

# *Nova Law Review*

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*Volume 27, Issue 3*

2003

*Article 4*

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## Attorney-Client Privilege for Suspected Terrorists: Impact of the New Federal Regulation on Suspected Terrorists in Federal Custody

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## I. INTRODUCTION

In response to the terrorist attacks on September 11, 2001, the United States Government has passed many new laws and regulations to strengthen national security in an effort to better prepare for a new era in which terrorists acting on American soil have become a constant threat.<sup>1</sup> On October 30, 2001, the United States Attorney General, John Ashcroft,

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1. E.g., USA Patriot Act, H.R. 3162. 107th Cong. (2001); 31 C.F.R. Part 103 (2002).

authorized a Justice Department rule that permits the Director of the Bureau of Prisons and other components of the Justice Department to monitor traditional confidential communications between specified federal inmates and their attorneys when senior intelligence and law enforcement officials determine that the information could endanger national security or could lead to other acts of violence and terrorism.<sup>2</sup>

On April 11, 2002, Lynne Stewart, a criminal defense attorney, was arrested for providing material support and resources to a terrorist organization. The Government's case developed from an investigation, which included the monitoring of her communications with her client, convicted terrorist Sheik Omar Abdel Rahman.<sup>3</sup> The Sheik, as he is commonly known, was convicted in 1995 of the World Trade Center bombing in 1993 and for conspiring to blow up other New York City landmarks. It is likely nobody would argue that The Sheik presents an obvious security threat to the United States, therefore, it may appear that the monitoring of his conversations with his lawyer were reasonable to prevent future acts of terrorism. But, what are the implications of this rule on other people in federal custody, others that may not appear as such obvious threats? Does this new regulation unnecessarily abridge the rights of these people to have confidential communications with their attorney in order to be effectively represented?

The attorney-client privilege under federal law "is the oldest of the privileges for confidential communications known to the common law."<sup>4</sup> It is very likely that the constitutionality of this rule will be challenged in the near future. As a result, this article will explore the constitutional arguments that could be raised to challenge this regulation, and will examine the legal context through the existing line of cases that have already placed limitations on the attorney-client privilege. This article will begin by first examining the federal regulations prior to September 11th that permitted the Bureau of Prisons to place special administrative measures on inmates in federal custody in order to prevent future acts of violence or terrorism. Second, it will look at the new federal regulation that was implemented by the Attorney General after September 11th that permits the government to monitor the communications between inmates and their attorneys under special administrative measures. Third, this article will examine how the procedures

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2. 28 C.F.R. §§ 500-01 (2001).

3. *United States v. Stewart*, No. 02 CR. 396 JGK, 2002 WL 1300059, at \*2 (S.D.N.Y. June 11, 2002).

4. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961)).

of the federal regulation attempt to preserve the attorney-client privilege. Fourth, it will examine the limited scope of protection the attorney-client privilege receives under the Fourth and Sixth Amendments of the United States Constitution. Fifth, this article will look into the crime-fraud exception, under which communications between a client and an attorney are not privileged if they are used to further an act of fraud or a crime. Sixth, since this regulation affects inmates in federal custody, it will examine how inmate rights are weighed against the governmental interest in maintaining security at prisons through a limitation of constitutional rights and federal wiretapping regulations. Seventh, this article will examine whether such an intrusion into the attorney-client privilege will cause irreparable harm to effective legal representation. Finally, this article will conclude that this new federal regulation is a reasonable response to a real security threat, and, if fairly applied, will adequately protect the rights of the inmate while serving the legitimate governmental interest of preventing potential acts of violence and terrorism.

## II. NEW FEDERAL RULE

### A. *Regulations Prior to September 11, 2001*

The threat imposed by terrorist acts on American soil was a prime concern for the government even before September 11, 2001. One response to the growing awareness of these potential attacks was from the Bureau of Prisons. On June 20, 1997, the Bureau had finalized its interim regulations of inmates in federal custody in order to maintain security at prison facilities and to prevent future acts of violence and terrorism.<sup>5</sup> Terrorism is defined in the *Code of Federal Regulations* as any acts dangerous to human life that violates the criminal laws of the United States and intends to intimidate or coerce a civilian population or conduct and policy of a government.<sup>6</sup> These rules were instituted to manage inmates who could possibly disclose information that could harm national security or could lead to acts of violence or terrorism.<sup>7</sup> These regulations give the Director of the Bureau of Prisons, upon direction of the Attorney General, authorization to implement the special administrative measures.<sup>8</sup> The Bureau of Prisons has complete

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5. Prevention of Acts of Violence and Terrorism, 62 Fed. Reg. 33,7301, 33,732 (June 20, 1997) (to be codified at 28 C.F.R. § 501.2).

6. 18 U.S.C. § 2331 (2002).

7. Prevention of Acts of Violence and Terrorism, 28 C.F.R. § 501.2-.3 (2002).

8. § 501.3(a).

discretionary power to determine what restrictions are implemented and whom they are placed upon.<sup>9</sup>

Under the special administrative measures, an inmate can be housed in segregated administrative detention as well as have certain other privileges limited, including the use of a telephone, correspondence, visitation, and interviews with the media.<sup>10</sup> These restrictive measures reduce the risk that an inmate, who has been shown to be a serious security risk, is able to cause or facilitate a future act of violence or terrorism through their communications or contact with persons outside the prison.<sup>11</sup> For example, if a suspected terrorist were arrested before they were able to carry out an attack, the Bureau of Prisons would want to prevent the chance that they could communicate with other members involved in the conspiracy or to pass along the location of money or explosives that could be used to plan another terrorist attack. This is not as far fetched as it might sound. Ramzi Yousef was convicted for his participation in the World Trade Center bombing in 1993 and for conspiracy to blow up American-owned airplanes.<sup>12</sup> Because of Mr. Yousef's terrorist activities, the then Attorney General, Janet Reno, authorized the Bureau of Prisons to place Mr. Yousef under special administrative measures.<sup>13</sup>

Before these restrictive measures are imposed, an inmate is given written notification of the restrictions and reasons for its imposition.<sup>14</sup> The reasons why they have been imposed, however, may be limited for security reasons or to prevent violence or terrorism.<sup>15</sup> These restrictive measures may be imposed for up to 120 days or for up to one year with approval of the Attorney General.<sup>16</sup> The Director of the Bureau of Prisons can also renew the restrictions for up to one-year increments upon the written notification by the Attorney General.<sup>17</sup> These measures cannot be renewed automatically.<sup>18</sup> A fresh risk assessment must be done at the end of every period.<sup>19</sup>

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9. *Yousef v. Reno*, 254 F.3d 1214, 1220–21 (10th Cir. 2001).

