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stances under which someone could be stopped and searched, that we are living in a different time, so constitutional considerations have been altered. That statement profoundly concerns me, because in a democracy, when there is a current crisis, the whim of the majority always prevails. But in a constitutional democracy, like the one in which we live the last time I checked, there is always a static document that will protect us from temporary crises, hysteria, and expansion of authority. Unfortunately, the concept of *stare decisis* has been waived due to the political sensibilities of those who sit in our highest court. I still have faith because there are still people like Gerry Goldstein who will effectively protect the rights of all of us. The ACLU, we are in it for the long haul.

THE EROSION OF CRIMINAL NORMS AND PROCEDURES AND THE
POLICE ABUSE OF AUTHORITY

*Gerald Goldstein**

Anyone who watched on September Eleventh the desecration of those buildings and the loss of lives and didn't immediately demand some retribution, doesn't deserve the freedoms we enjoy. Anyone who thinks throwing away our freedom in order to protect our freedom is a fool and will lose those liberties. What was it E.E. Cummings said? That was a different time and a different place.¹⁸ Well, our founding fathers were living in a difficult time. It was King George red coats that were on a Writ of Assistance rummaging through their underwear drawers. We live in a different time, and there is a more sinister and more sophisticated means of invading our privacy. It is not a physical search if you can't see it, you can't feel it, you can't taste it, or you don't notice your drawers strewn. As a matter of fact, it is more sinister and dangerous because of that. It steals our thought processes, it steals our conversations, it invades the crossroads between our Fourth Amendment right to privacy and our First Amendment right to free speech, to associate with each other, to petition our government, to complain and bitch about our government, which is the essence of freedom. They are stealing our ability and our will to communicate with one another.

Shortly after 9/11, I was shocked to read that an America Bar Association poll showed that almost seventy percent of my fellow lawyers, brothers and sisters of the bar that are taught at wonderful institutions like this, said they would refuse if asked or appointed to represent a terrorist. Shame on them! What was it Reverend Niemöller said? "When Hitler

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18. E.E. (Edward Estlin) Cummings (1894-1962).

attacked the Jews I was not a Jew, therefore, I was not concerned. And when Hitler attacked the Catholics, I was not a Catholic, and therefore, I was not concerned. And when Hitler attacked the unions and the industrialists, I was not a member of the unions and I was not concerned. Then, Hitler attacked me and the Protestant church—and there was nobody left to be concerned.”¹⁹ We do not have the luxury of throwing away our civil liberties in the hope of providing us a greater security.

On November seventh of last year, shortly after 9/11, a docent at an art gallery in Houston was met by two FBI agents as she opened the gallery. The agents badged her and said they understood there were un-American activities going on there and wanted to look around. They took notes of the paintings and the photographs on the walls. The show, which went up before 9/11, was called Secret Wars and was an anti-war protest. An individual who was on an ACLU scholarship at Durham Tech in North Carolina, had FBI come to his door, knocked and asked permission to enter, complaining about anti-American sentiments depicted on a poster, complaining about George W. and our politics in Central and South America. They took notes of the political posters on his wall and pointed out to him that his mother is an officer in the United States military, implying that somehow this would go on her record.

When the USA Patriot Act came up for a vote, there was no place for the Senate to vote even though we are told the vote was ninety-nine to one.²⁰ Russel Feingold was the only person saying he did not know about this and had not seen a copy of it. Two copies were provided, with one each side of the aisle, and no hearing was held other than the sponsor of the bill supporting it. They did not have chambers because remember, they had a scare involving a white powdery substance and no one has figured out yet where they did vote.

The definition of terrorism that you have heard described involves any violence to property, including breaking a window. One of the definitions of violence is to interfere in our waterways or the air. A contribution to Green Peace, who engages in acts against vessels by taking a rubber dingy up against a whaling ship is an example. Giving a contribution to them will put you on one of the Attorney General's lists and will subject your e-mail and your conversations to scrutiny by our government because you will be part of one of the thousands of organizations and domestic groups that are classified as terrorists and a contributor to that terrorist organization.

19. Rev. Martin Niemöller (1892-1984).

20. See United States Senate, *U.S. Senate Roll Call Votes, 107th Congress-1st Session (2001)*, at http://www.senate.gov/legislative/vote107/vote_00313.html (last visited Apr. 4, 2002).

Round up all the usual suspects. It would be wonderful to take Joe McCarthy's statements, the vitriolic statements that we have condemned for so long and overlay them across what we are reading now. They read the same. You know, Hitler did not rise to power by imposing his will on an unwitting, unwilling public. The Third Reich gained authority and control over those people on a ground swell of popularity. With the flames fueled by the same things we are hearing now. No doubt strong action needs to be taken, but let us not give up what separates us from that enemy in order to separate us from that enemy. We will become the same.

