

**COMMENTS OF**

**AMERICAN CIVIL LIBERTIES UNION**

**AMERICAN IMMIGRATION LAWYERS ASSOCIATION**

**ARAB AMERICAN INSTITUTE**

**ASIAN AMERICAN LEGAL DEFENSE EDUCATION FUND**

**CENTER FOR DEMOCRACY & TECHNOLOGY**

**DC PRISONERS' LEGAL SERVICES PROJECT**

**ELECTRONIC PRIVACY INFORMATION CENTER**

**EQUAL JUSTICE PROGRAM, HOWARD UNIVERSITY SCHOOL OF LAW**

**FRIENDS COMMITTEE ON NATIONAL LEGISLATION**

**LAWYERS COMMITTEE FOR HUMAN RIGHTS**

**LEGAL ACTION CENTER**

**LEGAL AID SOCIETY OF NEW YORK**

**LIBERTARIAN PARTY**

**(continued on next page)**

**THE MULTIRACIAL ACTIVIST**  
**NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE**  
**NATIONAL BLACK POLICE ASSOCIATION**  
**UNITARIAN UNIVERSALIST ASSOCIATION OF CONGREGATIONS**  
**WASHINGTON COUNCIL OF LAWYERS**  
**WORLD ORGANIZATION AGAINST TORTURE**

**REGARDING EAVESDROPPING ON CONFIDENTIAL ATTORNEY-CLIENT  
COMMUNICATIONS**

**66 Fed. Reg. 55062 (October 31, 2001)**

**Submitted December 20, 2001**

## **Introduction**

On October 31, 2001, the Attorney General promulgated an amendment to 28 C.F.R. Parts 500 and 501. See 66 Fed. Reg. 55062 (October 31, 2001). The regulation became effective immediately, without the usual opportunity for prior public comment. It allows the Department of Justice, unilaterally, without judicial oversight, and with no meaningful standards, to eavesdrop on the confidential attorney-client conversations of persons in custody whom the Justice Department itself may be seeking to prosecute.

This regulation is an unprecedented frontal assault on the attorney-client privilege and the right to counsel guaranteed by the Constitution. It is especially disturbing that these provisions for monitoring confidential attorney-client communications apply not only to convicted prisoners in the custody of the federal Bureau of Prisons (BOP), but to all persons in the custody of the Department of Justice, including pretrial detainees who have not been convicted of crime and are presumed innocent, as well as material witnesses and immigration detainees, who are not accused of any crime. 28 C.F.R. § 501.3(f) (as amended). The regulation is also unnecessary, as existing law permits the monitoring of attorney-client communications when a judge issues a warrant upon a showing of probable cause. The undersigned organizations call on the Attorney General to rescind this regulation immediately.

## **The regulation**

The regulation vests the Attorney General with unlimited and unreviewable discretion to strip any person in federal custody of the right to communicate confidentially with an attorney. In any case in which the Attorney General believes that there is “reasonable suspicion” that a person in custody “may” use communications with attorneys or their agents “to further or facilitate acts of terrorism,” the Justice Department “shall ... provide appropriate procedures for the monitoring or review of communications between that inmate and attorneys or attorneys’ agents who are traditionally covered by the attorney-client privilege.” 28 C.F.R. § 501.3(d) (as amended).

Except in the case of prior court authorization, the Department “shall provide written notice to the inmate and to the attorneys involved, prior to the initiation of any monitoring or review,” that “all communications between the inmate and attorneys may be monitored, to the extent determined to be reasonably necessary for the purpose of deterring future acts of violence or terrorism.” 28 C.F.R. § 501.3(d)(2) (as amended).

The Department “shall employ appropriate procedures to ensure that all attorney-client communications are reviewed for privilege claims and that any properly privileged materials ... are not retained during the course of the monitoring.” The intercepted attorney-client communications are to be reviewed by a “privilege team.” “Except in cases where the person in charge of the privilege team determines that acts of violence or terrorism are imminent, the privilege team shall not disclose any information unless and until such disclosure has been approved by a federal judge.” 28 C.F.R. § 501.3(d)(3) (as amended).

