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Legal Idiocy and the War on Terror

by Joseph Margulies

The following is a transcript of a speech given at The Future of Freedom Foundation's June 2007 conference, "Restoring the Republic: Foreign Policy & Civil Liberties" held in Reston, Virginia.

Jacob Hornberger: Thank you. I want to remind the Silver and Gold sponsors that we've got the party with the speakers in Room 1118, from 8 to 9. Also, with respect to the live band outside in the pavilion there, it's from what I understand a swing band and it's really nice. I've been to those things out there and it's a nice function to walk around in. So if you've got nothing else to do I highly recommend you walk around that area. Okay, Joseph Margulies is an attorney with the MacArthur Justice Center and Associate Clinical Professor at Northwest University Law School in Chicago. He was the lead counsel in *Rasul versus Bush*, one of the Guantanamo cases that reached the Supreme Court, of course prior to the enactment of the Military Commissions Act. He is the author of a book entitled *Guantanamo and the Abuse of Presidential Power*, and has won numerous awards for his work since 9/11, including most recently the American Bar Association's Silver Gavel Award. He's testified before the Senate Judiciary Committee on detainee issues.

And I'll tell you how I came to know him. I was on an overseas flight to Europe and I had bought his book before I left, this book, *Guantanamo*. And I was hoping to get some sleep, on those overnight flights. Well I started on this book and he cost me the entire sleep because I could not put this book down. This is one of the finest books I've ever read, and it's the perfect book for the nonlawyer, that explains the torture issue, the detainee issue, the rendition issue, in just a clear-cut, succinct manner. But what grabbed me most about the book was the passion and the commitment that exuded through this man's writings; I mean, it just poured out. To me, when I saw that, I said this exemplifies what a criminal defense lawyer is all about. This is one of the last barriers, the criminal defense attorney, between tyranny and freedom. And so I thought if I could get him to speak at this conference it would be a real high, and I succeeded in

that endeavor. So it's a great pleasure to present to you Joseph Margulies, for your speaker this evening.

Joseph Margulies: Thank you very much. That was an extraordinarily gracious introduction. I have to tell you though the problem with an introduction like that is it sets the bar way too high. And I don't know why but while you were talking what came to mind, what flooded into my mind-- when you reach my age you stop wondering why it is these things pour into your head-- but what came to mind is a number of years ago I was in a very serious car accident. Now why I should think of a car crash just this moment is not sure, but I'm worried about that too, I got to tell you. But I was in an ambulance to take me to the hospital, and it was a colleague of mine that had been driving to lunch and he was driving, and he was fine. And so I said to him, just as they were putting me in the ambulance, I said, "Could you call my wife please and let her know that I'm all right." And so she worked at the Public Defender's Office then, and many layers of bureaucracy, like any government office. And so he called the receptionist and left a message with the receptionist and the receptionist talked to a secretary and a secretary talked to her senior supervisor, and I think the butcher, the baker, the candlestick maker were involved, and finally someone ran off to court-- my wife was in trial-- and took her out of trial. And they said, "Your husband's been hit by a car but don't worry, they've heard him speak and he's more or less cogent."

And I've always thought, I thought that's how you want to be introduced-- I've heard him speak and he's more or less cogent. So I'm going to try to be more or less cogent with you this evening, a Saturday evening in Virginia. I want to try to chat with you a little bit. I know this is a very well-informed audience. I was eavesdropping in on a conversation at the gym with a number of you here about the previous speaker's talk, and I never learned so much about the Marshall Plan as I did from being on the elliptical machine next to these guys, and they didn't know-- I was too breathless to chime in, but they didn't have any problem.

I want to chat with you a little bit about the Administration's Detention Policy and what I perceive to be the critical assumptions that informed that policy and that guide the Administration's thinking and that perhaps can guide our thinking in making an intelligent assessment of the policy, because it occurs to me that we cannot have a meaningful critique of the Detention Policy unless we understand it from their perspective and unpack the assumptions that lie within it. So I want to talk to you about that. And to understand the Detention Policy-- and when I say the Detention Policy, what I mean, Guantanamo's really just the most visible manifestation of the policy. It is not at this point even the most important, it is just the one about which we know the most. There are 380 prisoners now at Guantanamo, give or take. There are many more at other sites that we don't even know about. We don't even know how many prisoners are at Bagram Air Force Base. So I will use Detention Policy and Guantanamo more or less interchangeably. But you should know, for the purpose of just being an informed

citizenry, you should know that when we talk about Guantanamo that is really just a piece of the larger detention policy.

To understand the Detention Policy you really need to understand two things. The first is that the Administration, not without some justification, the Administration perceives 9/11 fundamentally as an intelligence failure. What it represented to them that Tuesday morning is that the methods by which we penetrated what had previously been a dark and sinister and unknown entity that we came to understand as Al-Qaeda were ineffective. The methods that we had in place, according to their thinking, were ineffective. And what they were most concerned about, by about noon on Tuesday, was not affixing responsibility for 9/11, that is the backward looking, fixing responsibility for an event that has taken place in the past, but ensuring that there not be another 9/11 in the future. What they were most concerned about-- and from a policymaker's perspective this is not entirely illegitimate-- is the next wave. And what they believed is that in order to prevent the next wave-- and you recall on 9/11 we didn't know for awhile there how many planes were in the air, we just didn't know, and they were gripped with just a visceral fear. We didn't know what we didn't know, as Donald Rumsfeld said. And it prompted them to perceive their task as generating more and better intelligence. And frankly almost every post-9/11 initiative that the Administration has put forward has been geared towards that objective, it has been geared towards intelligence gathering. It has been geared, as we heard in some of the talks today, to gathering as much data as we can.

