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THE WAR ON TERRORISM AND ITS IMPACT ON THE ETHICAL REPRESENTATION OF CLIENTS

James M. McCauley

On September 11, 2001, al Quaida terrorists employed commercial jet airliners to launch massive attacks on the United States, successfully destroying the World Trade Center in New York City and inflicting substantial damage to the Pentagon in Washington, D.C. A third unsuccessful attack, believed to have been intended for Washington D.C., was stymied by the heroic efforts of the passengers of another jet airliner when it crashed in Somerset County, Pennsylvania, southeast of Pittsburgh. In total, over 3,000 people were killed on American soil on that single day.

In reaction to this atrocity, on September 18, 2001, Congress authorized President Bush, by Joint Resolution, "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks" or "harbored such organizations or persons." The President responded by committing armed forces to Afghanistan to subdue al Quiada and remove the governing Taliban regime supporting it. During these ongoing military operations, thousands of alleged enemy combatants have been captured and detained by U.S and allied forces.

Swift and sweeping changes in the law occurred, including passage of the USA Patriot Act,¹ permitting the federal government to have access to information about American citizens once protected as private, including: financial transactions, educational records, telephone conversations and grand jury findings. Previously protected in-

¹ "United and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001" (USA Patriot Act), Pub. Law No. 107-56, 115 Stat. 272 (Oct. 26, 2001). The Act includes provisions designed to detect, block and freeze funds and assets used to promote international terrorism efforts and advance the United States government's war on terrorism. Title III of the Act makes significant amendments to the International Money Laundering Abatement and Anti-Terrorism Financing Act of 2001, the Money Laundering Control Act of 1986 and the Bank Secrecy Act (BSA) of 1970. Some of these changes affect all financial institutions in the United States, broadly defined to include banks, brokers and dealers of securities, insurance companies, investment companies and firms, persons involved in real estate settlements and closings, currency exchangers and money transmitters and many other industry sectors not recognized as "traditional" financial institutions. Three key sections of the Act directed at financial institutions amend existing anti-money laundering laws: Sections 314, 326 and 352.

formation can now be requested of a “financial institution” by the government without judicial order or intervention. The Act, as well as Executive Orders issued shortly after 9/11² allow the government to block assets of known or suspected terrorists, make it unlawful for citizens to deal with suspected or known terrorists, and require “financial institutions”—broadly defined to include attorneys in particular circumstances—to run through lists published by the government and make suspicion transaction reports to the government if their clients are found on the list. Moreover, these regulations, issued by the Treasury Department and OFAC, make it unlawful for a “financial institution” to “tip off” customers or clients that a STR has been made. Civil and criminal sanctions have been imposed on legitimate businesses for failing to implement proper anti-money laundering procedures to detect and identify suspected and known terrorists who seek to funnel funds to support further terrorist activity through legal economic markets.

The Act and the complementary Bureau of Prisons Rule, applicable to all persons imprisoned in the federal penitentiary system and jails convicted or detained on charges with offenses against the United States, authorize the monitoring of communications between inmates and their attorneys whenever federal authorities have “reasonable suspicion” to believe that a particular inmate may use attorney-client communications to facilitate acts of terrorism.³ Generally, under the regulations, the inmate must be given prior notice of the government’s intent to monitor communications with his or her attorney. The regulations also create a sort of “firewall” by requiring that a “privilege team” of government agents, independent from the agents involved in the investigation or prosecution of the inmate, monitor the communications. The privilege team cannot disclose any intercepted information without court approval, however, court approval is not required for the interception as it would be, for example, for the government to engage in surreptitious wiretapping or interception of electronic communications.

² On September 23, 2001, the President, by Executive Order (E.O.) 13224, directed the Secretary of State and the Secretary of the Treasury and other federal agencies to “den[y] financing and financial services to terrorists and terrorist organizations.” 66 F.R. 49079, 49081 (Sept. 23, 2001). E.O. 13224 blocks all property and interests in property of the terrorist-related individuals and entities designated under the order. The primary purpose of these initiatives is to identify, block or freeze financial transactions of known or suspected terrorist-related individuals or organizations. Any transaction or dealing with the designated individuals or organizations or with the blocked property or assets is prohibited.

³ *Monitoring of Communications With Attorneys To Deter Acts of Terrorism*, 28 CFR Parts 500 and 501, [BOP-1116; AG Order No. 2529-2001], RIN 11200-AB08, issued by the United States Department of Justice on October 30, 2001.

