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

JOSEPH W. YOCKEY*

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),[1] 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

* *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.*

1. On September 11, 2001, nineteen terrorists hijacked and subsequently crashed four U.S. passenger airliners. *See* Press Release, Agence France-Presse, Sept. 11 Attack Death Toll at Twin Towers Lowered to 2,795 (Nov. 4, 2002) (on file with author). Terrorists crashed two planes into the World Trade Center and one plane into the Pentagon in Washington, D.C. *Id.* One Washington, D.C.-bound plane crashed in a Pennsylvania field. *Id*. The death toll from the attacks stands at 3,019, excluding the nineteen terrorists involved. *Id*.

USA Patriot Act, the first antiterrorism law following September 11th.[2] 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."[3]

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.[4] 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.[5]

2. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 8-50 U.S.C.).

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."[6] Ashcroft emphasized that al-Qaeda[7] training manuals teach how to continue terrorist operations from prison.[8]

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,[9] with some presupposing that the Supreme Court will invalidate the rule the first chance it gets.[10] Abdel Rahman's current attorney has announced that he will challenge the BOP regulations as unconstitutional.[11] With respect to the potential Sixth Amendment claims,[12] 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*.

6. Anderson & Simpson, *supra* note 4.

7. Al Qaeda is the international terrorist organization believed to be responsible for the September 11, 2001 attacks on the World Trade Center and Pentagon. *See* Glenn R. Simpson, *Al Qaeda List Points to Saudi Elite*, WALL ST. J., Mar. 18, 2003, at A7.

8. *See* McDonough, *supra* note 5.

9. *See, e.g.*, John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1115–17 (2002); Avidan Y. Cover, Note, *A Rule Unfit for All Seasons: Monitoring Attorney-Client Communications Violates Privilege and the Sixth Amendment*, 87 CORNELL L. REV. 1233 (2002) [hereinafter *A Rule Unfit*]; Tom Brune, *Drop Bug Rule, Defense Lawyers Tell Ashcroft*, NEWSDAY (Long Island), Dec. 21, 2001, at A25 (reporting that 200 lawyers in the firm Akin, Gump, Strauss, Hauer & Feld sent petition to Attorney General Ashcroft criticizing BOP rule); Bart Jansen, *Collins Says Eavesdrop Order by Ashcroft Troubling, 'Wrong,'* PORTLAND PRESS HERALD (Me.), Nov. 29, 2001, at 1A (reporting that Sen. Susan Collins, R-Me., and Sen. Arlen Specter, R-Pa., drafted a letter to Attorney General Ashcroft criticizing BOP rule); Steven Kimelman, Opinion, *Protecting Privilege*, NAT'L L.J., Dec. 3, 2001, at A21; George Lardner, Jr., *U.S. Will Monitor Calls to Lawyers; Rule on Detainees Called 'Terrifying,'* WASH. POST, Nov. 9, 2001, at A1; David Moran, Commentary, *Ashcroft's Monitoring Order Violates Attorney-Client Rights*, DETROIT NEWS, Nov. 28, 2001, *available at* http://www.detnews.com/2001/editorial/0111/28/a13-353317.htm; Jan Pudlow, *Guarding Liberties While Fighting Terrorism*, FLA. B. NEWS, Dec. 15, 2001, at 7; Statement of Robert E. Hirshon, former President, American Bar Association, Nov. 9, 2001, *at* http://www.abanet.org/leadership/justice_department.html; Letter from Senator Patrick Leahy, Chairman, Senate Judiciary Committee, to John Ashcroft, Attorney General, United States Department of Justice (Nov. 9, 2001), *at* http://leahy.senate.gov/press/200111/110901.html ("There are few safeguards to liberty that are more fundamental than the Sixth Amendment, which guarantees the right to a lawyer throughout the criminal process, from initial detention to final appeal. When the detainee's legal adversary—the government that seeks to deprive him of his liberty—listens in on his communications with his attorney, that fundamental right, and the adversary process that depends upon it, are profoundly compromised . . . . Trial by fire can refine us, but it can also coarsen us."). *But see* Bruce Fein, Commentary, *Privilege Bows to Danger*, WASH. POST, Nov. 13, 2001, at A16. For a unique perspective see Akhil Reed Amar & Vikram David Amar, *The New Regulation Allowing Federal Agents to Monitor Attorney-Client Conversations: Why It Threatens Fourth Amendment Values*, 34 CONN. L. REV. 1163 (2002) (stressing potential Fourth Amendment implications of BOP rule).

