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**FEAR OF A BLACKENED PLANET: PRESSURED BY THE WAR ON
TERROR, COURTS IGNORE THE EROSION OF THE ATTORNEY-
CLIENT PRIVILEGE AND EFFECTIVE ASSISTANCE OF COUNSEL
IN 28 C.F.R § 501.3(d) CASES**

Chris Ford

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CASES**

Chris Ford*

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*They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.*¹

I. Introduction

In the fear-drenched weeks that followed the September 11, 2001 (9/11) terrorist attacks on American soil, a timid Congress hastily passed laws expanding government surveillance and incursions into privacy,² and contemplated other, more intrusive measures.³ Meanwhile, the U.S.

¹ BENJAMIN FRANKLIN, HISTORICAL REVIEW OF PENNSYLVANIA (1759), in JOHN BARTLETT, FAMILIAR QUOTATIONS 422 (14th ed. 1968); Patricia Mell, *Big Brother at the Door: Balancing National Security with Privacy Under the USA Patriot Act*, 80 DENV. U.L. REV. 375, 426–27 n.409 (quoting BENJAMIN FRANKLIN, HISTORICAL REVIEW OF PENNSYLVANIA (1759), in JOHN BARTLETT, FAMILIAR QUOTATIONS 310 (Justin Kaplin ed., 16th ed. 1992)).

² Foremost among these measures is the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, or USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter Patriot Act]; ELAINE CASSEL, THE WAR ON CIVIL LIBERTIES: HOW BUSH AND ASHCROFT HAVE DISMANTLED THE BILL OF RIGHTS 20 (2004). The Patriot Act was passed "in haste, with virtually no congressional debate and little commentary in the press. . . ." *Id.* The House of Representatives passed the Patriot Act on a 357–66 vote, while the Senate tally was 98–1; President George W. Bush signed it into law on October 26, 2001. *Id.* at 17. The Patriot Act increases the scope of personal information that the government can access while reducing independent judicial oversight, and it creates a "systematic circumvention of established doctrine and procedures guarding against unreasonable government intrusion."; Mell, *supra* note 1, at 379, 426; HERBERT N. FOERSTEL, REFUGE OF A SCOUNDREL: THE PATRIOT ACT IN LIBRARIES 69 (2004). The Patriot Act:

has had a more disastrous effect on personal privacy than any other statute in American history. . . . The most dangerous provisions of the Patriot Act are those that merge foreign intelligence procedures with criminal law enforcement, bringing the CIA into domestic surveillance and allowing the FBI to conduct criminal investigations under the lower legal standards originally intended only for foreign intelligence activities. Indeed, the smoke screen of anti-terrorism has obscured the fact that the Patriot Act altered the rules of criminal law enforcement more than it assisted the war on terrorism.

Id.

³ Mark G. Young, *What Big Eyes and Ears You Have!: A New Regime for Covert Governmental Surveillance*, 70 FORDHAM L. REV. 1017, 1063 (2001). Advocates and even legislators on both sides of the political aisle were "[a]larmed by [the] haste and lack of thoughtful deliberation" that attended the initial flurry of anti-terrorism legislation immediately following 9/11 and challenged the wisdom, motive

Department of Justice (DOJ) altered Bureau of Prisons regulations to allow government monitoring of attorney-client communications.⁴ Under these regulations, where the attorney general has reasonable suspicion to believe that an inmate may use communications with his attorney to "further or facilitate acts of terrorism," the government may monitor or review communications between the inmate and the attorney and attorney's agents.⁵ These communications are traditionally covered by the attorney-client privilege.⁶ Under this scenario, the government would set up a "taint team" to monitor the attorney-client communication.⁷ The taint team would be kept separate from the prosecution and would be prohibited from disclosing the monitored information unless it determined that acts of "terrorism or violence" are imminent or a federal judge approved such disclosure.⁸

Monitoring communications between prisoners and outsiders has been allowed for "security" purposes for some time.⁹ But even in prison, attorney-client conversations have been protected, because prisoners have an expectation of privacy when conversing with their attorneys.¹⁰ The Bureau of Prisons regulation promulgated by the DOJ under former Attorney General John Ashcroft appears to have altered this standard. The regulation has been attacked in legal literature. The regulation has been attacked in legal literature as, *inter alia*, an assault on the Sixth Amendment right to effective assistance of counsel as well as an erosion of the traditional attorney-client privilege, but there has been little judicial analysis so far.¹¹ One case in which the defendant challenged the regulation was thrown out for lack of standing.¹² In a second case, involving alleged terrorists detained at a U.S. military base at Guantánamo Bay, Cuba, the court found that the government's requirement of real-time monitoring of attorney-client communications and review of legal mail "impermissibly burden the

and constitutionality of certain proposals. *Id.*; Editorial, *At What Price Security*, NEWSDAY, Nov. 25, 2001, at B02. "[B]efore the ink was dry on [the post 9/11] sweeping expansion of law enforcement power, the administration unilaterally pushed the envelope further with orders for military tribunals, detentions and dragnets, and eavesdropping on conversations between attorneys and their clients." *Id.*; Associated Press, *Taking liberties; Greater Access Sought to Social Security Data*, SEATTLE TIMES, Nov. 8, 2001, at A3. "AN ANTI-TERRORISM LAW . . . allows the FBI to shift its focus from solving crimes to gathering domestic intelligence. The Treasury Department has been charged with putting together a financial-intelligence-gathering system. And the CIA now has the authority to influence the FBI's domestic surveillance." *Id.*

⁴ 28 C.F.R. § 501.3 (2005)

⁵ *Id.*

⁶ 28 C.F.R. § 501.3(d) (2005)

⁷ 28 C.F.R. § 501.3(d)(3) (2005); 66 Fed Reg. 55,062, 55,064 (2001).

⁸ 28 C.F.R. § 501.3(d)(3) (2005); 66 Fed Reg. 55,062, 55,064 (containing former Attorney

General Ashcroft's comments regarding 28 C.F.R. §§ 500, 501).

⁹ *United States v. Paul*, 614 F.2d 115, 116 n.2 (6th Cir. 1980).

¹⁰ *United States v. Van Poyck*, 77 F.3d 285, 291 n.9 (9th Cir. 1996).

¹¹ See *infra* Part IV (discussing the lack of judicial analysis and the resulting court split).

¹² *Al-Owhali v. Ashcroft*, 279 F. Supp. 2d 13 (D.D.C. 2003).

attorney-client relationship and abrogate the attendant attorney-client privilege."¹³ Even this court, however, so severely restricts the inmate's access to counsel as to raise Sixth Amendment concerns. For example, each inmate may confer with only one attorney, and that attorney must treat all information relating to such conference as confidential, and is not even allowed to share the information with "law firm colleagues or support staff" without government review.¹⁴ It seems inconceivable that a defendant, accused of so serious a crime as an act of terrorism, can receive a constitutionally adequate defense from just one lawyer who is unable to confer with other counsel or even benefit from so basic a service as support staffing.

Because future terrorist attacks could better be prevented through a more sensible and peaceable foreign policy than the United States currently is pursuing, this Article urges against the erosion of the attorney-client privilege occasioned by war-on-terrorism policy-making and calls on courts to defend this all-important privilege. Part II elucidates some historical points of interest relating to the privilege and the Sixth Amendment right to effective assistance of counsel. This part also takes note of the increasing level of secrecy shrouding government and of court responses to government attempts to hold legal hearings behind close doors. Part III examines the provisions of 28 C.F.R. § 501.3 relevant to government monitoring of inmate-attorney interactions, offering a critique of the government's legal justifications for the provisions. Part IV reviews the few existing court cases that address these provisions, finding that one court has sought to protect the attorney-client privilege, but possibly only at the expense of the effectiveness of counsel available to the defendant. Finally, Part V concludes that the Constitution commends strong protection of the right to effective assistance of counsel and the privilege of confidentiality between attorney and client, and courts should not stand by while the government doggedly chips away at these longstanding protections.

II. Background

The war on terror, and its inexorable link with the nation's enormous appetite for oil,¹⁵ has tainted the nation's appearance in the court of world opinion with blood from Iraqi battlefields and prisons. It has also propelled a

¹³ Al Odah v. United States, 346 F. Supp. 2d 1, 14–15 (D.D.C. 2004).

¹⁴ *Id.* at 13 (emphasis added).

¹⁵ Jim Mullins, *Follow the Pipeline*, S. FL. SUN-SENTINEL, Dec. 28, 2004, at 19A. "It's now apparent that the Bush administration's Afghan invasion had two purposes, one laudable and unfinished—the destruction of al-Qaida—and the other for the site of a Central Asian pipeline." *Id.*; David Hale, *The Prohibitive Cost of a New US Imperialism*, BUSINESS TIMES SINGAPORE, Apr. 4, 2003.

general erosion in the United States of civil liberties and, specifically, of the attorney-client privilege.¹⁶ "Obvious[ly], the 'war on terror' invasion of Iraq was based on fabrication rather than the reality of consolidating U.S. control of Middle Eastern oil."¹⁷ Following the energy crunch of the 1970s, energy efficiency increased and oil consumption dropped as a result of the use of more fuel-thrifty automobiles, better home insulation, and improved appliances and manufacturing techniques.¹⁸ While energy consumption relative to economic output continued its decline even after the incentive for fuel efficiency evaporated in the face of \$10-per-barrel oil in the late 1990s, the transportation sector has suffered from the "relentless promotion of high-profit sport utility vehicles," increasing the demand for oil.¹⁹ Most alarming is that United States oil consumption continues to escalate as domestic production has hit a 50-year low.²⁰ The result is that is that the nation relies on foreign sources for 58 percent of its petroleum supply.²¹ Much of this oil comes from unstable regions such as the Persian Gulf and South America.²²

In a geopolitical sense, the Bush strategy in Iraq has worked against U.S. interests, because sabotage of Iraqi oil fields has spread to Saudi Arabia,

¹⁶ Luke Peter, *The Phony Campaign Begins*, THE PRESS (Christchurch, New Zealand), Jan. 22, 2005, at 11. New Zealand Green Party leader links "the erosion of human rights [with] an oilfield-inspired war on terror." *Id.*

¹⁷ Mullins, *supra* note 14.

¹⁸ Russell Sadler, *What Energy Crisis*, DENVER POST, May 13, 2001, at E-05 ("From 1973 to 2000, the U.S. economy became 42 percent less energy 'intense,' according to the Department of Energy's monthly review. This jargon simply means it took less energy to produce the same amount of goods and services.")

¹⁹ Michael Hiltzik, *We're All to Blame for Pump Prices*, L.A. TIMES, Sept. 8, 2005, at C1. "You want to know why our oil consumption is out of control? Take a look at the 3 ½-ton vehicular pachyderm blasting down the freeway next to you with two passengers inside, getting seven miles to the gallon. . . . According to the Union of Concerned Scientists, the average fuel economy of new vehicles today is the lowest it has been since 1986." *Id.*; Sadler, *supra* note 18; Hale, *supra* note 15; Paul Krugman, *Editorial: The Oil Crunch*, N.Y. TIMES, May 7, 2004, at 31; *see also* Editorial, *End of Cheap Oil is a Blessing*, TORONTO STAR, Apr. 13, 2005, at A23 [hereinafter Editorial] ("Artificially low gas prices have long stifled conservation efforts and alternative technologies, while fuelling a boom in vehicles so grotesquely inefficient that . . . our children will someday marvel at them in a museum.")

²⁰ U.S. ENERGY INFORMATION ADMINISTRATION, Country Analysis Briefs: United States of America, <http://www.eia.doe.gov/emeu/cabs/Usa/Oil.html> (last visited Jan. 15, 2006); Hiltzik, *supra* note 19. The U.S. Senate in 1990 considered increasing the Corporate Average Fuel Economy (CAFE) standards required of automakers to an extent that would currently save the nation enough oil to cut imports by about one quarter, but "[t]he idea flopped." *Id.* CAFE was instituted in 1975, two years after the first Arab oil shock, when the average fuel economy for cars was 13.5 miles per gallon (mpg) and for trucks 11.6 mpg. *Id.* The CAFE standards required fuel economy for cars to reach 27.5 mpg after several years but "light trucks were given a pass, on the reasoning that they were only 20% of the market anyway. Refashioned as SUVs, they've become 50% of the market." *Id.*

²¹ U.S. ENERGY INFORMATION ADMINISTRATION, COUNTRY ANALYSIS BRIEFS: UNITED STATES OF AMERICA, <http://www.eia.doe.gov/emeu/cabs/Usa/Oil.html> (last visited Jan. 15, 2006).

²² *Id.*

raising fears or radicalization throughout the Middle East.²³ Meanwhile, however short-sighted the promotion of gas-guzzling vehicles, the greater near-future threat to economic (and political) stability are oil-gulping developing nations that put pressure on demand, and thus prices, for petroleum.²⁴ "We can neither drill nor conquer our way out of this problem."²⁵ Yet the Bush Administration, "quixotic[ally]," proposes to do just that.²⁶ Ironically, U.S. taxpayers shoulder the cost—and the risk—borne by the oil industry, pouring billions in tax subsidies a year into this already mature industry.²⁷ This heavily subsidized cheap power has "reaped incredible economic and environmental costs that now may be more expensive than the power they provide."²⁸ Considering that the current Administration's oil-reliant energy policy underlies its "war on terror" efforts, the question arises whether there would be a need to be involved in the Middle East had the United States taken the many billions of dollars that it poured into the dying oil industry and instead had invested the money in renewable energy, such as solar and wind power. Though today's politicians will never admit it, widespread reliance on renewable or green energy is entirely realistic in the not-so-distant future—even an oil company recently admitted as much.²⁹ The renewable energy sector is now the fastest growing in the world.³⁰ The civil liberties of Americans and the security of the nation no doubt would be more reliably ensured had U.S. leaders concluded earlier

²³ Krugman, *supra* note 19. "It has been interesting to watch people who lauded George Bush's leadership in the war on terror come to the belated realization that Mr. Bush has given Osama bin Laden exactly what he wanted." *Id.*

²⁴ *Id.* In the days preceding Labor Day weekend, 2005, gasoline prices surpassed the all-time high that Americans had paid at the pump. *Id.*; James F. Peltz et al., *Bush Moves to Avert Gas Shortages*, L.A. TIMES, Sept. 1, 2005, at A16. In the wake of Hurricane Katrina, which caused a reduction in oil production as it slammed into the Gulf Coast of the United States on August 29, 2005, gas prices soared past \$3 per gallon in many parts of the country. *Id.* Once gas prices have topped \$3.05 per gallon, they surpass the inflation-adjusted price of gas in March 1981 following the Iranian revolution, which then stood at \$1.417 per gallon and represented the previous all-time high. *Id.*

²⁵ Krugman, *supra* note 19.

²⁶ Pete Morton, *Energy in Mind; Bush Administration Energy Bill a Costly Assault on Environment*, ROCKY MOUNTAIN NEWS, Jan. 19, 2004, at 12C. Administration supported a "myopic energy bill that [would] cost taxpayers \$19 billion in subsidies and tax breaks for the oil and gas industries and encourage air and water pollution while sacrificing our public lands." *Id.*

²⁷ Mark Detsky, *The Global Light: An Analysis of International and Local Developments in the Solar Electric Industry and Their Lessons for United States Energy Policy*, 14 COLO. J. INT'L ENVTL. L. & POL'Y 301, 322 (2003). "[T]ired fossil fuel industries are paid at every stage of the economic process, to the point that the oil and gas industry will not begin a major project without federal government assurances that the United States will pick up the shortfall when they lose money." *Id.* The author further citing a "vast network of subsidies and tax incentives to fossil fuel companies." *Id.* American taxpayers are not alone—Canadians lavished US\$4.75 billion of their hard-earned money on the fossil-fuel industry in that nation in 2004. *Id.*; Editorial, *supra* note 19.

²⁸ Detsky, *supra* note 27, at 322.

²⁹ Editorial, *supra* note 19. According to Shell International, "renewable sources could supply 50 per cent of the world's energy needs by 2050." *Id.*

³⁰ *Id.*

that heightened efficiency in the transportation sector and development of renewable power were worthy of a concentrated national focus.

A. War on Civil Liberties

The term "civil liberties" dates to the mid-seventeenth century and incorporates the most elemental freedoms inherent in the mind, body, home and church as well as travel and association.³¹ The U.S. Constitution guarantees these rights in the Bill of Rights.³² These rights have been placed at risk, and in some cases outright undermined, in the current war on terrorism. In the eyes of some, the War on Terrorism might better be named the War on Civil Liberties. For example, Judge Tashima, a federal appellate judge who was imprisoned along with other Americans of Japanese ancestry during World War II in an internment camp in Arizona, said the war on terrorism "threatens to destroy the very values of a democratic society governed by the rule of law."³³ Comparing the current political climate with that surrounding his World War II-era detention in Arizona, the judge added, "It's happening all over again."³⁴

The passage of the Patriot Act provides good reason for such concern, because it allows the government to subvert the guarantees of the Bill of Rights. For example, since the beginning of this century, the government has stepped up efforts to mute expression of dissent protected under the First Amendment by fencing off the public forum, restricting access to the public forum via privatization, and engaging in viewpoint discrimination by barring protesters who oppose the government's viewpoint from a public venue.³⁵ Some cities, including New York, have made it more

³¹ CASSEL, *supra* note 2, at 3.

