Balancing Fundamental Civil Liberties and the Need for Increased Homeland Security: The Attorney-Client Privilege After September 11th

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I. INTRODUCTION

An unfamiliar fear arose in the hearts of Americans after the attacks of September 11, 2001. For the first time since World War II, American citizens were demonstratively and successfully attacked on American soil. Shortly thereafter, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, hereinafter the “USA Patriot Act,” was enacted to combat and prevent this type of

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terrorism from occurring again. This act reflected the American desire to increase homeland security, recognized as so imperative immediately following September 11, 2001.

On October 31, 2001, only five days after the USA Patriot Act was enacted, Attorney General Ashcroft enacted an interim amendment to the Bureau of Prisons regulations, without the usual public comment period, in an effort to once again heighten homeland security. Civil libertarians claimed that by enacting both the USA Patriot Act and the Bureau of Prisons regulations in the month following the September 11th attacks, the government acted too swiftly, out of fear that another terrorist attack was imminent. The Bureau of Prisons amendment was


also criticized as a frontal attack on the attorney-client privilege.\(^9\) Since their enactment, the USA Patriot Act and the Bureau of Prisons regulation have been heavily scrutinized as taking away fundamental rights guaranteed by the Constitution.\(^10\)

This Note will specifically examine the amendment to the Bureau of Prisons regulation, 28 C.F.R. 501.3,\(^11\) and its effect on the attorney-client privilege after September 11, 2001. First, the Note will discuss the purpose and long-standing policy supporting the attorney-client privilege, including those limitations on the privilege that have already been recognized in American jurisprudence. Next, this Note will analyze the new interpretation of the attorney-client privilege under the amendment to the Bureau of Prisons regulations. The views of civil libertarians and government critics will be discussed, identifying their concerns for the need to balance individual rights against the need for national security. *United States v. Sattar*,\(^12\) the lead case questioning the effect of the Bureau of Prisons regulation on the attorney-client privilege, will also be analyzed. The Note will conclude that the Bureau of Prisons regulation as applied, including the changes to the contours of

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9 See Cohn, *supra* note 6, at 1241–42 (recognizing attorney-client privilege has been infringed upon); Cover, *supra* note 7, at 1234 (stating that new rule violates attorney-client privilege and Sixth Amendment); Kristen V. Cunningham & Jessica L. Srader, Comment, *The Post 9-11 War On Terrorism . . . What Does It Mean For the Attorney-Client Privilege?*, 4 WYO. L. REV. 311, 325 (2004) (explaining how this rule has significant impact on trust which is necessary aspect of attorney-client privilege).


the attorney-client privilege, properly balances fundamental civil liberties and the need for increased homeland security demanded by the American public after September 11, 2001.

II. ROOTS OF THE ATTORNEY-CLIENT PRIVILEGE

A. Purpose and Policy

It is important to understand the purpose and the policy behind the long-standing attorney-client privilege to better grasp whether or not this privilege has been restricted or infringed upon. The attorney-client privilege is one of the oldest privileges based in common law.\(^\text{13}\) Cases recognizing the privilege have been reported as far back as the 1500s, during the reign of Elizabeth I in England.\(^\text{14}\) Many scholars argue that the premise for the attorney-client privilege can also be found in the Sixth Amendment to the United States Constitution.\(^\text{15}\) Due to the rich history of the privilege, it has been recognized as one of the most appreciated and respected privileges in American


\(^{15}\) See U.S. CONST. amend. VI (listing rights of accused in criminal prosecutions); see also Noggle v. Marshall, 706 F.2d 1408, 1413 (6th Cir. 1983) (stating that District Court has interpreted Sixth Amendment to include broad attorney-client privilege); H. Lowell Brown, The Crime-Fraud Exception to the Attorney-Client Privilege in the Context of Corporate Counseling, 87 KY. L.J. 1191, 1269 n.5 (1998–99) (citing various views on attorney-client privilege, including that this privilege is within client's Fifth and Sixth Amendment rights).
jurisprudence. However, in interpreting the Federal Rule of Evidence 501, the Supreme Court noted that the privilege must be viewed "in light of reason and experience," and therefore, will adapt and change to reflect technological advancements and society's views in modern times.

The attorney-client privilege protects all information and communications shared between an attorney and a client to obtain and render legal advice as confidential, subject to a few exceptions. The purpose of the privilege is to promote full and frank communications between attorney and client, so that the client receives the best legal advice possible. Therefore, the privilege is a necessary building block in ensuring that justice is

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16 See Neil E. Herman, Note, Who Controls the Attorney-Client Privilege in Bankruptcy?, 13 Hofstra L. Rev. 549, 549 (1985) (noting privilege as most respected privilege in common law for confidential communications); see also Marion J. Radson & Elizabeth A. Waratuke, The Attorney-Client and Work Product Privileges of Government Entities, 30 Stetson L. Rev. 799, 799 (2001) (beginning article by stating that attorney-client privilege is most respected privilege in legal profession); Thompson & Kastenberg, supra note 14 at 64 (stating attorney-client privilege is most universally respected of testimonial privileges).

17 See FED. R. EVID. 501 (asserting privileges).

18 FED. R. EVID. 501.

19 See Dowley, supra note 8, at 165 (recognizing changes to certain rights under Patriot Act have just changed due to technological advancement and allowing government to adapt their practices to these advancements); Amy M. Fulmer Stevenson, Comment, Making a Wrong Turn on the Information Superhighway: Electronic Mail, the Attorney-Client Privilege and Inadvertent Disclosure, 26 Cap. U. L. Rev. 347, 365 (1997) (explaining that larger firms will be able to keep up with technological advancements, such as cryptography, to maintain security of attorney-client privilege, while smaller firms that are unable to afford such advancements will risk disclosure and loss of privilege); see also Catherine J. Lanctot, Attorney-Client Relationships in Cyberspace: The Peril and the Promise, 49 Duke L.J. 147, 155 (1999) (discussing that growth of legal advice websites on which laypersons ask questions and attorneys will answer for fees acknowledges emergence of attorney-client relationship while using disclaimers to limit duties owed to cyberclients).

20 See Upjohn v. United States, 449 U.S. 383, 389 (1981) (specifying that attorney-client privilege is oldest of confidential communications known to common law); Prudential Ins. Co. of Am. v. Massaro, 47 Fed. Appx. 618, 618 (3d Cir. 2002) (adding that an attorney's broader duty of confidentiality covers not only communications with his client, but also information relating to representation of that client, regardless of source). But see United States v. BDO Seidman, 337 F.3d 802, 811 (7th Cir. 2003) (defining attorney-client privilege as protecting only communications made by client to his lawyer).

21 See Upjohn, 449 U.S. at 390 (noting that such open communication promotes broader public interests in observance of law); Palmer by Diacon v. Farmers Ins. Exch., 861 P.2d 895, 908 (Mont. Sup. Ct. 1993) (declaring that purpose of attorney-client privilege is to foster attorney-client relationship by enabling attorneys to provide best advice possible to their clients, and that this privilege allows clients to provide information without fearing it will be used against them in future); Horon Holding Corp. v. McKenzie, 775 A.2d 111, 115 (N.J. Super. Ct. App. Div. 2001) (explaining intention of attorney-client privilege is to encourage client to freely and fully disclose information so he receives attorney's best advice in return).
served. Lawyers can only provide the best and most appropriate legal advice when their clients make full disclosures to them. Unfortunately, clients are often inhibited from speaking the whole truth. Often, the lawyer's credentials of a higher education and superior legal skills may intimidate a client. Other times, the rumors and stigma that surrounds the legal profession may make the client wary of trusting their lawyer. Either way, without the assurance of the attorney-client privilege, clients would never tell the entire story to their lawyer, which would make it impossible to provide proper and effective legal assistance. By ensuring the client that the attorney must keep certain information confidential, it allows the client to


24 See Robert P. Mosteller, Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant, 42 DUKE L. J. 203, 268 (1993) (commenting that most likely reason for client’s avoidance of fully disclosing information in child protection case is fear of revealing ambiguous but potentially damaging conduct); Lloyd B. Snyder, Is Attorney-Client Confidentiality Necessary?, 15 GEO. J. LEGAL ETHICS 477, 504 (2002) (stating that even with existence of privilege, clients are inhibited from being completely open with their attorneys for reasons besides fear of disclosure); Robert N. Treiman, Comment, Inter-Lawyer Communication and the Prevention of Client Fraud: A Look Back at O.P.M., 34 UCLA L. REV. 925, 945 (1987) (explaining that purpose of privilege is to encourage full disclosure and that removal of privilege will inhibit client’s willingness to provide information).

25 See Scott Daniels, The President’s Message: A Prayer for the Professions, 15 UTAH BAR J. 6, 6 (2002) (discussing fact that it is embarrassing to legal profession when lawyers attempt to use their titles and skills to intimidate others in day to day situations); Wayne Schiess, Department: Plain Language: When Your Boss Wants it the Old Way, 80 MICH. BAR J. 68, 68 (2001) (noting that many lawyers still use archaic, overly formal tones in their documents because they believe it might intimidate their clients); see also Paul Cheston, Solicitors are Told to Outlaw Gobbledygook, EVENING STANDARD (London), Mar. 17, 2003, at 16 (stating that some lawyers use Latin and old English to impress their clients, when in fact this only confuses and intimidates them).

26 See Upjohn, 449 U.S. at 389 (noting that purpose of privilege is to encourage clients to make full disclosures to their attorneys); see also Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (explaining that attorney-client privilege is based on necessity that client not be apprehensive about disclosing any information, so that there can be proper administration of justice).
speak freely. In return, the client receives better legal advice and administration of justice is served.

B. Narrow Interpretation

The privilege generally provides absolute protection of attorney-client communications, unless waived by the client. However, it is also important to note that the privilege is interpreted narrowly because it inhibits the truth seeking process. In certain instances, the privilege must yield to more prominent concerns. Such instances arise, for example, in criminal trials, when a criminal defendant's constitutional rights are at stake, or when the need for the probative evidence protected by the privilege outweighs the need to invoke the attorney-client privilege protection.

The crime-fraud exception is another example which illustrates the narrow interpretation of the attorney-client privilege. When an attorney's services are being used to facilitate and further criminal or fraudulent activity, attorneys have permission to break the confidences of their client to prevent that activity from

27 See Upjohn, 449 U.S. at 389 (stating purpose of confidentiality is to promote full conversation between attorneys and clients); see also Fisher v. United States, 425 U.S. 391, 403 (1976) (discussing that clients must be able to speak openly with their attorneys).

28 Fisher, 425 U.S. at 403 (stating that lawyer can provide informed legal advice because of client disclosures); Upjohn, 449 U.S. at 389 (explaining that privilege helps promote administration of justice).

29 See Swidler & Berlin v. United States, 524 U.S. 399, 405 (1998) (stating that confidential communications are privileged during client's lifetime); see also Fisher 425 U.S. at 403 (explaining that disclosures from client to attorney, in order to get legal assistance, are privileged); Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1424 (3d Cir. 1991) (announcing that privilege gives absolute protection and discusses standards to waive privilege).

30 See Fisher, 425 U.S. at 403 (stating privilege should only be used when absolutely necessary); United States v. Goldfarb 328 F.2d 280, 282 (6th Cir. 1964) (explaining that privilege does not extend to all aspects of attorney client relationship).


occurring. In cases such as these, a judge will determine whether the government has made a *prima facie* case as to whether the attorney facilitating the crime. If the judge finds that the client is trying to use the lawyer's services to commit a criminal or fraudulent act, the court will pierce those attorney-client communications. The privilege will therefore not apply and the communications will not be protected.

The main goal of the privilege is to assure that a client's communications with his or her attorney are protected, and the privilege should only be asserted for this purpose. By applying the privilege broadly, it significantly decreases the amount of information disclosed in discovery. This may mislead or confuse the jury, and effectively hinder their truth-seeking function. Therefore, the attorney-client privilege is interpreted narrowly and only applied to promote full disclosure between the client and the attorney, ensuring that the client receive the best available legal advice.