10. *No, Not Quite a Dictatorship*, ECONOMIST, Dec. 8, 2001, *available at* 2001 WL 7321013.

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 compulsory process for obtaining witnesses in his favor, and 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.[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.[14] One year earlier, however, in *New York v. Quarles*,[15] the Court expressly recognized a "public-safety" exception to the requirement that *Miranda* warnings be given before custodial interrogation.[16] The *Quarles* decision rested on the premise that *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."[17] Because of their prophylactic nature, the *Quarles* Court considered its public-safety exception to *Miranda* warnings perfectly justified.[18]

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

This note explores whether justification for the Department of Justice's new BOP rule could be premised on *Dickerson*'s conclusion that *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 *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.[22]

13. *See* Prevention of Acts of Violence and Terrorism, 28 C.F.R. § 501.3 (2002).
14. *See* Maine v. Moulton, 474 U.S. 159 (1985).
15. 467 U.S. 649 (1984).
16. *Id*. at 655.
17. *Id*. at 653–54 (internal citations omitted).
18. *Id*. at 657.
19. 530 U.S. 428 (2000).
20. *Id*. at 436–44.
21. New York v. Quarles, 467 U.S. 649, 657 (1984).
22. *See* 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."); *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 in the context of 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-

LOUIS POST-DISPATCH, Oct. 28, 2001, at C2 (quoting Justice Sandra Day O'Connor as saying, "we are likely to experience more restrictions on our freedom" because of the terrorist attacks of September 11, 2001); Tony Mauro, *Court Weighs in on Stops at the Border,* LEGAL TIMES, Dec. 3, 2001, at 8.

23. *See infra* text accompanying notes 62–78.
24. *See infra* text accompanying notes 74–100.
25. *See infra* text accompanying notes 101–14.
26. *See infra* text accompanying notes 115–67.
27. *See infra* text accompanying notes 115–18.
28. *See infra* notes 133–67 and accompanying text.
29. *See infra* text accompanying notes 164–67.
30. *See infra* text accompanying notes 168–81.
31. *See infra* text accompanying notes 182–212.
32. *See infra* text accompanying notes 182–242.
33. *See infra* text accompanying notes 243–65.

safety exception.[34] Part III will conclude by explaining why, even if recognized, a Sixth Amendment public-safety exception may not apply to the specific facts surrounding the BOP rule.[35]

Part IV attempts to resolve the issues set forth in this note by offering two suggestions.[36] 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.[37] 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.[38] Finally, Part V will conclude with a brief summary of this note's contentions.[39]

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.[40] Among other provisions, the rule expressly provides that upon an order by the Attorney General, the Director of the BOP[41] 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."[42] 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."[43] 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.
40. Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062 (Oct. 31, 2001) (codified in 28 C.F.R. § 501.3(a) (2002)).
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*.

United States . . . and persons held as witnesses, detainees, or otherwise."[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 communications.[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 "privilege team," composed of individuals not part of any underlying investigation, 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 responsibility 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 inmate may use communications with attorneys or their agents to further or facilitate acts of violence or terrorism, the government has a responsibility to take reasonable and lawful precautions to safeguard 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 terrorists since September 11, 2001, with most being held at a U.S. naval base in Guantanamo Bay, Cuba. *See* Neely Tucker, *Detainees Are Denied Access to U.S. Courts*, WASH. POST, Mar. 12, 2003, at A1. 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, at 14, *available at* 2003 WL 16394171.

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 custody 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*.

49. Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062, 55,066 (Oct. 31, 2001).

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.

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

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)).

