

A Failure of Moral Imagination: Guantanamo, Torture, the Constitution, and Mormons— An Interview with Brent N. Rushforth

Note: Gregory A. Prince, a biographer and chair of Dialogue's Board of Directors, conducted this interview in Potomac, Maryland, in June 2009. Brent N. Rushforth is a partner at a law firm in Washington, D.C., and practices in antitrust and white-collar defense litigation. For the past four-and-a-half years he has represented, pro bono, prisoners at the Guantanamo Naval Base in Cuba.

Prince: You have been involved in Guantanamo for some time, and recently one of your cases was in the headlines. Give us the background of the ongoing legal battles there, and then tell us of your involvement in them.

Rushforth: The process that is now unfolding in Guantanamo grew out of our panicked response to 9/11. A friend of mine, a lawyer in Washington, very shortly after 9/11—within a year or so—had gone to Guantanamo to represent a prisoner there. He had received death threats, one of which he thought came from within his own firm. I don't tell that for reasons of over-dramatization, but simply to reflect the state we were in as a country. It was a state of panic. Shortly after 9/11, I sat on the lawn at Farragut Square and talked to one of my law partners who said, "I think we're moving to Oregon, because there we will be out of the maelstrom that may happen." I think that reflects that we were really in a state of panic when we invaded Afghanistan.

What happened is that as the Americans attacked Afghani-

stan, mostly bombing and Special Forces—this wasn't just infantry; this was bombing from B52's and Special Forces seeking to find Osama bin Laden—at the same time, the United States instituted a bounty-hunting program, to have the Pakistanis and others seek out and capture Arab men who were anywhere in the area. Of course, the Pakistanis are not Arabs, and the Afghanis are not Arabs; but the Saudis and the Yemenis who were in the area were sought out, captured, and sold to the Americans for bounties, in the belief that they were up to no good and in the hope that they would provide information as to how we could find Osama bin Laden.

Prince: Comment on the amount of the bounty, and how much of the average annual income in that area that it represented.

Rushforth: The annual average income was about \$250. Certain parts of Pakistan and Afghanistan are very poor. The bounties mostly started at around \$5,000. They went up from there. But you can do the arithmetic, and it's about twenty years' worth of income to these folks. I think it qualifies as a fortune in that part of the world. These were the bounties being paid for virtually any Arab man who happened to be in the area. Many who got caught up in this net had nothing to do with being adverse to the United States. Even those who may have gone looking for trouble—young boys, eighteen or nineteen years old—never found trouble. In fact, some of them went to Afghanistan prior to 9/11. Well, prior to 9/11, jihad had nothing to do with the United States. It had to do with tribal warfare in Afghanistan; and before that it had to do with driving the Soviets out of Afghanistan, which we not only applauded but also financed and provided the weaponry for.

So when we call these guys jihadists, first you have to be careful as to which jihad you are talking about. And secondly, many of these young men went to Afghanistan before the United States ever got involved; and when the United States got involved, and our bombs started to fall and our Special Forces started to be on the ground in Afghanistan, these guys took off. They wanted nothing to do with being adverse to the United States. Many of them were captured within weeks after the United States came in with their B52's and their Special Forces, and they were captured

on the border of Afghanistan and Pakistan *on their way home!* They wanted out!

Let me talk about how I got involved. My friend Tom called me and told me about his representation, and said, “Come on in. We need help.” So I volunteered, and about four and a half years ago I was asked to represent, initially, four of the so-called detainees. They are prisoners, and that is what I call them.

Prince: Was there a clearinghouse that tried to get all of these men represented?

Rushforth: Yes. There is a very fine organization, based in New York City, called the Center for Constitutional Rights. They had gone to the Arab world, sought out the families of these prisoners, and received authorization through the families to represent these prisoners. I then went to the Center for Constitutional Rights, and they assigned me four prisoners to represent.

There is a very fine, dedicated group of lawyers. One of the pleasures of this representation is that it is one of the most courageous and—I’m not speaking about myself—one of the finest group of lawyers I have worked with.

So, four and a half years ago, I went to Guantanamo. You can’t fly over Cuban air space, so you have to fly way out over the Atlantic Ocean, and come in to the southeast tip of Cuba, which is about 800 miles from Havana. Cuba is a very big island! Guantanamo formerly was a very sleepy naval base. It couldn’t service the big ships in today’s navy, because the water in its harbor is not deep enough. So it was pretty sleepy.

Donald Rumsfeld, George Bush’s Secretary of Defense, conceived of the idea of putting these prisoners in Guantanamo. The *clear* hope and theory of putting these prisoners in Guantanamo was to put them in a legal “black hole” where they would never see legal representation and would be away from American due process. That was clearly the intent—where they could be tortured, where they could be abused and, frankly, where they could be held forever, whether or not they were guilty of anything. That was the intent, and we know that because that’s the position the government argued before the Supreme Court, three times.

I was privileged to sit near Seth Waxman when he argued the Boumediene case. The notion that our constitutional principle of

habeas corpus applied to these prisoners, who were clearly held under the power of the United States, hung by a thread. Seth Waxman's argument was brilliant and moving. It carried the Court 5-4. The Bush administration supposed that these guys would never see the inside of a courtroom. They created a legal black hole, but it did not remain a legal black hole because the lawyers and judges in our system cracked it wide open. Ultimately the Supreme Court cracked it open. Some think this decision puts us at risk, but I think it saves us. It saves the Constitution. It saves our most cherished values. It says that, even in the face of enormous fear and danger, we adhere to our values. We don't torture. We don't subject these folks to inhuman abuse. And we don't imprison them without giving them a right to raise their hand and say, "You've got the wrong guy. You don't have a basis to hold me." And in many, many of these cases, they are right.

What does *habeas corpus* mean? This is a seven-hundred-year-old principle of Anglo-Saxon common law. Magna Carta stuff in 1215. The barons at Runnymede told King John, "You cannot arrest an Englishman without allowing him *habeas corpus* rights," which means you can tell the king, "Stop. You've got the wrong guy." That puts the burden of proof on the king to come forward with the evidence establishing that there is a basis to hold that prisoner. It's the same principle today. It's one of the foundations of a free society. In fact, Joseph Smith filed many *habeas* petitions in Nauvoo to avoid imprisonment. That's what I'm doing for these prisoners. "Dear United States: Offer some proof to the court that you have a basis for holding this guy."