33 See Cohn, *supra* note 6, at 1239 (clarifying purpose of crime fraud exception); Gauthier, *supra* note 32, at 352 (explaining that there are circumstances when lawyer can disclose client confidences); Gerson & Gladieux, *supra* note 32, at 185 (stating privilege can be cancelled if government can prove legal advice was sought to further crime).

34 See Cohn, *supra* note 6, at 1239 (stating that government must make prima facie case that client sought out lawyer to obtain assistance in crime); Gauthier, *supra* note 32, at 355 (noting that there must be prima facie evidence before privilege is cancelled); Gerson & Gladieux, *supra* note 32, at 186 (specifying that focus must be on subjective intent of client).

35 See Cohn, *supra* note 6, at 1239 (explaining judge's role in determination of whether or not privilege should be pierced); Gerson & Gladieux, *supra* note 32, at 187–88 (noting that risk of privilege is largely up to view of trial judge).


38 See Fisher, 425 U.S. at 403 (explaining that an effect of privilege is withholding of evidence from fact finder); CHARLES MCCORMICK, MCCORMICK ON EVIDENCE 87 (John W. Strong ed., West 5th ed., 1999) (discussing effects of privilege).

39 See Fisher, 425 U.S. at 403 (explaining that purpose of privilege does not require broader rule); In re Application of Sarrio, S.A., 119 F.3d 143, 147 (2d Cir. 1997) (noting that privilege is applied only when necessary); Bortner & Miller, *supra* note 37, at 974 (stating that there are strict limits to privilege).
III. THE BUREAU OF PRISONS REGULATIONS AMENDMENT: RECOGNIZING A NEED TO MONITOR CERTAIN ATTORNEY-CLIENT COMMUNICATIONS

A. Before the Amendment

On June 20, 1997, the Bureau of Prisons finalized interim regulation, Section 28 CFR 501.3, authorizing special administrative measures, or SAMs, on a specialized group of inmates that presented a danger of disclosing information to third parties that could result in death or serious bodily injury to persons. The rule provided that the Attorney General, or the head of a federal law enforcement or intelligence agency, could make a written determination of whether specific inmates caused this particular type of threat. The inmates were able to seek review of any of the special administrative measures imposed by the regulation. Examples of these SAMs include housing in administrative detention, or limiting certain privileges such as visiting, correspondence, and use of the telephone.

41 See United States v. Reid, 369 F.3d 619, 621 (1st Cir. 2004) (explaining that SAM's could also be authorized if there was danger of "substantial damage to property that would entail the risk of death or serious bodily injury to persons" occurring); see also Al-Owhali v. Ashcroft, 279 F. Supp. 2d 13, 16 (D.C. 2003) (noting that SAM imposes various restrictions on inmates); cf. Yousef v. Reno, 254 F.3d 1214, 1219 (10th Cir. 2001) (noting that SAM's are infrequently used).
42 See 28 C.F.R. §501.3 (explaining who may authorize Warden to implement these policies); see also Reid, 369 F.3d at 620 (explaining that this regulation "permits the Attorney General, who has plenary power over the management of federal prisons . . . to impose on any individual prisoner 'special administrative measures that are reasonably necessary to protect persons against the risk of death or serious bodily injury"); United States v. Sattar, No. 02 Cr. 395, 2003 U.S. Dist. LEXIS 16164, at *13 (S.D.N.Y Sept. 15, 2003) (noting how Attorney General decides on information brought to him by federal officers).
43 See Yousef, 254 F.3d at 1219 (noting that even though prisoner may challenge administrative measures, "no action can be brought under federal law until the prisoner has exhausted 'administrative remedies as are available'") (citations omitted); see also Garrett v. Hawk, 127 F.3d 1263, 1267 (10th Cir. 1997) (holding that prisoner can "only exhaust administrative remedies that are actually available"); United States v. Johnson, 223 F.3d 665, 672 (7th Cir. 2000) (explaining that "these restrictions may, however, be imposed only in 120-day increments; and each time, before they can be reimposed, the warden must conduct the risk determination afresh").
44 See 28 C.F.R. §501.3 (noting that SAM also contains provisions prohibiting plaintiff from communicating with news media); see also Reid, 369 F.3d at 621 (noting that "the affected prisoner must be notified of the SAMs and the basis for their imposition"); Al-Owhali, 279 F. Supp. 2d at 16 (explaining that these restrictions are designed to prevent acts of violence and terrorism).
Before the amendment to the Department of Justice Bureau of Prisons rule in 2001, the attorney-client privilege protected all confidential communications between the attorney and the inmate that were made in order to obtain and render legal advice. Under the crime-fraud exception, if the government had a reasonable suspicion that communication between the attorney and the client were being used to plot a violent crime or terrorist activity, the law enforcement agencies' only remedy was to go to court and have a judge determine if there was probable cause to pierce those communications to prevent that violent crime or terrorist activity. This was so, even when the threat was life-endangering and imminent.

Much like drug-kingpins, and mob consiglieres, al-Qaeda had been known to use their attorney prison visits to relay information to the outside. An “al-Qaeda terrorism manual [was] obtained overseas that urged members to take advantage of prison visits to communicate useful information to the outside.” This included prison visits with co-conspirators or even the


46 See Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (noting that purpose of attorney-client privilege “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”); see also Fisher v. United States, 425 U.S. 391, 403 (1976) (stating “Privilege’s purpose is to facilitate full disclosure by client”); Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (explaining rationale behind privilege, namely that “assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure”).

47 See United States v. Richard Roe, Inc., 68 F.3d 38, 40 (2d Cir. 1995) (noting that “a party seeking to invoke the crime-fraud exception must at least demonstrate that there is probable cause to believe that a crime or fraud has been attempted or committed and that the communications were in furtherance thereof”); In re Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1039 (2d Cir. 1984) (explaining that for exception to apply, crime or fraud need to be intended, yet do not have to occur); see also In re Bankamerica Corp. Secs. Litig., 270 F.3d 639, 642 (8th Cir. 2001) (noting that client's intent to further crime is what must be shown).


49 Cohen, supra note 48, at 30.
inmates' lawyers. The manual created a dangerous situation in times where a terrorism attack could occur at any moment. In order to protect Americans against terrorists using their strategy, the Department of Justice amended the Bureau of Prisons Regulation under the advisement of Attorney General John Ashcroft.

B. After the Amendment

The amendment enacted in 2001 did not change the standards for the implementation of the special administrative procedures. However, the rule recognized the threat that many inmates participated in furthering acts of violence and terrorism through communication with associates while in detention facilities. The Bureau of Prisons believed that it was possible

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50 See United States v. Sattar, No. 02 Cr. 395 (JGK), 2003 U.S. Dist. LEXIS 16164, at *6 (S.D.N.Y. Sept. 15, 2003) (discussing prison visits which were monitored); Cohen, supra note 48, at 30 (noting that "only 16 of the 158,000 inmates in the federal system have been assigned the special administrative status that makes them eligible for monitoring"); see also United States v. Sabadu, 891 F.2d 1308, 1322 (7th Cir. 1989) (noting that in order to "establish the crime of conspiracy, the government must prove that there is an agreement between two or more persons to commit an unlawful act, that a defendant is a party to the agreement, and that an overt act is committed in furtherance of the agreement by one of the co-conspirators").

51 See generally Corporate Security Chiefs Favor Bush, WHITE HOUSE BULLETIN, Sept. 20, 2004 (noting that sixty eight percent of those polled recently thought terrorist act was likely to occur before upcoming election); John Deane & Jane Merrick, Government Needs Anti-Terror Minister-Tories, PRESS ASS'N, Dec. 3, 2002 (commenting on quote from someone in Britain's government who uttered that "it must be admitted that we cannot actually prevent a terrorist attack"); John J. Goldman, The World: Honoring Memory of Sept.11 Victims, L.A. TIMES, Aug. 12, 2003, at 8 (explaining why we will always fear terrorism attack).

52 See Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135 (9th Cir. 2000) (finding that "the government has a legitimate interest in preventing the spread of international terrorism, and there is no doubt that that interest is substantial"); Cohen, supra note 48, at 30 (noting skepticism that "many of these new rules "could help to easily use surveillance on "ordinary Americans"); see also Sattar, 2003 U.S. Dist. LEXIS 16164, at *6 (clarifying that "28 C.F.R. § 501.3 clearly authorized Attorney General and Bureau of Prisons to implement SAMs").

53 But see Cohn, supra note 6, at 1242 (stating that "Ashcroft replaced the standard of 'probable cause'... with the lesser 'reasonable suspicion' standard" with respect to application of special administrative procedures); Gauthier, supra note 32, at 371 (describing amendment to Bureau of Prisons rule as allowing Attorney General to monitor inmates' attorney-client communications on basis of "reasonable suspicion"); Steven R. Shapiro, Thirty-First Annual Review of Criminal Procedure, 90 GEO. L. J. 1087, 1091 (2002) (noting that "reasonable suspicion" standard "falls short of the traditional probable cause standard").

54 See Teri Dobbins, Protecting the Unpopular from the Unreasonable: Warrantless Monitoring of Attorney Client Communications in Federal Prisons, 53 CATH. U. L. REV. 295, 301-02 (2004) (stating that purpose of amendment allowing monitoring of attorney-client communications is to "deter inmates from committing future acts that could result in death or serious bodily injury"); Gauthier, supra note 32, at 371 (quoting Attorney
that inmates passed on messages to attorneys, facilitating terrorist activity.\textsuperscript{55} The amended rule provided that under certain circumstances, communications between the attorney and the inmate could be monitored when it was necessary to deter future acts of violence or terrorism.\textsuperscript{56}

The Bureau of Prisons regulation now gives more authority to the Attorney General to pierce the attorney-client privilege under necessary circumstances.\textsuperscript{57} If the attorney general has a "reasonable suspicion" that the lawyer-client communications are being used to facilitate acts of violence or terrorism, law enforcement officials can listen in on those conversations.\textsuperscript{58} However, there is a checks and balances process within the amendment. Although there is no longer judicial review to determine if the communications are being used for terrorism, 

General's testimony that imprisoned terrorists were instructed to "communicate with brothers outside prison" to facilitate acts of terrorism); see also Shapiro, supra note 53, at 1091 (describing government's fear that inmates will use communication with their attorneys to further acts of terrorism as justification for amended rule). \textsuperscript{55} See Dobbins, supra note 54, at 301–02 (stating that purpose of amendment allowing monitoring of attorney-client communications); see also Gauthier, supra note 32, at 371 (describing Attorney General's views that terrorists were exploiting American judicial process by communications between attorneys and prisoners). See generally Shapiro, supra note 53, at 1091 (stating how in midst of national crisis, "it is an understandable impulse to give the government whatever authority it seeks").

\textsuperscript{56} See Rules and Regulations, Bureau of Prisons, U.S. Dep't of Justice, 28 C.F.R. §§ 500, 501.3(d)(2)(i) (2002) (stating that inmate-attorney communications may be monitored to prevent future acts of terrorism); Cohn, supra note 6, at 1242 (noting that under amended rule, attorney-client communications can be monitored if reasonable suspicion exists to believe that "an inmate may use communications with attorneys ... to further ... acts of violence or terrorism"); see also John W. Whitehead & Steven H. Aden, Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti—Terrorism Initiatives, 51 AM. U. L. REV. 1081, 1116 (2002) (stating that under amended rule, communications between "prisoners and their attorneys may be intercepted if Attorney General certifies existence of reasonable suspicion to believe inmate may use communications with their attorney to further acts of violence.

\textsuperscript{57} See Rules and Regulations, Bureau of Prisons, U.S. Dep't of Justice, 28 C.F.R. §§ 500, 501.3(d)(2)(i) (2002) (noting Attorney General's authority to provide for monitoring of attorney-inmate communications on basis of reasonable suspicion); Cohn, supra note 6, at 1242 (stating that under Bureau of Prisons regulation as amended, attorney-client communications can be intercepted on Attorney General's finding of reasonable suspicion as opposed to probable cause that an inmate may be using attorney-client communications to further acts of terrorism). See generally Whitehead & Aden, supra note 56, at 1116 (arguing language of regulation is broad and vests Attorney General with considerable discretion).

