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THE RIGHT TO COUNSEL UNDER ATTACK

DAVID RUDOVSKY†

*"The first thing we do, let's kill all the lawyers."**

During the trial of the "Chicago Seven," the prosecution that arose out of the demonstrations at the Democratic National Convention in Chicago in 1968, there was a poignant exchange between Judge Julius Hoffman and defense lawyer William Kunstler. At one point in the contentious proceedings, as Mr. Kunstler aggressively pressed a legal point, Judge Hoffman stated that the demonstrations and unrest in the country could be explained by the ready availability of lawyers for the demonstrators. Dissidents took solace in the understanding that if they were arrested, a lawyer would be able to get them out of jail.¹ In a moment of unguarded candor, then, Judge Hoffman joined those who would blame the lawyer for the supposed ills in society.

Our history is filled with examples of this attitude. In the 1950s, "communism" was the major political evil. Then, too, high government officials contended that lawyers who represented persons with communist affiliations were as dangerous as their clients.² The FBI and the Department of Justice engaged in an extensive campaign to discredit the lawyers and legal organizations that were involved in these cases.³

I am currently involved in litigation on behalf of the National Lawyers Guild concerning the FBI's investigation and surveillance of the Guild over a twenty-five year period. One document among the thousands that have been disclosed shows that in 1948 the FBI was concerned that Professor Thomas Emerson was about to publish an

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* W. Shakespeare, *Henry V, Part 2, Act IV.*

¹ See J. EPSTEIN, *THE GREAT CONSPIRACY TRIAL* 389-96 (1970); J. SCHULTZ, *THE MOTION WILL BE DENIED: A NEW REPORT ON THE CHICAGO CONSPIRACY TRIAL* 160, 161 (1972); Lukas, *The Judge Himself Becomes an Issue in the Chicago Trial*, N.Y. Times, Oct. 5, 1969, § IV, at 9, col. 3.

² See R. BROWN, *LOYALTY AND SECURITY: EMPLOYMENT TESTS IN THE UNITED STATES* 333-56 (1958); see also F. DONNER, *THE AGE OF SURVEILLANCE: THE AIMS AND METHODS OF AMERICA'S POLITICAL INTELLIGENCE SYSTEM* 145 (1980) (stating that internal FBI files characterized the American Civil Liberties Union as "nothing but a front for the Communists").

³ See F. DONNER, *supra* note 2, at 146-49.

article in the Yale Law Journal that was critical of President Truman's national security policy. The FBI decided that it would be important to have a copy of that article so that they would have a ready response when it was published. Consequently, they burglarized Professor Emerson's office and stole the galleys of his article.⁴ This unlawful act was but one of many committed by the FBI in its attempt to destroy a national bar association. The ultimate targets, of course, were the political clients of Guild lawyers.

Today, confronted with the problems of drugs, crime, and terrorism, Congress has provided police and prosecutors with extraordinary additional powers.⁵ Whatever the impact these measures will have on crime, it appears that the Department of Justice and other prosecutorial agencies believe that without fundamental restrictions on lawyers, the war on crime cannot be won.

The government has moved to restrict zealous advocacy of lawyers representing those persons seen as the greatest threat to our social and political order. Over the past several years, a combination of legislative, investigative, and prosecutorial policies have created a high degree of unease in the legal community. First, there has been a dramatic increase in the use of grand jury subpoenas to lawyers for information relating to clients, including clients currently under criminal investigation or indictment.⁶ In enforcing these subpoenas the government has

⁴ See *id.* at 149.

⁵ See, e.g., Armed Career Criminal Act, 18 U.S.C. § 1202(a) app. (1982); Money Laundering Provisions, 18 U.S.C. §§ 1956, 1957 (Supp. IV 1986); Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO), 18 U.S.C. §§ 1961-68 (1982 & Supp. IV 1986); Bail Reform Act of 1984, 18 U.S.C. §§ 3141-43 (Supp. IV 1986); Continuing Criminal Enterprises Act, 21 U.S.C. § 848 (1982 & Supp. IV 1986); Criminal Forfeitures Act, 21 U.S.C. § 853 (Supp. IV 1986); see also *United States v. Salerno*, 107 S. Ct. 2095, 2097 (1987) (holding that pretrial detention provisions of the Bail Reform Act of 1984 are not facially invalid under the due process clause); Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 *FORDHAM L. REV.* 165, 177, 305 (1980) (providing a survey of the RICO statute with an emphasis on the advantages for prosecutors).