## **The regulation is inconsistent with the attorney-client privilege**

As the United States Supreme Court has recognized:

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in *Trammel v. United States*, 445 U.S. 40, 51, 100 S.Ct. 906, 913, 63 L.Ed.2d 186 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see *Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S.Ct. 125, 127, 32 L.Ed. 488 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 682 (1981).

Indeed, so well-established is this privilege, and so compelling the societal interest in unobstructed communication between clients and their attorneys, that the Supreme Court has held that the privilege survives even after the client's death. Swidler & Berlin v. United States, 524 U.S. 399, 410, 118 S. Ct. 2081, 2088 (1998).

Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether.

524 U.S. at 407, 118 S. Ct. at 2086. Consistently with the fundamental importance of the attorney-client privilege in our system of justice, federal courts have zealously protected the confidentiality of privileged communications between prisoners and their attorneys. See, e.g., Gomez v. Vernon, 255 F.3d 1118, 1135 (9<sup>th</sup> Cir. 2001), cert. denied, 70 U.S.L.W. 3291 (December 10, 2001) (affirming imposition of monetary sanctions on assistant attorneys general

who acquired and read privileged communications from prisoners' attorneys).<sup>1</sup>

The core purpose of the attorney-client privilege – to encourage full and frank disclosure by the client of information that may be embarrassing or damaging, and a thorough discussion between attorney and client of legal strategy and options – simply cannot be served when both attorney and client know that the very government agency that is prosecuting the client is listening in.

This concern is not allayed by the regulation's provision that "properly privileged materials" will not be retained during the course of the monitoring. The chilling effect on attorney-client communication does not require that privileged information, or indeed any information, actually be intercepted and turned over to prosecutors. Rather, the attorney-client relationship is fatally compromised as soon as attorney and client are informed that henceforth, all their communications are subject to government monitoring.

Moreover, under the regulation, the determination of what constitutes "properly privileged materials" is made not by a neutral and disinterested judge, but unilaterally by the Justice Department itself. It will therefore be impossible for detainees and their counsel to know in advance what portions of their intercepted communications the Justice Department will ultimately deem to be "properly privileged materials." This uncertainty renders the privilege worthless. "[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications ..., is little better than no privilege at all." Upjohn, 449 U.S. at 393, 101 S. Ct. at 684.

In some limited circumstances, attorney-client communications lose their privileged status pursuant to the "crime-fraud exception" to the privilege. See U.S. v. De La Jara, 973 F.2d 746, 748 (9<sup>th</sup> Cir. 1992) ("[i]n order to successfully invoke the crime-fraud exception to the attorney-client privilege, the government must make a prima facie showing that the attorney was retained in order to promote intended or continuing criminal or fraudulent activity"). However, it hardly follows from this narrow exception that the Justice Department may eavesdrop on all of a detainee's attorney-client communications, and then determine, unilaterally and after the fact, that some of these communications fell within the crime-fraud exception.

Rather, the Supreme Court has made clear that the determination whether an attorney-client communication falls within the crime-fraud exception is to be made by courts, not prison officials or prosecutors. Indeed, even to obtain in camera review of an allegedly privileged communication to determine whether the crime-fraud exception applies, the government must

---

<sup>1</sup>In an October 12, 2001 memorandum to the heads of all federal departments and agencies, the Attorney General cautioned against release of privileged documents pursuant to the Freedom of Information Act. Ironically, in this memorandum the Attorney General specifically recognized the importance of the attorney-client privilege and the "sound policies underlying" that privilege. See Ashcroft FOIA Memorandum, available at

<http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>

first provide the court with “a factual basis adequate to support a good faith belief by a reasonable person” that *in camera* review may reveal evidence to establish the exception’s applicability. United States v. Zolin, 491 U.S. 554, 572, 109 S. Ct. 2619, 2631, 105 L.Ed.2d 469 (1989). This showing must be made using non-privileged evidence. Id., 491 U.S. at 574, 109 S. Ct. at 2632. See also De La Jara, 973 F.2d at 749 (district court erred by conducting *in camera* review of allegedly privileged communication without first requiring prosecution to make prima facie showing supporting such review).

