THE CASE FOR A SIXTH AMENDMENT PUBLIC-SAFETY EXCEPTION AFTER DICKERSON

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Following the events of September 11, 2001, the Department of Justice promulgated a new Bureau of Prisons (BOP) rule that authorizes the government to monitor certain attorney-client conversations in the interests of public safety and national security. Because the BOP rule arguably will not survive scrutiny under traditional Sixth Amendment jurisprudence, the Department of Justice may wish to argue for the creation of a Sixth Amendment public-safety exception akin to that found in the context of the Miranda warnings. In this note, the author posits that support for such an exception under the Sixth Amendment can be premised on the Supreme Court’s holding in Dickerson v. United States that Miranda warnings are constitutionally based within the framework of the Fifth Amendment. Because the Court has carved out a public-safety exception for Miranda warnings, which are now viewed as stemming from a constitutional rule, it stands to reason that the Court could do the same in the context of the Sixth Amendment. The author ultimately argues, however, that neither the Court’s uncertain Fifth Amendment jurisprudence nor the policy considerations behind the Sixth Amendment justify creating a public-safety exception to the Sixth Amendment.

I. INTRODUCTION

In the wake of the attacks on the World Trade Center and the Pentagon on September 11, 2001 (September 11th), the federal government quickly enacted legislation and drafted orders aimed at preventing future acts of terrorism and strengthening the government’s ability to provide domestic security. Specifically, on October 21, 2001, Congress passed the

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* I dedicate this note to the memory of my grandfather, Elmer J. Adsit. My thanks go to Professor Lynn Branham for kindly suggesting this topic, and to Justin Arbes, Dan Raker, Mitch Zeff, Sze Sze Yockey, and my parents for their guidance and support.

USA Patriot Act, the first antiterrorism law following September 11th. Ten days later, on October 31, 2001, United States Attorney General John Ashcroft and the Department of Justice published in the Federal Register a comprehensive Bureau of Prisons (BOP) rule authorizing the BOP to monitor communications between inmates and their attorneys if the Attorney General has “certified that reasonable suspicion exists to believe that an inmate may use communications with attorneys or their agents to further or facilitate acts of violence or terrorism.”

In April 2002, Attorney General Ashcroft announced that the first prisoner to have conversations monitored under the BOP rule would be Sheik Omar Abdel Rahman, an Egyptian cleric presently serving a life sentence at a federal medical prison following his conviction in 1995 for conspiring to bomb New York City landmarks. That same month, federal prosecutors indicted Lynne F. Stewart, Abdel Rahman’s former attorney, on charges of conspiring with her client to aid a terrorist group.


3. Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062 (Oct. 31, 2001) (codified at 28 C.F.R. pts. 500 & 501). The main section of the rule central to this discussion states as follows: In any case where the Attorney General specifically so orders, based on information from the head of a federal law enforcement or intelligence agency that reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism, the Director, Bureau of Prisons, shall, in addition to the special administrative measures imposed under paragraph (a) of this section, 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, for the purpose of deterring future acts that could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons.

28 C.F.R. § 501.3(d) (2002).

4. See Lisa Anderson & Cam Simpson, U.S. Lawyer Indicted in Terror Case, CHI. TRIB., Apr. 10, 2002, available at 2002 WL 2643277 (quoting Attorney General Ashcroft as saying Abdel Rahman “is a person whose leadership is substantial in the community of terrorists,” and that his group, the Islamic Group, spreads “a message of hate that is now tragically familiar to Americans”); Mark Hamblett, WARRANTLESS MONITORING ASSAILED; ATTORNEY INDICTMENT CALLED ABSURD, THE LEGAL INTELLIGENCER, Apr. 12, 2002, at 4.

5. See Molly McDonough, Lawyer Charged with Aiding Terrorists—Prosecution Claims Conspiracy to Violate Special Agreement Limiting Client’s Access to Media, A.B.A. J. E-REPORT (Apr. 12, 2002). Stewart’s indictment alleged, inter alia, that she violated a “special administrative measure” (SAM) imposed on Abdel Rahman designed to limit his access to the media and visitors. Id. Stewart, who signed the SAM in order to represent Abdel Rahman, allegedly violated the order by helping the Sheik’s interpreter pass messages to an Islamic Group contact in New York and by announcing to the media her client’s position on a terrorist cease-fire in Egypt. Id. Many attorneys have spoken out in support of Stewart, arguing that the Justice Department indicted her at least in part to frighten those who represent controversial clients. Id. Soon after her indictment, the president of the Lawyer’s Guild, New York City Chapter, helped create the “Committee to Defend Lynne Stewart,” an organization that plans to hold a series of fundraisers to raise awareness of Stewart’s case. See Mark Hamblett, Defense Bar Mobilizes Behind Stewart, 227 N.Y. L.J. 1 (2002). Stewart herself, free on bond, has traveled across the country and stopped by late-night television shows in an effort to gain support and raise public awareness of her situation. See Jason Hoppin, Indicted Lawyer Brings Message to Berkeley Crowd, THE RECORDER (S.F.), July 15, 2002, at 1.

On July 22, 2003, two of the five counts against Stewart were dismissed after Judge Koeltl of the Southern District of New York held that the statute prohibiting conspiracy to provide material support and resources to a foreign terrorist organization was unconstitutionally vague. United States v. Sattar, No. 02CR.395(JGK), 2003 WL 21698266, at *30 (S.D.N.Y. July 22, 2003). Stewart’s motions to dismiss
Ashcroft stated that the BOP rule was created “with the knowledge . . . that inmates such as Sheik Abdel Rahman were attempting to subvert our system of justice for terrorist ends.” Ashcroft emphasized that al-Qaeda training manuals teach how to continue terrorist operations from prison.

Not surprisingly, the BOP rule has drawn criticism from legal scholars, practitioners, students, and politicians, who contend that the rule violates the Sixth Amendment right to counsel and the attorney-client privilege, with some presupposing that the Supreme Court will invalidate the rule the first chance it gets. Abdel Rahman’s current attorney has announced that he will challenge the BOP regulations as unconstitutional. With respect to the potential Sixth Amendment claims, however, these

the remaining charges of soliciting persons to engage in crimes of violence, conspiring to defraud the United States, and making false statements were denied. Id.

8. See McDonough, supra note 5.
11. See Hamblett, supra note 4, at 4.
12. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have Assistance of Counsel for his defense.

U.S. CONST. amend. VI.
individuals may be overlooking a possible justification for the BOP rule within the framework of the Supreme Court’s constitutional jurisprudence: the application of a public-safety exception.

Throughout its publication in the Federal Register, the Department of Justice repeatedly justifies the new BOP rule on the grounds of public safety and national security.\(^\text{13}\) The Supreme Court, in 1985, declined to carve out an exception to the Sixth Amendment based on legitimate public safety interests of state agents.\(^\text{14}\) One year earlier, however, in \textit{New York v. Quarles},\(^\text{15}\) the Court expressly recognized a “public-safety” exception to the requirement that \textit{Miranda} warnings be given before custodial interrogation.\(^\text{16}\) The \textit{Quarles} decision rested on the premise that \textit{Miranda} warnings are “prophylactic,” and are therefore “not themselves rights protected by the Constitution but are instead measures to insure that the right against compulsory self-incrimination is protected.”\(^\text{17}\) Because of their prophylactic nature, the \textit{Quarles} Court considered its public-safety exception to \textit{Miranda} warnings perfectly justified.\(^\text{18}\)

Just four years ago, however, the Supreme Court turned Fifth Amendment jurisprudence on its head when it announced in \textit{Dickerson v. United States}\(^\text{19}\) that the requirement of \textit{Miranda}-type warnings before custodial interrogation is \textit{constitutionally} based and thus cannot be effectively overruled by an Act of Congress.\(^\text{20}\) The \textit{Dickerson} opinion raises the question of what impact the Court’s analysis will have on a decision like \textit{Quarles}, which justified an exception to the \textit{Miranda} warnings rule on the assumption that the rule was inherently nonconstitutional.\(^\text{21}\)

This note explores whether justification for the Department of Justice’s new BOP rule could be premised on \textit{Dickerson’s} conclusion that \textit{Miranda} warnings are constitutionally based, thus opening the door to public-safety exceptions for constitutional amendments dealing with criminal procedure other than the Fifth Amendment. If the Court carves out a public-safety exception for \textit{Miranda} warnings, which the Court indicates are now constitutionally based under the Fifth Amendment, then it stands to reason the Court may do the same with the Sixth Amendment. This becomes increasingly likely given that at least two members of the current Court have indicated that the “war” on terrorism may require individuals to forego certain civil liberties.\(^\text{22}\)

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16. \textit{Id.} at 655.
17. \textit{Id.} at 653–64 (internal citations omitted).
18. \textit{Id.} at 657.
20. \textit{Id.} at 436–44.
22. See \textit{William H. Rehnquist, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME} 224–25 (1998) (“It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime.”); \textit{After Attacks, Expect Limits on Freedom, Justice Says}, ST.
After Part II provides background information on the new BOP rule, Part III will begin this note’s analysis with an overview of general considerations pertinent to a discussion of the Sixth Amendment.23 Included in this discussion of the Sixth Amendment will be an analysis of constitutional violations related to government interference with the right to counsel and government intrusion into the attorney-client relationship.24 Part III will then explain the various Sixth Amendment challenges launched by opponents of the BOP rule, as well as the relevance of the attorney-client privilege to the debate.25 A detailed analysis of the Justice Department’s purported authority for the BOP rule will thoroughly discuss the competing Sixth Amendment interests the rule implicates.26 Specifically, in defending the BOP rule, the Justice Department argues that the rule protects Sixth Amendment fairness interests.27 As many scholars and courts—as well as the majority of the BOP rule’s opponents—have demonstrated, the Sixth Amendment may also protect attorney-client privacy interests separate from fairness interests.28 A thorough analysis of the fairness/privacy debate is crucial to both an explanation of the constitutional challenges to the BOP rule and an understanding of why the Justice Department’s arguments in defense of the BOP rule may not survive Sixth Amendment scrutiny.29

Because of potential gaps in its defense, the Justice Department may be forced to rely on concerns for public safety in justifying the BOP rule.30 Accordingly, Part III will set forth the groundwork for a possible public-safety exception to the Sixth Amendment.31 After discussing how the Supreme Court previously had an opportunity to fashion a public-safety exception to the Sixth Amendment and declined to do so, this Part will move to an analysis of the public-safety exception in the context of Miranda.32 The impact of Dickerson on Miranda and the Fifth Amendment will then be evaluated to determine whether Dickerson alters the nature of Miranda’s public-safety exception.33 After reaching the conclusion that the Dickerson Court essentially acquiesced to a public-safety exception to a constitutional rule, this Part will consider Dickerson’s effect on the search for a Sixth Amendment public-

23. See infra text accompanying notes 62–78.
24. See infra text accompanying notes 74–100.
27. See infra text accompanying notes 115–18.
28. See infra notes 133–67 and accompanying text.
29. See infra text accompanying notes 168–81.
30. See infra text accompanying notes 182–212.
31. See infra text accompanying notes 182–242.
32. See infra text accompanying notes 243–65.
safety exception. Part III will conclude by explaining why, even if rec-ognized, a Sixth Amendment public-safety exception may not apply to the specific facts surrounding the BOP rule.