⁶ See, e.g., *United States v. Klubock*, 832 F.2d 649, 650, 658 (1st Cir. 1987) (barring prosecutors' subpoenas of defense attorneys to provide evidence to the grand jury without prior judicial approval), *vacated*, *United States v. Klubock*, No. 86-1413 (1st Cir. May 1, 1987) (order granting rehearing en banc, which withdrew the panel's opinion and vacated its judgment—however, the half of the en banc panel that voted to affirm the district court also "abide[d] by the majority panel opinion," *United States v. Klubock*, 832 F.2d 664, 665 (en banc) (Torruella, C.J.)); *In re Grand Jury Matters*, 593 F. Supp. 103, 104, 107 (D.N.H.), *aff'd*, 751 F.2d 13 (1st Cir. 1984) (granting motion to quash grand jury subpoena of defense attorney's testimony concerning fee arrangements with a client); see also Stern & Hoffman, *Privileged Informers: The Attorney-Subpoena Problem and a Proposal for Reform*, 136 *U. PA. L. REV.* 1783 (1988) (discussing a national survey of criminal defense lawyers which found "an enormous" jump in subpoenas between 1983 and 1985).

sought to restrict the scope of the attorney-client privilege.⁷

Second, lawyers have become the targets of highly intrusive investigative techniques, including searches of their offices, electronic surveillance, and the use of government informers, sometimes posing as criminal defendants.⁸ Third, Congress has given prosecutors the power to prevent a criminal defendant from retaining the counsel of her choice by threatened fee forfeitures.⁹

Further, ethical considerations have been invoked to limit the right to counsel. For example, courts may disqualify defense counsel from representing more than one client on a theory of conflict of interest, even where the clients expressly waive any challenge to such representation.¹⁰ As Professor Freedman has demonstrated in his analysis of *Nix v. Whiteside*,¹¹ the move to promote more "ethical" conduct on the part of defense counsel brings with it the significant potential of further eroding attorney-client confidentiality and trust.¹²

I accept as common ground that there are corrupt lawyers in the bar. I also accept the government's legitimate interest in prosecuting those lawyers if the evidence so warrants. I quarrel, however, with those who blame crime on the Constitution and on lawyers. As part of a program to weaken or eliminate a number of basic democratic rights,

⁷ See, e.g., *John Doe v. United States*, 781 F.2d 238, 252 (2d Cir. 1985) (en banc) (reinstating the district court's denial of a motion to quash grand jury subpoena of a defense attorney), cert. denied, 475 U.S. 1108 (1986); see also *supra* text accompanying note 6 (documenting the use of grand jury subpoenas concerning information on clients).

⁸ See, e.g., Goldstock & Chananie, *Criminal Lawyers: The Use of Electronic Surveillance and Search Warrants in the Investigation and Prosecution of Attorneys Suspected of Criminal Wrongdoing*, 136 U. PA. L. REV. 1855 (discussing the harmful consequences of investigative techniques on attorney-client relationships) (1988); Burke, *Controversy Mounts on Searches of Law Offices*, Philadelphia Inquirer, Mar. 21, 1988, at D-1, col. 1 (reviewing the law and specific cases on searches of law firms).

⁹ See Money Laundering Provisions, 18 U.S.C. § 1957 (Supp. IV 1986); Criminal Forfeitures Act, 21 U.S.C. § 853 (Supp. IV 1986).

¹⁰ See, e.g., *United States v. Flanagan*, 679 F.2d 1072, 1073, 1076 (3d Cir. 1982) (stating that the disqualification of defense counsel is not an abuse of discretion where a conflict of interest is likely to arise), *rev'd on procedural grounds*, 465 U.S. 259 (1984); *United States v. Russotti*, 565 F. Supp. 99, 101 (W.D.N.Y. 1983) (stating that the disqualification of joint counsel is approved notwithstanding defendant's knowing waiver of sixth amendment protection); *United States v. Siegner*, 498 F. Supp. 282, 285, 287 (E.D. Pa. 1980) (discussing a disqualification of counsel arising from a potential conflict of interest between current and former clients); Margolin & Coliver, *Pretrial Disqualification of Criminal Defense Counsel*, 20 AM. CRIM. L. REV. 227, 243-48 (1982) (arguing that pretrial disqualification of criminal defense counsel on conflict of interest grounds compromises the rights of criminal defendants).

¹¹ 475 U.S. 157 (1986).