### **The regulation violates the Sixth Amendment right to the assistance of counsel**

A person facing criminal charges is entitled, under the Sixth Amendment to the Constitution, to the assistance of counsel for his defense. Gideon v. Wainwright, 372 U.S. 335, 339-40, 83 S. Ct. 792, 794 (1963). This right is not limited to the trial itself, but includes the assistance of counsel in investigation and preparation of a defense. Indeed, the Supreme Court has recognized that “to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.” Maine v. Moulton, 474 U.S. 159, 170, 106 S. Ct. 477, 485, 88 L.Ed.2d 481 (1985). See also Johnson-El v. Schoemehl, 878 F.2d 1043, 1051 (8<sup>th</sup> Cir. 1989) (where defendants’ right to communicate effectively with counsel is “inadequately respected during pre-trial confinement, the ultimate fairness of their eventual trial can be compromised”). This right to counsel includes the right to confer with one’s lawyer. Geders v. United States, 425 U.S. 80, 88-91, 96 S. Ct. 1330, 1335-37, 47 L.Ed.2d 592 (1976). “Free two-way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful.” United States v. Levy, 577 F.2d 200, 209 (3d Cir. 1978).

More specifically, “the essence of the Sixth Amendment right is, indeed, privacy of communication with counsel.” United States v. Rosner, 485 F.2d 1213, 1224 (2d Cir. 1973). As the Justice Department itself has stated, “the Sixth Amendment’s assistance-of-counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private and that his lawful preparations for trial are secure against intrusion by the government, his adversary in the criminal proceeding.” Weatherford v. Bursey, 429 U.S. 545, 554 n. 4, 97 S. Ct. 837, 843 n. 4, 51 L.Ed.2d 30 (1977) (quoting Brief for United States as Amicus Curiae). In Weatherford, the Supreme Court specifically acknowledged that the effective assistance of counsel is threatened by a reasonable “fear that the government is monitoring [attorney-client] communications through electronic eavesdropping.” Id.

Under the regulation, the defendant and his counsel are confronted not just by “the fear that the government is monitoring [their] communications,” but by the certain knowledge that it is doing so. Unlike the defendant in Weatherford, the defendant cannot ensure confidential communications with his attorney merely by excluding third parties from such communications. Rather, he has been told that none of his communications with his attorney will be confidential -- that all such communications, whether conducted in person, by mail, or by telephone, are subject to government monitoring.

The devastating effect of such a policy on the right to counsel was recently recognized by the United States Court of Appeals for the Seventh Circuit, speaking through Chief Judge

Richard A. Posner:

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 the prosecutors. It merely stores them in the National Archives. The government's lawyer took the position that none of the defendants could complain about such conduct because none could be harmed by it, provided the prosecutors never got their hands on the tapes. We are inclined to disagree, although for a reason that will become apparent shortly we need not attempt to resolve the issue definitively. 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.)

United States v. DiDomenico, 78 F.3d 294, 299 (7<sup>th</sup> Cir. 1996) (italics in original, underscore added).

