

# Is the undefeated enemy the same as the defeated one?



The answer, one would think, is obvious: you shoot at the former, but not at the latter. The enemy that surrendered is treated differently than the one that has not.

Which is a difference that is clearly lost on one "Lieutenant Commander Shepard, a military officer and attorney in the U.S. Navy Judge Advocate General's Corps [who] currently serves as a managing defense counsel with the Military Commissions Defense Organization."

The Lieutenant Commander discharged himself of a teary "guest essay" at the *New York Times* titled "[What I've Learned as a Lawyer Representing Prisoners at Guantánamo](#)" in which he compared the humanity of a Jewish Army medic during World War II who treated wounded Germans captured after a battle, while knowing full well that "these same men have killed my cousins and aunts and uncles in Poland, have tortured and killed without compunction, and despise me because I am a Jew" thus showing "the very best of American values: recognizing the

humanity in everyone, even our enemies, and treating those in our custody with dignity and respect” and contrasted it with the treatment of Guantánamo detainees who were “secreted away to clandestine black sites for years of torture or – to use the legally approved euphemism – enhanced interrogation.” His essay concludes, “we must acknowledge our mistakes, and show we can learn from them. What’s happened at Guantánamo is an example of one such error. Twenty years on it is time for us to choose how – or if – we can begin to repair the damage. The choice is ours. But I think I know what Private Cooperberg would have us do.”

Well, lawyers will be lawyers – after all, they are tasked with defending their clients, and they do what they thing needs to be done: they hit the law, they hit the facts, and when facts and law are lacking, they hit the table. That’s the well-known rule of the court game, and I recognize that. I also recognize that Private Cooperberg had no free will but had to follow the laws of war. And these are fairly basic – you don’t shoot at the enemy who surrendered – because he ceased being an enemy, and you shoot at the enemy who did not surrender. To do the former is to be vindictive, to not do the latter is a dereliction of duty; so if you shoot at the enemy who surrendered, or do not shoot at the enemy who didn’t, you are in for a deep trouble – the trouble that is called “court-martial.”

And even then, one has to keep in mind that when Private Cooperberg wrote of “these same men have killed my cousins and aunts and uncles in Poland” he knew that they were not the same individuals; he spoke generally of them as the Nazis. Suppose though that he leafed through a photo album of one of his captive patients, and saw in it a photo of him taken in Poland, pointing a gun at a person who was clearly recognizable as Private Cooperberg’s aunt, stripped naked and standing, at the edge of a pit, about to be shot? Wouldn’t Private Cooperberg, in the heat of the moment, throw his

humanity to the wind, disregard the threat of court-martial – and killed his aunt’s killer? And for that matter, wouldn’t he be acquitted? Or at the very least, wouldn’t he reported the photo to his superiors, and treated the German’s wounds with expectation of seeing him put on trial upon recovery, and hanged?

So the real question that the Lieutenant Commander should have address at the *New York Times* is not “was our behavior towards Guantánamo detainees brutal” (war is) – but were they an active, unrepentant enemy still, seeking to do us harm at any opportunity, and potentially hiding the knowledge of further 9/11-style attacks which they wanted to conceal – or did they fully surrender and were harmless?

After all, Private Cooperberg did not treat captive Germans in expectation that they would return to the front line, and again shoot at the Americans. This is why he – and his commanders – could afford to be humane. They knew the difference between the defeated, and the active enemy. Neither the Lieutenant Commander Shepard, nor the *New York Times* do.

That difference is vital to understand; this is wthat the Lieutenant Commander Shepard should have “Learned as a Lawyer Representing Prisoners at Guantánamo.” It is just too bad that he didn’t.