Well, when that issue came before a federal district court judge in the spring for one of my clients, we had a full-blown trial. Full evidence. The United States could bring any witness into court that it wanted to. It could bring any evidence into court it wanted to. It could say anything to the judge that it wanted to, in terms of providing that basis. It was after a full evidentiary hearing. The judge, Gladys Kessler, clearly treated this case as one of the most important she has ever had. She had memorized the facts in the record. She wrote a forty-five-page opinion deconstructing every single fact that the government had presented and ultimately concluded the government had no basis whatsoever to hold Ala Ahmed as a prisoner. She ordered him released and or-

dered the United States to report back to her regarding what they were doing to make sure he could get released. I'm not making this up! For a federal court judge to say to the commander-in-chief in wartime, "You have no business to hold this guy whom you have imprisoned for more than seven years," is a big deal.

Prince: Were there obstacles thrown up even for you to represent these guys in the first place?

Rushforth: Well, my firm was very supportive. Many lawyers share a very proprietary notion about the rule of law. There is a sense that we are not a government of human beings; we are a government of laws, and everyone is under an obligation to obey the law and will suffer consequences if he or she doesn't. It's a principle that we all talk about.

When I set out to represent these guys, I found two things. First, because of the panic that had stricken the United States when those towers fell down—and it's a very human reaction, and of course the government had an obligation to protect us, and naturally we were all panicked—the government started telling us, through the bully pulpit and with the bullhorn, that the guys we had captured were the worst of the worst. They were murderous terrorists; and if we let them out, or if we so much as flinched, they would cut our throats. So when I first went to Guantanamo four and a half years ago, I had no idea whom I was going to meet in the prison camps. As far as I knew, they *were* terrorists. All I knew was that I believed, and still believe, that even they are entitled to fairness and due process.

Prince: And if the government can't prove them guilty, then they go free?

Rushforth: That's the fundamental proposition. And now, it is a proposition that has been upheld by the U.S. Supreme Court. It's the law! So that's the first point. We were in a national panic. I didn't know who these guys were.

The second thing is that the U.S. Department of Defense, after it rounded up these eight hundred guys and took them to Guantanamo, released five hundred of them. We often forget that. Remember that Dick Cheney and others are saying, "These are the worst of the worst." Well, the U.S. Department of Defense flew five hundred of them home. Just let them go. Now, there is

all this talk about recidivism and claims that some of them have returned to the battlefield. Well, of the five hundred who have been released, maybe a handful *have* returned to the battlefield. But the Department of Defense did it. No court ordered them released.

Prince: And in the process, we probably created some enemies and drove them in that direction.

Rushforth: There's no question about it. You and I would be angry if a government held us without cause. There's a great deal of anger. But the thing that has surprised me—and I happen to believe this based on my own personal experience—is that the prisoners whom I represent have the capacity to differentiate between the people and the government of the United States, on the one hand, and the Bush administration on the other. They believe that what happened to them was caused by an administration that had, regardless of the cost, basically launched a crusade. My clients are not angry at me, and they are not angry at the people of the United States, and they are not angry, ultimately, at America. They are furious at the people who have perpetrated this legal outrage—basically the Bush administration.

And so am I, because this was done in my name, as an American. I deeply resent it because it violates the Constitution. It violates the law. I don't believe that I should be protected at that cost, because the cost is too high. It violates a right that is too precious.

Prince: How many trips have you made to Guantanamo so far?

Rushforth: Frankly, contrary to your daily advice to me, I haven't kept detailed track, but I think fourteen or fifteen times over the last four years—three or four times a year. It's quite a trip. Guantanamo itself reminds one of the phrase from Hannah Arendt, "the banality of evil," because part of Guantanamo looks like Dayton, Ohio—no disrespect to Dayton. It has a navy exchange that looks like Wal-Mart, with a Subway sandwich shop, a McDonald's, and a golf course that has been dubbed "the worst golf course in the world"—because it's basically a desert. But it looks like a little town in America, on the windward side of Guantanamo Bay. We stay on the leeward side, and every morning we go across to the windward side on a navy patrol boat. Then we and our escorts get in a van. We stop and get some food for our

prisoners, and then travel the four or five miles out to the coast where the prison camp is located.

Ernest Hemingway said in *The Old Man and the Sea* that the water off Cuba is purple, and it truly is about the deepest indigo blue or purple color that you can imagine. It is absolutely, stunningly beautiful. But many of the guys there have never seen the sea, even though they are located a hundred yards from it, because they are kept in isolation. But the little town of Guantanamo, before you get to the prison camp, looks like America.

As a kid, I grew up in California. We had moved there from Utah. My dad was a lieutenant in the navy in World War II. He taught sailors how to jump off a carrier deck, which at that time was seven stories above the sea, without killing themselves. He was an athlete, so that was his job. We were stationed in San Diego. I was born in 1941, so of course I was only four years old when the war ended. But as a high school kid I read about the internment of the Japanese in California, under then-Attorney General Earl Warren, who changed his character when he became Chief Justice. I remember, even as a high school kid, thinking, "Well, thank heavens that kind of unconstitutional, aberrant behavior is now behind us." And lo and behold, who would have thought that in my dotage, sixty years later, I would be sitting with prisoners in Guantanamo who had been captured and sold to Americans and held without any basis, because of our panic during the so-called war on terror.

Prince: When you first went down, did you have any notion about the role of torture in all of this?

Rushforth: No. In fact, it was over time, where my guys felt enough confidence and trust in me that they would begin to open up on the subject of torture. The first time I met Mohammed Ghanem, he had clearly had the stuffing kicked out of him by the so-called "ERF team"—the Emergency Response Force. I was standing, waiting to go in to visit one of my prisoners when an ERF came down the hall of the prison camp toward me. It scares the stuffing out of you! They are five linebacker types dressed in black, wearing black plastic body armor all over their body, and a plastic shield that comes down over their face. You can imagine five of these guys coming into your cell. It's a rough business.

There have got to be some guys who are there to keep order in the camps, but these guys, in my experience—well, with Mohammed, for example, the day before I first met him, an ERF team had worked him over. He was in very, very bad shape.

Prince: You could see it?

Rushforth: Oh, absolutely. His face had been beaten, his arms and legs had been beaten; he was badly beaten. It was startling. What had happened is that these guys had come into his cell and had abused the Koran. They had thrown it on the floor, stepped on it and spit on it; so Mohammed, unadvisedly, had spat on a guard. That was enough to have the ERF team work him over. The beating was an overreaction and, in my judgment, had been instituted by the guards by abusing his religious sensibilities.

Prince: But that doesn't rise to the level of torture.

Rushforth: I agree. I would not necessarily call what the ERF teams do torture. What I would call it is abuse. But torture is a different proposition. Torture, with respect to the two prisoners whom I represent who have suffered torture, is something that takes place in the context of interrogation. It includes sleep deprivation. There's a "Frequent Flyer Program," which basically means that you are moved maybe twelve times a day, day and night, and you can't sleep. This goes on for days at a time. I don't know how many of our readers will have gone for a full night without sleep, or maybe two nights. I don't think I've ever gone for two nights without sleep. I've gone one night without sleep many times as an undergraduate, where I was trying to get something done. But it's hard even to imagine going five, six, seven nights without any sleep, and that's what happened.