10. § 501.3(a).

11. *Id.*

12. *Yousef*, 254 F.3d at 1216.

13. *Id.*

14. 28 C.F.R. § 501.3(b).

15. *Id.*

16. § 501.3(c).

17. *Id.*

18. *Yousef*, 254 F.3d at 1219 (citing *United States v. Johnson*, 223 F.3d 665, 672 (7th Cir. 2000)).

19. *Id.*

### B. *New Regulation Post September 11, 2001*

In response to the growing fear of additional terrorist attacks after September 11th, Attorney General John Ashcroft instituted a new restriction on inmates already under special administrative measures to include the monitoring of attorney-client communications.<sup>20</sup> This new restriction closed a loophole that allowed an inmate to communicate freely with his attorney. Before the Bureau of Prisons is allowed to monitor attorney-client communications under this new regulation, the Attorney General must first receive information from the head of a federal law enforcement or intelligence agency that “reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism.”<sup>21</sup> Upon such a finding, the Attorney General may then instruct the Director of the Bureau of Prisons to begin the appropriate procedures for the monitoring or review of the communications between the inmates and their attorneys.<sup>22</sup> Such procedures include a written notification to both the inmate and the inmate’s attorney prior to the start of the monitoring or review.<sup>23</sup> This written notification, however, need not be given where a court order directing that no notice be made is obtained.<sup>24</sup>

### C. *Preservation of the Attorney-Client Privilege Under This Regulation*

Although all communications between an inmate and his or her attorney are subject to monitoring and review under this new regulation,<sup>25</sup> the communications are still, for the most part, covered by the attorney-client privilege.<sup>26</sup> The only communications that lose the attorney-client protection are those that could “facilitate criminal acts or a conspiracy to commit criminal acts,” or are not related to legal advice or strategy.<sup>27</sup> The latter category is, of course, communication that does not fall within the definition of attorney-client privilege under any evidentiary rule or state statute.<sup>28</sup> The

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20. 66 Fed. Reg. 55,065 (Oct. 31, 2001).

21. Prevention of Acts of Violence and Terrorism, 28 C.F.R. § 501.3(d) (2001).

22. *Id.*

23. § 501.3(d).

24. § 501.3(2).

25. § 501.3(i).

26. *See* 28 C.F.R. § 501.3(ii).

27. *Id.*

28. FED. R. EVID. 501.

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory

former category is also a well-recognized exception to the attorney-client privilege, which provides that an attorney cannot assist his client in committing a crime.<sup>29</sup>

Given that any conversation being monitored can contain both privileged and non-privileged information, the regulation sets forth procedures for the review of this information to determine whether it is privileged and confidential, or whether it should be disclosed to the investigating body.<sup>30</sup> These procedures include the establishment of a "privilege team," which consists of independent individuals that are not involved in the investigation.<sup>31</sup> This team follows monitoring procedures that minimize the intrusion of the team into the privileged communications between the inmate and the attorney.<sup>32</sup> The regulation, however, is not exactly specific as to what these procedures are, but it does state that the team does not retain any communications that are found to be privileged.<sup>33</sup> Once the team makes a decision that this information is not protected and should be disclosed, it still must obtain a court order to release the information.<sup>34</sup> The team leader, however, can make a unilateral decision to disclose the information to the investigating body, prior to receiving a court order when the privilege team leader determines that potential act of violence or terrorism is imminent.<sup>35</sup>

An inmate who feels the restrictions are too severe or unwarranted does have legal recourse. Section 501.3 provides that affected inmates have a right to seek a review of the restrictions that have been imposed through the Administrative Remedy Program.<sup>36</sup> In *Yousef v. Reno*,<sup>37</sup> the plaintiff-inmate challenged the special administrative measures that were imposed on him after his conviction, arguing that the measures imposed violated his rights

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authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

*Id.*

29. *Clark v. United States*, 289 U.S. 1, 16 (1933) (holding the communication intended to further an act of fraud or crime is not protected by the attorney-client privilege).

30. 28 C.F.R. § 501.3(3).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. 28 C.F.R. § 501.3(d)(3).

36. Prevention of Acts of Violence and Terrorism, 28 C.F.R. § 501.3(e) (2001).

37. 254 F.3d 1214 (10th Cir. 2001).

under the First, Sixth, and Eighth Amendments.<sup>38</sup> The Tenth Circuit Court of Appeals, however, dismissed Mr. Yousef's claims because he failed to exhaust all his administrative remedies.<sup>39</sup> Thus, the court seemed to leave the door open to these claims once all remedies were exhausted.

### III. THE LIMITED SCOPE OF THE ATTORNEY-CLIENT PRIVILEGE

#### A. *Sixth Amendment Protection of the Attorney-Client Privilege*

Despite the long history behind the attorney-client privilege, no such explicit privilege exists in the United States Constitution. The Sixth Amendment does, however, afford an individual the right to counsel in all criminal prosecutions.<sup>40</sup> The issue that often arises is whether an intrusion into the attorney-client privilege damages the effectiveness of an attorney's representation of his client and thus violates the Sixth Amendment.<sup>41</sup> An example of this is discussed in *Massiah v. United States*.<sup>42</sup> In that case, Massiah, a merchant seaman, was arrested for smuggling cocaine into the United States aboard a ship he was working on.<sup>43</sup> While he was out on bail, a federal agent, who was investigating the case, succeeded in getting another man involved in the smuggling operation to cooperate with the government by helping to gather more information on Massiah.<sup>44</sup> So, without Massiah's knowledge, a listening device was placed in the informant's car and a few days later a lengthy conversation was recorded between Massiah and the informant.<sup>45</sup> This recording included several incriminating statements that Massiah made which were later used at his trial, and ultimately led to his

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38. *Yousef v. Reno*, 254 F.3d 1214, 1216–17 (10th Cir. 2001).