And so frankly, of course, that's what the NSA wiretapping program is, it is about vacuuming up pieces of information, pieces of data. That's what the electronic eavesdropping on e-mail is about, that's what much of the Patriot Act is about; it is about breaking down barriers in the collection and dissemination and distribution of information. Why? Because information, in their paradigm, is now the new coin of the realm, and you need to gather as much as you possibly can from every conceivable source.

And that only exhausts the methods that we know about. When Attorney General Gonzales testified in the same testimony that Mr. Ellsberg was talking about today, he was asked are there other programs-- they actually took the questioning one step further than what he was talking about-- are there other programs that the administration has put in place that rely on this same idea of executive power that can be superior to statutes? And he just refused to answer the question, he refused to answer. So we don't know what other mechanisms are in place, or methods are in place.

But the overarching objective is to vacuum up information. Why? Because it's an intelligence failure-- that's the first thing you need to know. What they want to do with that information is create an intelligence, or what I can an information imbalance. What is that? What they want to create is a world in which they know everything about Al-Qaeda and its various virile

manifestations; you know everything about what they're going to do and they know nothing about what we're going to do. Why? Because they perceive that information imbalance as the key to keeping them off balance and being able to penetrate and prevent the next attack-- that's the thinking. Obviously, of course, it's subject to critique, it should be subject to critique, but that's the perspective.

The second thing you need to know is that they wanted to approach this intelligence challenge with a military response. So what distinguishes it principally from the Clintonian response is that fundamentally, not without exception but fundamentally, the Clinton Administration approached the problem of transnational terror as a law enforcement problem-- right? And so you had developed an extraordinary body of expertise in the southern district of New York where the prosecutors there and the FBI agents there developed a real expertise. In the same way prosecutors in New York and elsewhere around the country had developed an expertise in bringing mob prosecutions, they had an expertise in bringing Al-Qaeda prosecutions. So of course there was the prosecution of the first World Trade Center bombing, the prosecution of the Embassy bombings. The bombings in '98 led to prosecutions in 2000. You had the most competent, qualified, experienced FBI agents in the country were working in that office. They spoke the language, they didn't need to use interpreters. They knew the personnel, the actors, upward, backwards, and forwards, and the same thing in the Prosecutor's Office. And the principal prosecutor there was Patrick Fitzgerald, who's now the U.S. Attorney in Chicago.

They jettisoned that, they jettisoned that perspective. The idea was that the Clintonian model was a failure, because-- as evidenced by buildings falling from the sky-- it did not prevent that. And it was principally directed towards fixing responsibility for a past event. They were not interested in that. They were interested in penetrating the problem in order to prevent a future event. It is an intelligence problem that we will meet with the arsenal of military intelligence, rather than a law enforcement problem that we will meet with the arsenal of criminal prosecutions. That's the perspective. So the question one needs to ask in order to understand this world is what environment do they want to create in order to get intelligence from people that are going to come into their custody? Because they knew very early on, they knew September 12th that there was going to be a military response, there was going to be boots on the ground. And if there's boots on the ground every military planner knows you're going to have prisoners; and if you have prisoners you have the capacity to extract intelligence. And it was not just DoD, that is military, but it was also CIA, because we know now that September 17th the President signed an Executive Order, an order that remains classified, no one's seen it, or at least no one's publicly described it, that authorized the CIA to get in the business of interrogating prisoners as well as rendering them-- and Joanne Mariner is going to talk about the Rendition Program tomorrow; we're very lucky to have her here. So I don't want to talk about that. But we knew that we were going to be getting prisoners. They represented a potential source for information, and our objective was to extract all that information. And as policymakers, from their perspective, they could leave no piece of information unsecured because they didn't know

whether the information that was left on the table unlearned is what prevented the next attack. That was their orientation.

So the question is how one-- what environment one creates that they believed was necessary to get that information from prisoners that they're going to-- okay, so what do they want to do? This is the most fateful step in understanding the Administration's detention policy. They came to the conclusion that you need to create a particular kind of environment to maximize the intelligence gathering process, the interrogation process, and that is an environment characterized by anxiety, fear, debility, dread. It is an environment of such overwhelming tension that the belief was you would create such a sense of turmoil in the prisoner that they would lose any capacity they have to resist the conventional blandishments to interrogation, they would be unable to resist the pressure applied on them during interrogations, and they would finally give up the information. In the elemental battle between interrogator and prisoner, between interrogator and subject-- interrogator wants the information, prisoner doesn't want to disclose it-- you need to skew the odds in favor of the interrogator by weakening the prisoner, and you weaken him psychologically, you weaken him morally, you weaken him physically, by creating this anxiety of this environment of extraordinary anxiety, because no human being can long tolerate that. That is the lesson of interrogation history.

So what does that translate to? It translates to a very deliberate creation-- very deliberate, everything about Guantanamo was extraordinarily deliberate-- of an environment of hopelessness and fear. And the fact, the event that captures that best for me-- there are many; everything that we've seen down there, by the way, is consistent with this, and in fact the very reason that it was at Guantanamo and not within the mainland, for instance, is to facilitate this, because they believed that if it was at Guantanamo it would not be within the jurisdiction of the courts and so you wouldn't have judges overseeing the interrogations, you wouldn't have lawyers going down there and talking to prisoners. Why? Because that interrupts, it interferes with the environment they're trying to create.