Nudity, religious abuse, beatings, and quite graphic sexual abuse. The sexual abuse has been graphic and horrific. In fact, I have been instructed by one of my clients that I cannot publish the details of it in any way, shape, or form, because he fears for his life in Yemen, if he is to return. The only time I can talk about it at all is under seal in court, where it will be sealed forever. When he talks to me about it, he does so in a highly, highly credible way. He does not exaggerate. He talks about it in a very calm way. I believe him, completely and totally, when he tells me the story of what has happened to him. The notion that it has been perpetrated by

agents and representatives of the United States, in my name, is appalling.

Prince: Did this start to come out spontaneously, as you developed a rapport with these guys?

Rushforth: Yes. There is no question that they revealed these details to me because they trust me. I have told them as I have represented them that it is important that the judge knows what has happened to them, because it reflects on their treatment at the hands of the United States, and it reflects on their case. What was the United States doing? Here is what the United States was doing; I alluded to this earlier.

When the United States invaded Afghanistan, the support of Americans for that invasion—to find Osama bin Laden—was about 100 percent, including me and you. It was a perfectly legitimate, appropriate, important, critical function of our government to try to protect us. Nobody is arguing that. But these guys, including my clients, were caught up in that net, and then they were brought to Guantanamo in early 2002, within months of 9/11, and within six or eight weeks after the United States invaded Afghanistan.

These guys were first taken to Bagram Air Base; and as my federal district court judge said, “What we have been learning about Bagram is worse than the Spanish Inquisition.” People were beaten to death at Bagram by agents of the United States. They were tortured severely, including beatings, hanging from the wall, throwing guys repeatedly, head-first, into the wall, sexual abuse, waterboarding—brutal tactics and torture.

The notion that this stuff is not torture is fanciful. It’s just pure rationalization. When you see President Bush standing and saying, “The United States does not torture,” given what we now know was actually going on—well, it’s really repugnant to see the President of the United States lying to us and telling us that we are upholding the standards of America when the standards of America were being trodden underfoot by the policies of the United States government. Here is what we need to bear in mind. None of my clients was captured anywhere near a battlefield. None of my clients was captured with a weapon. None of my clients is accused of having killed an American. None of my clients had anything to

do with being on a battlefield, killing Americans. They were captured fleeing Afghanistan, and they were sold to the Americans, and the Americans incarcerated them for the purpose of gathering intelligence—trying to find out where Osama bin Laden was, and so on. The Supreme Court has said very clearly, “You can’t just capture a guy and hold him forever, for purposes of seeking intelligence from him. That is not legal and it is not constitutional.”

These guys were captured, thrown first into Bagram, then flown to Guantanamo. They have been there now for seven years, for purposes of interrogation. And, most importantly in this context, they were thrown into what everyone—Rumsfeld, Cheney, Bush, and all their lawyers—believed was a legal black hole. They would never see lawyers. They would never see the inside of a courtroom. They would never enjoy due process. They were “enemy combatants,” so-called, who could be held forever for purposes of keeping them away from a battlefield, which, by the way, they had never been on in the first place (speaking of my clients) and interrogated. And this could go on indefinitely, as long as the so-called war on terror went on.

Prince: And they were content to just let them rot, to die?

Rushforth: Absolutely. No end in sight. It was the lawyers and the courts who cracked this egg open. Let me be very clear about that. We would know *nothing* about what is going on today in Guantanamo without lawyers. It was the lawyers who went down and then began filing *habeas corpus* petitions in federal court in Washington. That is what cracked this thing open for the world to see. Other lawyers like David Addington, who was Cheney’s lawyer and later chief-of-staff, and Scooter Libby, and our co-religionist, Jay Bybee, at the Justice Department, were given the task of rationalizing torture.

I didn’t know that at the time. I didn’t know that these guys had been tortured. Frankly, I assumed that they hadn’t been—except maybe, here and there, a real bad egg like Khalid Sheikh Mohammed. But not these guys, who were, at very worst, foot soldiers, if they were that. It turns out that they were *never* foot soldiers against the United States.

It wasn’t really until I had been in Guantanamo many times—I started going before the Boumediene case was decided, and it

wasn't clear that these guys were ever going to get *habeas corpus* rights, although we were fighting for it—but when the Supreme Court ruled, then we really began to prepare these *habeas* cases in detail. So it was a couple of years into my representation of these guys, and by that time I had developed a very strong, trusting relationship with them. These guys, now, are quite confident that I am fighting for them. But it wasn't until a couple of years into that representation that they really began telling me the torture story.

Prince: You had heard about torture by that time.

Rushforth: Right.

Prince: But this was different.

Rushforth: Absolutely. Torture was an abstract concept. I certainly had read about and heard about some of the big guys being tortured: Khalid Sheikh Mohammed, Abu Zubaydah. Abu Ghraib came along, I believe in 2003 or 2004. I had been in Guantanamo by the time Abu Ghraib came out. Then, in the context of Abu Ghraib and all those photographs, my conversations with my own clients began to focus on torture. It turns out that everything that has been pictured for the world that happened at Abu Ghraib, happened, and worse, at Guantanamo.

Incredibly, these guys have kept their sense of humor and their power to differentiate between an entire people, the American people, and a “few bad apples.” This notion that there were just a few bad apples somewhere down the ranks in our military that led to all of these abuses—the actual truth of the matter is there *were* a few bad apples. But they were at the very top, and they included President Bush, Dick Cheney, Condoleezza Rice, Donald Rumsfeld, and Cheney's chief counsel, David Addington. And unfortunately, they included the lawyers who legalized our dark side, this policy of torture, including our own Jay Bybee. If you want to say there were a few bad apples, the apples were at the very top of the bushel, and they infected the entire bushel. There is absolutely no question that this was a policy instituted at the very heart of and top of our government, carried out in an organized way.

So we have arrived at a place where America has, in the world today, the reputation of a country that tortures, a country that abuses. When I really let myself go and think that this was

done in my name, as an American citizen, it makes me very angry. I abhor it.

I hate to say that about Jay Bybee. I don't know him, but I know you know him. The only thing I know about Jay Bybee is the memo that he signed and perhaps helped to author. I understand John Yoo was substantially the author, and Jay Bybee signed it as the Assistant Attorney General. I must say that memo is shocking! It's shocking in its poor legal reasoning, in the authority that it left out, and most shocking in its concept of the commander-in-chief. In fact, the Jay Bybee memo—the now-infamous torture memo when Jay Bybee was the Assistant Attorney General of the United States—did not refer to an opinion some two or three decades earlier that very clearly held that waterboarding is torture. The notion that you could write the memo purporting to analyze whether certain techniques were torture or not without citing the law that anyone on Google could have found, shows how sloppily the memo was done.