³² *Id.*; U.S. CONST. amends. I – X.

³³ Steve Hyman, *Rights a Victim of Terror War, U.S. Judge Says*, L.A. TIMES, Nov. 7, 2004, at B3 (quoting United States Court of Appeals Judge A. Wallace Judge Tashima, speaking at a conference on the civil rights cases challenging the World War II-era internments).

³⁴ *Id.* (internal quotation marks omitted). Judge Tashima also criticized the government for interrogating people based only on race and for conducting searches without probable cause of Internet, library and university records. *Id.* Another former detainee at an internment camp told the Los Angeles Times, "A lot of people now are governed by fear. There are friends of mine who say racial prejudice can be justified. ... They really believe it. It's scary the way things are going. But I think people are going to be outraged sooner or later." *Id.* (internal quotation marks omitted).

³⁵ See generally Chris Ford, *Reclaiming the Public Forum: Courts Must Stand Firm Against Governmental Efforts to Displace Dissidence*, 2 TENN. J. LAW & POL'Y (accepted for publication, Winter 2006), available at BEPRESS LEGAL REPOSITORY, <http://law.bepress.com/expresso/eps/464> (last visited Jan. 15, 2006); FOERSTEL, *supra* note 2, at 127. Moreover, when he toured the country to sell the Patriot Act, Ashcroft held carefully scripted media events that excluded the public, prompting Vermont Congress member Bernie Sanders to comment, "It is a bit ironic that Attorney General Ashcroft is using closed meetings to try to build public support for a law that expands secret court proceedings." *Id.*

difficult to acquire a permit to protest government policies.³⁶ One court, in upholding the city's denial of a permit to protesters, appeared more worried about the condition of the grass in Central Park than the right to free speech in a public forum.³⁷ Moreover, apparently fearing that there is a terror plot behind every anti-war protest, the DOJ issued grand jury subpoenas for every person who attended a peace rally at Drake University in Des Moines, Iowa, demanded the membership list of the rally's sponsor, the National Lawyers Guild, and ordered Drake University to turn over academic records of students who attended the rally.³⁸ This was an unconstitutional infringement on the participants' freedom of association and appears to have been intended to chill participation in such events.³⁹ Besides chilling speech and association protected by the First Amendment,⁴⁰ the war on terror, through

³⁶ CASSEL, *supra* note 2, at 180; Ford, *supra* note 35, at 48–50.

³⁷ Ford, *supra* note 35, at 49–50. "Most disconcerting, however, is that the court seemed to bolster its decision not to grant an injunction on behalf of the plaintiffs that the city permit them to use the Great Lawn [in Central Park] because to open the park to the dissident groups might encourage more people to attend their event." *Id.* at 50; Nat'l Council of Arab Ams. v. City of New York, 331 F. Supp. 2d 258, 261, 262, 263–64, 270 (S.D.N.Y. 2004).

³⁸ CASSEL, *supra* note 2, at 179.

³⁹ See NAACP v. Alabama, 357 U.S. 449, 466 (1958) ("[I]mmunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment.").

⁴⁰ Doe v. Gonzales, 2005 U.S. District Lexis 19403 (D. Conn. 2005); Doe v. Ashcroft, 344 F. Supp. 2d 471 (S.D.N.Y. 2004). In both cases, plaintiffs were served with national security letters (NSLs), requiring them to produce customer records. *Gonzales*, 2005 U.S. Dist. Lexis 19403 at *5; *Ashcroft*, 344 F. Supp. 2d at 474–75. The *Ashcroft* Court described NSLs as "a unique form of administrative subpoena cloaked in secrecy and pertaining to national security issues." *Ashcroft* at 475. The NSLs in these cases were issued under 18 U.S.C. § 2709 to a library and an Internet service provider, respectively. *Gonzales*, 2005 U.S. Dist. Lexis 19403 at *2, *5; *Ashcroft*, 344 F. Supp. 2d at 474–75. Significant to First Amendment challenges of the statute is that it prohibits an NSL recipient from disclosing "to any person that the Federal Bureau of Investigation has sought or obtained access to information or records." 18 U.S.C. § 2709(c). The government has claimed authorization to keep such information in "perpetual secrecy." *Ashcroft*, 344 F. Supp. 2d at 519. Both the *Gonzales* and *Ashcroft* courts rejected this view, holding that to preclude a party from disclosing that it even received an NSL seeking customer records violates the First Amendment. *Gonzales*, 2005 U.S. Dist. Lexis 19403 at *45; *Ashcroft*, 344 F. Supp. 2d at 475, 524–25. According to the *Gonzales* Court:

[Section] 2709(c) creates a unique situation in which the only people who possess non-speculative facts about the reach of broad, federal investigatory authority are barred from discussing their experience with the public. . . . The potential for abuse is written into the statute: the very people who might have information regarding investigative abuses and overreaching are preemptively prevented from sharing that information with the public and with the legislators who empower the executive branch with the tools used to investigate matters of national security.

Gonzales, 2005 U.S. Dist. Lexis 19403 at *43–44.

the Patriot Act, abridges the Fourth,⁴¹ Fifth,⁴² and, most important here, Sixth Amendment rights.⁴³

⁴¹ Doe v. Ashcroft, 344 F. Supp. 2d 471, 474–75, 505 (S.D.N.Y. 2004); CASSEL, *supra* note 2, at 5. The Patriot Act gives attorney general "carte blanche" to seize computer, phone, mail, business and medical records with no notice simply by alleging an interest in national security. *Id.*

⁴² CASSEL, *supra* note 2, at 5. The government violates Due Process Clause by shutting down, freezing assets of and investigating directors of Muslim charities based on secret evidence; maintaining secret "no fly" lists from which there is no means to remove names; imprisoning Grand Jury witnesses or targets of government interrogations indefinitely without filing charges; violating the Fifth Amendment guarantee against self-incrimination by coercing confessions. *Id.*; Jeffrey Fleishman, *Man's Claims May Be a Look at Dark Side of War on Terror*, L.A. TIMES, April 12, 2005, at A1. In what must be the most harrowing account of a U.S.-backed forced detention and attempt to coerce a confession, a German citizen native to Lebanon on a bus ride through former Yugoslavia was kidnapped in Macedonia and held captive for 23 days, pushed to sign an admission that he had ties to al-Qaeda (which he did not do), beaten, blindfolded, injected with drugs and flown to Afghanistan, where he was held in a filthy cell for months and interrogated repeatedly by U.S. intelligence agents. *Id.* The man, whose surname is el-Masri and who was traveling on New Year's Eve 2003 to take a break from his difficult family life, was denied access to German embassy officials during the entirety of his months-long ordeal, yet was never charged with a crime. *Id.* El-Masri's story has yet to be proven, but analysis of his hair, which can show malnourishment as well as where on earth a person has been. Tests demonstrate that he was mistreated and may have been in Afghanistan in early 2004, which coincides with the time frame of his story. *Id.* Before flying him to Afghanistan, his seven or eight masked captors beat him "from all sides," tore off his clothes, including his underwear, stuck him in diapers and a sweatsuit, and drugged him. *Id.* (internal quotation marks omitted). The Los Angeles Times traced the ownership of a plane following the same route that same night to a Massachusetts firm with reported ties to the CIA. *Id.* On the thirty-seventh day of a hunger strike el-Masri conducted while in Afghanistan, an American doctor force-fed a chocolate-tasting fluid through a tube placed in his nose. *Id.* The man ultimately was dumped from a van, unshaven and unkempt, in the mountains of Albania. *Id.* When he returned home to Germany, he found that his wife and four children had gone to Lebanon, though he was able to track them down. *Id.*; see also *They Beat Me From All Sides*, GUARDIAN UNLIMITED, Jan. 14, 2005, <http://www.guardian.co.uk/g2/story/0,,1390080,00.html> (last visited Jan. 15, 2006) (describing further violations). The story in the London-based GUARDIAN adds:

With no way to prove his story, el-Masri's account remains ... a terrifying snapshot of America's 'war on terror.' . . . An investigation by the Washington Post suggested that the US held 9,000 people overseas in an archipelago of known prisons (such as Abu Ghraib in Iraq) and unknown ones run by the Pentagon, the CIA or other organisations. But this figure does not include others 'rendered' to third-party governments who then act as subcontractors for Washington, enabling the US to effectively torture detainees while technically denying that it carries out torture.

Id.; Tracy Wilkinson, *Italy Orders Arrest of 13 CIA Operatives*, L.A. TIMES, June 25, 2005, at A1. Agents from Central Intelligence Agency (CIA) allegedly kidnapped a radical Egyptian imam from the streets of Milan and flew him to Cairo, where he was imprisoned, beaten, and given electrical shocks to his genitals. *Id.* Italian prosecutors reported that the imam "had been detained for a long time and had undergone physical violence to make him respond to his interrogators' questions." *Id.* (internal quotation marks omitted). That the CIA defends extraordinary renditions by saying destination countries assure the agency that suspects are treated well, *id.*, is laughable considering that the reality is so starkly and brutally to the contrary; Richard A. Serrano, *FBI Agents Complained of Prisoner Abuse, Records Say*, L.A. TIMES, Dec. 21, 2004, at A1. Additionally, a June 2004 FBI report catalogs abuses committed by military personnel or their hired mercenaries (euphemized as "contractors") in America's archipelago of military prisons from Cuba to the Middle East, such as "strangulation, beatings, placement of lighted cigarettes into detainees' ear openings and unauthorized interrogations." *Id.* (internal quotation marks omitted). One Abu Ghraib prisoner told FBI agents that he was handcuffed and put into the "Scorpion" hold, an

B. A Brief History of the Attorney-Client Privilege

The attorney-client privilege, "one of the most venerable of the evidentiary privileges in Western jurisprudence," dates back more than two millennia to ancient Rome.⁴⁴ Indeed, in Roman times there was no waiver of the privilege based in part on the custom that the lawyer must not betray confidences.⁴⁵ An attorney's testimony regarding his client was viewed as "completely valueless," because in testifying on behalf of his client, the attorney had a strong motive to lie and was therefore not credible; yet if the attorney testified against his client, he was disreputable and thus not to be

uncomfortable physical position, then "doused with cold water, dropped onto barbed wire, dragged by his feet and punched in the stomach." *Id.* A Guantánamo Bay detainee was beaten and had his head slammed onto a floor, knocking him unconscious, after he tried to protect himself from being spat upon. *Id.* Another, after spending the night in an unventilated room in which the temperature topped 100 degrees, was found "with a pile of hair next to him . . . [having] been literally pulling out his own hair throughout the night." *Id.* (internal quotation marks omitted). Others were chained in the fetal position to the floor, without food or water or even a chair, and some "had urinated or defecated on themselves, and had been left for 18 to 24 hours or more." *Id.* (internal quotation marks omitted); Richard A. Serrano, *Military Report on Guantanamo Highlights Danger of Al Qaeda*, L.A. TIMES, Apr. 18, 2005, at A1. A more recent report confirms widespread abuses at Guantánamo Bay's Camp Delta "[T]he military has been pounded with allegations that prisoners have been abused and humiliated to get them to talk," undermining the credibility of the information gathered. *Id.* A recently released man told the Los Angeles Times "about prisoners at Camp Delta being hit, kicked, sexually humiliated and made to fear for their lives." *Id.*

⁴³ See *infra* note 207 and Part IV, C (detailing the Sixth Amendment violations).

⁴⁴ Marjorie Cohn, *The Legal Profession: Looking Backward: The Evisceration of the Attorney-Client Privilege in the Wake of September 11, 2001*, 71 *FORDHAM L. REV.* 1233, 1234 (2003); Ken M. Zeidner, *Inadvertent Disclosure and the Attorney-Client Privilege: Looking to the Work Product Doctrine for Guidance*, 22 *CARDOZO L. REV.* 1315, 1320 (2001) ("The notion that an attorney may not give testimony against his client is deeply rooted in Roman law."); Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 *CAL. L. REV.* 487, 488 (1927-28) ("Advocates from very ancient times could not be called as witnesses against their clients while a case was in progress. Cicero in prosecuting the Roman governor of Sicily regrets that he cannot summon the latter's *patronus*, Hortensius....").

⁴⁵ Radin, *supra* note 44, at 489. "[N]o act of his client could give [the lawyer] the right to testify," so the lawyer was immune having to testify. *Id.* This author, writing in the early 20th century, begins his article with a humorous (from the lawyer's perspective) comparison of lawyers and doctors and words of reassurance for those who aspire to the legal profession, and he includes a reminder that public vituperation of lawyers is not necessarily a new concept:

The profession of the law, for all the hard words laymen have said and say about it, is concededly an ancient and highly honorable calling. While the origins of medicine are to be found among mutterers of spells and hawkers of herbs, one class of experts in law in Western Europe were at all times—from the days of the Roman republic to our own—markedly gentlemen.

Id. at 488. Lawyers in France, for example, were seen as "*noblesse de la robe*," while in Scotland they also occupied the realm of nobility. *Id.* That as gentlemen they were obliged not to betray confidences has been said to be the basis of the attorney-client privilege. *Id.* But there was another theory: The lawyer, as servant to his client, "however honored and influential a servant . . . must keep his master's secrets." *Id.*; see Zeidner, *supra* note 44, at 1320 (noting that attorneys were "completely incompetent as witnesses in cases in which they acted as counsel").

believed.⁴⁶ The policy rationale behind the Roman approach was based on the notion that conserving the confidences and trust among family "and quasi-family" relations was more important than the "correct settlement of controversies" or punishment of wrongdoers.⁴⁷

At common Anglo and early American law, however, the privilege became more limited because of "our accepted theory that truth is better than *fides*."⁴⁸ The privilege also came to be seen as a means to limit or discourage the pursuit of litigation.⁴⁹ At early common law, the privilege belonged to the attorney, based on the sixteenth-century notion of protecting the honor of the legal advisor as a gentleman.⁵⁰ However, "we [later] disposed of the medieval or semi-medieval theory of honor," in favor of maximized truth-seeking.⁵¹ By the eighteenth century ownership of the privilege shifted to the client "to secure a client's freedom of action when dealing with his attorney."⁵²

Thus the rule protecting attorney-client communications remains under American case law: a privilege held by the client, limited, and protected by statutory or common law rather than by the Constitution.⁵³ The underlying rationale for the privilege enunciated in eighteenth century England also has persisted through time in American jurisprudence. In 1888, Justice Fuller wrote for the Supreme Court:

⁴⁶ Radin, *supra* note 44, at 488–89; Zeidner, *supra* note 44, at 1320; Cohn, *supra* note 44, at 1235.

⁴⁷ Radin, *supra* note 44, at 490.

⁴⁸ *Id.*; FLOYD L. MORELAND & RITA M. FLEISCHER, *LATIN: AN INTENSIVE COURSE* 417 (1977). *Fides* translates to "faith, trust, trustworthiness." *Id.*

⁴⁹ "Litigation is avoided if all facts are unreservedly placed before the legal adviser, and it is increased if the client cautiously avoids any statement except that which he thinks will support his case." *Id.* at 491.

⁵⁰ Zeidner, *supra* note 44, at 1320–21. The privilege arose at common law concurrently with the advent of compulsory live testimony and "commended itself, at the very outset, as a natural exception to the then novel right of testimonial compulsion." Cohn, *supra* note 44, at 1235 (quoting 8 JOHN HENRY WIGMORE, *EVIDENCE* 2290 (John T. McNaughton rev.ed., 1961)) (internal quotation marks omitted).

⁵¹ Zeidner, *supra* note 44, at 1321.

⁵² *Id.* at 1321. Zeidner points out that another, less discussed rationale for the attorney-client privilege is that it protects the integrity and furthers the truth-finding function of the adversarial system, under which each party is charged with marshalling the law and facts to its advantage and offering its own arguments and theories. *Id.* at 1325 n.59. Were lawyers to become as loyal to opposing parties and to the public as to their own clients, "their clients would no longer have lawyers. The clients would only have judges—a whole series of them." *Id.* (quoting Albert W. Alschuler, *The Search for Truth Continued, The Privilege Retained: A Response to Judge Frankel*, 54 U. COLO. L. REV. 67, 72 (1982)) (internal quotation marks omitted). *But see* Radin, *supra* note 44, at 490 ("The worst that can be said of the duty-privilege . . . is that it seriously impedes the discovery of truth, by withdrawing from possible testimony one who had the best opportunity for learning the truth."); Cohn, *supra* note 44, at 1235–36.

⁵³ Cohn, *supra* note 44, at 1237, 1238. "In the two hundred years since the privilege was formally recognized in American law, the only serious question concerning its application has arisen just recently in the context of how to delimit the scope of the privilege of a corporate client. . . . Aside from the corporate client debate, the privilege has remained a fairly stable and unchallenged concept in American law." *Id.*; Radin, *supra* note 44, at 490; Zeidner, *supra* note 44, at 1321.

