

No. C08-0072-1

IN THE
SUPREME COURT OF THE UNITED STATES

FALL TERM 2008

HAROLD HAN
Petitioner/Respondent

v.

MICHAEL MUKASEY
Petitioner/Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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October 8, 2008
Counsel for Petitioner

QUESTIONS PRESENTED

1. Does the broadly invasive and unjustified monitoring of attorney-client communications by special administrative measures violate Mr. Han's Fifth and Sixth Amendment rights?
2. Do the special administrative measures imposing intrusive restrictions upon Mr. Han's attorney, Ms. Butayan, violate Mr. Han's Sixth Amendment right to effective assistance of counsel?

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OPINION BELOW

The opinion of United States Court of Appeals for the Fourteenth Circuit is unreported. It may be found in its entirety at pages 4 though 14 of the record.

STANDARD OF REVIEW

This Court reviews questions of law de novo. *Elder v. Holloway*, 510 U.S. 510, 516 (1994).

ADMINISTRATIVE REGULATIONS AND CONSTITUTIONAL PROVISIONS INVOLVED

Entitled "Prevention of Acts of Violence and Terrorism," 28 C.F.R. § 501.3 was promulgated in 1997, amending the existing § 501. Following September 11, 2001, the Department of Justice ("DOJ") amended SAMs to allow application to all detainees. 66 Fed. Reg. 55,062, 55,064 (Oct. 31, 2001). One of the amendments was the addition of § 501.3(d), which authorizes monitoring of attorney-client communications without judicial review if

“reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism.” 28 C.F.R. § 501.3(d) (2001). The constitutional analysis of this case involves the Fifth and Sixth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Procedural History

In June 2007, Harold Han (“Mr. Han”) was detained as a material witness by the DOJ, and, on August 14, 2007, was indicted in the Eastern District of Apalsa with a variety of federal charges alleging conspiracy to engage in, and material support for, acts of eco-terrorism. (R. 4.) On certification by the Attorney General, Michael Mukasey, the Marshals Service imposed numerous special administrative measures (“SAMs”) on Mr. Han. (R. 6.) One of the SAMs imposed required Mr. Han’s attorney of record, Ms. Butayan, to sign an affirmation acknowledging that she received, understood, and would abide by the SAMs. (R. 6.) After refusing to sign the affirmation, Ms. Butayan was immediately denied any access to Mr. Han. (R. 6.)

Mr. Han filed an Emergency Motion, asserting that the monitoring of his communications with his attorney and the requirement of the affirmation deny him his Sixth Amendment right to effective assistance of counsel and his Fifth Amendment rights to due process and against self-compelled incrimination. (R. 6.) The motion also asserted that the restrictions placed on his attorney, Ms. Butayan, violated his Sixth Amendment right to effective assistance of counsel. (R. 6.) The District Court upheld both the monitoring provision and the attorney affirmation requirement against these constitutional challenges. (R. 6.)

Mr. Han timely appealed to the United States Court of Appeals for the Fourteenth Circuit, which upheld the District Court in part, and reversed in part and remanded to the District Court. (R. 4.) The court held that

because the attorney-client privilege does not extend to communications covered by the crime-fraud exception, Mr. Han's Sixth Amendment right to counsel had not been abridged by the monitoring. (R. 9.) The court also held that because there were provisions in place to protect legitimately privileged communications, Mr. Han's Fifth Amendment right against self-incrimination was not violated. (R. 10.) As to the restrictions placed on Mr. Han's attorney, however, the court found that both the SAM requiring Ms. Butayan be the sole person to disseminate client communication and the SAM requiring Ms. Butayan sign an affirmation before being granted access to her client violated Mr. Han's Sixth Amendment right to effective assistance of counsel. (R. 13.)

Mr. Han and the Attorney General filed petitions for certiorari, which this court granted on February 18, 2008.

Statement of the Facts

Mr. Han is a 28-year-old U.S. citizen, born and raised in the town of Appalled, in the State of Apalsa. (R. 5.) Since his 2003 graduation from the University of Apalsa with a degree in environmental sciences, he has worked for numerous nonprofit organizations. (R. 6.) He then allegedly became involved in the Planet Liberation Front, a group designated as a domestic terrorist organization by the Department of Homeland Security in 2006. (R. 6.)

After being detained as a material witness by the DOJ on June 2007, Mr. Han was indicted on August 14, 2007 with six counts of conspiracy to engage in terrorist activity and material support for a terrorist organization in connection with a plot to sabotage construction of a dam on the Apalsa River. (R. 4, 6.) Mr. Han currently remains as a pretrial detainee in a federal prison. (R. 4.)

Based upon the Attorney General's assessment that allowing Mr. Han to communicate freely would pose a risk, the United States Marshals then imposed

numerous SAMs upon Mr. Han. (R. 6.) The relevant restrictions of these SAMs include 1) prohibiting Mr. Han from communicating with any inmate and visitor except his mother and sister; 2) limiting Ms. Butayan and preventing her staff from disseminating Mr. Han's communications to third parties outside the sole purpose of preparing for his defense; 3) forcing Ms. Butayan to sign an attorney affirmation acknowledging these SAMs; and 4) imposing constant surveillance of all attorney-client communications. (R. 6.) Ms. Butayan, as Mr. Han's sole attorney of record, has refused to sign the attorney affirmation and has been denied access to her client. (R. 6.)

SUMMARY OF ARGUMENT

1. The monitoring provision of the special administrative measures violates Mr. Han's Sixth Amendment right to effective assistance of counsel and Fifth Amendment rights to due process and against compelled self-incrimination.

The Sixth Amendment protects the privacy of attorney-client communications as a cornerstone of our legal system. The monitoring provision of the special administrative measures violates this right to consult one's attorney in confidence and creates a chilling effect upon attorney-client communications. Numerous instances of prosecutorial misconduct and information leaks empirically prove that the DOJ is unable to balance protecting the attorney-client privilege and prosecuting the defendant. Since Mr. Han and his attorney fear being overheard and will not be able to freely exchange information, the monitoring provision infringes upon Mr. Han's right to effective assistance of counsel.