All right, one thing that captures this the best for me: in 2004 a memo surfaced. It was a memo written by interrogators to senior analysts at Guantanamo, shortly after prisoners arrived. The prisoners began to arrive at the base in January, January 11th of 2002; so many of the prisoners that are there are now entering into their sixth year. And the question was, was this. It seems that in many Muslim and Arab countries orange jumpsuits, orange, the prison garb-- you've all seen the pictures I presume-- orange prison garb is worn by prisoners who have been condemned; prisoners who are going to die wear orange. And the prisoners when they first came to Cuba-- they didn't even know they were in Cuba, by the way-- they thought they were brought here to be executed, and they were terrified. And the memo said to a senior analyst, the prisoners all think they're going to be killed-- should we tell them the truth? At no time in U.S. military or intelligence gathering history has that question ever been put. Why? Because you would never create an environment where you would willfully have prisoners believing, as a

deliberate policy, that they were going to be killed. But post-9/11 is a different world, and so not only was the question put, the answer was-- should we tell them? No, you should not tell them, wait until the first few rounds of interrogation. Why? Because you want to create an environment of terror.

I want to examine this more closely, because all of us should understand that this is not merely an abstraction. To my students-- and I know because Mr. Ellsberg talked about--asked for a show of hands of how many lawyers there were, and mercifully there were very few, and for that I commend you. But there was a very famous case-- I will put my friend Miss Mariner on the spot-- there was a very famous case called McCulloch versus Maryland, and one of the most famous lines in McCulloch versus Maryland-- Joanne, do you remember? Good, good for you. Justice Marshall, Chief Justice Marshall, he said, "This is a constitution. We must remember that this is a constitution we are expounding." And law professors are fond of quoting that, this was sort of almost rabbinical authority, oh, this is a constitution we are expounding, as though just to say it-- and students are supposed to stroke their chin knowingly, oh, yes; and no one really knows what it means. And I always tell my students to remember and not to get too wrapped up in the X versus Y, the issue, the case, to remember that this is a human being we are defending.

And my first trip to the base was in November of 2004. I went down to see my client. His name is Mamdouh Habib. Mr. Habib is Australian. He was born in Egypt but he's lived the last several decades of his life in Sydney, Australia, just an Australian citizen. He didn't even know-- this is November of 2004-- we had won the decision in Rasul in late June of 2004; Mamdouh did not even know that he had been the subject of the lawsuit; he did not even know that the Supreme Court had written about him; he did not know that he had won. And I was going down to see him-- and he had no reason to trust me, he had no reason to believe. He had been lied to. He had been rendered to Egypt before he was brought to Guantanamo where he was there subjected to the most ingenious interrogations and tortures that I have ever heard of, and he had no reason to believe that I was who I claimed to be. And so the question became how, in this environment, we would establish a relationship that you understand as one of attorney-client, or I could be his counselor and act as his agent in the world.

And what we decided to do, my co-counsel and I in Chicago, is we contacted his wife in Sydney and we flew her from Sydney to Chicago and met with her for several days, with the family lawyer, and to try to convince Maha Habib, his wife, that we were legit, which was the first challenge, and that we had her husband's interests at heart. But we knew that that wouldn't be enough. We got a letter from her, in her own hand, on plain paper, not on any letterhead, but we knew-- that said the predictable things, Mamdouh, you can work with these people. He could've believed that that was secured under duress-- right? We didn't know what condition he was going to be in. So I said to Maha one night, after we had been talking, I said, "Maha, I want you to go home tonight and I want you to think of the answers to three questions; I want you to think

of three things that the most patient interrogator in the world would not have asked you; I want you to tell me those three things, personal, in your relationship to Mamdouh, so that when I go to the base, I tell him those three things, he knows that I got them from you, and I got them from you as a friend. And she came back the next day, she said, "I thought of some." And together we came up with these three things.

And think about this if you're in this perspective. Where did you go on your first date?-- they'd been married for years-- your first date, way back when. And what is the first gift that Mamdouh ever gave you, when you were courting? And last, and she came up with this one, she said her son was very sick and he was in the hospital, and we had to stay with him overnight, and we were very scared, and we stayed by his bedside all night long, and very few people know who looked after the rest of our children while we were there; so tell him where our children were, and he will know it came from me. So I went down to the base. Mamdouh Habib is small, shrunken, gaunt-- he was in his late forties, he looked considerably older. I will spare you all the things that happened. He was shackled, shackled to an eye bolt on the floor, his back to the door, he's not even allowed to see natural light. His cell that he was in, a cage mesh cell about yam wide, six feet long, and they brought him out into a little room, anteroom outside the cell, can't see the natural light, there 23½ hours a day. And I talked to him about who I was and I showed him the case and I said, "Mamdouh, here's your name." I said, "Here's my card." He didn't-- was utterly unmoved, he was completely guarded and no reaction at all. And so finally I put all the papers away and I said to him, "Mamdouh, I want to talk to you about your wife."

And I told him about this trip and I told him about these three things. And I told him the answers to these three questions, which I have never repeated to anybody else and I'm not going to repeat now because they're personal to him and you have to leave him some personal space. And I said, "I know where you went on your first date and I know what your first gift was to her, and I know where your children were when you were in the hospital in Sydney with your oldest boy." And until then he'd been utterly impassive. And he looked at me, and he put his head down, and I saw his shoulders started to shake and he started to cry. And he looked back up to me, with tears in his eyes, and he said, "We have so much work to do." And from that moment on I knew I had a client.

