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Note, A Rule Unfit for All Seasons: Monitoring of Attorney-Client Communication Violates Privilege and the Sixth Amendment

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NOTE

A RULE UNFIT FOR ALL SEASONS: MONITORING ATTORNEY-CLIENT COMMUNICATIONS VIOLATES PRIVILEGE AND THE SIXTH AMENDMENT

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ROPER: So now you'd give the Devil the benefit of law!

MORE: Yes. What would you do? Cut a great road through the law to get after the Devil?

ROPER: I'd cut down every law in England to do that!

MORE: (Roused and Excited) *Oh?* (Advances on ROPER) *And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat.* (He leaves him). *This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would*

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blow then? (Quietly) *Yes, I'd give the Devil benefit of law, for my own safety's sake.*

—*A Man for All Seasons*[1]

INTRODUCTION

The September 11 terrorist attacks prompted the federal government to enact several laws focused on preventing further acts of violence against the United States. In very quick fashion, Congress passed the USA Patriot Act on October 26, 2001.[2] Soon after the law's passage, the Bush administration asserted its executive power, issuing a number of rules and executive orders. Recent presidential orders have allowed military tribunals to try persons charged with terrorism,[3] detentions of hundreds of foreign nationals,[4] measures precluding the release of names or information concerning detainees,[5] and a Bureau of Prisons (BOP) rule authorizing monitoring of communications between detainees and their attorneys.[6]

The government's interception of attorney-client communications has engendered significant criticism and prompted numerous Senate hearings.[7] In particular, critics have claimed that the interception violates both the attorney-client privilege and the Sixth Amendment.[8] This Note examines the validity of these claims. In addition,

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1 ROBERT BOLT, A MAN FOR ALL SEASONS 66 (1960). Senator Russell D. Feingold quoted this portion of the play on the Senate floor on October 25, 2001, as he explained his opposition to the USA Patriot Act. *See* 147 CONG. REC. S10,990, S11,023 (daily ed. Oct. 25, 2001) (statement of Sen. Feingold).

2 USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272; *see also* Jim McGee, *An Intelligence Giant in the Making: Anti-Terrorism Law Likely to Bring Domestic Apparatus of Unprecedented Scope*, WASH. POST, Nov. 4, 2001, at A4 (discussing the USA Patriot Act).

3 *See* Robin Toner & Neil A. Lewis, *White House Push on Security Steps Bypasses Congress*, N.Y. TIMES, Nov. 15, 2001, at A1 (discussing an Executive Order that authorizes the President and the Secretary of Defense to create military courts to try non-citizens accused of terrorist activities).

4 *See* Dan Eggen, *Ashcroft Defends Anti-Terrorism Steps*, WASH. POST, Dec. 7, 2001, at A1 (explaining Attorney General Ashcroft's position before the Senate Judiciary Committee that the practice is lawful and necessary to prevent future attacks).

5 *See id.*

6 *See* Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062 (Oct. 31, 2001) (to be codified at 28 C.F.R. pts. 500 & 501).

7 *See* Ann Davis, *Attorney-Client Confidentiality Waived in Rule*, WALL ST. J., Nov. 9, 2001, at B1; Eggen, *supra* note 4; William Glaberson, *Legal Experts Divided on New Antiterror Policy That Scuttles Lawyer-Client Confidentiality*, N.Y. TIMES, Nov. 13, 2001, at B7.

8 Senator Patrick Leahy has been the most notable and vocal critic of attorney-client communications monitoring. *See* Letter from Senator Patrick Leahy, Chairman, Senate Judiciary Committee, to John Ashcroft, Attorney General, U.S. Department of Justice (Nov. 9, 2001), http://leahy.senate.gov/press/200111/110901.html; *see, e.g.*, *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (Dec. 4, 2001) [hereinafter *DOJ Oversight Hearings*] (testimony of Nadine Strossen, President, ACLU), 2001 WL 1553668; Statement of Robert E. Hirshon, President, American Bar Association (Nov. 9, 2001), http://www.abanet.org/leadership/justice_department.html. *But see* Bruce Fein, *Privilege Bows to Danger*, WASH. TIMES, Nov. 13,

this Note explores other less intrusive means available to the government to prevent acts of violence that involve attorney-client communications. Finally, this Note explores what role professional responsibility rules may play in determining defense lawyers' responsibilities in this very new and terrifying area.

I
THE BUREAU OF PRISONS RULE

The BOP rule was published in the Federal Register on October 31, 2001.[9] The new rule authorizes the Attorney General to order the BOP Director to monitor or review communications between inmates and lawyers for the purpose of deterring future acts that could result in death or serious bodily injury to persons or property.[10] The Attorney General may issue the 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.[11] Under the BOP rule, monitoring of communications does not require judicial approval, and the Attorney General has complete authority to determine procedures for reviewing communications for attorney-client privilege claims and excluding privileged materials.[12] Generally, the BOP Director must provide written notice to both the inmate and the lawyer before initiating any monitoring.[13] The BOP rule also contemplates a "privilege team," separate and apart from the prosecution and investigation, that will monitor attorney-client communication.[14] The privilege team may not disclose any intercepted information without court approval, except where the material the team obtains indicates that violent acts are imminent.[15] Such monitoring may continue for one year without further authorization.[16] As of December 6, 2001, at least sixteen inmates' conversations with their attorneys were being monitored under the rule.[17]

The government justifies the BOP rule on national security grounds, claiming that it has balanced the interests of protecting in-

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2001, at A16 (defending the BOP rule as a reasonable and measured response to terrorist attacks).

9 Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. at 55,062.

10 *Id.* at 55,066.

11 *Id.*

12 *See id.*

13 *Id.*

14 *See id.*

15 *Id.*

16 *See id.* at 55,065.

17 *See Excerpts from Attorney General's Testimony Before Senate Judiciary Committee*, N.Y. TIMES, Dec. 7, 2001, at B6.

nocent American lives and safeguarding liberties.[18] The government also claims that monitoring attorney-client communications under the new rule merely closes a loophole in already existing administrative measures that were designed to restrict communications of detainees who could perpetrate acts of violence or terrorism.[19] The government, however, acknowledges the extraordinary nature of monitoring attorney-client communications, seeking only to monitor these communications in specific instances where "the Bureau may have substantial reason to believe that certain inmates who have been involved in terrorist activities will pass messages through their attorneys . . . to individuals on the outside for the purpose of continuing terrorist activities."[20]

The BOP rule summary supports monitoring attorney-client communications with reference to the crime-fraud exception to the attorney-client privilege.[21] The crime-fraud exception, however, generally relates to issues of disclosing evidence in court.[22] Given the trial-related function and purpose of the privilege and its exception, the judiciary should make the determination of whether the privilege or an exception to the privilege applies.[23] Where the government intrudes on this privilege without judicial approval, it clearly violates the privilege's utilitarian and humanistic goals.[24]

The BOP rule summary also explains that monitoring attorney-client communications does not implicate the Sixth Amendment because the rule does not upset adversarial fairness.[25] According to the summary, the government has a legitimate law enforcement interest, and the procedures in place prevent both disclosure of privileged material and the prosecution's use of any intercepted information absent court approval.[26] Notwithstanding the argument that the procedures might not actually protect the information obtained from the investigation and prosecution teams, the government's justifications suggest that the use of privileged information would implicate only Sixth Amendment fairness concerns. The government explanation evades the critical privacy component of the effective assistance of counsel right. That interest involves free and frank communication between

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18 *DOJ Oversight Hearings*, *supra* note 8 (testimony of Viet D. Dinh, Assistant Attorney General, Department of Justice).

