DEFENDING THE RIGHT TO DEFEND

CYNTHIA EVA HUJAR ORR

PRESIDENT'S MESSAGE

The threat of violent acts by Muslim radicals impacts our lives in ways most of us never imagined. We expected investigation of the World Trade Center, Pentagon and United Airlines flight 93 attacks, and accepted the temporary grounding of all flights as a sensible and necessary security measure.

What we did not anticipate was misuse of material witness warrants[1], mistreatment of non-suspects[2] held incommunicado (including from their lawyers)[3], denial of access to courts by United States citizens[4] while a French citizen enjoys the right to self-representation and stand by counsel[5], frustration of client confidentiality[6] and the Supreme Court's holding, in essence[7], that "torture" did not implicate the Fifth Amendment right to silence so long as the information obtained by these means was not used in a criminal proceeding[8].

On October 31, 2001 the Attorney General issued regulations which purport to authorize the Bureau of Prisons to eavesdrop on attorney/client communications upon his unilateral decision "that reasonable suspicion exists to believe that an inmate *may use* communications with attorneys or their agents to further or facilitate acts of violence or terrorism."[9] [emphasis added] Few are surprised that once the administration stepped onto this slippery slope, unquestioned[10], that the "authority" to eavesdrop would be abused by prosecutors seeking to gain an unfair advantage in an already unbalanced criminal justice system.[11] Local Assistant United States Attorneys are even eavesdropping in pedestrian drug conspiracy cases.[12] Drug offenses are not terrorist offenses, no matter how strong the rhetoric employed in the government's anti-drug campaign.[13]

The government's incursion into privileged communications began before these regulations issued. The communications of Lynne Stewart and her client, Sheikh Abdel Rahman, were video and audio taped by the government, unbeknownst to them. During these taped sessions Ms. Stewart spoke to her client in English, which a translator relayed to the Sheikh in Arabic. Ms. Stewart was unaware the sessions were intercepted and recorded, and the prison guards within earshot presumably could not understand Arabic.

Thereafter, Ms. Stewart was indicted for speaking loudly and for making a First Amendment protected statement to the press that fulfilled her role as Sheikh Rahman's counsel. Thus, one charge against Ms. Stewart is that she spoke loudly in order to cover up conversations between the interpreter and her client. Given that she was unaware anyone was trying to listen in, the allegation is farcical.

However, assuming *arguendo* that Lynne Stewart was concerned that the guard was attempting to overhear privileged communications, her speaking so that the guard could not overhear the interpreter would have been a proper attempt to keep her attorney/client communications confidential.[14]

Further, no law authorizes the government to unilaterally choose to interfere with a defendant's representation. Such interference must be authorized by a court having been shown that the crime fraud exception applies.[15] In fact, such unauthorized interference is considered government misconduct and can, when it prejudices the defendant, result in the dismissal of criminal charges.[16]

For these reasons and the odd timing[17] of Lynne Stewart's indictment, many view the October 2001 Bureau of Prisons regulations as an attempt to retroactively justify law breaking by the government. Others view Lynne's indictment as an afterthought, to justify the promulgation of the Bureau of Prison regulations which were issued before her indictment, but after her intercepted communications with her client.

Lynne Stewart was also charged with "providing material support to a terrorist organization"[18] by holding a press conference at which she announced that Sheikh Abdul Rahman felt that "the Islamic Group" ought to reconsider a ceasefire. By doing so, Ms. Stewart kept her client's political views and his political importance in the public eye, a key goal for obtaining a prisoner exchange with Egypt, his home country. Sheikh Rahman had been acquitted of misconduct in Egypt and if his political importance remained viable, he had a good chance of obtaining such a transfer. However, the government has charged Ms. Stewart's First Amendment protected conduct as a criminal offense.

In addition, it appears that Lynne Stewart has been singled out because she is a political activist. Her co-counsel, who engaged in similar proper representation of the Sheikh, was not indicted. Whatever may be the case concerning the government's interest in Lynne Stewart's dissident activities, under the reasoning employed by the government, eavesdropping on client communications and Lynne Stewart's indictment are wrong.

Her indictment also serves as a warning that the government is attempting to erode the attorney/client privilege. Lawyers who represent suspected terrorists are being asked to agree to Special Administrative Measures ("SAMS") which include interception of their attorney/client communications. However, the SAMS suffer from the same infirmities as Ashcroft's Bureau of Prison regulations. Intruding on communications that have been privileged for 200 years[19] based upon a unilateral decision by the Attorney General or a Bureau of Prisons official is unwarranted and dangerous.