39. *Id.* at 1222.

40. U.S. CONST. amend. VI. This amendment states that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by and impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witness in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

41. *See, e.g., Massiah v. United States*, 377 U.S. 201 (1964).

42. 377 U.S. 201 (1964).

43. *Id.*

44. *Id.* at 202.

45. *Id.* at 202–03.

conviction.<sup>46</sup> On appeal, Massiah argued that his Sixth Amendment rights were violated because the government agents sought to gain incriminating evidence against him after he was indicted and without the presence of his attorney.<sup>47</sup> The Court held that the incriminating evidence gained without the presence of his lawyer violated his Sixth Amendment right to counsel.<sup>48</sup> Further, the Court noted:

[A] Constitution which guarantees a defendant the aid of counsel at such a trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less, it was said, might deny a defendant "effective representation by counsel at the only stage when legal aid and advice would help him."<sup>49</sup>

In *Massiah*, the prosecution's use of the incriminating evidence led to the defendant's conviction and thus clearly caused injury to the defendant. But what happens when a violation of a defendant's Sixth Amendment rights does not injure or prejudice the defendant?

A further example of the damage or injury needed is illustrated by the case of *Weatherford v. Bursey*.<sup>50</sup> In that case, the plaintiff, along with the defendant, who was an undercover agent, were arrested for a state criminal offense.<sup>51</sup> The defendant went through the charade of the arrest in order to maintain his undercover status.<sup>52</sup> Although the defendant retained his own counsel, he attended two pretrial meetings with the plaintiff and his attorney.<sup>53</sup> The plaintiff's attorney requested the defendant's presence in order to obtain additional information or advice for the trial.<sup>54</sup> At no time did the defendant discuss the content of the meetings with his superiors or with the prosecution team.<sup>55</sup> After the defendant had been seen in the company of police officers, which compromised his cover, he was called as a

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46. *Id.*

47. *Massiah*, 377 U.S. at 204.

48. *Id.* at 207.

49. *Id.* at 204 (citing *Spano v. New York*, 360 U.S. 315, 326 (1959) (Douglas, J., concurring)).

50. 429 U.S. 545 (1977).

51. *Id.* at 547.

52. *Id.*

53. *Id.*

54. *Id.* at 548.

55. *Weatherford*, 429 U.S. at 548.

witness for the prosecution.<sup>56</sup> After the plaintiff's conviction, he brought suit against the defendant claiming the defendant's participation in the two pretrial meetings compromised the effectiveness of his counsel and thus violated his rights under the Sixth and Fourteenth Amendments.<sup>57</sup> The district court found in favor of the defendant, but the Fourth Circuit Court of Appeals reversed, holding that "whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship, the right to counsel is sufficiently endangered to require reversal and a new trial."<sup>58</sup>

The United States Supreme Court, however, disagreed with the Fourth Circuit Court of Appeals, holding that this per se rule was incorrect.<sup>59</sup> In reaching its decision, the Court distinguished three of its earlier opinions relied upon by the Fourth Circuit.<sup>60</sup> Specifically, those decisions were the Supreme Court's opinions in *Black v. United States*,<sup>61</sup> *O'Brien v. United States*,<sup>62</sup> and *Hoffa v. United States*.<sup>63</sup>

In *Black*, the defendant was charged with evading federal income taxes.<sup>64</sup> In a matter unrelated to his tax situation, the Federal Bureau of Investigation ("FBI") placed a listening device in Black's hotel suite in Washington D.C.<sup>65</sup> Over a three-month period, the FBI recorded conversations that included conversations Black had with his attorney concerning the federal income tax charges.<sup>66</sup> The FBI stated that they destroyed the recorded tapes but that notes were kept which summarized and quoted these conversations.<sup>67</sup> When the government attorneys prosecuting the tax case began trial preparation, they received information and transcripts from the FBI, including the summaries of the conversations Black had with his attorney.<sup>68</sup> It was not until after the trial began that the government attorney realized that the information from the FBI included conversations between Black and his attorney.<sup>69</sup> The Solicitor General argued that since the tax

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56. *Id.* at 549.

57. *Id.*

58. *Id.* (quoting *Weatherford v. Bursey*, 528 F.2d 483, 486 (4th Cir. 1975)).

59. *Id.* at 551.

60. *Weatherford v. Bursey*, 429 U.S. 545, 550-53 (1977).

61. 385 U.S. 26 (1966).

62. 386 U.S. 345 (1967).

63. 385 U.S. 293 (1966).

64. *See Black*, 385 U.S. at 27-29.

65. *Id.* at 27.

66. *Id.*

67. *Id.* at 27-28.

68. *Id.* at 28.

69. *Black*, 385 U.S. at 28.

division attorneys did not find anything relevant in the transcripts from the FBI, a new trial should not be granted, rather the judgment should be vacated to the district court to determine if the materials were irrelevant and the conviction should stand.<sup>70</sup> The Supreme Court did not agree and it held that “[i]n view of these facts it appears that justice requires that a new trial be held so as to afford the petitioner an opportunity to protect himself from the use of evidence that might be otherwise inadmissible.”<sup>71</sup>

The other case the Fourth Circuit relied upon in its decision was *O’Brien v. United States*.<sup>72</sup> In this case, which is very similar to *Black*, Charles O’Brien was convicted on several counts of stealing merchandise from a United States Customs Service facility.<sup>73</sup> The FBI placed a listening device in a commercial establishment owned by O’Brien’s friend.<sup>74</sup> During the surveillance, the FBI recorded conversations O’Brien had with his attorney concerning his upcoming trial over the theft from the customs service facility.<sup>75</sup> The conversations between O’Brien and his attorney were then summarized in the FBI’s logs, but were never mentioned in any report and were in no way communicated to the attorneys for the Department of Justice, which was prosecuting O’Brien’s case.<sup>76</sup> In a per curiam decision, the United States Supreme Court vacated the judgment and remanded it back to the district court for a new trial if the government desired to retry the case.<sup>77</sup> In his dissent, Justice Harlan argued that the order to vacate for a new trial was premature.<sup>78</sup> Justice Harlan agreed that O’Brien was entitled to a hearing to determine how much, if any, of the recorded material was possibly used at trial,<sup>79</sup> but stated that “a new trial is not an appropriate vehicle for sorting out the eavesdropping issue because, until it is determined that such occurrence vitiated the original conviction, no basis for a retrial exists. The Court’s action puts the cart before the horse.”<sup>80</sup>

The decision in *Hoffa* was more in line with Justice Harlan’s view. In that case, a government informant sat in on Hoffa’s conversations with his

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70. *Id.*

71. *Id.* at 28–29.