Part IV attempts to resolve the issues set forth in this note by offering two suggestions. First, until the Supreme Court confronts the issue of whether a Sixth Amendment public-safety exception can be recognized, the present “taint team” under the BOP rule needs to be removed from the Justice Department and relocated in the newly created Department of Homeland Security. Second, the author argues that if confronted with the opportunity, the Court should decline to craft a Sixth Amendment public-safety exception on the basis of public policy and in consideration of the ultimate purpose of the Sixth Amendment. Finally, Part V will conclude with a brief summary of this note’s conten-tions.

II. THE NEW BUREAU OF PRISONS RULE

Attorney General John Ashcroft and the Justice Department published the new BOP rule in the Federal Register on October 31, 2001. Among other provisions, the rule expressly provides that upon an order by the Attorney General, the Director of the BOP can monitor or review the communications between any inmate and his or her attorney “for the purpose of deterring future acts that could result in death or bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons.” Such monitoring may occur in any situation where the head of a federal law enforcement or intelligence agency informs the Attorney General that “reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism.” The rule broadly defines “inmate” as “all persons in the custody of the Federal Bureau of Prisons or Bureau contract facilities, including persons charged with or convicted of offenses against the

34. See infra text accompanying notes 243–301.
35. See infra text accompanying notes 302–10.
36. See infra text accompanying notes 321–62.
37. See infra text accompanying notes 321–27.
38. See infra text accompanying notes 328–62.
39. See infra text accompanying notes 363–68.
41. The rule states: “Other appropriate officials of the Department of Justice having custody of persons to whom special administrative measures are required may exercise the same authorities under this [rule] as the Director of the Bureau of Prisons and the Warden.” 28 C.F.R. § 501.3(f) (2002).
42. 28 C.F.R. § 501.3(d).
43. Id.
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United States . . . and persons held as witnesses, detainees, or other-
wise.”44

Unless the Director of the BOP receives prior court authorization,
he or she must provide a written notice to the inmate and any affected
attorneys before the government begins to monitor their communica-
tions.45 The Director of the BOP and the Assistant Attorney General for
the Criminal Division are instructed to take appropriate steps to ensure
that privileged attorney-client communications are not retained during
the monitoring.46 To this end, the rule calls for the creation of a “privi-
lege team,” composed of individuals not part of any underlying investiga-
tion, to monitor the communications to protect attorney-client privilege
and to keep investigators from hearing defense strategy.47 The privilege
team may not disclose any information without the approval of a federal
judge, “[e]xcept in cases where the person in charge of the privilege team
determines that acts of violence or terrorism are imminent.”48

In justifying its new BOP rule, the Department of Justice states as
follows:

This rule carefully and conscientiously balances an inmate’s rights
to effective assistance of counsel against the government’s respon-
sibility to thwart future acts of violence or terrorism perpetuated
with the participation or direction of federal inmates. In those cases
where the government has substantial reason to believe that an in-
mate may use communications with attorneys or their agents to fur-
ther or facilitate acts of violence or terrorism, the government has a
responsibility to take reasonable and lawful precautions to safe-
guard the public from those acts.49

In April 2002, Attorney General Ashcroft stated that the new rule
applied to “less than two dozen inmates out of the 158,000 in the federal

44. 28 C.F.R. § 500.1(c). The United States Government has detained at least 650 suspected ter-
rorists since September 11, 2001, with most being held at a U.S. naval base in Guantanamo Bay, Cuba.
Two detained U.S. citizens, Jose Padilla and Yaser Hamdi, are being held in U.S. military prisons. See
Camp Limbo: U.S. Courts Provide No Check on Guantanamo Detentions, FIN. TIMES, Mar. 13, 2003,

On December 18, 2003, the Second Circuit issued a writ of habeas corpus directing U.S. Secretary of
Defense Donald Rumsfeld to release Padilla from military custody, at which point Padilla could still
be held as a material witness in connection with grand jury proceedings or turned over to civilian cus-
tody if criminal charges are brought against him. Padilla v. Rumsfeld, No. 03-2235(L), 2003 WL
22965085, at *2 (2d Cir. Dec. 18, 2003).

45. 28 C.F.R. § 501.3(d)(2) (“The notice shall explain: 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; that communications between the inmate and
attorneys or their agents are not protected by the attorney-client privilege if they would facilitate
criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the
seeking or providing of legal advice.”).

46. 28 C.F.R. § 501.3(d)(3).
47. Id.
48. Id.
system.50 From the start of its discussion in the Federal Register, the Justice Department recognized the potential implications of the rule on the attorney-client privilege and an inmate’s Sixth Amendment right to counsel.51 The Justice Department noted, however, that not all communications between attorneys and their clients are privileged.52 The Justice Department opined that no Sixth Amendment violation occurs when the government possesses legitimate law enforcement interests in monitoring attorney-client conversations, as long as the conversations are not disclosed and none of the information revealed during the monitoring is used in a manner that deprives the client of a fair trial.53

To ensure that the monitoring of attorney-client conversations under the BOP rule stays within the legal bounds outlined in the summary, the Justice Department cites its provision creating a privilege team.54 The team allegedly becomes a “firewall” ensuring that “the communications [that] fit under the protection of the attorney-client privilege will never be revealed to prosecutors and investigators.”55 The use of a firewall, the Department notes, has been authorized to screen searches of law offices,56 communications revealed through wiretaps,57 and to ensure that a prosecutors’ office will not be disqualified when an attorney previously connected to a defendant joins the prosecution staff.58

The Justice Department implemented the rule without public comment, stating that swiftness was 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.”59 Because it perceived immediate dangers to the public, the Department invoked 5 U.S.C. § 553(b)(B) and (d) to justify the lack of a notice-and-comment period and the immediate effectiveness of the rule upon publication.60 Additionally, the Depart-

50. See Anderson & Simpson, supra note 4.
52. Id. (citing Clark v. United States, 289 U.S. 1, 15 (1933); In re Grand Jury Proceedings, 87 F.3d 377, 382 (9th Cir. 1996); United States v. Soudan, 812 F.2d 920, 927 (5th Cir. 1986); United States v. Gordon-Nikkar, 518 F.2d 972, 975 (5th Cir. 1975)). This includes communications provided to an attorney that do not relate to the seeking or providing of legal advice as well as communications that are in furtherance of a client’s ongoing or contemplated illegal acts. Id.
53. Id. (citing Weatherford v. Bursey, 429 U.S. 545, 552–54 (1977); Massiah v. United States, 377 U.S. 201, 207 (1964)).
56. Id. (citing Nat’l City Trading Corp. v. United States, 635 F.2d 1020, 1026–27 (2d Cir. 1980)).
57. Id. (citing United States v. Noriega, 764 F. Supp. 1480 (S.D. Fla. 1991)).
58. Id. (citing Blair v. Armontrout, 916 F.2d 1310, 1333 (8th Cir. 1990)).
59. Id. at 55,065 (stating that “[r]ecent terrorist activities perpetrated on United States soil demonstrate the need for continuing vigilance in addressing the terrorism and security-related concerns identified by the law enforcement and intelligence communities”).
60. Id. (“[T]he delays inherent in the regular notice-and-comment process would be ‘impracticable, unnecessary and contrary to the public interest.’”) (quoting 5 U.S.C. § 553(b)(B)(d)).
ment stressed that only a small number of federal inmates would be affected by the new rule. With the framework of the BOP rule in mind, Part III will discuss the potential creation of a Sixth Amendment public-safety exception by way of the Supreme Court’s Fifth Amendment jurisprudence.

III. ANALYSIS

A. The Sixth Amendment: General Considerations

The Sixth Amendment provides that “in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.” The starting point for any discussion of the underpinnings of the Sixth Amendment remains the Supreme Court’s 1932 opinion in Powell v. Alabama. Although not technically a Sixth Amendment case—it was decided on Fourteenth Amendment due process grounds—Powell has “had a continuing significance in the interpretation of the Sixth Amendment.” In Powell, the famous “Scottsboro Boys” case, Justice Sutherland declared:

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 . . . [the defendant] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Considering the history of the Sixth Amendment, Powell signaled the Court’s belief that each state has the obligation to provide defendants with a fair hearing. “Fairness” in the context of constitutional criminal procedure means assuring that an innocent person will not be convicted. As Justice Black declared in Gideon v. Wainwright, “[t]he right of one charged with [a] crime to counsel may not be deemed fundamen-

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61. Id. (noting that the only affected inmates would be those who “have been certified by the head of a United States intelligence agency as posing a threat to the national security through the possible disclosure of classified information; or for whom the Attorney General or the head of a federal law enforcement or intelligence agency has determined that there is a substantial risk that the inmate’s communications with others could lead to violence or terrorism”). Sheik Omar Abdel Rahman is the first inmate who would qualify for government monitoring under the new rule. See supra text accompanying notes 4–8.
62. U.S. CONST. amend. VI.
63. 287 U.S. 45 (1932); WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.1, at 553 (3d ed. 2000) (“The first major Supreme Court discussion of the constitutional right to counsel came in Powell v. Alabama, a 1932 ruling that considered the rights of defendants both to utilize retained counsel and to be provided with court appointed counsel.”).
64. See LAFAVE ET AL., supra note 63, § 11.1, at 553.
65. Moran, supra note 9.
68. See Akhil Reed Amar, Sixth Amendment First Principles, 84 GEO. L.J. 641, 642–43 (1996) [hereinafter Amar, Sixth Amendment].
62. 304 U.S. 458 (1938).
63. Id. at 467; see LAFAVE ET AL., supra note 63, § 11.1, at 555.
64. 315 U.S. 60, 70 (1942).
68. See Herring, 422 U.S. at 865; Geders, 425 U.S. at 91.
69. LAFAVE ET AL., supra note 63, § 11.8, at 608.
70. See infra notes 97–98 and accompanying text.
72. Id. at 547.
73. Id.

1. Government Intrusion: Weatherford

As for cases involving government intrusions into the attorney-client relationship, the Supreme Court has refused to hold that such intrusions give rise to a presumption of prejudice. Instead, the Court appears to require a demonstration that the invasion had an adverse impact on attorney performance. In Weatherford v. Bursey,80 Bursey brought an action against Weatherford, an undercover agent, claiming that the agent’s conduct effectively violated Bursey’s Sixth Amendment right to counsel.81 Weatherford, in his capacity as an undercover agent, had accompanied Bursey and others as they vandalized a local Selective Service office.82 To maintain his cover, the police arrested and charged
Weatherford along with the others. Shortly thereafter, Weatherford attended meetings with Bursey and Bursey’s lawyer at their request, still with the purpose of keeping his cover. The District Court found that Weatherford never initiated any of the meetings and that Weatherford never discussed with his superiors or the prosecutor any of the details regarding Bursey’s trial strategy.

In finding that Weatherford violated Bursey’s Sixth Amendment right to counsel, the Fourth Circuit held that “whenever the prosecution knowingly arranges and permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial.” The Supreme Court refused to adopt the lower court’s per se rule and reversed, relying on the “legitimate” purpose of Weatherford’s attendance—protecting his cover and perhaps protecting his safety—at the attorney-client meetings and the fact that he did not transmit any information from those meetings to the prosecution. The Court stated that

had Weatherford testified at Bursey’s trial as to the conversation between Bursey [and his lawyer]; had any of the State’s evidence originated in these conversations; had those overheard conversations been used in any other way to the substantial detriment of Bursey; or even had the prosecution learned from Weatherford, an undercover agent, the details of the [attorney-client] conversations about trial preparations, Bursey would have a much stronger case.

In addition, the Court stressed the “unfortunate necessity of undercover work and the value it often is to effective law enforcement.”