In the face of the threats that privileged communications may be intercepted or that lawyers may be indicted, counsel must maintain loyalty to their clients. The administration's continued interference with counsel's role short circuits the adversary system and, thus, justice. We are officers of the court, not required to take oaths in judicial proceedings because of our duties of candor to the tribunal and to our opponents. Lawyers take oaths to uphold the Constitution and the laws of the federal and state governments. We are not suspect because of the fact that we represent persons accused of crime. We are the bulwark for liberty, we breathe life into the Constitution and we provide the most significant protection against wrongful convictions and other forms of injustice. Therefore, the government's conduct suggesting that criminal defense lawyers as a whole would facilitate violence or terrorism is unfounded and unwarranted.

Through full and unfettered communications with counsel, accused persons can determine whether their conduct violated any law and whether they have any defense to the charges preferred. Also, through honest unmolested communication with counsel, individuals receive advice to avoid unwittingly committing crime.

When the executive branch opts out of its duties to uphold and enforce laws, pretending that lawyers are an impediment to justice rather than its champions, then it engages in the exercise of unchecked power, corrupting the proper function of democracy.

This is the lesson that the current administration did not learn from the Watergate era. In *U.S. v. U.S. District Court*, 407 U.S. 297 (1972) the Supreme Court observed:

"The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.... If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to court, one may question whether there is probable cause for surveillance."

Every day in courtrooms and state houses, criminal defense lawyers champion fairness, due process and constitutional rights. Nowhere else does the constitution live for individuals more so than in the criminal courts. Criminal defense lawyers also guard against wrongful convictions, investigate prosecutorial and police misconduct, challenge biased judges and defend persons accused of wronging society. In short, we ensure the integrity of the criminal justice system by testing its metal.

While judges, prosecutors and legislators appreciate the very important role defense counsel play, a few individuals, through ignorance or insensitivity, have taken steps to eliminate counsel, to encroach on the attorney/client privilege, to co-opt defense counsel and to corrupt the rights to privacy and against cruel and unusual punishment.

When John F. Kennedy asked Maury Maverick Jr. to show him the back door to exit the Alamo, he remarked:

"There's no back door at the Alamo. That's why we had so many dead heroes."

There is no back door to the "war on terror" either. It will render the struggle difficult, but like the former defenders of Texas liberty, we will ultimately prevail. Yours in the fight...

* Postscript: Since this article was written, the judge narrowed the charges in the Lynne Stewart case by declaring the charge of providing material support to a terrorist organization unconstitutionally vague as applied to Lynne Stewart. Congratulations to Michael Tigar, her attorney.

ENDNOTES

1 18 U.S.C.§3144 allows for detention of a material witness: a person who is material in a criminal proceeding whose presence is impracticable to secure by subpoena. Although one court has held that a grand jury constitutes a criminal proceeding for which a material witness warrant may issue, *In the Matter of the Petition of*

Bacon v. U.S., 449 F.2d 933 (9th Cir. 1971), it may not be used as a substitute for a subpoena where the government has not demonstrated the witness' unwillingness to comply with the same. *See also U.S. v. Awadallah*, 202 F.Supp.2d 82 (S.D.N.Y. 2002)[material witness warrants may only be utilized to preserve trial testimony, not grand jury testimony).

[2] "The inspector general, Glenn A. Fine, briefed lawmakers on a highly critical report delivered by his office earlier this month on the treatment of Sept. 11 detainees, and said that investigators had 'serious concerns' about a pattern of verbal and physical abuse faced by 84 illegal immigrants at the Metropolitan Detention Center in Brooklyn. "Treatment of Detained Immigrants Is Under Investigation," Eric Lichtblau, New York Times, June 25, 2003.

[3] In *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D. N.Y. 2002)[Padilla was entitled to contact his lawyer and could petition the court regarding his detention as an "enemy combatant"].

[4] *See Hamdi v. Rumsfeld, et al*, 316 F.3d 450 (4th Cir. 2003)[district court's order allowing counsel unmonitored access to the detainee was reversed, detention was authorized by Congress, detainee did not have the right to a hearing to determine his enemy belligerent status and the district court's orders conflicted with the President's war making powers].

[5] *U.S. v. Zacarias Massoui*, pending in federal court in Virginia. The administration is threatening to move the case to a military tribunal because the 4th Circuit Court of Appeals has upheld the trial Court's decision to order the deposition of Massaoui's defense witness, an Al Queda operative in U.S. custody outside the U.S.