As I was reading the Bybee memo and listening to these stories by my clients in Guantanamo, I was also reading a book called *Washington's Crossing* by David Hackett Fischer (New York: Oxford University Press, 2004). I am poorly educated on the Revolutionary War, so I was trying to fill in that gap a little bit. One of the stunning moments was reading about George Washington after the Battle of Trenton in 1776 and battles of early 1777. The British and the Hessians were torturing American prisoners-of-war severely—torturing some of them to death. They had captured tens of thousands of American soldiers after the Battle of New York. It was despicable, uncivilized, brutal. Tens of thousands of American soldiers died in prisons in and around New York and other parts of America that the British had taken.

As commander-in-chief, George Washington issued a general order to his troops saying, "We will not torture." So the prisoners of war that the Americans captured were not tortured, generally speaking. There were incidents, but the troops followed Washington's general order. In fact, they had captured 10,000 Hessian troops in a battle in New Jersey and were marching them west into Pennsylvania where they would be held. Battle imperatives dictated that the American troops guarding these Hessians had to go participate in other battles, so they told the Hessians to march

themselves off to the prison in Pennsylvania. And the Hessians did! They knew they were not going to be tortured or killed. This news spread like wildfire among American troops, Hessian troops, and British troops. After the war was over, many of the Hessians—and many of the British troops—repatriated themselves into the United States because of how they had been treated during the Revolutionary War.

You like to think that history is somehow an upward line of progress, but it isn't. George Washington, the Father of our Country, under the most powerful imperatives, fighting for the life of our country at the moment of its very birth, issued this general order that we would not torture, even though our own prisoners were being tortured and killed by the British and Hessians. And now, here we are, arguing publicly as a society about whether torture is essential to keep us safe.

One example to consider is the case of Abu Zubaydah, because it has been so much in the news recently. He is someone who is being represented by two friends of mine. He really illustrates the fundamental bankruptcy of the central argument of the torturers. The notion is that if somebody has the secret of the nuclear terrorist and he's sitting in front of you, of course you would torture him for the greater good, to learn where the nuclear bomb was about to go off. That's the central argument. At the heart of it, it has no truth to it whatsoever. You never know whether he has that knowledge or not. Torture won't tell you.

Abu Zubaydah was captured in Faisalabad, Pakistan. It was a shoot-out with Pakistani operatives, and he was shot three times as he was diving out a window. They brought a guy over from Johns Hopkins to do surgery on him to keep him alive, because they thought that he could be a source of information. For a long time, as he was recovering, they engaged in the same kind of interrogation that we did during World War II, namely, highly professional, very comradely interrogation. For example, one of the FBI agents learned the nickname that his mother used for him and began to call him by that name. They treated him with courtesy and respect. And that's where he gave up his important information about Khalid Sheikh Mohammed. When they started to water-board and torture him, he started giving them stuff that was use-

less. They never got anything of use out of him after they started to torture him.

He gives the lie to the central argument of the torturers: the “greater good” that justifies extracting information by torture to find out where the ticking time-bomb is. That *never* happens in real life. It happens only on “24” with Jack Bauer providing the torture.

Prince: Plus, these are warriors who are on suicide missions anyway.

Rushforth: That’s exactly right. So the central premise of the torturers, as now advocated by Dick Cheney, is utterly false. As the professionals would tell you, the way you get the good stuff is to engage with the person being interrogated.

Prince: And isn’t that how you have gotten the cooperation of your clients?

Rushforth: Yes. But that, of course, is very different. When I first went to the prison camps in Guantanamo in 2005, the CIA folks—the interrogators—had told them that I was a CIA operative, that I was a homosexual, that I was Jewish—and as Jerry Seinfeld would say, “Not that there’s anything wrong with that”—but clearly the purpose of it was to prevent any kind of confidential or trusting relationship from being established. I was quite forceful in telling my clients that the only reason I was there was to represent them and that my only duty as their counsel was to try to give them due process and the fairness of the American justice system. It took me about the first day that I met with each of my clients to really establish a trusting relationship, and I’ve had that trusting relationship with them ever since.

Prince: But it came through camaraderie, not through force.

Rushforth: Oh, absolutely! The torture stuff, as the good professionals in this business will tell you, simply doesn’t work. And the notion that waterboarding isn’t torture belies the fact that in the past we executed some Japanese for waterboarding, we court-martialed our own soldiers in Vietnam for waterboarding, and we prosecuted a sheriff in Texas for waterboarding. The notion that it’s not criminal and that it’s not torture is just fanciful. It’s astounding to me that we are having this public debate.

Furthermore, the whole notion that this is just about waterboarding is a total red herring. These guys have been hung from

hooks, beaten, held naked in cold rooms, sleep-deprived, and sexually abused. So it's not just about waterboarding. Waterboarding, for one reason or another, has just become the focus. You could just as easily think of these rooms where the CIA and other folks have gone about their business as medieval torture chambers, or southern prisons where blacks were abused and tortured a hundred years ago, because that's what they have been.

Anyway, back to my own prisoners. It evolved over my representation of these prisoners, that they have now confided the most lurid details of their personal torture at the hands of the United States. It makes me want to weep—that agents of my government have done this. As I was listening to *Washington's Crossing* on CDs, commuting to work, and listening to the account of George Washington's general order, I honestly *did* start weeping. *That* is what makes America what it is in the world, and that is what we have now given up.

One of my clients said to me the day I first met him in Guantanamo, "As a kid growing up in Yemen, America was always an idea to me. The idea that America represented is that you would be treated fairly, and you would breathe the air of freedom in America. I have lost that now." Sitting there as an American, that made me want to weep. We have lost a great deal of what has made us, as Ronald Reagan used to quote, "the city on the hill." That quality is what we stood for in this world, and we've given it up. We've lost it. We've sold our birthright for a mess of pottage. It's a very bad bargain.

I want to speak about the guys I represent, because they're the human consequences of what we have done. Let me tell you about three of them.

First, there is Mohammed Ghanem. He's a tough guy, a soldier. But here is the point. He's never been averse to the United States. One of the things that the United States puts in his list of allegations, for example, is that he fought for Muslim causes in Bosnia. Well, it turns out that the United States was *also* fighting for Muslim causes in Bosnia. So that's supposed to somehow show up on the dark side of his ledger? He tells me passionately that he has never intended to be averse to the United States. He fought against Communists. He fought against the Soviet Union in Af-

ghanistan. But he has been languishing in Guantanamo for over seven years without being charged with anything at all. He has never had a hearing.

Prince: If he were filling out a job application, what would he put as his occupation? Professional soldier?

