dug in against us. He seemed to be favorable toward them. When the trial proceeded, and it became clear that he was struggling to articulate rules of law that were new and untested in many respects—in a pretty novel situation for a federal trial judge—and he was, I think, conscientiously trying, in many respects, to do his job as a federal judge, to be impartial and interpret the statutes and the Constitution. It was a great relief that he could find those reserves to do that, even if, on many issues, he ruled against us. He was persuaded by the thrust of our case as to five of our six clients and ruled accordingly. Then he said in reading his decision on November 20, 2008, that he asked that the government not appeal the case. That was pretty remarkable.

Q: What could you do about the secret information that they supposedly had?

Oleskey: You could insist that it not come in unless you were able to see it and deal with it, and look to the judge to decide that, as a matter of fundamental due process, if he was going to look at evidence you'd never seen, you had to have some opportunity to see it yourselves and respond to it. If the problem was that it was classified at a higher level of security classification than anybody on our team held, you'd have to ask him if he would say to the government, "All right, if you want to offer this for me to look at substantively, as opposed to this is what you would offer, presumably, if I would see it, as a matter of evidence, then you have to show it to them. If they need higher security clearances for you to show it to them, you'll have to decide whether you're going to give them those clearances as a matter of what your clients say their ultimate interest is in the totality of these cases, including this one." I would assume that something like that was said, probably between Judge Leon and the government in hearings to which we were not party, and the government presumably said, "Our clients don't believe that they're willing to increase the security clearance for one or more of the trial team to see this evidence. So if your honor is saying that you won't look at it as a matter of evidence in chief, in the case, unless they get to see it, I guess we can't offer it because they can't see it."

Q: Did there ever come a time before the trial where it was thought necessary to divide any of your clients? It ended up five to one.

Oleskey: It always seemed, because of the way the government advanced its case against the six men—both the case that was public and the case that was classified—that they were singling out

Belkacem as unique among them all, as the evidence began to get compressed, as we got closer to trial. They singled out Belkacem as having done things that were more serious than the other five. When we got close to final argument and we had basically divided up the argument in the trial—which proceeded document by document, client by client issues, even though it was a consolidated hearing for all six men, with Rob mainly dealing with the three men that he had, historically, seen in Guantánamo, and I mainly dealing with the three men that I had, historically, dealt with. Then other people were pitching in like Mark Fleming and Greg [Gregory P.] Teran, our partners, particularly arguing legal issues while Rob and I were dealing with the facts because we had dealt with them the longest.

As the case got toward the end of the trial, which was around a six-day trial, it became clear for a variety of reasons that the evidence that the government had ultimately put in did seem to distinguish between Belkacem and the other five in degrees of seriousness. Therefore, even though that somewhat gave credence to the government's point to argue—for one of us to argue for Belkacem and the other to argue for the other five—ultimately it was simply recognizing the reality that that was the way the government had put in the evidence, and we would have a better chance of having the five men ordered released if one of us argued for the five, and implicitly but not explicitly distinguish their case from Belkacem's. Because you couldn't explicitly distinguish it completely without pointing a finger at Belkacem, which we couldn't do because we also represented him. So I argued for the five on final argument, man by man, that what they did didn't begin to approach meeting the government's burden, which the judge intimated he might believe and conclude, during the course of the trial. Rob, who, historically, had dealt with Belkacem mostly, at Guantánamo, argued for Belkacem. We had previously explained to the

clients that we might do this, why, and that we wanted them all to be comfortable with this approach.

I think it was the right strategy because in the course of that argument, which was all classified, it seemed that the judge was most concerned about Belkacem and much less concerned about the acts of the other five. By this kind of symbolic and actual division of five and one, you kept the Belkacem evidence from tarnishing, if you will, the other five men's cases with the evidence the government was offering against Belkacem. It was a very painful decision for us, and you can only hope it was the right decision, because it resulted in the release of the five men within about, I guess, eight months.

Q: How effective was the testimony of your clients?

Oleskey: That's hard to say. I felt at the time it was not particularly effective because we had them give only a general overview of their lives and a general denial of the charges against them. The government, for whatever reason, chose to use a very junior lawyer to examine them, and instead of sending the junior lawyer to Guantánamo, where they were testifying—did it by telephone from the courtroom in Washington.