In a vigorous dissent, Justice Marshall condemned what he perceived as the majority’s sanctioning of “spying upon attorney-client communications.” Drawing from precedent, Marshall argued that privacy of communications with counsel is the “essence” of the Sixth Amendment right to counsel and that defendants will only be candid with their lawyers if the government is prohibited from intercepting confidential attorney-client communications.

2. Government Intrusion: Morrison

Four years after Weatherford, the Supreme Court faced another incident involving government interference with the attorney-client rela-

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83. Id.
84. Id. at 547–48.
85. Id. at 549.
86. Id. (citing 528 F.2d 483, 485 (4th Cir. 1975)).
87. Id. at 550–54.
88. Id. at 554.
89. Id. at 557.
90. Id. at 562 (Marshall, J., dissenting).
91. Id. at 563–66 (Marshall, J., dissenting) (internal citations omitted).
tionship in United States v. Morrison.92 In Morrison, the defendant moved to dismiss her indictment on Sixth Amendment grounds after federal agents confronted her without her counsel’s permission and sought her cooperation in a separate investigation.93 The defendant claimed the agents made disparaging remarks about her counsel and implied that she would get a “stiff jail term” if she refused to cooperate.94 As in Weatherford, the Third Circuit ruled that the defendant’s Sixth Amendment right to counsel had been violated and that dismissal with prejudice was required, regardless of whether there was any adverse effect on the defendant’s representation.95

The Supreme Court assumed that the Sixth Amendment had been violated in Morrison, but reversed the lower court and held that “absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate.”96

Thus, with respect to government interference claims brought under the Sixth Amendment, the Supreme Court appears much more willing to reverse without requiring a showing of prejudice when the government actively restricts a counsel’s ability to perform, as cases such as Herring (closing arguments) and Geders (access to client during recess) indicate.97 On the other hand, if a government agent merely overhears confidential attorney-client communications or approaches a defendant outside the presence of counsel, then the defendant will need to demonstrate an adverse impact on his or her counsel’s performance before the Court will consider reversal.98 This reasoning appears consistent with the Sixth Amendment goal of assuring a fair trial because fairness would be maintained only if the defendant’s counsel were able to perform his or her duties.

Fairness, however, may not be the only relevant value underlying the Sixth Amendment. Like Justice Marshall in his Weatherford dissent, several scholars focus on notions of attorney-client privacy present in Sixth Amendment jurisprudence—including the attorney-client privi-

92. 449 U.S. 361 (1981); see LAFAVE ET AL., supra note 63, § 11.8, at 609.
93. 449 U.S. at 362.
94. Id.
95. Id. at 363 (citing 602 F.2d 529 (3d Cir. 1979)).
96. Id. at 364–67 (“In arriving at this conclusion, we do not condone the egregious behavior of the Government agents. Nor do we suggest that in cases such as this, a Sixth Amendment violation may not be remedied in other proceedings. We simply conclude that the solution provided by the Court of Appeals is inappropriate where the violation, which we assume has occurred, has had no adverse impact upon the criminal proceedings.”).
97. See LAFAVE ET AL., supra note 63, § 11.8, at 608.
Most of the new BOP rule’s opponents align themselves with these scholars.100

B. Sixth Amendment Challenges to the BOP Rule and the Relevance of the Attorney-Client Privilege

Even before the new BOP rule, scholars recognized that government intrusion into attorney-client communications raised specific Sixth Amendment issues: “if courts simply ensure access to counsel, without recognizing the client’s underlying right to communicate privately with his attorney, they may render ineffective the legal assistance that the Constitution guarantees.”101 If an attorney and a client fear that the government may overhear their confidential communications, then they may refrain from speaking freely. The end result is an attorney who lacks the full extent of his client’s knowledge, rendering his representation less effective.102 This “chilling effect” on attorney-client communications worries opponents of the BOP rule, who claim it will adversely impact attorney performance.103

Irwin Schwartz, former president of the National Association of Criminal Defense Lawyers, said of the BOP rule that “[i]f we [defense counsel] can’t speak with a client confidentially, we may not speak with him at all. And if we can’t do that, the client is stripped of his Sixth Amendment right to have a lawyer.”104 In written testimony before the Senate Judiciary Committee, Nadine Strossen, president of the American Civil Liberties Union (ACLU), stated that “[t]he essential bedrock of the Sixth Amendment right to the assistance of counsel is the ability to communicate privately with counsel . . . .”105 She went on to state that the moment attorneys and clients are told their communications may be listened to “all attorney-client communications will be chilled, thus


100. See infra text accompanying notes 104–13.

101. See Government Intrusions, supra note 99, at 1144–45 (“If clients fear that their opponents may gain access to these conversations, open communication with counsel will inevitably be chilled.”).

102. See id. at 1145; A Rule Unfit, supra note 9, at 1250.

103. See infra text accompanying notes 104–13.

104. See Lardner, supra note 9; see also Ann Davis, Attorney-Client Confidentiality Waived in Rule, WALL ST. J., Nov. 9, 2001, at B1 (describing how Schwartz said that professional rules about maintaining client confidences “would mean lawyers have to stop speaking with their clients who are in custody. That means you can’t possibly represent someone effectively if you can’t talk with him.”); Profile: Policies Adopted by the Bush Administration Since Sept. 11th That Trouble Civil Liberties Groups (Nat’l Pub. Radio broadcast, Dec. 8, 2001) (quoting Schwartz: “The right to confidential communications . . . is an integral part of the Sixth Amendment guarantee of a right to have a lawyer at all . . . . So if there’s a possibility that a third party is listening and I can’t talk to my client, he’s stripped of his right to legal representation.”).

thwarting the [attorney-client privilege’s] key purpose—to encourage the full and frank disclosure and discussion between attorney and client that is an essential prerequisite for the lawyer’s effective representation of the client.”

As indicated by Strossen’s testimony, many commentators and courts believe that the longstanding tradition of the attorney-client privilege is indelibly linked to the Sixth Amendment right to the effective assistance of counsel. Commentators are divided as to whether the BOP rule violates an unlinked attorney-client privilege or whether it instead falls within one of the narrow judicial exceptions to the privilege, such as the “crime-fraud” exception.

With respect to the Sixth Amendment’s interplay with the attorney-client privilege, commentators argue that the primary purpose of the attorney-client privilege is to encourage “full and frank communication” between attorney and client and that the BOP rule, by potentially chilling such communications, seriously undermines an attorney’s ability to provide effective representation. In the words of one scholar, “[b]ecause the sixth amendment ensures a right to effective assistance of counsel in criminal cases, it should follow that the sixth amendment subsumes the attorney-client privilege, a necessary underpinning of that right.” Indeed, the earliest critics of the BOP rule focused on the relationship between the need for privilege and the ability to provide effective assistance of counsel. In a letter to Attorney General Ashcroft nine days after the BOP rule was announced, Senator Patrick Leahy stated that “the essence of the Sixth Amendment right to effective assistance of counsel is privacy of communication with counsel, and law enforcement practice throughout our history has recognized that subject only to the most narrow and judicially-scrutinized exceptions, attorney-client communications are immune from government interception.” Similarly, Robert Hirshon, former President of the American Bar Association, spoke out the same day as Senator Leahy and condemned the BOP rule on the grounds that its potential effect on the attorney-client privilege “seriously impinge[s] on the right to counsel.” Justice Marshall even noted in his Weatherford dissent that “the essence of the Sixth

106. Id.
107. See infra notes 109–14 and accompanying text.
108. Compare A Rule Unfit, supra note 9 (arguing that BOP rule violates privilege and does not fall within any exceptions), with Geraldine Gauthier, Note, Dangerous Liaisons: Attorney-Client Privilege, the Crime-Fraud Exception, ABA Model Rule 1.6 and Post-Sept. 11 Counter-Terrorist Measures, 68 BROOK. L. REV. 351 (2002) (arguing that BOP rule does not violate privilege because covered by crime-fraud exception).
109. Hearing, supra note 105 (testimony of Nadine Strossen); see also A Rule Unfit, supra note 9, at 1250.
111. See infra notes 112–14 and accompanying text.
112. Leahy, supra note 9 (citations omitted); see A Rule Unfit, supra note 9, at 1234 n.8.
113. Hirshon, supra note 9; see A Rule Unfit, supra note 9, at 1234 n.8.
Amendment right is . . . privacy of communication with counsel.”114 As
the next section demonstrates, the Department of Justice’s arguments in
support of the new BOP rule fail to adequately address the issue of the
potential chilling effect created by announcing to attorneys and defend-
ants that the government may be listening to their confidential com-

C. Analysis of the Justice Department’s Authority for the BOP Rule:
Fairness Versus Privacy

1. Fairness

The Justice Department recognized that the BOP rule raised Sixth
Amendment issues and cited Weatherford v. Bursey as its primary au-
thority in arguing that its procedures would adequately protect the
constitutional rights of inmates.115 According to the Justice Department, “no
Sixth Amendment violation occurs so long as privileged communications
are protected from disclosure and no information recovered through
monitoring is used by the government in a way that deprives the defen-
dant of a fair trial.”116 To accomplish this, the Justice Department argues
that the use of its “taint team” will limit disclosure to attorney-client
communications necessary to prevent acts of terrorism.117

This reasoning stays in accord with the “fairness” interests of the
Sixth Amendment;118 however, it fails to recognize potential privacy val-
ues incorporated into the Sixth Amendment and insufficiently addresses
the possibility that the chilling effect of such monitoring, even with the
use of a taint team, might render assistance of counsel ineffective.119

Indeed, the facts of Weatherford are in many respects at odds with
those likely to be present in the context of the BOP rule. First, there was
no issue of chilled communications in Weatherford. Neither Bursey nor
Bursey’s counsel suspected that Weatherford was a government agent; in
fact, they invited him to their meetings.120 This being the case, Bursey
and his attorney would not have feared making “full and frank disclo-
sures” to one another and, as such, Bursey’s counsel did not lack a full
understanding of his client’s knowledge.121 Without announcing to

Weatherford, though not finding a Sixth Amendment violation under the facts, stated in a footnote
that “[o]ne threat to the effective assistance of counsel posed by government interception of attorney-
client communications lies in the inhibition of free exchanges between defendant and counsel because
of the fear of being overheard.” Id. at 554–55 n. 4.


116. Id.

117. Id.

118. See supra notes 67–70 and accompanying text.

119. See infra text accompanying notes 134–67.


121. See Hearing, supra note 105 (testimony of Nadine Strossen).
Bursey and Bursey’s counsel that a government agent may be listening to their communications, a situation different from the procedures of the BOP rule in which parties are informed of potential monitoring, Bursey did not have reason to fear intrusion.122 Because the issue in Weatherford was not a lack of free communication, the Court focused on whether Weatherford conveyed to the prosecutor any information related to defense preparations.123

In addition, the BOP rule contemplates a different sort of monitoring than that present in Weatherford. Weatherford involved a physical listener present in the same room as Bursey and with Bursey’s full awareness.124 The BOP rule, however, involves electronic surveillance.125 The majority in Weatherford noted a crucial difference between human and electronic monitoring:

One threat to the effective assistance of counsel posed by government interception of attorney-client communications lies in the inhibition of free exchanges between defendant and counsel because of the fear of being overheard. However, a fear that some third party may turn out to be a government agent will inhibit attorney-client communications to a lesser degree than the fear that the government is monitoring those communications through electronic eavesdropping, because the former intrusion may be avoided by excluding third parties from defense meetings or refraining from divulging defense strategy when third parties are present at those meetings.126

Thus, under the BOP rule’s call for electronic monitoring, attorneys and clients have no available measures to reduce the chilling effect of such eavesdropping: attorneys will be unable to prevent the monitoring when discussing defense strategy or the like.