54. Prevention of Acts of Violence and Terrorism, 28 C.F.R. § 501.3(d)(3) (2002).

55. Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. at 55,064 (also calling the privilege team a "taint team").

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.[61] 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."[62] The starting point for any discussion of the underpinnings of the Sixth Amendment remains the Supreme Court's 1932 opinion in *Powell v. Alabama*.[63] 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."[64] In *Powell*, the famous "Scottsboro Boys"[65] 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.[66]

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.[67] "Fairness" in the context of constitutional criminal procedure means assuring that an innocent person will not be convicted.[68] As Justice Black declared in *Gideon v. Wainwright*, "[t]he right of one charged with [a] crime to counsel may not be deemed fundamen-

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.

66. *Powell*, 287 U.S. at 68–69.

67. *See* LAFAVE ET AL., *supra* note 63, § 11.1, at 553–54.

68. *See* Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 642–43 (1996) [hereinafter Amar, *Sixth Amendment*].

tal and essential to fair trials in some countries, but it is in ours."[69] Indeed, fairness—both at trial and in certain pretrial circumstances—appears to be the central value underlying the right to counsel.[70] Six years after *Powell*, the Supreme Court ruled in *Johnson v. Zerbst*,[71] a federal case, that the right to retained and appointed counsel was found in the Sixth Amendment itself.[72]

The right to the assistance of counsel means little if an accused does not have the right to the *effective* assistance of counsel, as the Supreme Court recognized in *Glasser v. United States*.[73] Amid the myriad varieties of ineffective assistance of counsel claims are two of particular relevance to this note: government interference with the right to counsel and government intrusions into the attorney-client relationship.[74] Examples of the former include a law giving courts the power to disallow closing arguments,[75] or a court order preventing a defendant from consulting with his attorney during a seventeen-hour overnight recess.[76] In both cases, the Court called for automatic reversal, without requiring a showing of any prejudice.[77] Scholars have opined that in interference-type cases "the presumption of prejudice may be described as a prophylactic measure designed to discourage state action that may well preclude effective representation."[78]

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.[79] 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

69. 372 U.S. 335, 344 (1963).
70. *See* Martin R. Gardner, *The Sixth Amendment Right to Counsel and Its Underlying Values: Defining the Scope of Privacy Protection*, 90 J. CRIM. L. & CRIMINOLOGY 397, 399 (2000).
71. 304 U.S. 458 (1938).
72. *Id*. at 467; *see* LAFAVE ET AL., *supra* note 63, § 11.1, at 555.
73. 315 U.S. 60, 70 (1942).
74. *See* LAFAVE ET AL., *supra* note 63, §§ 11.7 to 11.10, at 599–636.
75. *See* Herring v. New York, 422 U.S. 853, 853 (1975).
76. *See* Geders v. United States, 425 U.S. 80, 81 (1976).
77. *See Herring*, 422 U.S. at 865; *Geders*, 425 U.S. at 91.
78. LAFAVE ET AL., *supra* note 63, § 11.8, at 608.
79. *See infra* notes 97–98 and accompanying text.
80. 429 U.S. 545 (1977).
81. *Id*. at 547.
82. *Id*.

Weatherford along with the others.[83] Shortly thereafter, Weatherford attended meetings with Bursey and Bursey's lawyer at their request, still with the purpose of keeping his cover.[84] 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.[85]

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."[86] 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.[87] The Court stated that

> [h]ad 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.[88]

In addition, the Court stressed the "unfortunate necessity of undercover work and the value it often is to effective law enforcement."[89]

In a vigorous dissent, Justice Marshall condemned what he perceived as the majority's sanctioning of "spying upon attorney-client communications."[90] 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.[91]

2. Government Intrusion: Morrison

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

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.

98. *See Morrison*, 449 U.S. at 365–67; Weatherford v. Bursey, 429 U.S. 545, 557–59 (1977).

lege.[99] 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

99. *See* Gardner, *supra* note 70; Note, *Government Intrusions into the Defense Camp: Undermining the Right to Counsel*, 97 HARV. L. REV. 1143 (1984) [hereinafter *Government Intrusions*]; *A Rule Unfit*, *supra* note 9.