¹² See Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939 (1988).

the Justice Department and its conservative allies have attempted to make the Constitution a scapegoat for a variety of social and political problems.¹³ These forces assert that adherence to constitutional principles is incompatible with effective law enforcement. They blame doctrines and rulings that promote fairness and equality in the criminal justice system for aggravating crime and violence. As the presentations in this Symposium demonstrate, there has been a determined effort to limit the right to counsel of choice and to undermine longstanding principles of confidentiality, trust, and fidelity in the attorney-client relationship.

The Symposium participants have not addressed fee forfeiture, an issue that is illustrative of the measures that deeply trouble defense counsel. Under the Comprehensive Forfeiture Act of 1984 (CFA),¹⁴ the court, upon motion of the government, may issue a restraining order prohibiting a criminal defendant from disbursing assets that derive from certain criminal activity. Further, the relation-back provision of the CFA¹⁵ allows the government to seek a post-conviction forfeiture of property transferred to a third-person. In the government's view, this provision includes counsel fees. Under the CFA (as passed by Congress and so far, as argued by the Department of Justice), the mere allegation in the indictment that the defendant has assets that derive from, or are the proceeds of, certain criminal enterprises gives the government the right to seek an ex parte restraining order to prevent the defendant from disposing of those assets. This right alerts lawyers that if they lose the case, the proceeds will be forfeited to the government and the lawyer will not be paid for her services. In that situation, the government, by the mere power of indictment, can forfeit the defendant's right to counsel of choice. No lawyer will take the case on a contingency basis and, indeed, it would be unethical to do so.¹⁶

¹³ See, e.g., OFFICE OF LEGAL POL'Y, U.S. DEP'T OF JUST., REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION 94, 95 (1986) [hereinafter PRE-TRIAL INTERROGATION]. The Office of Legal Policy urged the Department of Justice to persuade the Court to abrogate or overrule *Miranda v. Arizona*, 384 U.S. 436 (1966), in which the Court held that criminal suspects in the custody of law enforcement agencies were constitutionally entitled to certain procedural protection. The Office of Legal Policy included the following three reasons for urging the abrogation of *Miranda*: (1) the *Miranda* rule's practical impediment to prosecuting criminals, see PRE-TRIAL INTERROGATION, *supra*, at 94, (2) the rule's damaging effect on public confidence in the law, see *id.* at 95, and (3) the rule's symbolic importance as "the epitome of Warren Court activism in the criminal law area," *id.* at 115.

¹⁴ 21 U.S.C. § 853 (Supp. IV 1986).

¹⁵ 21 U.S.C. § 853(a) (Supp. IV 1986).

¹⁶ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(d)(2) (1983) ("A lawyer shall not enter into an arrangement for, charge, or collect . . . a contingent fee for representing a defendant in a criminal case.").

The government has argued that the right to counsel of choice is limited to those defendants with sufficient untainted assets to exercise the choice.¹⁷ A defendant who robbed a bank could not demand that the proceeds of the robbery be available to hire a lawyer. A defendant arrested in possession of cocaine could not demand that the cocaine be sold and the proceeds be used to retain counsel. In light of these constraints, then, why should a defendant be permitted to finance her defense with real estate allegedly purchased with the proceeds of illegal drug transactions? Should she not receive the same defense that any other indigent defendant would receive, either by public defender or appointed counsel?

This argument is fundamentally flawed. First, it ignores the contingency inherent in a criminal forfeiture proceeding. Whether or not the assets are "tainted" depends on the outcome of the proceeding for which the defendant seeks to retain counsel. Second, the argument ignores the impact of the forfeiture option upon our adversary system. By merely alleging in an indictment that assets are tainted, the prosecution could preclude any criminal defendant from retaining counsel of choice. The "taint brush" is in the prosecutor's hands. Third, it ignores the realities of criminal defense practice today. Lawyers are no longer fungible, if they ever were. Some criminal charges are so complex that specialized and well paid advocates are essential to a fair defense. Finally, there is the institutional concern. Using the forfeiture power, the government is

able to exert substantial power over defendants' ability to choose defense counsel, allowing the government to prevent the most capable lawyers from representing these defendants. By driving these attorneys from the market, the government would weaken the collective strength of the defense bar in the process. This would inevitably distort the adversary system by skewing the balance of power in favor of the government in these—and perhaps most—criminal prosecutions.¹⁸

¹⁷ See *United States v. Jones*, 837 F.2d 1332, 1336 (5th Cir. 1988); *United States v. Caplin & Drysdale, Chartered*, 837 F.2d 637, 643 (4th Cir. 1988) (en banc); *United States v. Monsanto*, 836 F.2d 74, 79 (2d Cir. 1987), *reh'g en banc granted*, No. 87-1397 (2d Cir. Jan. 29, 1988). See generally Brickley, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on the Right to Counsel*, 72 VA. L. REV. 493, 533 (1986) ("That the government's decision to seek forfeiture may make members of the private defense bar reluctant to represent RICO and CCE defendants seems constitutionally irrelevant.").

