COMMENTS OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ON THE ATTORNEY GENERAL’S ORDER REGARDING MONITORING OF CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATIONS

INTRODUCTION

The Attorney General has crafted a regulation that violates rights guaranteed under the First, Fourth, Fifth, and Sixth Amendments of the Constitution. The Attorney General’s Order infringes on the attorney-client privilege and restricts the maintenance of an appropriate work-product privilege. Implementing this regulation would circumvent Congressional authority by having an executive body legislating the scope, method, and safeguards for monitoring private attorney-client conversations. Further, this executive-drafted legislation fails to use traditional standards of “probable cause,” and fails to include any judicial oversight. Finally, the regulation is unnecessary, serves no sound investigative function, and seriously undermines the ethical rules that define the obligations of attorneys to courts, the profession, clients, and justice.

People in prison do not lose their fundamental right to a full and fair trial with the effective assistance of counsel. Yet, the Attorney General is attempting to deprive individuals of this basic right without any showing of a need for implementing this Order. He has made no showing that attorneys have been used to relay terrorism messages. Further, nothing has been presented to demonstrate that existing mechanisms such as the crime-fraud exception and 18 U.S.C. § 2518 cannot adequately handle any concerns that might arise. Finally, there is no reason given for the elimination of judicial review. The Attorney General’s Order also fails to include any provision for the lawyer and client to receive disclosure of what was intercepted as a result of this Order, thus seriously undermining the ability to seek redress in the courts for the violations that accrue as a result of the government monitoring attorney-client conversations. In essence, the Attorney General’s Order is a deprivation of fundamental rights with no showing of a need for this deprivation, no showing that existing procedures will not suffice to meet any possible concerns, and no recognition of existing safeguards that exist to protect individuals’ rights.
This Order affects the rights of U.S. citizens who may be held in a prison. Its breadth includes not only those convicted of crimes, but also those who have yet to be charged with any criminal activity. Additionally, those being held as material witnesses can be deprived of rights as a result of this Order. Although those who are not U.S. citizens may not enjoy the full benefit of constitutional rights, and some constitutional provisions may be limited to those who have been charged with a crime, the Order does not distinguish between citizens and non-citizens, and also does not distinguish between detainees, material witnesses, individuals charged with crimes, and individuals who have been convicted. This Order, however, affects U.S. citizens who have been charged with a crime, and as such all constitutional rights need to be considered in this comment.

**ATTORNEY GENERAL’S ORDER**

The Order permits the Attorney General to monitor communications between an attorney and a client when the Attorney General has “reasonable suspicion” to “believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of violence or terrorism.” The order recognizes that these communications would “traditionally be covered by the attorney-client privilege.” 28 C.F.R. § 501.3(d).

The Attorney General’s Order includes accommodations that are alleged to be aimed at protecting the attorney-client privilege. In this regard, it provides that absent court authorization, written notice of monitoring is required “to the inmate and to the attorneys involved.” The Order also instructs the “Director, Bureau of Prisons, with the approval of the Assistant Attorney General for the Criminal Division” to designate a “privilege team.” It notes as a rationale in having accommodations for the attorney-client privilege that it is designed to “ensure that the investigation is not compromised by exposure to privileged material relating to the investigation or to defense strategy.”

I. **The Attorney General’s Order Seriously Undermines the Rights Guaranteed under the First Amendment of the U.S. Constitution**

The First Amendment guarantees that the federal government “shall make no law ...abridging the freedom of speech... and to petition the Government for a redress of grievances.” *U.S. Const. Amend. I.* It is well established that this amendment includes a reasonable right of access to the courts. *See Bounds v. Smith,* 430 U.S. 817, 821 (1977). Inherent in the right of access to the courts is the right to seek and obtain the
effective assistance of counsel.

A. The Attorney General’s Order Violates Inmates’ Rights to Petition the Government

Inmates in a prison facility do not lose these constitutional rights as a result of their incarceration. In *Procunier v. Martinez*, 416 U.S. 396 (1974), the Court held that, “[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.” *Id.* at 405-06. Unless there is a showing that a regulation is necessary to protect “prison security” there is no justification for disregarding the constitutional rights of inmates. *See Thornburgh v. Abbott*, 490 U.S. 401 (1989). Even when security concerns are at stake, a restriction that is an “exaggerated response” is inappropriate. *See Turner v. Safley*, 482 U.S. 78, 98 (1987)(marriage restriction was not reasonably related to penological interests).