### **The regulation violates prisoners' constitutional right of access to the courts**

Separate and distinct from the Sixth Amendment rights of persons facing criminal charges, “[i]t is ... established beyond doubt that prisoners have a constitutional right of access to the courts.” Bounds v. Smith, 430 U.S. 817, 821, 97 S. Ct. 1491, 1494, 52 L.Ed.2d 72 (1977). This right is not limited to pretrial detainees facing criminal charges, or those appealing criminal convictions, but extends to convicted prisoners who may wish to seek a writ of habeas corpus or file an action challenging the conditions of their confinement. Indeed, “[b]ecause a prisoner ordinarily is divested of the privilege to vote, the right to file a court action might be said to be his remaining most fundamental political right, because preservative of all rights.” McCarthy v. Madigan, 503 U.S. 140, 153, 112 S.Ct. 1081, 1091, 117 L.Ed.2d 291 (1992).<sup>2</sup> This right of access to the courts “means that inmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation ... are invalid.” Procunier v. Martinez, 416 U.S. 396, 419, 94 S.Ct. 1800, 1814, 40 L.Ed.2d 224 (1974).<sup>3</sup>

---

<sup>2</sup>The importance of a prisoner's right to challenge his conditions of confinement is illustrated by reports of mistreatment of those held in the wake of the September 11 attacks. See Benjamin Weiser, Jordanian Student Held in U.S. Says Police Abused Him in Jail, N.Y. Times, December 5, 2001, at B8.

<sup>3</sup>In Lewis v. Casey, 518 U.S. 343, 349, 116 S. Ct. 2174, 135 L.Ed.2d 606 (1996), the Supreme Court held that a prisoner's right of access to the courts is not violated unless the

Federal courts have uniformly recognized that the right to receive the assistance of counsel includes the right to communicate confidentially with counsel. As one federal court of appeals has stated:

Citation of authority is hardly needed for the proposition that an inmate's right of unfettered access to the courts is as fundamental a right as any other he may hold. All other rights of an inmate are illusory without it, being entirely dependent for their existence on the whim or caprice of the prison warden. The judiciary, moreover, has not been content merely to keep free the lines of communication between the inmate, the courts, and agencies of correction. Whether as a vital concomitant of the prisoner's right to petition the bench or as a distinct requirement of his right to effective counsel guaranteed by the Sixth Amendment, a right of access by an inmate to counsel has been perceived by a number of courts. *Johnson v. Avery*, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969), for example, required that prison authorities allow inmates ready access to jailhouse lawyers. In the same vein, prison officials have been prohibited from interfering with postal communications between an inmate and his counsel which relate to the legality of either his criminal conviction or the conditions of his incarceration, even where the lawyer is not the inmate's counsel of record. The final phase of this development has been a recognition that the effective protection of access to counsel requires that the traditional privacy of the lawyer-client relationship be implemented in the prison context.

Adams v. Carlson, 488 F.2d 619, 630-31 (7<sup>th</sup> Cir. 1973) (citations omitted, emphasis added). See also Bach v. People of the State of Illinois, 504 F.2d 1100, 1102 (7<sup>th</sup> Cir. 1974) (“We think that contact with an attorney and the opportunity to communicate privately is a vital ingredient to [a prisoner’s] effective assistance of counsel and access to the courts”); Smith v. Robbins, 454 F.2d 696, 697 (1<sup>st</sup> Cir. 1972) (“[T]he prisoner has a right to have the confidence between himself and his counsel totally respected”); Bieregu v. Reno, 59 F.3d 1445, 1456 (3d Cir. 1995) (“the right of court access guarantees the privacy of attorney-client communications”).

For these reasons, it is well established that attorney-client mail may not be read by prison officials. See Bieregu, 59 F.3d at 1456 (“[o]f all communications, attorney mail is the most sacrosanct”); Adams, 488 F.2d at 631; Smith, 454 F.2d at 696-97; see also Muhammad v. Pitcher, 35 F.3d 1081, 1083 (6<sup>th</sup> Cir. 1994) (prisoner “has a fundamental interest in maintaining the confidentiality” of correspondence from the state Attorney General’s office; failure to treat such mail as confidential is unconstitutional).

