The Evisceration of the Attorney-Client Privilege in the Wake of September 11, 2001

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Fordham Law Review, Vol. 71, p. 1233 (2003)

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INTRODUCTION

Attorney General John Ashcroft responded to the terrorist attacks of September 11, 2001, by mounting a wholesale assault on civil liberties. He maneuvered the USA PATRIOT Act, which significantly lowers the standards required for surveillance of telephone and computer communications, through a timid Congress; inaugurated a new program of COINTELPRO-style surveillance, which was banned by Congress in the 1970s after the government used it to target civil rights leaders like Martin Luther King, Jr.; ordered federal agencies not to honor Freedom of Information Act requests, an important vehicle for citizens to hold the government accountable by requesting, receiving and publicizing public records; indefinitely detained hundreds of men of Arab, Muslim and South Asian descent in the United States and Guantanamo, Cuba, without charges or suspicion of terrorist ties; became determined to create internment camps to hold U.S. citizens in indefinite detention, where they would be denied their constitutional rights, including the right to counsel and access to the courts; set up the Terrorism Information and Prevention System, to recruit millions of Americans to spy on each other and report "suspicious activity" to the government which will then enter the report into a national database; and granted the FBI sweeping new surveillance powers to conduct investigations for up to one year without suspicion of criminal activity.[1]

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1. The USA PATRIOT Act, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, was hurriedly passed by Congress in the wake of the September 11, 2001, terrorist attacks in New York, Washington D.C., and Pennsylvania. It enhances the executive's ability to conduct surveillance and gather intelligence. *See* Nancy Chang, *The USA PATRIOT Act: What's So Patriotic About Trampling On The Bill Of Rights?* 58 Guild Prac. 142 (2001); *see also* Marjorie Cohn, *America: A Nation of Snitches?* San Diego Union-Trib., Jul. 18, 2002, at B7; Marjorie Cohn, *Americans' Patriotic Duty to Dissent Faces Lengthy Siege*, L.A. Daily J., Mar. 14, 2002, at 6; Marjorie Cohn, *War on Civil Liberties Hits a Speed Bump,* Jurist: The Legal

On October 31, 2001, Ashcroft summarily enacted an interim amendment to Bureau of Prisons regulations,[2] which permits the government to eavesdrop on confidential communications between attorneys and their clients, in defiance of the oldest and one of the most venerable evidentiary privileges in our jurisprudence.

Five months later, Ashcroft indicted attorney Lynne Stewart[3] for violating special administrative measures limiting communications with her client, Sheik Abdel Rahman, who is in custody in the Federal Medical Center in Rochester, Minnesota. The indictment was based on two years of governmental monitoring of conversations between Stewart and Rahman.[4]

This article analyzes the attack on the attorney-client privilege since September 11, 2001. Part I examines the historical development and contours of the privilege, including its relationship to the Sixth Amendment right to counsel. Part II describes the state of the privilege during the period before September 11, 2001, including an analysis of those provisions of Title III—the federal wiretapping statute—and the Foreign Intelligence Surveillance Act, which impact the privilege. It sets forth Ashcroft's new Bureau of Prisons regulation and discusses the legal challenges to it. Part III explains the indictment against Lynne Stewart, her response to the charges, and the judge's decisions on Stewart's arguments. The Conclusion warns of the dangers that undermining the attorney-client privilege poses to the United States criminal justice system.

I. HISTORY AND CONTOURS OF THE ATTORNEY-CLIENT PRIVILEGE

> [I]t generally is acknowledged that the attorney-client privilege is so sacred and so compellingly important that the courts must, within their limits, guard it jealously.[5]

The attorney-client privilege is one of the most venerable of the evidentiary privileges in Western jurisprudence. However, the justification for its existence has changed over time.[6] Although each

Education Network, (Aug. 19, 2002), *at http://jurist.law.pitt.edu/forum/forumnew57.php* (last visited Jan. 23, 2003).

2. Rules and Regulations, Bureau of Prisons, U.S. Dep't of Justice, 28 C.F.R. §§ 500, 501 (2002); Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55062, (Oct. 31, 2001) 2001 WL 1334043.

3. Ahmed Abdel Sattar, Yassir Al-Sirri and Mohammed Yousry were also indicted.

4. Indictment, United States v. Ahmed Abdel Sattar, Yassir Al-Sirri, Lynne Stewart & Mohammed Yousry, No. 02 CRIM. 395 (S.D.N.Y., filed April 9, 2002), *available at http://news.corporate.findlaw.com/hdocs/docs/terrorism/ ussattar040902ind.pdf* [hereinafter Indictment].

5. Chore-time Equip. Inc. v. Big Dutchman, Inc., 255 F. Supp. 1020, 1021 (W.D. Mich. 1966).

6. *See generally* Edward L. Imwinkelried, *The Historical Cycle in the Law of Evidentiary Privileges: Will Instrumentalism Come into Conflict with the Modern*

generation has recognized the beneficial effects of such a shield for legal advocates and their clients, time and circumstances have provided different rationales for doing so.

It is frequently stated that the attorney-client privilege is the oldest confidential privilege recognized by the common law.[7] The privileged nature of communications between an advocate and his client was recognized in Roman law,[8] where an attorney testifying in his client's case was considered incompetent, either because his favorable testimony was biased toward his client, or because his unfavorable testimony made him disreputable and unworthy of belief.[9] It is unclear, however, whether the civil law privilege influenced the formation of the corresponding notion in English law.[10]

The first recorded indications of this privilege operating in the common law appeared during the reign of Elizabeth I, and arose concurrently with the first appearance of compulsory process.[11] As Wigmore observed, before the advent of compulsory live testimony, there was little need for the shielding privilege, but once the circumstances arose, "[i]t thus appears to have commended itself, at the very outset, as a natural exception to the then novel right of testimonial compulsion."[12] By 1577, the privilege was recognized as well-established.[13] The rationale for the privilege at this early stage was not the same as asserted in later case law. Prior to the eighteenth century, the basis for recognizing the attorney-client privilege was that the advocate had a personal oath of honor to uphold his client's interests, and forcing him to break that oath by testifying against the client would besmirch the lawyer's honor as a gentleman.[14]

However, by the late 1700s, the rationale underlying the privilege began to change. Under pressure to maximize the truth-seeking

Humanistic Theories? 55 Ark. L. Rev. 241 (2002).

7. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); 8 John Henry Wigmore, Evidence § 2290 (John T. McNaughton rev. ed., 1961); Jon J. Kramer, *Dead Men's Lawyers Tell No Tales: The Attorney-Client Privilege Survives Death*, 89 J. Crim L. & Criminology 941, 942 (1999); Jean C. Moore, *Evidence-at-Issue Waiver of Attorney-Client Privilege and* Public Service Co. of New Mexico v. Lyons: *A Party Must Use Privileged Materials Offensively in Order to Waive the Privilege*, 31 N.M. L. Rev. 623, 625 (2001); Ken M. Zeidner, Note, *Inadvertent Disclosure and the Attorney-Client Privilege: Looking to the Work-Product Doctrine for Guidance*, 22 Cardozo L. Rev. 1315, 1320 (2001).

8. McCormick on Evidence § 87 (John W. Strong ed., West 5th ed. 1999); Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 Cal. L. Rev. 487, 488 (1928).