“One who is behind prison walls does not automatically surrender their rights.” *McDonough v. Director of Patuxent*, 429 F.2d 1189, 1192 (4th Cir. 1970). Especially important is a right of access to the courts. “An inmate’s right of unfettered access to the courts is as fundamental a right as any other he may hold.” *Adams v. Carlson*, 488 F.2d 619, 631 (7th Cir. 1973). Inmates access to the courts needs to be “adequate, effective, and meaningful.” *Bounds*, 430 U.S. at 822. The right of access to the courts includes “the right to seek and obtain the assistance of competent counsel so that the assertion of legal claims may be fully effective.” *McDonough*, 429 F.2d at 1192. As such, restricting access to counsel is clearly improper. *See Adams v. Carlson, supra.*

Essential to the right of access to the courts through counsel is the right while incarcerated to communicate confidentially with counsel. Courts recognize “that the effective protection of access to counsel requires that the traditional privacy of the lawyer-client relationship be implemented in the prison context.” *Id.* at 631. In *Bach v. Illinois*, 504 F.2d 1100 (7th Cir. 1974), the court stated,

> An inmate’s need for confidentiality in his communications with attorneys through whom he is attempting to redress his grievances is particularly important. We think that contact with an attorney and the opportunity to communicate privately is a vital ingredient to the effective assistance of counsel and access to the courts.

*Id.* at 1102; *see also Rhem v. McGrath*, 326 F. Supp. 681 (S.D.N.Y. 1971) (upholding the right to private consultation with one’s attorney); *Smith v. Robbins*, 454 F.2d 696 (1st Cir. 1972) (protecting mail
communications between an attorney and client).

By monitoring communications between an attorney and client, the government is denying the inmate from having confidential communication with his or her attorney. The client may be hesitant to discuss pertinent legal matters if he or she believes that the conversation is being listened to by the government. The chilling effect of monitoring can infringe on the rights of the client that desires to hire an attorney, the client being represented by counsel pre-trial and during trial, and the client represented post-trial. Absent full information, the attorney cannot properly investigate a client’s case and cannot properly prepare for trial. In many of these instances it is necessary to obtain information quickly, as in preparing a case within the strict time limits accompanying the appellate process. A client’s reluctance to speak, knowing that the government is listening to the conversation, will seriously undermine the ability of the attorney to properly represent the client. A lawyer in the dark about the facts of a case is not serving the client’s interests or the system of justice.

B. The Attorney General’s Order is not Appropriately Tailored to Meet Penological Interests

In *Turner v. Safley*, *supra*, the Court stated that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” Courts have examined penal institution regulations with this test in mind. *See, e.g., Muhammad v. Pitcher*, 35 F.3d 1081 (6th Cir. 1994). Thus, to permit the Attorney General’s Order requires a showing of a legitimate penal interest and that the regulation is appropriately tailored to address that interest.

The Attorney General could not entertain this Order outside a prison facility. Monitoring conversations of attorneys and clients would require a showing of crime-fraud, a finding of probable cause, a neutral and detached magistrate reviewing the situation, and in all but the exceptional case the monitoring would be prohibited. Since the monitoring suggested by this Attorney General’s Order cannot occur outside a prison facility, to occur within the facility requires a showing by the government of a special prison interest.

The Attorney General’s Order, however, offers no penological rationale
for monitoring attorney-client conversations. Although national security concerns are concerns of all of society, they have no special status that relates to security within a prison facility.

Additionally the Attorney General’s Order is not appropriately tailored to address specific needs of the institution. The Order adopts a standard of “reasonable suspicion” as the determining factor of whether to monitor a conversation. It does not provide for any judicial approval, judicial oversight, or showing that the monitoring would be limited only to matters within the crime-fraud exception. This Order is clearly a violation of the First Amendment in that it has enormous breadth in both its scope and eventual application.

C. Government’s Use of a “Privilege Team” Will Not Negate the First Amendment Violations

The government offers as amelioration for its conduct, the use of a “privilege team” to serve as a “firewall” in making certain that government prosecutors are not exposed to information that might be beneficial to the government’s case. There are, however, basic flaws in the Order’s suggestion of using “taint” teams. These “privilege teams” do not offer any assurance that the government will in fact be excluded from receiving confidential information of the defense. Further, the “taint team” fails to address the fact that monitoring will still have a chilling effect on the attorney-client conversation.

Perhaps the most obvious flaw in the government proposal is that the “privilege” or “taint team” is not a neutral entity. The team envisioned by this Order is organized by the government, its scope of review is set by the government, and its members are government personnel. There is no neutral magistrate overseeing the process.