Similarly, courts agree that prisoners must be allowed confidential in-person consultations with attorneys. See Ruiz v. Estelle, 679 F.2d 1115, 1154-55 (5<sup>th</sup> Cir. 1982) (affirming injunction prohibiting censorship of attorney-client mail and ensuring confidential attorney-client interviews); Dawson v. Kendrick, 527 F. Supp. 1252, 1314 (S.D.W.Va. 1981)

---

prisoner shows “actual injury.” However, Lewis does not apply to prison officials’ affirmative interference with a prisoner’s access to counsel; nor does it apply to the Sixth Amendment rights of pretrial detainees. Benjamin v. Fraser, 264 F.3d 175, 185 (2d Cir. 2001).



(prisoners' right of access to courts "carries with it the right to seek, obtain and communicate privately with counsel;" attorney-client interview area that does not provide privacy is inadequate); see also Williams v. Price, 25 F.Supp.2d 623, 630 (W.D. Pa. 1998) (prison officials' failure to provide facilities for confidential attorney-client conversation violates prisoners' First Amendment free speech and Fourteenth Amendment privacy rights).

\_\_\_\_\_ Once again, it is no answer to say that under the regulation, "properly privileged materials" will not be retained. The violation of the prisoner's right to counsel does not require that privileged communications be affirmatively used against the prisoner in a criminal prosecution, or even that such communications be intercepted. Rather, the violation occurs as soon as the prisoner and his lawyer are informed that their confidential attorney-client communications will henceforth be monitored by government agents.

Indeed, courts have explicitly rejected the argument that the prisoner's rights are not violated as long as confidential communications are not actually intercepted. In Muhammad v. Pitcher, 35 F.3d 1081 (6<sup>th</sup> Cir. 1994), a prisoner challenged the prison's policy of opening mail addressed to him from the state Attorney General's office. Prison officials argued that because the actual piece of mail they opened was not itself confidential, the prisoner's rights had not been violated. The court rejected this argument, noting that it "overlooks the chilling effect that the challenged policy has on inmates who desire to correspond confidentially with the state Attorney General." Id. at 1083. As the court noted, "[i]t is well-settled that a chilling effect on one's constitutional rights constitutes a present injury in fact." Id. at 1084. Other courts have similarly recognized that monitoring of attorney-client communications has an impermissible chilling effect on those communications, regardless of what, if anything, is actually intercepted. See Smith, 454 F.2d at 697 (noting that "a prisoner, and possibly some attorneys, may feel, if only to a small degree, that someone in the chain of command may not be trusted, and that the resulting fear may chill communications between the prisoner and his counsel. ... [W]e see no reason to leave such possible apprehensions on such an important matter as right to counsel in the minds of the prisoner or his attorney"); Taylor v. Sterrett, 532 F.2d 462, 469 (5<sup>th</sup> Cir. 1976); Bieregu, 59 F.3d at 1452.

### **The regulation violates the Fourth Amendment**

The Fourth Amendment to the Constitution prohibits "unreasonable searches and seizures." Although the Fourth Amendment rights of incarcerated persons are diminished, they are not non-existent, and the warrantless interception of attorney-client communications contemplated by the regulation violates these rights.

In Hudson v. Palmer, 468 U.S. 517, 530, 104 S. Ct. 3194 (1984), the Supreme Court held that the Fourth Amendment does not apply to searches of prisoners' cells. The Court reasoned that prison security requires that prison officials have "[u]nfettered access" to prisoners' cells to search for contraband. 468 U.S. at 527, 104 S. Ct. at 3200. However, even after Hudson, "[t]he door on prisoner's rights against unreasonable searches has not been slammed shut and locked." United States v. Cohen, 796 F.2d 20, 23 (2d Cir. 1986). For example, if a cell search is initiated by prosecutors for law enforcement purposes, rather than by prison officials for prison security purposes, prisoners do retain Fourth Amendment rights, and a warrant must be obtained. Id. at

24.