9. Radin, *supra* note 8, at 488-89.

10. McCormick, *supra* note 8, § 87.

11. Wigmore, *supra* note 7, § 2290; Zeidner, *supra* note 7, at 1320.

12. Wigmore, *supra* note 7, § 2290.

13. *Id.* (citing Berd v. Lovelace, 21 Eng.Rep. 33 (Ch. 1577)); *see also* Dennis v. Codrington, 21 Eng. Rep. 53 (Ch. 1580) (recognizing the rule "A counsellor not to be examined of any matter, wherein he hath been of counsel").

14. Wigmore, *supra* note 7, § 2290.

powers of the judicial process, the privilege started to erode. The notion arose in case law that an individual attorney's personal honor must yield to the ends of justice.[15] But simultaneously—in recognition of the importance of maintaining the privilege—a new rationale developed, that this special dispensation was necessary to maintain the "freedom of consultation" between a lawyer and his client.[16] This new justification arose in the mid-1700s and became the basis for the modern attorney-client privilege.[17] The "consultation" rationale overlapped in the cases for some time with the older one. For this reason, the modern rule of attorney-client privilege was still developing during the nineteenth century, paradoxically making it appear to be a more recent innovation than some newer privileges, and leading Wigmore to remark: "Probably in no rule of Evidence having so early an origin were so many points still unsettled until the middle of the 1800s."[18] Despite its continuing development, the privilege was recognized early on by the U.S. Supreme Court as well established in the common law.[19]

One change which did emerge in American jurisprudence was a re-definition of the notion of "confidential communication." Whereas confidentiality was originally conceived as deriving from the nature of the *relationship* between the attorney and client (so that any communication between them was privileged), American courts came to treat it as based on the nature of the *communication itself*,[20] so that it applied more narrowly to communications *intended* by the parties to be confidential. This change was initiated in the 1890s and was not complete until the mid-twentieth century,[21] but is now an essential part of the contemporary attorney-client privilege.

15. *Id.*; McCormick, *supra* note 8, § 87.

16. Wigmore, *supra* note 7, § 2290; Zeidner, *supra* note 7, at 1321.

17. McCormick, *supra* note 8, § 87.

18. Wigmore, *supra* note 7, § 2290.

19. Chirac v. Reinicker, 24 U.S. (11 Wheat.) 280, 294 (1826). By 1820, at least six states and two federal circuits had acknowledged the existence of the privilege. Paul R. Rice, Attorney-Client Privilege in the United States §§ 1:12 (1993). In England, a limitation on the scope of the privilege arose in the eighteenth century, but did not survive the end of the next. English courts restricted application of the privilege to communications made in anticipation of litigation, first as to the client's privilege (Radcliffe v. Fursman, 1 Eng. Rep. 1101 (H.L. 1730)), and then to the lawyer's (Annesley v. Anglesea, 17 How. St. Tr. 1139 (Ct. Exch. in Ireland 1733)). Rice, *supra*, §§ 1:6, 1:9. However, both limitations were subsequently abandoned within the next century and a half. *Id.* §§ 1:8, 1:11. The cases involved were *Greenough v. Gaskell*, 39 Eng. Rep. 618 (Ch. 1833) (discussing attorney's privilege) and *Minet v. Morgan*, L.R. 8 Ch. App. 361 (1873) (discussing client's privilege). The litigation limitation does not appear to have taken root in the United States, and the earliest cases preserve the original, broad scope of privileging any communication between a lawyer and his client. Rice, *supra*, § 1:12. Some abortive attempts were made to engraft the moribund English limitation onto the American privilege. *Id.* § 1:13. The earliest attempt appears to be *Dixon v. Parmelee*, 2 Vt. 185 (1829), but the change never caught on.

20. Rice, *supra* note 19, § 1:13.

21. *Id.* § 1:1.

During the formative stages of the new "consultation" rationale for the attorney-client privilege, three defining features emerged.[22] First, the client was not bound by honor to keep the confidence with his attorney. Second, the privilege was limited to the litigation currently at bar. Third, the privilege could be waived. The first and last of these features seem to arise from what was one of the most significant practical results of the shift from a personal honor basis to freedom of consultation: the privilege was now held by the *client*, not by the *attorney*.[23] The shift of emphasis was recognized early in the history of the privilege in American jurisprudence.[24]

The new rationale eventually became firmly rooted and is now the principal justification supporting the privilege. The "freedom of consultation" theory rests on three propositions: (1) the complexity of the law necessitates the assistance of trained legal professionals in order for laymen to vindicate their legal rights; (2) lawyers cannot fulfill this role of counselor unless they have the fullest access to the facts; (3) a client cannot be expected to be candid to the required degree without assurance that her confidences will not be used against her.[25]

The attorney-client confidence has remained a fixed part of American jurisprudence.[26] 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. The issue first arose in a federal district court opinion that held the privilege applied only to natural persons,[27] but the decision was eventually reversed after much negative commentary.[28] While the privilege was recognized as applicable to corporate clients, its scope

22. Wigmore, *supra* note 7, § 2290.

23. Zeidner, *supra* note 7, at 1321.

24. *Id.*; *see* Baker v. Arnold, 1 Cai. R. 258, 266 (N.Y. Sup. Ct. 1803); Chirac v. Reinicker, 24 U.S. (11 Wheat.) 280, 294 (1826). Justice Story wrote for the Court:

> The general rule is not disputed, that confidential communications between client and attorney, are not to be revealed at any time. The privilege, indeed, is not that of the attorney, but of the client; and it is indispensable for the purposes of private justice. Whatever facts, therefore, are communicated by a client to counsel, solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose; and the law holds their testimony incompetent.

Chirac, 24 U.S. (11 Wheat.) at 294.

25. McCormick, *supra* note 8, § 87.

26. However, there has been criticism of the privilege by the noted utilitarian Jeremy Bentham, who believed that the truly innocent needed no protection and that the privilege merely allowed collusion to breed. *Id.* But even a person thinking himself guilty may not be, or may be guilty of a lesser offense; it is the attorney armed with all the facts who must advise the client about the merits of his case.

27. Radiant Burners, Inc. v. Am. Gas Ass'n., 207 F. Supp. 771 (N.D. Ill. 1962).

28. Radiant Burners, Inc. v. Am. Gas Ass'n., 320 F.2d 314 (7th Cir. 1963); McCormick, *supra* note 8, § 87.1.

was delineated somewhat by the Supreme Court in 1981.[29] In *Upjohn Co. v. United States,*, the Court rejected the so-called "control group" definition of the scope of the corporate privilege utilized in *Philadelphia v. Westinghouse Electric Corp*.,[30] which focused on the status of the persons communicating with the attorney and favored a definition focused on the nature of the communication.[31] Under the *Upjohn* formulation, a corporate communication comes within the privilege if it is communicated with the express purpose of securing legal advice for the corporation, relates to the duties of the communicating corporate employee, and is treated within the corporation itself as confidential.[32]

Aside from the corporate client debate, the privilege has remained a fairly stable and unchallenged concept in American law. In fact, its philosophical foundation has acquired some additional support in recent times. To the "consultation" rationale recognized since the 1700s, a new principle based on the right to privacy has been added, though it has not been generally recognized by the courts.[33] Currently the existence of the privilege seems to rest in part on the "consultation" rationale and in part on its role in the adversarial structure of the legal system.[34] That is, the attorney-client privilege serves to uphold the strong fiduciary relationship between lawyer and client, a relationship inconsistent with a system which would allow the lawyer to disclose confidential communications. It is thus intimately tied to the contemporary view of the lawyer's professional responsibilities to her client. This brings the rationale for the privilege in the common law full circle, as once again it is seen as at least partially grounded in the "honor" and ethics of the individual practitioner. Because the privilege is now firmly rooted in this professional ethos, it would be difficult to alter or eliminate the privilege without making corresponding changes to legal ethics.[35]

Moreover, it is now well-settled that the purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of

29. Upjohn Co. v. United States, 449 U.S. 383 (1981).

30. 210 F. Supp. 483, 485 (E.D. Pa. 1962).