19 *See id.*; *see also* 28 C.F.R. pt. 501 (2001) (setting forth the scope of the BOP rules).

20 Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. at 55,064.

21 *See id.*

22 *See generally* David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443 (1986) (tracing the history of the crime fraud exception).

23 *See infra* Part II.B.

24 *See infra* notes 37–41 and accompanying text.

25 *See* Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. at 55,064.

26 *See id.*

the lawyer and her client.[27] Any indication that the government will monitor privileged conversations is likely to chill attorney-client communication, and therefore, the BOP rule violates the Sixth Amendment.[28]

It should also be noted that in the wake of the September 11 attacks, the Federal Bureau of Investigation has announced its intent to combine its intelligence gathering and law enforcement functions.[29] This union weakens the BOP rule's claim that a firewall will adequately protect monitored information from these teams. The summary cites cases supporting firewall procedures that apply to, among other things, wiretapping.[30] Wiretaps, however, may not be obtained by law enforcement without court approval.[31] Again, the lack of judicial involvement in a serious area of constitutional law throws into question the new rule's legality.

The attorney-client privilege and the Sixth Amendment are very much intertwined. Indeed, some commentators have argued that the privilege is constitutionally protected within the Sixth Amendment.[32] For analytic clarity, however, the following Parts present separate critiques of how the BOP rule violates the fundamental legal protections of both the attorney-client privilege and the Sixth Amendment.

II
THE BUREAU OF PRISONS RULE VIOLATES ATTORNEY-CLIENT PRIVILEGE

A. Background on the Attorney-Client Privilege

The attorney-client privilege is the oldest of common law privileges, dating back to at least 1654.[33] From 1654 through today there remains a tension between truth and privacy within the privilege's scope and applicability. Professor Geoffrey Hazard has characterized

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27 *See infra* Part III.A.

28 Some commentators have also argued that the BOP rule violates the Fourth Amendment. *See* Akhil Reed Amar & Vikram David Amar, *The New Regulation Allowing Federal Agents to Monitor Attorney-Client Conversations: Why It Threatens Fourth Amendment Values*, FINDLAW.COM, Nov. 16, 2001, *at* http://writ.news.findlaw.com/amar/20011116.html.

29 *See* McGee, *supra* note 2 (describing the FBI's new anti-terrorism powers as ending segregation within the Bureau of its criminal investigation function and its information gathering on foreign spies and terrorists). Assistant Attorney General Michael Chertoff was quoted as saying, "What we are going to have is a Federal Bureau of Investigation that combines intelligence with effective law enforcement." *Id.*

30 *See* Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. at 55,064.

31 *See id.*

32 *See, e.g.*, Martin R. Gardner, *The Sixth Amendment Right to Counsel and Its Underlying Values: Defining the Scope of Privacy Protection*, 90 J. CRIM. L. & CRIMINOLOGY 397, 410–11 (2000).

33 *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1070 (1978).

the dilemma as making a "value choice . . . involv[ing] the acceptance of an evil—betrayal of confidence or suppression of truth."[34] The determination of the privilege's applicability is further complicated by the possible crime-fraud exception in the context of a nation fearing future terrorist attacks.

Professor Wigmore stated the general formulation of the attorney-client privilege as follows:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.[35]

The privilege applies normally in a judicial context where a lawyer may be called to testify or required to produce evidence concerning a client. The privilege is intended to enable full legal advice and represents the view that there are "many things in life that should not be open to public inspection, even for 'good cause.'"[36] Thus, the attorney-client privilege rests upon both utilitarian and humanistic principles.[37]

From a utilitarian perspective, the privilege is necessary to ensure effective legal advice through the lawyer's promise of privacy and, hence, candid client disclosure.[38] By divulging confidential information clients enable their lawyers to present as many legal options as possible. Such legal advice will, in turn, assure society general obedience of the law.[39]

The humanistic approach emphasizes the privilege's function of enhancing the client's "autonomy, dignity and privacy."[40] Given the law's complexity and severity, privileging attorney-client communications ensures that the client will be able to put on his best case by informing the lawyer of all related matters. Particularly in a criminal case, where the government can summon all of its powers against an individual, the defendant should not be denied the opportunity to enable his lawyer to compete adequately in the adversarial process by disclosing all information. The lawyer should also be viewed as an

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34 *See* Hazard, *supra* note 33, at 1085.

35 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292 (McNaughton rev. 1961) (emphasis omitted).

36 Hazard, *supra* note 33, at 1061.

37 *See* Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and Its Exceptions:* Spaulding v. Zimmerman *Revisited*, 83 MINN. L. REV. 63, 102–03 (1998); *see also* Fried, *supra* note 22, at 490–92 (referring to the "instrumental" and "intrinsic value" justifications for attorney-client privilege).

38 *See* Cramton & Knowles, *supra* note 37, at 102–03.

39 *See id.*

40 *Id.*

extension of the individual defendant. Thus, requiring a lawyer, for example, to testify as to communications she had with her client might violate the client's Fifth Amendment right against self-incrimination.[41]

The privilege, however, is subject to the crime-fraud exception, which applies when an attorney-client conversation furthers a crime or fraud. Stated differently, "[i]n such circumstances, it is arguable that the privilege, by its own terms, is not applicable."[42] The communications could then be characterized as failing at least one of Wigmore's requirements, namely that the lawyer, by virtue of her complicity, is not then functioning in her professional capacity. Critics have suggested that the exception may well swallow the rule, permitting prosecutors to subpoena lawyers and execute wiretaps on lawyers' offices based on the argument that the privilege does not exist due to alleged wrongdoing.[43]

B. Application of the Attorney-Client Privilege and the Crime-Fraud Exception

The Department of Justice supports the BOP rule on the ground that the crime-fraud exception should apply. In its summary of the BOP rule, the Justice Department cites one Supreme Court case and a number of circuit court cases in support of the crime-fraud exception's applicability.[44] The facts of the noted cases, however, differ significantly from the new regulation and do not support applying the exception without judicial imprimatur.

For example, in *Clark v. United States*,[45] the Supreme Court held that the attorney-client privilege is overcome where there is a "showing of a *prima facie* case sufficient to satisfy the judge that the light should be let in."[46] In this case the lower court found a juror guilty of criminal contempt for giving false answers during voir dire. The Supreme Court found that other jurors' testimony regarding matters that took place in the jury room could not be shielded by any privilege, likening the situation to one allowing for the crime-fraud excep-

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41 *See id.*

42 Hazard, *supra* note 33, at 1063–64.

43 *See* Aviva Abramovsky, *Traitors in Our Midst: Attorneys Who Inform on Their Clients*, 2 U. PA. J. CONST. L. 676, 695 (2000); Fried, *supra* note 22, at 498–99; Michael Goldsmith & Kathryn Ogden Balmforth, *The Electronic Surveillance of Privileged Communications: A Conflict in Doctrines*, 64 S. CAL. L. REV. 903, 904–05 (1991); Max D. Stern & David Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. PA. L. REV. 1783, 1846 (1988). *But see* Cramton & Knowles, *supra* note 37, at 114–17 (responding to arguments against broadening exceptions to confidentiality).