72. 386 U.S. at 345.

73. *Id.*

74. *Id.* at 346.

75. *Id.*

76. *Id.*

77. *O’Brien*, 386 U.S. at 345.

78. *Id.* at 346–47 (Harlan, J., dissenting).

79. *Id.* at 346 (Harlan, J., dissenting).

80. *Id.* at 347 (Harlan, J., dissenting) (quoting *Black*, 385 U.S. at 31 (Harlan, J., dissenting)).

lawyers and other people during his trial of a Taft-Hartly Act violation.<sup>81</sup> Although that trial ended in a hung jury, there were allegations of jury tampering on the part of Mr. Hoffa and new charges were brought against him.<sup>82</sup> At the second trial, the government informant testified to conversations that he had overheard between Hoffa and other third parties, but this did not include any conversations that Hoffa had with his lawyers.<sup>83</sup> Hoffa was convicted of jury tampering and he subsequently challenged his conviction on the grounds that the government informant violated his Sixth Amendment right to counsel.<sup>84</sup> The Supreme Court held that Hoffa's Sixth Amendment right was not violated, however, because the testimony by the informant did not deal with conversations that Hoffa had with his lawyers.<sup>85</sup> Yet, the Court noted that, had Hoffa been convicted in his first case, it would have been reversed because the informant had listened to conversations between Hoffa and his lawyers and reported at least some of this information back to the authorities.<sup>86</sup>

To distinguish these cases, the Supreme Court's opinion in *Weatherford* notes that the only inference that can be made from *Black*, *O'Brien*, and *Hoffa*, is that when conversations between clients and their attorneys are overheard, a Sixth Amendment violation depends upon whether the communications led to evidence, either direct or indirect, at trial.<sup>87</sup> The Court also held that a Sixth Amendment violation might occur if the privileged conversations between a client and his or her counsel, was the subject of testimony at trial, was the origination of evidence used later at trial, or was "used in any other way to the substantial detriment of the client."<sup>88</sup> Therefore, as long as information obtained from the meetings is not communicated, there is no substantial threat to a defendant's Sixth Amendment rights.<sup>89</sup>

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81. *Weatherford*, 429 U.S. at 552–53 (citing *Hoffa v. United States*, 385 U.S. 293 (1966)).

82. *Id.* at 553 (citing *Hoffa v. United States*, 385 U.S. 293, 294 (1966)).

83. *Id.* (citing *Hoffa v. United States*, 385 U.S. 293, 307–08 (1966)).

84. *Id.* (citing *Hoffa v. United States*, 385 U.S. 293, 295 (1966)).

85. *Id.* at 553–54 (citing *Hoffa v. United States*, 385 U.S. 293, 307–08 (1966)).

86. *Weatherford*, 429 U.S. at 553 (citing *Hoffa v. United States*, 385 U.S. 293 (1966)).

87. *Id.* at 552.

88. *Id.* at 554.

89. *Id.* at 558.

Thus, in order to prove a Sixth Amendment violation, there must be at least a showing of prejudice to the defendant or a benefit to the State.<sup>90</sup> A two-part test is used to determine if there is sufficient prejudice.

[A] prejudice analysis is employed at two levels in the Sixth Amendment context. First, some amount of prejudice is required in order to establish the existence of a Sixth Amendment violation, but the prejudice need not be “outcome determinative.” Second, once a violation is established the level of prejudice will determine the remedy, if any, which is required.<sup>91</sup>

A court will not dismiss an indictment as a sanction for government intrusion into the attorney-client relationship unless the required amount of prejudice to the defendant is shown.<sup>92</sup>

In order for an inmate to show that his Sixth Amendment right to counsel is violated under section 501.3 of the *United States Code*, some amount of prejudice will have to be established. The only way that this could happen is if the privilege team, who is monitoring the communications between the inmate and his attorney, saves the recording or creates a summary of the conversations, and provides it to the prosecution team if the inmate has not already been convicted. The prosecution team would also have to use this information in the trial in order to get the heaviest sanction of having the indictment dismissed.

#### B. *Fourth Amendment Protection of the Attorney-Client Protection*

Section 501.3 provides procedures whereby the prosecution, if applicable, is walled off from the “privilege team” that monitors potentially privileged attorney-client communications to prevent its disclosure.<sup>93</sup> These procedures prevent a Sixth Amendment violation from occurring, but an individual’s Fourth Amendment rights might be still be violated.<sup>94</sup> Because

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90. *United States v. Noriega*, 764 F. Supp. 1480, 1488 (S.D. Fla. 1991) (citing *Weatherford*, 429 U.S. at 558)).

91. *Id.* at 1490 n.8 (quoting *United States v. Kelly*, 790 F.2d 130, 138 n.6 (D.C. Cir. 1986)).

92. *Id.* at 1489–90 (citing *United States v. Morrison*, 449 U.S. 361 (1981)).

93. *Prevention of Acts of Violence and Terrorism*, 28 C.F.R. § 501.3 (2001).