While not specifically addressing the chilling effect of potential monitoring under the BOP rule, the Justice Department falls back on the use of its taint team to allay fears of prosecutorial use of information gleaned from attorney-client monitoring.127 This rationale aligns with the Weatherford Court’s emphasis on fundamental fairness and the fact that the District Court specifically found that Weatherford did not communicate any information on defense strategy to the prosecution.128 The use of a taint team, however, will likely do little to calm the nerves of inmates subject to monitoring under the BOP rule. First, courts would have a difficult time determining if prosecutors were truly prevented from learning

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122. See Weatherford, 429 U.S. at 554.
123. See id.
124. See id. at 548.
125. See supra text accompanying notes 40–48.
126. Weatherford, 429 U.S. at 554 n.4.
128. Weatherford, 429 U.S. at 554; see A Rule Unfit, supra note 9, at 1247.
any defense strategy that may have been overheard.\textsuperscript{129} In the words of one commentator, “courts cannot effectively police the ... subtle uses that prosecutors may make of information about defense strategy that they may have acquired through sixth amendment violations.”\textsuperscript{130} Moreover, “[w]hether or not prosecutors conceal information, defendants and their attorneys are unlikely to be as comfortable as the Supreme Court appears to be in relying on the prosecution to reveal disclosures of damaging confidential information.”\textsuperscript{131} No matter how many firewalls the Justice Department erects between the BOP monitoring and prosecutors, the damage has already been done.\textsuperscript{132} Firewalls might not be meaningful screening devices if there are enough incentives to breach them. Arguably, the successful prosecution of a terrorist suspect is the type of incentive that could sway the Justice Department into breaching the firewall.

Yet, with Sixth Amendment jurisprudence’s emphasis on fairness, the use of a properly functioning taint team may be enough to ensure that some defendants subject to the BOP rule’s monitoring receive fair hearings. As mentioned above, however, several commentators and courts have argued that the Sixth Amendment protects attorney-client privacy interests separate from fairness interests.\textsuperscript{133} A rule that undermines such privacy interests casts suspicion on the likelihood that all defendants will receive a fair hearing.

2. Privacy

United States v. Morrison\textsuperscript{134} provides perhaps the best illustration of Supreme Court recognition that the Sixth Amendment protects attorney-client privacy, in addition to procedural fairness.\textsuperscript{135} In Morrison the Court held that there had been no prejudice to the defendant when government agents intruded into the attorney-client relationship.\textsuperscript{136} Yet, the Court assumed that the defendant’s Sixth Amendment rights had been violated.\textsuperscript{137} Thus, in the words of one scholar, “the intrusion itself appears to be the evil.”\textsuperscript{138}

Perhaps because of the tenuous position the Supreme Court has taken with respect to the existence of a privacy right distinct from inter-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{129} See Government Intrusions, supra note 99, at 1152–53.
\item \textsuperscript{130} Id.
\item \textsuperscript{131} Id. at 1154.
\item \textsuperscript{132} See Davis, supra note 104 (“Because lawyers are bound by professional rules to maintain clients’ confidences, [Schwartz] says, ‘this rule would mean lawyers have to stop speaking with their clients who are in custody. That means you can’t possibly represent someone effectively if you can’t talk with him.’”).
\item \textsuperscript{133} See infra notes 134–67 and accompanying text.
\item \textsuperscript{134} 449 U.S. 361 (1981).
\item \textsuperscript{135} See Gardner, supra note 70, at 406, 410. For a review of the facts of this case, see supra text accompanying notes 92–96.
\item \textsuperscript{136} 449 U.S. at 366–67.
\item \textsuperscript{137} Id. at 364.
\item \textsuperscript{138} Gardner, supra note 70, at 406.
\end{itemize}
\end{footnotesize}
ests of fairness in the Sixth Amendment, the Courts of Appeals are divided on the issue. Some circuits hold that a government intrusion into attorney-client communications constitutes a per se Sixth Amendment violation, with no required showing of prejudice. Along these lines, the Third Circuit stated:

The fundamental justification for the sixth amendment right to counsel is the presumed inability of a defendant to make informed choices about the preparation and conduct of his defense. Free two-way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful.

In contrast, the Sixth Circuit held in United States v. Steele that “[e]ven where there is an intentional intrusion by the government into the attorney-client relationship, prejudice to the defendant must be shown before any remedy is granted.” Circuits requiring a showing of prejudice reject the notion that government intrusion into attorney-client privacy alone violates the Sixth Amendment.

One prescient opinion written by Judge Posner of the Seventh Circuit sheds a great deal of light on the question of a Sixth Amendment attorney-client privacy interest separate from interests of fairness and provides the best support for critics of the new BOP rule. United States v. DiDomenico, a RICO case, featured twenty defendants who were all members of the “Chicago Outfit.” While awaiting trial, the defendants discovered that the room in the federal jail where they met privately with counsel had been bugged. Who specifically bugged the room remains unknown, but someone made a tape of a conversation between one of the defendants and his counsel and then mailed that tape to the defense attorney. The defendants were all subsequently convicted and they argued on appeal that the district court erred in failing to conduct an evidentiary hearing to determine the extent of the bugging and whether any attorney-client communications had been disclosed to the prosecution.

Though ultimately finding that the defendants in DiDomenico were not entitled to reversal, Judge Posner did elucidate the most compelling
theory for a Sixth Amendment privacy interest. After first noting that the complete denial of counsel would constitute reversible error even if not prejudicial to the defendant, Judge Posner described a hypothetical posited at oral argument that is remarkably similar to the new BOP rule: We put to the government at oral argument the following example. The government adopts and announces a policy of taping all conversations between criminal defendants and their lawyers. It does not turn the tapes over to prosecutors. It merely stores them in the National Archives. The government’s lawyer took the position that none of the defendants could complain about such conduct because none could be harmed by it, provided the prosecutors never got their hands on the tapes. We are inclined to disagree. . . . The hypothetical practice that we have described would, because of its pervasiveness and publicity, greatly undermine the freedom of communication between defendants and their lawyers and with it the efficacy of the right to counsel, because knowledge that a permanent record was being made of the conversations between the defendants and their lawyers would make the defendants reluctant to make candid disclosures. (Totalitarian-style continuous surveillance must surely be a great inhibitor of communication.)

Seemingly to Judge Posner, such a practice would be grounds for reversal, without any required showing of prejudice, due to its chilling effect. By contrast, Judge Posner stated that cases of “ad hoc governmental intrusion into the relation between a criminal defendant and his lawyer” would require a showing of prejudice, because in those situations “the bare fact of the intrusion does not create a high probability that communication between lawyer and client or between client and lawyer was disrupted.”

Ultimately, the DiDomenico court affirmed the convictions because the defendants did not state a Sixth Amendment violation and instead only argued that the district court erred in refusing to hold an evidentiary hearing on the matter, which the court of appeals found was within the district court judge’s discretion. Even if the defendants had argued for a Sixth Amendment violation, Judge Posner indicated that their claim would most likely fail: “[s]uch an argument would be unlikely to succeed when so far as appears the bugging incident was completely isolated (and isolated intrusions into the attorney-client relation are, as we have seen, not reversible error per se) . . . .”

151. See id. at 299.
152. Id.; see A Rule Unfit, supra note 9, at 1252.
153. See DiDomenico, 78 F.3d at 299.
154. Id. (emphasis added).
155. Id. at 300 (construing Weatherford, 429 U.S. 545, 554 n.4 (1977)).
156. Id.
157. Id. (emphasis added).
A notable aspect of the DiDomenico opinion is its focus on the nature and quality of the intrusion, as opposed to the motives of the government or the extent of disclosure to the prosecution.158 As described by one commentator, such an approach recognizes that "some systematic but 'non-egregious' intrusions greatly offend Sixth Amendment privacy while, on the other hand, some highly 'egregious' ad hoc intrusions do little damage to protected privacy interests."159 Admittedly, before the BOP rule, cases of "systematic" intrusions into attorney-client privacy were few in number.160

Because the issue was not present in DiDomenico and the Weatherford/Morrison line of cases, should courts face situations of systematic intrusion, they may turn to one of several possible remedies advanced by scholars.161 Following Judge Posner’s comments regarding his DiDomenico hypothetical, it appears that courts could find per se Sixth Amendment violations in cases of systematic intrusion into attorney-client privacy when the defendant was aware that such a pattern of intrusion existed at the time of his communications with counsel.162 Alternatively, courts in cases of systematic government intrusion could place the burden on the government to prove that attorney-client communications were not chilled in the specific case at bar.163

Whatever approach courts might take with cases of systematic intrusion into attorney-client privacy, "attorney-client privacy plays a legitimate role, albeit a narrow one, as a Sixth Amendment value independent from the more pervasive interest in procedural fairness."164 Thus, when faced with a situation of systematic intrusion, it would be difficult for the Supreme Court to fall back on its Weatherford opinion, given the logic of Judge Posner’s analysis in DiDomenico.165 Due to the consequences of systematic intrusions and the extreme likelihood that they would effectively chill attorney-client communications,166 the Justice Department’s reliance on Weatherford and the use of a taint team—at least in its current form—appears inadequate to fully address the criticism of the BOP rule.167 The Justice Department therefore may wish to focus less on the fairness of the BOP rule and more on its concern for public safety, which in turn may require it to argue for a Sixth Amendment public-safety exception.

158. See Gardner, supra note 70, at 442–43.
159. Id. at 443.
160. Id. at 444.
161. See supra text accompanying notes 158–59.
162. See Gardner, supra note 70, at 445–46.
163. See id. at 446.
164. Id.
165. See supra notes 151–57 and accompanying text.
166. See supra notes 151–60 and accompanying text.
167. Indeed, Strossen relied heavily on DiDomenico in her written testimony before the Senate Oversight Committee when decrying the BOP rule as in violation of the Sixth Amendment. See Hearing, supra note 105 (testimony of Nadine Strossen).
D. The Justice Department’s Reliance on Public Safety

At the heart of the Justice Department’s justification for the new BOP rule allowing the monitoring of communications between attorneys and their clients remains the interest in protecting the public from acts of terrorism.\footnote{See infra notes 171–77 and accompanying text.} If a defendant argues that the systematic intrusiveness of the BOP rule violates Sixth Amendment privacy interests, then the government could respond by noting the ultimate goal of ensuring public safety. Indeed, when responding to critics of the BOP rule, Justice Department officials defend the measure by citing the “extraordinary threats to our national security” following the events of September 11th.\footnote{Press Release, Agence France-Presse, Two Republican U.S. Senators Call for Scrapping of Anti-Terrorism Measure (Nov. 29, 2001) (quoting Assistant Attorney General Michael Chertoff), available at 2001 WL 25074689.} Several scholars also note that courts may justify the measures described in the BOP rule under the circumstances of the present day, even if they would not survive judicial scrutiny in a different time period.\footnote{See, e.g., Fein, supra note 9; William Glaberson, Legal Experts Divided on New Antiterror Policy That Scuttles Lawyer-Client Confidentiality, N.Y. TIMES, Nov. 13, 2001, at A7 (quoting former United States Attorney Otto G. Obermaier as saying “the government could now make a far stronger case for monitoring lawyer-client conversations than would have been possible before September 11”); Legal Action: Two Antiterrorism Measures Added, DETROIT FREE PRESS, Nov. 10, 2001 (quoting Professor Susan Bloch, “[i]t’s an extreme measure, but these are extreme times . . . .”), available at http://www.freep.com/news/nw/terror2002/rights10_20011110.htm.}