Q: Yes, I read that. I couldn't believe how shallow the cross-examination was.

Oleskey: It was done by a very nice, young, apparently rather inexperienced lawyer. This was at a point in the case, in early November 2008, where Barack [H.] Obama has just been elected

president, so you couldn't help wondering—and this is only the rankest speculation on my part—was the Justice Department beginning to rethink its position in this case around the edges a little bit? Or at least its tactics? Because someone who would be president in a little over sixty days had taken a very strong position on habeas and related Guantánamo issues that was counter to the present administration and the present Justice Department's views of this, and similar cases. Could that have influenced a tactical decision about who did the cross-examination? It could have. Or it could just be that they had promised this young lawyer that he could examine someone in the case. When it became clear that our clients weren't going to be allowed to give testimony that went on, and on, and on, in great detail, it seemed likely that a kind of a summary direct would be met with kind of a summary cross that would seek to minimize the whole impact of the client's testimony whatsoever, by not making it anything more than it was—half an hour of direct, half an hour of cross, "Thank you very much, your honor. We told you this wasn't needed. No big deal. Let's go back to the classified evidence, that's really what we want you to see." It's equally, if not more plausible that that could have been the way the government approached it.

Having said that, you never are able to tell, except through an opinion, what the impact is on any particular piece of evidence, including the credibility of your clients in a case, particularly a case like this which is, although denominated a habeas corpus civil case, in many ways has many of the trappings of a criminal case, given the underlying issues, pretty obviously. So I would like to think, but I don't really know if the fact that these men appeared to be well-spoken, non-ideological, denied looking the judge in the camera-eye. That the things they were accused of doing they had done—did that influence him one- or two-percent, or five-percent? As a trial lawyer, you think these impressions on judges are all so incremental and cumulative that you're

never sure where the tipping point is reached. Maybe that put a little bit of our weight on our side of the scale because at least it wasn't a negative, and it showed that we weren't running away from having them stand up and look the judge in the camera eye and testify straightforwardly about who they were and the injustice of their being held there as they saw it and, obviously, as we saw it—but we couldn't be witnesses and they could.

Then we had to decide who would make the best witnesses—not knowing what kind of cross-examination the government would give—who, if the government cross-examined vigorously, could best stand up to the cross-examination.

Q: From that very brief piece that I gave you—

Oleskey: From Paul Winke.

Q: Is that how you pronounce it? Obviously, the testimony by the two clients had an enormous effect on the detainees.

Oleskey: Yes. I think it was a moment when they began to regain their stature as free men because they had participated in something that free men, even those accused of crimes, or are held for crimes, without trial, could dispute and rebut. I think that, as the Winke article shows, they straightened their shoulders a bit and held their heads higher. I think it was a moment of some empowerment for them, even for those who didn't testify, because we concluded that, for whatever reason, they wouldn't be the most effective witnesses for their own cause.

Q: It's a lovely little piece.

Oleskey: Yes, it is. I'm glad you brought it to my attention.

Q: When you left the courthouse that day, what did you feel was going to happen?

Oleskey: After we concluded the final arguments?

Q: Yes, after you concluded the final arguments.

Oleskey: I think we felt that if Judge Leon stayed with the positions he had developed in the course of the trial, we had at least a fifty-percent chance of prevailing for the five, and maybe a twenty-five percent chance of prevailing for Belkacem, depending upon what legal standard the judge adopted to determine whether any of them could be held. There were competing legal standards being argued for—not just as to the quantum of proof, necessarily, but also what's the legal framework that their acts had to fit into for them to continue to be held. The judge hadn't been very encouraging on that latter point about the legal standard, so we thought, “Well, even if he stays with his position on the legal standard, it seems likely that we have at least a fifty-fifty chance of having him decide that everyone but Belkacem can be ordered discharged, and the writs granted.”

Q: And when you heard the decision?