31. *Upjohn*, 449 U.S. at 392-95.

32. *Id.* at 394. The privilege at issue in *Upjohn* arose under Federal Rule of Evidence § 501 and thus was not made on a constitutional basis; it is therefore not binding authority on the states. Indeed, the Court itself expressly stated it was not laying down a set of rules for the scope of the corporate privilege and each case has to be decided on its own merits. *Id.* at 396-97.

33. McCormick, *supra* note 8, § 87.

34. *Id.*

35. *Id.* ("To the extent that the evidentiary privilege, then, is integrally related to an entire code of professional conduct, it is futile to envision drastic curtailment of the privilege without substantial modification of the underlying ethical system to which the privilege is merely ancillary.").

justice."[36]

The attorney-client privilege has remained a staple of the common law system from the earliest modern times. Its justification has shifted over time, even returning to its origins, but each time the privilege has come under attack new reasoning has quickly arisen to keep it intact. Indeed, the attorney-client privilege has survived historical scrutiny because a confidentiality shield is a necessary tool for effective operation of the American jurisprudential system.

The general contours of the attorney-client privilege, as stated by Wigmore, are as follows: Legal advice of any type is sought from a professional legal adviser acting in that capacity; the communication relates to that purpose; it is made in confidence by the client who claims permanent protection of the communication; and the client does not waive the privilege.[37] The client is the holder of the privilege, and the attorney has an ethical obligation to maintain the secrecy of the communication.[38]

A. *The Crime-fraud Exception*

An attorney-client communication can lose its privileged character when it is made for purposes of committing a crime or fraud.[39] In order to invoke the crime-fraud exception, the government must make a prima facie case to a judge[40] that (1) a client consulted a lawyer for the purpose, which is later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so; or (2) regardless of the client's purpose at the time of consultation, the client used the lawyer's advice or other services to engage in or assist a crime or fraud.[41] The crime-fraud exception obviates the necessity for the newly amended Bureau of Prisons rule permitting the monitoring of attorney-client communications.[42] Piercing the attorney-client privilege is reserved to the courts, not prosecutors or prison officials.[43]

36. *See Upjohn*, 449 U.S. at 389. The privilege "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." *Id.* (quoting Hunt v. Blackburn, 128 U.S. 464, 470 (1888)).

37. Wigmore, supra note 7, § 2292.

38. McCormick, *supra* note 8, § 92; Model Rules of Prof'l Conduct R. 1.6 (2002); Legal Ethics: The Lawyer's Deskbook on Professional Responsibility R. 1.6 (2002-2003 ed.).

39. *See* United States v. Zolin, 491 U.S. 554, 562-63 (1989).

40. *See* United States v. De La Jara, 973 F.2d 746, 748 (9th Cir. 1992).

41. Restatement of the Law Governing Lawyers § 132 (1996).

42. *See infra* Part II.

43. *See Zolin*, 491 U.S. 554.

B. *Intersection of the Privilege and Sixth Amendment Right to Counsel*

The accused in a criminal case has the right to the effective assistance of counsel for his defense.[44] This guarantee extends to investigation and preparation of a defense, as well as to the trial itself.[45] The right to counsel includes the right to communicate with one's attorney.[46] Indeed, the fairness of a trial can be compromised if a defendant's right to effectively communicate with counsel is "inadequately respected during pre-trial confinement."[47] The Sixth Amendment's guarantee of effective assistance of counsel requires "[f]ree two-way communication between client and attorney."[48] In *Weatherford v. Bursey*, the Supreme Court wrote: "[T]he Sixth Amendment's assistance-of-counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private and that his lawful preparations for trial are secure against intrusion by the government, his adversary in the criminal proceeding."[49]

Like the attorney-client privilege, the right to counsel protects the rights to privacy and fairness.[50] Effective assistance of counsel requires confidential and unfettered communication between the accused and his attorney at every critical stage[51] of a criminal proceeding. Some scholars have argued that the attorney-client privilege is protected by the Sixth Amendment.[52] When his attorney-client privilege is wrongfully violated, a defendant has been denied his Sixth Amendment right to the effective assistance of counsel.

II. THE STATE OF THE PRIVILEGE BEFORE SEPTEMBER 11 AND ASHCROFT'S FRONTAL ASSAULT ON IT

The last three decades have seen an increased erosion of the constitutional protections of criminal defendants. Whereas many of

44. U.S. Const. amend. VI; Gideon v. Wainwright, 372 U.S. 335, 339-40 (1963); Strickland v. Washington, 466 U.S. 668, 686 (1984).

45. Maine v. Moulton, 474 U.S. 159 (1985). "[T]o deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." *Id.* at 170.

46. Geders v. United States, 425 U.S. 80, 88-91 (1976).

47. Johnson-El v. Schoemehl, 878 F.2d 1043, 1051 (8th Cir. 1989).

48. United States v. Levy, 577 F.2d 200, 209 (3d Cir. 1978).

49. Weatherford v. Bursey, 429 U.S. 545, 554 n.4 (1977).

50. *See* United States v. Rosner, 485 F.2d 1213, 1224 (2d Cir. 1973); Avidan Y. Cover, *A Rule Unfit for All Seasons: Monitoring Attorney-Client Communications Violates Privilege and the Sixth Amendment,* 87 Cornell L. Rev. 1233, 1238, 1244-46, 1258 (2002); Imwinkelried, *supra* note 6, at 260-61.

51. The Sixth Amendment right to counsel attaches at critical stages, i.e., after the government has initiated formal charges against the accused. Kirby v. Illinois, 406 U.S. 682, 688 n.6 (1972).

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

the landmark Warren Court decisions were overruled during the Burger Court era,[53] the cutback on the rights of criminal defendants has reached its zenith with the tenure of William Rehnquist as Chief Justice of the United States.[54] This trend has paralleled a conservative period in the country's political system.