Indeed, the Justice Department has declared that its role has changed because of the events of September 11th.\footnote{Hearing, supra note 105 (Statement of Hon. John Ashcroft, Attorney General, United States Department of Justice), available at http://judiciary.senate.gov/testimony.cfm?id=121&wit_id=42.} In written testimony before the Senate Judiciary Committee, Attorney General Ashcroft said, “[w]e have responded by redefining the mission of the Department of Justice. Defending our nation and its citizens against terrorist attacks is now our first and overriding priority.”\footnote{Id.; see also id. (Statement of Hon. Viet D. Dinh, Assistant Attorney General, Office of Legal Policy, United States Department of Justice) (“We cannot wait for [terrorists] to execute their plans; the death toll is too high; the consequences are too great. To respond to this threat of terrorism, the Department [of Justice] has pursued an aggressive and systematic campaign that utilizes all information available, all authorized investigative techniques, and all the legal authorities at our disposal.”), available at http://judiciary.senate.gov/testimony.cfm?id=128&wit_id=78.} Such a shift from investigation to prevention of crimes is necessary, according to former Deputy Assistant Attorney General Victoria Toensing, so that the government may “fulfill the nation’s primary responsibility: protection of its citizens.”\footnote{Hearing, supra note 105 (Statement of Victoria Toensing, former Deputy Assistant Attorney General), available at http://judiciary.senate.gov/testimony.cfm?id=128&wit_id=84; see also A Rule Unfit, supra note 9, at 1255.}

In addition, Attorney General Ashcroft responded to criticisms of measures such as the BOP rule by claiming that the criticisms are counterproductive to national security:
Charges of... “shredding the Constitution” give new meaning to the term, “the fog of war”... We need honest, reasoned debate; not fearmongering. To those who pit Americans against immigrants, and citizens against non-citizens; to those who scare peace-loving people with phantoms of lost liberty; my message is this: Your tactics only aid terrorists—for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies, and pause to America’s friends.174

The Justice Department can find some support in Weatherford175 for its position that legitimate public safety concerns may prevent an intrusion into attorney-client privacy from being deemed a Sixth Amendment violation. Part of the majority’s emphasis in that case was on the value of undercover work and the legitimate need of the government to allow its agents to maintain their cover.176 Weatherford, however, involved what Judge Posner would call an “ad hoc” government intrusion177 and not the systematic monitoring outlined in the BOP rule.

Still, the Justice Department can find some grounds for defending even systematic intrusion within the Weatherford opinion. In dicta referring to the Fourth Circuit’s per se approach to government intrusions, the majority commented that such a rule would be too drastic.178 According to the Court:

If, for example, Weatherford at Bursey’s invitation had attended a meeting between Bursey and Wise [Bursey’s counsel] but Wise had become suspicious and the conversation was confined to the weather or other harmless subjects, the Court of Appeals’ rule, literally read, would cloud Bursey’s subsequent conviction, although there would have been no constitutional violation.179

Besides being dicta, this statement was drafted without consideration of any governmental practice of systematic intrusion—such as that described by the BOP rule—in which inmates would be given notice that all communications with their counsel might be monitored.

It may be unwise for the Justice Department to rely on Weatherford and argue that its policy under the BOP rule is justified given the threat of terrorism. In the words of one commentator: “It is precisely when the government can posit a legitimate reason for the intrusion that courts should be most watchful; they should require the prosecutor to demonstrate that no alternatives less destructive of the defendant’s rights were available.”180

176. Id. at 557.
178. Weatherford, 429 U.S. at 557.
179. Id. at 557–58.
180. Government Intrusion, supra note 99, at 1157; see A Rule Unfit, supra note 9, at 1253.
In addition, given the compelling logic of Judge Posner’s opinion in DiDomenico, the Justice Department may need more ammunition if it wishes to survive a challenge to the BOP rule. 181 In this respect, the Justice Department could argue for a possible public-safety exception to the Sixth Amendment right to counsel. Such an exception would save the courts from having to decide which Sixth Amendment interest was in need of protection, fairness, or privacy, and could resolve the debate surrounding the BOP rule.

E. The Search for a Sixth Amendment Public-Safety Exception

The Supreme Court had an opportunity eighteen years ago to fashion a public-safety exception to the Sixth Amendment right to counsel, albeit in a different context than that of government monitoring of attorney-client communications. 182 In Maine v. Moulton, 183 the Court, split five to four, refused to recognize such an exception, despite strong arguments from the dissent. 184 Moulton involved two codefendants, Moulton and Colson, both of whom retained counsel. 185 While both men were released on bail, they met and Colson suggested that they might want to kill a key prosecution witness. 186 Shortly thereafter, Colson and his attorney met with police officials. 187 Through a plea bargain, Colson agreed to cooperate with police. 188 Colson also discussed anonymous threats he had received, as well as Moulton’s plan for killing a key witness for the prosecution. 189

Eventually, Colson and Moulton arranged to meet in person to discuss their defense strategy. 190 Once the police learned of this meeting, they equipped Colson with a secret wire transmitter. 191 According to the police, this procedure was taken to protect Colson’s safety in case Moulton already knew or suddenly realized that Colson was cooperating with the government, as well as to protect any witnesses who may have been threatened by Moulton. 192

Moulton only briefly discussed the possibility of eliminating witnesses during the conversation, but did make several incriminating statements. 193 When the State sought to introduce statements recorded during

181. See supra text accompanying notes 165–68.
183. Id.
185. Id. at 162.
186. Id.
187. Id. at 162–63.
188. Id. at 163.
189. Id.
190. Id. at 164.
191. Id.
192. Id. at 164–65.
193. Colson used a technique of feigning memory lapses in order to get Moulton to make most of the incriminating statements. Id. at 165–66.
the conversation, the trial court allowed the evidence over Moulton’s Sixth Amendment objection on the grounds that the recording was necessary to protect Colson and other prosecution witnesses. On appeal, the State Supreme Court and the U.S. Supreme Court both agreed with Moulton that the police had violated his Sixth Amendment right to counsel, justifying the reversal of his conviction.

The Sixth Amendment issue presented in Moulton was different from that in cases involving government intrusion into attorney-client communications—like the BOP rule—because the government intruded into a conversation between codefendants. Thus, in its analysis, the Moulton Court turned to a line of cases in which the government engaged an accused outside the presence of his or her attorney, including Massiah v. United States. Massiah involved two codefendants, Massiah and Colson (not the same Colson as in Moulton), who retained separate counsel. Colson eventually agreed to work with the authorities, so a government agent wired Colson’s automobile with a transmitter. When Massiah and Colson subsequently had a conversation in the vehicle while released on bail, a government agent heard several incriminating statements made by Massiah, which were introduced at trial. In reversing Massiah’s conviction, the Supreme Court held that Massiah “was denied the basic protections of [the right to the assistance of counsel] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in absence of his counsel.” In addition, in United States v. Henry, the Court held that under the Sixth Amendment the government cannot intentionally create a “situation likely to induce [the accused] to make incriminating statements without the assistance of counsel.”

Applying Massiah and Henry, the Moulton Court stated that the “Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a ‘medium’ between him and the State.” One scholar suggests that the “medium” referred to consists of a “zone of protected privacy,” which serves as a barrier between the accused and certain government contact. Applying this ra-

194. Id. at 166–67.
195. Id. at 168.
196. Id. at 163.
198. The Colson in Massiah is of no relation to the Colson in Moulton. See Moulton, 474 U.S. at 172 n.8.
200. Id. at 202–03.
201. Id. at 203.
202. Id. at 206 (emphasis added).
204. Id. at 274.
206. Gardner, supra note 70, at 427.
tionale to the situation in *Moulton*, the Court found that the State violated Moulton’s Sixth Amendment right when it arranged to record his conversations with an undercover informant. In response to the State’s argument that the recording of the conversation between Moulton and Colson was necessary to protect both Colson and future witnesses, the majority asserted that overlooking a Sixth Amendment violation whenever the government asserts a legitimate reason for its conduct would invite abuse by law enforcement in the form of fabricated investigations and risk “the evisceration of the Sixth Amendment right recognized in *Massiah*.”

The dissenter in *Moulton*, however, believed that the danger present to both Colson and prosecution witnesses justified the tactics used by the police. According to Chief Justice Burger, “if ‘alternative, legitimate reasons’ motivated the surveillance, then no Sixth Amendment violation has occurred. Indeed, if the police had failed to take the steps they took here knowing that Colson was endangering his life by talking to them, in my view they would be subject to censure.”

Perhaps at least one reason why the majority failed to condone the tactics employed by the government in *Moulton* is that it did not believe it could create any sort of public-safety exception in the context of the Sixth Amendment. After all, the Sixth Amendment is a constitutional rule as opposed to a judicially created rule. An example of the different principles involved with both types of rules, constitutional and judicially created, can be found in a discussion of the Court’s Fifth Amendment jurisprudence.

**F. Miranda, the Fifth Amendment, and the Quarles Public-Safety Exception**

With its decision in *Miranda v. Arizona*, the Supreme Court required that before custodial interrogation by police, the accused must be warned of his constitutional rights to remain silent and to have the assistance of counsel. Failure to do so renders any statements made during the interrogation inadmissible in court. In *Miranda*, Chief Justice War-

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208. Id. at 180.
209. See id. at 185.
210. Id. (Burger, C.J., dissenting). Chief Justice Burger went on to state: [I]t is impossible to identify any police ‘misconduct’ to deter in this case. In fact, if anything the actions by the police of the type at issue here should be encouraged. The diligent investigation of the police in this case may have saved the lives of several potential witnesses and certainly led to the prosecution and conviction of respondent for additional serious crimes.
211. Id. at 192 (Burger, C.J., dissenting).
212. See infra text accompanying notes 213–42.
214. Id. at 467.
215. Id. at 444.
ren referred to what have popularly become known as the “Miranda warnings” as “procedural safeguards” designed to secure one’s Fifth Amendment privilege. This language appeared to indicate that the requirement of Miranda warnings before custodial interrogation was a judge-made rule, as opposed to a constitutional rule. Yet, Chief Justice Warren went on to declare:

We have already pointed out that the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it. In any event, however, the issues presented are of constitutional dimensions and must be determined by the courts... Judicial solutions to problems of constitutional dimension have evolved decade by decade. As courts have been presented with the need to enforce constitutional rights, they have found means of doing so.

Using language such as “of constitutional dimension,” and speaking of the need “for procedures which assure that the individual is accorded his privilege under the Fifth Amendment,” Professor Yale Kamisar opines that the Court, at least at the time of the ruling, believed it was announcing a constitutional decision. Professor Kamisar further notes that “[i]f there were any doubts about the constitutional status of Miranda, they were dispelled three years later in Orozco v. Texas,” when a majority of the Court voted to throw out a confession because “obtain[ing] it in the absence of the required warnings was a flat violation of the Self-Incrimation Clause of the Fifth Amendment as construed in Miranda.”

