

COMMITTEE COMMENTARY

In *Guantánamo and the Abuse of Presidential Power*, author Joseph Margulies brings hands-on experience and insight to an issue of great constitutional significance. The question whether the Bush Administration's assertion of executive power in response to the threat of terrorism is appropriate has far reaching implications beyond the facts of Guantánamo. Uniquely positioned to tell this story, Margulies captures in this book a real life and very current exploration of the limits on executive power and our constitutional commitment to the separation of powers. "The question is not whether the United States has the power to imprison people in connection with the war on terror; without doubt the government has such power. The question is, and has always been, whether the exercise of this power would be restrained by the rule of law." As the lead attorney in *Rasul v. Bush*—in which the Supreme Court held in 2004 that the detainees at Guantánamo could challenge the lawfulness of their detention in federal court—Margulies effectively marries clear legal analysis with personal stories of detainees and the tribulations of the volunteer lawyers representing them. Margulies' examination of how our government determines the legal limits on our response to the threat of terrorism provides a clear and readable case study of the roles of the executive, judicial, and legislative branches. In this regard, the book teaches important lessons beyond the story of the Guantánamo detainees. Margulies has also done an excellent job showing the critical role lawyers play in taking on tough and often unpopular fights, often without compensation, and, in so doing, provide a critical bulwark in protecting fundamental constitutional guarantees.

Guantánamo and the Abuse of Presidential Power

Simon & Schuster, New York, New York
Joseph Margulies, Author



INTERVIEW WITH JOSEPH MARGULIES

Joseph Margulies is an attorney with the MacArthur Justice Center and Associate Clinical Professor of Law at Northwestern University School of Law.

Where did the initial idea for *Guantánamo and the Abuse of Presidential Power* come from?

I was lead counsel in *Rasul v. Bush*, one of the two cases decided by the U.S. Supreme Court in 2004 that established the right of judicial review for the prisoners at Guantánamo. The idea for the book emerged from the litigation that ultimately led to *Rasul v. Bush*. It became apparent to me during the case that there was a great deal of interest in the various pieces of the administration's detention policy, but also a great deal of confusion. Nowadays, people are flooded with bits of data from countless sources and it's almost impossible to distill a rational, comprehensible picture of the whole. My goal was to provide that picture by creating an account of the detention policy that was at once credible and accessible—credible to scholars and journalists working in this field, but accessible to an interested and educated layman.

How do you think the book treats or offers insights or perspectives on legal issues and legal institutions?

Most of all, I hope the book is simply a good read—an engrossing, informative narrative about matters of interest and importance. But along the way, I think it makes several contributions.

First, it is the only book that assembles nearly all the currently available information about the genesis and operation of the administration's detention policy, which it condenses into a single narrative and describes how it was brought to bear on real people. Second, it describes concretely how that policy intersects with other controversial pieces of the administration's response to 9/11, especially the claim to an inviolable Commander-in-Chief power and the use of aggressive interrogation techniques. Finally, and in what I think is the book's most important contribution to the scholarly literature, it lays out the history of the interrogation methods employed post-9/11. These interrogations relied principally

on psychological rather than physical pressure and trace their genesis to interrogations used against a small group of American POWs during the Korean War. Regrettably, the knowledge we gained from that experience in how to resist illegal and immoral interrogations became, after 9/11, the basis for how to conduct such interrogations. Though other reports have since confirmed these conclusions, my book was the first to make this link.

What do you see as the book's public impact?

William Faulkner used to say, facetiously, that he never knew what he had written until it had been explained to him by his critics. In that spirit, I suppose I should leave it to others to assess the impact of my book. I would just say that I have been very gratified by the reception the book has enjoyed. Barely a day goes by that I am not contacted by a complete stranger who thanks me for my work. Sometimes the thanks come from a scholar or journalist working on a book or article of their own. Sometimes it comes from a layperson who approached the topic out of an interest in the administration's detention policy. Sometimes it comes from a congressional staffer who is grappling with these issues on a policy level. I consider it all quite humbling.

PREFACE

I have been a lawyer for many years but few moments in my legal career have been as gratifying as the sight of Mamdouh Habib reunited with his wife. He spent more than three years in prison: six months in a prison outside Cairo (having been delivered by the Americans and tortured by the Egyptians), and more than two years at Guantánamo. He was never charged with any wrongdoing and the government had never defended his detention in open court. As I write this, in the spring of 2006, nearly five hundred prisoners remain at Guantánamo. Hundreds of others are held at facilities all over the world. They, like Mamdouh, are prisoners of the Bush Administration's post-9/11 detention policy. This book is about that policy.