Moreover, courts have recognized that in contexts other than cell searches, “a convicted prisoner maintains some reasonable expectations of privacy while in prison.” Cornwell v. Dahlberg, 963 F.2d 912, 916 (6<sup>th</sup> Cir. 1992). For example, because of the common understanding that one has a privacy interest in one’s naked body, strip searches and body cavity searches of prisoners must be justified under the Fourth Amendment. See, e.g., Covino v. Patrissi, 967 F.2d 73, 78 (2d Cir. 1992) (“we have little doubt that society is prepared to recognize as reasonable the retention of a limited right of bodily privacy even in the prison context”).

The confidentiality of attorney-client communications is one of the strongest expectations of privacy known to our society. For centuries these communications have been universally recognized as confidential, even after the client’s death, because of the importance of “encourag[ing] the client to communicate fully and frankly with counsel.” Swidler & Berlin v. United States, 524 U.S. 399, 410-11, 118 S. Ct. 2081, 2088 (1998). If this confidentiality survives death, it surely survives incarceration, and incarcerated persons retain a reasonable expectation of privacy in these communications. Thus, any interception of these communications must be justified under the Fourth Amendment.

Determining whether a search is reasonable under the Fourth Amendment “requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.” Bell v. Wolfish, 441 U.S. 520, 559, 99 S. Ct. 1861 (1979) (involving pretrial detainees). The warrantless interception of attorney-client communications cannot pass this test. As explained above, the invasion of the attorney-client privilege is total; all such communications are subject to interception. Moreover, the warrantless searches that courts have approved in the prison context, such as cell searches and strip searches, have been based on the need to maintain prison security (for example, by preventing the smuggling of drugs or weapons), and courts have granted great deference to the expertise of prison officials in that area. See Hudson, supra. By contrast, interception of attorney-client communications under the regulation is done for general law enforcement purposes, not prison security reasons, and is in no way based on the special expertise of prison officials. These searches therefore require more stringent scrutiny under the Fourth Amendment. See Cohen, supra.

Thus, under the Fourth Amendment, attorney-client communications cannot be intercepted without a warrant based on a finding of probable cause. As the Supreme Court has stated:

The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.

McDonald v. United States, 335 U.S. 451, 455-56, 69 S. Ct. 191, 193, 93 L.Ed. 153 (1948).

In this case, given the paramount privacy interests at stake, the Fourth Amendment does not permit the Attorney General to decide, unilaterally and without judicial oversight, to eavesdrop on the confidential attorney-client communications of persons he is seeking to prosecute.<sup>4</sup>

**The regulation is vague, contains no meaningful standards, and provides no oversight or review of the Attorney General’s decision to eavesdrop on attorney-client communications**

The regulation allows monitoring of attorney-client communications whenever the Attorney General believes there is “reasonable suspicion” that a person in federal custody “may” use communications with attorneys or their agents “to further or facilitate acts of terrorism.” However, there is no provision for judicial review of the Attorney General’s determination, which is apparently effective indefinitely. No definition of “reasonable suspicion” or “acts of terrorism” is provided. There is no requirement of a finding that the attorney in question would be likely to cooperate with the detainee in furthering “acts of terrorism.”<sup>5</sup>

Once the Attorney General makes this determination, the client and his attorneys are to be notified 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.” The term “acts of violence or terrorism” is not defined, but this provision appears to be more expansive than that set forth in the previous paragraph, which allows monitoring of attorney-client communications only upon a finding that the detainee may use such communications to further or facilitate “acts of terrorism.” Moreover, the regulation does not specify the standards used to determine the extent of monitoring that is “reasonably necessary,” nor identify the person who makes that determination.

Intercepted attorney-client communications are to be reviewed by a “privilege team” to ensure that “properly privileged materials ... are not retained.” The “privilege team” may disclose intercepted information if “the person in charge of the privilege team determines that acts of violence or terrorism are imminent.” However, there is no indication of the identity or qualifications of members of the “privilege team,” except that they are “not involved in the underlying investigation.” There is no review of the “privilege team’s” determination as to

---

<sup>4</sup>As explained below, it is already possible under existing law to intercept prisoners’ attorney-client communications when a warrant has been issued based upon a finding of probable cause that criminal activity is occurring.