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.").

105. *Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2001) [hereinafter *Hearing*] (Statement of Nadine Strossen, President, American Civil Liberties Union), *available at* http://judiciary.senate.gov/testimony.cfm?id=128&wit_id=83.

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."[106]

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.[107] 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.[108]

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.[109] 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."[110] 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.[111] 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."[112] 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."[113] 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.

110. *Government Intrusions*, *supra* note 99, at 1145.

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 defendants that the government may be listening to their confidential communications.

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 authority 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 defendant 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 values 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 disclosures" to one another and, as such, Bursey's counsel did not lack a full understanding of his client's knowledge.[121] Without announcing to

114. Weatherford v. Bursey, 429 U.S. 545, 563 (1977) (Marshall, J., dissenting). The majority in *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.

115. Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062, 55,064 (Oct. 31, 2001) (codified at 28 C.F.R. § 501.3 (2002)).

116. *Id*.

117. *Id*.

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

119. *See infra* text accompanying notes 134–67.

120. *See* Weatherford v. Bursey, 429 U.S. 545, 548 (1977).

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

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.
127. *See* Prevention of Acts of Violence and Terrorism, 28 C.F.R. § 501.3 (2002).
128. *Weatherford*, 429 U.S. at 554; *see A Rule Unfit*, *supra* note 9, at 1247.

any defense strategy that may have been overheard.[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."[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."[131] No matter how many firewalls the Justice Department erects between the BOP monitoring and prosecutors, the damage has already been done.[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.[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[134] provides perhaps the best illustration of Supreme Court recognition that the Sixth Amendment protects attorney-client privacy, in addition to procedural fairness.[135] In *Morrison* the Court held that there had been no prejudice to the defendant when government agents intruded into the attorney-client relationship.[136] Yet, the Court assumed that the defendant's Sixth Amendment rights had been violated.[137] Thus, in the words of one scholar, "the intrusion itself appears to be the evil."[138]

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

129. *See Government Intrusions*, *supra* note 99, at 1152–53.

130. *Id*.

131. *Id*. at 1154.

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.'").

133. *See infra* notes 134–67 and accompanying text.

134. 449 U.S. 361 (1981).

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.

136. 449 U.S. at 366–67.

137. *Id*. at 364.

138. Gardner, *supra* note 70, at 406.

ests of fairness in the Sixth Amendment, the Courts of Appeals are divided on the issue.[139] Some circuits hold that a government intrusion into attorney-client communications constitutes a per se Sixth Amendment violation, with no required showing of prejudice.[140] 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.[141]

In contrast, the Sixth Circuit held in *United States v. Steele*[142] 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."[143] Circuits requiring a showing of prejudice reject the notion that government intrusion into attorney-client privacy alone violates the Sixth Amendment.[144]

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.[145] *United States v. DiDomenico,*[146] a RICO case, featured twenty defendants who were all members of the "Chicago Outfit."[147] While awaiting trial, the defendants discovered that the room in the federal jail where they met privately with counsel had been bugged.[148] 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.[149] 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.[150]

Though ultimately finding that the defendants in *DiDomenico* were not entitled to reversal, Judge Posner did elucidate the most compelling

139. *A Rule Unfit*, *supra* note 9, at 1249–51 (discussing United States v. Steele, 727 F.2d 580 (6th Cir. 1984) and United States v. Levy, 577 F.2d 200 (3d Cir. 1978)).

140. *See* United States v. Levy, 577 F.2d 200, 208 (3d Cir. 1978).

141. *Id.* at 209.

142. 727 F.2d 580 (6th Cir. 1984).

143. *Id*. at 586.

144. *See* Gardner, *supra* note 70, at 440.

145. United States v. DiDomenico, 78 F.3d 294 (7th Cir. 1996); *see also* Gardner, *supra* note 70, at 441–48; *A Rule Unfit*, *supra* note 9, at 1252–53.

146. 78 F.3d 294.

147. *Id*. at 297.

148. *Id*. at 298.

149. *Id*.