Imposing monitoring without prior judicial review also turns the crime-fraud exception on its head. The crime-fraud exception requires a prior showing to the judiciary that the monitoring is necessary. On the other hand, SAMs establish a sweeping rule that ignores the standard of judicial review and grants unilateral discretion to the executive branch. This

unilateral discretion over monitoring impermissibly blends executive and judicial functions.

The Fifth Amendment ensures that criminal defendants are afforded fairness in the criminal process and provides a right against compelled self-incrimination. Current safeguards in the monitoring provision are insufficient to protect Mr. Han from violations of his right against self-incrimination. As a result, Mr. Han must choose to either risk self-incrimination by talking to his attorney, or forgo talking to his attorney and lose his right to effective representation.

The monitoring provisions also violate Mr. Han's right to due process because they run afoul of the four-factor reasonableness test articulated in *Turner v. Safley*. First, the lack of evidence shows no valid and rational connection between the SAMs and Mr. Han. Second, Mr. Han has no alternative means to exercise his right to counsel because of the constant government surveillance of his attorney-client meetings. Third, protecting this right to confidential communications will have virtually no impact on prison resources. Fourth, a number of better alternatives exist, such as the crime-fraud exception, Title III, and FISA.

Finally, the monitoring provisions are not only fundamentally unfair but also "shocking to the universal sense of justice" mandated by the Due Process Clause. Constant government surveillance of a defendant's conversations with his attorney destroys the balance between the defense and the prosecution. By arbitrarily depriving Mr. Han of his right to counsel, the prosecution dismantles any semblance of justice in our adversarial system.

2. The dissemination provision and the affirmation provision of the special administrative measures violate Mr. Han's Sixth Amendment right to effective assistance of counsel.

The Sixth Amendment provides criminal defendants the right to effective assistance of counsel from an independent and zealous advocate. Any

government interference with an attorney's ability to make independent decisions on how to conduct the defense is automatically presumed to be a Sixth Amendment violation. The dissemination provision of the SAMS interferes with Mr. Han's attorney, Ms. Butayan, by disabling her ability to normally use her support staff. The dissemination provision siphons Ms. Butayan's limited time and resources from developing defense strategies.

Moreover, the dissemination provision is unnecessary as the ethical and professional standards of the Apalsa State Bar, which closely follow the ABA Model Rules of Professional Conduct, strictly regulate the conduct of Ms. Butayan and her staff. There is no legitimate reason to impose additional restrictions on Ms. Butayan and her support staff as they all have passed government background checks and have never shown any indication that they will violate the existing professional standards. Justifications for imposing restrictions cannot simply be "bootstrapped" from Mr. Han onto his attorney.

Requiring Ms. Butayan to sign an affirmation prior to being granted access to Mr. Han violates the Sixth Amendment. The only court to directly discuss the Sixth Amendment constitutionality found that the affirmation provision impaired an attorney's ability to be an independent and zealous advocate. Furthermore, actual or constructive denial of counsel during a critical stage of a proceeding is a presumed Sixth Amendment violation of the right to counsel. The affirmation places attorneys in an impossible position to either sign the affirmation and face possible prosecution under them, or be denied access to their clients indefinitely.

The affirmations are akin to a loyalty oath to the government and undermine the existing professional standards which attorneys have already taken an oath to uphold. The DOJ's blanket rule regulating defense attorney behavior ignores the distinct facts of each case and assumes that attorneys are guilty by association with their clients. The government has thus not

asserted any legitimate justifications for the necessity of these SAMs placed on Ms. Butayan and only eviscerates Mr. Han's right to effective assistance of counsel.

ARGUMENT

I. SPECIAL ADMINISTRATIVE MEASURES PROVIDING FOR THE MONITORING OF ATTORNEY-CLIENT COMMUNICATIONS VIOLATE MR. HAN'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The government's concern for national security does not justify eviscerating Mr. Han's constitutional rights through the imposition of SAMs. According to the District Court vacating Fred Korematsu's conviction, "in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability." *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (D.C. Cal. 1984). The judiciary must remain vigilant against violations of civil liberties especially in times where "petty fears and prejudices . . . are so easily aroused." *Korematsu*, 584 F. Supp. at 1420. SAMs broadly invoke the specter of "national security" to justify unreasonable, unnecessary, and unacceptable violations of Mr. Han's Fifth and Sixth Amendment rights. More specifically, granting the executive branch the unilateral discretion to monitor Mr. Han's communications undermines his ability to communicate openly with his attorney in violation of his rights to effective counsel, due process, and against compelled self-incrimination.

A. The Monitoring Provision Violates Mr. Han's Sixth Amendment Right to Effective Assistance of Counsel.

The Sixth Amendment provides, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right . . . 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 the Assistance of Counsel for his defence.

U.S. Const. amend. VI. The Sixth Amendment protects the privacy of an attorney-client communication since "[f]ree 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); see also *United States v. Rosner*, 485 F.2d 1213,

1224 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974) (“the essence of the Sixth Amendment right is . . . privacy of communication with counsel.”). The attorney-client privilege operates as a cornerstone of the legal system, and denying the privilege would severely impair an attorney’s ability to offer effective assistance to her client.

1. The monitoring provision chills attorney-client communications and infringes upon the right to consult one’s attorney in confidence.

