

Independent counsel escalates attack on democratic rights

Starr seeks overturn of attorney-client privilege

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Independent Counsel Kenneth Starr's motion to obtain the notes of the attorney for the late Vincent Foster, argued before the Supreme Court on June 8, represents a major assault on the longstanding principle that attorney-client discussions are privileged and confidential.

The notes in question were taken by Washington lawyer James Hamilton nine days before Foster, a deputy White House counsel, committed suicide. Foster was under attack at the time from the media and congressional Republicans over his handling of the investigation into the firing of seven members of the White House travel office staff.

Starr has sought the notes as part of his strategy of seeking to criminalize the White House's response to his investigation. Failing to find any evidence of a crime in the travel office firings themselves—one of a host of minor and unrelated incidents over which the Whitewater prosecutor has jurisdiction—Starr has suggested that White House officials committed perjury by denying that Hillary Clinton played any role in the firings.

A lower court judge quashed Starr's subpoenas for Hamilton's notes, upholding the traditional view that attorney-client privilege continues after the death of the client. Last August a divided three-judge panel of the US Court of Appeals for the District of Columbia ruled in favor of Starr's claim that the attorney-client privilege should be set aside after death. That decision has been given expedited review by the Supreme Court, which is expected to rule by the end of June.

The American Bar Association and many other organizations, representing lawyers, terminally ill patients and others concerned about the principle of confidentiality, filed briefs opposing the independent counsel and warning that termination of attorney-client privilege after the client's death would effectively

undermine the privilege while the client is alive.

In the course of the June 8 Supreme Court hearing, Starr's representative Brett Kavanaugh confirmed the sweeping implications of the ruling that the independent counsel seeks. In response to a question from one justice about whether the independent counsel would seek to question Hamilton directly about his conversation with Vincent Foster, in addition to obtaining his notes, Kavanaugh responded, "Absolutely."

The "search for truth"

In his brief to the Supreme Court, Starr argued that attorney-client privileges "obstruct the search for truth," and therefore should be set aside. He claimed that clients would not care what happened after they were dead, and only witnesses who had committed perjury would be reluctant to have their confidential attorney-client discussions made public.

A common thread that runs throughout Starr's investigation is the practice of imputing criminal motives to anyone who stands in his way. In fact, there are a multitude of reasons for desiring confidentiality in an attorney-client discussion. Only in the rarest of cases does this involve a desire to conceal an illegal act. Whether for reasons of business, family concerns or simple privacy, a person consulting a lawyer may wish to keep information confidential not only during his lifetime, but afterwards.

To compel an attorney to divulge the contents of conversations after a client's death would have a profoundly chilling effect on what clients were willing to discuss with legal counsel. It would severely hamper the

process of obtaining candid legal advice, impeding the effort of individuals to defend themselves or press legitimate legal claims.

Moreover, once the attorney-client privilege has been breached after death, what is to stop courts and prosecutors from breaching it before death? If the “search for truth” takes precedence over confidentiality, why wait until after a potentially critical witness dies? Starr is already acting on this principle, by subpoenaing Clinton’s lawyers, such as Deputy White House Counsel Bruce Lindsey, and demanding that they testify about confidential discussions with the president.

Starr has taken the position that the attorneys for those targeted by his investigation are responsible, not to their clients, but to “the truth.” This seemingly high-minded rhetoric is utterly hypocritical—all the more so in light of Starr’s role as a long-time attorney for the American tobacco industry and other lucrative corporate clients. It is, moreover, fundamentally antidemocratic.

In a legal system based on due process, truth is not a monopoly of the prosecution, but emerges out of an adversary proceeding in which the defendant is entitled to vigorous independent representation. The assertions of the prosecution are not assumed to be the truth. On the contrary, the defendant is presumed innocent until proven guilty (“beyond a reasonable doubt” in criminal cases) and convicted by a judge or jury.

Starr’s formula for “the truth” is essentially that employed in inquisitions. The so-called truth is predetermined, and the task of the inquisitor is to extract, by one means or another, testimony or evidence that supports his version of events.

Starr’s claim that only someone guilty of perjury would insist on the attorney-client privilege is typical of right-wing attacks on due process. According to this view, such legal protections as Miranda rights, search warrants and the privilege against self-incrimination are only of value to criminals. There is an echo here of the red-baiting of the 1950s, when McCarthy and other congressional witch-hunters declared that to take the Fifth Amendment was proof of guilt.

This line of argument would apply equally well to any procedural restraint on the powers of the police and prosecutors. It is essentially a demand for the scrapping of all restrictions on the power of the state to extract information, and amounts to a major breach of the right to privacy.

Politics and methods

The Starr investigation has increasingly taken on the character of an assault on due process and democratic rights. The independent counsel used illegally obtained tape recordings to launch the Monica Lewinsky phase of his investigation.

This has been followed by ever more high-handed procedures: dragging witnesses before the grand jury for interrogation, four, five and six times; intimidating noncooperating witnesses with jail or threats of jail, illustrated by parading Susan McDougal in chains before television cameras when she refused to testify; threatening to treat political criticism of the independent counsel as criminal “obstruction of justice.”

It should be recalled that several months ago Starr invoked concern for “truth” in subpoenaing White House aides to interrogate them about statements to the media criticizing his investigation. When this was criticized as an attack on freedom of the press, Starr replied that this freedom only applied when the press was printing the truth—i.e., the truth as defined by the independent counsel.

The very methods employed by Starr begin to reveal the unstated political agenda underlying his investigation. The contempt which they evince for democratic procedures is a hallmark of the most right-wing sections of the American ruling class. Given the increasing brazenness of Starr’s expanding assault on democratic rights, it is extraordinary how little opposition it has encountered. The working class must take warning.



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