I was asked to speak today about the government's war on terrorism and its effect on the rule of law and lawyer's relationships with their clients. I begin with some fundamental ethical principles with which I am sure many of you are familiar. As lawyers, we took an oath to uphold the Constitution and the rule of law. We also have an ethical duty to improve access to justice and improve the legal system. As lawyers we must represent our clients with undivided loyalty, and preserve their confidences and secrets by not revealing information to others that would be detrimental or embarrassing to our clients.⁴ Public prosecutors have a duty to see that justice is done, and not merely seek convictions.⁵ In recent times, it appears the government has taken actions which give good cause to examine these principles against the backdrop of the government's concerted effort to protect our people from future attacks like the one witnessed on 9/11.

One area of very serious concern is the Government's monitoring of attorney-client communications, invoked in the name of fighting terrorism. Lawyers owe a duty of loyalty to their clients, especially clients charged with criminal offenses. A fundamental duty under the rules of professional conduct is the lawyer's obligation to maintain the confidentiality of information obtained during the attorney-client rela-

⁴ See, Va. S. Ct. R., pt. 6, Sec. II, Rule 1.6.

⁵ ABA Prosecution Standard 3-1.2 (c); ABA Model Code of Prof. Resp. EC-13; Virginia Code of Prof. Resp. EC 8-10; *Macon v. Commonwealth*, 187 Va. 363, 46 S.E. 2d 396 (1948) ("It is just as much the duty of the attorney for the Commonwealth to protect his fellow citizens from unjustified prosecutions as it is to prosecute those who are guilty.").

Comment [1], Virginia Rule 3.8:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. *This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.* (emphasis added).

See also *Berger v. United States*, 295 U.S. 78 (1935):

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer. He may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

tionship. When lawyers represent clients and the government—or any other adversary—seeks to obtain access to communications or information that are privileged under the attorney-client privilege, or protected under the ethical duty of confidentiality under Rule 1.6, the lawyer must take affirmative steps to resist such action and preserve confidentiality.⁶

Criminal lawyers have often faced the problem that communications with their clients in custody have been subject to official monitoring, whether during a visit to the jail, or over the telephone. In general, when an attorney has a reasonable suspicion that his or her communications with a client in custody are being monitored by government officials, the attorney must take affirmative action to safeguard confidentiality.⁷ Specifically, the attorney must make inquiry of the nature and extent of the government's monitoring and obtain assurances that officials will cease and desist. If such assurances cannot be obtained, the attorney should seek appropriate relief in court.

The ABA, ACLU, National Association of Criminal Defense Lawyers, the American Bar Foundation, and prominent law school professors and public interest groups have filed amicus briefs criticizing the detention of U.S. citizens classified by the U.S. Government as "enemy combatants." For example, in the habeas corpus proceedings filed on behalf of Yasser Hamdi⁸ and Jose Padillo,⁹ the government takes the position that U.S. citizens, once classified as "enemy combatants," can be detained and held incommunicado, thus denied access to counsel. Both cases are pending before the United States Supreme Court, the Fourth Circuit having ruled that such unqualified detention

⁶ Va. Legal Ethics Op. 334 (1979) (A lawyer may produce privileged information to a grand jury if the lawyer challenges the subpoena and loses. If the lawyer believes that the materials are not privileged, the lawyer may reveal the information without challenging the subpoena); Va. Legal Ethics Op. 967 (1987) (A law firm may produce a former client's documents after unsuccessfully opposing production and being ordered by the court to produce the documents); Va. Legal Ethics Op. 1300 (1989) (A lawyer may not reveal client confidences unless disclosure is compelled by a court after the lawyer challenges the subpoena in court).

⁷ National Assoc. of Crim. Def. Lawyers Ethics Adv. Op. 02-01 (November 2002); *See also* Ariz. Bar Ethics Op. 87-19 (1987)(public defender, upon learning that his communications with a juvenile client in a detention center were being monitored must seek relief in court and obtain assurances that government officials will cease and desist monitoring attorney-client communications).

⁸ *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002); *rehearing denied* 337 F.3d 335 (4th Cir. 2003), *cert. granted* 124 S.Ct. 981 (Jan. 9, 2004).

⁹ *Padilla v. Bush*, 233 F.Supp.2d 564 (S.D. N.Y. 2002), *remanded* 352 F.3d 695 (2d Cir. 2003), *cert granted* 72 USLW 3488 (Feb. 20, 2004)

was lawful, the Second Circuit concluding otherwise.¹⁰ These persons, according to the government, may be held, without charges, until the hostilities have ceased. Given the nature of the Government's War on Terrorism, the military operations in Afghanistan and Iraq, and declarations from President Bush¹¹ and Secretary of Defense Rumsfeld, no one has any confidence that the war on terrorism will be over in the foreseeable future.