This Court has long established the right to consult in confidence through its cases developing the attorney-client privilege. Over 130 years ago, this Court stated in *Connecticut Mutual Life Ins. Co. v. Schaefer* that “[i]f a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic.” 94 U.S. 457, 458 (1876). The criminal defendant must have the right to consult in confidence, for “[t]he 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.” *Trammel v. United States*, 445 U.S. 40, 51 (1980). The attorney-client relationship depends upon “total and absolute confidence,” and “barriers to full disclosure” hinder the attorney’s responsibilities in identifying issues and advising the client. *Id.*

Violating this confidence would discourage clients from disclosing all information needed for legal representation. *Swidler & Berlin v. United States* noted the breadth of this privilege by stating “[c]lients consult attorneys for a wide variety of reasons, many of which involve confidences that are not admissions of crimes, but nonetheless are matters the clients would not wish divulged.” 524 U.S. 399, 407 (1998). A client does not know whether information he discloses to his attorney will later be relevant to a future civil or criminal matter. *Upjohn v. United States*, 449 U.S. 383, 392

(1981). Since the client is unable to determine what information may be self-incriminating, a prudent attorney should advise her client not to disclose anything while being monitored. *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 Harv. L. Rev. 464, 485-86 (1977). The monitoring provision thus prevents any exchange of information and destroys Ms. Butayan's ability to effectively represent Mr. Han.

The Seventh Circuit described the chilling effect of pervasive government surveillance in *United States v. DiDomenico*, 78 F.3d 294 (7th Cir. 1996), when the court posed a hypothetical virtually identical to the monitoring imposed upon Mr. Han. In the hypothetical, the government adopts and announces a policy of taping all attorney-client communications but does not turn the tapes over to the prosecutors. *Id.* at 299. The court found that the "pervasiveness and publicity" of such monitoring would "greatly undermine the freedom of communication between defendants and their lawyers." *Id.* This fear of being overhead would chill attorney-client communications, "emptying the right to the assistance of counsel of much of its meaning." *Id.* at 300. Similarly, Mr. Han will be reluctant to candidly disclose information to Ms. Butayan when he knows all his attorney-client communications are being recorded.

2. The chilling effect from the monitoring provision is distinguishable from and more severe than infiltration of attorney-client meetings by informants.

Informant infiltration of attorney-client meetings differs from the chilling effect imposed by SAMs. The lower court heavily relies on *Weatherford v. Bursey*, which refused to find a per se Sixth Amendment violation when an informant attended a meeting of the defendant with his attorney. 429 U.S. 545 (1977). According to the *Weatherford* Court in footnote 4, however, the threat to the Sixth Amendment's assistance-of-counsel guarantee "lies in the inhibition of free exchanges between defendant

and counsel because of the fear of being overheard.” *Weatherford*, 429 U.S. at 555 n.4. This fear is less present in instances of informant infiltration than electronic monitoring because attorneys and their clients may cure the problem by “excluding third parties from defense meetings or refraining from divulging defense strategy when third parties are present at those meetings.” *Id.* Mr. Han and his attorney have no such options, as SAMs permit the government to maintain a ubiquitous presence in all attorney-client meetings. (R. 6.) This constant monitoring subsequently prevents any meaningful communication between Ms. Butayan and Mr. Han.

Additionally, the informant in *Weatherford* had no relationship to the prosecuting staff, therefore avoiding the potential for detriment to the defendant and benefit to the state. *Weatherford*, 429 U.S. at 556. In comparison, the SAMs only specify that “privilege teams” shall consist of “individuals not involved in the underlying investigation,” which would allow the Director of the Bureau of Prisons and the Assistant Attorney General to pick individuals within same law enforcement agencies prosecuting the case. Prevention of Acts of Violence and Terrorism, 28 C.F.R. § 501.3(d)(3) (2002). As executive branch agencies operating to prosecute defendants in an adversarial system, the DOJ and the Bureau of Prisons (“BOP”) are biased parties by their very nature. *Katz v. United States*, 389 U.S. 347, 359 (1967) (Douglas, J., concurring). Since the same law enforcement agencies may observe Mr. Han’s defense strategies before prosecuting him, a privilege team only reinforces the chilling effect upon Mr. Han’s attorney-client communications.

Moreover, numerous instances of prosecutorial misconduct empirically prove the executive branch’s inability to protect the attorney-client privilege. In 2000 and 2001, DOJ officials admitted error in more than seventy-five applications for surveillance under the Foreign Intelligence Surveillance Act (“FISA”). *In re All Matters Submitted to the Foreign*

Intelligence Surveillance Court, 218 F. Supp. 2d 611, 621 (FISC 2002) (*rev'd on other grounds*, 310 F.3d 717 (FISC 2002); 50 U.S.C. § 1801 (2008)). "In virtually every instance, the government's misstatements and omissions in FISA applications and violations of the Court's orders involved information sharing and unauthorized disseminations to criminal investigators and prosecutors." *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d at 621. This leaking of communications creates a "realistic possibility" of injury to Mr. Han that would violate his Sixth Amendment right. *Weatherford*, 429 U.S. at 558. Without judicial scrutiny, the executive branch can not be trusted to check its own abuses.

An intrusion into the attorney-client relationship followed by the disclosure of information creates a per se violation of the Sixth Amendment irrespective of a finding of prejudice. In *United States v. Levy*, the Third Circuit held that:

The inquiry into prejudice must stop at the point where attorney-client confidences are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case. Any other rule would disturb the balance implicit in the adversary system and thus would jeopardize the very process by which guilt and innocence are determined in our society.

577 F.2d at 209. The Tenth Circuit has similarly held that there was no need to determine prejudice to the defendant, as "purposeful intrusion on the attorney-client relationship strikes at the center of protections afforded by the Sixth Amendment." *Schillinger v. Haworth*, 70 F.3d 1132, 1141 (10th Cir. 1995). Regardless of actual prejudice, the monitoring provision infringes upon Mr. Han's right to effective counsel through its chilling effect and the likelihood of prosecutorial misconduct.