44 *See* Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062, 55,064 (Oct. 31, 2001) (to be codified at 28 C.F.R. pts. 500 & 501).

45 289 U.S. 1 (1933).

46 *Id.* at 14.

tion.[47] In contrast to the facts of *Clark*, the BOP rule does not implement procedures under which a judge could decide that the privilege should not attach and that sufficient evidence permitted an exception. Rather, the BOP rule allows the Attorney General to order the BOP Director to provide measures for monitoring of attorney-client communications.[48] The order may be based upon information from a head federal law enforcement official that reasonable suspicion exists that an inmate will communicate with his lawyer to facilitate an act of terrorism.[49] Thus, the BOP rule permits law enforcement officials to determine whether to eviscerate the protections of the attorney-client privilege, completely sidestepping the judicial involvement presumed in *Clark* and the other cases cited by the Justice Department.

The BOP rule's lack of any prescribed judicial role in determining the applicability of the crime-fraud exception is particularly egregious in light of the recent Supreme Court case *United States v. Zolin*.[50] In *Zolin* the Court allowed for *in camera* review to ascertain "whether allegedly privileged attorney-client communications fall within the crime-fraud exception."[51] The government, however, must meet a threshold showing even to obtain *in camera* review. The Court held that "before a district court may engage in *in camera* review at the request of the party opposing the privilege, that party must present evidence sufficient to support a *reasonable belief* that *in camera* review may yield evidence that establishes the exception's applicability."[52] Thus, *Zolin* does not even countenance a blanket rule permitting a judge to conduct *in camera* review for deciding the exception's applicability. The Court noted that such a policy would inhibit "open and legitimate disclosure between attorneys and clients" and might violate the client's due process rights.[53]

It is true that the BOP rule contemplates a context different from the traditional evidentiary concerns that *Zolin* addresses. Yet notwithstanding national security interests, the BOP rule will adversely affect

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47 Two cited cases, *United States v. Gordon-Nikkar*, 518 F.2d 972 (5th Cir. 1975) and *United States v. Soudan*, 812 F.2d 920 (5th Cir. 1986), are similar appeals of district court decisions regarding the applicability of the attorney-client privilege. In another cited case, *In re Grand Jury Proceedings*, 87 F.3d 377 (9th Cir. 1996), the Ninth Circuit laid out the requirements that the government must establish before the district court to trigger the crime-fraud exception. *See id.* A sneaking suspicion is not enough. *Id.* at 381. "Rather, the district court must find 'reasonable cause to believe' that the attorney's services were 'utilized . . . in furtherance of the ongoing unlawful scheme.'" *Id.*

48 *See* Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. at 55,066.

49 *Id.*

50 491 U.S. 554 (1989).

51 *Id.* at 574.

52 *Id.* at 574–75 (second emphasis added).

53 *Id.* at 571.

the attorney-client relationship and will have ramifications within the traditional evidentiary context. Security concerns cannot justify a complete abandonment of any judicial role.

The quantum of evidence that would satisfy the *Zolin* standard of "reasonable belief" for merely obtaining a court's *in camera* review of evidence supporting the crime-fraud exception may be akin to the BOP rule's "reasonable suspicion" standard. However, the BOP rule imposes that standard for intercepting attorney-client communication, and serves as a presumptive finding that the crime-fraud exception applies. It makes little sense to give law enforcement the discretion to decide that the crime-fraud exception attaches. In effect, the BOP rule allows the fox to guard the henhouse. Given the *Zolin* Court's resistance to blanket *in camera* review for determining the crime-fraud exception's applicability, it stretches credulity to think that the Attorney General's unilateral review is acceptable. As the *Zolin* Court warned, "'a complete abandonment of judicial control would lead to intolerable abuses.'"[54]

C. Other Options

The new regulation is not, of course, the only means by which the government intrudes or has intruded on attorney-client confidences. Through eavesdropping and electronic surveillance the government has arguably often violated the attorney-client privilege. Yet even under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III),[55] the government has not been so brazen as to intrude on attorney-client confidentiality without court approval.

Title III does not prohibit the government from monitoring attorney-client communications. Rather, it generally precludes the use of such communications as evidence.[56] Law enforcement may eavesdrop by obtaining warrants for electronic surveillance for serious crimes.[57] In addition to significantly more detailed procedures that apply to the law enforcement officials than are required under the BOP rule, Title III requires independent judicial review. In fact, a surveillance order may be issued only by federal district or circuit court judges, not by magistrates.[58]

In order to pass judicial review, the government must describe with particularity the person whose communications are to be monitored as well as the type of communications.[59] The government must

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54 *Id.* (quoting United States v. Reynolds, 345 U.S. 1, 8 (1953)).
55 18 U.S.C. §§ 2510–2521 (1994).
56 *See id.* § 2517(4)–(5).
57 *See id.* § 2516(1).
58 *See id.* § 2518(1).
59 *Id.* § 2518(1)(b), (d).

also show why less intrusive measures would not achieve the same purpose.[60] The judge shall issue an eavesdropping order only upon finding probable cause that the suspect is involved in the crime described, that eavesdropping will elicit information regarding the offense, and that less intrusive measures were insufficient.[61] Finally, the warrant is only valid for thirty days.[62]

National security is one statutory ground for obtaining a warrant.[63] In addition, Title III provides for emergency situations during which monitors may listen to communications without judicial authorization.[64] The exception applies to instances where there is a threat of death, serious injury, or a national security threat.[65] In contrast to the BOP rule, Title III requires law enforcement to apply for a surveillance order within forty-eight hours after the interception.[66]

Despite these detailed and exacting requirements that both law enforcement and judges must fulfill before eavesdropping on communications, commentators have called for further protection of attorney-client communications under Title III. Weighing attorney-client confidentiality against the government interest in prosecuting corrupt attorneys, Professors Ronald Goldstock and Steven Chananie have called for even more judicial oversight. In particular, Goldstock and Chananie recommend a "focus on the issuance and execution of search warrants targeting law offices and attorneys' papers, as well as on electronic surveillance warrants of attorneys."[67] Professor Goldsmith and commentator Kathryn Balmforth have also called for further judicial supervision, suggesting daily review where law enforcement monitors privileged communications.[68] Goldsmith and Balmforth would also "amend Title III to require probable cause that both parties are involved in a crime before any potentially privileged communications may be monitored."[69] In addition, they would require that probable cause be proved independent of the privileged communications.[70]

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60 *Id.* § 2518(1)(c).

61 *See id.* § 2518(3).

62 *Id.* § 2518(5).

63 *See id.* § 2511(2)(f).

64 *See id.* § 2518(7).

65 *Id.* § 2518(7)(a).

66 *See id.* § 2518(7).

67 Ronald Goldstock & Steven Chananie, *"Criminal" Lawyers: The Use of Electronic Surveillance and Search Warrants in the Investigation and Prosecution of Attorneys Suspected of Criminal Wrongdoing*, 136 U. PA. L. REV. 1855, 1876–77 (1988).

68 *See* Goldsmith & Balmforth, *supra* note 43, at 947.

69 *Id.* at 945.