Oleskey: We were in court. He called us in, and the head of our litigation department came, who had been very supportive of the case—a partner named Howard [M.] Shapiro who had formerly been a counsel to the FBI, so he had seen both sides of these issues many times—was fully invested in the notion that, not knowing what our clients might have done, that they deserved the kind of representation that the firm could give and did give. So he was sitting there. I was sitting at the counsel table with Rob, and Greg, and Mark, and others, and he was holding my wife's hand in the audience benches. Judge Leon began to read the unclassified portion of the decision, and it became apparent after five or ten minutes, that we had gotten the best result we were likely to get, which was five of the six. It was an immensely moving moment, certainly for me, where you feel quite emotionally overcome by what your efforts have helped to achieve. It was probably one of the several most moving moments in the case for me, another being meeting with the wives and children, and the third the time I had to come—did I mention this?—and talk to one of the clients about his daughter's death.

Q: Pardon?

Oleskey: Did I mention that?

Q: Very, very briefly, but we didn't get the whole story.

Oleskey: One of the clients' daughter had a congenital heart disease or defect, and we had learned, through him and through his wife—

Q: Which client is this?

Oleskey: I've always felt that I shouldn't say which client of ours it is, just for reason of his own privacy and dignity. We had become aware through him and through his wife that the daughter was about to die because there were no medical facilities in Bosnia that had the sophisticated pediatric surgeons that were necessary to do the heart operation that might save her. Working with our Berlin office, which was very helpful, we had arranged for a pro bono operation in a noted German clinic near Berlin. She was going to be flown from Bosnia to Berlin, then she would be operated on. It happened that I was about to go down to Guantánamo with Rob to see the men, and three days before she would have been flown out to Germany she died of the heart condition in Bosnia.

I went down and told the camp authorities what had happened, asked if I could see him the afternoon before our scheduled visit the next days. To their credit, I think, they said yes. I did see him a day early. I walked into his interview cell, he looked at me and I looked at him, and he said his daughter's name. "She died, didn't she?" He just knew, looking at me, that she had died. I was overcome, and he was overcome. We talked about that for about half an hour. Then I said, "They're letting me see you a day early, and I imagine you would like to have some private time now, and we'll have the interview that I planned for tomorrow."

He kind of straightened his shoulders, shook his head, and said, "You know, you've come a long way here. I can't do anything about my daughter's death right now except grieve privately. Let's talk about my case, because that's what we need to do." So we did.

Q: There must have been a lot of moments like that.

Oleskey: Yes, particularly ending an interview session with somebody to whom I could only offer our legal strategy, which might or might not be successful, and my own commitment and belief that we have a legal system in which I and my colleagues could operate, and ultimately hope to find principled judges who would apply the law as we saw it, despite the passion in the country that had risen after September 11. It seemed that the passage of time, as it does in so many things, was eroding some of the anger and distrust, and all the hatred that had arisen, that the administration seemed to fuel at times by people like the vice president talking about the worst of the worst, as if all these men were the same, and should all be condemned to being held forever, no matter what their connection to September 11 might have been—remembering, of course, that the Authorization for Use of Military Force of September 2001, under which our clients had been arrested in Bosnia and then shipped to Guantánamo, seemed to be, on its face, all about apprehending those who were responsible for September 11—not people who might be felt by our intelligence agencies to be a threat to us in some more generalized fashion, but who were actually responsible for September 11.

As time moved on, I thought that the media, the political system to some extent, and the judicial system to some extent, became more willing to hear principled legal arguments, which made it

more plausible that we might prevail. Still, when you're going there to Guantánamo in 2004, 2005, 2006, 2007, 2008, up to the time of the Supreme Court decision in June 2008, and all you can say is, "We filed the latest brief, we had the argument, we think we might win by five to four," it's got to seem very hollow to these men. I think it was in that context that the letter that I mentioned that Mustafa had written to me in April 2007 has to be seen.

Q: When Judge Leon handed down his decision, he also urged the government not to appeal, and they didn't.

Oleskey: Right.

Q: Which meant that you were then charged with trying to get your clients out?