The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.⁵⁴

But the privilege, Justice Fuller admonishes, is the client's alone, "and if the client has voluntarily waived the privilege, it cannot be insisted on to close the mouth of the attorney."⁵⁵ Similarly, in a more recent, well-known case, *Upjohn Co. v. United States*,⁵⁶ Justice Rehnquist reasoned that the privilege encourages "full and frank communications" between counselor and client, promoting "broader public interests in the observance of law and administration of justice."⁵⁷

C. Attorney-Client Confidentiality Required for Sixth Amendment Right to Effective Assistance of Counsel to Be Effective

While the right to trial by jury can be traced to the thirteenth century in England, that nation's Parliament did not statutorily confer upon criminal defendants the right to representation by counsel until 1836.⁵⁸ That is not to

⁵⁴ Hunt v. Blackburn, 128 U.S. 464, 470 (1888).

⁵⁵ *Id.*

⁵⁶ 449 U.S. 383 (1981). In *Upjohn*, Petitioner corporation initiated an investigation and sent out a questionnaire to all of its foreign general and area managers to determine whether its foreign subsidiary made illegal payments to secure a government business. *Id.* at 386–87. After petitioner disclosed such payments to the Securities and Exchange Commission, the Internal Revenue Service demanded a production of all the files relating to the investigation. Petitioner refused to produce the documents. *Id.* at 387. The Court rejected the "control group" test applied by the lower appellate court, concluding that even low-level and mid-level employees could have the information necessary to defend against the potential litigation, and that Fed. R. Evid. 501 protected any client information that aided the orderly administration of justice. *Id.* at 389–91. The Court also rejected the lower appellate court's conclusion that the work-product doctrine did not apply to tax summonses, but remanded the issue because the work-product at issue was based on potentially privileged oral statements. *Id.* at 398–99. The doctrine could only be overcome upon a strong showing of necessity for disclosure and unavailability by other means. *Id.* at 402.

⁵⁷ *Id.* at 389. Justice Rehnquist's opinion in *Upjohn* continued, "The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. . . . [It] rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Id.* (citation, internal quotation marks omitted).

⁵⁸ WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 8 (1955). The United States granted this right to all criminal defendants (at least in federal trials) decades earlier upon the ratification of the Bill of Rights in 1791. *Id.* In England, it was not until 1903 that a statute (the Poor Prisoners' Defense Act of 1903) provided for appointment of counsel for all accused of felonies, but in the years between the 1836 and 1903 acts, courts had the authority to appoint counsel for indigents, or counsel might have come forward to defend murder suspects without charge, and in rural villages, "the method of payment of counsel was frequently so flexible that legal aid was virtually free." *Id.* at 12.

say there was no authority for a defendant's right to counsel at trial prior to that year, but "[i]llogically" the right was afforded defendants facing misdemeanors punishable by brief jail terms, while those charged with felonies such as larceny, robbery, murder or treason—who frequently faced the death penalty—had no legal right to appear with counsel.⁵⁹ By the eighteenth century, the practice of common law courts *sua sponte* to allow counsel to argue points of law on behalf of the defendant ameliorated this seemingly paradoxical rule.⁶⁰

In early colonial America, the right to counsel progressed roughly as it did contemporaneously in England, though the lack of trained lawyers and judges meant that as a practical matter, the accused frequently defended themselves.⁶¹ Statutory recognition of the right to counsel go an early start under the Rhode Island Act of March 11, 1660⁶² and the Pennsylvania Frame of Government of 1683.⁶³ The latter granted parties the right to plead their

⁵⁹ *Id.* at 8–9, 11. The defendant did, however, have the right to *retain* counsel. *Id.* at 9. For those accused of treason, Parliament passed a law in 1695 requiring courts, upon request of the accused, to appoint no more than two counsel for their defense. *Id.* The rule allowing the right to counsel for those accused of misdemeanors but not felonies was justified because (1) an impartial judge was to view both sides in a criminal action with equal suspicion; (2) criminal proceedings were simple enough that any man could understand what was happening; and (3) it was tacitly acknowledged that the mere fact of having been indicted for a felony made the accused "at least half guilty," and because the security of the kingdom was more important than the defendant's liberty, whatever advantage that might be had should go to the king. *Id.* at 11.

⁶⁰ *Id.* at 9–10. Some courts broadened this practice to allow attorneys also to examine witnesses on behalf of the defendant, though only the king's counsel could make closing arguments. *Id.* Blackstone nonetheless denounced the rule: "Upon what face of reason can that assistance [of counsel] be denied to save the life of a man, which is yet allowed him in prosecutions for every petty trespass?" *Id.* at 11 (quoting IV WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 355 (12th ed. 1795)) (alteration in the original).

⁶¹ JOHN B. TAYLOR, THE RIGHT TO COUNSEL AND PRIVILEGE AGAINST SELF-INCRIMINATION: RIGHTS AND LIBERTIES UNDER LAW 48 (2004). In some place defendants were allowed the assistance of others, but those who rendered assistance could not be paid. *Id.*; BEANEY, *supra* note 58, at 15 (lack of trained counsel and judges "made some procedural improvisation necessary in the earlier colonial period").

⁶² BEANEY, *supra* note 58, at 17–18. As the 1660 act granted the right to representation by counsel in a criminal case, it also underlined the need for such representation:

Whereas it doth appeare that any person . . . may on good grounds, or through mallice and envie be indicted and accused for matters criminal, wherein the person that is so [accused] may be innocent, and yet, may not be accomplished with soe much wisdom and knowledge of the law as to plead his own innocencye, &c. Be it therefore inacted . . . that it shall be accounted and owned from henceforth . . . the lawful privilege of any man that is indicted, to procure an attornee to plead any poynt of law that may make for the clearing of his innocencye.

Id. (quoting II RHODE ISLAND COLONIAL RECORDS 1664–77 239 (Bartlett ed., 1857)) (alteration in the original).

⁶³ *Id.* at 16.

own case or, "if unable, by their friend. . . ." ⁶⁴ As the eighteenth century began, both Pennsylvania and Delaware passed statutes giving all criminal defendants "the same Privileges of Witnesses and Council as their Prosecutors." ⁶⁵ The importance of the privilege against self-incrimination rose with political tensions in the revolutionary war era. By the time the Bill of Rights was ready for ratification, seven states protected the right to counsel by their constitutions, four by statute and one via common law. ⁶⁶

Harkening back to those early days of the Republic, the U.S. Supreme Court, during the height of the Civil Rights era, held that the Sixth Amendment right to counsel was sufficiently "fundamental and essential to a fair trial" as to make it binding on the states through the Fourteenth Amendment. ⁶⁷ In so holding, Justice Black wrote: "Not only [the earlier] precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." ⁶⁸

A few years later, the court, citing *Powell v. Alabama* ⁶⁹ and other authority, ⁷⁰ made clear that courts long had equated the right to counsel guaranteed under the Sixth Amendment to the right to *effective assistance* of counsel. ⁷¹ Nonetheless, to overturn a conviction based on an ineffective assistance of counsel claim is not easy. The defendant must demonstrate

⁶⁴ *Id.* (internal quotation marks omitted).

⁶⁵ *Id.* at 16–17. South Carolina followed suit in 1831. *Id.* at 17.

⁶⁶ TAYLOR, *supra* note 61, at 48. Georgia was the lone holdout, inserting the right into its constitution of 1798. *Id.*; U.S. CONST. amend. VI. The Sixth Amendment to the U.S. Constitution, ratified along with the remainder of the Bill of Rights on December 15, 1791, provides that the accused in a criminal case "shall . . . have the assistance of counsel for his defense." *Id.*

⁶⁷ *Gideon v. Wainwright*, 372 U.S. 335, 342, 344–45 (1963).

⁶⁸ *Id.* at 344; *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932). "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." *Id.*; *see also* *Avery v. Alabama*, 308 U.S. 444, 447 (1940) (citing "particular sacredness" of right to assistance of counsel).

⁶⁹ 287 U.S. 45. In *Powell*, the defendants pled not guilty in state court to charges of rape. *Id.* at 49. Although it was recited that the defendants were represented by counsel upon arraignment, no counsel had been employed until the day of the trial. *Id.* The defendants were ultimately found guilty and sentenced to death. *Id.* The trial court overruled defendants' motions for new trials, and their convictions were affirmed by the state supreme court. *Id.* at 50. The U.S. Supreme Court reversed the convictions and remanded, holding that the defendants were denied their right to counsel in violation of the Fourteenth Amendment. *Id.* The Court noted that the defendants' illiteracy, youth, and the circumstances of public hostility made the necessity of counsel so imperative that the trial court's failure to make an effective appointment of counsel and the failure to give the defendants a reasonable opportunity to secure counsel was a clear denial of due process. *Id.* at 71.

⁷⁰ *E.g. Avery*, 308 U.S. 444. "The denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." *Id.* at 446 (footnote omitted).

⁷¹ *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). The Court noted that "defendants facing felony charges are entitled to the effective assistance of competent counsel." *Id.*

both (1) that counsel made errors "so serious that counsel was not functioning as the 'counsel'" guaranteed under the Sixth Amendment, and that (2) this deficient performance so prejudiced the defense as to deprive the defendant of a fair trial, rendering it unreliable.⁷² To successfully claim ineffective assistance, the defendant must point to specific errors made by counsel that had a prejudicial effect.⁷³ "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing."⁷⁴

Though the cases have differed somewhat on the exact timing, the Sixth Amendment right to assistance of counsel attaches once the government has initiated charges against the accused.⁷⁵ In *Kirby v. Illinois*,⁷⁶ Justice Stewart wrote:

The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. . . . It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable.⁷⁷

The right thus extends to investigation and preparation of a defense and, significantly, it also includes the defendant's right to communicate with an

⁷² *Strickland v. Washington*, 466 U.S. 668, 687 (1984); TAYLOR, *supra* note 61, at 91–92.

⁷³ *United States v. Cronin*, 466 U.S. 648, 666 (1984); TAYLOR, *supra* note 61, at 93.

⁷⁴ *Cronin*, 466 U.S. at 656. "When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Id.* at 656–57 (footnotes omitted).

⁷⁵ *Kirby v. Illinois*, 406 U.S. 682, 688–89, 689 n.6 (1972).

⁷⁶ 406 U.S. 682 (1972). In *Kirby*, the defendant was arrested because police thought he was another suspect who was wanted for a criminal offense. *Id.* at 684. After police found possibly stolen travelers checks in possession of the defendant, the victim of a robbery came to the police station and identified the defendant as the robber. *Id.* At the time of the identification, there was no lawyer present, the defendant had not asked for legal assistance, and the defendant had not been advised of any right to the presence of counsel. *Id.* After the identification, the defendant was indicted for the robbery and was arrested. *Id.* At trial, the victim testified as to the police station identification and also made an in-court identification of the defendant. *Id.* at 685–86. The defendant was convicted of robbery, and the state appellate court affirmed. *Id.* The U.S. Supreme Court affirmed the lower courts. *Id.* at 691. Although the Sixth Amendment right to counsel existed at a post-indictment pretrial lineup, the Court refused to extend the right to an identification that took place before the commencement of any prosecution whatever. *Id.* at 688. Because the defendant was identified before he was arrested on the robbery charge, the pre-indictment identification was admissible, even though counsel was not present. *Id.* at 691.

⁷⁷ *Id.* at 689–90.

attorney.⁷⁸ "Free, two-way communication" between attorney and client kept inviolate from government scrutiny is required for the Sixth Amendment protection to be meaningful.⁷⁹ Therefore, concludes Professor Cohn, a violation of the attorney-client privilege violates a defendant's right to effective assistance of counsel.⁸⁰

This proposition is also reflected under treaty law—specifically, the International Covenant on Civil and Political Rights, ratified by the United States on June 8, 1992.⁸¹ Under this treaty, a criminal defendant is given the right to counsel and the right "to communicate with counsel."⁸² The right to counsel arises, as under U.S. common law, once a defendant has been criminally charged.⁸³ Defendants are guaranteed adequate time and facilities to prepare their defense, access to documents and evidence required for the defense, and that the defendant and attorney may communicate "in conditions giving full respect for the confidentiality of their communications."⁸⁴ Arguably, then, the United States violates a treaty, which is binding under the supremacy clause of the Constitution⁸⁵—every time prison officials monitor communications between inmates and their attorneys.

D. Monitoring Provision Passed During a Time of Heightened Fears

During the days immediately following 9/11, the nation so was overwhelmed with fear of another physical attack or act of bioterrorism that

⁷⁸ Cohn, *supra* note 44, at 1240 (citing *Maine v. Moulton*, 474 U.S. 159, 170 (1985)); *Geders v. United States*, 425 U.S. 80, 88–91 (1976).

⁷⁹ *United States v. Levy*, 577 F.2d 200, 209 (3d Cir. 1978); *Weatherford v. Bursey*, 429 U.S. 545 (1977); *see also* TAYLOR, *supra* note 61, at 90 ("The right to counsel cannot be fully effective unless defense attorneys have full and unfettered access to the information they need, and clients would not be in a position to provide such information if they risked the possibility that it could be then used against them."); *United States v. Ginsberg*, 758 F.2d 823, 833 (2d Cir. 1985) ("Unquestionably, government interference in the relationship between attorney and defendant may violate the latter's right to effective assistance of counsel.").

⁸⁰ Cohn, *supra* note 44, at 1240.

⁸¹ International Covenant on Civil and Political Rights, Dec. 19, 1966, arts. 14(3)(b), 14(b)(d), 999 U.N.T.S. 171, 177 [hereinafter ICCPR]; 138 Cong. Rec. 8068, 8070 (1992); SCOTT N. CARLSON & GREGORY GISVOLD, PRACTICAL GUIDE TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 235 (2003); SARAH JOSEPH ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS AND COMMENTARY 866 (2d ed. 2004); Cohn, *supra* note 44, at 1248.

⁸² ICCPR, *supra* note 81, arts. 14(3)(b), 14(b)(d).

⁸³ JOSEPH, *supra* note 81, at 437; *see supra* notes 75–77 and accompanying text (discussing when Sixth Amendment rights attach).

⁸⁴ CCPR-Human Rights Committee, *General Comment 13*, 21st Sess., (1984), ¶ 9, quoted in JOSEPH, *supra* note 77, at 429, <http://www.unhchr.ch/tbs/doc.nsf> (last visited Jan. 15, 2006); *see also* CARLSON & GISVOLD, *supra* note 81, at 45 ("When an accused is discussing his or her defense with counsel, an environment ensuring confidentiality of communications must be provided.").

⁸⁵ U.S. CONST. art. VI; Cohn, *supra* note 44, at 1248.

nary a peep of protest was raised against the array of extreme policies emanating from a shadowy Washington.⁸⁶ For example, the public stood by as the government rounded up and detained 1200 people without identifying them, the charges they faced or whether they had access to counsel; opened the door to FBI snooping on individuals living in the United States; and allowed agents to listen in on conversations between inmates and their lawyers.⁸⁷ At the time these policies were pushed through, the public was afraid of further assaults or of appearing "unpatriotic."⁸⁸ The anthrax scare added to the already high level of fear at that time.⁸⁹

Bush Administration leaders further fomented fear. Former Attorney General Ashcroft, for example, proclaimed, "The American people face a serious, immediate and ongoing threat from terrorism."⁹⁰ Two years after the attacks, General Franks, who headed the 2003 U.S.-led invasion of Iraq, told a cigar lifestyle magazine that should the United States or another

⁸⁶ Naftali Bendavid, *Anti-terror laws face little challenge*, CHICAGO TRIBUNE, Nov. 11, 2001, at C1.

⁸⁷ *Id.*; CASSEL, *supra* note 2, at xii-xiii ("[S]ecret lists govern whether you can get on an airplane, open a bank account, or buy a house; . . . new laws allow the government to search your home, your bank records and your medical files without your knowledge of the search itself or the information obtained"); Tim Weiner, *Look Who's Listening; The C.I.A. Widens Its Domestic Reach*, N.Y. TIMES, Jan. 20, 2002, at 1. Even though its charter specifically precludes it from engaging in domestic policing, the CIA was given by Congress, in the aftermath of the 9/11 attacks, billions of dollars and "new legal powers to snoop on people in the United States." The CIA "is now permitted to read secret grand jury testimony, without a judge's prior approval." *Id.* "It can obtain private records of institutions and corporations seized under federal court-approved searches." *Id.*; see also, David McCormack, *Can Corporate America Secure Our Nation? An Analysis of the Identix Framework for the Regulation and Use of Facial Recognition Technology*, 9 B.U. J. SCI. & TECH. L. 128, 134-35 (2003) ("In the wake of September 11, law enforcement, public officials, and politicians began to explore new uses for facial recognition technology."). The author cites "Orwellian concerns" regarding the use of such technology, such as recording intimate and private conduct, targeting political opponents or racial minorities, and sharing information gathered with this technology among governmental agencies for purposes other than national security, actions that "could lead to the growth of a police state." *Id.* at 135; Frank James, *Security Tips Scale as Nation Balances Privacy Concerns*, CHICAGO TRIBUNE, Dec. 27, 2001, at 5 (noting that the new security measures "expanded the government's ability to conduct secret searches of homes and offices and reduced court oversight for law-enforcement surveillance of phone and Internet activities").