[6] *See* BOP-1116; AG Order No. 2529-2001, National Security; Prevention of Acts of Violence and Terrorism; Final Rule.

[7] The plurality opinion insists: "Our views on the proper scope of the Fifth Amendment's Self-Incrimination Clause do not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial; it simply means that the Fourteenth Amendment's Due Process Clause, rather than the Fifth Amendment's Self-Incrimination Clause, would govern the inquiry in those cases and provide relief in appropriate circumstances." *Chavez v. Martinez*, Cause no. 01-1444 (May 27, 2003).

[8] "Closely connected 'with the struggle to eliminate torture as a governmental practice,' ...the privilege is rightly regarded as 'one of the great landmarks in man's struggle to make himself civilized,'.... ...Convinced that Chavez's conduct violated Martinez's right to be spared from self-incriminating interrogation, I would affirm the judgment of the Court of Appeals."*See Chavez v. Martinez*, Cause no. 01-1444 (May 27, 2003)[J. Ginsburg Concurring in part, dissenting in part].

[9] *Id.*

[10] The regulations became effective upon their issuance. Thus, they were not subject to review and commentary for assurance that the new regulations were constitutional and otherwise legal. The regulations clearly violate the Sixth and Fourth Amendments to the Constitution. They interfere with confidential attorney client communications regarding which no crime fraud exception has been demonstrated to a judge. They chill attorney client communications, rendering counsel ineffective. They violate the Fourth Amendment because they authorize secret searches, non-consensual eavesdropping, without judicial approval. And they violate the prohibition on interception of others' conversations without a warrant meeting the strict requirements of 18 U.S.C.§2510 et seq. as well as violating similar state laws.

[11] "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor— indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."*Berger v. U.S.*,295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

[12] "Long-sought details have begun to emerge from the Justice Department on how anti-terrorist provisions of the USA Patriot Act were applied in non-terror investigations, just as battle lines are being drawn on proposed new powers in a Patriot Act II. Overall, the policy now allows evidence to be used for prosecuting common criminals even when obtained under extraordinary anti-terrorism powers and information-sharing between intelligence agencies and the FBI."Patriot Act of 2001 Casts Wide Net, Frank J. Murray, Washington Times, June 15, 2003.

[13] Obviously, discouraging children from drug use both because it violates the law and because it may affect health is important. It is a message best taught at home with honesty and love. Scare tactics only teach children to distrust the message and the messenger. The movie "Reefer Madness" stands as a testament to the ineffectiveness of a campaign based upon fear, exaggeration and misinformation.

[14] "In general, when an attorney has reasonable suspicion that his or her communications with clients in custody are being monitored by government officials, it is NACDL's position that the attorney must take affirmative action to safeguard confidential communications. Once either the attorney or client discover that surveillance or monitoring is occurring, the free exchange of information and ideas about the case is immediately chilled, and the Sixth Amendment is violated. Both will fear that confidences have already been discovered or even seized by the government. Accordingly, the criminal defense lawyer has a duty to seek to end the surveillance, discover the true extent of it, and find a remedy for what has already happened. One cannot simply rely upon *post hoc* use of the exclusionary rule because the harm to the ability of the criminal defense lawyer to adequately defend has already occurred and continues, and it substantially risks infecting the fairness of the trial." See NACDL Ethics Opinion 02-01 (November, 2002)

[15] What the interpreter chose to say to Sheikh Rahman may or may not have been what Lynne Stewart intended to communicate to her client. However, in order to invade the attorney/client privilege, the government must prove to a court that the crime fraud exception applies. It may not unilaterally choose to intrude. *U.S. v. Zolin*, 491 U.S. 554, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989).

[16] *Weatherford v. Bursey*, 429 U.S.545 (1977). "In *Weatherford v. Bursey*, the Supreme Court outlined four factors relevant to the determination of whether the defendant suffered injury from the intrusion: (1) whether the government purposely intruded into the attorney-client relationship; (2) whether any evidence offered at trial was obtained directly or indirectly from the intrusion; (3) whether the prosecutor obtained any details of the defendant's trial preparation or defense strategy; and (4) whether the overheard conversations had been used in any other way to the substantial detriment of the defendant." The Georgetown Law Journal, Thirty-First Annual Review of Criminal Procedure, Vol 90, Number 5, page1612 (2002).

[17] Ms. Stewart was not indicted for two years after her questioned attorney/client communications and press conference.

[18] *U.S. v. Lynne Stewart*, 2 CR 395 (S.D. N.Y.).

[19] *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981).