Oleskey: Right. Well, we started trying to get them out as soon as we had achieved the decision from Judge Leon, without respect to whether or not the government might appeal. Rob really led, and has led, that effort. For reasons I don't recall, he was in Washington, or he volunteered to go to Washington and work with the French embassy. He cultivated a relationship with the French embassy that was so strong that, in 2009, we were invited to their embassy's formal Bastille Day festivities—champagne, canapés, the *Marseilles* and all the rest. He really did a brilliant job, much more than you would think life would have equipped someone from Methuen, Massachusetts, who was an environmental lawyer to know about. He turned himself into a diplomat lawyer, which he carried off brilliantly, and still does. Unfortunately, in a way, the

high-water mark of our success was in 2009, before the Congress had made it so very difficult if not impossible to have people released, as it has done in 2009 and 2010 and 2011.

He's working just as hard now, but the rock that we have to roll up the hill, diplomatically and politically, is so much bigger than the one that we were facing at the end of 2008 and into 2009.

Q: You hit just that window of the early days of the Obama administration.

Oleskey: We did. We often wondered if it was a good or bad thing that we were the first case that was dismissed after the 2004 Supreme Court decisions, and the case that went up to the Supreme Court, and the first case tried—because Judge Leon felt, after the Supreme Court decision, that he was going to clear his calendar and try his cases first. But it turned out, in retrospect, to have been a very good thing that we got there first.

Q: Has the firm carried on with Bensayah [Belkacem]?

Oleskey: Still are.

Q: Still no resolution at all?

Oleskey: No. We were there in October 2011 to see him, and we'll be there probably in April 2012 to see him.

Q: But you did bring an appeal to the D.C. Circuit of his habeas denial?

Oleskey: We won two to one, but the decision wasn't that he should be released—it was that Judge Leon applied the wrong legal standard, and the case should go back and be tried again in front of Judge Leon. Since then, we have asked, first, for the government's assent, and more recently, with the government's agreement not to oppose, for a series of extensions on asking for reconsideration of that two to one decision, for clarification. The government had originally asked the court to hold off on the date for its filing of an appeal so we could all pursue a diplomatic solution to get Belkacem home because, in the meantime, the Obama administration had gone through this administrative clearance procedure between January of 2009 and June of 2009, and a number of people had been cleared by panels to go. I guess we're not allowed to say what happened with respect to Belkacem, but whatever it was, it was sufficiently encouraging that we could feel comfortable pursuing diplomatic solutions—none of which have been successful because of the congressional enactments and, I think, the timidity of the Obama administration originally in 2009 and 2010.

Now, the hurdles that have been erected by Congress that you have to jump through, that maybe don't make it impossible, but make it much more difficult than the administration wants to carry on—or that, perhaps, any foreign country wants to go through to please the administration. The Western European countries that were at the forefront of taking people who were, if you will, sometimes stateless, and couldn't go back to their Middle Eastern countries of origin, which were then more repressive than some of them are now, have felt, it seems, that they've done their part, and they don't owe a no-longer-new president any favors. They have their own issues. In some

cases like Italy and France the current government seemed to feel that they have their own problems with French Muslims and Italian residents and citizens, and they don't want to—they're playing to their non-Muslim constituents by being hard-over on immigration issues, so why would they bring in somebody from Guantánamo? That seems to be what they're thinking.

Rob has been to France to talk to the government several times, as I'm sure he related to you. We've continued to stay in touch with the Bosnian government because there's an outside chance that Belkacem could go back to Bosnia, where, after all, his Bosnian wife and daughters are. That doesn't seem to be very real at the moment, but maybe things will change. Maybe after the next election Congress will decide that it's really not a good thing to hold people indefinitely.

Q: Do you stay in touch with any of the five?

Oleskey: From time to time. Boudella and Ait Idir have been trying to raise money to establish a business in Sarajevo, through the help of an Austrian diplomat [Wolfgang Petrich] who came to know their case when he was in Bosnia in 2001 and 2002. As of a couple weeks ago, I think, there has been some success raising some money, which will help them. We've been in touch with them about that. Then, as you may know, Boumediene has become something of a spokesman in the human rights community for Guantánamo detainees. He's such a fundamentally decent and well-spoken person who can both detail the outrages that he suffered and the fundamental and irreparable dislocation done to his life, but not seem to be wholly consumed by those things. We, the public, with our non-advocacy hats on, want to believe in redemption as much in this area, I think, as we do in any other area. The tale he tells is a very

appealing one of great suffering that he's still experiencing, but also some possibility of redemption—the birth of a child, recently obtaining his driver's license for the first time in France. Small steps, toddler steps, but which are huge steps for someone who has been as brutalized, physically and emotionally as he was.