The government alleges in the commentary accompanying the Attorney General’s Order that “[p]rocedures such as this have been approved in matters such as searches of law offices.” The government cites to the case of National City Trading Corp. v. United States, 635 F.2d 1020 (2d Cir. 1980), as its authority. What is excluded, however, is the fact that in National City Trading Corp., there was a search warrant, the warrant was premised on probable cause, and a neutral and detached magistrate was there to oversee the process.

The Attorney General’s Order also references the case of United States
v. Noreiga, 764 F. Supp. 1480 (S.D. Fla. 1991). Here again, there is a glaring omission. In Noreiga the court specifically noted that there was “no intentional intrusion.” Id. 1489. Unlike the Noreiga case, this regulation would provide a clear intentional intrusion into attorney-client conversations.

What is not mentioned in the government’s proposal is that law office searches may include a judicial decision to turn the products of the search over to a “taint team.” See United States v. Skeddle, 989 F. Supp. 890 (N.D. Ohio 1997). Additionally, there are findings of probable cause (United States v. Abbell, 963 F. Supp. 1178 (S.D. Fla. 1997)), and there is rigid adherence to the particularity requirement when a law office is the subject of the search. See, e.g., Klitzman, Klitzman & Gallagher, 744 F.2d 955 (3d Cir. 1984); People v. Hearty, 644 P.2d 302, 313 (Colo. 1982). Most noticeable is that in law office searches there may be a court appointment of a special master, as opposed to it being a prosecutorial appointment. Abbell, 963 F. Supp. at 1184. For example, in the Abbell case, the court not only appointed a special master, but had the special master conduct “a document-by-document review of the seized materials and prepare[] recommended determinations as to the responsiveness of the materials and whether any privilege applied.”

Overseeing government conduct is also a crucial difference between a law office search and the Attorney General’s Order. For example, in Klitzman the court found the warrant overbroad and determined that there was a violation of the attorney-client privilege. In contrast, the government’s proposal does not offer this opportunity for review in that the government has complete control of the entire monitoring process.

The government is hardly in a position to equate the procedures used by the courts with law office searches with those suggested in the Attorney General’s Order. The proposal offers no safeguards, no review, and no judicial monitoring. As such, the government’s suggestion of using a “taint team,” as outlined in the Attorney General’s Order, does not remedy any of the First Amendment violations committed as a result of their monitoring attorney-client communications in prisons.

II. The Attorney General’s Order Seriously Undermines the Rights Guaranteed under the Fourth Amendment of the U.S. Constitution

The Fourth Amendment guarantees “the right of the people to be secure
in their persons, houses, papers, and effects, against unreasonable searches and seizures.” *U.S. Const. Amend. IV*. Government monitoring of attorney-client conversations clearly infringes on these Fourth Amendment rights. Additionally, the government use of a “reasonable suspicion” standard, as opposed to a standard of “probable cause,” is clearly improper. This is especially true with respect to this Attorney General’s Order in that it fails to provide for an “oath or affirmation” and approval by a “neutral and detached” magistrate prior to intruding on individuals’ privacy rights.

### A. Government Monitoring of Attorney-Client Conversations Violates the Fourth Amendment

It is a longstanding principle that the “Fourth Amendment protects people, not places.” *Katz v. United States*, 389 U.S. 347, 351 (1967). The protection afforded under the Fourth Amendment extends to private conversations and communications. Even when the conversation occurs in a public telephone booth (*Katz*), the government cannot violate an individual’s right to privacy. Use of monitoring devices can be particularly invasive and a violation of Fourth Amendment rights. *See Silverman v. United States*, 365 U.S. 505 (1961) (reversing conviction where the government attached an electronic device to a heating duct of a house). In determining whether a privacy interest under the Fourth Amendment exists, one looks at a person’s subjective expectation of privacy and whether this expectation is one that society is prepared to recognize as reasonable. *See Smith v. Maryland*, 442 U.S. 735 (1979). When a Fourth Amendment right of privacy is demonstrated, the state may not impede on that right absent probable cause and a warrant issued by a neutral and detached magistrate. *See U.S. Const. Amend. IV*. Although exceptions such as waiver and consent have served as limitations to the mandates of the Fourth Amendment, the exceptions are not applicable to the intrusion that would occur as a result of implementing the Attorney General’s Order.

One does not lose all constitutional rights when in prison. As stated by Justice O’Connor, who was writing for the majority in *Turner v. Safley*, 482 U.S. 78 (1987), “prison walls do not form a barrier separating prison inmates from the protections of the Constitution.” While inmates do not retain the full panoply of Constitutional rights while they are incarcerated, the government does not have unlimited rights to infringe on prisoner’s Fourth Amendment rights. *See Hudson v. Palmer*, 468 U.S. 517 (1984) (finding that there is no expectation of privacy for prisoners
from searches of their prison cells).