94. Akhil R. Amar & Vikram D. Amar, *The New Regulations Allowing Federal Agents to Monitor Attorney-Client Conversations: Why it Threatens Fourth Amendment Values*, Findlaw, (Nov. 16, 2001), at <http://writ.news.findlaw.com/amar/20011116.html>. The Fourth Amendment provides:

the Sixth Amendment protects the attorney-client privilege only in the context of a criminal prosecution, the Fourth Amendment may offer more protection because its privacy protection is broader.<sup>95</sup> A Fourth Amendment challenge to section 501.3 is likely because

[it] 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” with the meaning of the Amendment; and eavesdropping on conversations has long been held to be a Fourth-Amendment protected “search.”<sup>96</sup>

A Fourth Amendment challenge to monitored communications was raised in *United States v. Noriega*.<sup>97</sup> In that case, Manuel Noriega, the former dictator of Panama, was being held at the Metropolitan Correctional Center (“MCC”) in Miami awaiting trial on drug trafficking charges.<sup>98</sup> The security procedures at MCC provided that all calls made by inmates on its phones were automatically and randomly monitored by a central recording system.<sup>99</sup> Under MCC’s regulations, if an inmate wanted to make an unmonitored call, a specific request had to be made to a guard and explicitly request that the call be unmonitored or that he “wished to engage in a ‘privileged’ attorney-client communication.”<sup>100</sup> The phone which Noriega had access to also had a sticker on it which stated “that all calls made on that phone, with the exception of ‘properly placed’ calls to an attorney, were subject to monitoring and recording by the Bureau of Prisons.”<sup>101</sup> During a period of nine months, “Noriega made over 1,400 telephone calls, including some to his attorneys, from that phone.”<sup>102</sup> “The government served [several] subpoenas [to] MCC for production of Noriega’s tape-recorded

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The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

95. Amar & Amar, *supra* note 94.

96. *Id.*

97. 764 F. Supp. 1480, 1482 (S.D. Fla. 1991).

98. *Id.*

99. *Id.*

100. *Id.* at 1485.

101. *Id.* at 1483.

102. *Noriega*, 764 F. Supp. at 1483.

conversations.”<sup>103</sup> In order to shield itself from privileged attorney-client conversations, the trial team had the calls screened by a Spanish-speaking DEA agent to remove all privileged communications from the tapes that would be turned over to the trial team.<sup>104</sup> Despite the screening process, some of Noriega’s privileged communications accidentally reached the trial team through summaries of the tapes.<sup>105</sup> Upon learning of this intrusion into the attorney-client privilege, Noriega moved to have the charges against him dropped on the grounds that it violated his rights under the Sixth and Fourth Amendments.<sup>106</sup>

Noriega’s Sixth Amendment argument was dismissed by the district court because he failed to show the prejudice or injury required to prove a Sixth Amendment violation.<sup>107</sup> The court also rejected Noriega’s Fourth Amendment claim holding that this Amendment “protects only those subjects or areas in which there is a legitimate expectation of privacy.”<sup>108</sup> There is also no expectation of privacy when information is passed voluntarily to third parties.<sup>109</sup> The court held that there was no evidence to suggest that Noriega had an expectation of privacy when he made the calls.<sup>110</sup> Noriega was given adequate notice that his calls were subject to being monitored and he had no subjective expectation of privacy because he often warned the people to whom he was talking to be careful about what they discussed as well as using cryptic language during the conversations.<sup>111</sup>

Thus, a Fourth Amendment violation will not be found when there is no expectation of privacy. Since section 501.3 is applicable to inmates who are given notice that they are under special administrative measures and that their conversations with their attorneys may be monitored, there is no realistic expectation of privacy for these inmates. Therefore, it is likely that an inmate’s Fourth Amendment challenge to section 501.3 would fail if its provisions are carried out properly.

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103. *Id.*

104. *Id.*

105. *Id.* at 1484.

106. *Id.*

107. *Noriega*, 764 F. Supp. at 1488.

108. *Id.* at 1492 (citing *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979)).

109. *Id.*

110. *Id.*

111. *Id.*

## IV. CRIME-FRAUD EXCEPTION

One of the principle legal foundations of section 501.3's intrusion into the attorney-client privilege is the crime-fraud exception. This rule exempts communication used to further a future criminal act from the traditional protections afforded by the attorney-client privilege.<sup>112</sup> One of the earliest Supreme Court cases that discussed the limitations of privileged communications is *Clark v. United States*.<sup>113</sup> In that case, a juror was convicted of criminal contempt for knowingly giving false and misleading testimony during voir dire in order to remain of the jury and thereby thwart the prosecution of her former employer.<sup>114</sup> The petitioner challenged the admissibility of the testimony of her conduct during jury deliberations because the arguments and votes of jurors are privileged and cannot be disclosed unless they are waived.<sup>115</sup>

In discussing the origin and policy reasons supporting the privilege, the Court noted that the social policy behind the privilege might conflict with other competing social policies.<sup>116</sup> The free and independent debate of the jury room may be chilled if the juror's comments and votes were made publicly available.<sup>117</sup> The Court noted that "the function of the court to weigh these competing policies is more essential when there is little guidance in either case law or treaties that precisely limit the privilege in question."<sup>118</sup> The Court then held that this privilege is "not applicable when the circumstances giving rise to the privilege were fraudulently begun or continued."<sup>119</sup> In support of its decision, the Court looked to analogies in other privileges for precedent, specifically citing an early case that held that the attorney-client privilege did not protect a client who consults with an attorney in order to help him commit a fraud.<sup>120</sup> The Court noted that although many early cases required only an unsubstantiated charge of illegality to remove this privilege,<sup>121</sup> later rulings held that specific evidence of illegality must be shown before such privilege is destroyed.<sup>122</sup> The Court

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112. *United States v. Zolin*, 491 U.S. 554, 556 (1989).

113. *Clark*, 289 U.S. at 1.

114. *Id.* at 6-7.

115. *Id.* at 12.

116. *Id.* at 13.

117. *Id.*

118. *Clark*, 289 U.S. at 13.

119. *Id.* at 14.

120. *Id.* at 15.

121. *Id.* (citations omitted).

122. *Id.*

further stated that the confidences of a client and his or her attorney are protected only until abuse has been adequately demonstrated to the satisfaction of the judge.<sup>123</sup>

In *United States v. Gordon-Nikkar*,<sup>124</sup> the Fifth Circuit denied a petitioner's appeal from a cocaine trafficking and possession conviction because of the testimony of a government witness regarding two meetings the petitioner had with her attorney.<sup>125</sup> At one of the meetings, which included several other co-defendants including the government witness, the petitioner and the other people present agreed to give false testimony to hide their crime.<sup>126</sup> The court held that it was not a confidential communication because some of the participants at the meeting were not clients of the attorney.<sup>127</sup> Yet, the court further opined that, even if it was considered confidential, the testimony of the government witness was admissible because the attorney-client privilege does not include communications regarding the intent to commit a crime.<sup>128</sup> "The policy underlying the attorney-client privilege is to promote the administration of justice. It would be a perversion of the privilege to extend it so as to protect communication designed to frustrate justice by committing other crimes to conceal past misdeeds."<sup>129</sup>

The rules and procedures that a court uses in determining whether the crime-fraud exception is applicable in a given situation, greatly impact the strength of the attorney-client privilege. The issues facing the application of the crime-fraud exception were examined in the United States Supreme Court's opinion in *United States v. Zolin*.<sup>130</sup> In that case, the Internal Revenue Service ("IRS") issued a summons that demanded the production of certain materials involving an investigation into the tax returns of L. Ron Hubbard, the founder of the Church of Scientology.<sup>131</sup> These materials included some tapes that the church claimed were protected by the attorney-client privilege.<sup>132</sup> "The IRS filed a petition to enforce its summons with the United States District Court for the Central District of California."<sup>133</sup> The IRS

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123. *Clark*, 289 U.S. at 16.