So yes, we follow it. Once a year or so I hear from Mustafa and from Mohammed Nechle in Algeria, who sent pictures of his new child. I balance off the fact that Mohammed doesn't have a job, and is struggling, and may never have a job because he has a Guantánamo bulls-eye on his back, living in a country that's run by a military government. But the fact that he's free, he's with his family—his nuclear family and his larger family—and he's back in his own culture. I used to talk with Boumediene about how he wanted to welcome me back to his home in Algeria, and about the customs that would require him to be my host, in a profound way. In Algeria, I would stay at his house. If his house wasn't acceptable to me, he would be obliged by the culture and the norms of his community to find a hotel for me. There would be days of parties and so on. I encouraged him to talk about this because it seemed like it was something that could make more real the prospect of his release than simply my endless reassurances about the infinitely complex and problematical machinations of the American legal system.

Of course, he didn't go back to Algeria. He went to live near his wife's sisters, near Nice. When I finally got to see him the summer after he was released with my wife and kids, I took him to a restaurant in the village where he was staying to treat him to lunch and so they could meet him, and he could decompress a little bit on our first meeting. He excused himself at one point, and didn't come back. I knew he was concerned about getting back to his family by whatever it

was—3:00 or 4:00—and he was going to walk up the road to their house. I went to pay the bill and found that this man, who had nothing, had already paid whatever it was—let's say a seventy-five euro lunch bill, $100-some dollars. I realized that that was the meal and the welcome that he and I had talked about, albeit in a different context as occurring someday in Algeria. It had just played out in this little French village, and that was incredibly moving, too.

Q: I read an article from the *Maine Law Review* in which you talked about many avenues to pursue, aside from the courtroom, to achieve—I don't know if you would call it justice or not—to achieve the change you were looking for. I wonder if you could talk about a few of those avenues. You did, at one time, testify before Congress.

Oleskey: Yes. I think I testified two or three times before Congress—

Q: To what effect?

Oleskey: —before the Democrats lost control of the House.

I think the effect was that while the Democrats were in control of the House after the 2006 fall election and before 2008, for two years we were able to stave off the kind of enactments that did take place in 2010 and 2011 that made it impossible, apparently, to have us release anybody from Guantánamo. Testifying about habeas and the inadequacies of the CSRT system—that's an interesting experience because you're called in by the majority, in my case, and told, "Here are the issues we'd like you to address, in light of the pending legislation," whatever it was. I felt that

that had some effect because the legislation didn't pass. Part of what that involves is making a record that the advocates who call you in the Congress will need to rely upon when it gets to the floor of the House, and where someone who's been a JAG officer—as Lindsey [O.] Graham in the Senate has been and is—says, essentially, "I know all about military justice in Guantánamo, and I'm telling you, this is an adequate system." Then there was this record that you helped to make to the contrary that people who don't know what Lindsey Graham knows, but also who are elected representatives can rely upon. That was good.

Working to lobby Congress with the same matters through various human rights organizations that are still out there advocating, as you and I sit here today, was another part of that effort. Working with editorial boards, to help publish op-ed pieces. Working with bar associations to get resolutions of support of the habeas corpus hearing process for the men of Guantánamo. Speaking to community groups, just because of the view we had of our case that no matter how small the group, part of your advocacy for people is to get out there and talk to people. You never can tell who's going to be at that meeting, or who will be influenced by something you said at that meeting.

Those are all things that we did. I had learned back in that case in the early 1970s, the loyalty-oath case, that even if you lose in front of the Supreme Court—as I did, four to three—maybe in a couple of years you can put to the legislature that the issue is a profoundly important one, anyway, and they should do something they haven't been willing to do. So I knew, from forty years ago, that these things could succeed if you pursued multiple tracks. So this, for me, was the ultimate multiple-track case, where you could never know what advocacy, in any particular

sphere, might be influential. You felt like you had to do it in every sphere that was available, or could be made available.