The Attorney General’s Order allows the government to intrude into an area that a person subjectively would expect to be private and the expectation is one that society recognizes. There can be no question that one can reasonably expect that communications with one’s attorney would be private. The question then becomes whether this privacy interest is maintained in the context of a prison. The answer is a clear “yes.” Although the Court may not recognize all privacy rights in prison, those with a special relationship may differ. As the Court noted in dicta in *Lanza v. New York*, 370 U.S. 139 (1962), “[i]t may be assumed that even in a jail or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection.” *Id.* at 143-44 (emphasis added). As such, it is clear that the Attorney General’s Order violates inmates’ rights under the Fourth Amendment.

B. “Reasonable Suspicion” Is an Inappropriate Standard for Monitoring Attorney-Client Conversations

In addition to violating the Fourth Amendment, the government does not provide constitutional authorization for allowing this clear violation. The government disregards a traditional standard used in protecting privacy interests, that being “probable cause.” The Attorney General’s Order provides that attorney-client conversations can be monitored based solely on the government’s determination being based on “reasonable suspicion.” The regulation does not provide any statement that explains or rationalizes the choice of a “reasonable suspicion” standard as opposed to using “probable cause.”

The Fourth Amendment to the U.S. Constitution requires “probable cause, supported by Oath or affirmation” for reduction of privacy interests. The necessity of finding “probable cause” to infringe on an individual’s privacy rights is firmly embedded in judicial precedent. As held in *Brinegar v. United States*, 338 U.S. 160 (1949), “[t]hese long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community’s protection.” *Id.* at 176.

Despite the respect given to the probable cause standard, the Attorney
General has disregarded this constitutional premise to formulate his own standard of “reasonable suspicion” as the criteria to disregard the attorney-client privilege and confidentiality responsibilities of attorneys to their clients. Although a standard of “reasonable suspicion” is grounded in Supreme Court precedent, it is used only in the extenuating circumstances such as those that warrant protection of police officers. For example, reasonable suspicion, as enunciated in the case of Terry v. Ohio, 392 U.S. 1 (1968), is left for situations when, “necessarily swift action predicated upon the on-the-spot observation of the officer on the beat,” warrants the use of a lesser standard. Id. at 19.

Although national security is clearly a concern of the highest order, the use of a “reasonable suspicion” standard, as opposed to using “probable cause,” in no way diminishes addressing this concern. The Attorney General’s Order has the monitoring occurring after notification to the client and attorney. As such, this is not an “on-the-spot” action, and is in no way comparable to a street stop and frisk. Since immediacy is not the focus of the Attorney General, there is no reason to use a lesser standard of “reasonable suspicion” as the basis for invading a basic right to privacy.

The use of “reasonable suspicion” in the regulation cannot be justified by the Court’s recent decision in United States v. Knights, __ U.S. __ (Dec. 10, 2001). Unlike Knights, the victim of the government’s interception as a result of implementing the Attorney General’s Order would not be signing a consent agreement. Unlike Knights, some of the individuals who would be subject to the Attorney General’s Order would be individuals who had not been convicted of a crime and lost some of their rights. Even if they had been convicted of a crime, the privacy interest that is the subject of the Knights decision cannot be compared to the privacy interest afforded to attorney-client communications. More importantly, the privacy interest in the Knights case is not an interest that has been directly considered by Congress, set forth in specific legislation, and one that Congress has determined should be governed by a “probable cause” standard.

As presently exists, legislative procedures for interception of wire, oral, or electronic communications require a showing of probable cause. See 18 U.S.C. § 2518. The level of scrutiny for government interceptions of wire, oral, or electronic communications requires “a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued.” The particularity of
description required here is specified by statute. It includes “details of the offense,” “nature and location of the facilities from which or the place where the communication is to be intercepted,” “description of type of communications sought to be intercepted,” and “identity of individuals, if known.”

Congress has made it clear that interceptions that invade upon privacy interests should be subject to careful scrutiny prior to being allowed. See Title III of the Omnibus Crime Control and Safe Street Act of 1968 (18 U.S.C. §§ 2510-2521). Although some latitude is given in situations of emergency, (See 18 U.S.C. § 2518 (7)), the standards found in the statute are far more restrictive than those proposed by the Attorney General.