<sup>5</sup>The regulation appears simply to presume that attorneys, who are officers of the court and who undergo extensive background checks before they are admitted to the bar, would willingly cooperate in criminal or terrorist activity. Federal courts have been unwilling to make this presumption. *See, e.g., Adams v. Carlson*, 488 F.2d 619, 631-32 (7<sup>th</sup> Cir. 1973) (before requiring that attorney-client visits take place in a room divided by a glass barrier, “a prison warden must come forward with facts which tend to support a reasonable suspicion not only that contraband is being smuggled to inmates ..., but that their attorneys are engaged in the smuggling”) (emphasis added).

which of the intercepted attorney-client communications are privileged. Similarly, there are no standards for, and no review of, the determination by the “person in charge of the privilege team” that “acts of violence or terrorism are imminent.”

Such vague, standardless language invites arbitrary, inconsistent, and discriminatory application of the regulation. More fundamentally, to have the Attorney General determine, unilaterally and without judicial oversight or review, when to eavesdrop on the attorney-client communications of a person whom he may be seeking to prosecute is completely inconsistent with our adversarial system of justice.

### **The regulation is unnecessary because existing law allows monitoring of attorney-client communications upon a showing of probable cause and issuance of a warrant**

Finally, the regulation is entirely unnecessary. If federal officials have probable cause to believe that a detainee is using communications with his attorney to further a criminal purpose, existing law allows them to obtain a search warrant to intercept these communications. Indeed, the Supreme Court has even approved searches of an attorney’s law office, provided a warrant has first been obtained from a neutral and detached magistrate. See Andresen v. Maryland, 427 U.S. 463, 479-80, 96 S. Ct. 2737, 2748, 49 L.Ed.2d 627 (1976) (approving search of law office pursuant to a warrant based on probable cause); National City Trading Corp. v. United States, 635 F.2d 1020, 1026 (2d Cir. 1980) (same).

Thus, if prison officials have reason to believe that a particular prisoner is using legal mail, or any other privileged mail, to violate the law or threaten security, “they may, upon a showing of probable cause, obtain a search warrant to read and open the mail.” Guajardo v. Estelle, 580 F.2d 748, 759 (5<sup>th</sup> Cir. 1978). See, e.g., Benjamin v. Kerik, 102 F.Supp.2d 157, 178 (S.D.N.Y. 2000), aff’d, 264 F.3d 175 (2d Cir. 2001) (New York City jail system “does not read or censor ingoing or outgoing inmate mail except pursuant to a lawful search warrant”). Similarly, if the government has probable cause to believe that a prisoner is using attorney-client conversations to further criminal activity, it may obtain a warrant from a federal judge to intercept those communications. See United States v. Harrelson, 754 F.2d 1153, 1168-69 (5<sup>th</sup> Cir. 1985) (approving court-authorized electronic surveillance of conversations between federal prisoner and attorney).

### **Conclusion**

Existing law strikes an appropriate balance between legitimate law enforcement needs and the right of clients to communicate confidentially with their attorneys. This regulation, which gives the Attorney General unfettered authority to strip clients and their counsel of this ancient and fundamental right, is unconstitutional, dangerous, and entirely unnecessary. It should be rescinded immediately.

**Submitted this 20<sup>th</sup> day of December, 2001.**

**AMERICAN CIVIL LIBERTIES UNION**

David C. Fathi, Staff Counsel  
Amy B. Fettig, Litigation Fellow  
733 15<sup>th</sup> St. N.W., Suite 620  
Washington, DC 20005  
(202) 393-4930

Steven R. Shapiro, Legal Director  
125 Broad Street  
New York, NY 10004  
(212) 549-2500

Laura W. Murphy, Director, Washington National Office  
Rachel King, Legislative Counsel  
122 Maryland Ave. N.E.  
Washington, DC 20002  
(202) 544-1681

