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SYMPOSIUM: The New Regulation Allowing Federal Agents to Monitor Attorney-Client Conversations: Why It Threatens Fourth Amendment Values \*

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SUMMARY:

... A new federal regulation threatens an old American freedom. ... But the Sixth Amendment protects attorney-client privilege only in the context of criminal prosecution, whereas the Fourth Amendment protects privacy more broadly. ... Consider a situation in which a client is never prosecuted (perhaps because he is thought to be a "material witness," not a suspect), or in which prosecutors (but not investigators) are walled off from access to lawyer-client conversations. ... Such a detainee might want to consult a lawyer about a wide range of legal issues far beyond the scope of the Sixth Amendment yet within the core of historic attorney-client privacy. ... And under the regulation, the determination that a given inmate is too dangerous to speak alone with a lawyer is made not by a judge, but by the executive branch--once again acting unilaterally without traditional checks and balances. ... Ashcroft rightly argues that such inmate efforts are not protected by traditional attorney-client privilege. ... This approach to the crime-fraud exception tracks the Supreme Court's teaching in *Zolin*, which endorsed the idea of judicial determinations in closed chambers, but said little to support the notion that the executive branch could unilaterally dissolve attorney-client privilege upon its own Attorney General's suspicion. ...

TEXT:

[\*1163] A new federal regulation threatens an old American freedom. On October 30, Attorney General John Ashcroft approved a Justice Department Rule allowing federal agents, under some

circumstances, to monitor traditionally confidential meetings between federal inmates and their lawyers. The monitoring may occur whenever Ashcroft determines that "reasonable suspicion exists to believe that an inmate may use the communications with attorneys . . . to . . . facilitate acts of terrorism." n1

Importantly, "inmates" under this rule include not merely criminal convicts, but anyone "held as witnesses, detainees or otherwise." Thus, even those detainees held under "material witness" warrants may have their conversations with attorneys monitored.

## I. THE HISTORY OF THE RIGHT TO CONSULT AN ATTORNEY

The right to consult an attorney in private has deep roots in Anglo-American law. Indeed, according to a 1989 Supreme Court case, *United States v. Zolin*, n2 "the attorney-client privilege under federal law [is] the oldest of the privileges for confidential communications known to the common law." n3

**[\*1164]** The right is not limited to those facing criminal prosecution; it applies to all sorts of legal counseling. Much of what clients seek to discuss may be sensitive or embarrassing--for example, family disputes or personal finances--but the law has traditionally encouraged them to confide broadly in their lawyers so that they can receive proper advice about their legal rights and duties.

Confidentiality is key to the lawyer-client relationship; clients will hesitate to discuss delicate matters with their lawyers if they fear that their secrets will be disclosed. The historic right to consult lawyers confidentially is part of the reasonable expectation of privacy protected by the Constitution's Fourth Amendment, which prohibits "unreasonable" government intrusions.

## II. BOTH THE FOURTH AND SIXTH AMENDMENTS PROTECT ATTORNEY-CLIENT COMMUNICATIONS

We stress the Fourth Amendment point because most of the initial reaction to the Ashcroft regulation has focused on the Sixth Amendment (which guarantees a right to counsel) at the expense of the Fourth. But the Sixth Amendment protects attorney-client privilege only in the context of criminal prosecution, whereas the Fourth Amendment protects privacy more broadly.

That is significant, particularly in the context of the current detentions of over a thousand people. Consider a situation in which a client is never prosecuted (perhaps because he is thought to be a "material witness," not a suspect), or in which prosecutors (but not investigators) are walled off from access to lawyer-client conversations. In that event, the Sixth Amendment might be satisfied, but the Fourth Amendment might not be.

We must remember that those being detained by the government may have special need of confidential legal advice ranging far beyond criminal law. Imagine, for example, a detainee whose very incarceration is putting pressure on his marriage, threatening his financial situation, adversely affecting the health of his aging parents, and causing his children to misbehave in school. Such a detainee might want to consult a lawyer about a wide range of legal issues far beyond the scope of the Sixth Amendment yet within the core of historic attorney-client privacy.

## III. WHY THE FOURTH AMENDMENT APPLIES

The Fourth Amendment should be read to protect this entire range of communication. To begin, surely an inmate in federal detention whose every movement is tracked by the government has been

"seized" within the meaning of the Amendment; and eavesdropping on conversations has long [\*1165] been held to be a Fourth-Amendment protected "search."

The fact that Ashcroft's proposed eavesdropping is open rather than clandestine, with federal agents sitting visibly in the room, does not eliminate Fourth Amendment concerns; the Amendment covers all searches and seizures, not just secret ones. (If the government announced tomorrow that it would start recording all private telephone conversations, that announcement would hardly do away with potential Fourth Amendment objections.)

#### IV. WHY CONGRESS AND THE PEOPLE SHOULD REGULATE SEARCHES AND SEIZURES

Judged by general Fourth Amendment standards of reasonableness, the Ashcroft regulation is troubling. For one thing, the Ashcroft rule slights the legislature and the citizenry, bypassing the ordinary lawmaking process.