⁸⁸ Bendavid, *supra* note 86. "These are measures passed in a moment of crisis, fear and anxiety," a University of Wisconsin historian told the Chicago Tribune. "That is a recipe for creating bad legislation." *Id.* (internal quotation marks omitted).

⁸⁹ E.g. Josh Myer & Megan Garvey, *New Anthrax Case Feared in Northeast*, L.A. TIMES, Nov. 21, 2001, at A1.

⁹⁰ Bendavid, *supra* note 86. Such fear-mongering has not been confined to the United States. England's former home secretary, David Blunkett, defending of a bill allowing police to detain suspected foreign terrorists indefinitely, went so far as to ridicule the concept that the public may enjoy civil rights at all when he said, "We can live in a world with airy-fairy civil liberties and believe the best in everybody and they destroy us. But that is not the world we live in." Tom Tickell & Dorota Nosowicz, *Quotes of the Year: What They Said in 2001*, THE OBSERVER (London), Dec. 30, 2001, at 28; see also 2001: *The Year History Exploded*, NEW ZEALAND HERALD, Dec. 29, 2001 (reciting the story of a man among hundreds rounded up after 9/11 "for no better reason than his religion and nationality," and who was cleared of any links to the attacks but who died of a heart attack in jail 35 days after his detention, U.S. immigration officials remained unapologetic for the general infringement of civil liberties, because "[t]his is a time of war, and we are on a war footing.").

Western nation again be subjected to a large-scale attack, "the Constitution likely will be discarded in favor of a military form of government."⁹¹ One retired University of Washington professor recently wrote that the Bush Administration's antics have "turned promoting and exploiting public fear into an art form that Joseph Goebbels would envy."⁹²

Ultimately the 9/11 attacks were seen by many as a signal that the safe world Americans had once known was gone, to be replaced by an unpredictable and eminently more dangerous world.⁹³ However, the better explanation is not that the attacks made the world more dangerous but that they served as a reminder of how dangerous the world already was.⁹⁴

1. Response to Terrorism Fear Intertwined with Bush Administration Push to Silence Critics, Further Federalize Criminal Prosecution

Generally speaking, the government's response to 9/11, though no doubt underlain by the fear of a repeat attack, appears to have become entwined with the Administration's political agenda. The result has been the targeting of Bush policy opponents.⁹⁵ This is not a new concept. Afraid that Soviet spies were pumping U.S. librarians for key information that could help their country, the Cold War-era FBI investigated library employees.⁹⁶

⁹¹ John O. Edwards, *Gen. Franks Doubts Constitution Will Survive WMD Attack*, NEWSMAX.COM, Nov. 21, 2003, <http://www.newsmax.com/archives/articles/2003/11/20/185048.shtml> (last visited Jan. 15, 2006). General Franks offered this assessment of what would happen were the United States or another Western nation to be attacked with a weapon of mass destruction: "[T]hat causes our population to question our own Constitution and to begin to militarize our country in order to avoid a repeat of another mass, casualty-producing event. Which in fact, then begins to unravel the fabric of our Constitution. Two steps, very, very important." *Id.*

⁹² Hubert G. Locke, *It's Not Your Father's America Any More*, SEATTLE POST-INTELLIGENCER, Mar. 25, 2005, available at http://seattlepi.nwsourc.com/opinion/217447_locke25.html.

⁹³ E.g. Rupert Cornwell, *The Shadow of Terror: So This is History?*, THE INDEPENDENT (London), Dec. 27, 2001, at 7.

⁹⁴ *Id.*

⁹⁵ For example, a recognized member of the press was "quickly and aggressively removed" by two men who appeared to be Secret Service agents after he asked a question of Secretary of Defense Donald Rumsfeld at a speaking engagement in Los Angeles. Press Release, Pen Center USA, Reporter Removed After Questioning Rumsfeld, Aug. 18, 2005, <http://penusa.org/go/news/comments/424>. The reporter for U.S. Tour of Duty, an organization of veterans of the Iraq War and their families, had asked Rumsfeld, "Military families think you're lying to them. Why won't you meet with them?" *Id.* (internal quotation marks omitted). The men who hauled the reporter out of the speaking engagement first said they were going to hold and question him, but queried further by the reporter, "became vague and contradictory in their responses" and ultimately told him he was not actually being detained and was free to go. *Id.* Others at the speaking engagement were similarly treated; a mother tried to ask Rumsfeld about his inconsistent statements on the war in Iraq but "was prevented from speaking by nearby security," and peace advocates were dragged away after attempting to unfurl a banner criticizing Rumsfeld for lying to the public. *Id.*

⁹⁶ FOERSTEL, *supra* note 2, at 32-34.

Criticism, of course, was characterized as Soviet-instigated.⁹⁷ Yet a congressional committee that looked into the matter could obtain no evidence to support the theory that Soviet spies were scurrying around U.S. libraries, collecting key technical information.⁹⁸ Today, the label for a President's political opponents has been updated from "communist" and "Soviet" to "terrorist."⁹⁹ As an example of the absurd lengths to which this practice has been taken, Education Secretary Rod Paige defined an organization that represents school teachers, the National Education Association, as "terrorists" because they opposed President Bush's school funding program.¹⁰⁰ Additionally, officials trotted out the "terrorist" sobriquet to describe and vilify those who planned to protest Republican policy during that political party's 2004 national convention in New York City.¹⁰¹

Three incidents recounted by the Sacramento Bee newspaper further illustrate this point. The first conjures Cold War imagery of the Soviet Union's infamous KGB: A New Mexico public defender commented during a political discussion that "Bush is out of control" and was overheard; he later found himself surrounded by four police officers while using a library computer, handcuffed, detained by Secret Service agents and interrogated as to whether he was a threat to the President.¹⁰² In another incident, a retired phone worker, following an intense debate in a San Francisco gym during which he criticized Bush and the bombing of Afghanistan, was awakened in his apartment by FBI agents who sought to talk to him about his political beliefs. In the third case, two middle-age peace activists were barred from

⁹⁷ *Id.* at 34 (section entitled "Paint the Critics Red"). "Fixated on communist subversion, the FBI tends to see all dissent as emanating from Moscow." *Id.* at 35 (quoting John N. Berry III, *Editorial: Little Shops of Subversion*, LIBRARY JOURNAL, Dec. 1989, at 6) (internal quotation marks omitted).

⁹⁸ *Id.* at 34–35.

⁹⁹ Amazingly, though, there are those who apparently persist in the belief that communism still lurks in Latin America, ready to menace the capitalist nations of the Western Hemisphere. For example, Televangelist Pat Robertson, in issuing his much-maligned call for the assassination of Venezuela President Hugo Chavez, expressed fear that Chavez would make his nation "a launching pad for communist infiltration . . ." James Gerstenzang & Larry B. Stammer, *A Call for Assassination Brings a Cry of Outrage*, L.A. TIMES, Aug. 24, 2005, at A1 (internal quotation marks omitted).

¹⁰⁰ CASSEL, *supra* note 2, at 181.

¹⁰¹ *E.g.*, Bryan Virasami, *GOP Convention Threats; Threats led to fingerprints; Top police official says terror fears convinced cops to verify IDs of hundreds held that week*, NEWSDAY, Oct. 27, 2004, at A05; *see also* CASSEL, *supra* note 2, at 179 (noting that the BI conducted surveillance of antiwar groups on suspicions that they might train their members in terrorist tactics).

¹⁰² Sam Stanton & Emily Bazar, *Security Collides with Civil Liberties*, SACRAMENTO BEE, Sept. 11, 2003, available at <http://www.sacbee.com/content/news/projects/liberty/story/7457444p-8400138c.html>. This incident recalls the saying prevalent in modern Cuba, "The walls have ears." *See, e.g.*, Daniel Swift & Turi Munthe, *From Cuba*, THE NATION, Mar. 20, 2003, <http://www.thenation.com/doc/20030407/dispatches/14> (quoting Cuban journalist explaining why she could not discuss anti-war protesters. The writer notes that when she gave this explanation, "[w]e were sitting in an open square, a hundred yards from any wall").

boarding a plane to Boston to visit family and interrogated for hours because their names came up on a secret government "no fly" list.¹⁰³

The response by the government—and especially the executive branch—to 9/11 also has resulted in the expansion its authority criminal enforcement and prosecution, as illustrated by the proposed Domestic Security Enhancement Act of 2003 (Patriot II).¹⁰⁴ This proposal would, *inter alia*, allow the DOJ to subpoena and compel attendance and testimony from witnesses of terrorism-related crimes and to bar the recipient from disclosing that the subpoena was received to anyone other than an attorney while seeking legal advice and in other limited circumstances;¹⁰⁵ add witnesses and their attorneys to those who may not disclose a matter occurring before a grand jury;¹⁰⁶ strictly limit injunctive relief from law enforcement

¹⁰³ *Id.* "The government is treating us like we are all terrorists," a 36-year-old Iranian immigrant, who spent nearly a year in jail over a deportation order he ignored, told the Sacramento Bee. "We are not all the same ... What kind of Constitution is this? What kind of democracy is this?" *Id.* (internal quotation marks omitted). *Id.*; Sara Kehaulani Goo, *Report Faults TSA on Privacy*, WASH. POST, Feb. 13, 2004, at A07. With respect to no-fly lists, it also should be noted that the U.S. Transportation Security Administration's plan to screen airline passengers did not adequately protect consumer privacy and against identity theft, and in particular, there was no way for passengers falsely identified as suspected terrorists to clear their names. *Id.*; Sara Kehaulani Goo, *Data-Sharing Fails European Vote*, WASH. POST, April 1, 2004, at A15. Because of its lack of privacy protection, the passenger-screening system's full implementation may have suffered a setback when the European Parliament issued a resolution opposing the European Commission agreement to have European airlines provide personal passenger information to U.S. customs officials. *Id.* The system, known as Computer-Assisted Passenger Pre-Screening System (or by the acronym "CAPPs 2"), would verify passenger identity with the personal information provided then compare names to those on terrorist watch lists. *Id.* Passengers would be given numerical scores based the risk they allegedly would pose to the aircraft, and the score would determine the extent of security screening a passenger would receive at the airport. *Id.* CAPPs 2 could not get off the ground without European cooperation; on the other hand, the Europeans already share personal passenger information with the United States under a "temporary, informal agreement." *Id.*

¹⁰⁴ A 120-page confidential draft of this proposal, which includes a section-by-section analysis, was obtained by the Center for Public Integrity and is available at http://www.publicintegrity.org/docs/PatriotAct/story_01_020703_doc_1.pdf (last visited Jan. 15, 2006) [hereinafter Patriot II]. This proposal represents a further federalization of criminal enforcement, which traditionally is the province of state governments. In the late 20th century, the federal government expanded its role in criminal enforcement against especially white-collar criminal defendants; *see, e.g.*, 18 U.S.C. § 1001; *United States v. Rodgers*, 466 US 475 (1984) (criminalizing material false statements knowingly made to a government agency or department); 18 U.S.C. §§1341, 1343 (criminalizing mail and wire fraud); Securities and Exchange Commission Rule 10(b)-5 (criminalizing insider trading); 18 U.S.C. § 201 (criminalizing bribery of a public official); 18 U.S.C. § 1951 (criminalizing extortion); 18 U.S.C. § 1030 (involving computer-related crimes); DEATH PENALTY INFORMATION CENTER, FEDERAL LAWS PROVIDING FOR THE DEATH PENALTY, <http://www.deathpenaltyinfo.org/article.php?scid=29&did=147> (last visited Jan. 15, 2006). Additionally, the federal government in 1994 expanded the federal death penalty to cover 60 different crimes, most involving murder. *Id.* Considering that this nation was founded on the principle of limiting federal government, the value and propriety of the federal government's continual expansion into criminal enforcement are, to say the least, open to question.

¹⁰⁵ The recipient would also be able to disclose receipt of the subpoena to those to whom disclosure is necessary to comply with the subpoena and anyone else designated by the attorney general. Patriot II, § 128(d).

¹⁰⁶ This nondisclosure would apply if the witness were notified of the requirement and if there were reason to believe that disclosure would result in a threat national security or the physical safety of an

surveillance;¹⁰⁷ and expand the circumstances under which the President could order electronic surveillance without a court order.¹⁰⁸

The Patriot Act itself contains, in section 802, a troubling definition of "domestic terrorism" that is so broad that it easily could be used to target political dissenters or dissident groups.¹⁰⁹ According to § 3, domestic terrorism involves acts "dangerous to human life that are a violation of the criminal laws of the United States or any State" that appear to be intended "to influence the policy of a government by intimidation or coercion," and the acts occur "primarily within the territorial jurisdiction of the United States."¹¹⁰ With this definition, the Patriot Act could be used to chill dissident speech by accusing environmental, anti-globalization and anti-abortion activists of acting as "domestic terrorists."¹¹¹ After all, acts of civil disobedience, which form a common currency of communication among such groups, could be construed as "dangerous to human life," against criminal laws, and intended to influence government policy "by intimidation or coercion."¹¹²

2. Response to Terrorism Fears Could Undermine Immigrant Cooperation in Criminal Investigations

The United States has a long history of detaining or deporting perceived enemies who have not been shown to pose a specific or articulable harm to the nation's security.¹¹³ For example, it is widely known that President Abraham Lincoln during the Civil War suspended the writ of habeas corpus, allowing the military to detain without charge tens of thousands of civilians suspected of disloyalty to the Union.¹¹⁴ The detainees were to be "liable to trial and punishment by courts martial or military commission."¹¹⁵

individual, tampering with evidence, flight from prosecution, intimidation of a witness, or serious jeopardy to an investigation. *Id.* § 206 (proposing to amend FED. R. CRIM. P. 6(e)(2)(B)).

¹⁰⁷ *Id.* § 312.

¹⁰⁸ *Id.* § 103.

¹⁰⁹ NANCY CHANG, SILENCING POLITICAL DISSENT 44–45 (2002); Patriot Act, § 802, 115 Stat. 376, 18 U.S.C. § 2331(5) (2001).

¹¹⁰ Patriot Act, § 802, 115 Stat. 376, 18 U.S.C. § 2331(5).

¹¹¹ CHANG, *supra* note 109, at 45.

¹¹² *Id.* at 44–45.

¹¹³ *See generally id.* at 37–42.

¹¹⁴ *Id.*

¹¹⁵ *Id.*; *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 15–16 (1866); Cruz Reynoso, *The Lawyer as a Public Citizen: Eleventh Annual Frank M. Coffin Lecture*, 55 ME. L. REV. 335, 346–47 (2003); Liezl Irene Pangilinan, "When a Nation is at War": A Context-Dependent Theory of Free speech for the Regulation of Weapon Recipes, 22 CARDOZO ARTS & ENT L.J. 683, 716 (2004); Akhil Reed Amar, *Architecture +*, 77 IND. L.J. 671, 697 (2002).

Though Lincoln lacked the constitutional authority to suspend the writ of habeas corpus, Congress subsequently validated Lincoln's action by passing the Habeas Corpus Act of 1863.¹¹⁶ Congress passed this measure following a case in which U.S. Supreme Court Justice Roger Taney, sitting as a circuit court judge, ordered the release of a civilian who had been detained by the military in a fort.¹¹⁷ He declared that the President lacked the constitutional power to suspend the writ of habeas corpus.¹¹⁸ Justice Taney found that the military was obligated to pass any evidence of the defendant's wrongdoing to the district attorney.¹¹⁹ He noted that because the courts of the state of Maryland and the United States were operating without obstruction or resistance, there "was no reason whatever for the interposition of the military."¹²⁰ Even the specter of such an interposition caused Justice Taney great concern:

I can only say that if the authority which the [C]onstitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.¹²¹

Just after the Civil War ended, the U.S. Supreme Court granted the habeas corpus petition of an Indiana citizen charged by the military with inciting insurrection and other crimes against the state, found guilty and sentenced to death by hanging.¹²² The Court reversed the conviction, ruling that trials by a military tribunal of those not connected with the military were unconstitutional where civilian courts were open and available to try defendants.¹²³

¹¹⁶ Steven J. Bucklin, *Dedication to the Small Town Attorney: To Preserve These Rights: The Constitution and National Emergencies*, 47 S.D. L. REV. 85, 87 (2002) (quoting U.S. CONST. art I, § 9). The writ of habeas corpus may be suspended "when in cases of rebellion or invasion the public safety may require it," but the Constitution grants this power to the legislative, not the executive, branch. *Id.* Despite Congress' intention in passing the Habeas Corpus Act of 1863, it has been seen as "a model of legislative ambiguity that left it unclear whether the presidential suspensions before the act had always been legal or were legal only now because of congressional approval." *Id.* (quoting MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 68 (1991)) (internal quotation marks omitted).

¹¹⁷ *In Re Merryman*, 17 Fed. Cas. 144, 145 (C.C.D. Md. 1861) (No. 9487).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 152.