And I was there two days, and on the second day when I got up to leave I said, "Mamdouh, I'm going to try to come back down here again." And he said, "Joe, I appreciate everything you're doing." And I stood up and he put his arm on my forearm and he said, "It's very nice what you're doing but you have to know I'm going to die here, they're never going to send me home." Because if you create an environment of hopelessness and despair, if you create an environment of dread, if you create an environment where you extinguish what is the most precious commodity in any prison, which is hope, prisoners will give up and they will eventually turn to the wall and die.

So that was my first visit to Mamdouh. But let's leave him there because for the moment, if the prison is legitimate, if the prison is legitimate, then the anguish that he may feel is not something that we should feel all that much sorry about, all that much worry about. So let us then turn back from Mamdouh and ask about these three assumptions. I want to talk about the three assumptions that undergird, it seems to me, the Administration's detention policy.

The first should be apparent to everyone, I think, and that is that it is necessary to create this environment, it is necessary to create this environment of debility and dread in order to secure this information-- right? Because if the objective is getting this information the first assumption is that you need to create this environment in order to extract this information. All right, and in that regard it seems to me relevant that everyone with the applicable expertise, within the administration and without, advise them, very early on, that they were making a mistake. The FBI agents who were the foremost interrogators of Al-Qaeda agents told them this is a bad idea, you're not going to get good intelligence, you're not going to get good information, and it's not necessary. Tommy Franks, who was the first general in charge of the ground operations in Afghanistan, the first order that he gave when he landed there, when he started the operations, was comply with the Geneva Conventions including the rules regarding interrogations. He knew exactly what they were going into. He knew it was asymmetric, he knew they didn't wear uniforms, he knew they didn't follow a regular command structure-- very similar to a lot of what we've seen in other conflicts, follow the Geneva Conventions. Senior Pentagon planners, the senior Pentagon planners, and the Joint Chiefs of Staff and every branch of the service advised the White House against this. Lawyers in the Judge Advocate Generals Office, Secretary of State Colin Powell, former Chairman of the Joint Chiefs, every single person with relevant expertise and the relevant body of information advised them against this.

And they were vetoed by a very small, by and large very young cadre of civilian lawyers in the White House, the Office of the Vice President and the Department of Justice, who, as far as I can tell, none of whom had ever actually conducted an interrogation; none of them had ever served in the military, none of them had any intelligence-gathering experience.

So the first assumption is that you need to create this environment and there's no evidence to believe that that's correct. The second assumption is that you-- and I think you would agree with me that this is the obvious second assumption-- that you have the right people at the base. Because whatever moral justification there is for creating an environment of debility and dread-- and when I say debility all I mean is exhaustion; so the sleep deprivation, the moving people around. They used to have something called the frequent flyer program, which is you would interrupt a person's sleep cycle by every-- just as they were going to bed you would, after they'd been subjected to an eight hour interrogation you'd bring them back to their cell and they'd sleep for five minutes, and then you'd wake them up and bring them back to another interrogation as though an entire evening had passed, and you subject them to another eight hours of interrogation, to disrupt their sense of time, to disrupt their sense of orientation, and to exhaust

them. And then you'd bring them back to a different cell, so they couldn't even be in the same place in the prison. Why? Because you're trying to disrupt their sense of routine-- it's extraordinarily debilitating. And you let them sleep for five minutes and then you wake them up and do it again. It's excruciating. Well of course you don't need to put somebody on the rack in order to make them so miserable in their thinking that they will be forthcoming.

All right. It seems to me any moral justification there is for this kind of interrogation paradigm assumes that you have the right people. And in that respect other facts are relevant. Because they knew within weeks of when the prison opened-- the prison filled very quickly. They had a lot of people waiting in Afghanistan that they brought there, and it was very nearly filled by spring of 2002, within weeks of when it opened. And the first head of interrogations was so appalled that the people they were bringing there had no intelligence gathering, had no intelligence information to give, that he flew to Afghanistan and said, "What are you sending me all these Mickey-mouse prisoners"-- his words-- "Mickey-mouse prisoners for?" And they said, "General, we don't have anywhere else to put them, please go back to Guantanamo." Intelligence analysts, in Afghanistan, had identified dozens of prisoners who they said should be released because they have no intelligence information. There were farmers, there were laborers, there were taxi drivers. They were the most pedestrian noncombatants. But the problem was that they were so afraid that this person who appears to all to be a disengaged noncombatant was in fact someone who had information but was acting as a disengaged noncombatant. No one wanted to sign the piece of paper that said this person doesn't go to Guantanamo.

So by the dozens they were sent to Guantanamo mistakenly-- well not mistakenly in the sense that it was a mistake, it was a very deliberate thing, but people who shouldn't have been there. And several policies that they created only made the problem worse. One of the most prominent is they instituted a bounty program, and Secretary Rumsfeld at a press conference once described the bounty program. They dropped leaflets all over Afghanistan and Pakistan, by the millions, that offered money for anyone who was associated with the Taliban or Al-Qaeda-- \$5,000.00 for every member of the Taliban; \$25,000.00 for every member of Al-Qaeda; it was an extraordinary amount of money. And in fact the flyers said, and Rumsfeld said, they were falling on Afghanistan like snowflakes in Chicago in December. And the flyers said it's money beyond your wildest dreams. You can find these all on the Web, by the way, they're all public now. Just search bounty, flyer, Guantanamo, you'll pull it up. Enough to feed you and your family for the rest of their lives, for your tribe, your village, your clan, all the money you'll ever need.