70 *Id.* Note how the Title III procedures of judicial review differ from those established in *Zolin*. *See* discussion *supra* Part II.B.

Law enforcement may also intrude upon attorney-client confidentiality by issuing grand jury subpoenas to lawyers. Although such government interference may occur without judicial approval, a subpoena is not as invasive or detrimental to the attorney-client relationship as is pervasive monitoring. Still, such practices no doubt threaten the privacy of the communications and thereby inhibit both the privilege's instrumental and personal purposes.

The Justice Department, in fact, recognized the attorney subpoenas' adverse effects on the attorney-client relationship and instituted internal guidelines regarding subpoena requests. Among its requirements, the guidelines maintain that law enforcement exhaust alternative means of obtaining the information sought, show that the need for a subpoena outweighs the harm done to the attorney-client relationship, narrowly tailor the subpoena, and refrain from seeking privileged information.[71] The guidelines, however, are merely aspirational and are not enforceable. Not surprisingly, commentators have called for prior judicial review of attorney subpoenas at either ex parte or adversary hearings.[72]

Practitioners have also suggested alternative means to preventing acts of terrorism through attorney-client communications. Immigration lawyer Michael Boyle, for example, suggested the possibility of removing attorneys from the case and explained that "prosecutors are always free to initiate criminal proceedings against attorneys where appropriate."[73] These options would ensure judicial review where lawyers abuse the attorney-client privilege, protect confidentiality, and permit the government "to investigate and prevent criminal activity without obstruction."[74]

Statutory and case law emphasize the critical role judges should play in preserving both the attorney-client privilege and public safety.

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71 *See* Stern & Hoffman, *supra* note 43, at 1818 & n.177. In addition, there are some professional responsibility limitations placed on prosecutorial conduct. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8(f) (2000).

> The prosecutor in a criminal case shall . . . not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes: (1) the information sought is not protected from disclosure by any applicable privilege; (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information.

Id.

72 *See* Stern & Hoffman, *supra* note 43, at 1820, 1831–34; *see also* GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 257–58 (1999) (describing ABA efforts to require prosecutors to obtain court approval before serving subpoenas on lawyers).

73 *DOJ Oversight Hearings*, *supra* note 8 (written testimony of Michael Boyle, American Immigration Lawyers Association), http://www.aila.org/newsroom/21ts1002.html (last visited Apr. 15, 2002).

74 *Id.*

Title III, in particular, is an available statute that could serve the government's goal of stopping imminent terrorist attacks furthered through otherwise privileged communications while at the same time better maintaining the confidentiality of the attorney-client relationship. Title III may be distinguished on grounds that it is largely a prosecutorial or investigative statute, whereas the new regulation seeks merely to stop acts of violence. The emergency provision of Title III, however, suggests that there are ways in which judicial approval could still be obtained, albeit some time after monitoring begins. Ultimately, law enforcement should not be the final authority on whether to pierce the attorney-client relationship's confidentiality. Available procedures exist, and further measures can be adopted, that would afford judges the opportunity to determine the applicability of privileges and possible exceptions.

III
THE BUREAU OF PRISONS RULE VIOLATES THE SIXTH AMENDMENT

A. Background on the Sixth Amendment

One scholar has characterized the Sixth Amendment as "the heartland of constitutional criminal procedure."[75] Professor Akhil Amar identifies the deep principles of the Amendment as "the protection of innocence and the pursuit of truth."[76] In particular, the BOP rule implicates the Sixth Amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[77]

The right to counsel guarantee may be viewed as upholding at least two different, albeit related, substantive and procedural values: privacy and fairness.[78] Whether government monitoring of attorney-client communications violates a person's Sixth Amendment rights largely depends on what interest a court believes is at stake.

In its Sixth Amendment analysis, the Supreme Court has often invoked the value of fairness as underpinning the right to counsel. In *Gideon v. Wainwright*,[79] the Court stated that only through the right to counsel could a defendant achieve even approximately equal legal

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75 Akhil Reed Amar, *Foreword: Sixth Amendment First Principles*, 84 GEO. L.J. 641, 641 (1996).

76 *Id.* at 642.

77 U.S. CONST. amend. VI.

78 *See* Weatherford v. Bursey, 429 U.S. 545, 562–63 (1977) (Marshall, J., dissenting); Gardner, *supra* note 32, at 398, 404–10 (discussing autonomy as another value underlying the Sixth Amendment).

79 372 U.S. 335 (1963).

footing against the state adversary.[80] Under this traditional Sixth Amendment analysis, the right to counsel supports "the procedural goal of trial fairness" by enabling lay defendants to navigate legal complexities against the State.[81] Coupled with due process, the right to counsel promotes the "integrity of the adversary system . . . [and] is undermined when the prosecution surreptitiously acquires information concerning the defense strategy and evidence (or lack of it), the defendant, or the defense counsel."[82]

Courts and commentators may also view the right to counsel from a privacy perspective.[83] A government intrusion arguably triggers Sixth Amendment privacy concerns. In *Geders v. United States*,[84] the Court held that an order preventing a defendant from speaking with his lawyer during a seventeen-hour overnight recess between his direct- and cross-examination violated his Sixth Amendment right to counsel.[85] The Court observed:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . [A defendant] is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him."[86]

Notably, the privacy analysis does not require a finding of prejudice as a result of government interference.[87]

Sixth Amendment interpretation becomes difficult because it is not always clear upon which principles courts analyze government intrusions of attorney-client confidentiality.[88] Even where courts assert privacy values in their analysis, courts may not find a constitutional violation absent prejudicial effect to the defendant. *United States v.*

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80 *See id.* at 344; *see also* Massiah v. United States, 377 U.S. 201, 206 (1964) (holding that deliberately eliciting statements from a defendant outside the presence of his lawyer violates the Sixth Amendment). In *Massiah*, the defendant had already been indicted and retained a lawyer. *See id.* at 201. Law enforcement wired an informant and monitored his initiated communications with the defendant. *See id.* at 202–04. The Court reversed the defendant's conviction and suppressed the statements. *See id.* at 206–07.

81 Gardner, *supra* note 32, at 404.

82 *Weatherford*, 429 U.S. at 562 (Marshall, J., dissenting).

83 *See DOJ Oversight Hearings*, *supra* note 8 (written testimony of Nadine Strossen, President, ACLU) (Dec. 4, 2001), http://judiciary.senate.gov/testimony.cfm?id=128&wit_id=83. "The essential bedrock of the Sixth Amendment right to the assistance of counsel is the ability to communicate privately with counsel." *Id*; *cf.* Gardner, *supra note* 32, at 410 (suggesting that privacy is not as clear an underlying value as are fairness and autonomy).

84 425 U.S. 80 (1976).

85 *Id.* at 91.

86 *Id.* at 88–89 (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932)) (alterations in original).

87 *Id.* at 92–93 (Marshall, J., concurring).

88 Arguably, the *Geders* quotation from *Powell*, *supra* note 86, indicates the difficulty in distinguishing privacy interests from fairness concerns.