The Fourth Amendment speaks of a right of "the people," suggesting that citizens' views about the reasonableness of searches and seizures are relevant. So too are the views of the legislature representing the citizenry. As one of us has explained elsewhere:

Legislatures are, and should be, obliged to fashion rules delineating the search and seizure authority of government officials. General rule of law, structural due process, and separation of powers principles frown on broad legislative abdications. In cases of borderline reasonableness, the less specifically the legislature has considered and authorized the practice in question, the less willing judges and juries should be to uphold the practice. n4

If America is to make so large a change in longstanding practice restricting so venerable a privilege, this change should come from Congress, where both political parties are represented and many points of view can be heard.

Only a week before Ashcroft acted, Congress passed a comprehensive anti-terrorism law expanding government power and restricting liberty in various ways. But this law, the USA PATRIOT Act, n5 said nothing about abrogating lawyer-client confidentiality. Various restrictions initially supported by the Act's sponsors were modified or eliminated in Congress to assuage civil libertarians. Compromise is the essence of ordinary lawmaking.

[\*1166] By contrast, Ashcroft's unilateral executive regulation circumvents the Constitution's careful system of legislative checks and balances. Indeed, Senate Judiciary Chairman Patrick Leahy has already written a sharp letter to Ashcroft, n6 posted on the Senator's Web site, raising pointed questions about this circumvention.

#### V. "INMATES" WITHOUT CONVICTIONS; "CRIME-FRAUD" WITHOUT CRIME OR FRAUD

The Ashcroft rule also sidesteps judges and juries. Many "inmates" covered by the order have never been convicted of anything. Indeed, some inmates are simply "material witnesses" who have not even been *charged* with a crime. And under the regulation, the determination that a given inmate is too dangerous to speak alone with a lawyer is made not by a judge, but by the executive branch--once again acting unilaterally without traditional checks and balances.

Finally, the regulation sweeps too broadly. Ashcroft worries that some inmates might hire lawyers to help them commit ongoing crimes--for example, by transmitting messages to co-conspirators at large or by moving money around. Ashcroft rightly argues that such inmate efforts

are not protected by traditional attorney-client privilege. Rather, they fall within the well-established "crime-fraud exception" to the privilege: Although lawyers may help clients defend themselves regarding past misconduct, lawyers should never help clients commit new frauds or crimes.

But, Ashcroft solves the ongoing-crime problem with a cleaver rather than a scalpel. If the worry is that some shady lawyers will flout legal ethics and become partners in crime with terrorists, a more surgical response would create a special list of approved lawyers who meet the highest ethical standards--say, former Justice Department officials--and allow inmates to consult confidentially with any lawyer on that Honors list.

## VI. AN HONORS LIST OF ATTORNEYS

This approach would track the 1980 Classified Information Procedures Act, n7 and the alien terrorist removal provisions of the 1996 Antiterrorism and Effective Death Penalty Act, n8 under which specially trustworthy defense counsel may seek security clearance entitling them to greater access to classified government files.

The obvious advantage of an Honors-list approach is that it would allow honest inmates to consult honest lawyers without government agents [\*1167] eavesdropping on every word. Conversely, if the government has specific grounds to suspect certain dishonest lawyers, it might even be proper to "sting" them. Indeed, the mere threat of such stings can powerfully deter lawyer misconduct.

There remains the problem of honest attorneys unwittingly aiding inmates by transmitting some innocent-sounding code word--"rosebud"--to terrorists on the loose. Providing Honors-list lawyers with special Justice Department briefing could reduce this risk.

## VII. JUDICIAL, NOT FBI AGENT, MONITORING

Where such briefing cannot solve the problem, videotaping attorney-client conversations would seem less intrusive than placing a federal executive branch agent in the room. Upon a proper threshold showing, these videotapes could be reviewed in chambers by an independent judge, who could also receive special briefing about specific code words and suspected outside contacts. If the judge decided that the meetings were indeed being used to perpetrate ongoing crimes, executive agents would then be allowed to view the tape. Otherwise, the tape would remain private.

This approach to the crime-fraud exception tracks the Supreme Court's teaching in *Zolin*, which endorsed the idea of judicial determinations in closed chambers, but said little to support the notion that the executive branch could unilaterally dissolve attorney-client privilege upon its own Attorney General's suspicion. n9

A cardinal rule of both Fourth Amendment doctrine and attorney-client privilege law is that infringements on law-abiding privacy should be no broader than necessary. If new rules are needed to prevent new threats, let us frame such rules carefully, openly, and democratically, in a process that involves the legislature, the courts, and the people.

## FOOTNOTES:

n1 National Security; Prevention of Acts of Violence and Terrorism, 66 *Fed. Reg.* 55,062, 55,066 (Oct. 31, 2001) (to be codified at 28 C.F.R. pt. 501.3(d)).

n2 491 *U.S.* 554 (1989).

n3 *Id.* at 562 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

n4 Akhil Reed Amar, *Fourth Amendment First Principles*, 107 *HARV. L. REV.* 757, 816 (1994), reprinted in AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* (1997).

n5 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

n6 Letter from Senator Patrick Leahy to Attorney General John Ashcroft (November 9, 2001), available at <http://leahy.senate.gov/press/200111/110901.html> (on file with author).

n7 18 U.S.C. app. (1980).

n8 Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 18 U.S.C.).

n9 *United States v. Zolin*, 491 U.S. 554, 568-74 (1989).