

Boston University School of Law

MAX M. SHAPIRO LECTURE IN TRIAL ADVOCACY

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NEW LAW OR NO LAW?

The men without a country at Guantanamo Bay

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The boots crunch across the gravel, and you hurry behind a young sailor. It is hot and so silent as to be a little eerie in this small sterile camp, ringed by boxes with men in them. Nothing grows in here: no grass or flower or tree or even weed. You pass a cage, open to the sun, about eight foot square, that contains a soccer ball, and which can't be someone's idea of an exercise yard – can it? A sailor emerges from the guard shack and offers the formal greeting. You have read about this verbal salute. The first says, “Honor Bound.” The soldier returning salute responds, “To Defend Freedom.” That's the idea. But in the fact, your escort only mumbles. In the baking anvil of Camp Echo, JTF Guantanamo Bay, it's hard to get the word, “freedom” out.

It has been almost six months since you said, I just can't stand my morning newspaper any more, I've got to do something about this. Since you volunteered for the case, and boned up on habeas corpus and the law of war. You filed papers for your clients. You lost a few early skirmishes. In fact, all the early skirmishes. It's been five months since you were fingerprinted and submitted the form for secret clearance. Four months since the first of your old friends, landlords, and employers emailed to report that the FBI had been in touch. Three months since you bugged Justice, six weeks you bugged them again, one month since you had a temper tantrum and finally they scheduled your visit.

And through all those months, through the court papers and early, futile motions, you have never spoken to your client. Never had a letter from him. Never seen any piece of paper from the government to indicate why he is held, what, if anything, he is charged with, what, if anything someone thinks he did. The government got your case stayed, and when you ask for things the government deigns no answer. You ask. They don't respond. Not to any question – like for example, “what language does he speak?”

Here is what you know. Someone imprisoned at Guantanamo wrote on a piece of paper that a man named Adel Abdul Hakim wanted a lawyer. His name was written in Arabic characters. Next to the name, someone wrote, in English, "East Turkestan."

That's it.

You have read everything you can. About the Geneva Conventions and the Army Field Manual. About psychological abuse at Gitmo, about the export of torture to Egypt and Syria, about murder in Bagram. You have read case decisions: Rasul and Eisentrager and Ahrens and Quirin and Hamdi. You have googled and searched East Turkestan, and discovered that it is a remote land in Central Asia, representing the furthest eastern reach of the Turkic migration of a thousand years ago, where people are known as Uighurs. You have learned that a Republic of East Turkestan existed for five years in the 1940s, before Chairman Mao crushed it. You have read that imprisonment, beatings, torture, and worse is the common lot of these people today.

But about your client Adel, you know nothing at all.

So you are little anxious, hurrying after the anonymous sailor through that silent yard.

"Your detainee is ready," says another sailor wearing green rubber gloves, whose name is covered with duct tape. That's what they call them, "detainees." It sounds better that way. They are young, humorless, anonymous, their faces blank. A morose resentment of their detail to this spot radiates from them. You glance once at your interpreter – you couldn't find a Uighur speaker with secret clearance, and you hope that this man inside speaks Arabic too. On your side of the door, six months of papers, of anxious curiosity, of preparation in a vacuum, of ignorance. On the other side, a man bolted to the floor. You're a bankruptcy lawyer – what the hell are you doing at Echo Two? The impassive sailors may be wondering the same thing. With that question ringing in your head, you open the door.

But forgive me – I have forgotten myself. This is the Shapiro lecture, given annually in a great school of law, where no one will want to hear about so humdrum a thing as a client interview. It's the law you care about. As well you should, for it is fascinating and difficult – I say this as one who until February was as innocent of the law of war as he was of the conjugation of Uighur verbs. But the international law of armed conflict, the power of the President under our Constitution, the jurisdiction of the federal courts, the core meaning of the ancient writ of habeas corpus, these things are compelling. You want to know about them.

And because you are not simply law students in a school of law, but scholars in a great university, you are interested too, in the reach and play of the law in the history of our country; you will want to know what Robert Jackson said when he closed for the prosecution at Nuremberg, and how it was that in our own time, a deputy secretary of defense hastily declared a war that Congress never did; and why, today, officers assigned by the Secretary of Defense to prosecute war crimes cases say that the military commissions are rigged. You may even find instructive, as I did, the penetrating insight of Louie the Barber.

Its not that I don't want to tell you about July 14, and Echo 2, and what I discovered on the other side of the door – I do – but I feel a sense of responsibility to the Dean. And to you as well, because the Law of War, if it ever was well understood in America, is no longer. So, not tarrying any longer to ask of that law, 'what is it?' let us go then, you and I – as Eliot says, let us go and make our visit.