Morrison[89] illustrates the merging of both principles in judicial analysis. The *Morrison* Court assumed, without deciding, that where law enforcement solicited a represented defendant's cooperation outside the presence of her lawyer, the government had in fact violated her right to counsel.[90] The Court, however, did not find any demonstrable prejudice to the defendant and would not approve dismissal as a remedy.[91] Thus, *Morrison* essentially reverted to the fairness principles of the Sixth Amendment.[92]

B. Applying the Sixth Amendment to Government Monitoring of Attorney-Client Communications

1. Weatherford v. Bursey

In its summary of the BOP rule, the Justice Department cites *Weatherford v. Bursey*[93] for the proposition that "the presence of a government informant during conversations between a defendant and his or her attorney may, but need not, impair the defendant's Sixth Amendment right to effective assistance of counsel."[94] Such an equivocal stance reveals the ambiguity of the Supreme Court's most in-depth discussion of governmental intrusions on the attorney-client relationship. The result has been a split between the circuits over what intrusion does, in fact, violate the Sixth Amendment. To further aggravate the uncertain state of the law, because government intrusions may take on many different forms which often have very different fact patterns, it is next to impossible to establish one rule.[95]

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89 449 U.S. 361 (1981).

90 *See id.* at 362–64.

91 *See id.* at 366–67.

92 *Morrison* raises the issue that a number of Sixth Amendment cases elicit—whether a right can really exist if there is no remedy. *See generally* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778–79 (1991).

> Few principles of the American constitutional tradition resonate more strongly than one stated in *Marbury v. Madison*: for every violation of a right, there must be a remedy. Yet *Marbury's* apparent promise of effective redress for all constitutional violations reflects a principle, not an ironclad rule, and its ideal is not always attained.

Id. at 1778. *See also* Note, *Government Intrusions into the Defense Camp: Undermining the Right to Counsel*, 97 HARV. L. REV. 1143, 1159–61 (1984) (summarizing courts' remedial choices in Sixth Amendment cases).

93 429 U.S. 545, 552–54 (1977).

94 Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062, 55,064 (Oct. 31, 2001) (to be codified at 28 C.F.R. pts. 500 & 501).

95 Government intrusions may entail informants, wiretapping, or electronic surveillance. The intrusions may take place in a home, a prison, an office, and may or may not involve attorney-client communication. The Supreme Court and the D.C. Circuit had addressed government intrusion prior to *Weatherford*. However, it was a matter of some dispute whether and to what extent the Sixth Amendment was implicated in the Supreme Court decisions. *See* O'Brien v. United States, 386 U.S. 345 (1967) (per curiam) (vacating judgment and remanding for a new trial after Solicitor General acknowledged electronic

In *Weatherford*, the defendant and an undercover agent were arrested for vandalizing a county Selective Service office. The undercover agent met with both the defendant and his counsel at trial planning sessions on two separate occasions in order to maintain his masquerade and avoid suspicion.[96] The agent then testified as a government witness. The district court found that the agent did not communicate anything to either his superiors or the prosecution regarding trial plans.[97] Due to the lack of such communication, the Court was unconvinced that the defendant had even made out a Sixth Amendment claim.[98]

Weatherford was apparently decided primarily on fairness grounds. The Court buttressed its holding by observing that "this is not a situation where the State's purpose was to learn what it could about the defendant's defense plans and the informant was instructed to intrude on the lawyer-client relationship or where the informant has assumed for himself that task and acted accordingly."[99]

The Court explicitly rejected the Fourth Circuit's conclusion that "'whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial.'"[100] Without both a communication of defense strategy and a deliberate intrusion, the Court refused to find a Sixth Amendment violation.

Although the Court found no violation, *Weatherford* offers suggestions of what might constitute a valid Sixth Amendment claim. The Court presented a series of hypothetical facts that would have made the defendant's case stronger:

> Had Weatherford testified at Bursey's trial as to the conversation between Bursey and [his lawyer]; had any of the State's evidence originated in these conversations; had those overheard conversations been used in any other way to the substantial detriment of Bursey; or even had the prosecution learned from Weatherford, an

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eavesdropping); Hoffa v. United States, 385 U.S. 293, 304–05 (1966) (finding no Sixth Amendment violation where informant sat in on conversations between defendant and his lawyers); Black v. United States, 385 U.S. 26, 27–29 (1966) (per curiam) (ordering a new trial where FBI agents had monitored attorney-client communications for purposes unrelated to instant case and communications were inadvertently transcribed and used by government lawyers in preparing case); Coplon v. United States, 191 F.2d 749, 760 (D.C. Cir. 1951) (explaining that government interception of telephone conversations between the accused and her lawyer would deny the accused her constitutional right to effective assistance of counsel).

96 *See Weatherford*, 429 U.S. at 547–48 (1977).

97 *See id.* at 548, 556.

98 *See id.* at 556.

99 *Id.* at 557.

100 *Id.* at 549, 551 (quoting Bursey v. Weatherford, 528 F.2d 483, 486 (4th Cir. 1975), *rev'd*, 429 U.S. 545 (1977)).

> undercover agent, the details of the Bursey-[lawyer] conversations . . . Bursey would have [had] a much stronger case.[101]

The Court also acknowledged that "[o]ne threat to the effective assistance of counsel posed by government interception of attorney-client communications lies in the inhibition of free exchanges between defendant and counsel because of the fear of being overheard."[102] In addition, the Court noted, the fear of an informant's presence "will inhibit attorney-client communication to a lesser degree than the fear that the government is monitoring those communications through electronic eavesdropping."[103]

In his dissent, Justice Marshall argued that both fairness and privacy concerns were implicated by the undercover agent's presence at attorney-client meetings. Marshall argued on adversarial fairness grounds that the defendant was disadvantaged by the fact that the undercover agent could testify using information he had learned from the privileged meetings.[104] The privacy "right by definition is invaded when a government agent attends meetings of the defense team at which defense plans are reviewed."[105]

Most significantly, Justice Marshall took issue with the majority's requirement that the defendant show that the interception was intentional and that the contents were disclosed to the prosecution.[106] It is doubtful that a prosecutor or an informant would admit either the intent to initially monitor confidential lawyer-client communications, or that there was any improper communication between government lawyers and investigative team members. Given "the precious constitutional rights at stake" and the insurmountable proof problem for a defendant, Marshall suggested "a prophylactic prohibition on all intrusions of this sort."[107]

Weatherford remains a widely cited case.[108] No doubt its ubiquity may have something to do with the fact that its conclusions are particularly malleable. Although the majority did not find a Sixth Amendment violation, *Weatherford* offers a near roadmap for defendants in making out Sixth Amendment claims. In addition, the vociferous dissent has served as persuasive reasoning for finding that government intrusion is a per se Sixth Amendment violation.

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101 *Id.* at 554.

102 *Id.* at 554–55 n.4.

103 *Id.* at 555 n.4.

104 *See id.* at 564 (Marshall, J., dissenting).

105 *Id.* (Marshall, J., dissenting).

106 *See id.* at 565 (Marshall, J., dissenting).

107 *Id.* (Marshall, J., dissenting).

108 *See, e.g.*, Robin Cheryl Miller, Annotation, *Propriety of Governmental Eavesdropping on Communications Between Accused and His Attorney*, 44 A.L.R. 4th 841 (1986).