\textsuperscript{58} See Rules and Regulations, Bureau of Prisons, U.S. Dep't of Justice, 28 C.F.R. §§ 500, 501.3(d)(2)(i) (2002) (discussing reasonable suspicion standard that Attorney General uses); see also Cohn, supra note 6, at 1242 (describing reasonable suspicion standard that must be satisfied to intercept attorney-client communications). See generally Whitehead & Aden, supra note 56, at 1116 (stating that communication between an inmate and his or her attorney may be monitored if "reasonable suspicion" standard is met).
there is a separate group of monitoring attorneys called the “privilege team,” separate from the prosecution team, which listen to and evaluate the communications and weed out any privileged confidential information that is not the subject of furthering crime or terrorism.\textsuperscript{59} Therefore, the prosecution team is not given access to any information that is not used to facilitate violent or terrorist activity.

Additionally, written and advanced notice must be given to the inmate and her attorney before any monitoring occurs.\textsuperscript{60} These safeguards provide that the inmates’ rights in regard to the attorney-client privilege are protected and that the intrusion of privileged material and conversations is minimal.\textsuperscript{61} Any information collected, which is not relevant to the acts of violence or terrorism, cannot permissibly be used against the inmate in the current prosecution.\textsuperscript{62}

IV. CRITICISMS OF THE REGULATION BY THE CIVIL LIBERTARIANS

Civil libertarians have heavily criticized the procedure under the Bureau of Prisons regulation.\textsuperscript{63} First, they claim that the


\textsuperscript{60} See Cohn, \textit{supra} note 6, at 1243 (describing notice requirement); \textit{see also} Shapiro, \textit{supra} note 53, at 1091 (stating that notice requirement requires inmate and his or her attorney be provided written notification of government’s intent to monitor their communications). \textit{See generally} Collins, \textit{supra} note 59, at 14A (arguing efficiency of amendment against terrorism).

\textsuperscript{61} See Gauthier, \textit{supra} note 32, at 371 (characterizing notice requirement as a safeguard of attorney-client communications). \textit{But see} Cohn, \textit{supra} note 6, at 1243 (stating attorney-client privilege is compromised even if notice is given); Shapiro, \textit{supra} note 53, at 1091 (claiming that notice requirement fails to remedy fundamental invasion of attorney-client privilege).

\textsuperscript{62} See Cohn, \textit{supra} note 6, at 1243 (describing requirement that properly privileged materials not be retained); \textit{see also} Gauthier, \textit{supra} note 32, at 372 (stating that “except for the information indicating imminent threats, no other information gleaned from the monitoring may be . . . . used for any . . . . purpose”). \textit{See generally} Collins, \textit{supra} note 59, at 14A (arguing that amendment combats terrorism efficiently).

\textsuperscript{63} See Cohn, \textit{supra} note 6, at 1242–43 (asserting attorney-client privilege is eroded by amendment); Dobbins, \textit{supra} note 54, at 303 (noting that civil libertarians have criticized amended Bureau of Prisons regulation as violative of First, Fourth, Fifth, Sixth and Fourteenth amendment rights of inmates); \textit{see also} Gauthier, \textit{supra} note 32, at 374 (stating that ACLU has described amended Bureau of Prisons Regulation as “deeply troubling”).
“privilege team,” as set out in the regulation, is not defined. This leaves open the question of what attorneys or other officials are qualified to sit on the “privilege team,” and who will have the responsibility to decide what information will be left confidential. The rule states that a “privilege team” will be “designated, consisting of individuals not involved in the underlying investigation.” But the rule does not specify where the line will be drawn to establish a conflict of interest, disallowing an attorney to participate on the team. Critics believe this is an ultimate hazard that provides potential for misuse and abuse under the regulation. All this regulation does, in their minds, is to add another tool to the Department of Justice’s belt, allowing them to overstep the boundaries of their prosecutorial role.

Second, the civil libertarians complain that there is no judicial oversight and no meaningful standard to evaluate the opinions of


65 See Cohn, supra note 6, at 1243 (stating “privilege team” not sufficiently described by amended rule); Elijah, supra note 64, at 137 (describing who fits into “privilege team”); see also Podgor & Hall, supra note 64, at 154-55 (describing privilege team).


67 See Stuart Taylor Jr., False Alarm: Overblown Fears About Patriot Act Searches Obscure Real Liberties Abuses at Guantanamo, LEGAL TIMES, Nov. 10, 2003, at 60 (stating civil libertarians feel that USA Patriot Act and those other tools given to Department of Justice will be used against ordinary criminal defendants, not just those involved in terrorism); see also Steven J. Enwright, Note, The Department of Justice Guidelines to Law Office Searches: The Need to Replace the “Trojan Horse” Privilege Team with Neutral Judicial Review, 43 WAYNE L. REV. 1855, 1871 (1997) (stating that “idea behind the privilege team is to keep privileged material out of hands of the hands of the prosecuting government attorneys”). See generally Jan C. Ting, Unobjectionable But Insufficient – Federal Initiatives in Response to the September 11 Terrorist Attacks, 34 CONN. L. REV. 1145, 1151 (2002) (explaining that privilege teams are engaged in monitoring and are separated from prosecuting attorneys to insure that no information obtained through monitoring would be introduced at trial against detainees).

68 See Taylor, supra note 67, at 60 (reiterating that civil libertarians are concerned that tools given to Department of Justice will be used against ordinary criminal defendants); see also Enwright, supra note 67, at 1872 (stating that although Department of Justice guidelines acknowledge volatility inherent in law office search, some commentators argue that these guidelines do not satisfactorily protect integrity of attorney-client privilege). See generally Ting, supra note 67, at 1151 (stating that Department of Justice “published an interim rule authorizing the monitoring of attorney-client communications of detainees”).
the Attorney General or "privilege team" as to what should be confidential.69 Further, the Attorney General has the sole authority to determine whether there is a "reasonable suspicion" that certain communications with attorneys are being used to facilitate violence or terrorist activity.70 This standard is less than the "probable cause" standard set out in the Fourth Amendment to the United States Constitution.71 The purpose of the "probable cause" standard is to protect the individual's privacy interests.72 Because the Bureau of Prisons regulation uses the "reasonable suspicion" standard, it is highly questioned and criticized as circumventing legislative authority and interfering with the fundamental right of privacy.73 The

69 See Cohn, supra note 6, at 1242 (distinguishing difference between judge's involvement in crime-fraud exception to attorney-client privilege, and Attorney General's reasonable suspicion under Bureau of Prisons regulation). See generally Dobbins, supra note 54, at 296 (claiming that monitoring regulation leaves inmates without any other means of confidential communications with their lawyers); Enwright, supra note 67, at 1876 (stating that encroachment on attorney-client privilege is particularly intensified when privilege team views privileged material of clients who are unrelated to investigation).

70 See Mary Ellen Tsekos, Legislative Focus: Patriot Act, 9 HUM. RTS. BR. 35, 35 (2001) (stating that "Attorney General Ashcroft originally requested that law enforcement officials be able to detain individuals indefinitely without formal charges"); see also Cover, supra note 7, at 1235 (2002) (establishing that new rule authorizes Attorney General to order monitoring or reviewing of communications between inmates and lawyers). See generally Gauthier, supra note 32, at 352 (stating that new regulation allows U.S. Attorney General to monitor attorney-client communications of suspected terrorist prisoners).

71 See U.S. CONST. amend. IV (setting forth probable cause standard for searches and seizures); Cover, supra note 7, at 1235 (establishing that Attorney General may issue order when federal law enforcement agencies have "reasonable suspicion to believe that a particular inmate may use attorney-client communications to facilitate acts of terrorism"); see also Gauthier, supra note 32, at 352 (stating that new regulation allows attorney general to monitor attorney-client communications of suspected terrorist prisoners "when he has reasonable suspicion that an inmate may use communications with an attorney to facilitate terrorist acts").


"reasonable suspicion" standard usually only applies to those situations where there is an imminent threat of harm to a civilian or officer, as in "stop and frisk" situations. However, critics differentiate the intrusion on an inmate's conversations with their attorney from the "on the spot" action, which requires the lesser standard of reasonable suspicion. As a result, this regulation is viewed as a vehicle that could lead to a violation of the Fourth Amendment, stemming from its reasonable suspicion standard.

Third, the regulation was passed swiftly, as was the USA Patriot Act, and in the eyes of civil libertarians, this created a dangerous opportunity for the Department of Justice to use its powers destructively. The regulation was enacted unilaterally.

individual suspicion and probable cause are replaced with reasonable suspicion due to necessity for "swift action predicated upon the on-the-spot observations of the officer on the beat"); see also Cover, supra note 7, at 1235 (2002) (establishing that Attorney General may issue order when federal law enforcement agencies have "reasonable suspicion to believe that a particular inmate may use attorney-client communications to facilitate acts of terrorism"); Gauthier, supra note 32, at 352 (stating that new regulation allows attorney general to monitor attorney-client communications of suspected terrorist prisoners "when he has reasonable suspicion that an inmate may use communications with an attorney to facilitate terrorist acts").

See Pelic, supra note 73, at 1034 (stating that individual suspicion and probable cause are replaced with reasonable suspicion). See generally Gauthier, supra note 32, at 352 (stating when new regulation allows for monitoring of attorney-client communications of suspects); Gabriel M. Helmer, Note, Strip Search and the Felony Detainee: A Case for Reasonable Suspicion, 81 B.U. L. REV. 239, 288 (2001) (stating that iron curtain between "prison and the Constitution may have been drawn aside, but the danger from legal doctrines such as 'wide ranging deference' continues to threaten the borders of constitutional liberties").

See Luke R. Spellmeier, Comment, Bypassing the Fourth Amendment: The Missouri Supreme Court's Use of "Ruse" Reasonable Suspicion to Justify De Facto Drug Interdiction Checkpoints State v. Mack, 66 S.W.3d 706 (Mo. 2002), 42 WASHBURN L.J. 209, 216 (2002) (stating that lesser intrusion of brief and limited seizure for investigatory purposes could be justified by something less than probable cause). See generally Cover, supra note 7, at 1235 (establishing that federal enforcement agencies have reasonable suspicion to believe that inmate can use attorney-client communications to facilitate terrorism); Helmer, supra note 74, at 288 (stating that protection of the Constitution applies to detainees).

See Comments, supra note 72 (recognizing dangerous effects of this regulation on right to privacy) available at http://www.cnss.org/nacdlattorneyclientcomments.htm. See generally Burgess, supra note 72, at 218 (stating that most lower courts "are torn as to what standard to apply"); Gallagher, supra note 72, at 64 (stating "how probable cause is necessary factor to justify warrantless searches").

See generally Downs & Kinnunen, supra note 10, at 388 (stating that another problem with "USA PATRIOT Act is that it expands the definition of 'domestic terrorism' so broadly that it could be applied to many activities that have no relation to the terrorist attacks of September 11"); Smith, supra note 8, at 413 (emphasizing Patriot Act was enacted quickly to promote national security); Tsekos, supra note 70, at 35 (stating that "before passage of the Patriot Act, law enforcement officials seeking to obtain an order to electronically monitor a suspected terrorist overseas had to demonstrate that the
by the Attorney General without the usual protections of notice and public comment afforded by the Federal Administrative Procedures Act.\textsuperscript{78} It was posted in the Federal Register on October 31, 2001, only one day after it went into effect.\textsuperscript{79}

Fourth, civil libertarians are also wary of the definition of “domestic terrorism” set out in the Section 802 of the USA Patriot Act as well as the definition of “acts of violence” set out in the regulation.\textsuperscript{80} In order for the Attorney General to determine whether or not to listen to the communications between an attorney and a client, he must first determine whether or not he has suspected that inmate of being involved in terrorism or acts of violence.\textsuperscript{81} Prior to this new definition of terrorism, there were three other defined types of terrorism already set forth in federal collection of foreign intelligence information was the ‘sole or primary purpose’ of the investigation”).