150. *Id*.

theory for a Sixth Amendment privacy interest.[151] 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.).[152]

Seemingly to Judge Posner, such a practice would be grounds for reversal, without any required showing of prejudice, due to its chilling effect.[153] By contrast, Judge Posner stated that cases of "*ad hoc* governmental intrusion into the relation between a criminal defendant and his lawyer"[154] 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."[155]

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.[156] 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) . . . ."[157]

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.[168] 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.[169] 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.[170]

Indeed, the Justice Department has declared that its role has changed because of the events of September 11th.[171] 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."[172] 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."[173]

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:

168. *See infra* notes 171–77 and accompanying text.

169. 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.

170. *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.

171. *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.

172. *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.

173. *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.

> 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 *Weatherford*[175] 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 intrusion[177] 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]

174. *Hearing*, *supra* note 105 (testimony of Attorney General John Ashcroft).
175. Weatherford v. Bursey, 429 U.S. 545 (1977).
176. *Id.* at 557.
177. United States v. DiDomenico, 78 F.3d 294, 299–300 (7th Cir. 1996).
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.
182. Maine v. Moulton, 474 U.S. 159, 179–80 (1985).
183. *Id.*
184. *See id.* at 178–80, 181–92.
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.[194] 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.[195]

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*.[196] 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*.[197] *Massiah* involved two codefendants, Massiah and Colson (not the same Colson as in *Moulton*),[198] who retained separate counsel.[199] Colson eventually agreed to work with the authorities, so a government agent wired Colson's automobile with a transmitter.[200] 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.[201] 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."[202] In addition, in *United States v. Henry*,[203] 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."[204]

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."[205] 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.[206] Applying this ra-

194. *Id*. at 166–67.
195. *Id*. at 168.
196. *Id.* at 163.
197. 377 U.S. 201 (1964).
198. The Colson in *Massiah* is of no relation to the Colson in *Moulton*. *See Moulton*, 474 U.S. at 172 n.8.
199. *Massiah*, 377 U.S. at 202.
200. *Id*. at 202–03.
201. *Id*. at 203.
202. *Id*. at 206 (emphasis added).
203. 447 U.S. 264 (1980).
204. *Id*. at 274.
205. Maine v. Moulton, 474 U.S. 159, 176 (1985).
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.[207] 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*."[208]

The dissenters in *Moulton*, however, believed that the danger present to both Colson and prosecution witnesses justified the tactics used by the police.[209] 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."[210]

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.[211] 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.[212]

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

With its decision in *Miranda v. Arizona*,[213] 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.[214] Failure to do so renders any statements made during the interrogation inadmissible in court.[215] In *Miranda*, Chief Justice War-

207. *Moulton*, 474 U.S. at 176.
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.

Id. at 192 (Burger, C.J., dissenting).
211. *Id*. at 190–91 (Burger, C.J., dissenting).
212. *See infra* text accompanying notes 213–42.
213. 384 U.S. 436 (1966).
214. *Id*. at 467.
215. *Id*. at 444.

ren referred to what have popularly become known as the "*Miranda* warnings"[216] as "procedural safeguards" designed to secure one's Fifth Amendment privilege.[217] 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.[218] 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.[219]

Using language such as "of constitutional dimension,"[220] and speaking of the need "for procedures which assure that the individual is accorded his privilege under the Fifth Amendment,"[221] Professor Yale Kamisar opines that the Court, at least at the time of the ruling, believed it was announcing a constitutional decision.[222] 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*,"[223] 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-Incrimination Clause of the Fifth Amendment as construed in *Miranda*."[224]

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,[225] which adopted a public-safety exception in the context of *Miranda* warnings.[226] In *Quarles*, police officers received information that the defendant had committed a rape and was armed with a gun.[227] 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.[228] The officer asked the defendant where his gun was located before providing any *Miranda* warnings.[229] The defendant nodded toward some empty cartons, where police later retrieved a pistol, and said, "[t]he gun is over there."[230] 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.[231] The Supreme Court reversed, stating that the case "present[ed] a situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*."[232]