2. *The Circuit Split*

The detritus of the *Weatherford* majority and dissenting opinions—the difficult search for and clarification of the fairness and privacy interests underlying the Sixth Amendment—animates the circuit courts' decisions. Circuits that emphasize the fairness component in their Sixth Amendment analysis tend to require a showing of prejudice. Such a showing may be in addition to requiring proof of government intent to intercept communications and disclosure of that communication.[109] Other courts may also require that the government intrusion be committed in bad faith.[110] Circuits that emphasize the privacy component may suggest a Sixth Amendment protection of the attorney-client privilege. These circuits tend to presume prejudice where the government intended to intrude and to communicate the information.[111]

United States v. Steele[112] demonstrates the circuits' emphasis on fairness. In that case the Sixth Circuit required a showing of prejudice as integral to finding a violation of the defendant's Sixth Amendment right to counsel.[113] The court found that an informant's presence in a jail cell along with defendants and a defense lawyer was to protect the informant's identity.[114] Thus, the court found that the government had no *intent* to intercept attorney-client confidences. In addition, the court found that whatever information the informant had overheard was not *disclosed* to the prosecution, nor was any of that information used as evidence against the defendants. In order to make out a constitutional violation, the Sixth Circuit held that in addition to the three criteria of *Weatherford*, the government also would have had to prejudice the defendant by its actions.[115]

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109 *See, e.g.*, United States v. Glover, 596 F.2d 857, 863–64 (9th Cir. 1979) (finding that despite intentional intrusion by the government, evidence showing prejudicial effect against defendant as a result of interference with attorney-client communication was required to overturn a conviction).

110 *See, e.g.*, United States v. King, 753 F.2d 1, 1–3 (1st Cir. 1985) (finding no prejudice and thus no Sixth Amendment violation, and finding no egregious conduct by federal law enforcement or the U.S. Attorney, even though state police had given some intercepted information to federal law officers). Some have argued that the BOP rule constitutes egregious government action. For example, California criminal defense attorney Gigi Gordon believes that the government is using the September 11 attacks as a pretext in bad faith in order "'to carve out this gigantic exception' to the attorney-client privilege." Beth Shuster, *A Question of Confidentiality*, L.A. TIMES, Dec. 7, 2001, at B2.

111 *See, e.g.*, Shillinger v. Haworth, 70 F.3d 1132, 1136–38 (10th Cir. 1995) (upholding district court's determination that defendant's Sixth Amendment rights were violated without requiring a showing of prejudice where deputy sheriff attended lawyer-client meetings and disclosed some of the information obtained to the prosecutor).

112 727 F.2d 580 (6th Cir. 1984).

113 *See id.* at 586.

114 *See id.*

115 *See id.* at 585–87.

United States v. Levy[116] represents the circuits' privacy approach. There, a lawyer represented two co-defendants on narcotics charges. The lawyer, however, was not made aware that one of the defendants was an informant until after he had met with both clients together.[117] The prosecution then learned from the informant that the defense strategy was to focus on the credibility of a number of government witnesses.[118] Although law enforcement *intended* to intercept attorney-client confidences and *disclosed* that information to the prosecution, the district court also required that the defendant show the intrusion to be "pertinent and prejudicial."[119] The Third Circuit decried the lower court's standard as speculative and unfair to the defendant.[120]

Although the Third Circuit also found the government intrusion prejudicial, the court opined that such a test would require unusually candid disclosure by prosecutors. A prejudice test would also require judges to conduct difficult mini-trials on the subject—ones that would become all the more cumbersome the later in the trial the interception was disclosed.[121]

The court also rejected a prejudice test constructed along Fourth Amendment analysis lines which would only find prejudice when the government would not have known the information or acquired the evidence absent the interception and disclosure.[122] The Third Circuit would not accept a more severe prejudice test because, it held, the Sixth Amendment is predicated on "the presumed inability of a defendant to make informed choices about the preparation and conduct of his defense."[123] The court then appeared to rely chiefly on a privacy value understanding of the Sixth Amendment:

> Free two-way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful. The purpose of the attorney-client privilege is inextricably linked to the very integrity and accuracy of the fact finding process itself. Even guilty individuals are entitled to be advised of strategies for their defense. In order for the adversary system to function properly, any advice received as a result of the defendant's disclosure to counsel must be insulated from the government. No severe definition of prejudice, such as the fruit-of-the-poisonous-tree evidentiary test in the fourth amendment area, could accommodate the broader sixth amendment policies. We think that the inquiry into prejudice must stop at the point where

116 577 F.2d 200 (3d Cir. 1978).
117 *See id.* at 202–03.
118 *See id.* at 204–05.
119 *Id.* at 208 (citation omitted).
120 *See id.*
121 *See id.*
122 *See id.* at 208–09.
123 *Id.* at 209.

> attorney-client confidences are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case. Any other rule would disturb the balance implicit in the adversary system and thus would jeopardize the very process by which guilt and innocence are determined in our society.[124]

The Third Circuit's understanding of attorney-client confidentiality, however, is not disturbed by the government intrusion itself. Rather, it is the communication of those confidences to the investigating and prosecuting agencies that would constitute a violation of the Sixth Amendment right to counsel.

3. *The BOP Rule Violates Fairness and Privacy Interests*

Virtually all of the government intrusion cases address invasions of the defense at a stage after the act has occurred. Most of these surveillance or informant cases are done surreptitiously and are accidentally divulged at some later point. However, the BOP rule does not contemplate covert surveillance or eavesdropping. In fact, the BOP rule requires that the BOP Director inform both inmate and lawyer of the monitoring.[125] The antecedent disclosure appears well-intentioned and seems to suggest a good-faith effort to forewarn lawyer and defendant, as well as add credence to the BOP rule's terrorist deterrence purposes. The warning, however, presents the problem of chilling speech—a dilemma not largely addressed by the circuits, but one that is alluded to by the *Weatherford* Court. Judge Posner also directly addressed the problem in the recent case *United States v. DiDomenico.*[126]

The *Weatherford* Court observed that government interception of attorney-client confidences could result "in the inhibition of free exchanges between defendant and counsel because of the fear of being overheard."[127] Unfortunately, the Court was unclear as to whether this was a determinative factor, but diminished its significance in the instant case because there had been little reason for the lawyer and the defendant to have had such a fear and thus been so inhibited. Under the BOP rule, however, lawyer and defendant have every reason to fear being overheard. In fact, they are told they will be listened to.[128]

In *DiDomenico,* defendants were charged with conspiracy in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO). Prior to the trial, a defense attorney learned that the room

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124 *Id.*

125 *See* Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062, 55,066 (Oct. 31, 2001) (to be codified at 28 C.F.R. pts. 500 & 501).

126 78 F.3d 294 (7th Cir. 1996).

127 429 U.S. 545, 555 n.4 (1977).