\textsuperscript{78} See Whitehead & Aden, supra note 56, at 1116 (setting out the enactment of regulation). See generally Downs & Kinnunen, supra note 10, at 388 (stating that under previous approaches, government “limited the scope and definition of terrorism to a short list of groups designated by the Secretary of State”); Tsekos, supra note 70, at 35 (stating that “Patriot Act allows law enforcement officials to track e-mail communications in the same way they monitor telephone conversations”).


\textsuperscript{80} See Charles I. Lugosi, Rule of Law or Rule by Law, 30 AM. J. CRIM. L. 225, 273 (2003) (stating that §802 of USA Patriot Act defines domestic terrorism, “to include domestic political groups or individuals that engage or promote criminal acts that are dangerous to human life, that appear to be intended to intimidate or coerce a civilian population, by violence to bring about a change in government policy”); see also Emanuel Gross, The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001, 28 N.C. J. INT'L L. & COM. REG. 1, 6 (2002) (arguing that section 802 of Patriot Act fails to meet essential condition of democratic regime); Quinn H. Vandenberg, Note, How Can the United States Rectify its Post-9/11 Stance on Noncitizens’ Rights?, 18 NOTRE DAME J.L. ETHICS & PUB. POLY 605, 622-23 (2004) (affirming that Patriot Act’s broad definition of “domestic terrorism” raised questions as to what activity could be considered pertinent criminal activity that Act was enacted to arrest).

\textsuperscript{81} See Gross, supra note 80, at 13 (stating that Attorney General has discretion to determine whether detainee will use connection with his attorney to facilitate commission of future terrorist acts); Tom D. Snyder, Jr., A Requiem for Client Confidentiality?: An Examination of Recent Foreign and Domestic Events and Their Impact on the Attorney-Client Privilege, 50 LOY. L. REV. 439, 446 (2004) (noting that Attorney General may impose “Special Administrative Measures” such as eavesdropping when Attorney General finds that “there is a substantial risk that a prisoner’s communications or contacts with persons could result in death or serious bodily injury.”); Sekhon, supra note 79, at 128 (stating that section 412 of Patriot Act enables Attorney General to take into custody “any foreign national whom he has ‘reasonable grounds to believe’ is ‘engaged in any activity that endangers the national security of the United States’”).
law: international terrorism, terrorism transcending national borders, and federal terrorism. Now, a person can also be charged with domestic terrorism if:

[W]ithin the U.S. they engage in activity that involves acts dangerous to human life that violate the laws of the United States or any State and appear to be intended: (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion, or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping.

Civil libertarians claim that this new definition is unnecessary and it will subject everyday protestors to prosecution for terrorism. The General Accounting Office released a study in January 2003 that concluded that seventy-five percent of those convicted under the Patriot Act of "international terrorism" after September 11th, 2001, were actually dealing in more common non-terrorist crimes.
Critics also question the broad definition of "acts of violence," leading them to the conclusion that all federal prisoners will be subject to this regulation. They claim that the expansive terms of "terrorism" and "acts of violence" will only increase the number of federal inmates to these constrictive regulations. Furthermore, if the Attorney General uses these definitions of "terrorism" and "acts of violence" to utilize the Bureau of Prisons regulation, he will be able to listen in on conversations of those inmates and their attorneys who were simply guilty of a state crime, such as providing lodging to a protestor. In such a circumstance, the regulation would reach far beyond its scope, covering regular state criminal investigations.

The American Bar Association and the National Association of Criminal Defense Lawyers also agree that the monitoring of attorney-client communication as set out in Ashcroft's regulation violates the privilege, and that it is a serious infringement on the Sixth Amendment right to counsel. The Sixth Amendment

86 See Whitehead & Aden, supra note 56, at 1116 (communicating on danger of having such broad definition). See generally Siobhan Roth, Anti-Terror Laws Increasingly Used Against Ordinary Criminals, LEGAL INTELLIGENCER, Sept. 11, 2003 at 4 (explaining Justice Department's use of the USA Patriot Act on ordinary criminals such as currency smugglers and bookies); Mark Sommer, Civil Liberties Group's Resolution Urges The City To Reject USA Patriot Act, BUFF. NEWS FINAL EDITION, at B2 (indicating many citizens are not aware of loose interpretation of terrorism and that it has been applied to public protests, regular criminal investigations and other such activities).

87 See Taylor Jr., supra note 67, at 60 (quoting Senator Dianne Feinstein stating "I have never had a single abuse of the Patriot Act reported to me."); Whitehead & Aden, supra note 56, at 1116 (stating expanding definition will include large number of federal prisoners); see also Patricia Manson, Terrorism/Rights Nexus Will Spark Debates, CHI. DAILY L. BULL., Aug. 5, 2004, at 1 (noting that current provisions in Patriot Act enable delay in disclosing execution of "sneak and peek" warrant).

88 See Vanessa Blum, Towns Speak Out on Patriot Act But What are They Saying?, RECORDER, Aug. 10, 2004, at 3 (stating that Patriot Act authorizes some activities that are explicitly banned under state law enforcement); Jerry Crimmins, Amid War on Terror, Law and Liberty Under Sharp Scrutiny, CHI. DAILY L. BULL., Apr. 26, 2003, at 1 (stating that federal government's power is growing); see also Whitehead & Aden, supra note 56, at 1116 (explaining new crime of "harboring a terrorist.").

89 See How the USA-Patriot Act Would Convert Dissent into Broadly Defined "Terrorism", ACLU Archives (Oct. 23, 2001) (opposing new definition of terrorism because it allows federal government to regulate violations of state law) at http://archive.aclu.org/congress/1102301d.html; Crimmins, supra note 88 (noting that federal government is becoming more powerful); see also Martin, supra note 5, at 295 (noting that USA Patriot Act allows Federal government to conduct searches that are illegal under state law).

90 See Whithead & Aden, supra note 56, at 1116 (showing this regulation jeopardizes ability to seek effective representation); see also Thomas Adcock, Two Projects: One Documents, One Practices 9/11 Pro Bono, N.Y.L.J., Sept. 11, 2002, at 4 (stating that Patriot Act enables warrantless monitoring of attorney-client conversations); John Caher, A Summit on the Patriot Act Asks: Has it Gone too Far?, RECORDER, Jan. 30, 2004, at 3
states, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The amendment recognizes the rights of the accused to speak confidentially with a lawyer. Under the confines of the new regulation, an accused will have a profound fear of being overheard, and he will be inhibited to speak freely with his attorney. This is coupled with the fact that many of the detainees must already deal with the language barrier between themselves and their attorney. It is also likely that they know little about the American legal system, including the role that their lawyer plays in the system. The American Bar Association and the National Association of Criminal Defense Lawyers have commented on the chilling effect the regulation will have on attorney-client communications. They argue that the repercussions of the regulation will seriously restrict the effectiveness of counsel, thereby violating the Sixth Amendment of the Constitution.

(criticizing Patriot Act as it enables every part of conversation between attorney and client to be monitored).

91 U.S. CONST. amend. VI.

92 See id. (speaking of right to counsel); see also Snyder, Jr., supra note 81, at 442 (noting that confidentiality lies in heart of both attorney client privilege and Sixth Amendment).

93 See Cover, supra note 7, at 1238 (noting that Bureau of Prisons Rule hinders communication between attorney and his client). See generally Frank Kearns, Attorney-Client Privilege for Suspected Terrorists: Impact of the New Federal Regulation on Suspected Terrorists in Federal Custody, 27 NOVA L. REV. 475, 496 (2003) (acknowledging that inmate's knowledge of being monitored will prevent him from speaking freely); Snyder, Jr., supra note 81, at 454 (concluding that new rule will cause inmates to withhold information from their attorneys).


96 See Comments, supra note 72 (noting that new rule will hinder attorney client communication); see also ABA Comm. On BOP-1116, AG Order No. 2529-2001 (2001) (presenting ABA's belief that Bureau of Prisons Rule will adversely affect communication
Most importantly, civil libertarians assert that the USA Patriot Act and the Bureau of Prisons regulation have infringed upon privacy, one of the most valued rights Americans enjoy. Because of this infringement, three states and two hundred cities have passed resolutions opposing the Patriot Act. Civil libertarians regard the Patriot Act and the Bureau of Prisons regulation as products of fear, and as such, have become the enemy of freedom. The Patriot Act is regarded as a metaphor for many violations of constitutional rights. Overall, civil libertarians view this change to the attorney-client privilege as against the purpose in promoting full and frank communications between attorney and client.


98 See Dority, supra note 83, at 14 (clarifying pockets of resistance toward giving up civil liberties under Patriot Act are starting to appear around country); see, e.g., Briefing, NEWSDAY (N.Y.), Sept. 17, 2004, at A45 (stating that town of Huntington passed resolution opposing Patriot Act); Emily Szessnycki, Patriot Act Still Attracts Flak; 2 Iowa Cities Have Formally Opposed the Legislation, but Dubuque is Not Likely to Do So, TELEGRAPH HERALD (Dubuque, IA), Aug. 16, 2004, at A1 (noting that two Iowa cities have passed resolutions opposing Patriot Act).

99 See Cunningham & Srader, supra note 9, at 353–54 (noting that fear of terrorist attacks has lead to constraint on constitutional rights of public); see also Whitehead & Aden, supra note 56, at 1116 (arguing that since 9/11, Americans' liberties have been limited). See generally Steven Shapiro, supra note 53 at 1091 (promulgating in times of crisis government often takes away liberties of American people)....

100 See Judy Bachrach, John Ashcroft's Patriot Games, VANITY FAIR, Feb. 2004, at 106 (quoting Laura W. Murphy, ACLU's chief lobbyist); see also Rebecca A. Copeland, War On Terrorism Or War On Constitutional Rights? Blurring the Lines Of Intelligence Gathering In Post-September 11 America, 35 TEX. TECH L. REV. 1, 3 (2004) (asserting that Patriot Act has led to slow erosion of constitutional liberties); Whitehead & Aden, supra note 56, at 1116 (arguing that although Patriot Act was not intended to limit liberties of Americans, it consequently lead to violation of some constitutional rights).

101 See Cunningham & Srader, supra note 9, at 315 (noting that civil libertarians oppose regulation and view it as limiting attorney client privilege); see also Snyder, Jr., supra note 81, at 442 (stating that "unfettered confidential communication" is core of attorney client privilege). See generally Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (setting out purpose of the privilege).
V. UNITED STATES V. SATTAR\(^{102}\) - A PRESENT DAY APPLICATION OF THE AMENDMENT TO THE BUREAU OF PRISONS REGULATION

Lynne Stewart, a New York criminal defense attorney, was indicted on April 8, 2002, for conspiracy to provide and for providing material support to a terrorist organization, the Islamic Group, for conspiracy to defraud the United States, and for making false statements to the U.S. Department of Justice.\(^{103}\) By opinion and order dated July 22, 2003, the counts of conspiring to provide material support and resources to a designated terrorist organization were dropped.\(^{104}\) However, the crimes of conspiring to defraud the United States in violation of 18 U.S.C. §373 and making false statements in violation of 18 U.S.C. §§ 1001 and 2 still remain.\(^{105}\)

Stewart’s indictment was a result of her representation of Sheik Abdel Rahman, an inmate who is serving a life plus sixty-five year sentence for soliciting crimes of violence against the U.S. military and conspiring to bomb several New York City landmarks.\(^{106}\) Because of Rahman’s dangerous propensities, he was subject to special administrative procedures (“SAMs”), which regulated his access to the mail, media, telephone, and visitors.\(^{107}\) He was under this heavy surveillance to protect persons against the risk of death or serious bodily injury.\(^{108}\)

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\(^{104}\) See id. at *2. (discussing dropped count).

\(^{105}\) See id. (announcing which charges Stewart still faces).

\(^{106}\) See United States v. Sattar, 272 F. Supp. 2d 348, 354 (S.D.N.Y. 2003) (noting that Stewart has represented Sheikh Abdel Rahman since his 1995 criminal trial), motion ruled upon by 02 Cr. 395 (JGK), 2003 U.S. Dist. LEXIS 16164 (S.D.N.Y. Sept. 15, 2003); see also Cohn, supra note 6, at 1249 (explaining that Rahman used his attorney-client communications with Stewart to facilitate terrorist activity from jail); Peter Margulies, The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity, 62 MD. L. REV. 173, 174 (2003) (discussing Stewart’s indictment that resulted from her representation of Rahman).