Secret searches, reading our communications, the Synchronized Operations Command Central (SOCC),²¹ it looks like NASA command central. Has anyone seen a picture of it? Forty television screens with access to thousands of cameras in public schools now only in the Washington, D.C. area but soon certainly everywhere—banks, lobbies, ATMs—all of those cameras being centrally linked. How many of you ever saw *The President's Analyst*? It was a film years ago. There was a constant fight between the CIA and the FBI, and they were all interested in knowing the thought process of the president's psychiatrist because that person would know intimate details and would be in a position to control the destiny of this fine country. At the end of the movie, as they pull back, you realize that it is neither the CIA or the FBI, but these cables all running back to Ma Bell. I'm not suggesting that, but the idea is that it really would not be very difficult. The government is in a position with the communications system so that once we give them a right to do this, it is almost instantaneous. It is just a question of whether we have the resources—five billion here, five billion there. Where are they going to put it? Before, we were safe because it took someone else to listen to all that shit. It was a lot of stuff to listen to. Who was going to listen to all of these people? It will not take much now. They have their resources and we are going to give it to them.

When I testified before the Senate shortly after 9/11, there was a wonderful member of my profession who made a very compelling speech on behalf of the Department of Justice. It was interesting. He is Vietnamese by birth. You know, this whole onslaught against foreigners—have we forgotten where we came from? Look around this room. I understand we are no longer a melting pot and we cannot just open our gates to everyone, but the thought of the eclectic nature. Who wants a homogenous place? It is our differences that make us strong, and one has to wonder. He used the Statue of Liberty as an example of what a wonderful country

21. See, e.g., William Safire, *Privacy Tradeoff Unsettling*, HARRISBURG PATRIOT (Pa.), Feb. 20, 2002, at A7.

it was that admitted him and brought his family here. Well under the current theory, if you look at what is happening, the Bureau of Prisons has imposed a new rule that allows the Attorney General, upon his discretion, to eavesdrop on attorney-client conversations with incarcerated clients and who have no other means of communicating whatsoever with their lawyer other than in presumably privileged attorney-client rooms. These conversations can now be listened to by our government. Congress ought to repeal the Statute of Liberty. It ought to read, "Bring me your poor, your huddled masses and we will jail them as illegal aliens, we will hold them for indefinite periods of time, and we will eavesdrop on their communications with their lawyers." Somehow, we need to get to a different place if we really want to protect what we've got and cherish and hold so dear here in this country.

It was promised. Let me tell you that on September twelfth of last year, the day after those shocking events, I received a call from Aramco, the Saudi oil company, that an employee of theirs, a doctor who was in his fifth year of residency at the University of Texas Health Science Center, had his home searched and was taken away in the early morning hours shortly after the attacks. At five in the morning, Doctor Al Bader al-Hazmi was studying for his medical boards scheduled for that Friday. He was taken and held *in comunicado* for almost two weeks. That morning, after federal agents took almost any piece of paper—the notes on the ice box, the children's computer—he was allowed a brief telephone conversation to my office. He informed me that he was being held by immigration authorities and asked me to ascertain the reasons why he was being held. At that point, the conversation was interrupted. I was told that it was Special Agent West of the Immigration and Naturalization Service and he told me that he would provide me with no information regarding my client's whereabouts, the reasons why he was being detained, and referred me to his supervisor. For the next two days, I diligently attempted to contact that supervisor, but my calls to the supervisor went unanswered. I then wrote and faxed a letter both to the supervisor and to the director of the Immigration and Naturalization Service, advising them of my representation and expressing concern that I had been unable to contact my client, determine his whereabouts, or determine the reason he was being detained.

Doctor al-Hazmi advised the media after his release that during those two weeks, he continually requested an opportunity to consult or call his lawyer or his wife who, believe it or not, despite media reports that they had left town, was hiding with the children in a closet in the home with food being brought in by neighbors.

Rather than facilitating his request that he be allowed to talk to his lawyers, the authorities continued their investigation. We retained an immigration lawyer here, Bob Shivers here in town. We filed a formal no-

tice of representation²² with the Immigration and Naturalization Service. On September fourteenth, when we finally did reach the supervising agent, he also told me he was unable to provide me with any information about my client's whereabouts or the charges and referred me to a litigation attorney with the litigation unit who in turn, the following day, advised that he would not tell me where my client was or with what he was being charged. After corresponding with the INS and noting the utility of our efforts in the need to communicate with our client, we were contacted by the Director of the Immigration and Naturalization Service who informed me only that my client had been removed on a military plane from this jurisdiction. I then sent a letter to the Attorney General and to all of the Department of Justice officials, including local friends of mine who would not return my calls even though we had known each other, and even though I represented one of them. These were people I have known for thirty years. A local attorney, who I love and respect and who taught at this university for years, I was representing them at the time and they would not return my calls. I was later told that it was not coming from here, whatever that means.