¹²⁰ *Id.*

¹²¹ *Id.* Quoting the Declaration of Independence, Justice Taney underlined a principal reason behind the Colonists' decision to separate from England, which was that the king "had affected to render the military independent of, and superior to, the civil power." *Id.* at 152 n.3.

¹²² *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 6, 7, 107 (1866).

¹²³ *Id.* at 122, 130. The Court emphasized that the Constitution

During the early 20th century, following the bombing of the home of President Woodrow Wilson's attorney general, A. Mitchell Palmer, the Wilson Administration had up to ten thousand resident aliens interrogated, arrested, and detained based on their political views.¹²⁴ More than five hundred immigrants were deported as part of the "Palmer raids," even though not one of them was shown to pose a threat to the United States.¹²⁵

Finally, well within the memory of some alive today is possibly this nation's darkest chapter in its history of targeting perceived enemies, during which more than 100,000 persons of Japanese ancestry were rounded up and interned in "harsh and punishing conditions" on the perception—though without evidence on the government's part—that they were collaborating with Japan in its World War II efforts.¹²⁶ Regarding whether such detentions and round-ups actually benefit the war efforts that underlie their justification, former California Supreme Court Justice Cruz Reynoso recently argued:

[H]istory has shown that when in the past we have given up our civil rights, it has not helped improve our security. The Japanese Americans were loyal Americans and interning them did not help us fight the Second World War any better. The German Americans were marvelous Americans, and discriminating against them did not help us fight the First World War. When Abraham Lincoln suspended the habeas corpus, all historians agree that it did not help the North fight the Civil War any better. Are we accepting the curtailment of our civil rights now simply because our national political leaders tell us that it is necessary?¹²⁷

Presently, the government is once again targeting foreigners for deportation, and authorities are so eager to fill outbound jets with immigrants that they may be undermining the ability of law enforcement to solve crime in immigrant-heavy neighborhoods. In particular, the Los Angeles Police

covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence

Id. at 120–21.

¹²⁴ CHANG, *supra* note 109, at 39.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Reynoso, *supra* note 115, at 346–47. Two thirds of those rounded up and interned were U.S. citizens. *Id.*

Department (LAPD) has proposed to abandon a decades-old policy, known as Special Order 40, creating a firewall between local street officers and U.S. immigration authorities.¹²⁸ The Los Angeles County and Orange County sheriff's departments, which patrol expansive swaths of Southern California, recently have implemented similar policies.¹²⁹ The purpose of policies such as Special Order 40 is to encourage illegal immigrants who have been victims of or witnesses to a crime to cooperate with law enforcement without fear of deportation.¹³⁰ In Southern California, home to millions of immigrants from Latin America, law enforcement agencies have begun lifting the prohibition against cooperation by local police officers with U.S. immigration authorities.¹³¹

Police agencies large and small across the country, however, are changing their approach, justifying the change as a means to reduce offenses caused by suspected members of street gangs.¹³² One LAPD officer viewed the change as "another tool to get rid of these gangsters."¹³³ However, immigrants and immigrant groups are not convinced that the police agencies' designs are benign. "We don't want the LAPD to be stalking horses" for the federal Immigration and Customs Enforcement (ICE) agency, said one immigrant group representative.¹³⁴ An immigrant who had suffered eleven years of domestic violence said she "would never have contacted the police no matter how much abuse there was" had the firewall between police and ICE not existed, because she would have been afraid that her immigration status would become an issue.¹³⁵

While these efforts by Southern California police agencies may not punish individuals for their political views as was the case in the Palmer raids, they may, as was the case with internment of the Japanese-American citizens and aliens in the 1940s, punish based on race. Law enforcement's stated reason to "get rid" of street gang members is aimed *de facto* at black and Latino youths.¹³⁶ Moreover, as mentioned by immigrant group

¹²⁸ *Id.*; Susana Enriquez & Richard Winton, *Officers Back New Vision of Sanctuary*, L.A. TIMES, Apr. 9, 2005, at B1. Special Order 40 was adopted by former LAPD Chief Daryl F. Gates in 1979. *Id.*

¹²⁹ Solomon Moore, *Baca's Plan to Screen Inmates OK*, L.A. TIMES, Jan. 26, 2005, at B1; Richard Winton & Andrew Blankstein, *Agency Shifts on Immigration Law*, L.A. TIMES, Apr. 1, 2005, at B1.

¹³⁰ Enriquez & Winton, *supra* note 128.

¹³¹ E.g. Richard Winton, *Department Clarifying Rule on Immigrants*, L.A. TIMES, March 31, 2005, at A1.

¹³² Enriquez & Winton, *supra* note 128. One officer told the Los Angeles Times that "[y]ou are not going after the produce seller or the ice cream guy—people trying to make a living. You're going after violent gang members who are committing unspeakable acts on immigrants . . ." *Id.*

¹³³ *Id.*

¹³⁴ Winton, *supra* note 131.

¹³⁵ Moore, *supra* note 129.

¹³⁶ U.S. CENSUS BUREAU, CALIFORNIA QUICKFACTS, <http://quickfacts.census.gov/qfd/states/06/0644000.html> (last visited Jan. 15, 2006). African-Americans constitute about 11 percent of Los

representatives, it is too easy for what is sold as a means to cull from society only the those who pose a most violent threat, to turn into a means to "cast[] a wider net" against illegal immigrants.¹³⁷

3. *Governance in Secrecy Envelops the Courts: Appellate Panels Split on First Amendment Implications*

Generally speaking, since 9/11 the federal government has been operating under ever-greater secrecy. For example, the number of documents government has classified jumped forty percent between 2001 and 2003.¹³⁸ In 2003 only one fifth as many documents were declassified as in 1997.¹³⁹ "[President George W.] Bush has...presided over one of the most closed administrations in modern history, increasing the classification of documents and defending against any challenges to its secrecy."¹⁴⁰ For example, Ashcroft promised federal agencies to support any plausible refusal of a Freedom of Information Act request.¹⁴¹ The Bush Administration's obsession with secrecy has resulted in "secret arrests and trials using secret evidence, secret terrorist watch lists, and secret federal court dockets."¹⁴²

This penchant for secrecy is "the stuff of despots, not democracies."¹⁴³ Unfortunately, it has seeped into the judicial branch.¹⁴⁴

Angeles' population and Asians 10 percent, with whites and Latinos closely splitting the remainder. *Id.* However, of the 112,000 supposed members of Los Angeles gangs listed in the CAL/GANG database used by law enforcement to track alleged gang activity, only 2000 are white, while about two thirds are Latino and one third black. *Id.*; Linda S. Beres and Thomas D. Griffith, *The Rampart Scandal: Policing the Criminal Justice System: Criminalizing Youth*, 34 LOY. L.A. L. REV. 747, 761-62 (2001). Using LAPD gang-crime data, professors Beres and Griffith calculate, as a means of illustrating the extent to which the CAL/GANG database overstates membership in criminal gang members, that each gang member statistically commits a crime only once every fifteen years. *Id.* at 762. "Unless gang members are a surprisingly law abiding group, the gang database includes many individuals who have ended their gang involvement or who never were gang members in the first place." *Id.*

¹³⁷ Andrew Blankenstein, *Proposed LAPD Immigrant Policy Raises Fears*, L.A. TIMES, Apr. 7, 2005, at B4. "Immigration should be totally separate from crime enforcement," a community organizer told the Los Angeles Times. "The [policy] change could give way to abuse." *Id.* (internal quotation marks omitted).

¹³⁸ Edward Epstein, *White House Takes Secrecy to New Levels, Coalition Reports*, S.F. CHRONICLE, Aug. 27, 2004 at A7.

¹³⁹ *Id.*

¹⁴⁰ *Administration Unbound*, ST. PETERSBURG TIMES, Oct. 2, 2004, at 16A; Bush also has kept under wraps presidential papers pertaining to his father, George H.W. Bush, and Ronald Reagan, robbing scholars and the public of valuable information. Adam Clymer, *Government Openness At Issue as Bush Holds On to Records*, N.Y. TIMES, Jan. 3, 2003, at A1. In general, The Bush administration's "penchant for secrecy . . . has been striking to historians, legal experts and lawmakers of both parties." *Id.*; see also Bendavid, *supra* note 86 ("President Bush has dropped a blanket of secrecy over presidential papers, making it harder for scholars to get access.").

¹⁴¹ *Administration Unbound, supra* note 140.

¹⁴² CASSEL, *supra* note 2, at 162.

¹⁴³ *Id.*

Hearings for immigrants caught up in sweeps following the September 11, 2001 attacks have been subject to a "complete information blackout."¹⁴⁵ These hearings involved individuals "whom the attorney general has determined might have connections or knowledge of the September 11, 2001 terrorist attacks."¹⁴⁶ Chief Immigration Judge Michael Creppy issued an order (the Creppy Directive) that immigration judges are required to bar the public, press and family members from "special interest" deportation hearings and must avoid disclosing the cases outside the Immigration Court.¹⁴⁷ This includes confirming or denying that a specific case is on the docket or scheduled for hearing.¹⁴⁸ The record of the proceeding can be given only to the deportee's attorney, and even then only "assuming the file does not contain classified information."¹⁴⁹ Two federal appellate courts recently have split on whether the First Amendment countenances such secrecy in relation to special interest deportation hearings.

a. North Jersey Media Group v. Ashcroft

In *North Jersey Media Group v. Ashcroft*,¹⁵⁰ a consortium of media groups sought access to special interest deportation hearings, administrative proceedings which, unlike Article III trials, operate under the Executive branch through the DOJ.¹⁵¹ The court applied the *Richmond Newspapers*

¹⁴⁴ Robert Scheer, *The Man Behind the Oval Office Curtain*, L.A. TIMES, Oct. 26, 2004, at B11. The practice of trying defendants in secret in military tribunals, while utterly ineffective in containing terror, has "indelibly stain[ed] America's reputation as a leader in democratic principles and endanger[ed] the lives of American prisoners of war in current and future conflicts." *Id.* The validity of these tribunals is highly questionable. *Id.*; Serrano, *supra* note 42, at A13. A recent newspaper article paints them as little more than a kangaroo court. *Id.* For example, prisoners attend tribunal hearings unaided by counsel, some in "utter dejection." *Id.* Reportedly typical is this description from a transcript of a tribunal hearing: "Detainee unresponsive. Sat in chair with head down. Did not speak at any time." *Id.* One detainee, accused of wearing a brand and model of watch purportedly favored by Al Qaeda bomb builders because it allows alarm settings of more than 24 hours in advance, explained that it was a piece of personal jewelry that included a compass that showed the way to Mecca to facilitate daily prayers. *Id.* "If I had known [that it was a type favored by bombers], I would have thrown it away. I'm not stupid," the prisoner said, but the tribunal was "unimpressed" and declared him an enemy combatant. *Id.* (internal quotation marks omitted). The attorney of one detainee considered the tribunals a sham and told the Los Angeles Times, "This whole thing is going to come unraveled big time" once detainees' lawsuits move through the courts. *Id.* (internal quotation marks omitted).

¹⁴⁵ *North Jersey Media Group v. Ashcroft*, 308 F.3d 198, 203 (3d Cir. 2002). When defendants appealed unfavorable immigration rulings to district courts, their names were excluded from the court dockets; CASSEL, *supra* note 2, at 115-16; *see also* Clymer, *supra* note 140 (noting that the number of immigrants detained and details of their arrest were kept secret).

¹⁴⁶ *North Jersey Media Group*, 308 F.3d at 199.

¹⁴⁷ *Id.* at 199, 202-03. "[T]he courtroom must be closed for these cases—no visitors, no family, no press." *Id.* at 203 (internal quotation marks omitted).

¹⁴⁸ *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 684 (6th Cir. 2002).

¹⁴⁹ *Id.* (internal quotation marks omitted).

¹⁵⁰ 308 F.3d 198 (3d Cir. 2002).

¹⁵¹ *Id.* at 199, 207.

"experience and logic" test (experience and logic test),¹⁵² finding that under neither prong did the media plaintiffs have a right to access to the deportation hearings and upholding the constitutionality of the Creppy Directive.¹⁵³ Under the experience prong, while the court found an "unbroken, uncontradicted history" of access to criminal trials—and that access to civil trials under common law was "beyond dispute"¹⁵⁴—it found various examples in which administrative hearings were not held publicly.¹⁵⁵

The court then averred that in assessing the logic prong, not only should it consider the positive role of openness, but also "the extent to which it impairs the public good."¹⁵⁶ Toward that end, the court clearly was persuaded by the declaration of an FBI counterterrorism specialist who relayed concerns that through open deportation hearings terrorist organizations could acquire key information on government investigations, learn how to enter the country more easily, elude government detection by changing or rescheduling plans for future attacks, and even interfere with proceedings by tampering with evidence or witnesses.¹⁵⁷ The court evinced no willingness to second-guess the executive branch in the area of national security.¹⁵⁸ Consequently, the court found that open special interest

¹⁵² Though later formalized in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986), the experience and logic test was first enunciated in by Justice Brennan in a concurrence in *Richmond Newspapers v. Virginia*, 448 U.S. 555, 588–89 (1980) (Brennan, J., concurring). According to the test:

First, because a tradition of accessibility implies the favorable judgment of experience, we have considered whether the place and process have historically been open to the press and general public. . . . Second, in this setting the Court has traditionally considered whether public access plays a significant positive role in the functioning of the particular process in question. . . . These considerations of experience and logic are, of course, related, for history and experience shape the functioning of governmental processes. If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches.

Press Enterprise Co., 478 U.S. at 8–9 (citations, internal quotation marks omitted). The presumption of openness may be overcome "only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 9 (internal quotation marks omitted).

¹⁵³ *North Jersey Media Group*, 308 F.3d at 199–202.

¹⁵⁴ The Supreme Court has yet to rule on whether the public has a right of access to civil proceedings, but the five circuits that have addressed the issue agree (1) that *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) governs and (2) that the public and press do have a right to attend civil trials. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695 n.11 (6th Cir. 2002); see also *Ky. Press Ass'n v. State*, 355 F. Supp. 2d 853, 863 (E.D. Ky. 2005) ("[C]ivil trials have historically been open and policy considerations, like encouraging openness and placing a check on the judicial system, mandate that civil trials be accorded the same presumption of openness as criminal trials.").

¹⁵⁵ *North Jersey Media Group*, 308 F.3d at 205, 209–11; see also *id.* at 215 (stating that "there is no fundamental right of access to administrative proceedings").

¹⁵⁶ *Id.* at 217.

¹⁵⁷ *Id.* at 218–19.

¹⁵⁸ *Id.* The court conceded that the concerns raised in the FBI agent's declaration were "to some degree speculative, at least insofar as there is no concrete evidence that closed deportation hearings has

deportation hearings did not pass the experience and logic test, noting that defendants nonetheless enjoy "a heavy measure of due process" through the Board of Immigrations Appeals and the right to appeal that body's decisions to a federal court of appeals.¹⁵⁹

The dissent in this case pointed out that DOJ regulations promulgated in 1964 expressly authorize an immigration judge to hold closed hearings to protect the public interest. Nevertheless, argued Judge Scirica, a restriction on a qualified public right of access fails constitutional scrutiny when a reasonable alternative exists.¹⁶⁰ Here, instead of blanket closure of special interest deportation hearings as provided in the Creppy Directive, immigration judges should be given discretion to decide case-by-case whether to close the hearings.¹⁶¹ In so arguing, the dissent expresses the better view. Giving a political branch of government carte blanche to hold secret trials is bad policy. Taking into account that *North Jersey Media Group* was argued just a year and eight days after the 9/11 attacks may make more understandable the court's finding that it was "unable to conclude that openness plays a positive role in special interest deportation hearings at a time when our nation is faced with threats of such profound and unknown dimension."¹⁶² However, hiding behind a national emergency as a justification to govern in secret will not protect the nation in the long run. Justice Black counseled that "[t]he guarding of military . . . secrets at the expense of informed representative government provides no real security for our Republic."¹⁶³

b. Detroit Free Press v. Ashcroft

Judicial recognition of government's broad authority to regulate

prevented, or will prevent, terrorist attacks," but it argued that the logic prong itself "is unavoidably speculative." *Id.* at 219. The court's logic here is not entirely persuasive, because while deciding whether public access plays a positive role in the functioning of a government process may involve a sort of weighing that could be characterized as speculative, the court rightly could be criticized for using speculative *evidence* that the public good would be impaired in this case. On the other hand, one can make the case for openness with evidence that is in no way speculative—it is well documented, even in *North Jersey Media Group*. For example, the court pointed out that open trials assure fairness of proceedings, discourage perjury and other misconduct by participants, prevent against decisions made based on secret bias or partiality, and help to avert vigilantism by "providing an outlet for community concern, hostility and emotion." *Id.* at 205 (quoting *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980)) (internal quotation marks omitted).

¹⁵⁹ *North Jersey Media Group*, 308 F.3d at 221.

¹⁶⁰ *Id.* at 227, 228 (Scirica, J., dissenting).

¹⁶¹ *Id.* at 228.

¹⁶² *Id.* at 220. The court further commented, "The era that dawned on September 11th, and the war on terrorism that has pervaded the sinews of our national life since that day, are reflected in thousands of ways in legislative and national policy, the habits of daily living, and our collective psyches." *Id.* at 202.