The notion that Miranda announced only judicially created rules gained support, however, in the Supreme Court’s later opinion of New

216. He [the accused] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Id. at 479.
217. Id. at 444.
218. See infra notes 225–39 and accompanying text.
219. Miranda, 384 U.S. at 490–91 (The Chief Justice continued by stating, “[t]he admissibility of a statement in the face of a claim that it was obtained in violation of the defendant’s constitutional rights is an issue the resolution of which has long since been undertaken by this Court... Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.”).
220. Id. at 490–91.
221. Id. at 439.
222. See Yale Kamisar, Forward: From Miranda to §3501 to Dickerson to..., 99 MICH. L. REV. 879, 884 (2001).
223. Kamisar, supra note 222, at 885.
224. Id.
York v. Quarles, which adopted a public-safety exception in the context of Miranda warnings. In Quarles, police officers received information that the defendant had committed a rape and was armed with a gun. When police located the defendant in a grocery store, one officer chased and apprehended the defendant who, upon being frisked, was found to have an empty shoulder holster. The officer asked the defendant where his gun was located before providing any Miranda warnings. The defendant nodded toward some empty cartons, where police later retrieved a pistol, and said, “[t]he gun is over there.” When the defendant was subsequently tried for weapon possession, the trial court excluded his statement on the grounds that it was not preceded by the Miranda warnings. 

The Quarles Court continually emphasized that the “prophylactic Miranda warnings” were not rights protected by the Constitution, but instead were only measures designed to provide “practical reinforcement for the Fifth Amendment right.” The Quarles majority found no difficulty in fashioning an exception to the “prophylactic rule protecting the Fifth Amendment’s privilege against self-incrimination,” and believed that such an exception would not disturb the “doctrinal underpinnings” of the Miranda decision.
The idea that *Miranda* warnings are only prophylactic rules and not required by the Fifth Amendment can be seen in several other cases. At no point did any of these cases imply that the warnings were part of the constitutional rights of a defendant. Illustrative is then-Justice Rehnquist’s statement for the Court in *Michigan v. Tucker* that the required warnings outlined in *Miranda* are “not themselves rights protected by the Constitution.”

One might initially presume that there could be no public-safety exception to the Sixth Amendment because it, unlike the Court’s view of the *Miranda* rule after *Quarles* and *Tucker*, is constitutional in nature. However, when a majority of the Supreme Court declared *Miranda* to be a “constitutional decision,” one that could not be overruled by an Act of Congress.

G. Dickerson and Its Potential Effect on Quarles

The *Dickerson* decision shocked and confused scholars the moment it was announced because it appeared to stand in stark contrast to the Court’s previous explanation of the nature of its holding in *Miranda*. For purposes of this note, a brief explanation of the circumstances giving rise to the *Dickerson* decision will suffice.

In the wake of the *Miranda* rule requiring certain procedural safeguards before a defendant’s statements made during custodial interrogation could be admitted as evidence, Congress enacted 18 U.S.C. § 3501.

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238. *Id.* at 444; *see also Davis*, 512 U.S. at 457 (“The right to counsel established in *Miranda* was one of a series of recommended “procedural safeguards” . . . [that] were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected.”) (citations omitted); *Withrow*, 507 U.S. at 690 (“The Court indeed acknowledged that, in barring introduction of a statement obtained without the required warnings, *Miranda* might exclude a confession that we would not condemn as ‘involuntary in traditional [Fifth Amendment] terms,’ and for this reason we have sometimes called the *Miranda* safeguards ‘prophylactic’ in nature.”) (citations omitted); *Barrett*, 479 U.S. at 528 (“[T]he *Miranda* Court adopted prophylactic rules designed to insulate the exercise of Fifth Amendment rights.”); *Elstad*, 470 U.S. at 307 (“*Miranda’s* preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.”).
239. *Id.* at 432.
241. *Dickerson*, 530 U.S. at 431–32. Section 3501 provided as follows:
In any criminal prosecution brought by the United States or by the District of Columbia, a confession . . . shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the is-
In keeping with a more literal reading of the Fifth Amendment language regarding compulsion, this statute essentially made the admissibility of such statements depend solely on whether they were made voluntarily.245 Under the facts of the case, when Dickerson moved to suppress certain statements made to the FBI on the grounds that they had not been preceded by Miranda warnings, the district court granted his motion.246 The government filed an interlocutory appeal to the Fourth Circuit. The Fourth Circuit reversed on the basis that § 3501 was satisfied because Dickerson’s statements were voluntary, despite the FBI’s failure to provide Miranda warnings.247 In so doing, the Fourth Circuit explained that Miranda was not a constitutional holding and that Congress could thereby overrule the decision with a subsequent statute.248

As Professor Kamisar indicates, many scholars thought the Court’s reasoning behind decisions like Quarles and Tucker made a defense to § 3501 a legitimate possibility.249 “The Supreme Court, in a seven to two decision, reversed the Fourth Circuit, holding that “Miranda, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule Miranda ourselves.”250 Throughout the Dickerson opinion, Chief Justice Rehnquist—who wrote the Tucker opinion—states that Miranda set forth a “constitutional rule,”251 was “constitutionally based,”252 had “constitutional underpinnings,”253 and laid down “constitutional guidelines.”254 What these statements mean exactly remains unclear and the majority opinion offers no further explanation.255 Indeed, the Chief Justice admits that language in previous cases, such as Quarles and Tucker, gives support to the Fourth

245. Dickerson, 530 U.S. at 432.
246. Id.
247. Id.
248. Id.
249. Kamisar, supra note 222, at 887.
250. Dickerson, 530 U.S. at 432.
251. Id. at 439.
252. Id. at 440.
253. Id. at 440 n.5.
254. Id. at 435.
255. See Cassell, supra note 243, at 899.
Circuit’s conclusion that *Miranda*’s holding was nonconstitutional. In order to explain the seemingly inexplicable contradictions in cases like *Quarles* and *Tucker*, the Chief Justice stated:

> These decisions illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable. No court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of modifications represented by these cases are as much a normal part of constitutional law as the original decision.

In a vigorous dissent, Justice Scalia, joined by Justice Thomas, argued that previous opinions like *Quarles* could not be aligned with the announcement in *Dickerson*. According to Justice Scalia, “to justify today’s agreed-upon result, the Court must adopt a significant new, if not entirely comprehensible, principle of constitutional law.”

For instance, turning to *Quarles*, the Chief Justice’s statement that “no constitutional rule is immutable” does not appear to explain the creation of a public-safety exception to *Miranda*, when the *Quarles* Court specifically based its holding on the nonconstitutional, prophylactic nature of the *Miranda* warnings. Certainly no public-safety exception can be found in the text of the Fifth Amendment. As Justice Scalia stated in response to the above-mentioned quotation of the Chief Justice, “[t]he issue . . . is not whether court rules are ‘mutable’; they assuredly are. . . . The issue is whether, as mutated and modified, they must make sense.” Scalia stated that “if confessions procured in violation of *Miranda* are confessions ‘compelled’ in violation of the Constitution, the post-*Miranda* decisions . . . do not make sense.”

Taken in this light, one scholar notes that *Dickerson*’s holding could be compared to a declaration that “the Great and Powerful Oz has Spoken!”

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256. *Dickerson*, 530 U.S. at 438 (“We disagree with the Court of Appeals’ conclusion, although we concede that there is language in some of our opinions that supports the view taken by that court.”).

257. *Id.* at 441 (emphasis added).

258. *Id.* at 445 (Scalia, J., dissenting) (“One will search today’s opinion in vain . . . for a statement (surely simple enough to make) that what 18 U.S.C. § 3501 prescribes—the use at trial of a voluntary confession, even when a *Miranda* warning or its equivalent has failed to be given—violates the Constitution. The reason the statement does not appear is not only (and perhaps not so much) that it would be absurd, inasmuch as § 3501 excludes from trial precisely what the Constitution excludes from trial regarding compelled confessions; but also that Justices whose votes are needed to compose today’s majority are on record as believing that a violation of *Miranda* is not a violation of the Constitution.”).

259. *Id.* (Scalia, J., dissenting).

260. *See id.* at 441.


262. U.S. Const. amend. V (“No person shall . . . be compelled in any criminal case to be a witness against himself.”).

263. *Dickerson*, 530 U.S. at 445 (Scalia, J., dissenting) (“The requirement that they do so is the only thing that prevents this Court from being some sort of nine-headed Caesar, giving thumbs-up or thumbs-down to whatever outcome, case by case, suits or offends its collective fancy.”).

264. *Id.* (Scalia, J., dissenting).

II. Dickerson’s Impact on the Search for a Sixth Amendment Public-Safety Exception

After the Dickerson decision, the precise state of the Quarles public-safety exception remains clouded. The Dickerson Court did not overrule Quarles, noting simply that modifications of constitutional rules are a “normal part of constitutional law.” As a result, it appears that the Supreme Court acquiesced to a public-safety exception to “a constitutional rule” (Miranda), despite the fact that no such exception can be found anywhere in the text of the Fifth Amendment. The ramifications of this acquiescence have the potential to provide a springboard toward creating significant alterations to the Sixth Amendment’s landscape. Whatever the precise scope of Dickerson may be, proponents of public-safety exceptions to other constitutional amendments—at least exceptions related to criminal procedure—seem to be in a much better position than they would have been pre-Dickerson. Specifically, should the Court now choose to find an exigency exception to the Sixth Amendment, it would have a judicial decision on which to stand.

In searching for a public-safety exception within the context of the Sixth Amendment, the rationale of Dickerson may influence the Court were it to face the Moulton situation anew. Part of the Quarles Court’s justification for its “narrow exception” to the prophylactic Miranda warnings was the desire to assist law enforcement faced with split-second decisions concerning public safety. Indeed, the Court has a track record of crafting opinions to assist law enforcement in its Sixth Amendment jurisprudence. If one were to substitute the word “constitutional” in place of the term “prophylactic” in Quarles, the result would be an exigent circumstances exception—designed to assist law enforcement—to a “constitutional” rule (Miranda). Such an exception was specifically rejected in Moulton, where the Court noted the legitimate interest in protecting a government informant and prosecution witnesses, but held that the Sixth Amendment allowed no such exception. Any exception would, according to Moulton, dilute “the protection afforded by the right to counsel.” The Moulton Court stated at some length that the government remains limited by the Sixth Amendment rights of the accused in its pursuit of evidence, despite any legitimate reason for in-
vading those rights. To hold otherwise, cautioned the Court, would be to invite the police to fabricate “legitimate” reasons for infringing upon Sixth Amendment protections. However, such a concern was also present in Quarles, as the dissenting opinions pointed out.

Now, post-Dickerson, it appears that a public-safety exception to the “constitutional” rule of Miranda may give new life to the Moulton dissent’s comment that “if ‘alternative, legitimate reasons’ motivated the surveillance [of conversation between codefendants], then no Sixth Amendment violation has occurred.” If the Moulton majority held back from supporting the dissent’s view because it felt unable to craft any sort of public-safety exception to the Sixth Amendment, then Dickerson may signal that such a rule would be feasible. Returning to the dissenting opinion in Moulton, and after noting the Dickerson statement that no constitutional rule is “immutable,” the Court could look at Chief Justice Burger’s arguments in a different light: “As I see it, if ‘alternative, legitimate reasons’ motivated the surveillance, then no Sixth Amendment violation has occurred.” With Dickerson holding that Miranda created a constitutional rule, Quarles could be said to have announced something parallel to Chief Justice Burger’s statement in the following manner: if “alternative, legitimate reasons” (here public safety) motivated the absence of Miranda warnings, then no Fifth Amendment violation has occurred.