**AMERICAN IMMIGRATION LAWYERS ASSOCIATION**

Jeanne A. Butterfield, Executive Director  
918 F St. N.W.  
Washington, DC 20004  
(202) 216-2400

**ARAB AMERICAN INSTITUTE**

Majed Jafari, Director, Government Relations  
1600 K St. N.W., Suite 601  
Washington, DC 20006  
(202) 429-9210

**ASIAN AMERICAN LEGAL DEFENSE EDUCATION FUND**

Margaret Fung  
99 Hudson Street  
New York, NY 10013  
(212) 966-5932

**CENTER FOR DEMOCRACY & TECHNOLOGY**

James X. Dempsey, Deputy Director  
1634 I St. N.W., Suite 1100  
Washington, DC 20006  
(202) 637-9800

**DC PRISONERS' LEGAL SERVICES PROJECT**

Marie-Ann Sennett, Executive Director  
1400 20<sup>th</sup> St. N.W., Suite 117  
Washington, DC 20036  
(202) 775-0323

**ELECTRONIC PRIVACY INFORMATION CENTER**

Chris Hofnagle, Legislative Counsel  
1718 Connecticut Ave. N.W., #200  
Washington, DC 20009  
(202) 483-1140

**EQUAL JUSTICE PROGRAM, HOWARD UNIVERSITY SCHOOL OF LAW**

Nkechi Taifa, Director  
2900 Van Ness St. N.W.  
Washington, DC 20008  
(202) 806-8119

**FRIENDS COMMITTEE ON NATIONAL LEGISLATION**

Florence Kimball, Legislative Education Secretary  
245 Second St. N.E.  
Washington, DC 20002  
(202) 547-6000 ext. 116

**LAWYERS COMMITTEE FOR HUMAN RIGHTS**

Elisa Massimino, Director, Washington Office  
100 Maryland Ave. N.E., Suite 500  
Washington, DC 20002  
(202) 547-5692 ext. 206

**LEGAL ACTION CENTER**

Jenni Collier, Director of National Policy and State Strategy  
236 Massachusetts Ave. N.E., Suite 505  
Washington, DC 20002  
(202) 544-5478

**LEGAL AID SOCIETY OF NEW YORK**

Daniel L. Greenberg, President and Attorney-in-Chief  
John Boston, Director, Prisoners' Rights Project  
Janet Sabel, Supervising Attorney, Immigration and Health Law Unit  
49 Thomas Street  
New York, NY 10013  
(212) 298-5000

**LIBERTARIAN PARTY**

Steve Dasbach, Executive Director  
2600 Virginia Ave. N.W., Suite 100  
Washington, DC 20037  
(202) 333-0008 ext. 228

**THE MULTIRACIAL ACTIVIST**

James A. Landrith, Editor/Publisher  
P.O. Box 8208  
Alexandria, VA 22306-8208  
(760) 875-8547

**NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE**

Hilary Shelton, Director, Washington Bureau  
1025 Vermont Ave. N.W., Suite 1120  
Washington, DC 20005  
(202) 638-2269

**NATIONAL BLACK POLICE ASSOCIATION**

Ronald Hampton, Executive Director  
3251 Mt. Pleasant Street N.W.  
Washington, DC 20010  
(202) 986-2070, (202) 986-9410

**UNITARIAN UNIVERSALIST ASSOCIATION OF CONGREGATIONS**

Washington Office for Faith in Action

Rob Cavanaugh, Legislative Director

2026 P St. N.W.

Washington, DC 20036

(202) 296-4672 ext. 15

**WASHINGTON COUNCIL OF LAWYERS**

Sharon Bradford Franklin, Executive Director

555 12th St. N.W., Suite 210

Washington, DC 20004

(202) 942-5063

**WORLD ORGANIZATION AGAINST TORTURE**

Morton Sklar, Executive Director

1725 K St. N.W.

Washington, DC 20006

(202) 296-5902