Well that of course produced predictable results. You had someone trussed up in the back of a pickup truck, brought to the U.S. This is not Ahmed the tailor, this is Ahmed the terrorist-- that'll be \$5,000.00 please. Other things made it more acute. The Administration's own data reflect that only 5% of the prisoners at Guantanamo were captured by the U.S. military. The rest were handed over to them by the Northern Alliance or Pakistan intelligence agents or drug lords or warlords in Afghanistan. It made it inevitable that the number of people you got who actually

had intelligence would be very small. And as a consequence you got people-- it was just the most preposterous thing. Some in this audience-- Joanne you're excluded from this question-- may know the answer to this. Does anybody know the youngest prisoner, according to the Pentagon, not according to me, according to the Pentagon, the youngest prisoner to come to Guantanamo?

Man 2: 15.

Joseph Margulies: 15. We have 15. Do we have anything else? 10-years-old. I've got the cites for it, if you want to see. So it's all cited in my book. This is according to the Pentagon, the youngest prisoner there was 10 years old when he got there. There were some reports that said he was 9, but the Pentagon said he was 10, so I say he's 10. The second youngest was 12; after that he was 13. There were some who were extraordinarily old, extraordinarily old. There was one guy who the interrogators called him Al-Qaeda-Claus. When he was released an intrepid reporter for the *New York Times* tracked him down in Pakistan and he was babbling incoherently. He said that he was 105-years-old. Another guy who had had a war wound, half his head had blown off when he-- in conflict, during the Russian conflict in Afghanistan, and interrogators-- essentially noncommunicative. Interrogators there nicknamed him Half-Head Bob. He was there for 10 months.

All right, well let me come back then to Mr. Habib. So we've got the two assumptions. Mamdouh Habib is now home. I have the distinction, and it is a courtesy that I don't quite understand, to be the only lawyer who was allowed to fly home with his client. In January of 2005 I received a call from the Australian Embassy and they said, "Would you be willing to fly home with Mr. Habib?" And I said, "Of course." And they said meet us on such and such a day and time at the Miami International Airport, and we're going to pick you up at midnight. And it was all very cloak and dagger-- don't tell anyone-- and we're going to fly to the base and pick him up and then you'll join us on a flight to Sydney. And I want to tell you just very briefly about-- the flight was utterly without incident, he wasn't shackled, he wasn't-- he slept most of the time. The security guards that were with us on the flight, Australian, they slept most of the time. Everybody was just fine.

But I want to talk to you about when he came to Sydney. We step off of this very nice corporate Gulf Stream jet and he walks down the metal steps and he bends to kiss the ground at Sydney. And my co-counsel in Australia steers us to this very, very rickety, private, 6-seater prop plane, which looks very unsteady, but we've just been on a 24-hour flight and we weren't-- I was thinking about, it's okay, we'll take a cab; but they said no, no, no, we want you to-- because he wanted to avoid the media scrum, because there was a lot of media assembled there. So we climb up the steps of this old prop plane and he's going to take us to another neighborhood airport near when Mamdouh is. And Mamdouh walked in, and he looked inside and he saw a

woman sitting in the third row of seats, her hands folded, plain white pants, black blouse-- and it was his wife, who he hadn't seen in nearly four years. Interrogators at one point during his interrogation had told him that his wife had been killed. And this was a surprise to us, we didn't know that she was going to be there. And he collapsed. He sort of stepped back on the stairs and fell into the plane and fell into the seat with her. And my co-counsel and I will always-- I will always treasure this. He had the good sense to bring a screen that he put between the second row of seats, where we were, and the third row where they were. And as we turned-- and this is late January so it's a beautiful day in Sydney-- and took off into this crystalline blue sky, I could hear Mamdouh and his wife crying in the seats behind us.

I've been a lawyer a long time. Like Jacob, I was a criminal defense lawyer. I've had the privilege of delivering wonderful news to clients, I've had the burden of delivering the worst news to client, particularly when I represented men and women on Death Row, and that was the most rewarding and precious moment in my career was to see my client reunited with his wife.

Let me turn then to the third assumption of the Administration's detention policy-- and that I think you will agree with me is this. Let's assume that you need to create this environment, let's assume that you have the right people there-- both of those assumptions are questionable but let's assume that they're both true. It seems to me that the third assumption, the important assumption, is that whatever moral justification there is for this environment, it disappears when you're no longer interrogating them; that is, if it is an intelligence-gathering process and you're not intelligence gathering any more, you don't need to create this environment any longer. And that is why I met with some satisfaction when in June of 2005 the Administration announced that 70% of the prisoners at the base were going to be released. They were not a threat to the United States, they were not a source of intelligence any longer, we were going to release them. And most of the remainder who were there were going to be moved to a facility called Camp Six. It was a medium security facility, it was, they said, consistent with the Geneva Conventions. There will be communal living, there'll be an opportunity for more contact with the outside world, et cetera-- they were concerned about the quality of life. And they said at that time-- this is two years ago-- that 75% of the prisoners were no longer even being interrogated. So they're not interrogating people, they're not gathering intelligence. So they're going to do the morally justifiable thing, which is release them or put them in long-term.

In June of 2006 three prisoners committed suicide at the base. They were in a maximum security wing, Camp Six had not yet been completed. I will spare you the details of how they did it, but the Administration reacted to those suicides by concluding that there would be no more suicides at the base, and they re-tooled Camp Six into a, not a maximum security facility, a super maximum security facility, like the one at Florence, Colorado, or Marion, Illinois. Prisoners now pass their endless hours locked in concrete cages. By design-- the majority of prisoners there, even prisoners who have been cleared for release are now at Camp Six-- by design they are not allowed to see, hear, or touch another human being. Most of the prisoners who have

been cleared for release remain there and the Administration maintains that they may be held there for the duration of the War on Terror.