The government has launched an attack on the right to counsel by targeting lawyers who represent those protesting governmental policies. In discovery proceedings in the civil lawsuits that grew out of the mass arrests during the 2000 Republican Convention, the law firm that represented the city of Philadelphia questioned National Lawyers Guild ("NLG") attorneys about the content of discussions with their clients. The NLG Legal Observer Coordinator, Lestor Roy Zipris, objected to these questions as violative of the attorney-privilege, the work-product privilege and the First Amendment right of privacy and of association.[55] Likewise, for several years, the Department of Justice has challenged the joint defense privilege, which protects confidential attorney-client communications by defendants who jointly plan legal strategy in defense of charges growing out of political activism.[56]

A. *General Ashcroft's New Rule*

The same day that George W. Bush signed the USA PATRIOT Act into law,[57] General Ashcroft announced his interim amendment to Bureau of Prisons regulations, which took effect five days later, without the usual public comment period.[58] "[A]n unprecedented

53. *See, e.g.,* United States v. Leon, 468 U.S. 897, 918-21 (1984) (creating good-faith exception to the probable cause standard required for search warrant); Nix v. Williams, 467 U.S. 431, 443-48 (1984) (adopting inevitable discovery exception to exclusionary rule); Illinois v. Gates, 462 U.S. 213, 230-41 (1983) (adopting "totality of circumstances" standard for determining probable cause for search warrant); Rakas v. Illinois, 439 U.S. 128, 133-34 (1978) (ending vicarious standing to challenge Fourth Amendment violation).

54. *See, e.g.,* Lewis v. Casey, 518 U.S. 343, 352-55 (1996) (refusing to assume prejudice to inmate from showing of inadequate law library or legal assistance); Whren v. United States, 517 U.S. 806, 813-16 (1996) (upholding constitutionality of pretext stops); Arizona v. Fulminante, 499 U.S. 279, 308-10 (1991) (applying harmless error standard of review to admission of coerced confessions); California v. Greenwood, 486 U.S. 35, 40 (1988) (finding no reasonable expectation of privacy in trash).

55. As of this writing, Zipris's objections have not been ruled on, because the parties are engaged in settlement negotiations. *See* emails from Lester Roy Zipris to the author, Jul. 31, 2002 and Sep. 13, 2002 (on file with the author).

56. *See* Robert Anello, *The Attorney-Client Privilege at the Crossroads: The Indictment of Lynne Stewart*, Remarks at the Benjamin N. Cardozo School of Law, May 23, 2002 (transcript on file with author); *infra* note 122 and accompanying text.

57. *See* Chang, *supra* note 1.

58. Rules and Regulations, Bureau of Prisons, U.S. Dep't of Justice, 28 C.F.R. §§ 500, 501 (2002); Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55062, (Oct. 31, 2001) 2001 WL 1334043.

frontal assault on the attorney-client privilege and the right to counsel guaranteed by the Constitution," according to the American Civil Liberties Union,[59] the new regulation permits the Department of Justice ("DOJ") unlimited and unreviewable discretion to eavesdrop on confidential attorney-client conversations of persons in custody, with no judicial oversight and no meaningful standards. It applies not just to inmates who have been convicted of a criminal offense, but also to all persons in the custody of the DOJ, including pretrial detainees, material witnesses and immigration detainees who have not been accused or convicted of any crime.[60] According to Nancy Chang, senior litigation attorney at the Center for Constitutional Rights: "This rule is designed to chill, if not freeze, the confidential discussions between an inmate and his attorney that are essential to a well-prepared defense."[61]

Before the amendment, the Bureau of Prisons regulations authorized the Bureau to impose special administration measures ("SAMs") on certain inmates, based on information from senior intelligence or law enforcement officials, if it had been determined necessary to prevent the dissemination of classified information that might endanger national security or other information that could lead to violence or terrorism. The amended rule extends the period of time these SAMs may remain in effect from 120 days to up to one year, and it modifies the standards for approving extensions of the measures. Where the Attorney General has certified that "reasonable suspicion" exists to believe an inmate "may" use communications with attorneys or their agents to further or facilitate acts of violence or terrorism, the DOJ "shall . . . provide appropriate procedures for the monitoring or review of communications between that inmate and attorneys or attorneys' agents who are traditionally covered by the attorney-client privilege."[62]

Ashcroft replaced the standard of "probable cause," which is required by both Title III and FISA,[63] in accordance with the Fourth Amendment, with the lesser "reasonable suspicion" standard. Reasonable suspicion is reserved for situations where "necessarily swift action predicated upon the on-the-spot observation of the officer on the beat" justifies the use of a lesser standard.[64]

The DOJ "shall employ appropriate procedures to ensure that all attorney-client communications are reviewed for privilege claims and

59. Statement for the Record of the American Civil Liberties Union Submitted to the Senate Judiciary Committee Concerning Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism, Nov. 28, 2001, 2001 WL 1506625 (F.D.C.H.).

60. 28 C.F.R. § 501.2, 501.3 (as amended).

61. Nancy Chang, Silencing Political Dissent 87 (2003).

62. 28 C.F.R. § 501.3(d) (as amended).

63. *See infra* text accompanying notes 85-94.

64. Terry v. Ohio, 392 U.S. 1, 20 (1968).

that any properly privileged materials . . . are not retained during the course of the monitoring." The attorney-client communications that are intercepted will be reviewed by a "privilege team," to decide what constitute "properly privileged materials." This privilege team "shall not disclose any information unless and until such disclosure has been approved by a federal judge," unless "the person in charge of the privilege team determines that acts of violence or terrorism are imminent."[65] There is no specification of the identity or qualifications of the members of the "privilege team," except that they are "not involved in the underlying investigation." They would not be neutral magistrates. They will be acting under the auspices of the Department of Justice, which is tantamount to the fox guarding the hen house.[66] There are no provisions for review of the determination of the "privilege team" that "acts of violence or terrorism are imminent." Thus, there is no accountability for those charged with making the determination to pierce one of the most significant evidentiary privileges in our jurisprudence. Furthermore, it will be impossible for inmates and their counsel to know in advance what parts of their intercepted communications will be deemed to be "properly privileged materials." The Supreme Court said in *Upjohn*,

> if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications . . ., is little better than no privilege at all.[67]

Unless it has prior court authorization, the DOJ "shall provide written notice to the inmate and to the attorneys involved, prior to the initiation of any monitoring or review," that "all communications between the inmate and attorneys may be monitored, to the extent determined to be reasonably necessary for the purpose of deterring future acts of violence or terrorism."[68] But, whether or not notice is provided to the targets of the eavesdropping, the attorney-client relationship is infected by the knowledge that it is subject to surveillance.[69]

When he announced his amendment, Ashcroft acknowledged that "[t]he existing regulations, of course, recognize the existence of the attorney-client privilege and an inmate's right to counsel." He observed, however, that materials provided to an attorney that do not relate to the seeking or providing of legal advice are not covered by

65. 28 C.F.R. 501.3(d)(3) (as amended).
66. *See* Cover, *supra* note 50, at 1241.
67. Upjohn v. U.S., 449 U.S. 383, 393 (1980).
68. 28 C.F.R. 501.3(d)(2) (as amended).
69. *See infra* text accompanying note 77.

the privilege, and he cited the crime-fraud exception to the privilege.[70] That exception, however, is invoked only by a judge, if the government makes a prima facie case that it applies, using only non-privileged evidence, and only after an *in camera* examination by the court.[71]

Ashcroft also justified the "immediate implementation of this interim rule without public comment" as "necessary to ensure that the Department is able to respond to current intelligence and law enforcement concerns relating to threats to the national security or risks of terrorism or violent crimes that may arise through the ability of particular inmates to communicate with other persons." He cited "the immediacy of the dangers to the public" as well as "the small portion of the inmate population likely to be affected" by the new rule.[72] "[T]he delays inherent in the regular notice-and-comment process would be 'impracticable, unnecessary and contrary to the public interest,'" according to Ashcroft.[73] The Attorney General, however, provided no factual basis for his assertion that this extraordinary procedure is necessary to prevent violent crime or terrorism.