¹⁸ Cloud, *Forfeiting Defense Attorneys' Fee: Applying An Institutional Role Theory to Define Individual Constitutional Rights*, 1987 WIS. L. REV. 1, 35.

The money laundering statute¹⁹ presents similar problems, with even greater potential consequences to the lawyer. Consider, for example, the following hypothetical. A client comes to your office and says, "I have just been indicted in a drug conspiracy." After some discussion the lawyer sets the fee at \$20,000. The client then provides a check for \$10,000. Under the money laundering statute, it is a felony for that lawyer to accept that money knowing that it came from a criminal enterprise. Immediately, the lawyer is placed in an adversarial position with the client. The following dialogue may ensue: "Where did you get the money?" "I won it in the lottery." "Do you have proof of that?" "Well, I'm not so sure. Why is it so important?" Should the law require that the lawyer start her representation by cross-examining and investigating her own client?

The suggestion has been made that lawyers need only inform clients of the limits of confidentiality. As Charles Ogletree demonstrated, however, the warnings that would be required to explain these limitations adequately will have an inevitable, adverse effect on the confidence and trust between an attorney and client.²⁰ Client trust is very difficult to achieve. Even for private practitioners, trust does not come automatically. Moreover, clients are particularly suspicious about attorneys who are appointed by the court and paid by the government.

There are now several other layers of mistrust. These include the possibility of a subpoena, a disclosure of fees, a forfeiture, and the chance that the "client" or a co-defendant is actually a government informer or agent. In many of the cases it may be assumed that the prosecutor will not misuse these extraordinary powers. Indeed, we were told by the government representatives at this Symposium that the Department of Justice has various levels of review to ensure that abuses will not occur. But consider the circumstances in the Scott Turow matter: an assistant U.S. Attorney claimed that the departmental policy allowed him to wire a lawyer to record conversations of the lawyer's criminal defendant client.²¹ Departmental procedures did nothing to protect the client from a direct and insidious invasion of the attorney-client relationship.

It can be argued that the Turow matter is an exceptional case, and it may be. It can be said that Judge Hoffman's views were exceptional,

¹⁹ 18 U.S.C. § 1957 (Supp. IV 1986).

²⁰ See Ogletree, *The Future of Defense Advocacy*, 136 U. PA. L. REV. 1903 (1988).

²¹ See *United States v. Ofshe*, 817 F.2d 1508, 1511-12 (11th Cir. 1987), cert. denied, 108 S. Ct. 451 (1987). See generally Uviller, *Presumed Guilty: The Court of Appeals Versus Scott Turow*, 136 U. PA. L. REV. 1879 (1988) (noting the approval of the Department of Justice).

and that may be. But as the Supreme Court has cautioned, we should be most careful of governmental power when it is exercised in the "competitive enterprise of ferreting out crime."²²

Governmental restrictions on defense counsel are not the only ways in which we have limited access to counsel. Currently in this country we are faced with a scandal of growing proportions. There are over 2,000 people on death row, half of whom do not have lawyers to prosecute their final legal appeals. In Texas, for example, inmates on death row are representing each other because there are no lawyers who have taken their cases and the state will not pay for representation in habeas corpus proceedings.²³ If this situation is not soon remedied, we will have the ugly spectacle of persons put to death without counseled consideration of their cases.

Finally, it is important to examine the scope of our commitment to the ideal of *effective* assistance of counsel. No matter how well trained, how experienced, or how motivated a public defender may be, she will invariably be ineffective in some cases if her caseload is so large as to preclude adequate time for consultation, investigation, and legal preparation. All too often, the failure to provide sufficient resources undermines the principle of effective assistance of counsel.²⁴

This problem is seriously aggravated by the failure of the courts to establish meaningful standards to test the effectiveness of trial counsel. The most incompetent and indefensible actions of defense counsel are rationalized as tactical decisions. In all too many cases, lawyering that should trouble the collective conscience of the courts and bar is determined to be within the realm of competent assistance.