I want to close with these things, and if I have time take questions. My name appears now and again in the paper, and when it does it's usually associated with Joe Margulies says such and such. And I always get e-mails, and many of the e-mails I get are very nice, and people, increasingly, as time has gone on and we've gotten a little distance from 9/11, people are overwhelmingly very gracious-- not always however. And sometimes I get e-mails like this; and this one is unusual because the guy signed his name. "Dear Professor Margulies: I am sure the Third Reich would have loved 'an American' in quotes, like you during World War Two. If your philosophy and temperament had been the rule of the day, then, as now, we would've lost that war thanks to people like you. You should be ashamed. You are a thin-skinned, coward, traitor, and I hope you get your just desserts."

I am often accused of being depressing in my conversations, in my remarks. And I do not mean to be, and I don't want to end this talk that way. I have no doubt, despite the views expressed in that e-mail, that the United States will reclaim its moral compass. I have no doubt about that at all, I know that like I know this is my left hand. It is simply a matter of time. The last chapter of this book has already been written. The last chapter has already been written, and the last chapter says that we will look back on the rusting shell of the prison at Guantanamo Bay with a mixture of astonishment and disgust. And I would leave you only with this. The only question is how many pages we have to turn, how much damage we do to our country, to our Constitution, before we reach that welcome day. Thank you very much.

Joseph Margulies: I'm told that we have fifteen minutes for questions. I'm happy to chat as long as people will have me.

Man 3: Professor, I live in Charleston, South Carolina, and just above Charleston is Hanahan, South Carolina. Within the corporate limits of Hanahan is the Charleston Naval Weapons Station, and there's a gulag there, the naval brig. There's an American citizen that was there for 3½ years, Jose Padilla, held there, denied habeas corpus. He must've had some good lawyers. They eventually got to the point where it was apparent that the Supreme Court was going to say you can't deny this man habeas corpus. The Administration said well this one isn't working, so they changed the charges on him. He's down in Florida now being charged. How about a comment on that?

Joseph Margulies: Oh.

Man 3: And you can probably say a whole lot.

Joseph Margulies: Yes, that's right. Well I will say this. Jose Padilla had very good lawyers, and they're friends of mine, and I'm happy to recognize them here. What you described is accurate. What you should know however is that there is another gentleman there. There is a foreign national there named Mr. al-Marri, who was in the country lawfully, and he is the only person in the United States who remains designated as an enemy combatant. And they take the same position on him, that they said with Padilla, that is that he doesn't have a meaningful right to challenge his detention. And that's going to go to the Supreme Court next term, I'm confident of that.

The larger paradigm that you-- the larger pattern that you describe is a very interesting one. I guess I would make several observations. One is they still maintain that they have the power-- notwithstanding the fact that (a) they don't use it very often and (b) there's been so much Supreme Court hostility to it-- they still have the power to designate a person in this country even-- not U.S. citizens if they're in this country but foreign nationals who are here, even here lawfully-- as enemy combatants and hold them without habeas. Part of their vision of a global war on terror is that their position is there is no battlefield except the entire planet and so we can grab a person from anywhere on the planet and designate him an enemy combatant and treat him accordingly, wherever they may be. The larger pattern you identified though is that just before an event happens that will definitely break that power, as in for instance the Supreme Court saying, no, you can't do that, they will moot out the case by removing the person.

And exactly what you described happened. The petition for Sergio al-Marri was pending in the U.S. Supreme Court, and just before the government was supposed to respond they took Padilla down to Miami and made him part of an indictment there. That pattern has been replicated, not just in that case but in several cases, over and over again. Everyone's aware of it.

Let me just tell you one quick story. The other case that came down the same time as Rasul was a case called Hamdi, and Hamdi was a U.S. citizen picked up in Afghanistan. And the conclusion in that case was if you bring a U.S. citizen here-- and he was also at the Naval Base in South Carolina-- he gets the benefits of the Constitution. For years they had been saying Hamdi is such a threat to the union, he can't be given a lawyer, he can't be given habeas, we got to hold him incommunicado, locked up in this same facility-- and completely isolated from each other. For instance, Hamdi and Padilla didn't even know that they were both in the prison at the same time. Well they lose in the Supreme Court in Hamdi, and a judge in Virginia, Judge Doumar, here, says, after a bunch of back and forth-- oh, I should tell you, they've been saying for three years how dangerous Hamdi is. The day after the Supreme Court grants Hamdi relief and says give this guy a hearing, the government calls Hamdi's lawyer and says, "Can we settle this case?" And the settlement was that Hamdi was going to be flown to his home in Saudi Arabia-- he was a U.S. Citizen but he grew up in Saudi Arabia-- and he had to make sure he reported if he was ever approached by any terrorists. And the other condition was he had to give

up his U.S. passport. And I used to joke with his lawyer that that was a condition imposed by Hamdi. <Laughter>

But what happened leading up to that was that while these negotiations were going on the judge was getting frustrated. He said, "Look, this guy's entitled to a hearing"; the Supreme Court said give him a hearing. And they said, "Judge, these things take time, we're working out the details of it." And he said, "Okay, I've had enough of this." And he said, "On Monday"-- he said this on a Monday-- he said, "A week from today I want Hamdi in my courtroom, we're going to have a hearing, and you, United States, you're going to put on witnesses to justify why this U.S. citizen has been in custody for the last three years." All right? That Sunday, the day before the hearing, the government called the judge and said, "We can cancel this hearing, he's been released, he's in Saudi Arabia." To this day the United States Government has yet to call its first witness in any enemy combatant case worldwide. They have yet to have a person testify, here's why this guy is an enemy combatant; they've yet to call the first witness. It's all been based on hearsay allegations.