“The statute contains no specific exception for wiretapping at a prison.” United States v. Paul, 614 F.2d 115, 116 n.2 (6th Cir. 1980). Courts, however, have occasionally wrestled with the applicability of this statute to prison facilities. The cases that have bypassed this statute are not similar to what is being proposed in the Attorney General’s Order. This is not a situation where the interception includes consent by the prisoner, nor is this a situation of routine monitoring by a prison for prison security reasons. See, e.g., United States v. Paul, supra (permitting monitoring in prisons of telephone, despite Title III, as a prison security measure); United States v. Green, 842 F. Supp. 68 (W.D. N.Y. 1994) (finding consent to taping of inmates telephone calls). “Consent under Title III is not to be cavalierly implied. Title III expresses a strong purpose to protect individual privacy by strictly limiting the occasions on which interception may lawfully take place.” Watkins v. L.M. Berry & Co., 704 F.2d 577 (11th Cir. 1983).

What is involved here is targeted monitoring of attorney-client conversations, as determined by the Attorney General, a situation that differs substantially from the routine monitoring of telephone communications for prison security purposes. Monitoring that is not routine, and performed for reasons other than prison security purposes, will be a violation of the provisions of Title III. See Bunnell v. Superior Court, 21 Cal. App.4th 1811, 26 Cal. Rptr.2d 819 (3d Dist. 1994) (stating “[w]e are aware of no case authority endorsing the People’s position that a law enforcement purpose in and of itself suffices to meet the exception.”); Campiti v. Walonis, 611 F.2d 387, 392 (1st Cir. 1979) (finding that 18 U.S.C. §2510(5)(a)(i)(ii) does “not provide the basis for a ‘prison exemption’ from the Act.”). More importantly, conversations between an attorney and client, even in a prison, are afforded protection.
See United States v. Van Poyck, 77 F.3d 285, 291 n.9 (9th Cir. 1996) (finding that prisoners have an expectation of privacy when talking with their attorneys on the telephone).

Despite the fact that Congress has spoken clearly in passing specific legislation regarding interceptions of wire, oral, or electronic communications, the Attorney General’s proposal disregards existing legislation and attempts to use rule-making authority to reduce a required standard of “probable cause” to a level of “reasonable suspicion.” The use of “reasonable suspicion,” as opposed to “probable cause,” circumvents legislative authority and is unwarranted and clearly improper.

There is no basis for saying that national security warrants disregard for the established legislative standard set forth in 18 U.S.C. § 2518. Congress amended provisions applicable to government interceptions in the USA PATRIOT Act, but in doing so, the legislature did not reduce the probable cause standard required for these interceptions. Congress recently added new predicates to include terrorism (18 U.S.C. § 2516), but did not give waivers to the Attorney General for those being held in prisons. As such, probable cause should continue to be the applicable standard for the interception of conversations, and absent authorization by a “neutral and detached” magistrate, government monitoring of attorney-client conversations should be considered a violation of the Fourth Amendment.

C. Lack of Judicial Oversight, Review and Participation Is Inappropriate When Constitutional Rights of Privacy Are Being Removed

As a further affront to constitutional values, this regulation allows the government the exclusive decision-making authority to conduct this monitoring without being subject to judicial approval, review, or oversight. The regulation does not offer any explanation for the fact that it fails to include judicial review and circumvents judicial participation in the entire process.

The Attorney General has self-constructed a process that eliminates the judiciary. The importance of having reviews using neutral judges, prior to Fourth Amendment intrusions by the government, is stressed in the
case of *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), where the Court stated:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

*Id.* at 449 (*citing Johnson v. United States*, 333 U.S. 10, 13-14 (1947)). Existing rules that pertain to interceptions of conversations also require an application in writing “upon oath or affirmation to a judge of competent jurisdiction.” 18 U.S.C. § 2518(1). Yet, despite the existing precedent and legislation regarding interceptions of conversations, the Attorney General’s Order totally eliminates the requirement of judicial review.

Threats to national security are not a basis for ignoring these constitutional mandates. In *United States v. United States District Court*, 407 U.S. 297 (1972), the Court examined the status of Fourth Amendment rights in the context of a national security issue. The Court stated:

These Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute.

*Id.* at 316-17. The Court also noted that “those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks.” *Id.* at 317. It is without doubt clear that the Attorney General’s Order not only violates the Fourth Amendment, but also provides no safeguards in remedying this violation.

### III. The Attorney General’s Order Seriously Undermines the Rights Guaranteed under the Fifth Amendment of the U.S. Constitution
The Fifth Amendment of the U.S. Constitution provides that no person shall be “deprived of life, liberty, or property, without due process of law.” “Such due process includes the rights of one accused of crime to have the effective and substantial aid of counsel.” *Coplon v. United States*, 191 F.2d 749, 757 (D.C. Cir. 1951).