124. 518 F.2d 972, 974 (5th Cir. 1975).

125. *Id.* at 974.

126. *Id.*

127. *Id.*

128. *Id.* at 975.

129. *Gordon-Nikkar*, 518 F.2d at 975.

130. *Zolin*, 491 U.S. at 556.

131. *Id.*

132. *Id.* at 557.

133. *Id.* at 558.

argued that the tapes were not privileged communications as the respondents claimed, but rather, fell within the crime-fraud exception."<sup>134</sup> In support of its request to have the court listen to the tapes, the IRS offered partial transcripts of the tapes that it had lawfully obtained.<sup>135</sup> The district court ruled that while the transcripts showed some evidence of past crimes, there was nothing to indicate that future crimes were planned.<sup>136</sup>

The respondents appealed to the Ninth Circuit on other grounds and the IRS cross-appealed claiming, in part, that the district court incorrectly ruled on the crime-fraud exception without listening to the tapes *in camera*.<sup>137</sup> The Ninth Circuit held that in order for the crime-fraud exception to apply to privileged communication, the party opposing the privilege must base its assertion on "sources independent of the attorney-client communications recorded on the tapes."<sup>138</sup> The Ninth Circuit held that the IRS's "independent evidence" did not support a finding of the crime-fraud exception.<sup>139</sup> This case was then granted certiorari to the United States Supreme Court.<sup>140</sup>

The Supreme Court stated that many questions can arise when a crime-fraud exception claim is made.<sup>141</sup> The three principle questions raised in *Zolin* were: 1) whether a district court can review privileged communications in order to determine if the crime-fraud exception applies; 2) what minimum amount of evidence must be shown before a court can undertake a review; and 3) if there is an evidentiary threshold requirement needed before an opposing party claims a crime-fraud exception, whether the privileged material itself can be used to satisfy it.<sup>142</sup> The Court first looked at the *Federal Rules of Evidence* to determine if it bars an *in camera* review of privileged communications.<sup>143</sup> It noted that two rules, specifically Rule 104(a) and Rule 1101(c), of the *Federal Rules of Evidence*, stand out when first examining these questions.<sup>144</sup> When taken together, these rules can be

134. *Id.*

135. *Zolin*, 491 U.S. at 558.

136. *Id.* at 559.

137. *Id.* at 560.

138. *Id.* at 561 (quoting *United States v. Zolin*, 809 F.2d 1411, 1418 (9th Cir. 1987), *overruled on other grounds by United States v. Jose*, 131 F.3d 1325 (9th Cir. 1999)).

139. *Zolin*, 809 F.2d at 1418–19.

140. *Zolin*, 491 U.S. at 560.

141. *Id.* at 563.

142. *Id.* at 564–65.

143. *Id.* at 565.

144. *Id.* at 565–66. Rule 104(a) states:

Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the

read to conclude that a court cannot review the privileged communication to determine the crime-fraud exception.<sup>145</sup> But this interpretation leads to a result that, once a court finds that the communication is privileged, it would be almost impossible to ever prove a crime-fraud exemption.<sup>146</sup> Thus, the Court rejected this interpretation and stated that the plain language of Rule 104 does not explicitly exclude “all materials” from a court’s consideration of an exception.<sup>147</sup> Therefore, the Court held that the district court in *Zolin* was permitted to conduct an *in camera* review of the tapes.<sup>148</sup>

In its decision, the Supreme Court held that, while a blanket rule allowing an *in camera* review in every circumstance would jeopardize the policy reasons behind the attorney-client privilege, “the costs of imposing an absolute bar to consideration of the communications *in camera* for purpose of establishing the crime-fraud exception are intolerably high.”<sup>149</sup>

[W]e conclude that evidence that is not “independent” of the contents of allegedly privileged communications—like the partial transcripts in this case—may be used not only in the pursuit of *in camera* review, but also may provide the evidentiary basis for the ultimate showing that the crime-fraud exception applies. We see little to distinguish these two uses: in both circumstances, if the evidence has not itself been determined to be privileged, its exclusion does not serve the policies which underlie the attorney-client privilege.<sup>150</sup>

The Court further held that since an *in camera* review of privileged communication is a lesser intrusion on the attorney-client privilege than a public disclosure, a lower evidentiary threshold is required than would be to overcome the privilege itself.<sup>151</sup> But, a party claiming a crime-fraud exception “must present evidence sufficient to support a reasonable belief

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court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

FED. R. EVID. 104(a). Rule 1101(c) states: “The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.” *Id.*

145. *Zolin*, 491 U.S. at 566.

146. *Id.* at 567.

147. *Id.* at 566.

148. *Id.* at 568.

149. *Id.* at 569.

150. *Zolin*, 491 U.S. at 574 n.12.