Man 4: What we're hearing tonight is mortifying, to say the least, and I think most of us are viscerally disturbed, to say the least, as well. Do you foresee a day when we might hear what preemptions may have been made as a result of this type of internment? Is there any positive side to it at all, other than the fact that you, I'm sure, get the question, well we haven't been attacked as yet, have we?

Joseph Margulies: Yes. What good has come of it? In other words has there been any benefit that's come out of it? From the Administration's perspective you mean? Yes. Well in fairness the Administration claims that they have produced a great deal of valuable intelligence. They are particularly vociferous in that with regard to the CIA program-- and maybe Joanne will talk about that tomorrow-- they insist that the CIA program where you subject people to even more aggressive interrogation techniques has produced valuable intelligence. That obviously is not subject to verification. It's like the spray that I put in this room, the polar bear repellent, and the evidence is that there's-- it's obviously working. <Laughter> And you didn't even know.

The reporting that I have looked at-- and of course it's all classified so it's very difficult to get public information-- it's impossible to get public information-- is that the question is not simply whether they have gotten useful intelligence; obviously that's not the question. The question is whether they could only have gotten this intelligence by applying these methods. Because of course if you could have gotten this intelligence through conventional means then you would never have to have trampled on these time-honored principles. The best indication that I've seen is the answer to that question is no, most of these guys, the information they have gotten is through the application of conventional methods, conventional interrogation methods. So have they gotten information? Yes. Did they need to do it? There's no evidence of that.

Man 5: I'm one of the people who was next to you on the elliptical machine. The thing that strikes me about all this, and as I look at this I see how, for example, how U.S. attorneys handle just normal cases, and talking about against American citizens in the court. And it seems to me that what we're seeing is basically the White House and the Department of Justice saying we can do whatever we damn well please to anybody we damn well please because we're the United States of America and nobody ever tells us we're wrong. And it just seems to me that basically this is part of a larger war against everybody; that U.S. attorneys just kind of look at all of us as somebody waiting to go to prison one time or another.

Joseph Margulies: Well there's a sense in which that's a rhetorical question. You know, a different talk that I give, that I'll spare everybody now, is that it is commonplace to link what's happening now with prior periods of overreaction-- internment and Lincoln suspension of the writ. I think that they need to be a little bit more nuanced with that; and you touch on that. When Lincoln suspended the writ, when federal prosecutors prosecuted poor Mollie Steimer in 1919 for throwing leaflets out the window of a tenement building on the Lower East Side, when we interned the Japanese, when we suspended habeas in Hawaii during World War Two, those were domestic security measures that essentially had no effect, beyond our shores. They were not things that rippled to an effect beyond our shores. When Joe McCarthy was railing against what he believed was Communist infiltration in the State Department, it was a source of entertainment overseas.

The difference now, and a very important difference now, is that now our dominant civil liberties restrictions domestically are having a devastating effect globally. Now the civil liberties consequence is principally targeted in the most volatile region in the world, and regrettably our methods-- and I believe this is an unintentional consequence-- contrary to what the Administration says, contrary to what-- to in fact what the Administration believes, we have convinced, or we are becoming-- we are close to convincing an entire region that this is not a war on terror, it is in fact a war on Islam. And that is an extraordinarily dangerous thing, because one thing that history teaches us, if it teaches us anything at all, anything at all, is that people will fight for their religion. People will shed their blood and they will shed the blood of their children, for their religion. And if you communicate to the world that this is a war on Islam, you guarantee more terror for this country. And that is the real risk.

Man 6: Assuming the individual might understand your explanation, how would you respond to the e-mail you just read us, and what kind of an explanation would you give that individual?

Joseph Margulies: You know, I'm glad there's free speech in this country. <Laughter> That's the explanation. I know some people who get these e-mails and they actually try to engage the folks, and I just don't, I just don't. And I've learned that the hard way, because I have to tell you my father-in-law is one of those guys. But for the fact that he's my father-in-law, he could send

one of those e-mails. And he just thinks what I'm doing is meshugana. And hey heck if I can't get through to him I'm not going to get through to this guy.

Woman 1: I grew up during the Second World War and we heard all about the Nazi tortures, and were horrified. And all I can think of this is-- we're Nazis.

Joseph Margulies: Yes. No, we're not, we're not but-- I'm sorry.

Woman 1: Well I think-- what's the difference, in the tortures? This sounds even worse almost, it's so psychological.

Joseph Margulies: Yes, no. Right. The real link back to this-- and I find this really fascinating-- the real institutional legacy that this-- these interrogation models, the psychological pressure comes from, is to Korea. The real refinement of interrogation lore or how it was done took place during the Korean War. That's where they sort of first made the leap from the more grotesque physical torture to this sort of psychological. And it's fascinating how you can trace this link and it really is pretty conclusive, and in fact there's no longer much of a dispute about it. My book was one of the first ones that really sort of made this but it's now pretty widely recognized.

But I am very careful, and I think it is a mistake and I think it is historically inaccurate, grossly inaccurate, to liken this to a gulag. I never do that, I think that it's a mistake. I never say that this is anything like a concentration camp or that these are like-- or that we are behaving that way. I think that is tempting but historically inaccurate and insulting to-- and I don't mean to attack you at all, because many, many people who I respect a great deal use language like this. But Stalin killed millions. The best accounts are, the number of people killed in U.S. detention since 9/11 is about 125. Now some people say that's underreported, some people say it's substantially underreported because there are manipulations of death certificates and so on, and they say it's an accidental death and he's got the choke marks. Okay, maybe it's double, maybe it's triple, maybe it's off by a factor of 10, maybe it's 1,200 people. It's insignificant compared to the horrors-- Now believe me, you should know from what I've just said, I'm not defending it. But I think it's very important that we be rigorous in our critique.