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."[233] The *Quarles* majority found no difficulty in fashioning an exception to the "prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination,"[234] and believed that such an exception would not disturb the "doctrinal underpinnings"[235] of the *Miranda* decision.[236]

225. 467 U.S. 649 (1984).
226. *Id*. at 655–56.
227. *Id*. at 651–52.
228. *Id*. at 652.
229. *Id*.
230. *Id*.
231. *Id*. at 652–53.
232. *Id*. at 653.
233. *Id*. at 654 (citations omitted).
234. *Id*. at 657.
235. *Id*. at 656.
236. The *Quarles* opinion provoked lengthy dissents by Justices O'Connor (writing a separate dissent), and Justice Marshall (joined by Justice Brennan and Justice Stevens). *Id*. at 660–90. Both Justices O'Connor and Marshall criticized the lack of clarity that a pubic-safety exception would bring to the Miranda warning procedure and Justice Marshall strongly argued that the majority's new exception seriously undermined the Fifth Amendment. According to Justice Marshall,

> [t]he [*Miranda*] Court . . . created a constitutional presumption that statements made during custodial interrogations are compelled in violation of the Fifth Amendment and are thus inadmissible in criminal prosecutions. . . .
>
> In fashioning its 'public-safety exception' to *Miranda*, the majority makes no attempt to deal with the constitutional presumption established by that case. The majority does not argue that police questioning about issues of public safety is any less coercive than custodial interrogations into other matters. . . .
>
> Though the majority's opinion is cloaked in the beguiling language of utilitarianism, the Court has sanctioned *sub silentio* criminal prosecutions based on compelled self-incriminating statements. I find this result in direct conflict with the Fifth Amendment's dictate that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."

Id. at 683–86 (Marshall, J., dissenting).

The idea that *Miranda* warnings are only prophylactic rules and not required by the Fifth Amendment can be seen in several other cases.[237] 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*[238] that the required warnings outlined in *Miranda* are "not themselves rights protected by the Constitution."[239]

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.[240] The apparent nature and scope of the *Miranda* rule was turned on its head in *Dickerson v. United States*,[241] 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.[242]

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*.[243] 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.[244]

237. *See* Davis v. United States, 512 U.S. 452, 457 (1994); Withrow v. Williams, 507 U.S. 680, 690–91 (1993); Connecticut v. Barrett, 479 U.S. 523, 528 (1987); Oregon v. Elstad, 470 U.S. 298, 306–07 (1985).

238. 417 U.S. 433 (1974).

239. *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.").

240. Johnson v. Zerbst, 304 U.S. 458, 467 (1938).

241. 530 U.S. 428 (2000).

242. *Id*. at 432.

243. *See, e.g.*, Paul G. Cassell, *The Paths Not Taken: The Supreme Court's Failures in* Dickerson, 99 MICH. L. REV. 898 (2001).

244. *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

sue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances. (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession. The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

18 U.S.C. § 3501 (2000).

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.[256] 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.[257]

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*.[258] 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."[259]

For instance, turning to *Quarles*, the Chief Justice's statement that "no constitutional rule is immutable"[260] 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.[261] Certainly no public-safety exception can be found in the text of the Fifth Amendment.[262] 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*."[263] 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."[264] 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!"[265]

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.

261. Quarles v. New York, 467 U.S. 649, 653 (1984).

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 455 (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).

265. Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 89 n.212 (2000); *see also* Donald A. Dripps, *Constitutional Theory for Criminal Procedure:* Dickerson*,*

H. 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."[266] 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.[267] 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.[268] Indeed, the Court has a track record of crafting opinions to assist law enforcement in its Sixth Amendment jurisprudence.[269] 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*).[270] 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.[271] Any exception would, according to *Moulton*, dilute "the protection afforded by the right to counsel."[272] 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-

Miranda*, and the Continuing Quest for Broad-But-Shallow*, 43 WM. & MARY L. REV. 1, 33 (2001) ("The Supreme Court of the United States, however, doesn't 'have to' do anything, as the decision in *Dickerson* once again reminds us.").

266. *Dickerson*, 530 U.S. at 441.