128 *See* Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. at 55,066.

in which he had met with his client had been bugged, and that a tape recording was made of the conversations.[129] The defendants sought an evidentiary hearing to determine the severity of the bugging and whether the prosecution had obtained information about the defense. The government argued that no hearing was necessary because the defendant had not shown any prejudice.[130] There was "no evidence that the prosecution was privy to the bugging or, if it was, used the information gleaned from it to undermine the defense or if it did caused innocent people to be convicted of heinous crimes."[131] In an opinion written by Chief Judge Posner, the Seventh Circuit rejected this reasoning, explaining that denial of a criminal defendant's fundamental rights is reversible error even if completely harmless.[132]

With remarkable similarity to the BOP rule, the Seventh Circuit described a hypothetical rule to illustrate its view of the Sixth Amendment right to counsel's underlying privacy principles:

> The government adopts and announces a policy of taping *all* conversations between criminal defendants and their lawyers. It does not turn the tapes over to the prosecutors. It merely stores them in the National Archives. The government's lawyer took the position that none of the defendants could complain about such conduct because none could be harmed by it, provided the prosecutors never got their hands on the tapes. We are inclined to disagree . . . . The hypothetical practice that we have described would, because of its pervasiveness and publicity, greatly undermine the freedom of communication between defendants and their lawyers and with it the efficacy of the right to counsel, because knowledge that a permanent record was being made of the conversations between the defendants and their lawyers would make the defendants reluctant to make candid disclosures. (Totalitarian-style continuous surveillance must surely be a great inhibitor of communication.) And yet it would be impossible in any given case to show that the outcome had been changed by the practice.[133]

The Seventh Circuit distinguished its hypothetical from instances of "ad hoc governmental intrusion" (citing *Weatherford* as an example) where it is unlikely attorney-client communications would be disturbed.[134] The court suggested that the bugging of the room where lawyers and defendants met in the instant case could have chilled further attorney-client communication because of the legitimate fear of being overheard.[135]

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129 *See DiDomenico*, 78 F.3d at 298.
130 *See id.* at 299.
131 *Id.*
132 *See id.*
133 *Id.*
134 *Id.* at 299–300.
135 *See id.* at 300.

The BOP rule's notice of monitoring will similarly chill attorney-client communication. Indeed, it is likely "the mere specter of monitoring will complicate the already difficult endeavor of communicating effectively with incarcerated clients and will chill the delicate relationship between the accused and his advocate."[136] Thus, an essential prerequisite for effective representation, "full and frank disclosure" between attorney and client, will be precluded.[137]

Chief Judge Posner's example, however, is narrowly drawn in order to demonstrate the importance of the privacy interest in the right to counsel. It remains unclear whether there exists some government or state interest that would justify a violation of the Sixth Amendment. As *Weatherford* also noted, "[o]ur cases . . . have recognized the unfortunate necessity of undercover work and the value it often is to effective law enforcement."[138]

In its summary of the BOP rule, the Justice Department states that "a legitimate law enforcement interest in monitoring such conversations" is "the prevention of acts of violence or terrorism."[139] It is hard to imagine a more compelling state interest than preventing terrorist attacks. However, as one commentator has observed,

> It is precisely when the government can posit a legitimate reason for the intrusion that courts should be most watchful; they should require the prosecutor to demonstrate that no alternatives less destructive of the defendant's rights were available and that all precautions were taken to shield the government from defense strategy information.[140]

Given the BOP rule's intrusive effects on a defendant's Sixth Amendment right to counsel, the BOP rule may be criticized as having ignored other available procedures to lessen the intrusion.

The BOP rule does contemplate some procedures in order to safeguard the defendant's right to counsel. In particular, the procedures involve "the use of a taint team and the building of a firewall [that] will ensure that the communications which fit under the protection of the attorney-client privilege will never be revealed to prosecutors and investigators."[141] The rule summary cites cases approving similar procedures. In none of those cases, however, was monitoring

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136 *DOJ Oversight Hearings*, *supra* note 8 (written testimony of Gerald H. Goldstein, National Association of Criminal Defense Lawyers) (Dec. 4, 2001), http://judiciary.senate.gov/testimony.cfm?id=128&wit_id=82.

137 *Id.* (written testimony of Nadine Strossen, President, ACLU) (Dec. 4, 2001), http://judiciary.senate.gov/testimony.cfm?id=128&wit_id=83.

138 429 U.S. 545, 557 (1977).

139 Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062, 55,064 (Oct. 31, 2001) (to be codified at 28 C.F.R. pts. 500 & 501).

140 Note, *supra* note 92, at 1157.

141 Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. at 55,064.

done in a systematic manner nor was the court completely sidestepped. In addition, the cases did not involve instances in which the attorney and client should have had reason to fear being overheard. Thus, the freedom of their communications was not chilled.

The rule summary cites *National City Trading Corp. v. United States*[142] as supporting its procedures. First, the case is not directly on point because it was decided entirely on Fourth Amendment grounds.[143] Second, the case involved the search of an office floor that included both the defendant's and the lawyer's individual offices. However, the police had a warrant for their search that was issued by a magistrate. The Second Circuit upheld the warrant, finding that it was supported with probable cause and sufficient specificity. In addition, the police did not conduct their search until the lawyer was present.[144] The role of a judge in this search distinguishes the case from the BOP rule.

The Justice Department also cites *United States v. Noriega*[145] as an example of similar screening procedures used in wiretap surveillance. In *Noriega* the prison had a policy of recording all inmate phone conversations, except for discussions with their lawyers.[146] A judge approved a subpoena duces tecum served upon the prison custodian of records for copies of a number of the defendant's conversations.[147] Prison officials accidentally recorded conversations between the defendant and his lawyer.[148] These conversations were obtained through the subpoena and then mistakenly reduced to memorandum form and presented to the prosecution.[149] The court applied the analysis of *United States v Steele*[150] in arriving at its conclusion that no Sixth Amendment right to counsel had been violated.[151]

Noriega can also be distinguished from the rule it is cited to support. First, the discovery of governmental intrusion occurred after the attorney-client conversation had taken place.[152] Thus the freedom of attorney and client to communicate was not likely inhibited. Second, in *Noriega* a judge approved the subpoenas of the conversations.[153] Thus, a judge was involved in determining the propriety of obtaining certain conversations. It is unclear whether the judge would have ap-

142 635 F.2d 1020, 1026–27 (2d Cir. 1980).
143 *See id.*
144 *See id.* at 1024–27.
145 764 F. Supp. 1480 (S.D. Fla. 1991).
146 *Id.* at 1482–83.
147 *Id.* at 1483.
148 *Id.* at 1484.
149 *Id.*
150 727 F.2d 580 (6th Cir. 1984); *see supra* notes 112–15 and accompanying text.
151 *See Noriega*, 764 F. Supp. at 1489.
152 *See id.* at 1484.
153 *See id.* at 1483.

proved the subpoenas had anyone been aware that the recordings contained attorney-client communications. Finally, there were no systematic procedures in place to record all attorney-client communications.[154] Rather, the recording was done inadvertently. The district court noted that the screening procedures suggested that the intrusion was unintentional and served as a basis for avoiding a dismissal of the indictment.[155]

C. The Necessity of Court Involvement

The BOP rule should be revised. The Justice Department must heed the *Weatherford* and *DiDomenico* Sixth Amendment concerns about chilling attorney-client communications. In honoring the *Weatherford* dissent's call for prophylactic measures to guard the Sixth Amendment right to counsel, the most obvious measure that might cure the BOP rule would be a requirement that a judge approve the monitoring of certain attorney-client communications.

Given the Justice Department's recent plans to focus FBI efforts on thwarting acts of terrorism, rather than on prosecuting cases, it is unclear whether a valid separation can exist now between prosecution, investigation, monitoring, and other ostensibly preventative law enforcement efforts.[156] Moreover, court involvement should not be relegated to a post-monitoring stage, merely for the purpose of determining disclosure to investigators and prosecutors.

