ERNST ZUNDEL AND THE POLITICS OF 'GOTCHA'
by Bruce Leichty

On January 24, 2007, I was arguing before three judges in Cincinnati, on behalf of my German-born client Ernst Zundel and his wife Ingrid Rimland Zundel, when a curious thing happened.

Out of nowhere, it seemed, the presiding judge in the case, Judge Deborah Cook, a George Bush appointee of 2003, asked me coldly whether my clients were playing "gotcha" with the government.

"Gotcha" with the most powerful government on Earth – now that was a strange thing to be hearing in this marble-accented chamber. But don't get me wrong; I knew what the judge was suggesting. For over a year, I had been relishing the opportunity to stand in front of a panel of judges at the 6th Circuit and essentially challenge them to find any error in my airtight legal argument – that Ernst Zundel, a reviled Holocaust revisionist who was awaiting U.S. permanent residence through his U.S. citizen wife Ingrid, had been arrested and whisked out of the United States illegally in 2003 based on premises that could not possibly hold up under impartial judicial scrutiny.

I was frankly elated that I had discovered the government's Achilles heel – that when federal agents had arrested and deported Ernst Zundel in 2/03 they had done so based on a false premise about Ernst Zundel's last entry into the United States. That turned Ernst Zundel's case into an extrajudicial rendition – and it had all the earmarks of one, because Ernst's fate was to be confined in Canada for two years and declared a national security threat under a law that allowed secret evidence – a law that the Canadian Supreme Court has now declared unconstitutional.

After doing its dirty work, Canada then deported Zundel to Germany, where he was convicted of inciting racial hatred and sentenced to five years in prison – for nothing more than his political speech.

It all started with the U.S. federal agents in 2003. These agents postulated that Ernst Zundel had waived all his rights to due process in the United States under a program called the Visa Waiver Pilot Program. But I knew this was impossible, and I could explain it to anyone willing to put aside their prejudices for a few minutes: Ernst Zundel had last entered the U.S. in May 2000 when the Visa Waiver Pilot Program had already expired, and before Congress had belatedly authorized a permanent visa waiver program in October 2000.

When the pilot program expired, so did the authority of then-Attorney General Janet Reno to admit anyone from Germany without a visa so long as they waived their rights. She didn't get her "visa waiver" authority restored until October 2000.

Attorney General Reno decided that, while Congress mulled over the fate of the program, German visitors expecting to enter with visa waivers instead would be allowed into the United States under a program known as "parole."

So I was gratified that it didn't matter what Ernst Zundel thought when he crossed the Canada-U.S. border that night in May 2000, namely that he might need to flash his outdated visa waiver program authorization, but that what really mattered was the actual state of federal immigration law at the time. After all, in this country we don't hold people accountable to laws that they might have believed existed, but rather to laws that actually do exist.

I was gratified that, contrary to the opinion of the folksy District Court judge who had kicked Ernst's case out of his Knoxville, Tennessee court, this expert panel would have to agree that Ernst Zundel's own expectations were irrelevant.

Rather, the question would have to be: in May 2000 did Ernst sign away his rights to a court hearing, or didn't he?

I knew that he had signed nothing in May 2000. So did the government. Of course, the government claimed that he had signed a waiver of rights earlier, in March 2000, while the visa waiver pilot program was still in effect. But -- didn't that earlier waiver bind him only so long as the Attorney General herself still had the power to waive visas for Germans?

It was obvious as a matter of law that it did. Come May 2000, Ernst Zundel couldn't use the program and Janet Reno couldn't use it either. Janet Reno couldn't enforce a waiver of due process rights if her agents let Ernst into the country without a visa after her authority to do so had been withdrawn.

Therefore I knew that honest judges would have to find that Ernst Zundel had not waived any of his rights in order to enter the U.S. and that Reno's agents had instead targeted Ernst Zundel for his controversial opinions; they couldn't simply arrest Ernst Zundel in 2/03 and whisk him out of the country before considering his marriage. Our immigration laws have always had a high view of marriage to a U.S. citizen! Hundreds of Mexican nationals exercise those marriage-based rights every year before immigration officers – despite illegal entry!

Ernst knew that, too, soon after he entered the U.S. in May 2000. Tired of all his legal struggles in Canada, he and Ingrid consulted with a Tennessee immigration attorney in the summer of 2000, and they decided to get married then, and not later. In October 2000 they began life together in Tennessee assured in the knowledge that, like others who marry U.S. citizens after entering for some other reason, Ernst's status would be resolved through his marriage, without need for him to leave the United States. Their Tennessee attorney told them so.

And now Judge Cook was effectively challenging me in not so many words to admit that I had outmaneuvered the government – that if my argument were accepted the United States government was backed into a corner with no way out, that I had somehow trapped the government by its own words or acts. That the United States government had been outsmarted.