267. U.S. CONST. amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself.").

268. New York v. Quarles, 467 U.S. 649, 658 (1984).

269. *See* Weatherford v. Bursey, 429 U.S. 545, 557 (1977).

270. *Quarles*, 467 U.S. at 657.

271. *See* Maine v. Moulton, 474 U.S. 159, 178–80 (1985).

272. *Id*. at 171.

vading those rights.[273] To hold otherwise, cautioned the Court, would be to invite the police to fabricate "legitimate" reasons for infringing upon Sixth Amendment protections.[274] However, such a concern was also present in *Quarles*, as the dissenting opinions pointed out.[275]

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."[276] 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."[277] 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.[278]

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.[279] 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."[280] Such a compromise would appear to leave the *Miranda* doctrine "incoherent,"[281] because, as noted above,[282] 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*.
278. *See* Dickerson v. United States, 530 U.S. 428, 441 (2000).
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

283. Kamisar, *supra* note 222, at 894–95.

284. Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1071 (2001).

285. *Id*.

286. Dickerson v. United States, 530 U.S. 428, 441 (2000).

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).

288. *Dickerson*, 530 U.S. at 445 (Scalia, J., dissenting).

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 violation of the *Miranda* rule.[292] As Professor Klein notes, the *Quarles* exception is the *only* one applicable to intentional violations—every other exception to *Miranda* recognized by the Court involved unintentional violations.[293] Klein posits that because some exceptions to *Miranda* involved *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 constitutes a Sixth Amendment violation, then it would be an intentional violation 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 justification 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 exception to the Sixth Amendment is feasible may seem deceptively straightforward: 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 person does not have a First Amendment right to scream "fire" in a crowded theater.[296] Similarly, Professor David Strauss argues that exceptions to *Miranda* can be carved out without overruling that case.[297] According to Strauss:

> *Miranda* is required by the Self-Incrimination Clause because that Clause has to be implemented in some way; any method of implementation will strike some balance of advantages and disadvantages; 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. New York v. Quarles, 467 U.S. 649, 652 (1984).

293. *See* Klein, *supra* note 284, at 1061–63 n.141.

294. *Id*. at 1063.

295. *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.").

296. *Id*. at 1062 n.148.

297. David A. Strauss, Miranda*, the Constitution, and Congress*, 99 MICH. L. REV. 958, 968–69 (2001).

> 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

298. *Id*.

299. *Id.* at 968.

300. *See id*. ("To make the comparison to the First Amendment once again, the constitutional rules governing defamation of public officials are different from the rules governing defamation of private individuals, which are in turn different from the rules governing defamation that addresses no subject of public interest. These differences do not mean that the rule of *New York Times v. Sullivan* is not a constitutional rule. They just mean that the constitutional rule that applies in one set of circumstances might have to be altered when different circumstances arise—a wholly unremarkable proposition.").

301. *See generally* Klein, *supra* note 284, at 1062 (discussing cases where public safety is argued to have trumped mirandizing a suspect).

302. *See infra* text accompanying notes 304–10.

303. *See supra* text accompanying notes 182–212.

304. *See* Maine v. Moulton, 474 U.S. 159, 173–76 (1985); United States v. Henry, 447 U.S. 264, 274 (1980); Massiah v. United States, 377 U.S. 201, 206 (1964).

305. *Moulton*, 474 U.S. at 176.

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.
314. *Abdel Sattar*, 2002 WL 1836755, at *7.
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.

323. 6 U.S.C. §§ 101–557 (2002) (also known as the Homeland Security Act of 2002).

324. *See* 6 U.S.C. § 111(b)(1)(A) ("The primary mission of the department is to—prevent terrorist attacks within the United States . . . ."); 6 U.S.C. § 111(b)(1)(B) ("Reduce the vulnerability of the United States to terrorism . . . .").

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*,[331] 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.

330. *Compare* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (holding that waiver in Fourth Amendment context need only be voluntary), *with* Edwards v. Arizona, 451 U.S. 477 (1981) (holding that waiver of Fifth Amendment rights after *Miranda* must be knowing, intelligent, and voluntary), *and* United States v. Beniach, 825 F.2d 1207 (7th Cir. 1987) (holding that waiver of right to conflict-free counsel must be knowing, intelligent, and voluntary).