One obstacle to a Sixth Amendment public-safety exception, however, is the lack of clarity in the Dickerson opinion. As Justice Scalia pointed out, the Dickerson majority never expressly stated that a violation of Miranda is a violation of the Constitution. Thus, Dickerson may best be seen as a “compromise opinion,” one that, in the words of Professor Yale Kamisar, “‘reaffirmed’ Miranda’s constitutional status (thereby invalidating the federal statute that purported to overrule it), but preserved all the qualifications and exceptions the much-criticized case has acquired over three decades.” Such a compromise would appear to leave the Miranda doctrine “incoherent,” because, as noted above, the cases finding exceptions—such as Quarles—could not survive a labeling of the Miranda requirements as “constitutional” rules. As Professor Kamisar describes the situation:

273. See id. at 180.
274. See id.
275. Quarles, 467 U.S. at 660–74 (O’Connor, J., concurring in part and dissenting in part); id. at 674–90 (Marshall, J., dissenting).
276. Moulton, 474 U.S. at 185.
277. Id.
279. See id. at 445–46 (Scalia, J., dissenting).
280. Kamisar, supra note 222, at 889.
281. Cassell, supra note 243, at 901.
282. See supra text accompanying notes 258–65.
I am afraid that lawyers trying to reinvigorate *Miranda* will be reminded that, what the Chief Justice calls “the sort of modifications represented by [the] cases [interpreting *Miranda* narrowly]”—what some, including me, would call cases drawing distinctions between *Miranda* violations and ‘real’ constitutional violations that no longer seem defensible after *Dickerson*—are, to quote the Chief Justice’s opinion in *Dickerson* again, “as much a normal part of constitutional law as the original decision.”283

Because the Court posited that *Miranda* warnings are “constitutional” rules, never stated that the warnings are required by the Constitution, and failed to explain the precise status of the seemingly contradictory exceptions to post-*Dickerson* *Miranda*, Professor Susan Klein calls the *Dickerson* opinion, “in a word, terrible.”284 Professor Klein states that the Chief Justice’s compromise “holds by judicial fiat that the law is to stay exactly as it was pre-*Dickerson*.285 If the *Miranda* rule is “constitutional,” then it would have been helpful for the Chief Justice to have explained how to view *Miranda*’s public-safety exception, because it would seemingly violate the “constitutional rule.”286

As a result of the uncertainty surrounding the exceptions to *Miranda* in a post-*Dickerson* world,287 supporters of public-safety exceptions in the context of constitutional criminal procedure are forced to focus on perhaps the most troublesome part of *Dickerson*: the way the Court engaged in what seems to be a significant departure from the previous *Miranda* decisions of the last thirty years or, as Justice Scalia labeled it, a new theory of constitutional law.288 There is no public-safety exception to a prophylactic rule in the context of the Sixth Amendment for the Court to *constitutionalize* or *reconstitutionalize*.289

Additionally, the circumstances giving rise to the public-safety exception in *Quarles* are distinguishable from those presented by the BOP rule to which a Sixth Amendment public-safety exception would apply. The exception in *Quarles* was premised in part on the need to give non-legally trained law enforcement officers a bright-line rule to help them when faced with situations requiring “snap” judgment.290 The situation

285. *Id*.
287. Note, however, that despite any uncertainty, several state courts have upheld all pre-*Dickerson* exceptions to *Miranda*. See, e.g., People v. Trujillo, 30 P.3d 760 (Colo. Ct. App. 2000); State v. Walton, 41 S.W.3d 75 (Tenn. 2001).
289. Professor Klein notes that although there are prophylactic rules in the context of the Sixth Amendment, none are premised on concerns for public-safety. See Klein, *supra* note 284, at 1040–41 (describing Sixth Amendment prophylactic rules related to pretrial line-up identifications, joint trials, and attorney conflicts of interest due to multiple representation).
290. *Id* at 1037.
presented by the BOP rule does not involve any similar need for quick
decisions.291

Moreover, the Quarles exception emerged from an intentional vi-
olation of the Miranda rule.292 As Professor Klein notes, the Quarles ex-
ception is the only one applicable to intentional violations—every other ex-
ception to Miranda recognized by the Court involved unintentional
violations.293 Klein posits that because some exceptions to Miranda in-
volved unintentional violations there may be a way to reconcile them
with Miranda’s constitutional status: “[i]f the Court determines that the
exceptions encourage violations of the rule [Miranda], it may limit these
exceptions to unintentional violations . . . .”294 If the BOP rule consti-
tutes a Sixth Amendment violation, then it would be an intentional viola-
tion each time it operated to monitor attorney-client communications.
Thus, if, after Dickerson, the Court decides to limit Miranda’s exceptions
to unintentional violations, then using Quarles and Dickerson as justifica-
tion for an exception to the Sixth Amendment loses significant merit.

One final way to distill the above discussion of Miranda, Dickerson,
Quarles, and Moulton into a clear resolution that a public-safety excep-
tion to the Sixth Amendment is feasible may seem deceptively straight-
forward: the Court could simply declare that the Sixth Amendment must
yield to public safety concerns as a matter of law. Professor Klein argues
that one way for the Quarles exception to survive Dickerson might be to
craft an express public-safety exception to the Fifth Amendment.295
There are already holdings premised on concerns for public safety that
indicate no constitutional right is absolute, such as the ruling that a per-
sont does not have a First Amendment right to scream “fire” in a
crowded theater.296 Similarly, Professor David Strauss argues that excep-
tions to Miranda can be carved out without overruling that case.297 Ac-
cording to Strauss:

Miranda is required by the Self-Incrimination Clause because that
Clause has to be implemented in some way; any method of imple-
mentation will strike some balance of advantages and disadvan-
tages; and Miranda strikes the best balance in the circumstances
presented by that case. In different circumstances, such as in Elstad
(or Quarles, or Tucker), a different balance might be best . . . . But
the fact that the Court refined the balance it struck in Miranda,

291. See supra text accompanying notes 40–48.
292. See supra text accompanying notes 40–48.
293. Id. at 1063.
294. Id. at 1062 (“No constitutional right is absolute, and one could plausibly argue if a suspect
refused to reveal where he had planted a bomb in the schoolyard the Constitution might tolerate some
level of coercion to compel the defendant to reveal its location.”).
295. See supra text accompanying notes 40–48.
296. Id. at 1062 n.148.
when cases presenting different circumstances arose, has no bearing on the constitutional status or legitimacy of that decision.298 The idea that a “constitutional rule that applies to one set of circumstances might have to be altered when different circumstances arise”299 could lead the Court to apply its traditional Sixth Amendment jurisprudence in all cases where public safety is not the primary issue, leaving room for an exigency exception in those situations that implicate safety interests.300 This rationale, however, might invite fraud by the government and create an exception that effectively swallows Sixth Amendment rights.301

I. Even If Recognized, a Public-Safety Exception to the Sixth Amendment May Not Specifically Apply to the BOP Rule

Even if the Court recognizes a public-safety exception in the context of the Sixth Amendment, it might not be applicable to the BOP rule. One of the problems with using Dickerson to justify a public-safety exception to the Sixth Amendment is that there are multiple lines of Sixth Amendment cases.302 An exception that may fit within one line may not fit well within another. For example, the reasoning behind the Massiah/Moulton line of decisions stands in contrast to the Weatherford decision.303 Were the Court to rely on Dickerson to find a public-safety exception in a factual situation analogous to that present in Moulton, such a holding would be distinguishable from the situation illustrated by Weatherford or the BOP rule.

In both Moulton and Massiah, as well as in Henry, the Court held that that the Sixth Amendment right to counsel is violated when the government uses against a defendant at trial incriminating statements that had been “deliberately elicited” from him postindictment and in the absence of counsel.304 In Moulton, the Court held that the defendant’s right to counsel was violated when the police wired Colson during his meeting with the defendant in the absence of counsel.305 Even though Moulton...
asked Colson to come to the meeting, the Court held that “knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State’s obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity.”306 The Court announced this holding despite acknowledging that the police had a legitimate purpose for wiring-up Colson the informant, namely to protect him and potential witnesses.307

In contrast, both Weatherford and the facts likely to be present in the context of the BOP rule feature government intrusion into conversations between the defendant and his or her counsel and, in the case of the BOP rule, the defendant is aware of the intrusion.308 With the Weatherford situation, the Court solely emphasized the fairness value of the Sixth Amendment: there is no violation so long as the prosecution does not learn the contents of the conversation between attorney and client.309

Because of the factual differences between the Massiah line of cases and the BOP scenario, the Supreme Court may choose to apply a Sixth Amendment public-safety exception to the former area of the law and withhold application in the context of the BOP rule. In other words, the Court could choose to hold that a public-safety exception to the Sixth Amendment may apply when the government has intentionally created or exploited an opportunity to elicit incriminating statements from an accused in counsel’s absence, yet refrain from applying any sort of exigency exception when the government overhears conversations between an accused and his or her counsel. This approach would promote the Supreme Court’s emphasis on fairness in the context of the Sixth Amendment.

Following Weatherford, if the BOP rule can be fair to defendants by ensuring that no communications between attorney and client make their way to the prosecution camp, then there would be no need for application of a public-safety exception to justify its usage. With the reasoning applied in the Massiah/Moulton line of cases, on the other hand, there would be no such alternative rationale available to the Court—a specific public-safety exception would be the only way to justify the Moulton-type of government eavesdropping.310

306. Id.
307. Id. at 164–65.
308. See supra text accompanying notes 40–48, 79–91.
309. See Weatherford v. Bursey, 429 U.S. 545, 558 (1977) (“[U]nless Weatherford communicated the substance of the Bursey-Wise [Bursey’s lawyer] conversations and thereby created at least a realistic possibility of injury to Bursey or benefit to the State, there can be no Sixth Amendment violation.”).
310. See supra text accompanying notes 182–212.
J. The Court Could Avoid Recognizing Privacy Interests Altogether

Additionally, the Court could avoid any discussion of the need for a public-safety exception to the Sixth Amendment in the context of the BOP rule by refusing to recognize any privacy relationship between attorney and client worth protecting and focusing solely on interests of fairness. This reasoning would have to provide some response to Judge Posner’s prescient comments in *DiDomenico* concerning a system—not unlike that pronounced by the BOP rule—that would chill attorney-client communications.\(^{311}\) But an emphasis solely on fairness interests has already occurred in one court that has heard arguments against the BOP rule.

*United States v. Abdel Sattar*,\(^ {312}\) a case involving Lynne Stewart,\(^ {313}\) declined to hold that *fear* of government interception of attorney-client communications alone could violate the Sixth Amendment, especially if the government has in place a system that would notify defendants of any such monitoring and that would keep any intercepted communications away from the prosecution.\(^ {314}\) Admittedly, that case did not involve actual implementation of the BOP rule and no notification was given to the defendants that their communications might be monitored.\(^ {315}\) Therefore, the facts of that case did not present the court with a defendant who received notification of monitoring and thus was chilled from speaking—it merely involved unassailable claims of “fear” of monitoring.\(^ {316}\) Yet, a roadmap for how a court may handle an actual claim of chilled communications based on notification of monitoring can be seen in *Abdel Sattar*.\(^ {317}\) Just as in *Weatherford*, the judge in *Abdel Sattar* continually emphasized the fact that the government gave assurances that no information obtained during any monitoring would make its way into the hands of prosecutors.\(^ {318}\) As such, the judge indicated, defendants would not be denied a fair trial.\(^ {319}\)

If the Court holds that the Justice Department’s design for a firewall consisting of a taint team functions properly, then there should be no unfairness to the defendant under the BOP rule. But such a situation still raises the issue of chilled communication, especially after Judge Posner’s thoughts in *DiDomenico*.\(^ {320}\) As a result, the best way to reach a compromise that allays some of the fears held by the BOP rule’s critics, and yet still gives due import to the government’s concern for national

\(^{311}\) See supra text accompanying notes 145–55.