151. *Id.* at 572 (quoting David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443, 467 (1986)).

that an *in camera* review may yield evidence that establishes the exception's applicability."<sup>152</sup> This requirement may be met by using any lawfully obtained evidence that the court has not adjudicated to be privileged.<sup>153</sup>

If under section 501.3 the "privilege team" monitors conversations that are used to further acts of terrorism, it is permitted to release it to the proper authorities.<sup>154</sup> This is what occurred in the case of the Sheik when he was using his conversations with his lawyer to direct the terrorist activities of his followers.<sup>155</sup> This obviously falls within the crime-fraud exception and is precisely the type of information section 501.3 was designed to prevent.<sup>156</sup>

## V. LIMITATIONS ON INMATE RIGHTS

### A. *Constitutional Limitations of Inmate Rights*

Since section 501.3 is applicable to inmates under the supervision of the Bureau of Prisons, as well as other people in federal custody, it is important to examine how the rights of inmates are limited under existing law and how the courts balance the constitutional rights of inmates and the government's legitimate interest in protecting society. One of the leading cases in this area is *Pell v. Procunier*.<sup>157</sup> In that case, three professional journalists and four inmates brought suit against various California Department of Corrections officials, claiming that a corrections department rule, which prohibited face-to-face media interviews with specific inmates, violated their rights of free speech under the First and Fourteenth Amendments.<sup>158</sup> This rule prohibited media and press interviews with specific inmates, but still permitted interviews with a random selection of inmates.<sup>159</sup>

The United States Supreme Court began its decision with the proposition that "[l]awful incarceration brings about the necessary withdrawal or limitations of many privileges and rights, a retraction justified by the considerations underlying our penal system."<sup>160</sup> "In the First Amendment context a corollary of this principle is that a prison inmate

152. *Id.* at 574–75.

153. *Id.* at 575.

154. Prevention of Acts of Violence and Terrorism, 28 C.F.R. § 501.3 (2002).

155. Harriet Chiang, *Colleagues Call Lawyer's Arrest Harmful*, THE S.F. CHRONICLE, April 11, 2002, at A3.

156. Prevention of Acts of Violence and Terrorism, 28 C.F.R. § 501.3(d)(2)(i) (2002).

157. 417 U.S. 817 (1973).

158. *Id.* at 819.

159. *Id.*

160. *Id.* at 822 (quoting *Price v. Johnson*, 334 U.S. 266, 285 (1948)).

retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.”<sup>161</sup> Thus, any constitutional challenges to prison regulations must be weighed against the legitimate policies and goals of a correctional system, which is principally to deter crime by separating convicted criminals from society and hopefully to rehabilitate them for their return to society.<sup>162</sup>

In its decision, the Court stated that the alternative means of communication available to the inmates should be a relevant factor when weighing the inmates’ First Amendment rights against any legitimate governmental interests.<sup>163</sup> Because the inmates in California still had other reasonable and effective means of communication available to them and the regulations were uniformly applied, the regulations did not violate the inmate’s rights under the First and Fourteenth Amendments.<sup>164</sup> The Court further noted that “[t]he nature of a place, the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner are reasonable.”<sup>165</sup> In a prison environment, in which security concerns are of great importance, the restrictions of people allowed to enter the prison and interview inmates are considered reasonable.<sup>166</sup>

#### B. *Inmate Exemptions from Federal Wiretapping Statutes*

The governmental interest in maintaining security in prisons also restricts an inmate’s ability to make unmonitored phone calls while in custody. Title III of the Omnibus Crime Control and Safe Streets Act, “forbids the willful interception of wire communications, including telephone conversations, without prior judicial authorization.”<sup>167</sup> However, this limitation of governmental power does not fully apply to inmates. There are two exceptions to this statute that allow prison officials to tape the conversations of inmates.<sup>168</sup> Prison officials can intercept communications through wiretaps if: 1) it falls within their routine duties; or 2) one of the parties to the communication gives their consent to the interceptions.<sup>169</sup>

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161. *Id.*

162. *Pell*, 417 U.S at 822–23.

163. *Id.* at 824 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972)).

164. *Id.* at 826.

165. *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) (internal quotation marks omitted)).

166. *Id.* at 827.

167. *United States v. Noriega*, 764 F. Supp. 1480, 1490 (S.D. Fla. 1991).

168. *Id.*

169. 18 U.S.C. §§ 2510(5)(a)(ii), 2511(2)(c) (2002).

The first exception, section 2510(5)(a)(ii), states that a law enforcement officer, which includes prison officials, are permitted to use wiretaps to intercept inmate calls when it is done “in the ordinary course of his duties.”<sup>170</sup> In *United States v. Sababu*,<sup>171</sup> the Seventh Circuit held that taping of inmate phone calls is permitted when it is done according to prison regulations and within the normal routine.<sup>172</sup> The routine use of phone taps is authorized by 28 C.F.R. section 540.100. This regulation states that “[i]nmate telephone use is subject to limitations and restrictions which the Warden determines are necessary to insure the security, good order, and discipline of the institution and to protect the public. The Warden shall establish procedures and facilities for inmate telephone use.”<sup>173</sup>

The interception of communications is also authorized when “one of the parties to the communication has given prior consent to such interception.”<sup>174</sup> A violation of this statute was raised in the prison context in *Noriega*.<sup>175</sup> The district court rejected Noriega’s claim because Noriega’s conversations were recorded under the normal routine of the prison and were based on legitimate security concerns.<sup>176</sup> Noriega’s claim was also rejected because his consent to be monitored could be inferred from the ample warnings he received through the stickers on the phone, orientation manual, and other consent forms.<sup>177</sup>

How the courts interpret Title III may be useful in understanding how the courts might view challenges to the intrusion into the attorney-client privilege in section 501.3. First of all, before any inmate can be subject to having his conversations between himself and his attorney monitored, they must first be placed under “special administrative measures.”<sup>178</sup> The inmates are given written notification of the restrictions that will be imposed as well as the reasons why they are having the restrictions placed on them.<sup>179</sup> If the security risks are severe enough, the inmate may have the additional measure of monitoring his or her attorney-client communications placed on him or her by the Attorney General, once he is notified by law enforcement or

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170. 18 U.S.C. § 2510 (2002).

171. 891 F.2d 1308 (7th Cir. 1989).

172. *Sababu*, 891 F.2d at 1329.

173. *Id.* at 1329 n.7 (quoting 28 C.F.R. § 540.100).

174. 18 U.S.C. § 2511(2)(c).

175. *Noriega*, 764 F. Supp. at 1490.

176. *Id.* at 1491.