331. 470 U.S. 298 (1985).

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."[335] 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.[336] 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.[337] A trial is unfair if an innocent person is convicted.[338] 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.[339] With this in mind, the Sixth Amendment has been called "the central element of our adversary system"[340] and "the heartland of constitutional criminal procedure."[341]

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.[342] A confession "compelled" within the meaning of the Fifth Amendment is inherently unreliable.[343] 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.[344] Because the Fifth Amendment gives even a guilty defendant the right to remain silent, it thereby assists in depriving the court of the truth.[345] 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.[346] The Self-Incrimination Clause, like the Sixth Amendment, also works to ensure that an innocent defendant avoids conviction.[347] Given enough coercion, an innocent person may confess to a crime he or she did not commit.[348] Yet even this idea is premised on a desire to present only reliable evidence to the fact finder.[349]

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.
339. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).
340. James J. Tomkovicz, *The* Massiah *Right to Exclusion: Constitutional Premises and Doctrinal Implications*, 67 N.C. L. REV. 751, 753 (1989).
341. *See* Amar, *Sixth Amendment*, *supra* note 68, at 641.
342. *See* Oregon v. Elstad, 470 U.S. 298, 308 (1985); Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 922–24 (1995).
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.[350] Should the Court someday overturn *Miranda*, which may not be an altogether unlikely scenario,[351] it would not mean a total evisceration of the Fifth Amendment: courts could simply revert to the state of the law before *Miranda*, namely the due process "totality of the circumstances" test for voluntariness.[352] Section 3501 purported to do just this before the Court decided *Dickerson*.[353] Admittedly, strict adherence to the dictates of *Miranda* will lead to some entirely voluntary statements being suppressed, and without *Miranda* some involuntary statements might be admitted.[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.[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.[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 *Miranda*'s constitutional status, in theory the *Quarles* public-safety exception will not *always* lead to the admission of compelled, unreliable testimony, thereby preserving the core goal of the Fifth Amendment.[357] The Supreme Court has said statements made without *Miranda* warnings may in fact be voluntary and thus reliable.[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.[359] This holds true regardless of whether the source of the violation implicates fairness or privacy interests.[360] By allowing a public-safety exception to condone a denial of effective assis-

350. The Fifth Amendment Self Incrimination Clause can be reinforced by the federal courts through *Miranda* or by state courts. *See* Malloy v. Hogan, 378 U.S. 1 (1964).

351. In March 2003, the Court granted certiorari to a case that presents an opportunity to revisit *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).

352. *See* Haynes v. Washington, 373 U.S. 503 (1963).

353. *See supra* notes 233–45 and accompanying text.

354. *See* Klein, *supra* note 284, at 1036.

355. *See* Strickland v. Washington, 466 U.S. 668 (1984).

356. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

357. *See supra* text accompanying notes 237, 342–46.

358. *See* Withrow v. Williams, 507 U.S. 680, 690 (1993); New York v. Quarles, 467 U.S. 649, 654 (1984).

359. *See supra* text accompanying notes 336–40.

360. *See supra* text accompanying notes 115–67.

tance of counsel, the risks of convicting an innocent defendant become too great to bear.[361] 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.'"[362]

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.[363] 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.[364] This stems from the fact that the *Dickerson* Court declined to alter the status of the *Quarles* public-safety exception to *Miranda*.[365] 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.[366] 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.[367] 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.[368] *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.
362. Johnson v. Zerbst, 304 U.S. 458, 462 (1938) (internal citation omitted).
363. *See supra* text accompanying notes 40–59, 182–301.
364. Dickerson v. United States, 530 U.S. 428, 441 (2000).
365. *See id.; see also supra* text accompanying notes 258–75.
366. *See supra* text accompanying notes 243–65.
367. *See supra* text accompanying notes 266–301, 328–62.
368. *See supra* text accompanying notes 328–62.