Due process requires that individuals be provided with “fundamental fairness.” As a “free-standing” concept it includes an array of conduct that will not be tolerated by the Court. *See generally* Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court’s Search for Interpretive Guidelines*, 45 *St. Louis L. Rev.* 303 (2001) (discussing the pre-trial through sentencing cases that have applied the due process clause). Key fundamental rights are enforced through the due process clause, such as the duty of prosecutors to disclose exculpatory evidence (*Brady v. Maryland*, 373 U.S. 83 (1963)), and the rights of indigents to have access to experts for evaluating scientific evidence (*Ake v. Oklahoma*, 470 U.S. 68 (1985)).

The right to assistance of counsel is a central element of “fundamental fairness.” *See, e.g.*, *Powell v. Alabama*, 287 U.S. 45 (1932). The Attorney General’s Order is contrary to “fundamental fairness” in limiting individuals’ rights to confer with their counsel freely, in limiting the right to properly prepare the charges facing the client, and in denying individuals the ability to discuss the charges or allegations against them free of government surveillance.

Although the Attorney General’s Order speaks to considerations under the Sixth Amendment, the Fifth Amendment is not mentioned. This is particularly noteworthy in that the Fifth Amendment reaches a broader range of individuals. For example, rights under the Fifth Amendment apply to those who have not been charged and those who might be material witnesses. *See United States v. Kennedy*, 225 F.3d 1187, 1194 (10th Cir. 2000) (providing that “while a claim of a Sixth Amendment violation based on intrusion of attorney-client privilege is limited to government action which interferes with legal representation after the initiation of criminal proceedings, we acknowledge a defendant may claim his or her rights under the Due Process Clause have been violated by prosecutorial misconduct occurring prior to indictment.”); *In re Class Action Application for Habeas Corpus ex rel. All Material Witnesses in the Western District of Texas*, 612 F. Supp. 940 (W.D. Tex. 1985) (finding that material witnesses held under 18 U.S.C. §§ 3142, 3144
have a Fifth Amendment right to counsel).

One does not lose their rights under the Fifth Amendment when they are incarcerated. In Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974), the Court held that “[t]here is no iron curtain drawn between the Constitution and the prisons of this country.” Specifically with regard to rights of due process, the Court noted that “[p]risoners may also claim the protections of the Due Process Clause. They may not be deprived of life, liberty, or property without due process of law.” Id. at 556. Internal order and institutional security can serve as limitations on these rights. See Bell v. Wolfish, 441 U.S. 520 (1979).

As previously shown, the Attorney General’s Order fails to provide any institutional security concern as the motivation for the violation of a constitutional right. See supra at IB. With no penal rationale for the deprivation of substantive due process rights, there is no justification for allowing this Attorney General’s Order.

IV. The Attorney General’s Order Seriously Undermines the Rights Guaranteed under the Sixth Amendment of the U.S. Constitution

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.” Court precedent has emphasized the importance of this provision of the Sixth Amendment. See Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932). It is a fundamental right. Individuals require “the guiding hand of counsel at every step in the proceedings against him [or her].” Id. at 69. As stated in the case of Escobedo v. Illinois, 378 U.S. 478 (1964):

We have learned the companion lesson of history that no system of criminal justice can, or should survive if it comes to depend for its continued effectiveness on the citizens’ abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement then there is something very wrong with that system.

Id. at 490. There is nothing wrong with the system here, and there is no need to void constitutional provisions. In this same regard, there is no
need to accept a regulation that will have this result.

In *Maine v. Moulton*, 474 U.S. 159 (1985), the Court stated:

Once the right to counsel has attached and been asserted, the State must of course honor it. This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused’s choice to seek this assistance.

*Id.* at 170-71. This obligation extends to respecting the rights of the accused to converse with their attorney without government intrusion. It is particularly egregious when the government disregards the attorney-client privilege and the accused’s right to counsel by monitoring their conversations.

The Attorney General’s Order cites to *Weatherford v. Bursey*, 429 U.S. 545 (1977), in claiming that “the presence of a government informant during conversations between a defendant and his or her attorney, may, but need not, impair the defendant’s Sixth Amendment right to effective assistance of counsel.” Omitted from the commentary of the regulation is a caveat to this position that is noted in footnote four of this opinion. In this footnote, Justice White, writing for the majority, states that:

One threat to the effective assistance of counsel posed by government interception of attorney-client communications lies in the inhibition of free exchanges between defendant and counsel because of the fear of being overheard. However, a fear that some third party may turn out to be a government agent will inhibit attorney-client communication to a lesser degree than the fear that the government is monitoring those communications through electronic eavesdropping, ...