Rushforth: Yes. He's a soldier for Muslim causes. One of the guys on my team was a paratrooper in the U.S. Army in the Vietnam War. As the two of them sat in the room together, they bonded. They're two soldiers talking to each other. We all like Mohammed. Now, Mohammed is a soldier for Muslim causes. I told him, "One of the things the court will ask is, 'Will you return to the fight against the United States?'" His response was, "I've never been in a fight against the United States. As long as you are not telling me that I can't fight on the Saudi Arabian side of a war if the Shiia regime of Iran invades Saudi Arabia, then sure, I'll sign a declaration that I won't be adverse to the United States." I responded, "If that happens, the United States Marines will be fighting alongside you." This is a complex struggle, and Mohammed deserves his day in court. He deserves justice from the United States, and he hasn't had it. He is the most difficult case, in the sense that he was at least *on* a battlefield.

The other guys I'm representing were never on a battlefield, never close to a battlefield. One guy has a fiancée who has waited for him. She has just graduated from medical school and is a doctor in Yemen. When he returns home, as he will, he'll be married. He wants me to bring Ben & Jerry's Ice Cream to his wedding. He will return to a hero's welcome but not because he has ever been a terrorist. He hasn't.

He was captured coming across from Afghanistan, where he was an ambulance driver, taking medical supplies to the poor. As soon as the United States got into Afghanistan and started bombing, and things got really hot, he said, "I've got to go home!" He was there because of the longstanding Muslim tradition that you do charitable work in memory of your father. His father, a businessman dealing with medical supplies and pharmaceuticals, died when Fahdel was two. Fahdel decided, "What I can do in the memory of my father is to work with the Red Crescent," and that's what he did. He went to Afghanistan, was an assistant to an ambulance driver, and drove the ambulance sometimes, to deliver med-

ical supplies to poor people in and around Kabul. When the bombs started falling and the Northern Alliance was coming down and attacking Kabul, he headed out. He was arrested on the border of Pakistan. The first time he ever saw snow was when he climbed up over the mountains to go into Pakistan.

He was wearing a Casio watch. The United States alleges, in its charges against him, that sometimes a Casio watch is used to set off explosive devices. But the United States has also admitted, in response to my discovery requests, that there are thousands upon thousands of people who wear Casio watches who are not terrorists and who wear their Casio watches for the purpose of telling time. And there is no evidence—I mean *no evidence*—in the record that Fahdel ever had any kind of training about how you use a Casio watch or any other kind of watch to set off explosive devices nor, perhaps most importantly, that he ever engaged in such activity. He told me—he was looking at my watch, a Rolex given to me by a client—“I should have been wearing a Rolex!” I said to him, “Inshallah,” which means “God willing,” and we both laughed.

Fahdel has a great sense of humor. He wants to go home. If he were my son, I would want him to go home. And he deserves to go home. He was cleared by the Department of Defense almost two years ago to go home! Why is he still sitting there? Maybe because the United States is embarrassed that it had kept him for five years with no basis, so “let’s keep on truckin’ and keep him there.” He’s sitting there because of bureaucratic denseness on our side, in a cell that is seven by twelve feet.

When I asked him, “Have you ever been tortured?” he said, “No, not unless you count the fact that I have been sitting in this cell for seven years, with nobody telling me why I’m sitting here. I would actually call that torture, but that’s up to you.” It’s a pretty potent argument. I read a piece by a psychiatrist, in, I believe, the *New Yorker* a few weeks ago, that basically confirmed what my prisoner had told me—namely, that, when you keep someone in isolation over long periods of time, it is, in fact, torture. It has the psychological effect of severe torture. So that’s Fahdel.

Let me tell you about Ala Ahmed. He grew up in Aden. I went to Yemen a couple of years ago and met his family. His brother is a surgeon’s assistant. He was wearing chinos and a madras shirt and

carried a briefcase. He looks like an American kid, and so does his brother Ala, who is still sitting in Guantanamo. Well, we finally got his case to court, before Judge Gladys Kessler, whose forty-five-page opinion held that the government's evidence was of *no* value. The purported testimony against him was so deeply flawed that she gave it no credence. She held specifically that there was no evidence he had ever been trained in Afghanistan for any military activity, no evidence that he ever engaged in *any* military activity, and no evidence that he did anything other than live in a house where he was seeking further education in Pakistan, which has a reputation for high-quality education in Islam.

Yemenis and other Arabs have, for years, gone to Pakistan to further their education. He was captured in a house where twenty other people were living. A couple of them have purportedly admitted to being connected with Al Qaeda. The other eighteen were students who had no connection with any terrorist activity whatsoever. Judge Kessler characterized that evidence as a classic case of guilt by association. There is no evidence against Ala whatsoever that he ever engaged in *any* activity adverse to the United States. He had no weapons; he had no other paraphernalia; he had no terrorist literature; he had nothing on him when he was captured; there was nothing in his locker in the house; he was characterized by other people who were captured in that house as being a quiet, unassuming student of the Koran. He is known in the Guantanamo prison as "the sweet kid," and he is. He is a sweet kid.

Judge Kessler cleared him of *any* wrongdoing and ordered the United States to do everything in its power to release him. So he is still sitting there, pending the government's decision on whether to appeal the case. I hope they don't appeal it, because the Obama administration is trying to shut the place down. Ala ought to be home with his family. He has been at Guantanamo for seven and a half years with no justice, no fairness, no due process whatsoever.

One thing that has happened here, as I sometimes tell my kids, is a failure of imagination. If anything like what happened to Ala Ahmed happened to one of our kids or one of our acquaintances, people would be outraged. People would be up in arms, and it would take very little to get them active in trying to set this injustice right. But we have suffered, and we continue to suffer, from a failure of imagination, because we just can't put our own

kids in the place of Ala Ahmed. But guess what, he likes Ben & Jerry's ice cream. He wants to go home so that he can get married. He wants to see his brother again. Whenever I talk to his brother, which I do over the phone a couple of times a month, he weeps for Ala. He wants his brother to come home so he can embrace him.

We can't imagine our own children or our own acquaintances in Ala's position. "He has a funny-sounding name; he is from a far-away country; he is not like us." But it turns out that he *is* like us. And he has been sitting, at the pleasure and hospitality of the United States, in a seven-by-twelve cell for seven years! If you personalize this, it's a tragedy. It is a disgrace and a tragedy, what we have perpetrated.

Now, let me talk about the human cost of our torture policies. When I stood up before Mohammed's judge, a woman named Colleen Kollar-Kotelly, I said, "Judge, I have been trying cases in federal court for well over forty years, and I am about to tell you something that I thought I would never say. And that is that the United States of America has tortured my client." I proceeded to tell her some parts of the torture story. Other parts are yet to come in this trial. It's tragic, not only for Mohammed, but also for the United States, in that we have abrogated our principles of justice and fairness, and we have abrogated our commitment to the Constitution of the United States. We have done it all based on the notion that it makes us more secure.