\(^{107}\) See Cohn, supra note 6, at 1249 (asserting that regulation of Rahman was necessary due to his earlier attempts to contact third parties in connection with terrorism).

\(^{108}\) See Rules and Regulations, Bureau of Prisons, U.S. Dep’t of Justice, 28 C.F.R. §§ 500, 501.3(a) (2002) (establishing that “[u]pon the direction of the Attorney General, the Director, Bureau of Prisons may authorize the Warden to implement special administrative measures that are reasonably necessary to protect persons against the risk of death or serious bodily injury”); see also Sattar, 272 F. Supp. 2d at 354 (declaring that SAMs are enacted to protect “persons against the risk of death or serious bodily injury”); Cohn, supra note 6, at 1249 (stating that Rahman was subject to restrictions to protect “persons against the risk of death or serious bodily injury”).
Stewart had to agree that she would abide by the SAMs when representing Rahman.\textsuperscript{109} Therefore, she could only communicate with him in regards to legal matters and was not allowed to use her visit to help Rahman communicate to outside third parties.\textsuperscript{110}

Stewart allegedly used her communications with her client Rahman to pass messages to third parties and allowed an interpreter, Mohammad Yousy, to read letters to her client regarding the terrorist organization's compliance with a cease-fire in Egypt.\textsuperscript{111} Further, Stewart was charged with taking affirmative steps to hide these discussions from prison guards and for her announcement to the media of Rahman's intention to withdraw his support in the cease-fire.\textsuperscript{112} Since Stewart had communicated information to third parties, she was in clear violation of the SAMs, resulting in a possible sentence of up to 40 years in prison.\textsuperscript{113}

The Department of Justice had collected several attorney-client communications between Rahman and Stewart including notebooks, tape recordings of phone conversations, and videotapes of prison visits.\textsuperscript{114} This was the first attempt by the Attorney General to use the amendment to the Bureau of Prisons regulation enacted in October 2001.\textsuperscript{115} Stewart claimed that this

\textsuperscript{109} See Sattar, 272 F. Supp. 2d at 354 (specifying that Rahman's counsel was required to sign affirmation before gaining access to him); see also Cohn, supra note 6, at 1249 (affirming that before Stewart was allowed to speak with Rahman, she was required to sign affirmation); Margulies, supra note 106, at 196 n.114 (highlighting that Stewart admits to signing affirmation).

\textsuperscript{110} See Cohn, supra note 6, at 1249 (articulating certain restrictions placed on Stewart's communication with Rahman).

\textsuperscript{111} See id. at 1249–50 (violating her agreement to comply with SAMs).

\textsuperscript{112} See Sattar, 272 F. Supp. 2d at 355 (S.D.N.Y. 2003) (revealing which allegations remain against Stewart); see also Cohn, supra note 6, at 1249 (describing what Stewart was charged with).

\textsuperscript{113} See Sattar, 272 F. Supp. 2d at 355 (emphasizing that these communications are in clear violation of SAMs); see also Cohn, supra note 6, at 1249 (clarifying that if Stewart was convicted, she would face up to 40 years in prison).

\textsuperscript{114} See United States v. Sattar, No. 02 Cr. 395 (JGK), 2003 U.S. Dist. LEXIS 16164, at * 4–8 (S.D.N.Y. Sept. 15, 2003) (announcing how these attorney-client communications were used against Stewart).

\textsuperscript{115} See Cohn, supra note 6, at 1249 (proclaiming that these types of communications had never been monitored before); see also Steve Fainaru, Saudi Convicted in Embassy Bombings Sues; Filing Challenges Rule Allowing Eavesdropping on Attorney-Client Discussions, WASH. POST, May 9, 2002, at A20 (commenting on Attorney General John Ashcroft's announcement that this regulation would be applied to communications between Rahman and Stewart); Robert F. Worth, Government Cuts Contact with Sheik, Lawyer Says, N.Y. TIMES, April 26, 2002, at B4 (mentioning Attorney General John Ashcroft's statement that Rahman will be first inmate to whom this regulation is applied).
monitoring infringed on her Fourth Amendment right to communicate with her client, and that Ashcroft’s procedures froze attorney-client communications.\textsuperscript{116} Her main concern was that in allowing the Department of Justice to monitor these attorney-client communications, clients would begin to fear such communication and in turn, be prevented the full and frank communications between attorney and client.\textsuperscript{117} Stewart filed a motion to compel disclosure of the notebooks and recordings that were in the government’s possession.\textsuperscript{118} However, the United States District Judge Koeltl denied her motions.\textsuperscript{119} The court found no authority to support Stewart’s notion that the fear of being monitored had a substantial effect on the attorney-client communications.\textsuperscript{120} Therefore, there was not enough evidence to require the government to disclose whether or not they were under court authority to conduct surveillances of certain attorney-client communications.\textsuperscript{121} Stewart’s claim that the surveillance of the communications was a violation of the Sixth Amendment was also denied because the surveillance followed proper court procedures.\textsuperscript{122}

Stewart then filed motions to suppress the videotapes of prison visits and audiotapes recorded pursuant to FISA, the Foreign Intelligence Surveillance Act of 1978, as amended by the USA Patriot Act, on the ground that the invasion into those

\textsuperscript{116} See Sattar, 2003 U.S. Dist. LEXIS 16164, at *4 (discussing Stewart’s motion to suppress certain attorney-client communications).

\textsuperscript{117} See Cohn, supra note 6, at 1251-52 (suggesting that monitoring attorney-client communications would hinder effective legal representation); Cunningham & Srader, supra note 9, at 325 (arguing that attorney-client conversation will be affected since, “whether or not the conversation is actually overheard or recorded, the client will likely believe that the conversation is being overheard or recorded”); see also Laura Mansnerus, A Nation Challenged: News Analysis; Fine Line in Indictment: Defense vs. Complicity, N.Y. TIMES, Apr. 11, 2002, at A23 (reiterating Lynne Stewart’s statement that government observation of lawyer-client communications has “almost a freezing effect on [a lawyer’s] ability to defend the person”).

\textsuperscript{118} See Cohn, supra note 6, at 1252 (citing the denial of Stewart’s first motions).

\textsuperscript{119} See Sattar, 2003 U.S. Dist. LEXIS 16164, at *70 (denying all defendant’s motions in their entirety).

\textsuperscript{120} See Sattar, 2003 U.S. Dist. LEXIS at *71 (stating that this and her other arguments are moot or without merit); Cohn, supra note 6, at 1251 (rejecting Stewart’s notion that fear of surveillance was enough to compel government to disclose if it was conducting investigations).

\textsuperscript{121} See Sattar, 2003 U.S. Dist. LEXIS at *17 (noting that ample evidence exists to determine whether surveillance was lawful without such disclosure).

\textsuperscript{122} See id. at *67 (stating that surveillance was obtained through valid search warrant).
communications violated the Fourth Amendment. She also requested certain information be turned over to the court because the information was allegedly attorney-client privileged material. Justice Koeltl once again denied Stewart’s motions. Her attempt to assert the attorney-client privilege to protect the communications with her client was also denied because she was trying to invoke the privilege to protect herself, not her client. Consequently, the court concluded she could not assert the attorney-client privilege on her own behalf. The privilege is only invoked when it is necessary to protect the client, circumstances which were not necessary in this instance. Stewart was attempting, as a third party, to invoke the attorney-client privilege for her own benefit because the information was being used against her. However, the court found “the privilege is not hers to invoke.”

Not only was Stewart’s motion denied, but she also failed to provide proof that the notebooks and prison recordings were privileged before they were taken and recorded by the government. She only made “blanket assertions” to establish her burden that they met the essential elements of the privilege. The surveillance of the attorney-client communications was lawfully executed. The government had also given the appropriate notice to Stewart in the first

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123 See Sattar, 2003 U.S. Dist. LEXIS at *46 (arguing that because Stewart had reasonable expectation of privacy in her meetings with her client, government’s surveillance violated her Fourth Amendment rights).

124 See Sattar, 2003 U.S. Dist. LEXIS 16164 at *4 (discussing Stewart’s motion to suppress videotapes of visits to her clients and audio tapes of phone calls).

125 See id. at *70–71 (holding “the defendants’ motions to suppress the fruits of the FISA evidence are denied.”).

126 See Sattar, 2003 U.S. Dist. LEXIS 16164 at *58 (emphasizing that privilege belongs to client).

127 See id. at *58 (explaining client holds privilege and is only person who can assert it).

128 See Sattar, 2003 U.S. Dist. LEXIS 16164 at *54 (noting privilege only applies when necessary to achieve its purpose); see also In re Sarrio, S.A., 119 F.3d 143, 147 (2d Cir. 1997) (arguing that attorney-client privilege applies only where necessary to assist client). See generally Upjohn Co. v. United States, 449 U.S. 383, 389–90 (1981) (stating that privilege exists to further client’s interests).

129 See Sattar, 2003 U.S. Dist. LEXIS at *58 (stating that privilege belongs to client).

130 See id. at *62 (reiterating that work product is only privileged if prepared to assist in anticipated or current litigation).

131 See id. at *63 (stating that defendant has provided no affirmative evidence that materials are privileged).

132 See id at *67 (stating that recordings were properly authorized by FISA and notebooks were obtained by valid warrant).
indictment that it had overheard certain communications, one of which involved Stewart in May of 2000.\textsuperscript{133}

As a result of Stewart’s indictment, she began lobbying at conferences against government procedures in situations such as hers.\textsuperscript{134} She claimed that the procedures utilized under the USA Patriot Act and the Bureau of Prisons regulations inhibit the full and frank communications between attorney and client, and thus, stop effective legal representation of criminal defendants, especially those detainees after September 11, 2001.\textsuperscript{135} However, as Justice Koeltl noted, there is no empirical evidence to support Stewart’s viewpoint.\textsuperscript{136} If there was, Stewart could have supplied it in support of her motions to suppress the attorney-client communication evidence.\textsuperscript{137}

The case against Lynne Stewart demonstrates that the attorney-client privilege is still intact after the enactment of the USA Patriot Act and the amendment to the Bureau of Prisons regulation. The core values protected by the attorney-client privilege still stand.

First, the attorney-client privilege as “the oldest of the privileges for confidential communications known to the common law,”\textsuperscript{138} has always been interpreted narrowly, and therefore is

\textsuperscript{133} See id. at *68 (S.D.N.Y. Sept. 15, 2003) (noting that Stewart’s former counsel admitted to knowing that government had transcripts of conversations).

\textsuperscript{134} See Cohn, supra note 6, at 1253 (noting how Stewart has spoken at National Lawyers Guild, California Attorneys for Criminal Justice, and California Public Defenders Association since her indictment); see also Snyder, Jr., supra note 81, at 449 (discussing possibility that many lawyers will face same charges as Stewart). See generally Deborah L. Rhode, Terrorists and Their Lawyers, N.Y. TIMES, Apr. 16, 2002, at A27 (stating “such felony indictments could affect lawyers’ willingness to defend despised groups).

\textsuperscript{135} See Cohn, supra note 6, at 1252–53 (enumerating Stewart’s arguments in favor of protecting attorney’s right to defend and preventing unnecessary governmental intrusion in relationship between attorney and client); see also Elijah, supra note 64, at 135 (discussing Stewart’s advocacy of attorney-client privilege and her belief that “she is being used as an example to deter others from representing more controversial figures and causes”). See generally Kevin R. Johnson, Civil Liberties Post-September 11: A Time of Danger, a Time of Opportunity, 2 SEATTLE J. SOC. JUST. 3, 7 (2004) (commenting on Stewart’s “courage and refusal to be cowed into her advocacy”).

\textsuperscript{136} See Sattar, 2003 U.S. Dist. LEXIS 16164 at *62 (noting Stewart did not meet her burden of proving that challenged communication was privileged).