The term "gotcha" was not exactly neutral and dispassionate judicial language. It implies something devious, something substantively unfair. It evokes images of gamesmanship – of legal scholars or canon law experts or rabbis sitting in their parlors seeing who can one-up the other with their logic. I bridled at the suggestion.

And while I knew what prompted the question, I was also startled at the candor of the judge. Even considering the coded implications of her slang, to pose the question so openly smacked of desperation. The desperation itself was not a surprise, but the revelation was.

(Was Judge Cook thinking of her own public humiliation, two weeks earlier, as a "gotcha" moment? On January 12, 2007, after an investigative reporter had uncovered two illegal campaign contributions she made after she had taken office as a federal judge, she apologized and backtracked from an earlier explanation that these contributions had been made by her lawyer husband. She explained instead that she hadn't been aware of the prohibition, since she had not attended federal judges' school.)

My answer to Judge Cook's question, formed hastily and framed in as dignified a tone as I could muster, was that we were not playing "gotcha" at all, but rather just urging the court to follow the law. It was very true. But in retrospect that was too prosaic an answer, too defensive to have been the best answer.

The gall! What I wish I would have declared to Judge Cook and her colleagues was that if there was any "gotcha" involving Ernst Zundel and the United States, the judge had it backwards – big time!

This certainly wasn't a case where Ernst Zundel and his slingshot-armed lawyer should stand accused of "putting one over" on the United States, but rather a case where the United States had pulled a Goliath-style "gotcha" on Ernst.

Ernst Zundel knew that thousands of people like him had remained in the U.S. and adjusted status based on their marriages to U.S. citizens; that it was the policy of the INS to respect those marriages EVEN IF they had entered with visa waivers. Now he was supposed to know that INS reserved the right to change course suddenly because this was just "policy" and not "law?" Gotcha!!

Ernst Zundel and his Tennessee attorney knew that once notified of an appointment date, if either of them had a conflict, it was the policy of INS to honor an initial rescheduling request and to automatically reschedule the appointment. Ernst Zundel was supposed to know that when his Tennessee attorney had to ask for rescheduling in 2001, this policy did not have to be honored? Gotcha!!

Ernst Zundel was supposed to know that the two letters about the rescheduling sent by his attorney (one certified) would turn up missing in his INS file, thereby establishing a pretext for federal agents to say that Ernst had "missed" his adjustment interview? Gotcha!!

Ernst Zundel was supposed to know that instead there was a letter in his file issued by INS in January 2002 stating that he had been deemed to have abandoned his permanent residence application for failure to appear at his interview, when this letter was not even sent to him or his attorney until a full year later, after he was arrested? Gotcha!!

Ernst Zundel was supposed to know that after his wife found an attorney to ask for an emergency writ of habeas corpus in Knoxville, the judge would summarily deny the request

without a hearing, while Ernst was still confined in Blount County Jail, where he was terrorized with dogs and their black-clad handlers? Gotcha!!

Or that when his attorney first sought a stay of that abrupt order from the Sixth Circuit, the Sixth Circuit would communicate with his INS adversaries by *ex parte* fax (without disclosure to his attorney) in order to confirm that Ernst was a "visa waiver" entrant (a falsity)? Gotcha!!

But of course there wasn't time to make all these points either. Under Judge Cook's glare and with the merciless clock ticking, I finished my argument. Judge Cook and her colleague, Judge Martha Daughtrey, had already taken up most of the time with hostile questions. It was left to me to entreat them to read the expiration provisions of the Visa Waiver statute and regulation very carefully. When she was on the Ohio Supreme Court prior to becoming a federal judge, Judge Cook had the reputation of being a "strict constructionist." That was fine by me. Would she strictly construe this statute and regulation, too, even though it favored Ernst Zundel?

Would Judge Daughtrey, said to be one of the appeals court judges most sympathetic to the rights of habeas petitioners, recognize that Ernst Zundel had his liberties stripped from him without due process?

Would the silent Judge Herman Weber, a WWII veteran who had made difficult decisions respecting First Amendment rights as a district court trial judge, understand the implications of this case for the free speech rights of Ernst Zundel protected under the First Amendment? That the illegal actions of the U.S. government had set in motion a disastrous chain of events resulting in Ernst Zundel being handed over to countries whose repressive laws are the same as those that Americans fought and died over?

Would these three Cincinnati judges, perhaps feeling hemmed in and compelled to do something by law that they found repugnant based on their own emotions and conditioning, still honor the law?

Curious indeed. Was it not fair instead to expect these judges to realize that it was the outspoken dissident Ernst Zundel, and not the federal government, who was the victim of a diabolical "gotcha" in the bizarre saga of his botched extrajudicial rendition, forced separation from his wife and cruel interruption of his longed-for repose in the land of the free and home of the brave?

Could I not expect these judges to probe even more deeply, and to ask: "Why?"

Why was Ernst Zundel snared in a perverse game of "gotcha?"

After all, this is not a game to Ernst Zundel.

It is not a game to any person of conscience.