177. *Id.*

178. Prevention of Acts of Violence and Terrorism, 28 C.F.R. § 501.3(a) (2002).

179. § 501.3(b).

intelligence officials of the heightened security risk.<sup>180</sup> The selected inmate also receives an additional notice of this extra security measure, unless a court gives its authorization not to provide the additional warning.<sup>181</sup>

Since under most circumstances section 501.3 provides the inmate with sufficient notice of the extra security measures that are being imposed, it would be hard to establish that there is any expectation of privacy. The rights enjoyed by regular inmates are initially limited by the fact that they are in custody. The security concerns of maintaining a prison naturally reduce the rights and privileges enjoyed by inmates. Add to this the security concerns needed to apply “special administrative measures” and finally, the highest level of a security threat needed to impose the monitoring of attorney-client communications, and any expectation of privacy by the inmate is minimal.

#### VI. IRREPARABLE HARM TO EFFECTIVE LEGAL REPRESENTATION?

The courts and the public at large have accepted the reduced rights and privileges of inmates, but the issue of monitoring attorney-client communications has caused substantial unease among the legal community.<sup>182</sup> Many lawyers and civil rights activists are concerned that monitoring the communications of people who qualify under section 501.3, including suspected terrorists, will have a chilling effect on the lawyers who represent them.<sup>183</sup> But, is this an irreparable harm to effective legal representation?

There is no doubt that the knowledge that the government is taping the communications between someone who is in federal custody and his or her lawyer would cause them both to closely guard their words. The client would be very apprehensive about giving details that might be potentially incriminating to him. This would, in turn, hurt the ability of the attorney to know as much as possible about the client’s case and thus, limit the effectiveness of the attorney’s representation. In fact, the courts recognize that the purpose of the attorney-client privilege is to “encourage clients to make full disclosure to their attorneys.”<sup>184</sup>

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180. § 501.3(d).

181. § 501.3(d)(2).

182. Chiang, *supra* note 155.

183. *Id.*

184. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)).

[The attorney-client privilege's] purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such sound legal advice or advocacy depends on a lawyer being fully informed.<sup>185</sup>

There is no denying that this regulation will have a detrimental effect on the inmate's legal representation, but it is not irreparable. The inmates that are subject to having their conversations with their attorneys monitored are not the typical inmates in federal custody. These inmates have been determined by the Attorney General or by other intelligence and law enforcement officials to pose a serious threat of continued acts of violence and terrorism. It is unlikely that these inmates have a great deal of trust for any government or prison officials. It seems reasonable that they would be reluctant to speak open and candidly about any act of violence or terrorism that they committed in the past, regardless of whether their conversations with their attorneys were being recorded.<sup>186</sup>

In addition, the inmates could be reassured by the fact that, as long as their attorney-client communications do not fall within the crime-fraud exception, they will remain privileged. If the privilege team fails to follow its proper procedures and transfers privileged communications to the prosecution team, there is legal recourse. If the privileged materials were intentionally disclosed to the prosecution by the privilege team, and if the prejudice caused to the inmate was substantial, the court could order a new trial.<sup>187</sup>

## VII. CONCLUSION

This new regulation was implemented in a response to real and substantial threats faced by the United States. Its purpose was to prevent a limited group of people in federal custody from abusing the attorney-client privilege to cause future acts of violence and terrorism. Any time a privilege is chipped away, even for just a very select group of people, it can be a

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185. *Upjohn*, 449 U.S. at 389.

186. *See, e.g., Noriega*, 764 F. Supp. 1480, 1492 (S.D. Fla. 1991) (noting that Manual Noriega frequently warned the people he was talking on the phone with not to discuss sensitive matters and repeatedly used coded and cryptic language).

187. *See Black v. United States*, 385 U.S. 26 (1966).

dangerous step toward limiting the privilege for everyone. But, the conditions in this particular case warrant this unprecedented measure. The regulation is carefully drawn to protect privileged communication that is monitored and gives redress procedures to inmates who feel that this measure is unwarranted. In addition, this regulation is extremely limited in scope. At the moment, only about sixteen prisoners in federal custody qualify to have their conversations with their attorneys monitored.<sup>188</sup>

Although some people feel that this regulation is too intrusive and that the threat of terrorism is overstated, the regulation is necessary. As mentioned in the introduction, this regulation enabled the Department of Justice to arrest a lawyer who has been accused of helping her client, the man responsible for the planning of the World Trade Center bombing in 1993, to pass messages to his followers in order to direct terrorist activities from his jail cell.<sup>189</sup> In another example, Isabelle Coutant Peyre, the fiancée and lawyer of the notorious terrorist Carlos “The Jackal”, offered to represent Zacarias Moussaoui, who is under indictment for his role in the September 11, 2001 destruction of the World Trade Center.<sup>190</sup> It is understandable that allowing her to have private conversations with Moussaoui could possibly impose an unreasonable security risk.

This regulation can be effective, but will it be able to withstand a legal challenge? It is the opinion of the author that the courts will find that the regulation does not violate the Constitution. As detailed above, the attorney-client privilege is not absolute and courts have acknowledged that there are exceptions to it. An attempt to abuse this privilege to further an act of fraud or further a crime is not protected. Second, if privileged attorney-client communications are monitored by the government, but are not used to prejudice the defendant or to benefit the government, there is no violation of the privilege. Third, this article has shown that, when the rights of inmates are weighed against the governmental interest in maintaining peace and security in the prisons as well as the country at large, the governmental interest prevails.

Finally, this article recognizes that this regulation could possibly harm the legal representation of the inmates who are subject to having their

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188. *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism; Hearing Before Senate Judiciary Committee*, 107th Cong. (2001) (statement of Assistant Attorney General Michael Chertoff), available at [http://judiciary.senate.gov/print\\_testimony.cfm?id=125&wit\\_id=66](http://judiciary.senate.gov/print_testimony.cfm?id=125&wit_id=66).

189. See *infra* part I.

190. Hugh Dougherty, *I Enter No Plea Says Defiant Hijack Suspect*, BIRMINGHAM POST, Jan. 3, 2002, at 3, available at 2002 WL 4388879.

attorney-client communications monitored. This harm, however, is not irreparable and there are legal recourses available to ensure that privileged communication stays protected. The courts of this country shape the contours of a privilege “in the light of reason and experience.”<sup>191</sup> When the costs imposed on an affected inmate’s rights are weighed against the legitimate governmental interest and benefit in preventing acts of violence and terrorism, this regulation will likely be deemed reasonable.

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191. FED. R. EVID. 501.