*Id.* at 554 n.4. *Weatherford v. Bursey* did not involve monitoring, but rather the case involved the presence of a co-defendant who was a government undercover agent, and participated in attorney meetings. In contrast, the Attorney General’s Order involves government monitoring of confidential attorney-client communications. Unlike *Weatherford v. Bursey*, the chilling effect results from the very existence of this Order.

The essence of the government’s claim, that there is no Sixth
Amendment violation accompanying the Attorney General’s Order, is premised on cases where the government did not directly interfere with the attorney-client relationship. See, e.g., Massiah v. United States, 377 U.S. 201 (1964). This differs, however, from cases where the government directly monitors attorney-client communications. The Attorney General omits the relevant cases that apply in this context.

Supreme Court precedent has been clear in holding that direct government interferences with the right to counsel violates the Sixth Amendment. See Geders v. United States, 425 U.S. 80 (1976) (finding it improper to deprive a defendant and attorney from consulting during 17 hour overnight trial recess); Herring v. New York, 422 U.S. 853 (1975) (finding that “there can be no justification for a statute that empowers a trial judge to deny absolutely the opportunity for any closing summation at all”); Brooks v. Tennessee, 406 U.S. 605 (1972) (“requiring the accused and his lawyer to make that choice without an opportunity to evaluate the actual worth of their evidence, the statute restricts the defense-particularly counsel-in planning its case”). In Brooks the Court rejected a state law “that restricted the right to counsel to decide ‘whether and when in the course of presenting his defense, the accused should take the stand.’” Herring, 422 U.S. at 857-58. In Herring the Court found a statute denied a defendant the “assistance of counsel that the Constitution guarantees.” Id. at 865. In Geders the Court stressed the impropriety of interfering with the defendant’s right to consult with counsel. Geders, 425 U.S. at 91.

Because the Attorney General’s Order directly interferes with the attorney-client relationship, directly chills the ability of counsel to meet with his or her client to discuss the legal matter, directly impedes the ability of counsel to obtain necessary information to properly represent his or her client, and directly keeps counsel and client from conversing about strategy, it violates the Sixth Amendment of the Constitution.

V. The Attorney General’s Order Circumvents Legislative and Judicial Functions

The Attorney General attempts through this regulation to bypass the legislature and judiciary and to provide through his rule-making authority a regulation that is diametrically opposed to existing law. This regulation exceeds his powers and cannot be sustained under emergency powers necessary for national security.
In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Court found the executive (President) “order directing the Secretary of Commerce to take possession of and operate most of the Nation’s steel mills” unconstitutional. The Court held: “[t]he Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times. It would be no good to recall the historical events, the fears of powers and the hopes for freedom that lay behind their choice.” In keeping with the importance of maintaining the roles of each branch of government, the Attorney General’s Order cannot be allowed.

The legislature has spoken clearly as to when it is appropriate to monitor conversations. See 18 U.S.C. § 2518. Congress, by statute, also set forth strict legislative mandates that need to be followed in wire, oral, or electronic monitoring. Even in emergency situations, these rules allow for action by the Attorney General, but require strict adherence to legislative provisions. 18 U.S.C. § 2518(7) provides that when there is an emergency situation that involves “(i) immediate danger of death or serious physical injury to any person, (ii) conspiratorial activities threatening the national security interest, or (iii) conspiratorial activities characteristic of organized crime,” the interception may be made without an order if there is probable cause and there is judicial approval of the interception “within forty-eight hours after the interception has occurred, or begins to occur.” If the order is denied by the reviewing judge, than “the contents of any wire, oral, or electronic communication intercepted shall be treated as having been obtained in violation of this chapter.” Despite the existence of these strict rules, the Attorney General is proposing an Order that will totally disregard these legislative mandates and judicial safeguards. While prosecutors have enormous discretion, they do not have unfettered discretion. See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). In light of the clear Congressional language, it is evident that the Attorney General has exceeded his discretionary powers in proposing a regulation that deprives individuals of numerous constitutional rights and violates separation of powers.

VI. The Attorney General’s Order Seriously Undermines the Attorney-Client and Work Product Privileges


When imprisoned, one does not lose the right to consult confidentiality with a lawyer. The attorney-client privilege must be adhered to, even in prison facilities. See *Gomez v. Vernon*, 255 F.3d 1118 (9th Cir. 2001). Monitoring of conversations between an attorney and client, even within a prison, as proposed in the Attorney General’s Order, is a clear violation of the attorney-client privilege.