Indeed, as cases have made clear, it is all too difficult to determine if, in fact, overzealous prosecutors have or have not already obtained such information. It would seem logical in an area of great constitutional significance, and in particular one that protects defendants from the government's powers, that a judge, and not the government itself, should determine whether the circumstances warrant intrusion of the Sixth Amendment. Moreover, a judge, and not the government, should determine whether prejudice would occur, and thus whether a defendant's Sixth Amendment rights would be violated.

Critics argue that obtaining such court approval would take too long,[157] but such criticism seems dubious. Warrants issue at all times of the night and have hardly slowed down the speed of law enforce-

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154 *See id.* at 1482–83.

155 *See id.* at 1489.

156 *See* McGee, *supra* note 2.

157 *See, e.g., DOJ Oversight Hearings*, *supra* note 8 (written testimony of Victoria Toensing, former Deputy Assistant Attorney General) (Dec. 4, 2001), http://judiciary.senate.gov/testimony.cfm?id=128&wit_id=84. In her testimony before the Senate Judiciary Committee, Toensing suggested that a Foreign Intelligence Surveillance Act (FISA) court could be created "to review the finding of reasonable suspicion to believe the inmate may use communications to further acts of terrorism. No matter what judicial-type body is

ment and prosecutions. Indeed, in times of emergency, perhaps such monitoring should be permitted, contingent on obtaining court authorization within a specified time limit.

IV
THE ROLE OF PROFESSIONAL RESPONSIBILITY RULES

The BOP rule presents ethical dilemmas for defense lawyers as well. As Irwin Schwartz, President of the National Association of Criminal Defense Lawyers (NACDL) has pointed out, under the *Model Code of Professional Responsibility*[158] a lawyer "may not talk to [his] client at all about something confidential if there's a third party listening. So if there's a possibility that a third party is listening and [the lawyer] can't talk to [his] client, he's stripped of his right to legal representation."[159]

Although much of the problem with the BOP rule involves its notification of the monitoring to lawyer and client, there are secretive portions of the BOP rule that also implicate the *Model Code of Professional Responsibility*. The BOP rule appears to allow some surveillance, provided the BOP obtains prior court authorization.[160] The uncertainty of the attorney-client privilege would also bar lawyers from communicating with their clients.[161] John Wesley Hall, Jr., chairman of the NACDL ethics committee, observed that the rule limits a lawyer's options:

> You can't talk to a client if you can't guarantee privilege, so you have to file a motion with the court and get the government to put up or shut up . . . . But of course they don't have to tell you [when they have a court order allowing them to keep their surveillance secret].[162]

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used, the standard should not be the more onerous probable cause of Title III wiretap." *Id.*

158 *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 4-1, 4-2, 4-4 (1981); MODEL RULES OF PROF'L CONDUCT R. 1.6 (2000).

159 *Weekend All Things Considered* (NPR radio broadcast, Dec. 8, 2001); *see also* Steven Kimelman, *Protecting Privilege*, NAT'L L.J., Dec. 3, 2001, at A21 ("I seriously doubt whether an attorney could even ethically undertake to represent someone with these restrictions in place.").

It is also unlikely any defendant will talk upon notification, so the rules will be self-defeating in some respects. *See* Shuster, *supra* note 110. Paul L. Hoffman, a California civil rights lawyer was quoted as observing, "I just can't imagine that lawyers and clients could have the same kinds of conversations if they know that someone's going to listen to it . . . . You're never going to get anyone . . . who's going to talk about future criminal activity. It's completely preposterous." *Id.*

160 *See* Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062, 55,066 (Oct. 31, 2001) (to be codified at 28 C.F.R. pts. 500 & 501).

161 *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 4-1, 4-2, 4-4, 4-5 (1981); David E. Rovella, *Ashcroft Rule Puts Defenders in a Bind*, NAT'L L.J., Dec. 3, 2001, at A1.

162 Rovella, *supra* note 161.

Professor Jonathan Turley has argued that it would be unethical for a defense lawyer not to challenge government monitoring. But if the challenge did not succeed, the lawyer could ethically continue his representation.[163]

In many respects, the BOP rule is unnecessary when the lawyer is an ethical practitioner.[164] Under Model Rule 1.2(d) "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."[165] Model Rule 1.6(b)(1) further states that "[a] lawyer may reveal such information to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."[166]

The *Model Rules of Professional Conduct* do not, however, impose a mandatory obligation on lawyers to disclose information—the rules are simply discretionary. More importantly, the rules only address instances in which the lawyer learns of prospective client crimes. The rules do not include situations in which the lawyer obtains information from his client relating to life threatening acts of third persons.[167] Professor Roger Cramton and commentator Lori Knowles have suggested revising Model Rule 1.6 to permit disclosure "to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm."[168] This revision would no doubt alleviate some of the Justice Department's concerns with respect to some lawyers' ethical reasons for nondisclosure.

No doubt the Justice Department would also prefer that professional responsibility rules make disclosure mandatory in the above instances. Presently only eleven states' ethics codes require lawyers to disclose a client's intent to commit a crime that would likely result in death or substantial injury.[169] However, such a requirement ignores the "variety and uniqueness of the circumstances that must be consid-

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163 *See id.* The ethical obligation to challenge is presumably based upon *Model Rules of Professional Conduct Rule* 1.3 cmt. 1 (2000). The comment explains:

> A lawyer should pursue a matter on behalf of a client despite opposition . . . and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

Id.

164 Rules of professional responsibility may not, of course, address the unwitting lawyer who is engaged as merely an unaware mouthpiece. Also, lawyers who act as participants in acts of terrorism are beyond the scope of the ethics rules.

165 MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2000).

166 *Id.* R. 1.6(b)(1).

167 *See* Cramton & Knowles, *supra* note 37, at 106–17.

168 *Id.* at 124.

169 *See* THOMAS D. MORGAN & RONALD D. ROTUNDA, 2001 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 136–46 (2001).

ered" when lawyers learn certain information from their clients.[170] A blanket rule would ignore the facts of each particular case. Despite some lawyers' notable deviations from ethical and moral behavior,[171] the profession and society will be better served if exceptions to confidentiality are phrased in discretionary language.

CONCLUSION

The attorney-client privilege and the Sixth Amendment embody principles of both privacy and fairness. In an adversarial system, these principles are all the more important—particularly when a defendant faces the state, an already imposing and powerful entity but one that is even more fearsome at times of war. Prosecutors should not be given carte blanche to do away with defendants' rights. Even if the government erects a wall to keep information from the prosecution, fairness and privacy concerns are still implicated. Defendants will not disclose sufficient information to their lawyers, feeling inhibited by the monitoring, and thus will not be on adequate footing with the government. Fairness and privacy interests are paramount, and should not be invaded by the government without court approval.

170 *See* Cramton & Knowles, *supra* note 37, at 119.

171 *See, e.g.*, Spaulding v. Zimmerman, 116 N.W.2d 704, 710 (Minn. 1962) (setting aside a settlement agreement because the defense lawyer did not disclose life threatening medical examination results to the plaintiff before entering into the agreement); *see also* HAZARD ET AL., *supra* note 72, at 310–33 (discussing the lawyer's duty to warn, duty of confidentiality, and related concerns).