CHAPTER THREE: "The System That Has Been Developed"

The litigation in *Rasul* raised a deceptively simple question: what is the role of the judiciary in the war on terror? It is customary to think of war as a no-holds-barred affair. This, of course, is the import of the oft-quoted Latin expression, *Inter arma silent legis*—"In time of war, laws are silent." But though it sometimes must struggle to be heard, the law in this country retains its voice during wartime in two significant respects: first, our constitutional structure ensures that the exercise of military discretion will be kept within its proper sphere; second, the laws of war guarantee that, even within this sphere, armed conflict will not descend into lawless anarchy. The law is not always successful in this regard and its failures have had disastrous results, but it is certainly incorrect to say that war is lawless. Twin legal systems—the separation of powers and the laws of war—limit war's reach and regulate its conduct. Together, they are indispensable if a constitutional democracy, tested by the strain of war, is to remain "a government of laws, and not of men."

CHAPTER SEVEN: "War Is Not a Blank Check"

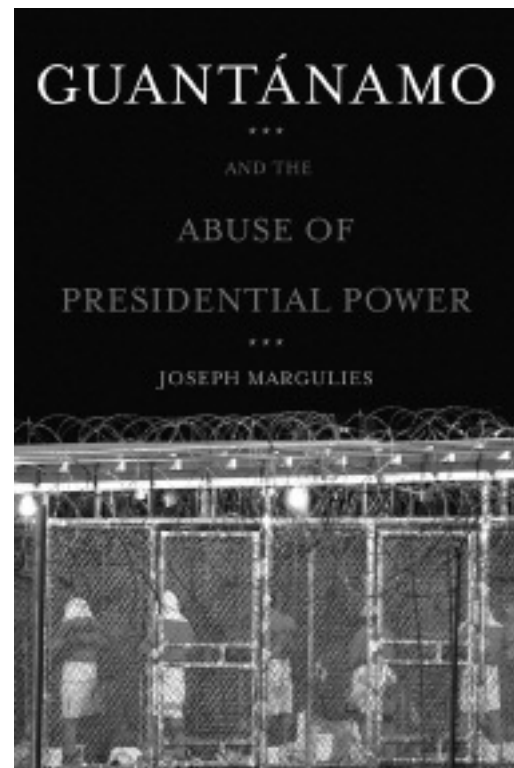
No lawyer wants to pass up an opportunity to argue before the Supreme Court, and Tom Wilner of Shearman & Sterling and I are no different. We had led our respective teams from the beginning—developing the legal issues, presenting the arguments in the lower courts, and pressing the litigation at a time when few others were willing to come forward. We both had earned the right to stand before the Court. We knew, however, that the Court was unlikely to hear arguments from more than one lawyer for the prisoners. At a meeting in New York shortly after the Supreme Court agreed to review the case, I quipped to Tom that we should arm wrestle for the honor. Tom quickly agreed, having been a champion wrestler in high school. I pointed out that he had since taken up smoking, but he was undeterred. Cooler heads eventually prevailed, and we decided to bring a new member into our group.

We recruited retired federal judge John Gibbons to argue the case. President Nixon had appointed Judge Gibbons to the Third Circuit Court of Appeals in Philadelphia in 1970. He eventually became chief judge before retiring in 1990 and returning to private practice in New Jersey. He had earned a reputation as a rigorously fair advocate whose personal and political views defied categorization. On the bench, he had been seen as conservative, and certainly not sympathetic to criminal defendants. A lifelong Republican, Judge Gibbons had testified in support of Clarence Thomas's nomination to the U.S. Supreme Court. Yet since his retirement, he had devoted most of his time to public interest litigation. He had defended a number of death row inmates, including one in Virginia whose appeal he handled successfully in the U.S. Supreme Court. His participation in *Rasul* demonstrated that the principle at stake in the litigation—that no person can be held without some lawful process—transcended political affiliation. (As an added wrinkle, Judge Gibbons had volunteered as a young man to serve in the U.S. Navy and was stationed

briefly at Guantánamo, a tidbit he never ceased to remind us of as we helped him prepare for the argument.)

The Court heard arguments April 20, 2004. The courtroom was filled to overflowing. Tom and I sat nervously with Judge Gibbons at counsel table, a few feet in front of the Court. Chief Justice William Rehnquist called the case: "We'll hear argument now on 03-334, *Shafiq Rasul v. George W. Bush* and a companion case. Mr. Gibbons." Judge Gibbons rose from his seat, moved to the podium, and addressed the Court:

What is at stake in this case is the authority of the federal courts to uphold the rule of law. Respondents assert that their actions are absolutely immune from judicial examination whenever they elect to detain foreign nationals outside our borders. Under this theory, neither the length of the detention, the conditions of their confinement, nor the fact that they have been wrongfully detained makes the slightest difference. Respondents would create a lawless enclave insulating the executive branch from any judicial scrutiny now or in the future.



Guantánamo and the Abuse of Presidential Power retails for \$25.00 hard-cover and is available from Simon & Schuster and booksellers nationwide. Go online to www.abanet.org/publiced/gavel for a link with more information.