\(^{312}\) No. 02 Cr. 395(JGK), 2002 WL 1836755, at *1 (S.D.N.Y. Aug. 12, 2002).

\(^{313}\) See supra notes 5–8 and accompanying text.


\(^{315}\) *Abdel Sattar*, 2002 WL 1836755.

\(^{316}\) Id. at *6.

\(^{317}\) Id. at *4–6.

\(^{318}\) Id. at *6–7.

\(^{319}\) Id. at *7.

\(^{320}\) See supra notes 145–55 and accompanying text.
security, would likely be an alteration to the way the government’s firewall operates—at least until the Court resolves the Sixth Amendment public-safety exception issue.

IV. RESOLUTION

A. The Need to Relocate the Taint Team

Until the Supreme Court confronts the issue of whether there exists a public-safety exception to the Sixth Amendment, either by virtue of the Court’s Fifth Amendment jurisprudence or otherwise, the current version of the BOP rule must be altered. The most troublesome aspect of the new BOP rule remains its potential to chill candid communications between attorney and client.321 Despite the government’s repeated assurances that the taint team will ensure that no communications of defense strategy will reach the prosecution, the Justice Department will feel more secure relying on that procedural safeguard than will the average terrorist suspect and his or her attorney.322 By creating the taint team within the BOP, and thereby a part of the Justice Department, the proverbial fox is left guarding the hen house. As such, despite what the Supreme Court might do in the way of a public-safety exception to the Sixth Amendment, at least at present the location of the taint team needs to change.

Keeping in mind that the purpose of the BOP rule remains protection against terrorist attacks, the taint team should be based in the newly formed Department of Homeland Security.323 With the goal of the Department of Homeland Security being to protect the United States from future terrorist acts, this alteration of the BOP rule’s structure remains in line with the rule’s policy goals.324 This relocation is particularly important because, as one commentator notes, “[g]iven the Justice Department’s recent plans to focus FBI efforts on thwarting acts of terrorism, rather than on prosecuting cases, it is unclear whether a valid separation can exist now between prosecution, investigation, monitoring, and other ostensibly preventative law enforcement efforts.”325 Not only will this alteration to the BOP rule remain consistent with its purpose, but, hopefully, affected inmates and their attorneys will feel more secure knowing that another federal department has its eyes on the Justice Department, thereby creating an additional barrier over which a federal prosecutor would have to pass before gaining access to monitored attorney-client

321. See supra text accompanying notes 101–14.
322. See supra text accompanying note 131.
325. A Rule Unfit, supra note 9, at 1255 (citation omitted).
conversations. In fact, Congress realized that the Department of Homeland Security needed to remain separate from the prosecution of acts of terrorism when it drafted the legislation creating the Department: “primary responsibility for investigating and prosecuting acts of terrorism shall be vested not in the Department, but rather in Federal, State, and local law enforcement agencies.”326 Thus, besides being good policy, relocating the taint team remains consistent with preexisting legislation.327

B. A Public-Safety Exception to the Sixth Amendment Should Not Be Recognized

If the Supreme Court confronts the issue of creating a public-safety exception to the Sixth Amendment premised on ideas expressed in Dickerson, then the Court will be required to balance and compare the interests and goals of the Fifth and Sixth Amendments. Following such a balancing, as a matter of policy, Dickerson’s reasoning should not be applied to the Sixth Amendment context. The Court should refuse to craft a Sixth Amendment public-safety exception.

The proposition that an exception may work well under one set of circumstances and not another, depending on the amendment involved, presents nothing remarkable.328 The Supreme Court has said that the differing natures of the Fourth, Fifth, and Sixth Amendments can lead to seemingly contrasting results for similar situations.329 In the context of waiver, for example, the standards are different under Fourth, Fifth, and Sixth Amendment jurisprudence.330 In Oregon v. Elstad, the Court confronted the issue of whether an unwarned statement made a subsequent voluntary statement preceded by warnings inadmissible under the Fourth Amendment “fruit-of-the-poisonous-tree” doctrine.332 The Court refused to apply a taint theory to exclude the second, warned statement, holding that the goals of the Fifth Amendment were fully satisfied by barring only the unwarned statement.333 According to the Court, the purpose of the Fourth Amendment fruits doctrine is to deter unreasonable searches.334 But in the context of Miranda and the Fifth Amendment under the facts of Elstad, Justice O’Connor states that “[w]hen neither the initial nor the subsequent admission is coerced, little

326. 6 U.S.C. § 111(2).
327. Id.
328. See Strauss, supra note 297, at 968–69.
329. See infra text accompanying notes 331–37.
332. Id. at 305.
333. Id. at 318.
334. Id. at 306.
justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder. Justice O'Connor effectively elevated the truth-seeking function of the tribunal above any impact an unintentional failure to warn may have had to the accused. Thus, just because a public-safety exception might be acceptable in the context of the Fifth Amendment, the same result under the Sixth Amendment does not necessarily follow.

The Sixth Amendment right to counsel exists to prevent the conviction of an innocent defendant by ensuring each person receives a fair trial. A trial is unfair if an innocent person is convicted. The Court has correctly held that a person will not receive a fair trial in this sense if he or she does not have the effective assistance of counsel. With this in mind, the Sixth Amendment has been called “the central element of our adversary system” and “the heartland of constitutional criminal procedure.”

The Fifth Amendment also plays a part in the truth-seeking function of the tribunal, but at a different level. The Fifth Amendment Self-Incrimination Clause has as its primary goal the preservation of reliable evidence. A confession “compelled” within the meaning of the Fifth Amendment is inherently unreliable. Any tribunal hoping to reach the correct result will only be interested in reliable evidence. The goal of preserving reliable evidence may actually hinder the pursuit of truth. Because the Fifth Amendment gives even a guilty defendant the right to remain silent, it thereby assists in depriving the court of the truth. One might hope that the guilty defendant’s conscience will lead to confession and acceptance of responsibility, but in reality this does not always happen. The Self-Incrimination Clause, like the Sixth Amendment, also works to ensure that an innocent defendant avoids conviction. Given enough coercion, an innocent person may confess to a crime he or she did not commit. Yet even this idea is premised on a desire to present only reliable evidence to the fact finder.

335. Id. at 312.
336. See Klein, supra note 284, at 1062.
337. See Amar, Sixth Amendment, supra note 68, at 642–43.
338. See id. at 643.
341. See Amar, Sixth Amendment, supra note 68, at 641.
343. See Amar & Lettow, supra note 342, at 922–23.
344. See id. at 861.
345. See id.
346. See id. at 861–64.
347. See id. at 922.
348. See id.
349. See id. at 922–23.
The Fifth Amendment Self-Incrimination Clause also differs from the Sixth Amendment right to counsel in that it can effectively be reinforced through two different mechanisms.\textsuperscript{350} Should the Court someday overturn \textit{Miranda}, which may not be an altogether unlikely scenario,\textsuperscript{351} it would not mean a total evisceration of the Fifth Amendment: courts could simply revert to the state of the law before \textit{Miranda}, namely the due process “totality of the circumstances” test for voluntariness.\textsuperscript{352} Section 3501 purported to do just this before the Court decided \textit{Dickerson}.\textsuperscript{353} Admittedly, strict adherence to the dictates of \textit{Miranda} will lead to some entirely voluntary statements being suppressed, and without \textit{Miranda} some involuntary statements might be admitted.\textsuperscript{354} Either way, the Sixth Amendment right to counsel does not have any similar “fall back” safeguards on which to rely. While there can be different tests for determining whether counsel’s assistance was effective, no procedure exists to restore effectiveness of counsel once ineffective assistance of counsel has been established.\textsuperscript{355}

Describing various differences between the Sixth and Fifth Amendments does not purport to show that one amendment is better than the other—both are designed to protect fundamental civil liberties.\textsuperscript{356} Rather, the differences between the two amendments indicate that a public-safety exception will operate better in the context of one as opposed to the other. Assuming \textit{Miranda}’s constitutional status, in theory the \textit{Quarles} public-safety exception will not always lead to the admission of compelled, unreliable testimony, thereby preserving the core goal of the Fifth Amendment.\textsuperscript{357} The Supreme Court has said statements made without \textit{Miranda} warnings may in fact be voluntary and thus reliable.\textsuperscript{358} In this sense, a public-safety exception can successfully coexist with the Fifth Amendment. On the other hand, a violation of the right to counsel, even if justified on public-safety grounds, always presents the risk of convicting an innocent defendant if the end-result means ineffective assistance of counsel.\textsuperscript{359} This holds true regardless of whether the source of the violation implicates fairness or privacy interests.\textsuperscript{360} By allowing a public-safety exception to condone a denial of effective assis-

\textsuperscript{350} The Fifth Amendment Self-Incrimination Clause can be reinforced by the federal courts through \textit{Miranda} or by state courts. See Malloy v. Hogan, 378 U.S. 1 (1964).
\textsuperscript{351} In March 2003, the Court granted certiorari to a case that presents an opportunity to revisit \textit{Miranda}. See United States v. Fellers, 285 F.3d 721 (8th Cir. 2002), cert. granted, 2003 WL 891644 (U.S. Mar. 10, 2003) (No. 02-6320).
\textsuperscript{353} See supra notes 233–45 and accompanying text.
\textsuperscript{354} See Klein, supra note 284, at 1036.
\textsuperscript{357} See supra text accompanying notes 237, 342–46.
\textsuperscript{359} See supra text accompanying notes 336–40.
\textsuperscript{360} See supra text accompanying notes 115–67.
tance of counsel, the risks of convicting an innocent defendant become too great to bear. As the Court declared over sixty years ago, “[t]he Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not ‘still be done.’”

V. CONCLUSION

This note has explored the possibility of creating a public-safety exception in the context of the Sixth Amendment by focusing on the new Bureau of Prisons rule authorizing the government to monitor communications between attorneys and suspected-terrorist clients. In arguing for such an exception, proponents may look to the Supreme Court’s recent Fifth Amendment jurisprudence for support. Specifically, when Chief Justice Rehnquist in Dickerson declared Miranda to be a “constitutional rule,” the Court apparently acquiesced to a public-safety exception to a constitutional rule. This stems from the fact that the Dickerson Court declined to alter the status of the Quarles public-safety exception to Miranda. On the basis of Dickerson’s impact on Miranda, Quarles, and the Fifth Amendment, the idea of creating a public-safety exception to the Sixth Amendment—once seemingly impossible—now has new life.

The uncertainty surrounding Dickerson and its underlying rationale, however, renders its use in the Sixth Amendment context considerably problematic. In addition, policy considerations and the different principles embodied in the Fifth and Sixth Amendments make a public-safety exception more suited to the former than to the latter. While a public-safety exception can theoretically be aligned with the Fifth Amendment’s goal of prohibiting unreliable evidence, the same cannot be said for the Sixth Amendment’s goal of protecting an innocent person from conviction through the guarantee of effective assistance of counsel. Dickerson left Miranda and Fifth Amendment jurisprudence in a state of shock and confusion—there is no need to let it do the same to the Sixth Amendment.

361. See supra text accompanying notes 337–49.
363. See supra text accompanying notes 40–59, 182–301.
365. See id.; see also supra text accompanying notes 258–75.
367. See supra text accompanying notes 328–62.
368. See supra text accompanying notes 328–62.