\textsuperscript{137} See id. at *62–63 (discussing court’s willingness to assess whether attorney-client privilege extends to specific portions of material and noting Stewart’s failure to direct court to such specific provisions).

only invoked when necessary.\textsuperscript{139} Especially in times of war, when threats of terrorism are imminent, the privilege must continue to be narrowly construed to protect the truth seeking process of the legal system.\textsuperscript{140} This will create the means to promote the safety and security of the nation while facilitating the administration of justice.

Second, the privilege continues only to be asserted by the client because it exists for their protection, not for the attorney's protection.\textsuperscript{141} Lynne Stewart was justifiably prevented from asserting the privilege to protect herself from criminal prosecution.\textsuperscript{142} The privilege is put in place to promote full and frank disclosure between the attorney and the client, so that the client feels comfortable to tell his whole story to his attorney.\textsuperscript{143} The client uses the privilege as a guarantee to be candid, and in

\textsuperscript{139} See Sattar, 2003 U.S. Dist. LEXIS 16164, at *54 (explaining strong public policy in favor of interpreting privilege narrowly); see also Fisher v. United States, 425 U.S. 391, 404 (1976) (reasoning that because attorney-client privilege has effect of withholding relevant information from fact finder, it must apply only where necessary); United States v. Goldberger & Dublin, P.C., 935 F.2d 501, 504 (2d Cir. 1991) (emphasizing how attorney-client privilege must not conflict with countervailing law or strong public policy and must be "strictly confined within the narrowest possible limits underlying its purpose").


\textsuperscript{141} See Sattar, 2003 U.S. Dist. LEXIS 16164 at *58 (specifying that attorney-client privilege can be asserted only by client or someone on client's behalf); see also In re Von Bulow, 828 F.2d 94, 100 (2d Cir. 1987) (defining privilege as "belong[ing] to the client"). See generally In re Sarrio S.A., 119 F.3d 143, 147 (2d Cir. 1997) (explaining that only client and those acting on behalf of client have standing to invoke attorney-client privilege).

\textsuperscript{142} See Sattar, 2003 U.S. Dist. LEXIS 16164 at *58 (holding that Stewart lacks standing to invoke attorney-client privilege because her client has not presented any opposition to disclosure of challenged materials and has, likewise, not requested relief Stewart seeks); see also Sarrio, 119 F.3d at 147 (finding that because client did not invoke and waive his right to attorney-client privilege, his attorney had no right to insist on court's observance of privilege). See generally State-Wide Capital Corp. v. Superior Bank FSB, No. 98 Civ. 0817, 2000 U.S. Dist. LEXIS 18552, at *4 (S.D.N.Y. Jan. 11, 2000) (declaring attorney-client privilege inapplicable when it is invoked in absence of client intent).

\textsuperscript{143} See Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (noting that goal of attorney-client privilege is to encourage candid discussions and full disclosure between attorneys and their clients); see also Von Bulow, 828 F.2d at 100 (acknowledging that attorney-client privilege exists for purpose of fostering comprehensive and honest communication between an attorney and his client). See generally Fisher, 425 U.S. at 403 (emphasizing that the attorney-client privilege is meant to create comfort level so that the client may freely disclose information).
return they receive the best legal advice possible.\textsuperscript{144} Notably, Stewart was not asserting the privilege for these purposes.\textsuperscript{145} As a result, the principles of the common law privilege prevented her from using the privilege to her benefit.

The checks and balances of the judicial system ensure that the privilege will be protected, even in instances where the Bureau of Prisons regulation is used to monitor attorney and client communications.\textsuperscript{146} As seen in this instant case, the privilege maintained its narrow construction.\textsuperscript{147} The privilege would still only be invoked when necessary to promote full and frank communications between attorney and client.\textsuperscript{148} Proper notice, given to the prison inmate and the attorney of the possible surveillance of certain communications, protects the client from being surprised.\textsuperscript{149} As long as the communications are not being

\textsuperscript{144} See State-Wide Capital, 2000 U.S. Dist LEXIS 18552 at *4 (noting that attorney-client privilege fosters securing and rendering of legal advice); see also Fisher, 425 U.S. at 403 (summarizing practical and beneficial effects of privilege in attorney-client relationship). See generally Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (stating that privilege "is founded upon the necessity ... of the aid of persons having knowledge of the law ... which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

\textsuperscript{145} See Sattar, 2003 U.S. Dist. LEXIS 16164 at *59–60 (emphasizing that, contrary to common law requirements, Stewart is not attempting to invoke privilege on behalf of her client, government is already in possession of information Stewart wishes to shield, and Stewart has not specifically referenced which materials allegedly fall under attorney-client privilege). See generally Von Bolow, 828 F.2d at 100 (examining how broadening scope of this privilege would render it less certain, less workable, and more convoluted); Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 556 (2d Cir. 1967) (stating general rule that privilege may not be used solely to benefit attorney).

\textsuperscript{146} See Sattar, 2003 U.S. Dist. LEXIS 16164 at *62 (stating common law requirements for asserting attorney-client privilege in various circumstances and acknowledging constitutional and procedural arguments in favor of privilege in face of Bureau of Prisons Act); see also Podgor & Hall, supra note 64, at 147 (summarizing internal procedural limitations on Bureau of Prisons regulation). See generally Gauthier, supra note 32, at 372–75 (suggesting that Bureau of Prisons regulation poses less threats to attorney-client privilege post-September 11th than do ABA rules and common place federal processes).

\textsuperscript{147} See Sattar, 2003 U.S. Dist. LEXIS 16164 at *64 (emphasizing that materials do not fall under privilege because Stewart has put forth only "blanket assertions" in support of her argument and has not provided court with sufficient proof in satisfaction of common law elements).

\textsuperscript{148} See id. at *58 (noting that attorney-client privilege does not bar government from turning over information that has already been obtained to co-defendant in cases); see also United States v. Zolin, 491 U.S. 554, 562 (1989) (accepting notion that underlying purpose of attorney-client privilege has changed, yet remains focused on promoting full and frank communications between lawyer and client); Upjohn, 449 U.S. at 389 (noting "purpose is to encourage full and frank communication between attorneys and their clients").

\textsuperscript{149} See Cohn, supra note 6, at 1243 (stating that absent prior court authorization, the Department of Justice is required to give notice to defendant and their lawyer prior to conducting surveillance); R. Aubrey Davis III, \textit{Big Brother the Sneak or Big Brother the
used to facilitate acts of violence or terrorism, the communications will be kept privileged, and will not be used against the client.\textsuperscript{150}

Other safeguards on the privilege, including the "privilege team," provide more assurance that the communications, when collected by the government, will not be misused.\textsuperscript{151} Presently, there is no evidence to show that the Bureau of Prisons regulations unfairly prevents the inmate from getting effective legal representation or that it prevents the attorney from rendering legal advice to the client.\textsuperscript{152} The judge also plays a role in making sure the procedures under the USA Patriot Act and the Bureau of Prisons regulations are properly followed.\textsuperscript{153} If the procedures are not followed, the defendant's motions to exclude the information will be upheld and the evidence will be suppressed.\textsuperscript{154}

\textit{Sentry: Does a New Bureau of Prisons Regulation Truly Abrogate the Attorney-Client Privilege?}, 27 HAMLIN L. REV. 163, 168 (2004) (discussing consequences of Bureau of Prisons regulation, including requirement of notice before instituting surveillance); Dobbins, supra note 54, at 303 (noting that government may not covertly listen to attorney client communications, but rather must inform attorney and inmate in writing prior to initiation of monitoring).

\textsuperscript{150} See Cohn, supra note 6, at 1243 (stating that privilege team is not to release information obtained through surveillance of attorney client communications unless authorized by judge or necessary to protect imminent violence or terrorism); Dobbins, supra note 54, at 302 (noting that privilege team assists in assuring information obtained through monitoring of communications is used solely to deter possible future violence or terrorism). \textit{See generally} Collins, supra note 59, at 14A (arguing no confidentiality is violated by this regulation).

\textsuperscript{151} Dobbins, supra note 54, at 302–03 (discussing various protections required under Bureau of Prisons regulations); Marianne Kerber & Alexis M. Thomas, Current Development 2002–2003, \textit{The Erosion of Privacy After September 11: A Call to Arms for the Protection of the Attorney-Client Relationship in the Face of a National Crisis}, 16 GEO. J. LEGAL ETHICS 693, 699 (2003) (noting requirements that Attorney General must meet before using communications against prisoner); Podgor & Hall, supra note 64, at 147 (describing different restrictions on ability to use information obtained from monitoring attorney client communications).

\textsuperscript{152} See Cohn, supra note 6, at 1252 (stating Judge Koeltl rejected Stewart's presumption that surveillance hindered attorney-client relationship). \textit{But see} Kerber & Thomas, supra note 151 at 702 (noting that regulation could have effect); Cunningham & Srader, supra note 9, at 325 (discussing potentially serious affect that regulation may have on attorney-client privilege).

\textsuperscript{153} See, e.g., United States v. Sattar, No. 02 Cr. 395 (JGK), 2003 U.S. Dist. LEXIS 16164, at *16 (S.D.N.Y. Sept. 15, 2003) (exemplifying court analysis of procedures used by government to do surveillance on Stewart and client Rahman). \textit{But see} Cohn, supra note 6, at 1242 (arguing that Bureau of Prison regulations does not provide for any judicial oversight); Podgor & Hall, supra note 64, at 147 (noting communications will not be used without court order unless it involves imminent terrorist or violent actions).

\textsuperscript{154} See generally Cohn, supra note 6, at 1242 (noting procedure for utilizing communications intercepted under Bureau of Prisons regulation); Dobbins, supra note 54, at 303 (noting uses of information obtained from scrutinizing attorney-client communications); Kerber & Thomas, supra note 151 at 698–99 (discussing ways in which
Stewart stated, "[u]sually if one breaks a Bureau of Prisons . . . edict, one is told one can't visit the prison again, or one gets some sort of administrative slap on the wrist of some kind. One does not usually get indicted for aiding a terrorist organization."\textsuperscript{155} However, these are not usual times. After the threat of terrorism became a reality on September 11, 2001, it became necessary to invoke a larger punishment to deter attorney's who facilitate communications with terrorist organizations.\textsuperscript{156} In a time of war, the balance of national security and civil liberties is tested.\textsuperscript{157} Both the protection of these liberties, including privileges such as the attorney-client privilege, can be upheld, while creating a greater defense mechanism against terrorism.\textsuperscript{158}

VI. REBUTTAL TO CIVIL LIBERTARIANS CLAIMS THAT THE USA PATRIOT ACT AND THE BUREAU OF PRISON REGULATIONS GO TOO FAR.

The USA Patriot Act and Ashcroft's amendment to the Bureau of Prisons regulations were enacted to combat the immediate threat of terrorism.\textsuperscript{159} Civil libertarians often forget to mention the catalyst for enacting the amendments when they attack them

\begin{itemize}
  \item information obtained during monitoring of attorney-client communications can properly be used).
  \item See Cohn, supra note 6, at 1254 (mentioning Stewart's views on threat to attorney-client communications).
  \item See generally Dobbins, supra note 54, at 346 n.34 (giving purpose of rule allowing monitoring of attorney client communications); Jennifer Evans, supra note 8, at 934 (proposing enacting of legislation such as Patriot Act was to facilitate terrorism investigations and put end to terrorism); Snyder, Jr., supra note 81, at 447 (noting prompt passage of USA Patriot Act in order to facilitate collection of information).
  \item See Dowley, supra note 8, at 180 (discussing changing standard of reasonableness in light of changing potential threats); Evans, supra note 8, at 990 (concluding there is long history of balance between liberties and security); see also Taylor, supra note 79, at 64 (discussing need to re-evaluate balance of civil liberties in light of attacks of September 11th in order to prevent future terrorist attacks).
  \item See Viet D. Dinh, Freedom and Security After September 11, 25 HARV. J.L. & PUB. POL'Y 399, 400 (2002) (arguing that liberty and security are not mutually exclusive notions); Kerber & Thomas, supra note 151, at 700 (discussing government's attempts to balance liberty and protection).
  \item See Tsekos, supra note 70, at 35 (noting USA Patriot Act was enacted to eliminate terrorist threats); Dana B. Weiss, Note, Protecting America First: Deporting Aliens Associated with Designated Terrorist Organizations That Have Committed Terrorism in America in the Face of Actual Threats to National Security, 50 CLEV. ST. L. REV. 307, 313 (2002-2003) (stating that purpose of Patriot act was to deter and punish terrorism in United States). See generally Charles A. Flint, Comment, Challenging the Legality of Section 106 of the USA Patriot Act, 67 ALB. L. REV. 1183, 1183 (2004) (arguing that primary goal of Patriot Act is to remove monetary resources of terrorist organizations).
\end{itemize}
as being unconstitutional. It must be remembered that in times of war and when there are increasingly heavy threats of future terrorism, promoting national security is the most important goal on the government's agenda. The Framers of the Constitution supported the notion that in times of war and threatened national security, the government had the power to deal with those threats.

