

THE REAL TERRORIST AGENDA—THE DESTRUCTION OF THE BILL OF RIGHTS

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Between 1998 and 2007 I was privileged to be the Legal Director at the Center for Constitutional Rights (“CCR”), and it was a great honor. CCR is a small public interest law firm that grew out of the Civil Rights Movement in the South during the 1960s.¹ Although small, it has had a profound impact on the development of constitutional and civil rights law since that time. *Powell v. McCormack*,² *United States v. Dellinger*,³ *Dombrowski v. Pfister*,⁴ and *United States v. United States District Court for the Eastern District of Michigan*⁵ are merely a few examples of the major cases that CCR handled that had an enormous impact on the law, American society, and the political discourse of that time and this.

While I was not at CCR for the cases that I have mentioned, I was there on 9/11 and thereafter. After 9/11, we girded ourselves for what we anticipated would be an onslaught of basic democratic institutions within our society. I discuss our efforts below. First, however, as an introduction, I want to present a basic civics lesson, an outline of democracy, as it is taught and understood in this country. It is not complicated. It can be divided into seven separate points, more or less, and they are as follows:

First, you cannot arrest people, hold them either temporarily or indefinitely, or bring criminal charges against them unless you have probable cause to do so, *i.e.*, unless you present evidence and explain to an independent magistrate that the suspect has done something wrong. If you cannot do that, the magistrate has the authority to have them released.⁶

Second, you cannot hurt people unnecessarily, or do what we think of as torturing people, even if you call it enhanced interrogation.⁷ While it may characterize the Spanish Inquisition, the Soviet Gulag and the Pinochet Secret Police, it is profoundly undemocratic. Democratic societies must not do it.

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1. One of the founders of CCR was the famous radical lawyer, William Kunstler.

2. 395 U.S. 486 (1969).

3. 472 F.2d 340 (7th Cir. 1972).

4. 380 U.S. 479 (1965).

5. 407 U.S. 297 (1972).

6. U.S. CONST. amends. IV, V, & VI.

7. U.S. CONST. amend. VIII.

Third, people have a right to speak freely and to protest without interference from the government.⁸

Fourth, the government cannot discriminate against people based on race, religion, sexual orientation, or gender.⁹

Fifth, the government cannot invade our homes and our persons in those areas that we consider private and personal, such as our bodies and our homes, without being able to establish that there is probable cause to believe that criminality is or was afoot.¹⁰

Sixth, we have a separation of powers in our government such that no single institution of the government can acquire too much power without being checked by another branch of government.¹¹

Finally, there must be free and fair elections where everybody's vote counts equally and everyone has a voice.¹²

Since 9/11, I would assert virtually every one of those rights, with the possible exception of the last, has been under attack and has been diminished since 2001. In the case of electoral rights, that was already under profound attack *before* 9/11¹³ but has been further weakened since the 2010 Supreme Court opinion, *Citizens United v. Fed. Election Comm'n.*¹⁴

Regardless of whether you preface this assault on democracy as wartime exigency or as derived from the basic instinct of a society to preserve and protect itself, we cannot deny that our democracy has been weakened as a result of these events. To that extent, Al-Qaeda, Osama bin-Laden, and the other 9/11 terrorists have succeeded, at least to some degree. To the extent we as citizens, our courts, and our politicians have fought for our democratic institutions, those terrorists failed and faltered.

I can illustrate at least five of these seven points through a particular Guantanamo case, one that I have worked on. The Guantanamo case is called *Al-Zahrani v. Rumsfeld*,¹⁵ which is instructive in a number of respects. Yasser Al-Zahrani and two other men were inmates at Guantanamo in June of 2006.¹⁶ They were found dead, hanged in their

8. U.S. CONST. amend. I.

9. U.S. CONST. amend. XIV, § 1.

10. U.S. CONST. amend. IV.

11. U.S. CONST. art. I, II, & III.

12. U.S. CONST. amend. X.

13. *See* Bush v. Gore, 531 U.S. 98 (2000).

14. 130 S. Ct. 876 (2010).

15. 684 F. Supp. 2d 103 (2010).

16. *Id.* at 106-107.

cells.¹⁷ In the words of the naval commander at Guantanamo, at the time, they had committed suicide as an act of “asymmetric warfare.”¹⁸

Of these three men, two were Saudis and one Yemeni.¹⁹ All three were believed to have been tortured or to have been at least the subjects of enhanced interrogation (which I think is just a nice phrase to describe torture), forced into positions of great stress, denied bathroom privileges, ridiculed about their religion, their sacred book, the Koran, was desecrated in front of them, forced into various states of undress and positions of physical abuse, denied sleep, made to endure temperature conditions of extreme heat and extreme cold, and so on. They had been held indefinitely, with the only process that had been given being a ‘CSRT’ or a Combatant Status Review Tribunal. CSRTs are a form of “lite” due process; at best, they are based on widespread use of hearsay and the inability of the detainee to call or subpoena witnesses or to confront witnesses and accusers.²⁰

As a result of these deaths, a law suit was brought by the families of the men through the CCR. The complaint claimed that the suicides were the result of torture and set out three basic causes of action: 1) under the Alien Tort Statute,²¹ that the norms of the international human rights law had been violated in connection with their detention and interrogation; 2) a “*Bivens*” claim, which is a direct action under the U.S. Constitution claiming that their 4th and 5th amendment rights had been violated by individual jailers and interrogators;²² and 3) under the Federal Tort Claims Act, which was a claim against the U.S. Government directly for wrongful and tortious conduct.²³

The government brought motions to dismiss all three claims. U.S. District Judge Huvelle granted these motions and threw the cases out.²⁴ The government filed an affidavit that asserted that the individual defendants were acting within the scope of their employment as federal employees.²⁵ That affidavit accompanied a motion to substitute the U.S. Government for the individual defendants under the Westfall Act, which included the Secretary of Defense, the commander of the base, and the

17. *Id.*

18. *Guantanamo suicides ‘acts of war,’* BBC NEWS, June 11, 2006, <http://news.bbc.co.uk/2/hi/americas/5068606.stm>.