3. The monitoring provision turns the crime-fraud exception on its head by ignoring the standard of judicial review.

The lower court justifies the monitoring under the SAMs with the crime-fraud exception, but such reasoning runs counter to this Court's holding in

United States v. Zolin, 491 U.S. 554 (1989). The crime-fraud exception provides that communications in furtherance of a crime are not protected by the attorney-client privilege. John Henry Wigmore, *Wigmore on Evidence* § 2298, p. 573 (McNaughton rev. 1961); see also *Clark v. United States*, 289 U.S. 1, 15 (1933). The *Zolin* Court allowed for an *in camera* review to determine if the crime-fraud exception applied but emphasized its rare application. *Zolin*, 491 U.S. at 571-572. An expansive rule allowing routine use of *in camera* review would inhibit "open and legitimate disclosure between attorneys and clients," create "groundless fishing expeditions," and might violate the client's due process rights. *Id.* Rather, the prosecution in each case must establish a prima facie showing of a "reasonable belief" that an *in camera* review may yield evidence. *Id.* at 574-75. SAMs, however, remove this requirement of judicial review and grant unlimited access to otherwise protected and confidential communications. 28 C.F.R. § 501.3(d)(3). The lower court ignores the *Zolin* standard, instead creating a presumption that the exception attaches whenever the DOJ determines that monitoring is "reasonable" without any prior judicial review.

Furthermore, the DOJ's "reasonable suspicion" standard in applying the SAMs is lower than the *Zolin* "reasonable belief" standard. By using the term "reasonable belief," the *Zolin* Court established an objective standard for judicial review only after attorney-client communications have been made. *Zolin*, 491 U.S. at 574-75. The DOJ, on the other hand, subjectively invokes SAMs when "reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism." 28 C.F.R. § 501.3(d). Little, if any, evidence indicates that Mr. Han intends to use his attorney to facilitate an act of terrorism. (R. 6-7.) While the Planet Liberation Front may be designated as a terrorist organization, the executive branch possesses too

much unilateral discretion in determining its “reasonable suspicion” standard.

This unilateral discretion allowed by SAMs impermissibly blends executive and judicial functions. “Under the separation of powers created by the Constitution, the Executive Branch is not supposed to be neutral and disinterested.” *Katz*, 389 U.S. at 359 (Douglas, J., concurring). Judges, not prosecutors or prison officials, should determine when it is reasonable to pierce the attorney-client privilege. Warning that “a complete abandonment of judicial control would lead to intolerable abuses,” *Zolin* emphasized the need for balance. *Zolin*, 491 U.S. at 571. Although judicial review is available when the privilege team wants to disclose privileged information after the monitoring,¹ the abandonment of any prior judicial review irrevocably damages the attorney-client relationship. 28 C.F.R. § 501.3(d)(3). Since judicial review is not provided for anywhere else in the process, the unilateral application of the DOJ’s broad standard permits the crime-fraud exception to swallow the rule.

B. The Monitoring Provision Violates Mr. Han’s Fifth Amendment Right to be Free from Compelled Self-incrimination and Right to Due Process of Law.

The Fifth Amendment provides, in relevant part:

No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

U.S. Const. amend. V. The Due Process Clause of the Fifth Amendment ensures “fundamental fairness” in the criminal process for individuals accused of crimes. *Powell v. Alabama*, 287 U.S. 45 (1932). By intruding upon the attorney-client privilege and denying Mr. Han’s right to effective assistance of counsel, the monitoring provision violates Mr. Han’s right to due process.

¹The head of the privilege team may also decide to release the information based on his opinion that “acts of violence or terrorism are imminent.” 28 C.F.R. § 501.3(d)(3). The vagueness of this standard also shows the potential for “intolerable abuse.” *Zolin*, 491 U.S. at 571.

Additionally, Mr. Han faces potential self-incrimination when the DOJ gathers information from his meetings with Ms. Butayan. The monitoring provision violates both Mr. Han's Fifth Amendment right against compelled self-incrimination and his right to due process.

1. Current safeguards are insufficient to protect Mr. Han from compelled self-incrimination.

A long pattern of prosecutorial misconduct undermines any presumption that law enforcement agencies will preserve Mr. Han's right against self-compelled incrimination while simultaneously investigating him. The executive branch has repeatedly failed to separate intelligence and criminal investigation squads, and has allowed unauthorized sharing of information with Federal Bureau of Investigation criminal investigators and assistant U.S. attorneys. *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d at 620-21. When an unfriendly adversary has access to attorney-client information, monitoring by jail authorities of a criminal defendant's conversations with his attorney violates the defendant's right against compelled self-incrimination. *See Fajeriak v. State*, 520 P.2d 795, 799 (Alaska 1974). Mr. Han must choose to either risk self-incrimination by talking to his attorney, or forgo talking to his attorney and lose his right to effective representation.

The lower court invokes *Chavez v. Martinez* to state that the Fifth Amendment only applies if a defendant's statements are used against him in a criminal case. (R. 10.) *Chavez*, however, can be distinguished because the respondent in *Chavez* was never charged with a crime and his statements were therefore never used against him. 538 U.S. 760, 764-765 (2003). Without "the initiation of legal proceedings," the respondent had not been compelled to be a witness against himself "in any criminal case" within the meaning of the Fifth Amendment. *Id.* at 766-767. Mr. Han, on the other hand, has been charged with six counts of conspiracy and faces additional criminal

liability. (R. 6.) Given this adversarial context and the DOJ's history of leaking sensitive information, the monitoring provision violates Mr. Han's right against compelled self-incrimination.

2. The monitoring provision runs afoul of the four-factor test for reasonableness articulated in *Turner v. Safley* and thus violates Mr. Han's right to due process.

The monitoring fails to meet each prong of the four-part reasonableness test of *Turner v. Safley*, 482 U.S. 78, 89 (1987). Under *Turner*, a prison regulation that abrogates a prisoner's constitutional rights may be accorded special status and still be valid "if reasonably related to legitimate penological interests." *Id.* at 89. In assessing the prison regulation, the Court must apply a four-factor reasonableness standard. This Court must determine first whether a "valid, rational connection" exists between the regulation and a legitimate penological interest; second, whether there are alternative means for the prisoner to exercise the right; third, the impact that the desired accommodation will have on guards, other inmates, and prison resources; and fourth, the absence of "ready alternatives." *Turner*, 482 U.S. at 89.