Woman 2: Aren't we better than that?

Joseph Margulies: Oh absolutely, that's my point. I think that we should take no comfort from the fact that we're not as bad as Stalin. <Laughter and applause> It seems to me the question is not whether we are better than Stalin, the question is whether we are as good as we should be. One more I gather.

Man 7: Dan Ellsberg. What you've described is a situation with—chilling, and a very creditable life you've been leading-- but what you describe is a situation where as I take it we knew anyway. There are many, many people in the government, in every branch of service, you've said, in the-- and civilians throughout this-- who regarded what was happening as not only a violation of the laws we have passed, forbidding torture, as well as international treaties-- a violation then of the oath to execute those laws by the president and everybody associated with this, Cheney, Rumsfeld and all the others. But immoral, ineffective-- which is not a layman's judgment but by these people ineffective-- and dangerous to the security of this country, and it's in a dangerous world, increasing our danger.

Joseph Margulies: That's true.

Man 7: How many people do you know of, and can you give us examples, of people who had this appreciation who then acted on that, risking their clearances, their careers, their position in the government, by telling Congress and telling you and telling the public what we have needed and deserved to know about this situation? What whistle blowers have actually risked their careers by as I would say they should've all considered doing?

Joseph Margulies: Joanne, are there any? The person that comes to mind is Alberto Mora.

Joanne Mariner: [unintelligible]

Joseph Margulies: Oh well Diaz, although--.

Man 7: Valentine, we've just heard about, who's just been convicted-- right?

Joseph Margulies: Right.

Man 7: I don't know what his sentence is.

Joseph Margulies: Right, yes, that's a very interesting case, Lieutenant Commander Diaz.

Man 7: And he's kind of apologized for it. I thought he did exactly the right thing, I must say.

Joseph Margulies: I have to have to say I have some--

Man 7: Aside from that case, do you know of other-- that would be an example of what I'm talking about.

Joseph Margulies: Right. What he's talking about is the first Jag officer who was down there when we-- when lawyers started going to the base was a lieutenant-commander Matthew Diaz. And Diaz was appalled at the-- he was sort of our liaison when lawyers started going down there after the decision in 2004. Diaz was appalled at the obstructionism that he perceived in the Defense Department, resisting lawyers going there, because they were very hostile to-- you should gather, it should be obvious, they didn't want lawyers there because lawyers interrupted the milieu they were trying to create. And Diaz has just been convicted-- this by the way is an answer to Mr. Ellsberg's point about it's not a crime. It is a crime if you're in the military. He mailed a list of the prisoners at Guantanamo to a lawyer at the Center for Constitutional Rights, and he was prosecuted for that and convicted. It is telling, it is telling-- he was just prosecuted here in Norfolk. And for awhile I was listed as a defense witness; I ended up not testifying. The prosecutors asked-- he was charged with very serious offenses-- the prosecutors asked for 14 years. A military jury sentenced him to six months, without losing his pay, or his benefits. So the military did not perceive-- the jury at least did not perceive it as--. But the answer to your question, I'm not aware of any others.

Man 8: Aren't there other examples?

Joseph Margulies: The closest-- there are people who have since come out, who have resigned from government and have since come out, and made their objections known. There are documents that we have secured that showed that they objected to it at the time, like Powell's memos and his former legal advisor, William Howard Taft, but no one who risked their career, while it was going on.

Man 9: Two more questions, Owen and Dan, and then we'll wrap it up.

Man 10: Thank you for your comments this evening. They've certainly been illuminating and terrifying. We have in Tampa, Florida, the instance of a Dr. Sami al-Arian, who is a Palestinian. I'm wondering if you have any knowledge of that or could comment about this kind of gulag, this procedural gulag that he has fallen into-- and it is truly that.

Joseph Margulies: I'm not familiar with this case. I know there was a fellow-- was it in Tampa, the guy who was acquitted, was that that--?

Man 10: He's still in prison.

Joseph Margulies: Right. But he was tried, acquitted, but not released because now they want to deport him. That actually is commonplace, that happens quite frequently. People, when they end the criminal justice system, can be held for years. The law says that you're not supposed to be, and there was just a case in Washington, D.C where they had held a guy for like 5½ years because they couldn't find a country to deport him to, and a judge finally said, no, no, no, you got to release him. But now he's caught up in that. I view that as a slightly different kettle of fish because he's at least in an established legal system. He has a right to a lawyer, he has a right to have his family visit him, people know about him. And one thing that I think Joanne is going to talk about is there are people in CIA custody, at least we knew they were in CIA custody, who have now disappeared. And for the first time in this country we knew they were there and now where are they? Nobody seems to know. So first time you have disappeareds in this country.

Man 9: One last question. Dan?

Man 11: Will a change of Administration eliminate Guantanamo?

Joseph Margulies: Okay, thanks everybody. <Laughter> The question was will a change in Administration end Guantanamo?

Joseph Margulies: The lesson of history-- yes, maybe some. The lesson of history is not promising in that regard. It's obvious to me and to careful observers that the Administration is just desperate to get out of this. I sometimes say to people that the Administration is as much a prisoner of this policy as the prisoners, and all they want to do is hand off this baton and let it be somebody else's problem. But once it is somebody else's problem I'm not convinced that there is the political will to shutter Guantanamo. There again I get depressing again-- I'm sorry.