19. *Id.*

20. See *Al-Zahrani* at 106.

21. 28 U.S.C. § 1350.

22. See *Bivens v. Six Unknown Named Agents Of Fed. Bureau Of Narcotics*, 403 U.S. 388 (1971).

23. 28 U.S.C. § 1346(b).

24. *Al-Zahrani*, 684 F. Supp. 2d at 105-06.

25. *Id.*

individual interrogators.²⁶ The shocking aspect of this case is that the government's motion assumed that the defendants had tortured these three men and the Judge *agreed*.²⁷ In fact, this was used to deny the plaintiffs' access to the judicial process.

As to the *Bivens* claim, the judge held that this action could not be maintained, due to what are called "special factors." In particular, when there are special factors at work that counsel hesitation, a court must decline jurisdiction to hear cases based on governmental misconduct.²⁸ What constitutes special factors has grown and mutated over the years, but now, many courts, and certainly the U.S. Court of Appeals for the District of Columbia in *Rasul v. Myers*, recognize that any claim that might involve national security or might implicate foreign policy is covered by the "special factors" exception.²⁹

Finally, with respect to the Federal Tort Claims Act part of the case, Judge Huvelle held that such a case must originate within the territorial U.S., *Rasul v. Bush*³⁰ notwithstanding.³¹

Fascinatingly, just as Judge Huvelle decided this motion, granted the government's motion to dismiss, and threw us out of court, there was an article published in *Harpers Magazine* by Scott Horton³², which contained several extremely disturbing details. The article was based on interviews that had been conducted with whistleblower G.I.s who had been on duty at Guantanamo.³³ They described how Zahrani and the other decedents were taken away in the night to a highly secret place called "Camp No," a so-called black site literally *inside* Guantanamo itself.³⁴

These whistleblowers then described that the three victims were brought back to "G'tmo" literally in body bags.³⁵ They further described that it appeared that rags had been stuffed down the decedents' throats (the rags were still in their mouths), and that they had obviously been suffocated or strangled; they further indicated that the commander of the

26. *Id.*

27. *Id.*

28. *Id.*

29. 563 F.3d 527, 532 (D.C. Cir. 2009).

30. 542 U.S. 466 (2004).

31. *Al-Zahrani*, 684 F. Supp. 2d at 116.

32. Scott Horton, *The Guantanamo "Suicides": A Camp Delta Sergeant Blows The Whistle*, HARPER'S MAGAZINE (Jan. 18, 2010), available at <http://www.harpers.org/archive/2010/01/hbc-90006368>.

33. *Id.*

34. *Id.*

35. *Id.*

camp insisted that the three had hanged themselves and demanded that camp personnel not mention the rags stuffed in their mouths.³⁶

As a result of this magazine article, the plaintiffs moved for reconsideration, arguing that they had alleged before that the decedents committed suicide as a result of having been tortured and now it looks as though they could well have been murdered. The plaintiffs proffered that this appears to be homicide.³⁷ The motion to reconsider demanded that the court take another look and decide whether, in reference to the Alien Tort Statute claim, a U.S. employee can be considered to have acted within the scope of his employment when he murders someone in cold blood.

Judge Huvelle dismissed the claims, even though the defendant may have committed first degree murder, because they were engaged in interrogations.³⁸ Thus, she held that in this moment of history, homicide is a legitimate governmental activity.

With regard to the *Bivens* claim, the special factors issue trumps any possible liability because, no matter how grievous the activity, any assignment of fault or responsibility was for the other branch of government and not for the courts to decide.

So the basic definition of American democracy that I outlined above is implicated in at least five respects—protection from indefinite detention, inhumane punishment and violence, invasion of bodily privacy and discrimination (all the Guantanamo detainees are Muslim), as well as the right to an independent judiciary to hold the executive in check. Traditionally, the courts have provided a vital mechanism to demand the truth from powerful authority when it overreaches (and in this case may well have engaged in cold-blooded homicide) to force it to answer hard questions. Because of the actions of the executive branch of government and the spinelessness of the courts, that democratic value has been greatly diminished.

The extent to which this damage is permanent can perhaps be gauged by the terms of the current wartime paradigm. We are in a war that is without boundaries, either of time, geography, or national borders. According to many of our politicians, this is a state of permanent war. Thus, the danger is, sadly, quite grave that wounds to the Bill of Rights could be extended to other areas of our lives, other parts of our society, and other parts of our community.

36. *Id.*

37. *Id.*; Motion for Reconsideration, *Al-Zahrani v. Rumsfeld*, 2010 WL 2519055 (D.D.C. 2010) (No. 09-cv-00028).

38. *Al-Zahrani*, 684 F. Supp. 2d at 105-06.