

**The Power of Small Things**  
**Annual ABA/NLDA Pro Bono Convention**  
**Keynote Address**  
**Orlando, FLA**  
**May 14, 2009**

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Why do you do *pro bono* work? The adversaries have all the power, and sometimes most of the charm. There's no money in it. It makes you hard bitten and skeptical, tough minded, unsentimental. The most effective among you build tough shells around yourselves. But I put it to the hardest nose in this room. Once you felt the brush of heaven's hem. Or thought you might.

Let me tell you a story.

One day in July, 2005, I walked into a plywood hut in Guantanamo Bay and came face to face with a man from central Asia, chained to the floor.

His name was Adel. He was a Uighur. Now the Uighurs are the Tibetans you've never heard of – Muslims from the far west of China who, according to our State Department, have suffered religious persecution from their communist overlords for generations. Adel fled China in 2000.

Without a visa, he was blown by the east wind into Asia's land without borders, its wild west – Afghanistan. When our bombs fell, he fled to Pakistan -- straight into the arms of bounty-hunters. And in the roiled, confused, aftermath of 9.11, Adel was washed into the sink trap of Guantanamo, for somebody else to figure out.

Somebody quickly did. He wasn't our enemy, the U.S. military concluded. In fact, he'd always venerated America as China's opposite. He'd never heard of al Qaeda. He wasn't a criminal, he wasn't much of anything. But what country wanted to offer asylum to a Guantanamo alumnus? Who also happened to be a dissident from the world's largest trading partner and creditor? So Adel was cleared of being an enemy combatant by our military, and then sent back to the same cells as everyone else.

What I knew about military law or habeas corpus that July afternoon in 2005 would have fit in a very short brief. But we brought to the plywood hut the same lawyers' toolbox that you all

carry. And we rattled around in there and found a few things. Motions. Affidavits. Briefs. We rushed to court and had a series of hearings. A judge pressed the government; he agreed that Adel's imprisonment was unlawful. But he found himself impotent to remedy it, and so dismissed our case in December. There is a heartbreak at the heart of things, as Virgil says.

I have a partner who answers, "Nuts! At the heart of things is the right of appeal!" So up we went. The case was to be heard in the DC Circuit on May 8, 2006, a Monday. Three days before, they sent Adel to Albania.

My firm brought other cases, for other Uighurs. There were many rounds, and we won most of them. We won *Parhat v. Gates* in the summer of 2008 – the DC Circuit ruled three to nothing that Adel's companion Huzaifa Parhat was not properly held. We won *Kiyemba v. Bush*, in September. The District court ordered all the Uighurs freed to Washington. We kept winning.

Until the DC Circuit took it all away, ruling this past February that immigration power barred their release. "Dear me," they said, "these prisoners are on our threshold, and releasing them would mean crossing it, and that sounds like immigration, and we judges can't order immigration remedies." Never mind who brought them to our threshold. So judges will flex habeas muscle by meekly accepting the executive's assurances – that is to say, the *jailer's* assurances – that it is politely asking other countries to resettle men we won't resettle ourselves. Failing which, they sit in military prison forever. The circuit reduced our judiciary, as it has been for so long in the Guantanamo saga, to a board of law review editors -- a role which for so many DC Circuit judges is, of course, coming home.

By the way, for those of you who thought you read some place that this was all over – the case is called *Kiyemba v. Obama* now. We're up on *cert*. That will be a few more years.

As one of these exonerated prisoners said to me in Guantanamo several months ago, "I am a free man in America."

So as summer approaches, I take inventory. Everyone agrees our clients are not terrorists, are not criminals, are not enemies, were never on a battlefield, never did this country wrong, were brought by us in chains and shackles and goggles to an island prison, and remain their still, now embarked on their eighth year of military prison. No Nazi, no fighter from the Empire of the Rising Sun, no real enemy of this nation ever spent half as long in a military prison.

You've had your share of disappointments. I will tell you mine. I'm a believer in the third branch of government. If Earth's the right place for love, then courts are the right place for remedies. Or so I always thought. But the net result of my four years of labor in that branch of government is that it mainly failed. Even as to Adel, who made it to Sweden at last – no court released even him. The same executive branch of government that imprisoned our clients because it felt like it ultimately released a few of them because it felt like it. We helped them get the feeling, maybe, but that was all.

Our judiciary didn't have the stuffing for it. It sounded the trumpet in *Boumediene v. Bush*, but the walls haven't come tumbling down. As for the tough, lonely, work of patrolling our Constitution's perimeter, giving sure remedies against indefinite executive prisons in real cases – as to that, the judiciary has been absent from its post. A country that for remedies to overreaching by the executive branch looks to --- the executive branch – why, that's a despotism. Maybe benevolent, but despotism nonetheless. It's hard for me to distinguish that country from the one my clients fled.

Yet I have much to be grateful for. I am fifty-two years old, and I have practiced law since my twenties, for most of that time I have been associated with a law firm I am proud of. They sprang to this call. The Guantanamo work also introduced me to a group of lawyers outside the firm whose like I may never see again. They came from large firms and small, from solo shops and NGOs and law schools and federal defenders and the United States Marine Corps. They came for free. They saw their flag raised over torture chambers, and they said, as Judge Coughenour would say in Seattle, that while there is breath in my body I will fight that. They brought zeal and creativity and courage and scholarship and guts. They brought relentlessness. I have never been prouder than when I say I was one of them. You too should be proud, because you are one of them too. We didn't win in court, not really; but our work in court punctured the mythology and exposed the lies, it surfaced the crimes and injustice. It mattered.