The monitoring provision fails the first *Turner* prong since no connection exists between the monitoring imposed upon Mr. Han and a legitimate penological interest. Preventing potential terrorist attacks outside of the prison facility has no relation to institutional security. The monitoring provision would therefore not have the special status that invokes the *Turner* standard. *Turner*, 482 U.S. at 89. Even if this Court applies the *Turner* standard broadly to mean a governmental interest of protecting public safety, Mr. Han's case differs significantly from the Second Circuit cases which have used this broad standard to establish the "valid, rational" connection. In *United States v. Felipe*, the Second Circuit allowed monitoring of a prisoner convicted of orchestrating at least six murders from inside the prison system. 148 F.3d 101, 105-107 (2d Cir. 1998).

Unlike the convicted gang leader in *Felipe*, no details in the record indicate that Mr. Han has used his attorney to facilitate crimes or abused his attorney-client privilege as a pretrial detainee. (R. 6-7.) Additionally, the lower court incorrectly relies upon *United States v. El-Hage*, which involved other conditions of confinement but not monitoring of attorney-client communications. 213 F.3d 74, 78 (2d Cir. 2000). The lack of a “valid, rational” connection between the monitoring provision and the interest of public safety shows that the provisions placed on Mr. Han are an “exaggerated response” by the government. *Turner*, 482 U.S. at 87, 89.

The second *Turner* factor weighs against upholding section 501.3(d) since Mr. Han has no other means of exercising his constitutional rights. Section 501.3 allows the government to monitor every available means of communication, destroying the essential component of confidentiality in the right to effective counsel. As the *Turner* Court stated, “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution.” *Turner*, 482 U.S. at 84. Subsequently, Mr. Han may not be shut off from his Sixth Amendment right to effective counsel.

The third *Turner* factor also supports rejecting the monitoring provision. Accommodating Mr. Han’s right to confidential attorney-client communications will have virtually no impact on the prison environment since current regulations already protect the confidentiality of such communications for the vast majority of inmates.² Even without the existence of section 501.3(d), monitoring may still be allowed with a judicially approved warrant. The lower court states only that “the allocation of prison resources has been taken into consideration.” (R. 10.) However, the DOJ and the Fourteenth Circuit fail to prove any evidence that applying for a warrant is an exhaustive process that consumes too many resources. (R. 5-10.)

² See 28 C.F.R. §§ 543.13(b), 543.13(e), 540.18(c)(1), 540.102 (2008) (addressing the time and place of attorneys’ visits, permissible recordings of attorneys’ visits, opening special mail, sealing special mail, and monitoring inmate phone calls).

Finally, the monitoring provision fails the fourth *Turner* prong because other alternatives better balance the government's safety concerns and the pretrial detainee's civil liberties. For example, the common law crime-fraud exception allows a judge to determine if federal officials may obtain a search warrant to monitor a defendant's communications. *Zolin*, 491 U.S. at 574-75. Also, both Title III of the Omnibus Crime Control and Safe Street Acts of 1969 and the Foreign Intelligence Surveillance Act of 1978 conform to constitutional standards while allowing monitoring. 18 U.S.C. §§ 2510-2521 (2000); 50 U.S.C. § 1801 (2008). Under both statutes, any attempts to pierce the attorney-client privilege are subject to judicial review. *Id.* Contrary to these established methods, the SAMs circumvent both legislative and judicial authority and ignore more appropriate alternatives. Failing all aspects of the *Turner* test, the monitoring provision thus constitutes an unreasonably punitive measure against Mr. Han.

3. The monitoring provisions are not only fundamentally unfair but also "shocking to the universal sense of justice" mandated by the Due Process Clause.

The SAMs as applied to Mr. Han are deplorable enough to violate the Due Process Clause under the standard established by this Court in *United States v. Russell*. To constitute a violation of the Due Process Clause of the Fifth Amendment, the law enforcement technique in question must be so outrageous that it is fundamentally unfair and "shocking to the universal sense of justice." *United States v. Russell*, 411 U.S. 423, 432 (1973). Due process heavily relies upon the client's ability to speak to his attorney frankly and candidly. *Coplon v. United States*, 191 F.2d 749, 759 (D.C. Cir. 1951). By severely restricting Mr. Han's ability to freely communicate with his attorney, Mr. Han's right to due process is fatally compromised.

The lower court incorrectly uses *United States v. Ofshe* as the standard to determine prejudice in Mr. Han's case. 817 F.2d 1508 (11th Cir. 1987). In *Ofshe*, the government secretly placed a body bug on defendant's attorney,

but the lack of evidence produced from piercing the attorney-client privilege also meant a lack of prejudice. *Ofshe*, 817 F.2d at 1510, 1516. Given this lack of prejudice, *Ofshe* expressly limited its holding to the unique facts of the case. *Id.* at 1516. Additionally, *Ofshe* involved surreptitious monitoring for an investigation of drug traffickers. *Id.* at 1510-1511. *Ofshe* thus does not take into account the distinct chilling effect that occurs from monitoring as mandated by the SAMs.

Indeed, constant government surveillance of a defendant's conversations with his attorney destroys the careful balance in our adversarial system. It is not only the interest of justice that must be served, but also the appearance of justice. *In re Search Warrant for Law Offices Executed on March 19, 1992*, 153 F.R.D. 55, 59 (S.D.N.Y. 1994). The lack of transparency means that Mr. Han would need to take a "great leap of faith" to believe that the government would fairly and carefully protect the attorney-client privilege. *Id.* The SAMs essentially transform Mr. Han's attorney into an interrogator and a representative for the government. Consequently, this subversion of the adversarial process and Mr. Han's rights is so outrageous as to shock the universal sense of justice.