Some eleven days later, we were advised that our client was taken by authorities the day after the September Eleventh attacks and moved to a detention facility in lower Manhattan with a booking sheet that reflected he was a suspected terrorist. What do you think happened to him when he reached lower Manhattan and was placed in a large holding cell with notice to everyone in there that he was a suspected terrorist? Yet, the lawyers were afraid to even mention what had happened to him, although there probably is some record. I have to tell you that the records regarding all of this are still sealed and I am not at liberty to discuss with you what took place in New York. I can tell you that there is still fear among even the lawyers representing these people that describing what any one of them had suffered might affect the rights of those who still remain.

One has to wonder. One wonders when you hear statements by our Attorney General that no individuals were held intentionally *in comunicado*, and that somehow these people slipped through the cracks. Well, Dr. al-Hazmi did not slip through any cracks. He had a bunch of lawyers representing him. I even hired two lawyers in New York. Both of them, by the way, were refused an opportunity to visit with him except in the courtroom when we had a hearing.

One has to wonder. This was somebody that had lawyers they knew about and who had communicated directly with him verbally, by telephone, and in writing, and had filed a formal notice. This was not somebody who fell through the cracks. This is before we had legislation that

22. Notice of Entry of Appearance as Attorney or Representative (G-28).

suggested they could hold these people. I was shocked by the Supreme Court's opinion by Justice Scalia, which said that we can hold people two days without giving them any notice of reason or any opportunity for recourse. That is bad enough. But to say that because you are not a citizen we can hold you for seven days, or indefinitely as they have suggested, one has to wonder. What worries me is what this sets in terms of a precedent for all of us, because I would suggest to you the truism that how we treat the least of us is how ultimately we can expect to be treated ourselves. It is important for us to understand that from the aspect of protecting our civil liberties. It is also important for us to understand that, in a sense, they really frustrated their own process. Had they contacted Dr. al-Hazmi's lawyer and allowed him access to his lawyer, not only were they denying his rights, they really wasted untold resources on someone. For example, (this is going to matters that are public record) some of the instance that called attention to him was not just misidentification. It was that, in fact, he had a receipt on his visa card at The White House in August of that year. Had they talked to his lawyer, I could have told them that I had the paperwork showing he was at Georgetown University Medical School on a leave of absence from the University of Texas. I could have told them that, in fact, his family now recalls what that was. It was a food cluster in a mall in Washington, D.C. where they had hamburgers and a hot dog called The White House, which they later confirmed.

Had they allowed his lawyer to interact with the client, they not only would have preserved our constitutional rights for how we treat quote "the least of us," which is how all of us can expect to be protected, but they also would have facilitated and saved precious resources at a time when we really needed those resources to be applied to the real bad guys. So I might suggest to you that protecting civil liberties is not just to protect the least of us, and it is not just to protect you and I. It really allows law enforcement to operate in a more efficient fashion at a time when it is critical to do so.

If you have questions, you have two people here who obviously care about this issue. One of us comes at it naturally from an organization that, quite frankly, has appeared before the highest court in this land more often than any other litigant other than the United States government. That is the American Civil Liberties Union. The ACLU is one of the few organizations willing to stick their neck out at times when all of us understand it is not a popular position to take. No one wants to be told that we have to sacrifice security at the price of some elusive term like freedom. Security is something that when you saw what happened in that building, you had to wonder about what we are willing to give up in order to be secure? I will say this, someone someplace somewhere probably could have predicted that, but I sure as hell could not. And I would

not doubt that someone, if they put their mind and imagination to it, can surprise us again. One thing is certain. What separates us from all of those evildoers are the freedoms upon which this country is founded and throwing them at these perceived ills, I would suggest, is cruel hearted.

COMMENTS

AUDIENCE: Have those that are still being detained been given attorneys and are they able to contact their families?