The ABA's efforts have focused thus far on obtaining due process rights for defendants being tried by military commissions or tribunals, who are being denied the right to counsel and the right to confront witnesses; the right of alien deportees to public hearings and access to counsel; and government monitoring of attorney-client communications in terrorism cases. The ABA has pursued these objectives thorough the filing of amicus briefs in pertinent cases and through lobbying Congress to enact legislation that would implement meaningful judicial review of "enemy combatant" detentions, the adoption of clear standards or criteria for the classification, the right to counsel and the means to challenge or rebut the government's allegation that an individual is an "enemy combatant."

In the case of Yasser Hamdi, recently decided by the Fourth Circuit, the court ruled that a U.S. citizen captured by U.S. or allied forces during an ongoing military combat operation in Afghanistan was not entitled to challenge his detention on a petition for a writ of habeas corpus. Hamdi did not dispute the government's factual assertion that he was captured in a zone of combat operations abroad. Thus, further judicial inquiry is unnecessary given the undisputed facts of his capture. Stated differently, because Hamdi did not contest the government's factual assertions that he was captured in a combat zone during military hostilities abroad and was found among the enemy forces; that coupled with the fact that Hamdi was classified as an enemy combatant, his petition failed as a matter of law. The Fourth Circuit opinion does not address what rights Hamdi would have to challenge the government's factual assertions had he denied them. The Court took specific pains to point out that its holding was limited to the facts before it—the undisputed capture of a U.S. citizen in a

¹⁰ *Padilla v. Bush*, n. 7, *supra*, 352 F.3d at 712 (detention unlawful absent explicit Congressional authorization).

¹¹ President George W. Bush, Jr. in his Address to the Joint Session of Congress and the Nation on September 20, 2001 stated:

Americans are asking: how will we fight and win this war? We will direct every resource at our command—every means of diplomacy, every means of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war—to the disruption and defeat of the global terror network.

foreign country during military combat with a hostile enemy and a determination by the executive branch of government that he was allied with the enemy forces.

The Fourth Circuit explicitly recognized the difference between Hamdi's case, and the case of Jose Padilla, now pending on appeal in the Second Circuit. Unlike Hamdi, Padilla was in Chicago when he was taken into custody on a material witness warrant issued by a federal grand jury in New York. The government had evidence that Padilla had been abroad in Egypt, Pakistan and Afghanistan, meeting with high ranking al Quaida officials and purportedly returned to the United States to plan terrorists attacks, including a plan to detonate a radioactive or "dirty bomb" somewhere in this country. Shortly after he was taken into custody, President Bush signed an order designating him as an "enemy combatant" and he was released to military authorities and has been detained in a military brig ever since. The government has kept Padilla in isolation and he has no access to anyone, including counsel. There were no criminal charges pending against Padilla. Padilla filed a petition for a writ of habeas corpus in New York challenging his detention. One of the issues before the district court was Padilla's right to consult with counsel to prepare and prosecute his habeas petition. The district court ordered the government to work out with Padilla's counsel the terms and conditions under which Padilla would be allowed to consult with counsel. The government not only failed to do so, but argued that Padilla's access to counsel would undermine the progress his interrogators had made over the course of Padilla's detention, and that giving Padilla access to counsel would pose a grave security risk. The court denied the government's motion to reconsider in March 2003 and the government has appealed this decision to the Second Circuit. Clearly, Padilla cannot have meaningful access to the courts if he cannot consult with a lawyer. While the government is not required under the Sixth Amendment to guarantee effective assistance of counsel, since a habeas proceeding is civil not criminal, the Fifth Amendment's due process clause accords citizens the opportunity to be heard, present evidence on their behalf and to challenge or rebut the government's assertions. A citizen cannot be denied the right to consult with a lawyer in order to exercise those due process rights. The government's evidence in this case consists of a Presidential Order, an affidavit setting out factual assertions that support the classification of Padilla as an "enemy combatant" and a declaration from an official that allowing Padilla access to counsel will undermine the interrogation techniques and strategy which the government has employed during Padilla's detention. The declaration used by the government is not based on first hand information and admits that some of the information is not reliable. The declaration does not allege what specific actions Padilla took nor does it allege specific involvement in planning any attack. Although Attorney

General Ashcroft told the media that Padilla's arrest thwarted a plot by al Qaeda terrorists to detonate a dirty bomb, the Deputy Secretary of State was quoted as saying there actually was no real plan *per se*, only some loose talk. Some of the government's more detailed factual assertions are under seal and cannot be challenged by Padilla or his counsel. The government's position in this case is remarkable: Padilla should not be allowed to present evidence or challenge the government's assertion that he is an "enemy combatant" once the government has produced "some evidence" supporting the classification. If the government's position is upheld by the Second Circuit, Padilla's petition offers no meaningful access to justice.