The exceptions to the attorney-client privilege do not apply here. There is no showing of attorneys and clients consenting or waiving the privilege. There is, likewise, no showing of the conversation being part of the crime-fraud exception. “In 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.’” See *United States v. De La Jara*, 973 F.2d 746 (9th Cir. 1992) (quoting *United States v. Zolin*, 905 F.2d 1344, 1345 (9th Cir. 1990) (quoting *United States v. Hodge & Zweig*, 548 F.2d 1347, 1354 (9th Cir. 1977)). Even when the crime-fraud exception is alleged, judicial review is necessary to determine the appropriateness of applying the exception. See *United States v. Zolin*, 491 U.S. 554 (1989).

In the Attorney General’s Order we see the Attorney General providing himself with complete authority to monitor all attorney-client conversations under the circumstances that he deems appropriate. The monitoring is not for prison security purposes, nor is there a showing that the conversations will meet the crime-fraud exception. If he in fact has such evidence than the appropriate action would be for him to secure court permission prior to any monitoring.
VII. The Attorney General’s Order is Contrary to Ethical Standards for Lawyers

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

*ABA Model Rules of Professional Conduct*, Rule 1.6, Comment ¶4. “The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.” *ABA Model Rules of Professional Conduct*, Rule 1.6, Comment ¶2.

The Attorney General’s Order disregards the importance of these ethical principles. By monitoring conversations of attorney and client, the information will no longer be confidential, and clients will be discouraged from communicating “fully and frankly” with their attorneys. Discarding confidentiality between an attorney and client cannot be justified on the basis that a client may perpetrate a future criminal act. The rules clearly provide that “[a] lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal or fraudulent.” *ABA Model Rules of Professional Conduct*, Rule 1.2. Further, “[a] lawyer may not knowingly assist a client in criminal or fraudulent action.” *ABA Model Rules of Professional Conduct*, Rule 1.2, Comment ¶6.

Lawyers have a duty not to become co-conspirators with their clients. The importance of a lawyer not participating in criminal conduct has been stressed in opinions issued by the American Bar Association. For example, “[a] lawyer should not undertake representation without making further inquiry if the facts presented by a prospective client suggest that the representation might aid the client in perpetrating a fraud or otherwise committing a crime.” *Duty of Lawyer to Inquire into Fraudulent or Criminal Conduct and Disclose Past Activities of a Prospective Client*, ABA Informal Op. 1470 (1981). Additionally, lawyers have a duty to withdraw when their services will be used to...
perpetrate a crime or fraud. See Withdrawal When a Lawyer’s Services Will Otherwise Be Used to Perpetrate a Fraud, ABA Formal Op. 92-366 (1992).

VIII. The Attorney General’s Order Is Unnecessary and Serves No Sound Investigative Police Function

As noted above, under the Model Rules of Professional Conduct, “a lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal or fraudulent.” ABA Model Rules of Professional Conduct, Rule 1.2. As such, if a client is providing the attorney with information of proposed criminality, the attorney cannot participate in furthering that conduct. The attorney can, however, serve in a useful function to society and to the government when advised that a client is considering possible criminal conduct.

The attorney can educate the client of the ramifications of this criminality, thus assisting society and the government in having the client desist from the criminal activity. The attorney also has the ability to disclose this information in instances where individuals might be considering conduct that “is likely to result in imminent death or substantial bodily harm.” ABA Model Rules of Professional Conduct, Rule 1.6. Further if the client relays information of other individuals about to participate in criminal conduct, the client can be advised of the benefits of cooperating with the government and receiving a downward departure motion from the government. See U.S. Sentencing Guidelines, § 5K1.1. As such, there are clear benefits to the government and society in having a client divulge potential criminality to his or her attorney.

By monitoring the attorney-client conversation, and informing the client of this monitoring, it is highly unlikely that clients will speak freely to their attorneys. It is also unlikely that there will be any worthwhile information provided to the government as a result of clients being informed that their conversations are no longer protected from government intrusion. The net result of the Attorney General’s Order is, therefore, a decrease in possible valuable information that might serve national security interests.

Equally evident is that under the existing crime-fraud exception to the attorney-client privilege, the Attorney General could obtain information that might be outside the scope of proper attorney-client conduct. Here
again, with no information being relayed, there is no opportunity to invoke the crime-fraud exception to the attorney-client privilege in order to obtain this information.

Finally, there is no institutional benefit to the Attorney General’s Order. The proposal does not state as its mission that it is intended as a means to enhance prison security and there is no indication that it would serve that purpose. The net result of this regulation is a deprivation of constitutional rights with no corresponding benefit to the government or society.

December 20, 2001