II. THE SPECIAL ADMINISTRATIVE MEASURES IMPOSING RESTRICTIONS ON MR. HAN'S ATTORNEY, MS. BUTAYAN, VIOLATE MR. HAN'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

In *Strickland v. Washington*, this Court explained that the Sixth Amendment provides the right to the assistance of counsel "because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." 466 U.S. 668, 685 (1984). The Sixth Amendment protects the defendant who typically does not have specialized legal skills and knowledge to counter an experienced and resource-rich prosecution. *Johnson*, 304 U.S. at 463. The importance of this constitutional right explains why this Court has consistently recognized the right to counsel as "the right to the effective assistance of counsel."

McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970); *Strickland*, 466 U.S. at 686. The excessive and unnecessary imposition of the SAMs on Mr. Han's attorney, Ms. Butayan, violates his right to effective assistance of counsel.

A. Forcing Ms. Butayan to Directly Disseminate All Client Communications Violates Mr. Han's Sixth Amendment Right to Effective Assistance of Counsel.

1. The dissemination provision interferes with Ms. Butayan's ability to independently decide how to conduct the defense.

In *Strickland*, the Court established two ways in which a defendant may be denied his constitutional right to effective assistance of counsel. 466 U.S. at 686. First, a defendant may be denied his right to effective assistance when his counsel fails to render "adequate legal assistance." *Id.* If such a claim is made, the defendant must further show that his attorney's ineffectiveness caused prejudice in the results. *Id.* Second, a defendant may be deprived of his right to effective assistance of counsel when the government "interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Id.* In situations involving direct government interference, the defendant need not show prejudice to prove that there was a violation of his Sixth Amendment right. *Id.* at 692. While dealing with a post-trial review of the right to effective assistance of counsel, *Strickland* still applies to Mr. Han as a pretrial detainee because the right to counsel attaches once the prosecution has commenced. *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). As a result, the *Strickland* standard governs this case and establishes that government interference alone establishes a per se violation of the Sixth Amendment.

The dissemination provision constitutes government interference and thus violates the Sixth Amendment. Having "detailed guidelines for representation . . . distract[s] counsel from the overriding mission of vigorous advocacy of the defendant's cause." *Strickland*, 466 U.S. at 689. As the lower court stated, the government exceeds its authority by dictating

that all work should be done by the attorney of record and not by her staff. (R. 13.) Under the SAMs, Ms. Butayan is unable to delegate work that would normally be done by an entire team. For instance, Ms. Butayan must take on time-consuming tasks typically done by experienced investigators, such as searching for potential witnesses and interviewing witnesses to confirm the defendant's stories. Ms. Butayan also may not have her paralegals and administrative staff prepare briefs, pleadings, or internal investigatory documents if they involve any communications from her client. The dissemination provision effectively immobilizes Ms. Butayan's ability to serve her client by draining her limited time and resources from developing defense strategies. These guidelines dictating Ms. Butayan's workload cripples her ability to effectively represent Mr. Han.

Moreover, defendants and their attorneys should inherently be free from any government influence. In *Polk County v. Dodson*, this Court explained that criminal defendants have the right to "the guiding hand of counsel" at every step of the proceedings against them, and "[i]mplicit in the concept of a 'guiding hand' is the assumption that counsel will be free of state control." 454 U.S. 312, 322 (1981). Defense attorneys already face a tremendous disadvantage compared to the prosecution, who spends "vast sums of money to establish machinery to try defendants accused of crime." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). Further restricting Ms. Butayan's use of her staff creates an even greater imbalance between the prosecution and the defense. In order to represent her client adequately against such odds, Ms. Butayan must be free from government control measures such as the dissemination provision.

2. Only the professional standards of an independent bar that is wholly autonomous of the government may regulate the conduct of defense attorneys and their staff.

Professional standards set by an independent state bar obviate the need for intrusive government regulation of ethical behavior by defense attorneys.

United States v. Reid stated that only an “independent bar . . . truly independent of the government” may regulate and define the role of an attorney. 214 F. Supp. 2d 84, 92, 94 (D. Mass. 2002). Additionally, state judiciaries, not the federal or state executive branches, regulate conduct of the legal profession. *Id.* The professional rules governing Ms. Butayan already require honesty to the court and restrict her from aiding her client in committing crimes or fraud of any kind,³ and further rules imposed by the executive branch are unnecessary.

Lawyers also assume responsibility for the conduct of their nonlawyer staff. Model Rules of Prof'l Conduct R. 5.3 (2007). “[A] lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.” *Id.* Further, government background investigations have cleared Ms. Butayan’s co-counsel, paralegals, and administrative staff. (R. 10.) There is simply no legitimate reason for the government to restrict Ms. Butayan from normally utilizing her support team. Even if the government justifies the placement of SAMs on Mr. Han, such justification cannot simply be “bootstrapped” onto placing restrictions on Ms. Butayan, who has never shown any indication that she has or will ever violate any of her ethical obligations. (R. 11.)

B. Requiring Ms. Butayan to Sign an Affirmation Prior to Being Granted Access to Mr. Han is a Violation of Mr. Han’s Sixth Amendment Right to Effective Assistance of Counsel.

1. The only court to directly address the constitutionality of the attorney affirmation provision held that it violates a criminal defendant’s right to effective representation.

In *United States v. Reid*, the court held that the attorney affirmation provision infringes upon a defendant’s Sixth Amendment right to effective assistance of counsel. 214 F. Supp. 2d 84 (D. Mass. 2002). Similar to the case at hand, the defense attorney refused to sign the attorney affirmation

³Model Rules of Prof'l Conduct R. 1.2(d), R. 1.6(b)(2), R. 3.3, R. 8.4 (2007).

and was promptly denied access to defendant Richard Reid. *Reid*, 214 F. Supp. 2d at 88. In a clear statement of disapproval, the court rejected any requirement that an attorney must sign an affirmation:

The affirmation here unilaterally imposed by the Marshals Service as a condition of the free exercise of Reid's Sixth Amendment right to consult with his attorneys fundamentally and impermissibly intrudes on the proper role of defense counsel. They are zealously to defend Reid to the best of their professional skill without the necessity of affirming their bona fides to the government.