Monitoring of prison telephones was already permitted for security measures.[74] But Ashcroft's new regulation allows the targeted monitoring of attorney-client conversations as the DOJ warrants, a far cry from routine monitoring of telephone conversations for prison security purposes. Even in prison, conversations between attorneys and clients are protected.[75]

In May, 2002, attorney Fred Cohn filed a Complaint in the United States District Court for the District of Columbia, against John Ashcroft, on behalf of Mohamed Rashid Daoud Al'-Owhali, seeking a declaratory judgment that Ashcroft's new regulation violates Al'-Owhali's Sixth Amendment right to effective assistance of counsel and Fifth Amendment Due Process rights.[76] Al'-Owhali, who is serving a sentence of life without the possibility of parole for his convictions in the United States District Court for the Southern

70. Rules and Regulations, Bureau of Prisons, U.S. Dep't of Justice, 28 C.F.R. §§ 500, 501 (2002); Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55062, (Oct. 31, 2001) 2001 WL 1334043.

71. *See* United States v. Zolin, 491 U.S. 554, 572, 574 (1989).

72. Rules and Regulations, Bureau of Prisons, U.S. Dep't of Justice, 28 C.F.R. §§ 500, 501 (2002); Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55062, (Oct. 31, 2001) 2001 WL 1334043.

73. Ashcroft cited 5 U.S.C. § 553(b)(B), (d) in support of his decision to circumvent the regular notice-and-comment process.

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

75. *See* United States v. Van Poyck, 77 F.3d 285, 291 n.9 (9th Cir. 1996) (stating prisoners have an expectation of privacy when they talk to their attorneys on the telephone).

76. Complaint, Mohamed Rashid Daoud Al'-Owhali v. John Ashcroft, No. 02-CV-883 (D.D.C. May 8, 2002).

District of New York of multiple counts of conspiracy and other crimes arising out of the bombing of the United States Embassy in Nairobi, Kenya, alleged that the monitoring of counsel's conversations with a client, with or without notice, chills the attorney-client relationship and deprives him of his right to discuss any aspect of his case with his attorney and receive honest advice in return.[77] Al'-Owhali is seeking to enjoin Ashcroft from monitoring his communications with his counsel without a judicial determination that there is probable cause to believe that activity not protected by the attorney-client privilege is occurring.[78]

In a recent program at Cardozo School of Law, Gerald Lefcourt, a criminal defense attorney and past President of the National Association of Criminal Defense Lawyers, speculated on the dangers of the new regulation if Al'-Owhali desired to cooperate with the government:

> An appellate defense lawyer has to think about how to resolve a case in the best interests of his client. That may mean finding more facts for a motion for a new trial or possible cooperation with the government. You need to know everything the client knows. But the client can't talk to you while being monitored. Al –Owhali may want to cooperate. He's been convicted. His appeal is pending in the United States Court of Appeals. Fred Cohn might want to discuss with him how to get out of this life sentence: "Tell me everything you know about these kinds of activities that occurred in Nairobi." Now, can Fred have that conversation with his client? It is clearly in the interest of the United States government to seek cooperation. But if what the client says to his lawyer in this taped conversation isn't good enough for the government to agree to cooperation, the government will have his statements anyway, and could use them against him.[79]

In order to have a chilling effect on a client's communications with his attorney, it is not necessary that the privileged information actually be intercepted and delivered to prosecutors. As soon as the attorney and client are informed that all their communications are subject to governmental monitoring, the attorney-client relationship is compromised. In *Weatherford v. Bursey,* the Supreme Court acknowledged that the right to effective assistance of counsel is threatened by a reasonable "fear that the government is monitoring [attorney-client] communications through electronic eavesdropping."[80] Ashcroft's new regulation serves as an

77. *Id.*

78. *Id.*

79. Gerald Lefcourt, *The Attorney-Client Privilege at the Crossroads: The Indictment of Lynne Stewart*, Remarks at the Benjamin N. Cardozo School of Law, May 23, 2002 (transcript on file with author); Telephone Interview with Gerald Lefcourt, criminal defense attorney (Jan. 8, 2003).

80. Weatherford v. Bursey, 429 U.S. 545, 554 n.4. (1977).

announcement that a client's communications with his attorney are subject to monitoring at any time. This creates a reasonable fear of surveillance.

B. *Existing Methods for Monitoring Attorney-Client Communication*

The law in existence prior, and subsequent, to September 11, 2001, amply provides for judicially-sanctioned monitoring or disclosure of communications between clients and their attorneys where necessary to prevent criminal activity or where there is a threat to national security.

When a judge determines that a communication is undertaken for the purpose of committing a crime or fraud, she can find an exception to the attorney-client privilege, and permit disclosure of the communication.[81] If federal officials have probable cause to believe a detainee is utilizing communications with his lawyer for the furtherance of a criminal purpose, they can obtain a search warrant to intercept those communications.[82] They can also search an attorney's office if they have a search warrant supported by probable cause.[83] If prison officials have probable cause to believe an inmate is using legal mail for unlawful purposes or if security is threatened, they can obtain a search warrant to open and read the mail.[84]

Title III of the Omnibus Crime Control and Safe Streets Act of 1968[85] allows the government to monitor attorney-client communications without prior notice to the targets of the surveillance, if it secures a warrant based on probable cause that an individual has, is or will commit an enumerated offense, and particular communications concerning that offense will be obtained thereby, provided normal investigative procedures have failed or are likely to fail or be overly dangerous, and when a number of other requirements are met. The wiretap order must be issued by a federal district or circuit court judge.[86] Title III, however, prohibits the use of intercepted privileged communications as evidence.[87]

Finally, there is a formal mechanism in place to oversee electronic surveillance when there is a threat to national security. The Foreign Surveillance Intelligence Act ("FISA")[88] was enacted in 1978, in

81. *See supra* text accompanying notes 39-43.
82. *See* United States v. Harrelson, 754 F.2d 1153, 1168-69 (5th Cir. 1985).
83. *See* Andresen v. Maryland, 427 U.S. 463, 479-80 (1976).
84. *See* Guajardo v. Estelle, 580 F.2d 748, 759 (5th Cir. 1978).
85. 18 U.S.C. § 2510-21 (1994).
86. *See id.* § 2518(1), (3), (8)(b) & (d).
87. *See id.* § 2517(4) ("No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.").
88. 50 U.S.C. § 1801. FISA defines "foreign intelligence information as:
(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against – (A) actual

response to the Nixon administration's abuses of national security wiretaps, which it used against its domestic opponents under the guise of conducting counterintelligence investigations.[89] FISA is something of a Title III for foreign intelligence wiretapping conducted in the United States.[90] The Act established the Foreign Intelligence Surveillance Court, which approves wiretaps in national security investigations .[91]

The FISA court, comprised of Article III judges designated by the Chief Justice of the United States, must find, among other things, that there is probable cause to believe that the target of the electronic surveillance is a foreign power or an agent of a foreign power[92] and that each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power, "provided . . . that no United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the first amendment to the Constitution of the United States." The application must also contain a certification by a designated national security official that a significant purpose of the surveillance is to obtain foreign intelligence information; and the application must be approved by the Attorney General.[93] As in Title III, FISA provides

> or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to (A) the national defense or security of the United States; or (B) the conduct of the foreign affairs of the United States.