And when I say, "lies," consider this. It took us six years to get real habeas hearings, hearings about facts. All through that six years of appellate preliminaries, the administration argued that it was holding vicious terrorists. In the year since the *Boumediene* case, thirty habeas cases have been heard. Now if I told you the five had been found to be noncombatants, you might say, "well, seventeen percent, that's a nontrivial number; that's a lot of people to hold in a military prison for eight years." But five isn't the

number of cases the government *lost*. Five is the number the government has *won*. 85% are not terrorists, not enemies, not any of the libels heaped on them by an administration that fought so relentlessly against judicial review.

We wouldn't know that today if it were not for lawyers, working for free.

I know two young lawyers. They had a case for a kid from Chad. Before Judge Leon, the toughest nut on that bench. They reached into their toolbox – the same toolbox you all have -- and tried the case and beat the USDOJ. I am proud of those two lawyers.

I know a bunch of lawyers at Bingham McCutchen. Associates and partners. Everything the government threw at them, they threw back – and I am proud of them.

I know a former sailor named Charles Swift.

Swift, assigned to the JAG Corps, in 2002 was tasked to defend a Yemeni called Salim Hamdan. You've heard of him – he was bin Laden's driver. "Your job," a superior told Lt. Commander Swift, "is to plead him out."

Now Swift is an officer and a gentleman, who swore an oath to defend the Constitution, and so he replied, "My job is to be his lawyer, Sir." This, I am assured by friends in the military, is the correct way for a junior officer to invite a superior officer to go fuck himself.

"His lawyer" Swift proceeded to be. He demanded a fair trial – a court martial, instead of a trumped up military commission, and up and down the appellate courts went *Hamdan v. Rumsfeld* until, in the summer of 2006, two important things happened in the life of Charles Swift. The first was, he won his case – going away. The Supreme Court concluded not only that Hamdan was entitled to a court martial – a fair trial – but that he hadn't even been charged with a war crime – mere conspiracy never having been a war crime before. (This is a point upon which Vice President Cheney may someday need to cite that decision, but that's another story.).

The second was that *Lt.* Commander Swift came up for promotion to Commander. And was passed over.

I wrote him an email. There may be higher ranks in the Navy than Lt. Commander, but as far as I'm concerned, none more honorable. So I'm proud to be in his union. You should be too.

So why do we do this?

Here is a photograph of our client Adel, on the night he reached Sweden.

The child is Fatima. About her hangs a tale.

In 2000, a Uighur woman named Kavser, who already had two small children, became pregnant again. She had two choices. Comply with China's compulsory abortion policy, or flee the country. So with her husband and the toddlers in tow, now pregnant with a third child, she fled. But he was seized by Chinese agents and remanded to prison. Destitute on the streets of Islamabad, she washed up into an office of the UNHCR. And became a refugee. They sent her thousands of miles away, to a place called Sweden.

*Where* the child, Fatima, was born.

*Where*, five years later, Kavser's world was shaken to the core, when news came that her brother Adel was not dead after all, but was alive, living in a cell, in a place called Guantanamo.

*Where*, two years after that, on a November night in 2007, carrying a small black satchel, Uncle Adel came through the arrivals gate at Arlanda Airport in Stockholm.

And *where*, during that joyous reunion, Adel would meet six-and-a-half year old Fatima, and it would occur to us, that all of those people were reunited in that faraway place -- because of this child.

The lights for *Jul* were already strung in Stockholm's old town that November night. You could almost hear Isaiah sing -- "And a little child shall lead them."

We had then been in the GTMO cases for two and a half years, and already we'd grown rich in disappointment and heartbreak. But that night, I later wrote,

We felt the brush of heaven's hem,  
and with the world began to fall in love  
again.

Why do you do this? For law? For policy? For an unwed mother with a drug problem and a shiftless landlord? For the ornery pleasure of walking into a courtroom and having at the government? You are tough minded, and bruised by experience,

and you have budget problems, and ungrateful clients who yell at you, and a judge who next Thursday will rule for the government - - and there's no money in it. I know. Four years on in the Guantanamo prison, all these paper victories and I can tell you, I have a few Uighurs who yell at me too.

But still, the poet Hopkins says,

There lives the dearest freshness deep down  
things  
Tho the last light off the black west went,  
Lo, Morning at the brown brink eastward springs.

Morning comes.

You are layered like an onion. Years of doing this work has left you spiny as an artichoke; some guy quoting a Victorian poet at a conference is not going to help you get summary judgment in May or funding in June. I know. But I know something else. Deep down inside you have never stopped believing that morning comes; you have never perfected your immunity to the inspirational force of a small thing.

So -- I wish you all a great conference, and renewed vigor for the battles that lie ahead in these budget-strapped times, and of particular importance now, I wish for each of you a small thing.

A small thing. Because you haven't quite let go, have you? -- Of that faith you carried, that once in your lifetime, when you least expected it, in a way you didn't foresee, you would accomplish something that could never be measured in dollars, something no one would write about, some trivial thing -- like a child's embrace of long-lost uncle. Such a small thing! And yet you will never forget it -- not as long as you live. You who wrote briefs and argued appeals and pressed for the government's records, and so played some small role in that reunion, and perhaps were even privileged to take the photograph, you will shiver a little, as though you felt something brush faintly by.

I call it heaven's hem.

Thank you.