¹⁶³ *New York Times v. United States*, 403 U.S. 713, 719 (1971).

immigration dates to 1889, when the government's decision to exclude certain foreigners was found "conclusive upon the judiciary."¹⁶⁴ The authority recognized was that over substantive immigration laws and decisions.¹⁶⁵ The Creppy Directive, on the other hand, goes to non-substantive decisions, over which the Supreme Court has never deferred to a governmental assertion of plenary authority where a constitutional right was recognized.¹⁶⁶ Unlike the *North Jersey Media Group* Court, the appellate panel in *Detroit Free Press v. Ashcroft*¹⁶⁷ found a public right to access deportation hearings under the First Amendment.¹⁶⁸ As did the dissent in *North Jersey Media Group*, the *Free Press* court found that allowing immigration judges to determine case-by-case whether to close a hearing would sufficiently address the government's concern that information gleaned from an open hearing might be misused by a potential terrorist.¹⁶⁹ Because a First Amendment right was at stake, the court had the authority place a meaningful limit on a non-substantive immigration law.¹⁷⁰

Applying the experience prong of the experience and logic test, the court in *Detroit Free Press* asserted that deportation hearings traditionally have, as a matter of "general policy," been public, in part because they "walk, talk, and squawk very much like a judicial proceeding."¹⁷¹ As in civil cases, a defendant in a deportation hearing has a right to retain counsel (though not at public expense), to be present at the hearing, to examine evidence against her, to present evidence on her own behalf, and to cross-examine

¹⁶⁴ *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 685–86 (6th Cir. 2002) (quoting *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889)).

¹⁶⁵ *Id.* at 686.

¹⁶⁶ *Id.* at 686, 688, 693.

¹⁶⁷ *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002). In *Detroit Free Press*, the government designated certain deportation cases to be special interest cases and conducted them in secret, closed off from the public. *Id.* at 683. Plaintiffs in three separate cases sought an injunction against such action. *Id.* at 683–84. The United States District Court for the Eastern District of Michigan at Detroit granted the injunction finding blanket closure of deportation hearings in special interest cases to be unconstitutional. *Id.* at 684–85. On appeal, the Sixth Circuit rejected the government's assertion that a line had been drawn between judicial and administrative proceedings, with the First Amendment guaranteeing access to the former but not the latter. *Id.* at 695. Under the two-part "experience and logic" *Richmond Newspapers* test, the court concluded that there was a First Amendment right of access to the deportation proceedings. *Id.* at 700. The court held that deportation hearings had traditionally been open to the public, and openness undoubtedly plays a significant positive role in the process. *Id.* at 700–01.

¹⁶⁸ *Id.* at 700, 705.

¹⁶⁹ *Id.* at 692–93; see *supra* note 152 and accompanying text (discussing when immigration judges should close a hearing).

¹⁷⁰ *Id.* at 688, 693; see also *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (citing *INS v. Chadha*, 462 U.S. 919, 941–42 (1983) and *The Chinese Exclusion Case*, 130 U.S. 581, 604 (1889)) (noting that Congress' plenary powers to create immigration law are "subject to important constitutional limitations").

¹⁷¹ *Detroit Free Press*, 303 F.3d at 700, 701 (internal quotation marks omitted).

witnesses.¹⁷² Moreover, deportation is such a serious penalty—it "can be the equivalent of banishment or exile"—that what is at stake for the defendant is similar to what is at stake in a criminal case.¹⁷³ "It is clear that removal proceedings are decidedly adversarial" and are "exceedingly formal" and thus more like court trials than administrative hearings, and they are presumed open.¹⁷⁴

Turning its attention to the Creppy directive, the *Detroit Free Press* court found the order too broad. While the U.S. Supreme Court in *Zadvydas v. Davis*¹⁷⁵ instructed that courts may defer to political branches with respect to "a small segment of particularly dangerous individuals" or in matters of national security, even in such situations courts are not required to defer to the political branches' determination of who those particularly dangerous individuals are.¹⁷⁶ Yet the Creppy directive "strikingly lacks" such a measure of limitation, the *Detroit Free Press* court found.¹⁷⁷ Based on the notion that limiting special interest cases as outlined in *Zadvydas* would allow terrorists to figure out which hearings are open and which are closed, the government admitted in *Detroit Free Press* that deportation hearings even for aliens *known* not to have links to terrorism will be designated as special interest cases and held in secret.¹⁷⁸ The court rejected both the reasoning and the result of the government's argument.¹⁷⁹

Addressing the logic prong of the experience and logic test, the court emphasized the importance of access to such hearings as a check on

¹⁷² *Id.* at 699, 704. Procedurally, removal proceedings resemble civil cases, requiring notice, a form of service of process and that the government prove its case by clear and convincing evidence. *Id.* at 698.

¹⁷³ *Id.* at 696. Banishment served a form of criminal punishment under English law beginning in 1718. *Id.* at 702.

¹⁷⁴ *Id.* at 699, 701.

¹⁷⁵ 533 U.S. 678 (2001). In *Zadvydas*, two illegal immigrants were ordered deported from the United States. *Id.* at 684. Immigration and Naturalization authorities could not locate a country amenable to receive the deportable aliens, so the aliens were detained indefinitely. *Id.* Both aliens filed for habeas corpus relief under 28 U.S.C.S. § 2241. *Id.* at 684–85. The issue before the Court was whether 8 U.S.C.S. § 1231(a)(6) authorized the Attorney General, in his sole discretion, to detain a removable alien indefinitely beyond the 90-day removal period or only for a period reasonably necessary to secure the alien's removal. *Id.* at 689. The Court interpreted § 1231(a)(6) as containing an implicit "reasonable time" limitation of six months. *Id.* at 682, 690. The civil confinement at issue was not limited, but potentially permanent. *Id.* at 691. Also, the Court noted that these detention provision did not apply narrowly, but broadly to aliens ordered removed for many reasons, including tourist visa violations. *Id.* Moreover, the sole procedural protections available to the alien were administrative proceedings where the alien bore the burden of proving he was not dangerous. *Id.* at 692. As a result, the Court vacated the decisions below and remanded both cases for further proceedings. *Id.* 702.

¹⁷⁶ *Detroit Free Press*, 303 F.3d at 692 (citing *Zadvydas*, 533 U.S. at 691, 696).

¹⁷⁷ *Id.* "The Creppy directive does not apply to a 'small segment of particularly dangerous' information, but a broad, indiscriminate range of information, including information likely to be entirely innocuous." *Id.*

¹⁷⁸ *Id.* at 692–93.

¹⁷⁹ *Id.*

executive power and a means to ensure that the government "does its job properly," enhance the perception of integrity and fairness, enable individual citizens to participate in government and serve as an outlet for community catharsis in light of the devastation visited by 9/11.¹⁸⁰ In stark contrast to the court in *North Jersey Media Group*, which was unable to conclude that openness played a positive role in deportation hearings,¹⁸¹ the *Detroit Free Press* Court did not find "one persuasive reason why openness would play a negative role in the process."¹⁸² In a potent defense of the public right of access, the court added:

The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully, and accurately in deportation proceedings. When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First Amendment "did not trust any government to separate the true from the false for us."¹⁸³

The DOJ's reliance on secret trials, secret detentions, secret evidence and lack of access to lawyers undermines the Bush Administration's claims that its war on terror is legitimate.¹⁸⁴ "The most obvious conclusion to be drawn from these practices ... is [that] the government has weak cases against [the defendants] that could not withstand judicial scrutiny in any American court."¹⁸⁵

4. *Habeas Corpus Relief Can Be Elusive Even When Those Ensnared by War on Terror Are Citizens*

Two cases in which the validity of the government's case against the accused may be lacking involve the indefinite lock-down of each defendant – one in South Carolina and the other in Saudi Arabia – without charge or access to a lawyer.¹⁸⁶ For example, Jose Padilla, a U.S. citizen designated by

¹⁸⁰ *Id.* at 703–05.

¹⁸¹ See *infra* note 153 and accompanying text (discussing the court's finding in *North Jersey Media Group*).

¹⁸² *Detroit Free Press*, 303 F.3d at 705.

¹⁸³ *Id.* at 683 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 773 (1972)).

¹⁸⁴ CASSEL, *supra* note 2, at 129; *Al Odah*, 346 F. Supp. 2d at 5. The government argued that Guantánamo Bay detainees have no right to counsel when petitioning for writ of habeas corpus. *Id.*

¹⁸⁵ CASSEL, *supra* note 2, at 129. Noteworthy is that none of the prisoners at Guantánamo or Americans targeted as "enemy combatants" has been even so much as charged with a crime. But they have been imprisoned, possibly tortured, kept from their families and held without access to counsel and the courts. *Id.*

¹⁸⁶ Michael Powell, *Lawyer Visits "Dirty Bomb" Suspect*, WASH. POST, Mar. 4, 2004, at A10; *Omar Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 38 (D.D.C. 2004).

the President as an "enemy combatant" for allegedly plotting with al Qaeda leaders, was spirited off to a naval brig in South Carolina indefinitely with no access to a lawyer.¹⁸⁷ "Shortly after the Supreme Court agreed to hear the case, the Pentagon allowed Padilla to meet face to face with a lawyer"—yet as the attorney told the Washington Post, "this was not an attorney-client meeting" considering that the government videotaped her meeting with Padilla, during which the two spoke through a glass security window while two government agents monitored the conversation.¹⁸⁸ The Supreme Court heard Padilla's habeas corpus petition but declined to rule on its merits.¹⁸⁹ The Court determined that the district in which he filed the petition lacked personal jurisdiction, according to the "immediate custodian rule," over the commander of the military brig at which Padilla was confined.¹⁹⁰

Unlike the *Padilla* Court, which declined to reach the validity of the petitioner's habeas corpus claim,¹⁹¹ a district court in *Omar Abu Ali v. Ashcroft* found "considerable" evidence that the habeas corpus petition of a U.S. citizen held at the behest of the U.S. government in Saudi Arabia was

¹⁸⁷ Powell, *supra* note 175.

¹⁸⁸ *Id.*

¹⁸⁹ Rumsfeld v. Padilla, 124 S. Ct. 2711, 2718 (2004). Interestingly, the government later filed a motion with the U.S. Court of Appeals for the Fourth Circuit seeking an order allowing it to transfer Padilla from military to civilian custody. *Padilla v. Hanft*, 432 F.3d 582, 583 (4th Cir. 2005). The government further suggested that the court withdraw its opinion in *Padilla v. Hanft*, 423 F.3d 386, 389 (4th Cir. 2005), which held that the president possessed the constitutional authority to detain Padilla as an enemy combatant in military custody. 432 F.3d at 583. The court denied both the motion and the suggestion, *Id.* Taking into account that the government had "steadfastly" maintained for three and a half years that holding Padilla militarily was "imperative" in the interest of national security, the court noted that the government's sudden desire to transfer Padilla to civilian custody and withdraw its earlier decision "compound[s] . . . an appearance that the government may be attempting to avoid consideration of our decision before the Supreme Court." *Id.* Judge Luttig, writing for the court, further commented that the government's actions

have left the impression that the government may even have come to the belief that the principle in reliance upon which it has detained Padilla for this time, that the President possesses the authority to detain enemy combatants who enter into this country for the purpose of attacking America and its citizens from within, can, in the end, yield to expediency with little or no cost to its conduct of the war against terror—an impression we would have thought the government likewise could ill afford to leave extant.

Id. at 587.

¹⁹⁰ *Id.* "In accord with the statutory language and [the] immediate custodian rule, longstanding practice confirms that in habeas challenges to present physical confinement—'core challenges'—the default rule is that the proper respondent is the warden of the facility where the prisoner is being held [or the commandant of a brig, the military equivalent of a warden], not the Attorney General or some other remote supervisory official." *Id.* Padilla filed his petition in the Southern District of New York but, according to the Court, should have filed it in South Carolina. *Id.* at 2716, 2724. The appellate court in this case did grant Padilla's petition of habeas corpus, finding a strong statutory and common law presumption "against domestic military detention of citizens absent explicit congressional authorization." *Id.* at 2717 (citing *Padilla v. Rumsfeld*, 352 F.3d 695, 710–22 (2d Cir. 2003)).

¹⁹¹ Rumsfeld v. Padilla, 124 S. Ct. 2711, 2715 (2004).

valid.¹⁹² Petitioner Abu Ali, a U.S.-born scholarship student at the Islamic University of Medina in Saudi Arabia who was valedictorian of his Virginia high school, was arrested by Saudi security officers while taking a final exam.¹⁹³ The United States "orchestrated the detention and was intimately involved from the very beginning."¹⁹⁴ During his detention, Abu Ali had no access to counsel, was interrogated by Saudi officials and FBI agents, and allegedly was tortured during the interrogations.¹⁹⁵ U.S. officials told Abu Ali and his parents that they would release him if he cooperated.¹⁹⁶ Otherwise, they would leave him in Saudi Arabia to be tried without counsel or ship him to Guantánamo Bay where he would be detained as an "enemy combatant."¹⁹⁷

A primary reason, according to Abu Ali, that the U.S. government was keeping him in Saudi Arabia was so that it could interrogate him without constitutional scrutiny and because the government was unable to get a grand jury to indict him in the United States.¹⁹⁸ This lends credibility to any claim that the government's case against Abu Ali was weak from the start. Considering cases such as Padilla's and Abu Ali's, in which an American citizen is held by the military (or a foreign government) at the behest of the United States and denied counsel, author Cassel comments, "[W]e [now] see American Citizens removed from the rule of law."¹⁹⁹ As noted, the Supreme Court has been decidedly unenthusiastic toward military detention of U.S. citizens.²⁰⁰

¹⁹² *Omar Abu Ali*, 350 F. Supp. 2d at 38, 68–69.

¹⁹³ *Id.* at 31–32. The court found these factual allegations "well-supported," and the government offered practically no evidence in rebuttal. *Id.* at 31, 38, 69.

¹⁹⁴ *Id.* at 38.

¹⁹⁵ *Id.* at 32, 36, 38. Abu Ali allegedly had his fingernails removed as a form of torture. *Id.* An unidentified witness said he saw Abu Ali "experiencing so much pain in his hands that he was unable to pick up a pen to sign documents. *Id.* at 36. An assistant U.S. attorney was quoted as saying "that Abu Ali 'doesn't have to worry about clipping his fingernails anymore'" and that "'he's no good for us here, he has no fingernails left.'" *Id.* The court found "at least some circumstantial evidence" that Abu Ali was tortured with knowledge of the United States during interrogations. *Id.* at 38.

¹⁹⁶ *Id.* at 38.

¹⁹⁷ *Id.* On the other hand, Abu Ali's father, who worked for the Saudi embassy in Washington, D.C., claimed Saudi officials "consistently" told him that his son had violated no Saudi laws and that there were no plans in Saudi Arabia to prosecute him. *Id.* at 33.

¹⁹⁸ *Id.* at 38.

¹⁹⁹ CASSEL, *supra* note 2, at 129.

²⁰⁰ *See supra* notes 119–21 and accompanying text (stating that usurpation by the military of criminal prosecution when civilian courts are open and functioning would leave the life, liberty and property of every citizen "at the will and pleasure of the army officer in whose military district he may happen to be found").

E. Monitoring of prison communications, pre-Ashcroft

Since the mid-20th century, courts have allowed, for security reasons, the government to monitor inmates' phone calls to those outside of prison.²⁰¹ *United States v. Paul*, in which a criminal defendant sought to suppress testimony of a monitored phone conversation between an inmate and a visitor under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), is illustrative of this practice.²⁰² In *Paul*, an inmate was overheard telling a female over the phone to "bring the material" and that he would have money.²⁰³ The next day, prison guards took \$5 from the inmate and strip-searched his female visitor, finding no contraband.²⁰⁴ It was later discovered, following another monitored conversation in which the visitor told the inmate that she "ditched the stuff" under a chair in the warden's office, that she had attempted to bring hashish into the prison.²⁰⁵

The court found the wiretapping permissible under Title III because it was done within the ordinary course of the prison guards' duties.²⁰⁶ Federal appellate courts in other circuits have followed this approach.²⁰⁷

²⁰¹ *E.g.* *United States v. Paul*, 614 F.2d 115, 116 (6th Cir. 1980) ("We do not question the government's need to monitor prisoners' telephone calls as a security measure.").

²⁰² *Id.*; Title III of the Omnibus Crime Control and Safe Streets Act of 1968 § 802, 18 U.S.C. §§ 2510–2522.

²⁰³ *Id.* at 115.

²⁰⁴ *Id.* at 115–16.

²⁰⁵ *Paul*, 614 F.2d at 116. Bringing anything onto federal prison grounds contrary to a rule of the Attorney General is a violation of 18 U.S.C. § 1791. *Id.* (internal quotation marks omitted).