Id. § 1801(e).

89. *See* Philip Shenon, *Surveillance: Justice Dept. Denounces Secret Court on Wiretaps*, N.Y. Times, Sept. 28, 2002, at A10.

90. In *United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297 (1972) [hereinafter *Keith*], the Supreme Court rejected President Richard Nixon's request for unchecked executive power to conduct warrantless wiretaps while investigating national security threats by domestic organizations without foreign ties. But *Keith* did not examine "the scope of the President's surveillance power with respect to the activities of *foreign* powers, within or without this country." *Id.* at 308 (emphasis added). In order to fill this gap, Congress enacted FISA. *See* Chang, *supra* note 61 at 57-58.

91. 50 U.S.C. § 1801.

92. 50 U.S.C. § 1805(a)(3) & (b). FISA's probable cause standard is different from the traditional Fourth Amendment standard of probable cause to believe a crime will occur. The USA PATRIOT Act purports to amend FISA, to permit FISA's lesser standard of probable cause to apply to investigations which are partially criminal, as long as a "significant purpose" of the intrusion is to collect foreign intelligence. *See* USA PATRIOT Act, § 218. The FISA Court, however, in an unprecedented opinion, wrote, "[T]his Court"—not the DOJ or the FBI—"is the arbiter of the FISA's terms and requirements." *See infra* text accompanying note 93.

93. *See* 50 U.S.C. §§ 1803, 1804(a)(7), 1805(a)(1), (3)(A)-(B), (5). Although its proceedings have always been shrouded in secrecy, the FISA court overturned a

for the suppression of evidence, which is protected by the attorney-client privilege.[94]

Ashcroft has presented no evidence to demonstrate that existing mechanisms such as Title III, FISA and the crime-fraud exception to the attorney-client privilege could not effectively meet his concerns about terrorism and violent crime. There is no justification for the elimination of judicial review and the weakening of the current probable cause standard for electronic surveillance. The ACLU has called the new regulation "a terrifying precedent" that "threatens to negate the keystone of our system of checks and balances, the right to a competent legal defense."[95]

Under the International Covenant on Civil and Political Rights,[96] a major human rights treaty ratified by the United States, and therefore binding law under the Supremacy Clause of the Constitution,[97] criminal defendants and incarcerated persons have the right to confidential communications with their lawyers.[98] On November 14, 2001, the Lawyers Committee for Human Rights condemned Ashcroft's new regulation.[99]

wiretap order in May 2002, publishing an unprecedented rebuke of the Department of Justice, whom it accused of misleading the court to justify electronic surveillance in more than 75 investigations. The court criticized the DOJ for unlawfully permitting intelligence information to be shared with criminal investigators, stating it had made "erroneous statements" in applications for wiretap orders about "the separation of the overlapping intelligence and criminal investigators and the unauthorized sharing of FISA information with F.B.I. criminal investigators and assistant U.S. attorneys." *See http://news.findlaw.com/nytimes/doc/terrorism/fisa111802opn.pdf*. Seven months later, however, the United States Foreign Intelligence Surveillance Court of Review reversed the FISA lower court opinion. The FISA appellate court ruled that the DOJ was free to use information in criminal investigations that it had acquired during the gathering of foreign intelligence. *See http://www.nytimes/docs/terrorism/fisa51702opn.pdf*.

94. *See* 50 U.S.C. § 1806(a) ("No otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this title shall lose its privileged character."). *See generally* United States v. Belfield, 692 F.2d 141 (D.C. Cir. 1982).

95. *See* Tennessee Attorneys Memo AM, Vol. 26, No. 47, Nov. 19, 2001 (quoting the ACLU).

96. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, U.N. Doc. A/6316 (1966), *opened for signature* December 19, 1966 (entered into force Mar. 23, 1976); 138 Cong. Rec. 8068 (1992).

97. *See generally* Marjorie Cohn, *Affirmative Action and the Equality Principle in Human Rights Treaties: United States' Violation of Its International Obligations*, 43 Va. J. Int'l. L. 249 (2002).

98. Human Rights Committee, General Comment 13, Article 14, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 21st Sess., at 14, U.N. Doc. HRI/GEN/1/Rev.1 (1994), *http://www.umn.edu/humanrts/gencomm/hrcom13.htm* (last visited Jan. 21, 2003).

99. Lawyers Committee for Human Rights, *Lawyers Committee Condemns Attack on Attorney-Client Privilege*, Nov. 14, 2001, *http://www.lchr.org/protect/domestic_terrorism_measures.htm* (last visited Oct. 3, 2002).

III. THE INDICTMENT OF LYNNE STEWART

On April 8, 2002, at the behest of Attorney General John Ashcroft, a Grand Jury sitting in the Southern District of New York indicted New York criminal defense attorney Lynne Stewart for conspiracy to provide[100] and for providing material support[101] to a terrorist organization (the Islamic Group), conspiracy to defraud the United States,[102] and making false statements to the U.S. Department of Justice.[103]

When Ashcroft announced the filing of the indictment, he also declared that he had "directed the Bureau of Prisons to modify the SAM for Sheikh Abdel Rahman to include the monitoring of future attorney-client communications to ensure that Sheikh Abdel Rahman is not continuing to use the guise of attorney/client communications to shield efforts to facilitate terrorist activities from jail." Ashcroft proclaimed that this represented "the first time since the enactment of the USA PATRIOT Act that the Attorney General [had] exercised his authority to monitor such communications."[104]

The charges against Stewart stemmed from her representation of Sheik Omar Abdel Rahman, who is serving a life plus 65-year sentence for conspiring to bomb several New York City landmarks and soliciting crimes of violence against the U.S. military and Egyptian President Hosni Mubarak.[105] Since 1997, Rahman has been incarcerated at the Federal Medical Center in Rochester, Minnesota. Beginning in 1997, the Bureau of Prisons, at the direction of the Attorney General, imposed special administrative measures ("SAMs") on Rahman, limiting his access to the mail, the media, the telephone and visitors, for the purpose of protecting "persons against the risk of death or serious bodily injury." Stewart was obliged to sign an affirmation agreeing to be bound by the SAMs, before being granted access to Rahman.[106]

The indictment alleges Stewart agreed "only to be accompanied by translators for the purpose of communicating with inmate Abdel Rahman concerning legal matters" and not to "use my meetings, correspondence, or phone calls with Abdel Rahman to pass messages between third parties (including, but not limited to, the media) and Abdel Rahman."[107] It also alleges that Stewart allowed interpreter

100. 18 U.S.C. § 2339A(b) (1994).
101. 18 U.S.C. § 2339B.
102. 18 U.S.C. § 371.
103. 18 U.S.C. § 1001.
104. Press Release, United States Attorney, Southern District of New York (April 9, 2002), *http://www.usdoj.gov/ag/speeches/2002/040902agpreparedremarksislamicgroupindictments.htm*; *see* Chang, *supra* note 1.
105. Indictment, *supra* note 4.
106. *Id.*
107. *Id.*