Id. at 94. The court further held that attorneys are "subordinate to the existing laws, rules of court, ethical requirements, and case-specific orders of this Court - and to nothing and no one else." *Id.* (emphasis added). Consequently, the affirmation provision should not prevent Ms. Butayan from seeing and effectively representing her client.

Moreover, *Reid* stated that the Attorney General may not criminalize conduct by imposing the SAMs and then prosecute those who violate them. 214 F. Supp. 2d at 96 n.8. "It is constitutional bedrock that only the Congress can enact federal criminal statutes." *Id.* The Sixth Amendment goal of ensuring a balanced adversarial process is lost when the executive branch demands immediate obedience from defense attorneys with far fewer resources and more vulnerable clients. Since the attorney affirmation provision imposed upon Mr. Han is substantially similar, this Court should follow the lower court in adopting *Reid's* logical reasoning. (R. 11-13.)

Beyond *Reid*, no other cases challenging the attorney affirmation provision have decided the issue on Sixth Amendment grounds. Some courts have avoided the issue entirely, finding a lack of subject matter jurisdiction because the petitioner failed to exhaust all the administrative remedies available to him. *United States v. Troya*, No. 06-80171-Cr., 2008 WL 2537145, at *3 (S.D. Fla. Jun. 24, 2008); *Yousef v. Reno*, 254 F.3d 1214, 1223 (10th Cir. 2001). Other courts have upheld the affirmations without acknowledging the Sixth Amendment. See *United States v. Sattar*, No. 06-Cr.-

442(LAP), 272 F. Supp. 2d 348 (S.D.N.Y. 2003); *United States v. Hashmi*, No. 06 Cr. 442, 2008 WL 216936, *9 (S.D.N.Y. Jan. 16, 2008). This Court cannot rely on such cases because they simply do not address the constitutionality under the Sixth Amendment.

The Attorney General incorrectly relies upon *Sattar*, which only held that attorney Lynne Stewart could not evade prosecution for violating the affirmations by subsequently asserting that the affirmations were unconstitutional. 272 F. Supp. 2d at 371. As a result, the *Sattar* court never discussed the Sixth Amendment implications of the affirmation. *Id.* at 371-372. The court instead noted that "Stewart had avenues of redress within the legal system through which she could challenge the SAMs or the Government's authority to obtain the . . . affirmation," and then cited *Reid* as an example. *Id.* at 372. *Reid* has stated that regardless of the merits in indicting Stewart, "its chilling effect on those courageous attorneys who represent society's most despised outcasts cannot be gainsaid." 214 F. Supp. 2d at 95. The attorney affirmation provision is akin to Ms. Butayan signing a loyalty oath to the government, and this in turn discourages future attorneys from representing easily vilified defendants.

2. The complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice to the defendant.

The Sixth Amendment and Supreme Court jurisprudence establishes that any person accused of a crime has a right to counsel through the investigative and preparatory phases. *Maine v. Moulton*, 474 U.S. 159, 170 (1985). In situations of actual or constructive denial of the assistance of counsel, a Sixth Amendment violation is immediately presumed. *Strickland*, 466 U.S. at 683. "The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *United States v. Cronin*, 466 U.S. 648, 659 n. 25 (1984). In *United State v.*

Geders, the Court found that preventing an attorney from consulting with his client even during a seventeen-hour overnight recess violated the Sixth Amendment. 425 U.S. 80, 91 (1976). In light of all the Court's precedents, completely denying Ms. Butayan's access to her client triggers this presumption of a Sixth Amendment violation.

The affirmation provision jeopardizes the right to have counsel present in all critical stages when attorneys face an impossible choice. Ms. Butayan must either sign the affirmations and face potential criminal prosecution for a violation, or refuse to sign the affirmations and completely be denied access to her client. According to the *Sattar* court, an attorney should challenge the constitutionality of the attorney affirmation when initially presented to her, or she will lose the right to make such a challenge. *Sattar*, 272 F. Supp. 2d at 371. Yet in this case, refusal to sign the affirmations immediately results in a restriction of an attorney's access to her client. As the lower court stated, "it is reasonable for Ms. Butayan to refuse to sign the affirmations . . . it is unreasonable, however, for . . . Han to be denied access to counsel as a result." (R. 13.) The denial of access after a reasonable refusal to sign the affirmation violates Mr. Han's right to have Ms. Butayan present at every stage of a criminal proceeding.

Further, as this Court held in *United States v. Gonzalez-Lopez*, erroneous deprivation of a defendant's attorney of choice is automatically presumed to violate the Sixth Amendment. *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). The DOJ may not erroneously require Mr. Han to choose another attorney simply because Ms. Butayan reasonably refused to sign the affirmation. Since no legitimate reason justifies depriving Mr. Han of retaining Ms. Butayan as his first choice of counsel,⁴ the attorney

⁴ This Court has held that certain reasons to deprive counsel of choice may be legitimate. See *Caplin & Drysdale v. United States*, 491 U.S. 617, 624 (1989) (right to counsel of choice does not extend to appointed counsel); *Wheat v. United States*, 486 U.S. 153, 159-160 (1988) (defendant may not insist on representation by a person who is

affirmation provision disregards his Sixth Amendment right to counsel of choice. *Gonzalez-Lopez*, 584 U.S. at 151-152.

3. The attorney affirmation provision undermines the attorney's strict responsibilities mandated by the Model Rules of Professional Conduct.