²⁰⁶ *Id.* at 117. The government had argued, earning the vote of a concurring judge on this appellate panel, that Title III does not apply to prisons at all. *Id.* at 116, 117–18 (Phillips, J., concurring). The concurring judge argued that Title III did not apply because "[s]urveillance conducted to maintain internal prison security lies distinctly outside the threat to privacy that Title III was designed to address." *Id.* at 118. The government had argued that Title III does not apply to surveillance that does not require a warrant under the Fourth Amendment, but the court majority "ha[d] problems with this view," preferring the finding of the district court in this case that Title III did apply, but wiretapping by "an investigative or law enforcement officer in the course of his duties" is admissible into evidence. *Id.* at 116, 117 (internal quotation marks omitted).

²⁰⁷ *See, e.g.*, *Gidlay v. Dubois*, 124 F.3d 277, 297 (1st Cir. 1997) (finding that the monitoring of Massachusetts inmates' phone calls was lawful); *Abraham v. County of Greenville*, 237 F.3d 386 (4th Cir. 2001) (noting that the county's recording of judges' conversations not a legitimate surveillance activity because it was not carried out in the normal course of the county's law enforcement duties); *United States v. Van Poyck*, 77 F.3d 285, 290–91, 292 (9th Cir. 1996) (stating that the defendant's motion to suppress phone calls made in prison was denied under law a enforcement exception to Title III). The court further reasoned that "no prisoner should expect privacy in his outbound telephone calls." *Id.*; *Smith v. Department of Justice*, 251 F.3d 1047 (D.C. Cir. 2001). *Smith* offers an interesting twist on the typical inmate challenge to corrections department monitoring of phone calls that the inmate initiates or receives while in prison. In *Smith*, inmate-appellant spoke with his attorney from prison via telephone, using a line he knew to be monitored rather than an available unmonitored line. *Id.* at 1048. During the phone conversation, appellant claimed, the attorney acknowledged that he provided appellant a constitutionally inadequate defense. *Id.* Appellant later sought a copy of the recording of that phone conversation from the Bureau of Prisons under the Freedom of Information Act, 5 U.S.C. § 552. *Id.* The

Nonetheless, the way was left clear under this line of cases for attorneys to communicate with their clients about the clients' legal issues without government monitoring.²⁰⁸ This now appears to have changed with the revisions the Ashcroft DOJ made to Bureau of Prisons rules.

III. Monitoring of Prison Communications Under 28 C.F.R. 501.3(d)

Federal law defines international terrorism as a violent act which, no matter where committed, violates any criminal law in the United States, and which appears to be intended to: (1) intimidate or coerce the civilian population; (2) influence government policy through intimidation or coercion; or (3) affect the government's conduct via mass destruction, assassination or kidnapping.²⁰⁹ The Code of Federal Regulations allows the Bureau of Prisons to issue special administrative measures (SAMs) by which a prison warden may place an inmate in administrative detention and limit such inmate privileges as phone access, correspondence, visiting, and participation in media interviews where "reasonably necessary to protect persons against the risk of acts of violence or terrorism."²¹⁰ The time limit on a SAM is 120 days, but the attorney general can extend the time period indefinitely.²¹¹ The Bureau of Prisons adopted these SAMs in 1997.²¹²

More recent rule changes, however, allow the attorney general to order that an inmate's communications with an attorney that otherwise would be protected by the attorney-client privilege be monitored where "reasonable

Smith court found that recordings of phone conversations made by prison authorities who routinely monitor inmates' conversations are admissible into evidence. *Id.* at 1050.

²⁰⁸ *E.g. Smith*, 251 F.3d at 1048 (noting that "an unmonitored phone was available" to an inmate at a federal correctional institution for the purpose of conferring with his attorney).

²⁰⁹ 18 U.S.C. § 2331(1) (2005).

²¹⁰ 28 C.F.R. § 501.3(a). A prison warden is authorized to implement a SAM at the direction of the attorney general, or of the head of a federal law enforcement or intelligence agency through the attorney general. *Id.* Needless to say, the implementation of these SAMs can have significant constitutional implications. For example, a defendant popularly known as the "shoe bomber," for having attempted in December 2001 to blow up an American Airlines flight over the Atlantic Ocean by detonating explosives in his shoes, challenged a restriction on his access to news media. *United States v. Reid*, 369 F.3d 619, 619–20 (1st Cir. 2004). Specifically, prison officials removed the "letters to the editor" section of the weekly *Time* magazine to which Reid subscribed as well as two terrorism-related articles. *Id.* at 620. Reid challenged the SAMs on First Amendment grounds, and the district court denied his motion as moot after the government gave him the two articles. *Id.* at 622–23. The prison renewed the restrictions on the magazine, including delaying its delivery by 30 days, reasoning that clipping the letters to the editor was justified because Reid might receive "coded" messages that might enable him to continue his criminal activity from jail. *Id.* at 623. Sounding a skeptical note, the district court wrote, "[T]his constant reiteration of we've got to keep data away from him, we've got to keep his data out of the hands of the public lest disaster befall, respectfully, is wearing a little thin." *Id.* The appellate court dismissed the case as moot, *inter alia*, because the SAMs at issue had expired and been replaced by new SAMs. *Id.* at 625.

²¹¹ *Id.* § 501.3(c).

²¹² 62 Fed. Reg. 33,730 (1997).

suspicion exists to believe that [the] inmate may use communications with attorney or their agents to further or facilitate acts of terrorism."²¹³ Unless the monitoring is authorized by a court, the prison must notify the inmate and counsel prior to the monitoring that all communications may be monitored to deter future acts of violence or terrorism and that communications not related to attaining legal advice and those that would facilitate a crime are not privileged.²¹⁴ This provision seems in part superfluous, because the crime-fraud exception to the attorney-client privilege already "breaks the seal of secrecy" when a client seeks advice for the purpose of committing a future crime.²¹⁵ To minimize exposure of privileged material to investigators, the government is to set up a "taint team" separate from those participating in the underlying investigation to monitor the communications.²¹⁶ However, the leader of the taint team may divulge privileged material with court approval or where she or he determines that "acts of violence or terrorism are imminent."²¹⁷ Disconcertingly, the prosecution's determination of whether the attorney-client communications have been used for terrorism related purposes is not subject to judicial review.²¹⁸

Citing *Weatherford v. Bursey*,²¹⁹ the government justifies this intrusion into the attorney-client privilege by pointing out that the privilege may not be impaired by the presence of a government informant where an attorney and client are conferring.²²⁰ In *Weatherford*, an informant who

²¹³ 28 C.F.R. § 501.3(d).

²¹⁴ *Id.* § 501.3(d)(2).

²¹⁵ *Clark v. United States*, 289 U.S. 1, 15 (1933) ("The privilege takes flight if the relation is abused."); *United States v. Zolin*, 491 U.S. 554, 562–63 (1989).

²¹⁶ 28 C.F.R. § 501.3(d)(3); 66 Fed. Reg. 55062, 55064 (2001).

²¹⁷ 66 Fed. Reg. 55062, 55064 (2001).

²¹⁸ Katherine Ruzenski, *Balancing Fundamental Civil Liberties and the Need for Increased Homeland Security: The Attorney-Client Privilege After September 11th*, 19 ST. JOHN'S J. L. COMM. 467, 478–79 (2005); Eric D. MacArthur, *The Search and Seizure of Privileged Attorney-Client Communications*, 72 U. CHI. L. REV. 729, 755 (2005). One author seeks to ameliorate the seeming one-sidedness of this policy by advocating that a court "[a]t very least" should require the prosecution to disclose the privileged information to which it has been exposed so it "can determine whether the prosecutor's knowledge of privileged material has prejudiced the defendant." *Id.*

²¹⁹ 429 U.S. 545 (1977).

²²⁰ 66 Fed. Reg. 55062, 55064 (2001) (citing *Weatherford v. Bursey*, 429 U.S. 545, 552–54). Citing to *Weatherford* arguably is of limited value to the government in trying to justify monitoring of attorney-client communications in prison, because the attorney-client communications at issue in *Weatherford* did not take place in a prison setting. *Weatherford*, 429 U.S. at 547–49. Moreover, the testimony of an informant who was present during a meeting between the defendant and his attorney that was found admissible in *Weatherford* touched not on an overheard conversation with counsel but on a conversation between the defendant and third parties while counsel was not present. *Id.* at 553–54. The *Weatherford* Court suggested that informant testimony less likely would be admissible were it derived from a conversation between client and attorney. *Id.* at 554, 558–59. However, the Court did not come to a conclusion on this point. *Id.* at 552–54. Adding strength to the argument that *Weatherford* provides a weak underpinning for the government's justification of monitoring attorney-client communications in prison is that court's contention that electronic surveillance—which the government seeks to conduct

engaged in an act of vandalism with the defendant met with the latter and his attorney to discuss trial strategy.²²¹ The informant had been invited and agreed to meet as a means to maintain his deception.²²² The court found no incursion into the defendant's right to effective assistance of counsel.²²³ Although the monitor of an inmate-attorney communication could be seen as an "informant," *Weatherford* can be distinguished because there the informant was invited into the attorney-client conversation. This presumably would not be the case in the prison setting. Beyond being a poor fit as support for the government's attempt to justify monitoring of attorney-client communications in prison, the *Weatherford* holding was plain wrong. Justice Marshall wrote in dissent: "I cannot join in providing even the narrowest of openings to the practice of spying upon attorney-client communications."²²⁴

The government further argues that it would build a "firewall" around the taint team to ensure any privileged information it overheard would not be shared with an inmate's prosecution team, following the allowable practice under the American Bar Association (ABA) Model Rules of Professional Conduct.²²⁵ Under the applicable ABA Model Rule, when a lawyer works for the government then moves to a private firm, the firm is not disqualified from litigating against the government even if the lawyer worked in an adversarial position, so long as the lawyer is "timely screened" from participation and receives none of the related fee, and the government is notified.²²⁶ This is an exception to the general proposition in the private sector that confidences shared with a lawyer are imputed to the whole firm.²²⁷ Again, the government's reasoning is suspect, because the Model Rule that provides for screening applies specifically when a lawyer leaves a

under 28 C.F.R. § 501.3(d)—is more likely to chill attorney-client communications and thus impair the Sixth Amendment right to effective assistance of counsel than the mere presence of a third party at an attorney-client meeting, as occurred in that case. *Id.* at 554 n.4.

²²¹ *Weatherford*, 429 U.S. at 547–48.

²²² *Id.* at 547–48, 558–59.

²²³ *Id.* at 547–48, 558–59. The informant did not share what he learned at the meetings with the government. *Id.* at 548.

²²⁴ *Id.* at 562 (Marshall, J., dissenting). Justice Marshall argued that allowing government informants to sit in on attorney-client meetings both undermines the integrity of the adversarial system and thus the fairness of trials, and impairs a defendant's right to effective assistance of counsel. *Id.* at 562, 563.

²²⁵ 66 Fed. Reg. 55062, 55064 (2001) (citing *Blair v. Armontrout*, 916 F.2d 1310, 1333 (8th Cir. 1990); American Bar Association, Model Rules of Professional Conduct, Table of Contents, http://www.abanet.org/cpr/mrpc/mrpc_toc.html (last visited Jan. 15, 2006) [hereinafter Model Rules].

²²⁶ Model Rule 1.11, http://www.abanet.org/cpr/mrpc/rule_1_11.html (last visited Jan. 15, 2006).

²²⁷ Model Rule 1.10, http://www.abanet.org/cpr/mrpc/rule_1_10.html (last visited Jan. 15, 2006); *Henriksen v. Great Am. Sav. & Loan*, 14 Cal. Rptr. 2d 184, 188 (Cal. Ct. App. 1992). Of interest is that California courts apply this rule quite strictly: "[W]here an attorney is disqualified because he formerly represented and therefore possesses confidential information regarding the adverse party in the current litigation, vicarious disqualification of the entire firm is compelled as a matter of law." *Id.*

government position for the private sector, which is not the case when a taint team is monitoring attorney-client conversations in prisons. Furthermore, the purpose of the screening rule is not to facilitate intrusions into the attorney-client privilege by justifying government monitoring of attorney-client conversations, but rather to facilitate government recruitment of talented attorneys by making it relatively easy for them to move to the private sector, a valuable policy because "attorneys with experience in both sectors are more useful to the courts, clients, and the government."²²⁸

The government's reasoning behind allowing incursions into attorney-client conversations is not solidly grounded. To be sure, some writers, haunted by the ghosts and ugly realities brought to light by the 9/11 attacks, argue in favor of a rule change allowing the government to monitor inmate-attorney conversations.²²⁹ But an appellate court represents the stronger position by arguing that:

the inquiry into prejudice must stop at the point where 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.²³⁰

IV. "District Split": One of Two Washington, D.C. Courts Finds Breach of Privilege

Only a few cases available to date deal with the attorney-inmate monitoring provisions in 28 C.F.R. 501.3(d). One of these decisions merely denies the defendant's motion to order the government to reveal whether it monitored attorney-client interactions as moot, because under the regulations the government is required to inform the inmate and attorney of any recording of privileged communications.²³¹ Another case, involving noted New York defense attorney Lynne Stewart, reaches the same result under the

²²⁸ Donald R. McMinn, *ABA Formal Opinion 88-356: New Justification for Increased Use of Screening Devices to Avert Attorney Disqualification*, 65 N.Y.U. L. REV. 1231, 1262-63 (1990).

²²⁹ E.g. Ruzenski, *supra* note 217, at 478-79 (downplaying the incursion to the privilege); 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, 479 (2003). Startlingly, Kearns characterizes the rule changes as a means to "close[] a loophole that allowed an inmate to communicate freely with his attorney." *Id.*

²³⁰ *Levy*, 577 F.2d at 209. This court, therefore, would not permit the government to take the half-measure of screening.

²³¹ *United States v. Esawi*, No. 02 CR 038, 2003 U.S. Dist. LEXIS 1695, *10-*14 (E.D. Ill. Feb. 6, 2003) (order granting/denying defendant's motions) (citing 28 C.F.R. 501.3(d)(2)).

same theory, but the court in this case offers more specifics as to its reasoning.²³² Finally, representing what could be termed a "district split," a pair of Washington, D.C. courts has examined the inmate-attorney monitoring provisions. One court declined, on standing grounds, to decide the merits of the case, and the other found monitoring improper but left in place a framework so restrictive that it likely compromises the attorney-client privilege and thus is questionable on Sixth Amendment grounds.²³³

A. United States v. Sattar – *the Lynne Stewart Case*

New York defense attorney Lynne Stewart was convicted in February 2005 of aiding terrorism.²³⁴ Stewart was found guilty of helping her client, Sheik Omar Abdel-Rahman, pass a message in which he withdrew support for a cease-fire in Egypt by his militant followers.²³⁵ Abdel-Rahman, a blind cleric, was serving a life term for conspiring to assassinate the president of Egypt and destroy New York landmarks.²³⁶ Stewart, who describes herself as "a radical human rights attorney,"²³⁷ and who built a "fierce reputation fighting for the poor, the dispossessed, radicals and revolutionaries" during her three-decade career, faces 20 years in prison.²³⁸ Although Stewart's involvement was key to the prosecution's case, prosecutors were unable to specify a single act of violence that resulted from the statement.²³⁹

Stewart's radical politics by their nature draw controversy. Her oft-quoted statement, "[t]o rid ourselves of the entrenched, voracious type of

²³² United States v. Sattar, 02 Cr. 395, 2002 U.S. Dist. LEXIS 14798, 2002 WL 1836755 (S.D.N.Y. Aug. 12, 2002); see *infra*, Part IV, A (discussing *Sattar*).

²³³ Al-Owhali, 279 F. Supp. 2d at 13; *Al Odah*, 346 F. Supp. 2d at 1. Another case makes mention of 28 C.F.R. 501.3(d), but only as it relates to seeking remedies under another provision. *Yousef v. Reno*, 254 F.3d 1214, 1220 (10th Cir. 2001).

²³⁴ Robert Gearty & Greg B. Smith, *Guilty! Lawyer Called Terror Helper*, DAILY NEWS (New York), Feb. 11, 2005, at 5; Larry Neumeister, *Civil Rights Lawyer Convicted of Aiding Terror by Passing Jailed Client's Messages to Followers*, THE INDEPENDENT (London), Feb. 11, 2005, at 36. For a thoroughgoing overview—and criticism—of the indictment and prosecution of Stewart, see Cohn, *supra* note 44, at 1249–55; Legal Documents & Transcripts, Justice for Lynne Stewart, <http://www.lynne-stewart.org/legal.html> (last visited Jan. 15, 2006).

²³⁵ Gearty & Smith, *supra* note 233, at 5; Neumeister, *supra* note 233, at 36.

²³⁶ Gearty & Smith, *supra* note 233, at 5; Neumeister, *supra* note 233, at 36.

²³⁷ The Lynne Stewart Defense Committee, *Who Is Lynne Stewart?*, JUSTICE FOR LYNNE STEWART, <http://www.lynnestewart.org> (last visited Jan. 15, 2006).