The Geneva Conventions

Here is one cornerstone of the Geneva conventions.

A soldier of the enemy is no criminal. When he tries to kill an American soldier on the field of battle, he engages in an honorable profession. Any soldier, of any enemy. He may be a Nazi of the Third Reich; a suicide bomber of the Empire of the Rising Sun; he may be a Viet Cong fighter who wore no uniform; he may be a member of the Taliban.

This proposition seems astonishing at first, and it may be why Judge Young of our district court lashed out at the "shoe bomber" prosecuted before him, telling him he was a thug, and no soldier. I happen to agree with Judge Young on both counts, and particularly the last one, because America seems to have quite forgotten that when you declare a war you make of your opponent a soldier, which is to say, a person of honor. It is not for me to question the wisdom of Congress's decision to declare war on Al Qaeda and those responsible for the 9/11 attacks, and thus make of them soldiers.

But they did. And under Geneva, the enemy soldier must be treated as our own soldier would, which is to say, housed, fed, attended by doctors, as a soldier would; granted letters from home, as a soldier would; sent home when hostilities end, as a soldier would be. A soldier's lot is Spartan, but humane. Torture is unthinkable. Indeed, the prisoner, whether a lawful combatant under article 17 of the third, or unlawful under article 31 of the fourth convention, cannot even be coercively interrogated. Did you know that? That means no threats, no intimidation, no stress positions, no round-the-clock assaults with light or Limp Bizkit, no withholding of benefits or even promises of privileges. The drafters of Geneva had seen how swiftly the thin veneer of civilization is ripped from men by warfare; they knew how slick was the slope between coercion and abuse. And so they forbid any coercion in interrogation.

Who is outside the Geneva Conventions? According to an execrable post-adolescent named John Yoo – who as far as the record shows has never done anything in his life but sit on the Bush-administration's knee, stitching like Madame Defarge torture and assassination into his academic knitting – Al Qaeda and the Taliban. But according to the former Secretary of State, the former judge advocate general of the Navy, the former Chief Judge of the Third Circuit Court of Appeals, and every JAG I've ever met who has actually smelled cordite, no one. Lawful and unlawful combatants alike are protected.

For long years this was the law in America. The Geneva Conventions were written into the bible of every JAG prosecutor, the Uniform Code of Military Justice and the Army Field

manual. But the Geneva Conventions are a dead letter today. Oh, they may be law, the Court of Appeals for the DC Circuit tells us, but those victimized by their violation have no standing to raise them. Who has such standing? The President. Thus the Geneva Conventions live on only in the conscience of a few good men – and women.

In my own case our Justice Department did cite one precedent for its read of Geneva – an article. I had to go to the NYPL to find it, but it did identify a post-hostility power of indefinite detention. The ART cited one historical example that indeed dealt with the indefinite postwar incarceration of German prisoners. That example was Joseph Stalin.

If it makes anyone else here a little uneasy when the Department of Justice cites Stalin as authority for its conduct, you are in good company. A major assigned to prosecute a war crimes case writes,

"I consider the insistence on pressing ahead with cases that would be marginal even if properly prepared to be a severe threat to the reputation of the military justice system and even a fraud on the American people,"

Another prosecutor, Captain John Carr says, "When I volunteered to assist with this process and was assigned to this office, I expected there would at least be a minimal effort to establish a fair process and diligently prepare cases against significant accused. Instead, I find a half-hearted and disorganized effort by a skeleton group of relatively inexperienced attorneys to prosecute fairly low-level accused in a process that appears to be rigged."

So much for the Geneva Conventions in America today. Treaties, law of the land, Supremacy Clause? What's left of the rule of law, then? One thing, perhaps – the oldest thing.

The Writ of Habeas Corpus

Now what is habeas corpus? A quaint Latin subjunctive, I used to think, the last refuge of a serial murderer who has exhausted all the courts of Texas or Florida.

But what is it really, this writ that long predated our own constitution, whose roots, as Justice Scalia likes to remind us, run back to Runnymede itself? Why is this ancient writ singled out by the Constitution of the United States for recognition? Not for creation, but for acknowledgement? Compared to habeas corpus, our own constitution is an adolescent. What is it, exactly?

This simple proposition: that whenever it imprisons a human being, the executive can be required to justify that imprisonment in law. Power, desire, fiat – these are not justifications. There must be law. And if there is no law, a magistrate can order the prisoner freed.