The United States is presently in the largest and most intense criminal investigation in the world. Effectively, the main objective must be to expand and enhance terrorism legislation to prevent any terrorist attack. There are rational governmental interests behind the restrictions on inmates' attorney-client communications. In order to fully accomplish these goals,

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160 See Dority, supra note 83, at 14 (arguing USA Patriot Act and Attorney General Ashcroft's procedures disseminate many civil liberties). But see Cohn, supra, note 6, at 1233 (noting that Attorney General Ashcroft responded to September 11th by "attack[ing]" civil liberties); Kerber & Thomas, supra note 151, at 693 (discussing September 11th as the motivation for Patriot Act and Bureau of Prisons regulation).


162 See Raquel Aldana-Pindell, The 9/11 'National Security' Cases: Three Principles Guiding Judges' Decision-Making, 81 OR. L. REV. 985, 994 (2002) (observing that "the U.S. Supreme Court has strongly suggested that the executive enjoys a degree of constitutionally-based discretion to act in matters of national security"); see also Dowley, supra note 8, at 174 (noting Framers' intent to give authority to government to deal with significant national security threats); Evans, supra note 8, at 947–48 (mentioning that in certain needy times, government broadly interprets procedures necessary to protect national security).


164 See Margulies, supra note 106, at 208 (noting that Sheikh Abdel Rahman was "appropriately subject to restrictions on contact and communication" in dealing with his attorney); see also Dinh, supra note 158, at 399 (describing "prevailing wisdom" among Americans as accepting that loss of certain freedoms is necessary for additional security). But see Whitehead & Aden, supra note 56, at 1083 (opining that rights of government
surveillance teams and law enforcement agencies need efficient tools to combat these threats before they occur. It is not enough to remedy terrorism after it occurs. There is a reasonable balance between national security and civil liberties when utilizing the defense mechanisms set out in the USA Patriot Act and the Bureau of Prisons regulations. Specifically, certain conversations and communications between terrorists and their attorneys, which serve as tools for terrorists to promote acts of violence and terrorism, should be monitored as part of these prevention procedures.

The civil libertarians first argue that the procedures used by the Justice Department and the Attorney General are extra tools that are not needed to combat terrorism and prevent imminent acts of violence, thus creating the possibility that they will misuse their authority. However, the USA Patriot Act and subsequent legislation, such as the Bureau of Prisons regulation, officials have been extended to "eavesdropping on attorney/client communications" under "guise" of stopping terrorism.


See Kelly R. Cusiek, Note, Thwarting Ideological Terrorism: Are We Brave Enough to Maintain Civil Liberties in the Face of Terrorist Induced Trauma?, 35 CASE W. RES. J. INT'L L. 55, 79 (2003) (recognizing that it is reasonable in certain situations to sacrifice suspect's right to notice of search or seizure in favor of other concerns); Evans, supra note 8, at 179 (agreeing that certain surveillance measures are "reasonable, constitutional, and necessary for protection of American citizens"). See generally Lawrence D. Sloan, Note, Echelon and the Legal Restraints on Signals Intelligence: A Need for Reevaluation, 50 DUKE L.J. 1467, 1469 n.7 (2001) (noting that "the drafters of our Constitution recognized the need to sacrifice personal freedom in the name of national security").

See Rules and Regulations, Bureau of Prisons, U.S. Dep't of Justice, 28 C.F.R. §§ 500, 501 (2002) (stating that "a legitimate law enforcement interest" in monitoring attorney-client conversations is "the prevention of acts of violence or terrorism."); see also Collins, supra note 59, at 14A (explicating that monitoring of communications between inmate and attorney prevents future terrorist incidents); Michael Powell, Accused of Aiding Terror Plot, Lawyer Braces for Fight of Her Life, WASH. POST, June 22, 2004 at A03 (describing conversations between layer and her client that were allegedly used in furtherance of terrorist plot).

See Taylor, supra note 67, at 60 (identifying Patriot Act as tool that will be improperly used on ordinary criminals). See generally Susan W. Brenner, Complicit Publication: When Should the Dissemination of Ideas and Data be Criminalized?, 13 ALB. L.J. SCI. & TECH. 273, 289 n.57 (2003) (recognizing perceived tendency among government officials to misuse powers that they are given); Jeremy Travis, Note, Rethinking Sovereign Immunity After Bivens, 57 N.Y.U. L. REV. 597, 618 (1982) (stating that "courts have often recognized that the nature of governmental power lends itself at times to misuse").
have proven very effective and helpful to fight terrorism.\textsuperscript{169} They have increased the investigator’s ability to deal with terrorism activities, including weapons offenses, weapons of mass destruction, and terrorism financing.\textsuperscript{170} This legislation has been stated as necessary to enable law enforcement officials to “effectively monitor and track the enemy before their horrific plans come to fruition.”\textsuperscript{171}

Based on the statistics, it is evident that a more restrictive agenda, exemplified in the USA Patriot Act and the procedures followed by the Department of Justice, has been effective in catching those targeted as dangerous suspects involved in terrorism.\textsuperscript{172} These procedures that increase national security were necessary to identify and disrupt one-hundred and fifty terrorist cells since September 11, 2001.\textsuperscript{173} Two-thirds of al-Qaeda’s known senior leadership has also been caught or killed,

\textsuperscript{169} See Patel, supra note 161, at 104 (suggesting that Patriot Act has been effective, thus far, in improving immigration system and gathering intelligence leading to capture of terrorist leaders). See generally Davis III, supra note 149, at 166–67 (summarizing expected benefits of restricting attorney-client privilege under Bureau of Prisons Regulations in stating that “the government, namely the Attorney General, has a firm belief that monitoring such conversations will avert potential terrorist attacks”).


\textsuperscript{171} See Dowley, supra note 8, at 183.

\textsuperscript{172} See Lisa Finnegan Abdolian & Harold Takooshian, The USA Patriot Act: Civil Liberties, the Media, and Public Opinion, 30 FORDHAM URB. L.J. 1429, 1440 (2003) (indicating that government has put Patriot Act to "excellent use" in discovering Al-Qaeda cells in New York, Michigan, and Oregon); see also Bryan Bender, AG Touts Patriot Act; Opponents Unconvinced, BOSTON GLOBE, July 14, 2004 at A1 (summarizing Attorney General Ashcroft’s discussion of report showing "how effective the Patriot Act has been: helping uncover terrorist cells in upstate New York and Oregon; leading to the indictments of individuals involved with the Palestinian Islamic Jihad terrorist group; uncovering a case in Florida involving money laundering for a leftist terror group in Colombia..."); Rita Katz & Josh Devon, The Weakness of the West, NAT’L REV. ONLINE, Sept. 17, 2002, (praising the general success of the Patriot Act) at http://www.nationalreview.com/comment/comment-katz091802.asp.

\textsuperscript{173} See Dep’t of Justice, USA Patriot Act Overview, (supporting the Patriot Act and its effects on terrorism) available at http://www.lifeandliberty.gov/patriot_overview_pversion.pdf (last visited Oct. 2, 2004). See generally Lindsay N. Kendrick, Comment, Alienable Rights and Unalienable Wrongs: Fighting the War on Terror Through the Fourth Amendment, 47 HOW. L.J. 989, 999 (2004) (recognizing that Patriot Act "allowed for potential terrorist cells to be broken up, terrorist threats to be intercepted, senior leadership of Al-Qaeda to be thwarted, and financial networks that sponsor terrorists to be disassembled"); Elizabeth M. McCormick, Book Review Essay, Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism, 19 CONN. J. INT’L L. 423, 423 (2004) (quoting President Bush as declaring that one purpose of Patriot Act is to ‘disrupt’ terrorist cells).
including the masterminds responsible for participation in the September 11, 2001 attacks. Other terrorist cells in major cities across the United States have been destroyed, and in the long-term, the Department of Justice is building a stronger network against terrorism. Although it is too early to calculate the efficiency of the amendment to Bureau of Prisons regulation, it is the next logical step to prevent those captured from keeping contact and involvement with their terrorist friends who have not yet been caught.

The civil libertarians also dispute the lack of judicial standards involved in the regulation, which allow the Attorney General to make the sole decision on whether or not to monitor specific attorney-client conversations. However, as examined in the analysis of *United States v. Sattar,* above, sufficient measures keep the processes implicated by the Attorney General

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174 *See* Erik Schechter, *Generic Jihad,* JERUSALEM POST, Dec. 5, 2003, at 14 (quoting Paul Wolfowitz as stating that "two thirds of al-Qaida's identified leadership had been either captured or killed"); Catherine Wild, *Parents of a Soldier React,* J. NEWS, Jan. 21, 2004, at 6A (quoting President Bush as stating that "the United States has captured or killed two-thirds of the leadership of the al-Qaida network, although Osama bin Laden remains at large"). See generally Mark Silva, *Graham Decrees Administration's 'Sorry Record' In War On Terror,* ORLANDO SENTINEL, June 14, 2004, at K2373 (noting that United States has killed two thirds of al-Qaida and toppled two dictatorships in war on terror).

175 *See,* Tom Brune, *Chilling Portrait Of Threat to U.S.; FBI, CIA Heads Detail Terror Network,* NEWSDAY (New York), Feb. 12, 2003, at A04 (quoting FBI Director Robert Mueller as stating that "within the United States, ... at least six suspected terror cells have been disrupted, nearly 200 people have been charged criminally and nearly 500 others deported"). But see Mark Matthews, *Intelligence Chiefs Present Dark View of Global Terror; Concerns Over Iraq Raised; Al-Qaida Is Still Capable of Attack, Tenet Tells Senators,* BALT. SUN, Feb. 25, 2004, at 1A (quoting FBI Director Robert S. Mueller III as stating that "al-Qaida has retained a "cadre of supporters" within the United States to develop plots and carry out instructions"). See generally Faye Bowers, *Al-Qaida Two Years Later; Arrests Leave Group Leaner, But Officials Remain Leaner,* SEATTLE TIMES, Sept. 10, 2003, at A3 (highlighting an FBI officials remarks to Congress that FBI knows of domestic support cells and has "ongoing operations directed against suspected al-Qaida members and their affiliates in about 40 states").

176 *See,* Cohn, *supra* note 6, at 1242 (highlighting complaint by ACLU that "new regulation permits the Department of Justice unlimited and unreviewable discretion to eavesdrop on confidential attorney-client conversations of persons in custody, with no judicial oversight and no meaningful standards"); Dobbins, *supra* note 54, at 303–04 (highlighting that many prominent legal, law enforcement, human rights, civil liberty, and religious scholars and organizations submitted comments arguing that Bureau of Prisons Amendment violates inmates' Sixth Amendment right to counsel). See generally Podgor & Hall, *supra* note 64, at 148 (noting that many groups, including National Association of Criminal Defense Attorneys, New York State Association of Criminal Defense Attorneys, and American Civil Liberties Union, are vehemently opposed to Bureau of Prisons Amendment).


178 *See* infra Part V.
Although the Attorney General oversees the initial determination of whether or not to monitor certain communications, the “privilege team” and a judge overseeing the reasonability to the procedures will have the last word on whether or not to keep certain information confidential. The “privilege team” must still seek a court order to share the information collected from these communications with the prosecutors and other government agents involved.