But the government's position in the case is so clearly wrong for additional reasons. The government's case is purportedly based on well settled principles established in the law of war, specifically that an enemy combatant captured on the battlefield can be detained by his capturer until the end of the hostilities. A prisoner of war or enemy combatant has no right to counsel or to legally challenge his detention unless charged with a war crime. The detention of enemy combatants is not punishment or retribution, but is simply justified to prevent the prisoner from reuniting with the enemy during the hostility. These rules are quite logical when applied properly. Clearly, courts and lawyers should not be involved in challenging or second guessing the capture of enemy combatants during hostilities with another country. But those are not the facts in Padilla's case.

Experts on the laws of war and international law have filed an amicus brief challenging the government's expansive use of the term "enemy combatant." According the experts, the term "enemy combatant" is a clearly defined term under international humanitarian law and the rules of war. To be an enemy combatant under international law or convention, one must generally be directly involved in armed combat on behalf of a nation state. While Padilla was allegedly associated with al Qaeda, al Qaeda—as well as any other international terrorist group, is not a nation state or foreign country. The U.S. can or may declare war on al Qaeda or terrorism, but that does not establish the necessary predicate, under international law, for treating terrorists as enemy combatants. Padilla was not captured during any active military operation abroad, nor was he armed at the time he was taken into custody. Neither case law nor historical precedent supports the government's classification of Padilla as an "enemy combatant." Civilians who aid and abet enemy forces may be tried and punished for treason or other crimes against the state, as has been the case during the civil war and World War II. Under those circumstances, however, they have a right to counsel, to prepare a defense, present evidence and require that the government prove its case beyond a reasonable doubt. If the government's position is correct, by logical extension, the

government could declare war on drugs or organized crime and detain indefinitely drug dealers and other criminals, keeping them incommunicado without charging them.

In a related matter, Zacharias Moussauoi, detained since 2001 on charges of conspiracy and involvement in al Qaeda hijackings and future terrorist attacks, cannot, over the government's opposition on national security grounds, depose and examine two witnesses, also detainees, to elicit testimony that would show that he was not directly involved in the planning of the 9/11 attack or that his involvement was minor. The federal district court has made a ruling that Moussauoi has made an adequate showing that such testimony would be relevant to his defense and possibly preclude the Government seeking the death penalty. However, the government refuses to comply with the court's orders allowing the depositions. As a sanction for the government's non-compliance, the court has ordered that the government is barred from seeking the death penalty in Moussauoi's case. The court's order has been appealed to the Fourth Circuit.

These post 9/11 laws and regulations represent significant departures from prior law. At issue is the extent to which the Government, in furtherance of its critical and important duty to protect our citizens from atrocious terrorist acts may nonetheless, in the interests of national security, deprive citizens, detainees and defendants charged with terrorist crimes of meaningful access to counsel, witnesses, and due process. On September 16, 2002, a special appeals court created under the Foreign Surveillance Act of 1978 met secretly to hear the Justice Department argue that it should be given even more latitude to obtain information on suspected terrorists. During this hearing only attorneys from the Department of Justice were heard—no one else was allowed to be present to challenge the Attorney General, not even members of the Senate Judiciary and Intelligence Committees who asked to attend.

History has revealed that during times of national crisis and war, civil liberties have taken second chair to national security: the suspension of habeas proceedings during the Civil War, the internment of Japanese, German, and Italian Americans during WWII, and the domestic surveillance and harassment of peace demonstrators and civil rights leaders such as the late Dr. Martin Luther King. If the government is allowed to permanently destroy the attorney-client relationship and the rule of law, and to deny citizens due process and access to counsel, all in the interest of fighting terrorism and national security, then the terrorists have won and we have lost. As Senator Russell Feingold stated: "Preserving our freedom is the reason we are

engaged in this new war on terrorism. We will have lost that war without firing a shot if we sacrifice the liberties of the American people.”¹²

¹² Senator Russell Feingold, *On Opposing the U.S.A. Patriot Act*, ARCHIPELAGO, Vol. 6, No. 2 (Summer 2002).