Last term, in *Burger v. Kemp*,²⁵ for example, the Court held that a court-appointed criminal defense lawyer provided effective assistance of counsel even though she did not present any mitigating evidence at the sentencing stage of the defendant's murder trial. The defendant was a seventeen year old army private with a sub-normal I.Q. and a history of psychological problems at the time of the killing.²⁶ The Court also held that there was no conflict of interest between counsel and client

²² Johnson v. United States, 333 U.S. 10, 14 (1948).

²³ See Lewis, *A Muted Trumpet*, N.Y. Times, Mar. 17, 1988, at A31, col. 1; Kamisar, *The Gideon Case 25 Years Later*, N.Y. Times, Mar. 16, 1988, at A27, col. 1.

²⁴ See Appel, *The Limited Impact of Nix v. Whiteside on Attorney-Client Relations*, 136 U. PA. L. REV. 1913 (1988). Political control of defender offices by county governments or the courts also poses a significant barrier to independent, effective, and zealous advocacy. The often unspoken messages of "moving cases" and "cooperating with the system" places defense lawyers in the untenable position of compromising their representation to protect their funding and political support.

²⁵ 107 S. Ct. 3114 (1987).

²⁶ See *id.* at 3122-26.

where the lawyer and her law-partner represented co-defendants in the case. This situation precluded the possibility that both counsel could make a "lesser culpability argument" and it also made more difficult any plea bargaining with the prosecutor.²⁷

Burger illustrates the minimal degree of competence required by the Court. I find it somewhat ironic that while we are increasing our ethical demands on defense counsel, we denigrate the central purpose of the sixth amendment: meaningful and effective assistance of counsel. Thus, for example, in *Whiteside*, the Court presumed to constitutionalize rules of professional conduct for defense counsel,²⁸ while in a case like *Tollet v. Henderson*,²⁹ it found nothing wrong with a lawyer who did not even investigate a challenge to an indictment handed down by a grand jury whose racial composition offended the equal protection clause.³⁰ Why are we less demanding of defense counsel with respect to their skills and courtroom advocacy than we are with regard to their decisions on ethical issues?

Indeed, we should demand that prosecutors be held to the same level of ethical conduct. In *Darden v. Wainwright*,³¹ the prosecutor in closing argument expressed his personal opinion about the defendant's guilt, called the defendant an "animal,"³² and said that he wished he could see him with "no face, blown away by a shotgun."³³ The Court held that these comments did not deprive the defendant of a fair trial.³⁴ *Darden* is particularly remarkable because it was decided just one year after *Whiteside*,³⁵ yet the *Darden* Court did not even mention the ethical rules when judging the prosecutor's misconduct.

Twenty-five years ago the Court handed down its historic decision in *Gideon v. Wainwright*,³⁶ when it ruled that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him."³⁷ *Gideon* is one of the Court's most compelling and popular decisions. It reflects a broad ethical and legal consensus that the interposition of a lawyer between the forces of the state and the individual accused of crime is of profound importance. But the struggles over the

²⁷ See *id.* at 3120-22.

²⁸ See *Whiteside*, 475 U.S. at 175-76.

²⁹ 411 U.S. 258 (1973).

³⁰ See *id.* at 266-69.

³¹ 477 U.S. 168 (1986).

³² *Id.* at 179.

³³ *Id.* at 180 n. 12.

³⁴ See *id.* at 181-82.

³⁵ See *Whiteside*, 475 U.S. at 157.

³⁶ 372 U.S. 335 (1963).

³⁷ *Id.* at 344.

real meanings of *Gideon* have been divisive: they reflect a true ambivalence among the public and the courts concerning the role of counsel, and how we can best ensure that criminal defense counsel are independent, effective, honest, and zealous.

The Court denigrates the sixth amendment by asserting that a client has no right to a "meaningful relationship" with her lawyer.³⁸ In turn, the government takes this position to its extreme by claiming the power to prevent a defendant from retaining counsel of choice in a criminal case.³⁹ Of course, we are told that important interests of efficiency, crime control, and public safety properly motivate whatever restrictions are imposed on counsel.

Granted, the problems of crime and crime-control are complex and difficult. The public's demand for safety encourages the paring of laws of criminal procedure to make it easier to reach suspects. Simple solutions may win elections. They will not solve the serious problems of crime. The current emphasis on fighting crime by diluting constitutional protections and by blaming the lawyers is seriously misdirected. If liberties and lawyers continue to be viewed as causes of crime, we will have neither safety nor liberty.

³⁸ *Morris v. Slappy*, 461 U.S. 1, 14 (1983).

³⁹ See *supra* notes 17-21 and accompanying text.

