US prosecutors routinely violate attorney-client privilege

Ed Hightower
31 July 2014

Evidence has recently emerged of a widespread practice by prosecutors of reading emails sent by criminal defendants in prison to their attorneys. The *New York Times* published a story July 22 exposing this routine practice by federal prosecutors in Brooklyn, noting that the email snooping has taken root in jurisdictions across the country.

The monitoring of inmates' emails to their attorneys and the use of these emails as incriminating evidence against the inmates represent a fierce attack on the core democratic right to be represented by an attorney. This right is enshrined in the 6th Amendment to the US Constitution, just following the right to a trial by jury, the right to call witnesses at trial and the right to confront one's accuser.

American legal precedent dictates that the right to have an attorney means more for the criminal defendant than just having someone to stand next to him or her during trial. Rather, the right includes effective assistance of counsel, a major part of which is honest, confidential discussion with the attorney. Without confidentiality, honest attorney-client communication becomes virtually impossible and representation is severely compromised.

The shredding of the right to counsel makes a mockery of due process as a whole. Without the right to counsel, every other democratic right evaporates. How can one expect a fair trial, for example, without the ability to freely communicate with one's attorney to prepare a defense?

Moreover, it is by and through attorneys that one asserts any democratic right against the encroaching power of the state. Freedom of speech, of the press and of religion, freedom of assembly, the right to privacy against unreasonable searches and seizures of the person or property, the rights against double jeopardy and self-incrimination—the first and immediate legal line of defense for these rights consists of defense attorneys arguing in courts of law.

In the case of alleged mob boss Thomas DiFiore, the ailing defendant sent emails from prison to his lawyers almost every day. Brooklyn prosecutors sought to introduce those same emails as evidence against DiFiore.

Judge Allyne Ross had previously blocked federal agents from reviewing DiFiore's emails until she could more thoroughly review the legal issues involved. She ultimately ruled that the emails could be admitted into evidence against DiFiore, finding that DiFiore had other adequate means of communicating with his attorney apart from email, and that the prosecutor's use of the emails as evidence did not "unreasonably interfere" with DiFiore's right to consult with his attorney.

Judge Ross took as good coin the prosecutors' claim that it was too expensive and cumbersome for the prison to determine which emails could be looked at by the prosecutors and which ones should be protected.

"Certainly, it would be a welcome development for BOP [Bureau of Prisons] to improve TRULINCS [the federal prison email system] so that attorney-client communications could be easily separated from other emails and subject to protection," she said.

Other federal judges have had the opposite reaction. In the Medicare fraud case of Dr. Syed Imran Ahmed, Judge Dora L. Irizarry rejected the explanation that prosecutors gave for using emails in the DiFiore case. Judge Irizarry barred prosecutors from "looking at any of the attorney-client emails, period."

Pointing to the obvious advantage that reading attorney-client emails gave prosecutors, Judge Irizarry scoffed at the claim that it was too expensive or cumbersome to separate emails, saying, "That's hogwash… You're going to tell me you don't want to know what your adversary's strategy is? What kind of a litigator are you then? Give me a break."

The defense of incarcerated clients presents numerous

logistical problems. Incarcerated clients cannot simply come by the office, for one thing. Nor is it a simple matter to visit them in prison, where a lawyer is subjected to innumerable pressures and time constraints. There are only so many meeting rooms, and guards want to move things along as quickly as they can. Given these conditions, email proves extremely convenient and reliable.

Criminal defendants have the right to private communications with their attorneys, whether by email or other means. The state has no business scouring their emails, least of all those that concern legal representation. That prosecutors systematically read emails between inmates and their attorneys reveals a corroded legal system. It should be noted that spying on attorney-client conferences has been a hallmark of the Guantanamo Bay show trials.

Spying on attorney-client communications comes amidst a general attack on democratic rights, as well as an increasing air of intimidation against those who represent criminal defendants.

The foremost example is civil rights lawyer Lynne Stewart, who was convicted on trumped up charges of breaking prison regulations by communicating something a client of hers said to the media. She ultimately served four years in prison before being released due to her suffering from terminal cancer.

At the same time, the NSA's secret spying and data collection, both on US residents and abroad, has effectively destroyed any right to privacy. The right to free assembly also suffers immensely when the government maps out people's comings and goings, their friends, their spending habits, travel etc. The executive branch of the US government claims the right (and uses it) to assassinate American citizens without trial, and to detain persons incommunicado without even charging them with a crime.

In light of this, the attack on the right to counsel represents one more brick in the steadily growing structure of a police state.