Q: Were there some things that were more comfortable to you than others?

Oleskey: I don't think I had testified in front of Congress before, but after I did it for the first time I could see that, if you were testifying in front of the majority and they're controlling the proceedings that although you can be beaten up some, if you know your field—which, within the tiny confines of habeas and Guantánamo I had become an expert, just by virtue of living it for three or four years—then you can hold your own. I think that was the place I had the least experience in, but I came to like that because I felt that was a contribution I could make that was outside the courtroom.

Q: I have some follow-up questions to ask, much larger kinds of questions. When you look back on the whole experience, what was the lasting effect upon you of this whole experience?

Oleskey: I think the lasting effect upon me was to reaffirm what my clients thought on occasion was a hopelessly naïve view, that the American justice system was capable, even under great stress and pressure, in achieving, more or less, the most just result you could expect. I won $17 million in a jury case against the city of Boston. Then it was taken away from me and my client by the Supreme Court of Massachusetts, unanimously, in a decision that I thought was not well-founded, and seemed somewhat driven by parochial considerations, because it was a judgment for a Canadian against the City of Boston and Suffolk County. Things like that can shake the

faith that I think you need to have—that we mainly have a fundamentally fair system, with all its imperfections, and that it's right, and meet, and just. You spend your life advocating in it because, on balance, everything else being equal, if you are well-prepared and have a thoughtful position that's appealing and factually supportable, you can achieve what approximates a just result. It won't be a surgical result, it will be a clumsier result because that's the way the judicial system usually operates—not cleanly, but a bit jagged, if you will, but you have a chance for an affirmative result. If we had lost this case, I think it would have forced me to confront the limits of what the American justice system could do at moments of great stress, something which I have believed all my life, since those days back in New Hampshire when I decided in the eighth grade that this was what I wanted to do for my life. I would have had to fundamentally reconsider all that. Instead, I'm able to script my own ending, which is, yes, okay, on balance, I think it was a good decision to follow this path. I could be a change agent and have been.

Q: What was the long-term effect on the firm?

Oleskey: That remains to be seen. I think it is that it will become—and I hope it is—like the [Joseph R.] McCarthy hearings for Welch and St. Clair, or St. Clair's advocacy for Richard Nixon in a moment when it was, for many people, unpopular that he do that—although that was not a firm effort. He was known to be our leading trial lawyer—and the work by John Pickering to fundamentally bring large firms into a huge commitment to pro bono, or Lloyd Cutler to counsel with [James E. "Jimmy"] Carter [Jr.] and [William J.] Clinton. I hope it will become a part of the history of the firm that people are proud of, and that will lead them when the next event of this type occurs—to say "Yes, this is the kind of thing we do. We have one thousand

one hundred lawyers all around the world. We're compensated more than most people. Because of who we are, we get to go into government and do consequential things, but when we're outside and in opposition to the government and someone—whether it's an American, or, in this case, not an American, needs help—in a moment of great extremis and stress in the legal and political system, we stand for these things. We'll do them again because that's who we are. That was what helped to bring me here and keep me here, and I hope that Rob and I, and Doug [Douglas] Curtis, Greg Teran, Mark Fleming, Seth Waxman, Paul Wolfson, and others have contributed to the next turn of that wheel here and the next burnishing of that commitment.

Q: The last one is a little more complicated, partially because it's about what you think is the long-term effect on the United States. It's complicated by what's happening now with the Obama administration, and all the frightening new legislation that you've talked about from time to time, but it's more complicated—the picture, as you would see it today, now?