Mohammed Yousy to read letters to Rahman regarding Islamic Group matters, and to conduct a discussion with Rahman regarding whether Islamic Group should continue to comply with a cease-fire in Egypt.[108] Stewart is further charged with taking affirmative steps to conceal those discussions from prison guards, and announcing to the media that Rahman had withdrawn his support for the cease-fire, in violation of the SAMs.[109] Finally, the indictment charges Stewart with making false statements to the U.S. Department of Justice that she would abide by the SAMs, only communicate with Rahman regarding legal matters, and not use meetings or telephone calls with him to pass messages between Rahman and third parties, including the media.[110] If convicted, Stewart could be sentenced to 40 years in prison.[111]

At the arraignment on April 9, 2002, the government represented that its case was based, in part, on evidence obtained pursuant to court-authorized electronic surveillance obtained pursuant to FISA.[112] This evidence purportedly included intercepts from certain attorney-client visits between Stewart and Rahman in prison, which, according to the indictment, were used to further some of the criminal activity alleged in the indictment.[113]

On April 25, 2002, Stewart sent a letter to the government seeking disclosure of whether there was any ongoing court-authorized monitoring under FISA, Title III, or any other provisions or on any extra-legal basis, of the telephones in her office, her attorney Susan V. Tipograph's office, the law offices that include the offices of Stewart and other criminal defense attorneys, and any of Stewart's visits with any of her incarcerated clients, in either federal or state custody.[114]

The government responded that it could not provide any assurances it is not engaging in any court-authorized surveillance because that would disclose information about the status or existence of ongoing criminal investigations and/or foreign intelligence operations, if any, which would undermine the investigations. But the government assured the defendants that any surveillance would be conducted only in accordance with the relevant procedural safeguards set forth in the governing statutes and regulations.[115]

108. *Id.*
109. *Id.*
110. *Id.*
111. 18 U.S.C. §§ 371, 1001-02, 2339A(b), B (1994).
112. United States v. Ahmed Sattar, et al., No. 02 Cr. 395, 2002 U.S. Dist. LEXIS 14798 (S.D.N.Y. Aug. 12, 2002).
113. *See id.* at *4 (citing Letter from the Government to the Defendants (May 8, 2002) ("In accordance with the Foreign Intelligence Surveillance Act of 1978 (FISA), notice is hereby given that information obtained or derived pursuant to the authority of the FISA was used, and will continue to be used, in connection with the prosecution of the above-referenced case." (citation omitted))).
114. *See id.* at *6 (citing Letter from Susan V. Tipograph, Esq. to the Government (April 25, 2002)).
115. *See id.* (citing Letter from the Government to Susan V. Tipograph, Esq. (May

Stewart's co-defendant, Ahmed Abdel Sattar, moved to compel the government to provide assurances it was not monitoring any of his attorney-client communications at the Metropolitan Correctional Center without court authorization, and without prior notification pursuant to 28 C.F.R. § 501.3(d).[116] Sattar had argued that without some assurance he would obtain prior notification of any such surveillance, he could not effectively communicate with his counsel, for fear the government might intercept privileged communications and use them against him in these proceedings without any prior court findings of probable cause that his attorney-client communications were being used to further ongoing terrorist or criminal activity.[117] The government represented to Sattar and his counsel that their communications were not presently being monitored under § 501.3 and that the government would provide Sattar and his counsel with prior notification if the Attorney General were to direct any such monitoring pursuant to these regulations, unless a court authorized the government to withhold such notice.[118] Based upon these assurances by the government, Sattar withdrew his motion.[119]

Stewart moved to compel the government to disclose whether it is engaging in any surveillance of a number of locations that might involve attorney-client communications relating to any of the defendants or Stewart's clients, pursuant to either Title III, FISA or the new Bureau of Prison rule enacted by Ashcroft after September 11.[120] She argued that any interception of attorney-client communications could not be justified. Without such a disclosure, Stewart maintained that her communications with counsel had been sufficiently strained to deprive her of effective assistance of counsel due to the fear that the government might intercept privileged communications and use them against her in these proceedings.[121] She also argued that to the extent that the other defendants lack similar assurances, her ability to enter into a *joint defense agreement*[122] with

2, 2002)).

116. *Id.* at *3.

117. *Id.* at *5.

118. *Id.* at *6-7.

119. *Id.* at *11.

120. *Id.* at *11-12.

121. *Id.* at *12.

122. *Id.* The "joint defense privilege," which is embodied in a "joint defense agreement," is an extension of both the attorney-client privilege and the work product doctrine. *See* Waller v. Fin. Corp. of Am., 828 F.2d 579, 583 n.7 (9th Cir. 1987); Rebecca J. Wilson & Elizabeth A. Houlding, *Using Joint Defense Privilege Agreements in Parallel Civil and Criminal Proceedings*, 68 Def. Couns. J. 449 (2001). The joint defense privilege, which protects communications between a defendant and the attorney for a co-defendant if the communications are pursuant to a joint strategy. Wilson, *supra*. It applies when the communications were made pursuant to a joint defense effort. They were designed to further the joint effort, and the privilege has not been waived. *See* United States v. Am. Tel. & Tel. Co., 642 F.2d 1285, 1298-99 (D.C. Cir. 1980).

them had been hampered, which would undermine her ability to obtain effective representation in this case.[123]

United States District Judge John G. Koeltl denied Stewart's motion to compel disclosure of any ongoing surveillance pursuant to Title III or FISA.[124] He cited detailed provisions in both statutes for notice and the opportunity to challenge surveillance after it occurs and before it is used against a defendant, but said they "do not provide for advance notice,. . . which would undermine the efficacy of the statutes."[125] Judge Koeltl noted that Stewart cited no authority for the proposition that "a bare fear of surveillance, without more, is sufficient to establish a constitutional requirement that the government disclose whether it is engaging in any court-authorized surveillance of a criminal defendant under Title III or FISA."[126]

Judge Koeltl rejected Stewart's Sixth Amendment argument, noting that "[w]here the intrusion upon an attorney-client communication is *unintentional or justified* there can be no violation of the Sixth Amendment" without a showing of prejudice.[127] He further found Stewart's belief that she has been "chilled in her ability to consult with her attorneys," which denies her the effective assistance of counsel, to be unreasonable.[128]

The government's allegation that Stewart violated the SAMs is based on a press conference, where she declared that Rahman had withdrawn his support for a cease-fire.[129] Responding to the charges against Stewart, her attorney, Michael Tigar, said at a conference at Cardozo Law School:

> The obligation of lawyers, the thought of lawyers to hold a press conference to take these controversies into the public forum, is central to what we do. It is said that Lynne . . . what did she do? She somehow expressed in public the ideology of her client. You know legal representation often involves you doing that . . . You are fooling yourself, lawyers, if you don't think that your practice reflects some kind of ideology.[130]

Stewart now frequently refers to herself as "The Poster Child for the PATRIOT Act."[131] In an address to a conference sponsored by the National Lawyers Guild, the California Attorneys for Criminal Justice, and the California Public Defenders Association, Stewart