You'd think that point was settled. And yet we find the President's lawyers advocating the proposition that he may seize people on the streets of Sarajevo or Doha or Bangkok, shackle them, hood them, send them to a desert island, and there hold them in prison, forever,

without saying why. We find him arguing that the Geneva Conventions are not enforceable by those who suffer its violations. That he may conduct tribunals in which the defendant never sees a lawyer – or even the critical evidence. We find all of this done in the name of security, under the premise that our generation faces a threat that our grandfathers did not: as if Americans were not killed at Pearl Harbor and Normandy; as if Americans did not fear the U Boats off Long Island or the Japanese Kamikazis; as if Washington felt no threat in 1862 by the encampment of an enemy army at Sharpsburg, Maryland, fifty-six miles away.

In an age where no one cares for history, it is strange, then that our most historical protection, this artifact of the last millenium, now becomes the anvil upon which we try to hammer out a rule of law in this one.

Now I'd like to give you the answer that the writ does apply; that *Rasul v. Bush* means what it so plainly says, which is that the district court should have hearings and consider the merits of my case. I'd like to, but that matter is bogged in appeals so interminable that clients at Gitmo have begun starving themselves in protest. They ask what has happened in their cases and we try to explain through an interpreter about another procedural stay and reply briefs and Eisentrager and the metaphysics of "jurisdiction." And they have lost hope. Who can blame them?

These human beings forgotten amid the counting of angels on the heads of pins bring me, for a moment, to Mamdouh Habib. You have heard the Guantanamo prisoners described loosely as the "worst of the worst." The government doesn't like to dwell on how few of these men it charges with any crime. It was a tiny number – for years, four men, out of more than seven hundred. And Habib was one of this tiny minority who were actually to be tried for war crimes. I use the verb loosely. The proceeding was not to be anything you would recognize as a court martial or a trial. Habib would not, for example, be able to see the evidence upon which he might be hanged.

Now, here let me make a confession to you, not as a lawyer, but as a citizen. If there is anyone in Guantanamo who conspired in the 9/11 murders, then I would like to see him tried. If he is guilty I hope he is convicted. If tried and convicted by a court martial duly constituted under the Uniform Code of Military Justice, I would shed no tear for the sentence. And one of the perplexing things about Gitmo is how few people there are, four years later, whom the government has even sought to try. Despite what you may have read of *Hamdan*, no district judge ever enjoined a court martial. Judge Robertson said only that they needed to try bin Laden's driver, following Title 8 of the United States Code. It was the Executive that refused to do this, preferring to a military trial a proceeding with secret evidence.

In any event, Habib was one of the few designated for prosecution. This was in the early days, when it was hard to find a lawyer in America, when the smell of death hung over lower Manhattan. Who was courageous enough to take on such a case? Would any of you in this room have been? Was I? But Habib's family found a group called the Center for Constitutional Rights and a lawyer named Margulies. And I will say this about them. They are fearless. They have been called unpatriotic and accused of coddling terrorists. The 18th

century Braintree lawyer who appeared for the British officers accused in the so-called Boston Massacre heard such abuse, too. But CCR and Margulies today, and John Adams then, had learned a lesson I hope all of you learn, which is that if you join this trade, if you actually believe in a rule of law, there may come a time in your career when you need to show some old fashioned guts. Margulies took the case. And he started demanding to see his client.

Now understand something. In those days, that was forbidden. Lawyers filing habeas petitions were forbidden from seeing their clients at Gitmo. Or talking to them. But Margulies kept at it and kept at it. And finally saw his client in October of 2004.

What he learned was that Habib had confessed. To anything and everything. He had been shipped to Egypt. He had been held in solitary confinement for months. They put Habib in water chambers and filled them to his chin. They hooked him to electric probes. They left him in cells as days stretched to weeks and left him there as weeks stretched to months. Eventually, Habib had only this to say:

“Where do I sign?”

This story became public. Then – and here is my point. Here is the one point I want you to take away with you today about Gitmo – more than that Gitmo is illegal: I want you to understand that Gitmo is a monstrous, political lie. When the story of Habib became public, did the executive do what it would do in criminal law – did it proceed to trial *without* the tainted evidence? Did the government ensure that you and I are protected from a terrorist?

No. They quietly put him on an airplane and sent him back to Australia.

They released him.

Think about that. And while you are at it, think about Rasul. I don't mean Rasul the Supreme Court's case from June, 2004, that held the trial courts have jurisdiction. I mean something else – Rasul himself, the guy – what happened to him? After the government had worked to dismiss the habeas case, and succeeded, and succeeded again, and through two years held Rasul in prison, what happened after the case came under Supreme Court scrutiny?