Oleskey: Well, I think it was on January 12, 2012 or something I went to Washington and participated in the events there that were scheduled to recognize the tenth anniversary of the establishment of Guantánamo, and I participated in a press conference that advocacy groups put on. Then I joined a march from Lafayette Park, opposite the White House, to the Supreme Court steps on the lower plaza, where I spoke with others about, in this case, Belkacem, and what it meant to have a client still at Guantánamo. In the two or three minutes at the Supreme Court, I said that the fact that there were several thousand people who had come to Washington—however many it was—to march in front of the White House and to march in front of the Supreme Court, many of them wearing orange prison jump suits, to associate themselves,

visually, as advocates for the men in Guantánamo, meant that not everybody in the country had forgotten these men. That's the optimistic view of things.

On the more pessimistic side of things, I always said that I thought there was a constituency of perhaps five thousand people in the country who cared about habeas corpus for people in Guantánamo. It's obviously larger than that, but it was never arguably large enough to justify Barack Obama making it an element of his campaign as he did in promising that he would close Guantánamo. That has to be ascribed to the idealism of Barack Obama that he then held and demonstrated, to his passion as a former law professor, to deal with this. As soon as this commitment bumped up, at least by the end of 2009, against the realities of being president, that commitment was put into a box, and the box was, if not nailed shut, at least locked shut for the moment, and he went on to other issues.

I go back and forth about my own degree of comfort as to where we'll get on this and similar issues. In that *Maine Law Review* article that you have looked at, I talked about something that then became an issue the following year, which is the targeting of enemy combatants, some of whom are American citizens, for summary execution by drone bombs piloted by people sitting in bunkers in Langley, Virginia or somewhere, and raining death and destruction summarily, from the skies, often on their families, and their wives and children, or innocent others. That bothers me profoundly but it has been accepted, it appears, by an overwhelming majority of American people, including people of good will among my family and friends, who seem to take the understandably expedient view that it's preferable to sending Americans to die in Somalia, Pakistan, Afghanistan, or Iraq. I suppose, viewed through that narrow lens of self-interest, that's

correct, but the precedent we're establishing—that the president can apparently decide, or those he authorizes can decide—who, particularly including American citizens who have never been indicted or brought to justice, will be summarily executed is profoundly disturbing to me.

I feel that where we're going now, even under a president who was perhaps elected, or thought he was elected, to implement a different program, but has now become the architect of the drone program—arguably because that's the politically expedient thing to do, and has shored up his support on the national security side so that it is said by the pundits that he's not vulnerable, particularly now, to charges that the Democrats have always felt vulnerable about, since, quote, "the Democrats lost China" in the late 1940s—the claim by the China lobby—and that he's not vulnerable to these things because he's been so tough and muscular in these areas. Perhaps that's true, but at what price to legal precedent to the rule of law, as we go forward, and after, how long will the courts feel more comfortable when some challenge inevitably reaches them about some aspect of our covert policy, such as drone executions—how much more comfortable will the courts feel that it's gone on for ten years, and let’s say, hypothetically, that Congress has done nothing?

Those are very bad precedents, so I worry about them, and not just the ninety or so men of the one hundred seventy left in Guantánamo who, apparently, the administration would release if it could release them, but also the larger implications of where that stalled project leaves us in other areas.

Q: Any final thoughts?

Oleskey: I think you have to remain fundamentally an optimist about the opportunity to change things if you go into law, human rights, social work, or government, feeling that you want this to be a career full of meaning. There are going to be profound setbacks along the way, and if you look at it through one lens you could say that you move an inch forward, and then you move two inches back. But you have to savor that inch-forward movement, because that's what it's all about, and that's how change is accomplished. It's not like the 1960s very often, where profound moral and political leaders arise around central, riveting notions like equality for all, and we pass laws that begin to change cultural norms that have existed for centuries. A lot of the things that lawyers and politicians and thinkers become involved in aren't susceptible to such sweeping change. You have to be satisfied with smaller more monumental changes for the most part.

Looked at in retrospect, from 2012, almost four years after the *Boumediene* decision, most legal scholars and most people working on the Guantánamo case think that the Circuit Court of Appeals has fundamentally eviscerated the impact of the *Boumediene* decision. Well, that seems to be the case, but that's not the end of the story because advocacy groups are working to change those results. We have another election coming up. We have more court cases to bring, so let's get on with it.

Q: Okay. Thank you very much.

Oleskey: Thank you and your colleagues for taking on this project.

[END OF INTERVIEW]