²³⁸ David Teather, *Lawyer Guilty of Aiding Terrorists Faces 20 Years in Jail*, THE GUARDIAN (London), Feb. 11, 2005, at 18; Julia Preston, *New Trial Is Being Sought For Lawyer in Terror Case*, N.Y. TIMES, Aug. 13, 2005, at B3. Stewart has filed a motion seeking that the court declare a mistrial because a juror failed to disclose during voir dire that he is biased against criminal defendants. *Id.*

²³⁹ Neumeister, *supra* note 233. Stewart also was convicted for having lied when she made written promises to abide by SAMs imposed on her client and for conspiring to evade the prison restrictions. In Brief, *Lynne Stewart convicted, but vows to fight on*, NAT'L L.J., Feb. 14, 2005, at 3.

capitalism that is in this country that perpetuates sexism and racism, I don't think that can come non-violently,"²⁴⁰ drives her political foes to angry fulmination.²⁴¹ On the other hand, her conviction has been cited as an assault on the First Amendment and the attorney-client privilege. Further, it has been characterized as a thinly-veiled threat by a politically sensitive Bush Administration against lawyers who represent "unpopular" clients.²⁴² Professor Cavise pointed out that Stewart merely delivered her client's statement to the press and "didn't pass any secret codes or messages" to anyone.²⁴³ Highlighting the political nature of the prosecution, the Cavise argued that typically violations of administrative rules result in administrative sanctions, not decades-long prison sentences.²⁴⁴

Moreover, the First Amendment implications of the Stewart case are profound. However controversial or unlikely her predicted violent end to the current brand of capitalism may be, expressing this view is entirely legal under First Amendment jurisprudence.²⁴⁵ Proving that such a statement was directed at inciting imminent lawless action and was likely to produce such action is a dubious prospect.²⁴⁶ Addressing one of the crimes for which she was convicted, Stewart's attorney, Michael Tigar, told a Cardozo Law School conference: "The obligation of lawyers . . . to hold a press conference to take these controversies into the public forum, is central to what we do."²⁴⁷

In *United States v. Sattar*,²⁴⁸ Stewart moved to compel the government to disclose whether it was electronically monitoring communications with her clients *or* her counsel under Title III,²⁴⁹ the Foreign Intelligence Surveillance Act (FISA),²⁵⁰ or the Bureau of Prisons

²⁴⁰ *Id.* (internal quotation marks omitted).

²⁴¹ *E.g. Post Details: Lynn Stewart*, RANDOM RAVINGS, Feb. 15, 2005, http://www.brendoman.com/hippydave/2005/02/15/lynn_stewart (last visited Jan. 15, 2006) ("[A]s far as I'm concerned Lynn Stewart deserves a cell in the Supermax next Omar Abdul Rahman to be gang raped for the rest of her days. . . . Stewart is a traitorous dog and deserves to die like one"). *Id.*

²⁴² Gerald F. Uelmen, *Motions FYI: Vagueness; Vindictive Prosecution; Severance of Defendants; the Case of Lynne Stewart*, 28 CHAMPION 36 (2004). Professor Uelmen contends that the prosecution of Stewart is seen as a "test of how far John Ashcroft will go in harassing attorneys who have the courage and stamina to defend accused terrorists." *Id.*

²⁴³ Leonard L. Cavise, *Commentary: Protect Attorney-Client Privilege*, CHICAGO TRIBUNE, Feb. 23, 2005, at 22.

²⁴⁴ *Id.*

²⁴⁵ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Under the First Amendment, the government cannot "proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.*

²⁴⁶ *Id.*

²⁴⁷ Cohn, *supra* note 41, at 1252 (internal quotation marks omitted).

²⁴⁸ *United States v. Sattar*, 02 Cr. 395, 2002 U.S. Dist. Lexis 14798 (Aug. 12, 2002).

²⁴⁹ Title III of the Omnibus Crime Control and Safe Streets Act of 1968 §802, 18 U.S.C. §§ 2510-2522.

²⁵⁰ Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801 et seq.

regulations allowing attorney-client monitoring in terrorist cases.²⁵¹ Stewart argued that "any interception of attorney-client communications cannot be justified."²⁵² Specifically, she contended, because Title III and FISA do not require notification of the defendant or attorney prior to monitoring, instead only allowing defendants to later challenge the monitoring, the government's monitoring under these provisions chilled communications with her attorney, depriving her of effective assistance of counsel.²⁵³ The court rejected this view, noting that Stewart cited no authority to show that "a bare fear of surveillance, without more, is sufficient to establish a constitutional requirement" that the government disclose whether or not it was monitoring.²⁵⁴ A defendant, the court held, must show that the intercepted communication "was somehow used against the defendant" to prove a Sixth Amendment violation when the incursion into privileged communications is unintentional or justified.²⁵⁵

Unlike under Title III or FISA, the Bureau of Prisons regulations require that the inmate and attorney be notified in writing of any planned monitoring prior to any communications.²⁵⁶ Stewart challenged government monitoring under this provision, but the court appeared satisfied with the government's assurances that it would follow its regulations and pointed out that the monitoring under 28 C.F.R. § 501.3(d) applied in this case only to defendant Sattar.²⁵⁷ Thus, the court did not reach the issue of whether monitoring is constitutionally proper or violates the attorney-client privilege.

²⁵¹ *Sattar*, 02 Cr. 395, 2002 U.S. Dist. Lexis 14798 at *3, *11–*12, *12 n.1.

²⁵² *Id.* at *12.

²⁵³ *Id.* at *12, *18.

²⁵⁴ *Id.* at *19; *see also* *United States v. Massino*, 311 F. Supp. 2d 309, 313 (E.D.N.Y. 2004) ("To establish a Sixth Amendment violation, the defendants thus would have to show either that privileged information was passed to the government and prejudice resulted, or that the government intentionally invaded the attorney client relationship and prejudice resulted."); *Coplon v. U.S.*, 191 F.2d 749, 759 (D.C. Cir. 1951) (citing *Glasser v. United States*, 315 U.S. 60 (1942)). Courts, however, have not always required prejudice to a defendant to find a Sixth Amendment violation. The U.S. Court of Appeals for the District of Columbia Circuit, for example found that "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Id.* The *Coplon* Court continued, "We think it is further true that the right to have the assistance of counsel is so fundamental and absolute that its denial invalidates the trial at which it occurred and requires a verdict of guilty therein to be set aside, regardless of whether prejudice was shown to have resulted from the denial." *Id.*; *see also* *Weatherford v. Bursey*, 425 U.S. 545, 565 (1977) (Marshall, J., dissenting) ("A rule that offers defendants relief only when they can prove 'intent' or 'disclosure' is, I fear, little better than no rule at all."). These mid-20th century courts exhibited a more appropriate level of respect for the requirement that defendants and their counsel confer in private without government spying, a level of respect that the current bench appears willing to allow the government to erode.

²⁵⁵ *Sattar*, 02 Cr. 395, 2002 U.S. DIST. LEXIS 14798 at *20.

²⁵⁶ 28 C.F.R. § 501.3(d)(2) (2005).

²⁵⁷ *Sattar*, 2002 U.S. DISTRICT LEXIS 14798 at *12 n.1.

B. Al-Owhali v. Ashcroft

Considering the constitutional implications of the 28 C.F.R. § 501.3(d) monitoring, the district court found that the plaintiffs failed to show that they had standing.²⁵⁸ As a result, the court did not reach the merits of the constitutional question posed by the plaintiffs.²⁵⁹ Aside from contesting the constitutionality of the monitoring provision, the plaintiffs, as did Lynne Stewart, alleged that government surveillance "chills the attorney-client relationship and deprives the Plaintiff . . . of the right to discuss any aspect of his case with an attorney and receive honest advice in return."²⁶⁰ The court disagreed, reasoning that a mere allegation that a government action chills constitutional activity without specifying an "immediate threat of concrete, harmful action" to a plaintiff will not survive a challenge to standing.²⁶¹

C. Al Odah v. United States

In the case that most thoroughly examines the Bureau of Prisons procedures for monitoring of inmate-attorney communications under 28 C.F.R. § 501.3(d)—which were rejected as an intolerable incursion on the attorney-client privilege—the court nonetheless approved a framework that itself is suspect under the Sixth Amendment.²⁶² In this habeas corpus proceeding, the government proposed a particularly intrusive program of monitoring, including real time audio and video monitoring of attorney-client meetings and review of all material taken to or from such meetings, including attorney notes, as well as legal mail between inmates and their counsel.²⁶³ Moreover, the taint team monitoring an attorney-client session would be entitled to halt the meeting whenever it believed that the prisoner or attorney was trying to "defeat or frustrate" the surveillance or convey

²⁵⁸ *Al-Owhali*, 279 F. Supp. 2d at 13, 16.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 18–19 (internal quotation marks omitted).

²⁶¹ *Id.* at 26 (citing *United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984)) (internal quotation marks omitted). As an example of a chilled-expression case that survived a standing challenge, the court cited *United Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989). *Id.* at 27. There, the plaintiff churches, supported their claim that federal immigration officers abridged their rights to association, free expression and free exercise of religion by entering churches "wearing body bugs and surreptitiously recording church services." *Id.* The churches showed that they had lost membership and had canceled Bible study classes due to lack of attendance. *Id.* Furthermore, they claimed parishioners were less inclined to seek pastoral counseling and less open during confessions and prayers. *Id.*

²⁶² *Al Odah*, 346 F. Supp. 2d 1, 14–15 (D.D.C. 2004).

²⁶³ *Id.* at 8–9.

terrorist- or crime-related information that posed an "immediate and substantial" threat to national security.²⁶⁴

Much as in the Lynne Stewart case, the government in *Al Odah* feared that attorneys would unwittingly pass coded messages from inmates to other presumed terrorists.²⁶⁵ Disturbingly, the government appeared eager to deputize defense attorneys as surrogate interrogators, admitting during a hearing that it planned to "exploit the 'intelligence value'" of attorney-inmate interactions—a fact, the court noted, that government attorneys were "careful to omit . . . from their briefs."²⁶⁶ The court took the government to task for giving short shrift, in its arguments, to the principle of counsel-client confidentiality:

The Government's proposal that it monitor these meetings and conduct a classification review of meeting notes flies in the face of the foundational principle of the attorney-client privilege. In fact, the courts have found that intrusion by the government, in particular, would lay waste to the value of the attorney-client privilege.²⁶⁷

The court further chided the government for "attempt[ing] to erode this bedrock principle with a flimsy assemblage of cases and one regulation."²⁶⁸

It is worth mentioning that the government additionally argued that the plaintiffs had no right to representation by counsel in their petition for habeas corpus.²⁶⁹ In this way, the relationship between the detainees and their attorneys would be "at the Government's pleasure and discretion," allowing it to restrict the relationship in any way it saw fit.²⁷⁰ The court was likewise unimpressed with this line of reasoning, and, exercising discretion conferred by statute, found that plaintiffs were entitled to counsel in the interest of justice.²⁷¹

This court showed admirable respect for the attorney-client privilege, resolving to stand firm against a government accustomed to getting its way

²⁶⁴ *Id.* at 9 (internal quotation marks omitted).

²⁶⁵ *Id.* Of concern is information regarding prisons, military operations or circumstances of capture that would violate national security; the government noted that members (and presumably supporters) of terrorist groups are trained to pass such information and could do so through unsuspecting attorneys.

²⁶⁶ *Id.* at 10 n.11.

²⁶⁷ *Id.* at 11.

²⁶⁸ *Al Odah*, 346 F. Supp. 2d at 12. Regarding the government's citation to 28 C.F.R. § 501.3(d), the court noted that "there is no case law considering the propriety of this regulation, and the mere fact that such a regulation exists is not, itself, sufficient to persuade the Court that such monitoring is proper." *Id.* at 12–13.

²⁶⁹ *Id.* at 5.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 8.

merely by citing necessity based on the war on terror. Yet the court did pay heed to the national security concerns by approving a framework under which attorney-client interactions could be constrained.²⁷² Under the framework, counsel is required to get security clearance "at the level appropriate for the level of knowledge the Government believes is possessed by the detainee..."²⁷³ Furthermore, each client is allowed confidential communications with only one attorney, and that attorney cannot disclose the privileged information to anyone—not even co-counsel or support staff—without submitting it to the government for review.²⁷⁴ This restriction applies also to legal mail and attorney notes.²⁷⁵ Considering that the right to assistance of counsel entails, to maintain fairness in the adversarial system, the right to *effective* assistance of counsel,²⁷⁶ it seems hardly the case that a defendant could receive effective representation when the attorney effectively is unable to rely on staff or co-counsel in preparing a defense. Therefore, while the *Al Odah* court rightfully defended the attorney-client privilege of confidentiality, which itself is necessary for effective representation,²⁷⁷ it allowed for a framework that in effect undermines the defendant's ability to prepare for trial.

V. Conclusion

For all the governmental secrecy and intrusions into personal freedoms and privacy entailed in the Patriot Act and related regulation, little evidence exists that they have averted any terrorist acts.²⁷⁸ In particular, the

²⁷² *Id.* at 13–14.

²⁷³ *Id.* at 14.

²⁷⁴ *Al Odah*, 346 F. Supp. 2d at 13 (citing *Al-Owhali*, 279 F.Supp. 2d at 14). The attorney also will have to abide by any government decision to approve or prohibit disclosure. *Id.*

²⁷⁵ *Id.*

²⁷⁶ *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (discussing the long established rule that "the right to counsel is the right to effective assistance of counsel.").

²⁷⁷ *See Levy*, 577 F.2d at 209 (explaining the need for open, two-way communication between an attorney and client in order for the Sixth Amendment to be adequately protected); *see also Weatherford*, 429 U.S. at 545 ("Unquestionably, government interference in the relationship between attorney and defendant may violate the latter's right to effective assistance of counsel."); TAYLOR, *supra* note 61, at 90 ("The right to counsel cannot be fully effective unless defense attorneys have full and unfettered access to the information they need, and clients would not be in a position to provide such information if they risked the possibility that it could be then used against them.").

²⁷⁸ CASSEL, *supra* note 2, at 26. "There is no indication that snooping on American's [sic] library and Internet usage, monitoring antiwar protestors, detaining immigrants, or forcing foreign visitors to register have done anything to mitigate against future terror attacks. Not one arrest has resulted from these controversial measures." *Id.*; Wilkinson, *supra* note 39. Indeed, the increasingly common, shadowy practice of extraordinary renditions, by which the CIA seizes persons on foreign locales and sends them to third countries where they often are subjected to violent and abusive treatment, at least in one instance has been said not only to constitute a crime in the nation in which the seizure occurred, but an impediment to progress in reining in terrorism. *Id.*; Tracy Wilkinson, *CIA Said to Leave Trail in Abduction*, L.A.

changes to the Bureau of Prison rules allowing government monitoring of attorney-inmate communications set a perilous precedent and appear "designed to chill, if not freeze, the confidential discussions between an inmate and his attorney that are essential to a well-prepared defense."²⁷⁹ This should be of concern to anyone who values fairness in the adversarial system of justice as secured by an effective defense of the accused. Such a defense is especially important here, because "dedicated attorneys are all defendants have going for them when the government wants to try them with secret evidence or lock them up indefinitely without trials."²⁸⁰

The government insists that it will "scrupulously respect[]" defendants' Sixth Amendment rights²⁸¹ even as it proposes to eavesdrop on their privileged communications. But how is one to trust a government that has, as this Article has detailed, tried defendants in secret, flown or arrested people in foreign countries and held them for repeated interrogation without counsel, engaged in torture and other physical and sexual abuses in an attempt to coerce confessions, and hampered travel of law-abiding citizens with secret "no-fly" lists? Even if despite these practices the government generally could be said to function in a trustworthy way, in light of regulations that undermine the bedrock principle of protecting attorney-client confidences, a stable feature of U.S. law for more than 200 years,²⁸² the words of Justice Bradley resonate: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."²⁸³ It would be unwise for courts to let the government by "slight deviations" procure a weakening of the attorney-client privilege and undermine the Sixth Amendment right to effective assistance of counsel.

TIMES, June 26, 2005, at A3. "Not only was [Egyptian imam] Abu Omar's kidnapping illegal in having seriously violated Italian sovereignty, but it was also an inauspicious act that has contaminated the overall fight against terrorism," an Italian judge wrote. *Id.* (internal quotation marks omitted). Moreover, the CIA's extraordinary rendition in this case has developed into a diplomatic headache following an order issued by an Italian judge for the arrest on kidnapping charges of 13 of the 19 U.S. operatives involved in the kidnapping of Abu Omar. *Id.* Appallingly, the CIA agents involved used their cell phones, driver's license and passport numbers and frequent flier numbers in a "brazen and perhaps reckless" way so as to expose their CIA operation. *Id.* "Although much of the information they provided may have been false, they seemed to have left a trail worthy of Hansel and Gretel." *Id.*

²⁷⁹ CHANG, *supra* note 109, at 87.

²⁸⁰ *Id.* at 85.

²⁸¹ 66 Fed. Reg. 55062, 55064 (Oct. 31, 2001) (to be codified at C.F.R. pts. 500 and 501).

²⁸² See Zeidner, *supra* note 44, at 1320–21 (discussing the history of the attorney-client privilege); see also Cohn, *supra* note 44, at 1235 (describing the roots of the attorney-client privilege).

²⁸³ Boyd v. United States, 116 U.S. 616, 635 (1886) (evaluating the process and procedure for proper search and seizure).