They released him.

What happened to Moazzem Begg? Another worst of the worst? He got a lawyer and she is another fearless one – the very first lawyer to get to the base. Imagine her, walking alone into Camp Echo. What happened to Moazzem Begg after the fortuity that he happened to get a lawyer and she started doing the fearless things lawyers do, and the story of what our government had done to Moazzem Begg became public?

They released him.

When Nazi war criminals were tried, they were tried in the sunlight. And when an American summed for the prosecution, he said this:

“Of one thing we may be sure. The future will never have to ask, with misgiving: “What could the Nazis have said in their favor?” History will know that whatever could be said, they were allowed to say. The extraordinary fairness of these hearings is an attribute of our strength.”

How right Robert Jackson was. The world has never doubted the judgment at Nuremberg. But in no GITMO case has the President been willing to let a federal judge hear a single fact about the worst of the worst. Instead, they released them. Think about that. And think about the other people at Gitmo, who don't have fearless lawyers, or any lawyers. They haven't been released, or tried. Or even charged. They've been in jail for almost 4 years. And as we gather in this hall today, some of them are starving themselves to death.

The Uighurs

Which brings me to a strange footnote to this whole sordid business – the dispiriting case of my clients the Uighurs, whom the Government does not even allege to be enemy combatants, but who remain at Guantanamo today.

In September, 2001 Congress authorized the president to use military force. Against Al Qaeda and the 9.11 attackers. It did not declare war on terror. Propaganda aside, neither did the President himself: in November, he authorized DoD to go after Al Qaeda and the Taliban. And in the wake – only in the wake – of the 2004 Rasul decision saying that the men held incognito at Guantanamo were entitled to some sort of judicial review, a deputy defense secretary named Wolfowitz hastily cobbled together a definition of “enemy combatants,” and a secret military tribunal to “review” whether the so-called detainees were “enemy combatants.” These combatant status review tribunals or CSRTs place the burden on the detainee, rely on hearsay, proceed on the basis of secret evidence – evidence the detainee never sees – and they permit the detainee no lawyer. Needless to say, they do not comply with Geneva. Lawyers have furiously debated whether their results should be met with scorn, whether they should bind the courts, or whether some middle ground is right.

The Uighur case demonstrates it's all a show. This at last brings me back to the door of echo 2, and the sleepy-eyed, soft-spoken man I met behind it last July. His leg bolted to the floor, Adel told me he'd been advised in May that the CSRT had found he and his friend Abu Bakker innocent. They'd been advised of this in May. As we would later learn, the CSRT process that adjudged them noncombatants was completed in March. Yet even though we had a habeas case pending in March, the government kept this fact secret. It would be a secret today, but for the fortuity that Adel and Abu Bakker have lawyers who came to the base.

When I returned to Boston from my first hearing in this case, which took place on August 1, my partner asked me the same question Judge Robertson had put to the government: if these

men have been cleared by the CSRT, if it has found they are not Al Qaeda, not Taliban, and have not engaged in hostilities against the United States, then under what theory may it detain them? So I told my partner what the government said to the judge. It was the “wind up power.” A power ancillary to the power to wage war, they said, was the power to “wind it up” by making orderly dispositions of prisoners. What authority was there for this? The judge wanted to know, and so did my partner. The authority of history, my opponent said. When World War II ended, it took some time to repatriate the German and Italian and Japanese prisoners of war. This was the same thing. That’s when my partner said, “You should talk to Louie.”

Was he a lawyer, I asked?

Better: a barber. And like all barbers, an historian.

Louie is an *old* barber – he remembers Boston in 1944. The Italian POWs had been turned loose on the streets of Boston – and here was the resonant and outrageous fact that impressed itself on Louie’s mind half a century ago: these Italians were permitted to flirt with young girls, a fact made more intolerable by the failure of the young girls to mind.

Turned loose? We dug into the archives. Sure enough, the Rule of law applied in the Boston in the 1940s. When Italy surrendered in 1943, eighteen months before VE day, Italian prisoners held at Fort Mackay in South Boston could not be repatriated – the Italian peninsula remained in chaos – so here they were released from the camps, billeted in a soldier’s barracks, and given jobs and leave among the community. There were no reports of torture, although there were some of marriage.