Ms. Butayan is an officer of the court subject to the State of Apalsa's equivalent of the ABA Model Rules of Professional Conduct. (R. 13.) Model Rule 1.2(d) specifies that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." Model Rules of Prof'l Conduct R. 1.2(d) (2007). Despite this strict prohibition on attorneys facilitating criminal conduct, the DOJ insists on further monitoring and restricting attorneys, which undermines the Model Rules and its effective sanctions. A blanket rule restricting attorney behavior ignores the distinct facts of each case and creates an assumption that attorneys are guilty by association with their clients.⁵

In *Geders*, the prosecution argued that the defense attorney should be barred from communicating with his client due to concern that the attorney would manipulate his client's testimony through coaching. *Geders*, 425 U.S. at 82. The *Geders* Court rejected the prosecution's argument and held that, as an officer of the court, a defense attorney is able to distinguish between properly doing her job and violating any rules of the court. *Id.* at 91. The Model Rules also require attorneys to make ethical decisions concerning the representation of their clients while maintaining their professional responsibilities. Model Rules of Prof'l Conduct R. 8.4 cmt. 1 (2007). This requirement for Ms. Butayan to sign an additional declaration of loyalty blatantly ignores her preexisting duties.

not a member of the bar); *Morris v. Slappy* 461 U.S. 1, 11-12 (1983) (court may balance right of choice of counsel against calendar demands.). The record reflects no such similar legitimate reasons. (R. 5-6, 10-13.)

⁵ "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." Model Rules of Prof'l Conduct R. 1.2(b) (2007).

In the case at hand, Ms. Butayan is member of a bar mandating ethical responsibilities that restrict her from engaging in conduct involving fraud, deceit or misrepresentation, or conduct prejudicial to the administration of justice. Model Rules of Prof'l Conduct R. 8.4 (2007). She has taken an oath to the court to uphold the standards required of her, and the Attorney General "has neither asserted a belief nor made any showing that Ms. Butayan is likely to violate her professional responsibilities in representing Mr. Han." (R. 13.) This lack of evidence undermines the government's claim that the application of restrictions on Ms. Butayan is necessary.

CONCLUSION

For the foregoing reasons, Mr. Harold Han respectfully requests that this Court (1) REVERSE the Fourteenth Circuit's decision on the monitoring imposed upon Mr. Han's communications with his attorney; and (2) AFFIRM the Fourteenth Circuit's decision on the affirmation and dissemination provisions.

Dated: October 8, 2008

Respectfully Submitted,

Team #03PCA
Counsel for Petitioner

APPENDIX A

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

- (a) Upon direction of the Attorney General, the Director, Bureau of Prisons, may authorize the Warden to implement special administrative measures that are reasonably necessary to protect persons against the risk of death or serious bodily injury. These procedures may be implemented upon written notification to the Director, Bureau of Prisons, by the Attorney General or, at the Attorney General's direction, by the head of a federal law enforcement agency, or the head of a member agency of the United States intelligence community, that there is a substantial risk that a prisoner's communications or contacts with persons 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. These special administrative measures ordinarily may include housing the inmate in administrative detention and/or limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to protect persons against the risk of acts of violence or terrorism. The authority of the Director under this paragraph may not be delegated below the level of Acting Director.
- (b) Designated staff shall provide to the affected inmate, as soon as practicable, written notification of the restrictions imposed and the basis for these restrictions. The notice's statement as to the basis may be limited in the interest of prison security or safety or to protect against acts of violence or terrorism. The inmate shall sign for and receive a copy of the notification.
- (c) Initial placement of an inmate in administrative detention and/or any limitation of the inmate's privileges in accordance with paragraph (a) of this section may be imposed for up to 120 days or, with the approval of the Attorney General, a longer period of time not to exceed one year. Special restrictions imposed in accordance with paragraph (a) of this section may be extended thereafter by the Director, Bureau of Prisons, in increments not to exceed one year, upon receipt by the Director of an additional written notification from the Attorney General, or, at the Attorney General's direction, from the head of a federal law enforcement agency or the head of a member agency of the United States intelligence community, that there continues to be a substantial risk that the inmate's communications or contacts with other persons 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. The authority of the Director under this paragraph may not be delegated below the level of Acting Director.
- (d) 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.

- (1) The certification by the Attorney General under this paragraph (d) shall be in addition to any findings or determinations relating to the need for the imposition of other special administrative measures as provided in paragraph (a) of this section, but may be incorporated into the same document.
 - (2) Except in the case of prior court authorization, the Director, Bureau of Prisons, shall provide written notice to the inmate and to the attorneys involved, prior to the initiation of any monitoring or review under this paragraph (d). The notice shall explain:
 - (i) That, notwithstanding the provisions of part 540 of this chapter or other rules, 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;
 - (ii) 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.
 - (3) The Director, Bureau of Prisons, with the approval of the Assistant Attorney General for the Criminal Division, shall employ appropriate procedures to ensure that all attorney-client communications are reviewed for privilege claims and that any properly privileged materials (including, but not limited to, recordings of privileged communications) are not retained during the course of the monitoring. To protect the attorney-client privilege and to ensure that the investigation is not compromised by exposure to privileged material relating to the investigation or to defense strategy, a privilege team shall be designated, consisting of individuals not involved in the underlying investigation. The monitoring shall be conducted pursuant to procedures designed to minimize the intrusion into privileged material or conversations. 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.
- (e) The affected inmate may seek review of any special restrictions imposed in accordance with paragraph (a) of this section through the Administrative Remedy Program, 28 CFR part 542.
- (f) Other appropriate officials of the Department of Justice having custody of persons for whom special administrative measures are required may exercise the same authorities under this section as the Director of the Bureau of Prisons and the Warden.

APPENDIX B

ABA Model Rules of Professional Conduct (2007)

Rule 1.2(b)

A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities

Rule 1.2(d)

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Rule 1.6. Confidentiality of Information

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) to prevent reasonably certain death or substantial bodily harm;
 - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
 - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
 - (4) to secure legal advice about the lawyer's compliance with these Rules;
 - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
 - (6) to comply with other law or a court order.

Rule 3.3. Candor to the Tribunal.

- (a) A lawyer shall not knowingly:
- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse

Rule 5.3. Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

- (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.