123. *Ahmed Sattar*, 2002 U.S. Dist. LEXIS 14798.
124. *Id.* at *28.
125. *Id.* at *18.
126. *Id.* at *19 (citing United States v. Defede, No. 98 Cr. 373, slip op. at 1 (S.D.N.Y. Sep. 22, 1998)).
127. *Id.* at *20 (emphasis added).
128. *Id.* at *21.
129. *See supra* text accompanying note 108.
130. *See supra* note 56.
131. *See* Susan B. Jordan, *The Right to Defend: An Interview with Lynne Stewart*, 59 Guild Prac. (forthcoming 2002).

expressed alarm at what her indictment portends for the attorney-client privilege and criminal defense. She said: "This is about protecting the right to defend. Once the attorney-client privilege is lost, there is no right to defend as we know it." Speaking specifically about the monitoring of her conversations with her client, Stewart stated: "The question you should be asking is not what I was doing in that room, but what was the government doing in that room?"[132]

The Manhattan courtroom where Stewart was arraigned was packed with lawyers and legal workers from the National Lawyers Guild and the Center for Constitutional Rights, who were astonished that Stewart had been indicted. Bruce Nestor, president of the National Lawyers Guild, issued a statement, saying: "Stewart is a veteran criminal defense attorney who often represents both controversial causes and unpopular clients. The government seems to be singling her out as 'poster child' for its campaign to justify the unconstitutional monitoring of conversations between lawyers and inmates." Nestor worried that this indictment "may have a chilling effect on lawyers who want to represent politically active clients but are afraid of being singled out by the government for surveillance."[133] New York attorney Sandra Nichols echoed Nestor's concerns: "I think it was done to have a chilling effect and I know a lot of attorneys are reluctant to represent detainees post-9/11."[134]

Likewise, Stanford Law School Professor Deborah L. Rhode wrote in *The New York Times*, that "such felony indictments could affect lawyers' willingness to defend despised groups, like suspected terrorists, at all." She felt "it should be a concern that lawyers must agree to such restrictions [the SAM] as a condition of communicating with their clients." According to Professor Rhode, "America's civil liberties depend on counsel willing to assert them." She cited John Adams, who lost half his practice because he defended British officers who were charged in the Boston Massacre; Adams considered that case "one of the best pieces of service that I ever rendered for my country." Rhode's primary worry: "If the indictment against Ms. Stewart signals a broader trend to crack down not just on terrorists but on those courageous enough to represent them, we are all at risk."[135]

It was not accidental that it was Lynne Stewart whom John Ashcroft chose to indict. According to Heidi Boghosian, executive

132. Lynne Stewart, Remarks at National Lawyers Guild Convention (Oct. 16, 2002).

133. *See* Heidi Boghosian, *Guild Member Lynne Stewart Indicted: Grave Threat to Attorney-Client Privilege*, XXVII Guild Notes 1 (2002).

134. *See* Jim Edwards, *Struggling to Keep Client Confidences: Lawyers in Post-Sept. 11 'Special Interest' Cases Talk About How They Are Coping With Often-Intrusive Government Security Measures*, 169 N.J. L. J. 568 (2002).

135. Deborah L. Rhode, *Terrorists and Their Lawyers*, N.Y. Times, Apr. 16, 2002, at A31.

director of the National Lawyers Guild:

> In addition to being a model of how lawyers should champion the rights of those who most need zealous legal advocacy, Stewart was also a prime target for the Attorney General, who needed desperately to show that the Justice Department was actively fighting terrorism. Having arrested only one person since September 11—John Walker Lindh—the Department's choice of Lynne Stewart as a highly visible indictee spoke volumes.[136] Her clients were well-known to the general public; their beliefs were vilified by the government; in short, they fit into the rubric of the Bush administration's "axis of evil" rhetoric. By indicting Stewart, Ashcroft effectively sent the dual message that he could indict other lawyers who represented clients with unpopular beliefs and that such clients do not deserve defense.[137]

Although the communications between Stewart and her client were ongoing before September 11, 2001, she was indicted in April, 2002. As Stewart noted at the Socialist Scholars Conference in New York: "Usually if one breaks a Bureau of Prisons . . . edict, one is told one can't visit the prison again, or one gets some sort of administrative slap on the wrist of some kind. One does not usually get indicted for aiding a terrorist organization."[138]

The government's monitoring of Lynne Stewart's conversations with her client, communications which should have been protected, poses a threat to the vitality of the attorney-client privilege and the principles that undergird it. Her indictment will, and in all likelihood was designed to, deter lawyers from representing unpopular clients, which imperils the very fabric of our constitutional system of criminal justice.

CONCLUSION

Whether the rationale for the attorney-client privilege rests upon professional ethics, the right to privacy or the need to encourage clients to confide fully in their attorneys, the privilege is a crucial fixture of the American criminal justice system. Indeed, the Supreme Court recently ruled that the attorney-client privilege is so strong, it survives the death of the client.[139] Even a client who thinks she is

136. *See* Jordan Elgrably, *The Government's Attack on Attorney-Client Privilege,* Criminal Defense Weekly, Sept. 15-30, 2002.

137. Heidi Boghosian, *Taint Teams and Firewalls: Thin Armor for Attorney-Client Privilege*, 1 Cardozo Pub. L., Pol. & Ethics J. (forthcoming 2003).

138. *Civil Liberties After September 11: A Panel at the Socialist Scholars Conference 2002*, transcript published by National Lawyers Guild, 2002 (on file with author); *see* www.nlg.org.

139. Swidler & Berlin v. United States, 524 U.S. 399, 410 (1998).

> Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from

guilty may have a legal defense, which becomes apparent only after full and frank disclosure of the facts to her attorney. The societal policy promoting the settlement of cases will be furthered by protecting the confidentiality of attorney-client communications. Moreover, weakening or abolishing the privilege would encourage lawyers to lie to protect their clients or risk contempt for a failure to betray their confidences.

Attorney General John Ashcroft's consistent pattern of emasculating civil liberties in the period since September 11, 2001, is disturbing and dangerous to a democracy. His amended Bureau of Prisons regulation provides no judicial protection for privileged communications, and will fatally infect the attorney-client relationship. Ashcroft's security concerns are adequately addressed by FISA and the crime-fraud exception to the privilege, which must be ruled on by a judge.

Likewise, Ashcroft's indictment of Lynne Stewart, based upon her alleged violation of special administrative measures she was forced to sign in order to communicate with her client, will have a chilling effect on attorneys who may otherwise represent people facing political crimes in this emotionally-charged historical period.

In the words of Nancy Chang: "The issuance of the interim rule, combined with the cautionary tale to be found in the prosecution of Lynne Stewart, sends the clear message that attorneys who represent individuals charged with terrorist crimes now run the risk of landing in jail alongside their clients and having their client files seized by FBI agents."[140]

It is essential that people feel safe and secure in these perilous times. But, as Supreme Court Justice Sandra Day O'Connor wrote in *Vernonia v. Acton*: "It cannot be too often stated that the greatest threats to our constitutional freedoms come in times of crisis."[141] The confidential relationship between attorney and client sits at the heart of our criminal justice system. It must be zealously guarded or we will find ourselves in the midst of a police state.

> counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether.

Id. at 407.

140. Chang, *supra* note 61, at 91.

141. Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 686 (1995) (O'Connor, J., dissenting).