The Government says it cannot repatriate my clients to Communist China, from which they fled persecution, and that is right. It says it needs a little time to repatriate to another country? How much time? Given the current state of US diplomacy, I fear it will be a very long time indeed. My clients, who never were combatants, ought be granted at least the decent treatment that the Italians received. So we have argued to the court, and so, one day, I hope to be able to report that the Court has granted their release. But so far not.

Why Care?

Now you might ask, why care about this? I don’t mean legally, I mean ethically. Why volunteer your time to represent these men? It’s the war on terror, isn’t it? So what if somebody is roughed up a little in Kandahar or Bagram – there are horrors in Darfur and New Orleans. We have reservists from Vermont losing mortgages. Injustices abound in the world. Why care about this particular one? The question ought to be asked.

I can tell you why the JAG officers care. Because of American troops in the field. You want 19-year-old Americans treated like human beings? Or do you want to see Iraqi thugs dressing up prisoners in Gitmo orange and cutting off their heads on the Internet? Does anyone really think there isn’t a connection? Not JAG.

With me there is another point, and I make no bones about it. I want my flag back. My country has been hijacked and I want it back. If we care about being a civilized people, then it is precisely in times of fear that we have to hold fastest to our rule of law.

And I would add something else. The rule of law is plenty potent. We can gather military intelligence and fight wars without torturing people. We gathered intelligence pretty well from 1942 to 1945, and that was before the age of internet searches and spy satellites. For pure criminals, we have an arsenal of statutes. We already have the tools to deal with fanatics who blow up buildings and murder the innocent. We knew how to deal with Timothy McVeigh and not surrender our souls.

Can I bring you any good news? Only a little. Adel's story made its way to the press, and thence to Sweden, where a Uighur woman was living as a refugee. On July 28, 2005, I listened on a telephone as she wept. She is Adel's sister, and for long years thought he was dead. You see, no one knows who is in Guantanamo. A few weeks later, with the help of some judicial pressure, we organized a very unusual event at Gitmo. A phone call between these two people, Adel and his sister. I saw Adel again late in August, after that call. The sleepy-eyed man had come to life. Before, he told me, "it was as though I had evaporated from the earth." A phone call – so small a thing. And yet I don't know if I've ever done anything bigger.

Closing

May I say, by the way that you have invited to speak to you this afternoon the least competent lawyer in America. This is a rather dismaying to me, and not without its disagreeable implications for the Shapiro Lecture itself, but it is an objective fact. Incompetence may be all around you, but only I have failed to obtain release from prison for men whom the Government has acquitted. And so I count myself lucky to have received your invitation, and fear you may think me ungracious if I close with you truthfully.

But it is the truth that I hold each of you in this room personally responsible for GTMO. As I hold myself. It is no good wringing one's hands about the Bush administration. Democracy is the civic expression of the law of principal and agent. You and I are responsible for what he does. If at Bagram Air Base they murder a taxi driver called Dilawar by hanging him from his arms, if at Abu Ghraib they leer and grimace at naked men stacked like cordwood and take their photographs, if at Guantanamo they leave a man in solitary confinement until he talks to himself and tears the hair from his scalp, if a woman smears on a devout muslim what she says is her menstrual blood, if they ship a man to Egypt and there make shift to drown him until he signs a confession, if they imprison men in secret even after their own tribunal has acquitted them, and hide that fact from court and countrymen, and if you and I have not done all that we can to renounce these obscenities, and to stop them happening – if we have not written and telephoned and emailed our congressman and our senators and our president and our local newspapers, and if we have not given a hundred dollars or fifty or

even ten to Amnesty International and the Center for Constitutional Rights, then you and I are responsible for them. Personally. We might as well have done them ourselves.

I used to be a bankruptcy lawyer, and I hope to be so again. It will be a better thing for our country when my opponents are again holders of convertible debentures, rather than the President of the United States. I am middle aged and grouchy and filled with misgivings about the future. A nation that hides behind the high water mark and permits its stewards to act like animals so long as they do it just over the horizon is not a strong nation, but a puny and a feeble one. And it is a damned foolish nation if it does not think it will soon reap at home what it sows abroad.

The rule of law will not return to our country easily. It is not coming back on its own. It will come back only when you go out and grab hold of it by the ears and drag it back. In the ballot box and the courtroom and the newspaper and the classroom and the public street. You in this room are young and bright and strong and you can, if you choose, drag it back.

I say, "You," for this is your historic moment as much as it is mine. It is not a channel you can change – it is your moment. What you do or do not do with it will forever mark who you are. The rule of law isn't coming back unless you really want it back. Do you? That's the question that only time will answer.

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