I happen to adhere to Barack Obama's statement that it has not made us more secure but that we *can* pursue policies that keep us secure, that are consistent with our commitment to our Constitution and consistent with our highest principles. Here is what gives me hope. I'm telling these stories now to federal court judges, who are experienced and independent. Under our Constitutional system of separation of powers, they do not have to fear that, if they rule against the United States they will lose their jobs or lose their heads. When these federal judges hear these stories, they are outraged. The first case I argued that involved torture led the judge to order the United States to give me every piece of information about the torture that has occurred.

The connection for me between the policy and the behavior of agents of the United States is a deeply personal one. We've

been reading the memo, authored in part and signed by Jay Bybee, issued here in Washington, in the antiseptic corridors of power. I'm going to get to the Mormon involvement here in a minute. This memo is theoretical and antiseptic. We now have Dick Cheney leading the charge that these measures were necessary for the protection of the United States. But then I sit in a little, tiny cell in Guantanamo with a young man who has suffered torture and been severely abused by agents of the United States and it stops being antiseptic and theoretical. It comes home.

One of my partners, who was with me when the story of the Bybee memo was coming out, had to stand up and walk to the back wall of the cell. He was crying. I was trying not to cry, because it was important to elicit the full story, which we did.

Prince: This was as the client was describing the torture?

Rushforth: The client was describing the details of what had happened to him. I've tried many cases with my partner over the last twenty-five years. He asked me after this session, "Is there anything in that story that you don't believe?" I said, "Not a word." He said, "I agree. It is completely and entirely credible."

So you come from the antiseptic memo, which in itself makes you scratch your head, since it claims that abuse isn't torture unless it leads to organ failure or death. You wonder where in the world that came from. It comes out of a very dark place.

Prince: How about, "Torture is not torture unless it is intended to be"?

Rushforth: That's the second part of the Bybee memo's analysis. It basically defines torture out of existence. If the commander-in-chief does it for some other purpose than torture per se—anyone can say it is done for the purpose of gathering information—then it's not torture? Well, then, there's no such thing as torture. That's a theoretical debate. To me, it is chilling even on the page. I've had that debate with members of my ward, members of my stake, and they keep it antiseptic, theoretical. To me, the words themselves are chilling.

Prince: In that crowd of people, you don't necessarily represent the majority viewpoint.

Rushforth: I don't. I had a conversation with a friend in the Church who was describing prosecutorial abuse in the United States against a bunch of young men—evidence had been fabri-

cated about an alleged rape. It was a clear case of prosecutorial abuse.

Prince: For the purpose of promoting one's own political career.

Rushforth: For the purpose of ambition. My friend was absolutely outraged and went on for some time about "how could this happen in America?" I listened, and at the end of that—and it was true venting and outrage, and rightly so—I said, "I completely agree. This was outrageous, completely and totally outrageous. The reason that you are so outraged is because you can put your own sons in the position of these kids who were abused by this prosecutor." And in fact, some of them had gone to school with his kids. "It doesn't take a great leap of imagination to say, 'How could this happen? It could happen to my own kids!' Now, let me tell you about an abuse that's maybe a thousand times worse, and that is what has happened to my young clients in Guantanamo. The reason that you are not so outraged about this is a failure of imagination. It is a failure of us being able to say, 'That could be my kid.' Let me just tell you, that *could* be your kid. They are just the same. They like Ben & Jerry's Ice Cream. They want to go home and get married and raise a family. They have been wrongly arrested. They have been wrongly detained for going on eight years, and they have been tortured by Americans."

Prince: And his response?

Rushforth: He listened. He listened. I think for a moment it had an impact. The problem is, as we go about our lives it is hard for us to hold that thought. It is hard for us to realize that, if it happens to these kids, it happens to us and to our kids. I feel privileged to have spent the last four or five years being in the middle of this legal fight because it keeps at the very top of my consciousness the qualities that are most precious about our country. Without those qualities, Mormonism could not have been restored. I couldn't practice my religion. We are in some respects, even today, a persecuted minority religion. See what happened to Mitt Romney's campaign. The majority in our country still sees Mormonism as a sect, and a kind of weird sect at that. But for our Steve Youngs and Bill Marriotts, we'd be seen as a bunch of weirdos. And yet, we are free to walk into our ward house and practice our religion because of

what is precious about America. And that is its freedoms. Yet we have perpetrated war crimes. We have committed torture, abuse, and religious abuse, as a country, against these young men and vilified them as the “worst of the worst.”

When we torture people and deliberately offend against their religion, we surrender our moral authority. It’s a terrible abrogation of what is most precious about our country. It flies in the face of what George Washington did when he was founding our country. It flies in the face of the freedom that made the restoration of the gospel possible.

Now, let me tell you of a conversation I had with one of my Jewish law partners. I came back and launched into a vitriolic tirade about America torturing these guys. Then I said, “The thing that hurts me very deeply is that four of the guys at the heart of this were Mormons, and I’m a Mormon kid from Utah.” He listened patiently to my tirade, and then he said, “Brent, what I don’t get is that you are so upset about Mormons being involved in this. What’s the big deal? Mormons are just people.” That really focused my thinking. His attitude was that it didn’t surprise him. Why was I so upset by it? As far as he was concerned, Mormons are good people generally and he has no bone to pick with them, but he said, “Why would you think that Mormons would not be subject to the same kinds of forces of fear that are abroad in the land—that we are all subject to?” In other words, as he put it, “Morality is not an institutional thing. Morality is a personal thing. So it doesn’t surprise me. What interests me is why you are so upset by it.”

So I started thinking, “Why *am* I so upset by it?” I recognize that I’m making value judgements about the torture memo written or signed by Jay Bybee and about the participation of two Mormon psychologists in the development of the CIA’s torture program, and another Mormon lawyer in the White House participating in the so-called legal analysis leading up to the adoption of these policies. I recognize that I could appear to be self-righteous. I don’t want to be holier than thou, but that doesn’t stop me from assessing what I think is wrong about this behavior. If I’m taking the risk of being judgmental and self-righteous, so be it.

But here’s what upsets me. We, as Mormons, often behave and speak as if being Mormons raises us above normal human be-

havior and makes us immune to normal human influences. I understand that we attach a very high value to the restoration of the gospel. But Brigham Young once said something like this: "Mormonism doesn't make us better unless we *are* better." In other words, morality is personal, whether you have the benefit of the restored gospel in your life or not. The choice is yours; the choice is mine. My partner was right. Morality is not institutional.