MR. GOLDSTEIN: The short answer is yes. I remember years ago, when all of the CIA drop-outs were writing books. The CIA still had contracts with them and there was always a big fight about that. We were hired by some of the agents and the CIA would say they would send us all of the information, but would only talk about it once we cleared security. Well, I did not want to clear a security, and they would tell me I could not do it then. My response was "just don't tell me things I shouldn't know." That is what is going on here. What happened ultimately, even with Dr. al-Hazmi, is they had their quote "lawyers." These were lawyers the government felt were secure enough among the defense bar, such that they would deal with them. I will say this. They did invite me to participate and I told them I did not want to. I was on the other side! I told them that I did not want to know things that would compromise my country and although I certainly did not intend to do that, I did not want to become one of them. They wanted *their* lawyers to do it. They had one lawyer, for example, representing about 140 Saudis in the criminal process. You know Rule 44(c)? In federal court, if you have two lawyers in a dope case representing three people, they would have a conniption fit. The potential conflict of interest here was drastic, sort of like 'Don't tell them about getting beaten because that might jeopardize these other folks,' assuming that is what happened in those secret proceedings. Well, that is a conflict. If you have been trashed, you are entitled to complain about it. That is what your lawyer is for. He is your mouthpiece. He is your representative. He is the only person in that courtroom whose sole obligation is to protect your liberties and to protect your rights and safety. He has an obligation to stand up for you, but not if he or she is representing 140 and is worried about the safety of others. It may be that you as an individual would say, 'I'm worried about my brothers and sisters still incarcerated, so I opt not to bring it up.' But you ought to have that right unfettered from counsel who is not burdened with all of that.

So, yes they are getting counsel, but the question is what kind of counsel and is it vigorous representation? One has to wonder because I can tell you this—and this has nothing to do with the secret proceedings—Aramco was very unhappy with our position because I made it very clear to them, when they started telling me what to do, that I appreciated

the fact they were the third party paying for the bill, but, quite frankly, they were not my client. I had an obligation to Dr. al-Hazmi, and that troubled them. To his credit, Dr. al-Hazmi is a very stand-up person and a very forgiving one. I do not know if any of you saw the statements he made, but when it was all said and done and they had cleared him and released him, he said "I understand. My heart goes out to those people. I hold no one responsible." By the way, even though they would not re-admit him when he tried to return to finally take the exam, Mary Jo White, the U.S. Attorney in New York ultimately cleared him so that he could come back and take the medical boards belatedly.

MR. HARRELL: Another concern is the closing of what used to be considered open government, which is the principle foundation upon which any legitimate democracy exists. The ACLU and other organizations filed a Freedom of Information Act request with the U.S. Attorney General's office, asking them to release the names of the people being detained. Naturally, they refused to honor that request because they did not want to be open about who those people were. But the government has an obligation to report these activities to the public, because that is the only way the public can hold the government accountable.

AUDIENCE: Can you comment about the rights and abuses of the rights of those who are being held in Guantanamo Bay, Cuba?

MR. GOLDSTEIN: I understand the concept of whether or not this is a war and whether or not these are true prisoners of war, but I do think we should be very careful since unless we intend to isolate ourselves and not engage in free intercourse with our neighbors and those abroad, unless we intend to stay home, we better be careful. We better be careful about how we treat these people because there but by the grace of God go our children, our loved ones, our students, our teachers, and our tourists.

MR. HARRELL: Right or wrong, the United States has been an example internationally with regard to our due process and how we treat the accused. The way in which we expect our people will be treated abroad is now diminished because of the precedent we have set. They can now say they are going to treat us accordingly.

MR. GOLDSTEIN: What if our daughters, like the missionaries, are being held and were going to face secret military tribunals? How would we feel? What was the threat that they posed? They were preaching the gospel in places. You know, we can talk about this, but if we are going to say you cannot do that, we must be careful to at least insist on protecting the liberties of those people who are in our own country by our grace.

MR. HARRELL: If you look at the past eight years in this country, the Department of State has released annual human rights reports critiquing other countries, democratic or not, which rely on military courts believed

to be doing the business of civilian courts. The Lori Berenson case in Peru is one example.

MR. GOLDSTEIN: No rules of evidence and secret proceedings. They are doing all sorts of things we would find aberrant if we were mistreated in that fashion.

MR. HARRELL: The quagmire this administration has gotten itself into by creating these military tribunals and resisting calling these people prisoners of war puts them in an awkward position. If they are prisoners of war, then they have not committed a crime because the definition of an international crime, in order for someone to become a prisoner of war, is not what happened on September Eleventh. The administration is now stuck in a quagmire and trying to have it both ways. Eventually, they will have to make a determination that will have substantial effects on the rights of those people and in the course of their process, as well as, ultimately, the crimes of which they have to be accused. If the "war" ends, they need to be sent home if they are prisoners of war. However, that is not what this administration wants to see.

MR. GOLDSTEIN: One of the real issues here is whether they can interrogate these folks. If they call them prisoners of war, they cannot interrogate them. That appears to be why we have this moving standard. That is exactly the kind of thing we would not tolerate if our citizens were being subjected to such treatment.