

# THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## CivilLITIGATION

### A look at the 'Boumediene v. Bush' decision

*Panel examines legal impact of Guantanamo Bay detainees' right to 'habeas corpus' review*

By **JAMES V. D'ANZA**  
Daily Record Columnist

On June 12, a divided U.S. Supreme Court ruled 5-4 that the detainees at Guantanamo Bay are entitled to the Constitutional right of *habeas corpus* — the right to challenge the legality of their detention.

This historic ruling allows the detainees at Guantanamo to challenge their detention before civilian judges, and for the first time, subjects the government to Constitutional scrutiny in their prosecution of these cases. There are approximately 270 detainees remaining at Guantanamo; most have been there for over six years.

This past Wednesday, Aug. 20, the Monroe County Bar Association hosted a panel discussion reviewing the substantive legal aspects of the decision, and how it will affect the United States' war on terror; specifically, future dealings with people deemed enemy combatants by the government.

The discussion was moderated by Michael Wolford, who assembled an esteemed panel consisting of: the Hon. Richard C. Wesley (U.S. Court of Appeals, Second Circuit), Mark Fleming (representing six of the detainees at Guantanamo, including Lakhdar Boumediene), and Andrew Kent (associate professor, Fordham Law School, National Security Law and Constitutional law). The discourse included a comprehensive and well-rounded explanation on how our government and the courts have arrived at this point, and what the future holds.

Soon after the 9/11 attacks, the Bush administration strategically chose the Guantanamo Bay military prison in Cuba to house those suspected of terrorism. The administration believed that because the detainees were foreigners and the prison was on foreign soil, Constitutional rights would not extend to them. For six years, it worked. Despite numerous lawsuits (see *Rasul v. Bush*, 542 U.S. 466 [2004], *Hamdan v. Rumsfeld*, 548 U.S. 557 [2006], and *Parhat v. Gates*, 532 F.3d 834 [2008]), none of the detainees have succeeded in having their matter reviewed by a judge.

Mark Fleming explained the circumstances surrounding his six clients. They were living in Bosnia in 2001 when warrants were issued for their arrests. They were taken into custody without incident (several of them turned themselves in), and were held by the Bosnian authorities for three months, while their cases were investigated.

Fleming claims that at the conclusion of the investigation, the local Bosnian prosecutor determined that there was no longer a sufficient basis to hold them, and their release was ordered. At that time, the U.S. Embassy in Bosnia stepped in, demanding that the six men be turned

over to them, classifying them as enemy combatants. Bosnia complied, and they were taken to Guantanamo Bay where they have been held since January 2002.

He went on to explain that his clients have never had the opportunity to challenge their arrests, or been informed of what they are accused of. Until recently, they had no contact with their families during their six years at Guantanamo Bay.

Fleming is hopeful that the *Boumediene* decision will now allow his clients to have their day in court. Supreme Court Justice Anthony M. Kennedy, writing for the five-member majority, seemed to indicate as much in the decision: "The laws and Constitution are designed to survive, and remain in force, in extraordinary times ... the costs of delay can no longer be borne by those who are held ... the detainees in these cases are entitled to a prompt habeas corpus hearing."

However, Fleming admitted that even with the decision, the clashes between the presidency, congress, and the courts over these issues would continue, and it could be one or two years before the cases are actually heard and decided. Even then, the *Boumediene* decision does not address the authority of the government to hold those determined to be enemy combatants or the authority of the government to make that determination.

And add to this another element: All of this will be greatly affected by the result of the upcoming presidential election. John McCain described the *Boumediene* decision as "one of the worst decisions in the history of the country." Barack Obama stated that the ruling is "a rejection of the Bush administration's attempt to create a legal black hole at Guantanamo" and "an important step toward re-establishing our credibility as a nation committed to the rule of law."

Judge Wesley expanded on the effect of the decision, and discussed the difficult challenge that the courts, the government, and society are faced with when dealing with a post-9/11 world. Judge Wesley explained that the war on terror is a "war with no boundaries" and that it is a complex process for the courts to determine what laws to apply, and how to apply them.

For example, how to determine that someone is an enemy combatant. Judge Wesley reminded the panel that the majority of terrorists are not found on a battlefield, nor do they wear uniforms. There are no guidelines for dealing with these types of issues, and Judge Wesley expressed that the *Boumediene* decision should have been more definite in its explanation of how the principles expressed in the opinion should be



*Continued ...*

# THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

---

*Continued ...*

practically applied. Without establishing that guidance, the cases now inevitably face even more litigation as they return to the district courts.

These are extraordinary issues that our country faces as we continue to fight the war on terror. Judge Wesley concluded his comments with this timely quote from Abraham Lincoln: "The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high

with difficulty, and we must rise with occasion. As our case is new, so we must think anew, and act anew," (Lincoln's Second Annual Message to Congress, Dec. 1, 1862).

*James V. D'Anza is an attorney in Underberg & Kessler's Litigation and Municipal Practice Groups, where he focuses his legal practice in the area of general civil litigation, including business, employment and municipal law.*