My second point may be either parallel or even slightly contradictory. Another thing that upsets me stems from the Church's making moral pronouncements and giving us moral direction. Don't get me wrong, I think that's exactly what the Church should do; it doesn't hesitate to tell us in detail the rules of sexual morality, for example. I think that's important in our society, and I think it is a very legitimate function of the Church. The Church took a strong and decisive stance in favor of Proposition 8 in California by framing it as a moral, rather than a civil rights issue, although there is a strong civil rights component to the debate. However, the strength of its voice on Prop 8 stands in stark contrast to its silence on torture. That's the cause of my discomfort.

Torture carries both moral and political dimensions, the latter being in the area of national security. By speaking out so loudly on the moral aspects of homosexual marriage, the Church effectively shifted the attention of its members away from its civil rights aspects. But its absolute silence concerning the moral aspects of torture gives the strong impression that this is merely a political issue. Well, you can see the result of leaving it to the politicians. A strong statement by the Church condemning torture on moral grounds would have been heard, and it would have been a source of great pride and reassurance for me. Instead, the Church sat this one out, and that saddens me greatly.

That is disturbing to me, but as my Jewish friend would say, the morality of it is an individual choice. So let me speak as an individual. Does my Mormonism—does my Christianity—inform my attitude toward these prisoners in Guantanamo on a personal level? Does it inform my attitude toward my country torturing these guys? The answer is that it absolutely does. Does that sound as if I think it didn't inform Jay Bybee's judgment? Yes, it does,

and I think it's a tragedy. Now, I don't know Jay Bybee personally—

Prince: He was elders' quorum president in the Washington DC Singles Ward when I was in the bishopric, and he was a great elders' quorum president. He's a good friend.

Rushforth: I am informed that he is a very fine man and a fine and active member of the Church. He is now a judge on the United States Court of Appeals for the Ninth Circuit, and I am told by others that he is a really good judge—all of which makes it deeply puzzling and deeply hurtful that he would write or sign a memorandum that is legally indefensible. It doesn't cite precedent. In fact, it ignores precedent. It is four degrees from the norm of any constitutional reasoning. At one point it talks about the President's authority as commander-in-chief, yet it doesn't mention the case of *Youngstown Steel*, which is the definitive case on that issue. When Harry Truman tried to take over the steel plants, the U.S. Supreme Court said, "You can't do it. It doesn't fall within your prerogatives as the commander-in-chief." Well, Bybee signed a memo that, without citing or analyzing that case, basically concludes: "The President can torture somebody if his intent is to garner information because that falls within the power of the commander-in-chief." It's preposterous, and it has led us, as Jane Mayer said in her book, to the dark side. Now we have Dick Cheney, who is fundamentally repudiated by the majority of the American people, saying that, "Well, without torture, we would be attacked again." It's fear mongering.

Prince: You and I have both read Jane Mayer's book, *The Dark Side* (New York: Doubleday, 2008). She outs three Mormons in it. Tim Flannigan was in the "Circle of Five," that was essentially the war council. There were two psychologists, James Mitchell and Bruce Jessen, who had developed techniques for protecting U.S. troops who might fall into the hands of enemies.

Rushforth: Yes, the SERE program: Survival Evasion Resistance and Escape.

Prince: Ironically, Jay Bybee had the highest profile among these Mormons, but Mayer apparently did not realize that he is a Latter-day Saint. As I recall, the three that she identified as Mormons were the only characters in the entire book whose religions she disclosed.

Rushforth: That's right. I have had many conversations with Jane Mayer. Her reporting is wonderful. It is very accurate and very enlightening.

Prince: The two psychologists were working together. The other two guys, one presumes, were just part of this overall government machine. I don't think that there was a Mormon cabal in there—just these four guys who were doing their thing, and the common denominator was that they were all Mormons.

Rushforth: Let me address that for a second—not because I've figured this out, because I haven't—but I've thought a lot about it because of the connection that I have lived through between the memo and what has happened to my clients. It is horrific. It is something I never thought I would encounter. And so, I have given a lot of thought about how fellow Mormons could, by my lights, be led so far astray, could come down on the dark side.

Prince: And not just go along, but lead.

Rushforth: Yes. Lead. Here is what I have come up with. It is worth about what you are paying for it. I grew up in Kaysville, Utah, a block away from Kaysville Second Ward's rock chapel, built from the rocks of the Wasatch Front. When you're knee-high to a grasshopper, you are told, "Don't question the Brethren." Of course, that's one of the fundamental principles of practical Mormonism. Gene England once showed me a letter from Bruce McConkie. Gene was one of the founders of this great journal, as was I. The sentence that jumped out and punched me in the nose read something like the following: "From Bruce McConkie to Gene England. It is my job to do the thinking. It is your job to do the obeying." To my own thinking, that is about as contrary to fundamental, underlying gospel precepts as it can be. We are thinking machines, as far as I am concerned. That is what we are supposed to do. And in fact? I don't want to get too far afield here; but in the beginning, eons ago when we were co-existent with our Heavenly Father that first war was fought for the purpose of our being able to think and choose. That's the purpose. So when somebody says, "It's my job to do the thinking and your job to do the obeying," I'm thinking, "Well, that comes out of a dark place. I don't understand that." Now the tension between critical thought and personal revelation on the one hand and obedience on the

other has always been with us. Joseph Smith was big on free agency *and* obedience (he reacted badly to disloyalty), so maybe the tension is part of the human condition. But we often err on the side of obedience and it can dull our capacity for critical thought at the very moment that our freedom may depend on it.

I once asked a friend who runs a major American corporation, was a stake president, and now is in the leadership of the Seventy, "When you show up at your work every day at 8:00, how deep into the day do you go before somebody says to you, 'That's really not a good idea'?" He said, "Maybe an hour or two." I said, "Okay, now, how deep into your career as the stake president did you go before anyone said to you, 'You know, that's not really a good idea'?" He said, "It's never happened." That, I think, is a flaw in our structure and in our culture.

I've gotten a little far afield, but here is the point. When we are taught that you don't question the Brethren, that may be okay if you are talking about a prophet. I don't quite think it is because I still think you have to differentiate between when a prophet is speaking as a prophet and when he is kind of ruminating and hypothesizing. I think there's room for open, critical discussion even when you are dealing with a prophet, when he is discussing a topic from his human perspective. I think it's wonderful that your book, Greg, on David O. McKay has been so well received. You humanized David O. McKay in a way that, to me, was a brilliant treatment of what it means to be a prophet. He was a prophet, and he was also a human being. You can't be a prophet without being a human being. I thought the story you told was a wonderful story.

But even today, we have substantially lost the message of your book. Somehow we believe that unblinking obedience is what the gospel is about, and then we transfer that over to Republican politics, and we say, "If the commander-in-chief does it, it's legal," as Richard Nixon put it. And that's basically what the torture memorandum says.