Furthermore, civil libertarians urge citizens to believe that these procedures are tactics used against all American citizens convicted of ordinary crimes. However, in 2001, only sixteen out of 158,000 individuals were even assigned to special administrative status, making them available for monitoring. Additionally, these monitoring processes are similar to the processes used to determine if there is a crime-fraud exception in which a judge is given sole discretion to make the determination.

See, e.g., Sattar, 2003 U.S. Dist LEXIS at *64 (holding legal advice between attorney and client is still protected by attorney client privilege); see also Davis III, supra note 149, at 166 (highlighting that “Bureau of Prisons regulation requires Director of Federal Bureau of Prisons to “provide appropriate procedures for the monitoring or review of communications between that inmate and attorneys or attorneys’ agents”). But see Whitehead & Aden, supra note 56, at 1116–17 (noting that prior government standard for monitoring attorney-client conversation has eroded from one of “probable cause” that criminal activity was occurring to standard of “reasonable suspicion”).

See Rules and Regulations, Bureau of Prisons, U.S. Dep’t of Justice, 28 C.F.R. § 501.3(d) (2002) (stating, in relevant part that “The Director, Bureau of Prisons, with the approval of the Assistant Attorney General for the Criminal Division, shall employ appropriate procedures to ensure that all attorney-client communications are reviewed for privilege claims”); see also Dobbins, supra note 54, at 303 (stating that “privilege team” will be designated to “ensure that privileged material is not disclosed to the prosecution team”); Dowley, supra note 8, at 181 (highlighting that judicial review allows courts to limit abuses under Patriot Act).

See Shapiro, supra note 53, at 1091 (describing government’s safeguards protecting attorney-client privilege); see also Kearns, supra note 93, at 480 (stating that once team decides information is not protected and should be disclosed it still needs court order to release information”). But see Cunningham & Srader, supra note 9, at 315 (highlighting that “privileged team” may disclose information without court order when team determines that acts of violence or terrorism are imminent).

See, Paul R. Rice & Benjamin Parlin Saul, Is the War on Terrorism A War On Attorney-Client Privilege, 17 CRIM. JUST. 22, 23 (2002) (quoting Attorney General Ashcroft as stating that “We have the authority to monitor the conversations of 16 of the 158,000 federal inmates and their attorneys because we suspect these communications are facilitating acts of terrorism”). See generally Cohen, supra note 48, at 30 (identifying Ashcroft’s use of these special monitoring procedures directly after September 11th).

See Collins, supra note 59, at 14A (positing that confidential communications are not infringed upon any differently with amendment than with crime-fraud exception); see also Podgor & Hall, supra note 64, at 163 (noting that crime-fraud exception to attorney-client privilege already permits government to gather and use type of information sought through Bureau of Prisons Amendment). But see Cohn, supra note 6, at 1239
authority to determine what communications can be monitored, the "privilege team" must still gain permission from an independent judge to give the monitored communications to the prosecution team.\textsuperscript{184} Effectively, there are sufficient safeguards in place to mimic a detached magistrate overlooking the procedure. The same type of procedure was used on former President Clinton, to determine whether or not he was corroborating in criminal activity.\textsuperscript{185}

Even though the USA Patriot Act and the Bureau of Prisons regulation were enacted in the month immediately following the September 11th attack, it was not unreasonable or inconceivable to rely on the national government to properly act in regards to security as soon as possible. Americans expect that their government, including Congress, react to the needs of the American people. At that moment, the American people needed protection from terrorist threats and invasions within their land. Reflecting these needs, the USA Patriot Act was passed with overwhelming bipartisan support.\textsuperscript{186} At that time, it was also not certain how imminent the acts of violence and terrorism were.\textsuperscript{187}

(highlighting that in contrast to crime-fraud cases, where piercing attorney-client privilege is reserved for courts determination, Bureau of Prisons Amendment leaves determination to prosecutors or prison officials).

\textsuperscript{184} See Dobbins, supra note 54, at 303 (highlighting that "[u]nless the head of the privilege team determines that acts of violence or terrorism are imminent, no information gathered from monitoring may be disclosed to anyone without approval from a federal judge"); see also Cohn, supra note 6, at 1242-43 ("The DOJ shall employ appropriate procedures to ensure that all attorney-client communications are reviewed for privilege claims and that any properly privileged materials . . . are not retained during the course of the monitoring."). \textit{See generally} Cole, supra note 10, at 549 (emphasizing that Department of Justice finds that requirement for judicial approval safeguards attorney-client privilege).

\textsuperscript{185} See Bachrach, supra note 100, at 106 (claiming that attorney-client privilege has been intruded upon for less serious affairs); see also Naftali Bendavid, \textit{Appeals Court Questions Ruling On Clinton's Release of Willey Letters}, CHI. TRIB., May 19, 2000, at N16 (discussing appellate review of federal judges' determination that certain communications between Bill Clinton and his attorney were outside attorney-client privilege due to crime-fraud exception).

\textsuperscript{186} See Brian Bender, supra note 172, at A1 (noting that Patriot Act was passed with overwhelming bipartisan support following 2001 attacks); see also Mary Beth Buchanan, \textit{Liberty and Security For All: The Balancing Act}, PITTSBURGH POST-GAZETTE, Sept. 21, 2003, at B1 (emphasizing that "Congress passed the Patriot Act, almost unanimously in the Senate by a vote of 98-1, and overwhelmingly in the House of Representatives by a vote of 357-66, with bipartisan support across the political spectrum").

\textsuperscript{187} See Michael P. O'Connor & Celia M. Rumann, \textit{Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland}, 24 CARDOZO L. REV. 1657, 1705-06 (2003) (stating how Patriot Act was passed after terrorist attack and that "American people do not have the luxury of unlimited time in erecting the necessary defenses to future terrorist acts"). \textit{See generally} Jonathan Grebinar, Note, \textit{Responding to Terrorism: How Must a Democracy Do It? A Comparison of Israeli and
Therefore, it was only proper that the government act as quickly as they did.

The government further disputes the contention that the definition of terrorism is too broad. The definition of "domestic terrorism" in section 802 of the USA Patriot Act only applies to those violations of state or federal law and those that are dangerous to human life. Therefore, organizations who peacefully protest the government views will not be targeted under this provision. The argument that peaceful political organizations will be attacked by the Justice Department is not supported under this definition of terrorism.

Finally, those opposing the USA Patriot Act and the regulation amendment concerning the attorney-client privilege claim that Constitutional guarantee of privacy is infringed. However,
the American people have not agreed with this argument.\textsuperscript{194} After September 11, 2001, eighty-two percent of Americans did not feel that their civil liberties were infringed upon, and agreed with the Bush administration's procedures to deal with terrorist criminal detainees.\textsuperscript{195} Polls taken in 2003, exhibited public support again, noting that Americans still did not feel pressure on their civil liberties.\textsuperscript{196} The importance of this is grounded in the fact that the government, including the Department of Justice and Congress, is working for the American people. The


\textsuperscript{194} See Cohen, supra note 48, at 30 (stating "polls showing support for increased government power"); see also Boyd, supra note 193, at 9A (discussing polls in favor of expanded law enforcement). See generally Akram & Johnson, supra note 193, at 345 (showing general public support for government's response to September 11th attacks).

\textsuperscript{195} See Diana Bellettieri & Khurram Saeed, What it Means to be a Patriot, J. NEWS, July 4, 2003, at 1A (noting "[p]ublic opinion polls show most Americans are solidly behind the president and his administration's actions, whether it's invading Iraq or passing legislation to curtail individual civil liberties in the name of security."); What Price National Security?, CONN. LAW TRIB., Sept. 8, 2003, at 17 (stating although provisions of Patriot Act are encroachments on civil liberties, polls indicate willingness to accept such encroachments for security purposes); see also Josh Richman, Lockyer's Civil Liberties Record is Key in Run for Governorship; California Voters Will Recall His Enforcement of Homeland Security Come Election Time, Experts Say, OAKLAND TRIB., May 21, 2003 at Headline News (commenting "Public opinion polls tend to show California is 'out of sync' with the national willingness to sacrifice constitutional protections ".).
polls corroborate that the people are being represented properly while retaining their privacy and freedoms.¹⁹⁷

VII. CONCLUSION

The largest group of critics of the post 9/11 legislation directed at terrorists, are those the believe the government had too much power before the threats of terrorism made an appearance on United States soil.¹⁹⁸ However, those events, that are still in the vivid memories of the American population, promoted the initiative to take control of national security.¹⁹⁹ Prevention is the key for stopping terrorism worldwide. Many high-ranking officials of terrorist organizations are already behind bars because of the successful use of the USA Patriot Act.²⁰⁰ The communications of these dangerous and violent criminals must now be monitored in certain instances to prevent them from striking again.

¹⁹⁶ See Malcolm, supra note 85, at 1 (claiming Patriot Act does not “unduly infringe” on civil liberties); Paul Rosenzweig, In Reality, the Widely Demonized Law Thwarts Terrorists, Hasn’t Been Abused; The Patriot Act; Who’s Being Targeted?, BALT. SUN, July 23, 2004, at 19A (noting that official designated by Patriot Act to monitor use of Act and report any abuse “has reported that there have been no instances in which the Patriot Act has been invoked to infringe on civil rights or civil liberties”). But see What Price National Security?, supra note 195, at 17 (positing that although certain groups have been concerned with provisions of Act, general public has not expressed same concerns).

¹⁹⁷ See Taylor, supra note 67, at 60 (“[The] Patriot Act’s most ardent critics were also sure that the government had too much power to investigate terrorists before Sept. 11.”). See generally Patrick J. Fitzgerald, It Stripped Our Enemies of Protective Cover, CHI. DAILY LAW BULL., Apr. 24, 2004, at 5 (arguing portions of Patriot Act assailed by its critics are not all that groundbreaking); Ann Woolner, Conservatives and Liberals Agree on Patriot Act: It’s No Good, FULTON COUNTY DAILY REP, Sept. 25, 2003 (noting that “[m]uch of what is in the Patriot Act ‘is the same ole, same ole’ . . . but ‘now somebody’s shined a flashlight on it.’”).

¹⁹⁸ See Canestaro, supra note 188, at 134 (2003) (“Homeland defense and domestic security was not a priority for the U.S. military before the September 11, 2001, terrorist attacks.”); McDonnell, supra note 187, at 355–56 (noting how Patriot Act and creation of Homeland Security were responses to post September 11th demands to keep public safe); see also Whitehead & Aden, supra note 56, at 1084 (“For the sake of greater security in this post-September 11th climate, many Americans have expressed the willingness to relinquish some of their freedoms.”).

¹⁹⁹ See Thomas D. Anderson, Patriot Act Protects Americans From Terrorism, BURLINGTON FREE PRESS, Aug. 3, 2004, at 11A (noting “[a]s of May 5, 2004, the Department of Justice has charged 310 defendants with criminal offenses as a result of terrorism investigations since the attacks of Sept. 11, 2001, and 179 of those defendants have already been arrested . . . “); Rhea Davis, Shelby Applauds USA Patriot Act; U.S. Attorney Calls Law Powerful Tool, HOUS. CHRON., May 06, 2004, at 31 (speaking of U.S. Attorney Michael Shelby’s statements concerning view that Patriot Act has done more than any other law in last quarter century to protect America); Rosenzweig, supra note 196, at 19A (proving why Patriot Act was vital to protect America’s security).
Attorney-client confidentiality is essential to promote fair and effective legal representation. Protection of these communications is highly important for a client's protection in vulnerable situations. However, when a client uses the delicate and respected communications to facilitate their own mad and dangerous goals, putting the lives of others at risk, they must be halted immediately. Therefore, the Bureau of Prisons regulation is an essential and necessary tool for the Department of Justice in times where terrorism and violence are imminent. Unfortunately, the times when Americans lived with trust in others has faded with the progression of the war. The enacted legislation is simply a reaction to these feelings and the change in technology in modern times. These regulations are constitutional and promote an efficient balance between national security and securing civil liberties, including the attorney-client privilege.