Now, fear is a powerful thing. When I get on the commuter train between Washington and New York and somebody blows it up in Philadelphia, we're going to be gripped by fear again. It doesn't take much. But fear is what has led us to the dark side. I believe that it led us to the abrogation of our principles, to the violation of our Constitution, and to the stench and tragedy of

Guantanamo. Do I think it is in the highest tradition of—this is the part that sounds self-righteous, but I’m going to say it—our religion to try to bring justice and fairness to these prisoners in Guantanamo? Yes, I do.

I have talked with them about my religion. In fact, quite remarkably, one of the reasons they trust me so much is that they see me as a man of faith. It’s a different faith, but it’s not completely alien. Mohammed and I have talked about the fact that Abraham is the father of his religion and also of mine. My faith informs what I am doing in Guantanamo. It certainly makes me feel like a powerful advocate for fairness for these guys, for fairness under the Constitution and fairness under our system of justice. We’re having some success in that regard.

Let me bring it back to where I have come regarding what has happened here. When you are taught that you cannot question, and you are even told you cannot think, then there is a great danger—and that’s what I think we may be seeing here—that somehow, when you are in other corridors of power, you transfer the notion that when somebody speaks with authority, you must not question it. Rather, you must rationalize that power. That’s what I think happened here with that memo, which rationalizes a horrific abuse of power, a fundamentally unconstitutional abuse of power, one that goes contrary to George Washington’s founding principles on which this country is based.

I think that the Mormon principle—which I’ve explained I see as problematic even in that context—of “You don’t think. Your job is to obey authority” got transferred from the religious setting to other corridors of power, namely secular power, the exercise of power by the commander-in-chief, and bingo, you have a horrific rationalization of power. You combine that with personal ambition, and you combine that with the Mormon notion that only the Republican Party is blessed by God, and then you have a real toxic mix.

Prince: There is one other element here. This issue, rather than being a debate between two political parties, is cast in unambiguous terms as good versus evil.

Rushforth: Good versus evil. Even in our own society, if you questioned this unfettered exercise of power and authority, you

were a traitor. My friend who first called me when we were getting involved in this, received a death threat. I haven't, but another close friend later played me a very chilling voice-mail that he had received on his office phone. It called him a coward and traitor, and said to him, "Just know that I am watching the back of your head." It was really quite chilling. It's the same point you're making. It wasn't a debate between two political parties or two points of view. It was, "Either you are with us or against us, and if you are against us, you are a coward and a traitor."

Prince: It's a practical and horrific outcome of what we heard in 1964 from Barry Goldwater: "Extremism in the defense of liberty is no vice."

Rushforth: Yes. It is a replay. And have no doubt about this: These are extreme views. Jay Bybee's memo is the expression of an extreme Constitutional view. I can't predict what will happen. I do think the great debate that is taking place because President Obama has backed strongly and explicitly away from torture and abuse—especially with Dick Cheney fueling the fire—will not go away any time soon. I understand the argument that we have to move forward. But frankly, you can't move forward until you understand and bring daylight to what has just happened. We can't just act as if what has just happened is the ordinary course of business. It isn't. What has happened is a horrific deviation. I believe that it's a criminal and unconstitutional deviation from our core principles. It is more dangerous to us than anything the terrorists can do to us. In fact, it is the worst thing that the terrorists can do to us—namely, to scare us into walking away from our principles. That is what the torturers would have us do.

I don't mean to sound self-righteous, and I'm sure that a lot of people will think I am, but I'm very proud of my Mormon heritage. My Mormon heritage has led me to fight hard for the right of my clients, not only to receive due process but to be faithful Muslims without being a target of United States torture and abuse. I like to think that my motivation comes, in part, because of my Mormon heritage. And so, it hurts me, it pains me to think that Mormons have become so deeply involved in the dark side of things.

Prince: Is Judge Kessler's ruling a landmark for this whole scenario? Is this the first major ruling that goes in that direction?

Rushforth: It's not the first. There are other, very fine federal

district court judges who are addressing these *habeas* cases. But I believe it is a wonderful opinion. It certainly, in some ways, is the most comprehensive.

Prince: Is it precedent-setting?

Rushforth: It doesn't bind the other judges. Only the Court of Appeals binds the other federal district court trial judges. But she is a very fine and highly respected judge, and so we hope that it will have a very strong, profound impact.

I wish you could have been in Judge Kessler's courtroom. It was a classified hearing, so the doors were shut, and everyone in the courtroom had security clearance. Judge Kessler read her opinion to Ala as he was sitting in Guantanamo. It was a very powerful moment. You had a federal district court judge, dressed in her black robes, sitting up on her bench, in all the majesty of the U.S. justice system, reading to this prisoner her analysis of why the United States government has never had grounds to hold him as a prisoner. I was extremely proud of my country. In wartime, a United States federal district judge, under Article III of the Constitution, sat on her bench and told the commander-in-chief of our armed forces, "You cannot hold this prisoner. You have no grounds to hold this prisoner." That was a powerful moment, and it deeply affected me.

I deeply believe that, given the flaws in the human heart and the flaws in the human mind and all of these forces to which we are all subject, our system of government, our system of justice, and the separation of powers is an inspired system. The only reason I can travel to Guantanamo and can provide legal counsel to these prisoners is because of our system of separation of powers. The only reason that the United States military at Guantanamo gives me any deference whatsoever is because I have the power to bring them before an independent judiciary.

I wish that our readers could walk with me into these prison cells at Guantanamo and experience the power of our system of justice. It is a remarkable system. It has broken down under the weight of the fear that followed the 9/11 attacks, and we are just now beginning to see it rise again and assert the independent power of the judiciary. It's a wonderful thing. It's what makes America, America. It's so interesting, this trip, Greg. There is a

real, working telegraph system within the prison camps. The prisoners know almost instantaneously when something like this occurs. As I walked into the prison camps this last week, the power of what happened when Judge Kessler read her opinion to Ala Ahmed was palpable. A lot of it gets attributed to me, and that's very gratifying. My guys were infused with the sense that what I was doing for them and what the courts can do for them is extraordinary. Despite all this fear of the military, the United States judiciary can say, "The United States commander-in-chief has no power to hold you." I wish that everyone could feel the *palpable* power of that realization. It was pretty extraordinary.

So I'm hopeful. And having just come back from Guantanamo forty-eight hours ago, I have to say that I'm hopeful about Guantanamo, too. It was powerful to go striding into the prison camps with Judge Kessler's opinion in my pocket. They call each other "the brothers." Well, that day, we were all brothers.

Update: On Saturday, September 26, 2009, Ala Ahmed was reunited with his family.