DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Parts 500 and 501

[BOP–1116; AG Order No. 2529–2001]

RIN 1120–AB08

National Security; Prevention of Acts of Violence and Terrorism

AGENCY: Bureau of Prisons, Department of Justice.

ACTION: Interim rule with request for comment.

SUMMARY: The current regulations of the Bureau of Prisons on institutional management authorize the Bureau to impose special administrative measures with respect to specified inmates, based on information provided by senior intelligence or law enforcement officials, where it has been determined to be necessary to prevent the dissemination either of classified information that could endanger the national security or of other information that could lead to acts of violence and terrorism. This rule extends the period of time for which such special administrative measures may be imposed from 120 days to up to one year, and modifies the standards for approving extensions of such special administrative measures. In addition, in those cases where the Attorney General has certified that reasonable suspicion exists to believe that an inmate may use communications with attorneys or their agents to further or facilitate acts of violence or terrorism, this rule amends the existing regulations to provide that the Bureau is authorized to monitor mail or communications with attorneys in order to deter such acts, subject to specific procedural safeguards, to the extent permitted under the Constitution and laws of the United States. Finally, this rule provides that the head of each component of the Department of Justice that has custody of persons for whom special administrative measures are determined to be necessary may exercise the same authority to impose such measures as the Director of the Bureau of Prisons.

DATES: *Effective date*: October 30, 2001.

Comment date: Written comments must be submitted on or before December 31, 2001.

ADDRESSES: Rules Unit, Office of the General Counsel, Bureau of Prisons, HOLC Room 754, 320 First Street, NW., Washington, DC 20534.

FOR FURTHER INFORMATION CONTACT: Sarah Qureshi, Office of the General Counsel, Bureau of Prisons, (202) 307–2105.

SUPPLEMENTARY INFORMATION: On June 20, 1997 (62 FR 33732), the Bureau of Prisons (''Bureau'') finalized its interim regulations on the correctional management of inmates whose contacts with other persons present the potential for disclosure of classified information that could endanger national security or of other information that could lead to acts of violence or terrorism. These rules are codified at 28 CFR 501.2 (national security) and 501.3 (violence and terrorism).

The Bureau previously had published an interim rule on preventing the disclosure of classified information in the **Federal Register** on October 13, 1995 (60 FR 53490). No public comment was received, and the 1997 final rule adopted the 1995 interim rule with only minor changes. In general, § 501.2 authorizes the Director of the Bureau of Prisons to impose special administrative measures with respect to a particular inmate that are reasonably necessary to prevent disclosure of classified information, upon a written certification by the head of a United States intelligence agency that the unauthorized disclosure of such information would pose a threat to the national security and that there is a danger that the inmate will disclose such information. 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 prevent the disclosure of classified information.

The Bureau also had previously published a separate interim rule on preventing acts of violence and terrorism on May 17, 1996 (61 FR 25120). The Bureau's 1997 final rule responded at length to the public comments received on the 1996 interim rule. Section 501.3 authorizes the imposition of similar special administrative measures on a particular inmate based on a written determination by the Attorney General or, at the Attorney General's discretion, the head of a federal law enforcement or intelligence agency that there is a substantial risk that an 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.

In either case, the affected inmate may seek review of any special administrative measures imposed pursuant to §§ 501.2 or 501.3 in accordance with paragraph (a) of this section through the Administrative Remedy Program, 28 CFR part 542.

Both rules limit the initial period of special administrative measures to 120 days, and provide that additional 120-day periods may be authorized based on a certification or notification that the circumstances identified in the original notification continue to exist.

Changes to § 501.2 With Respect to National Security

This rule makes no change in the substantive standards for the imposition of special administrative measures, but changes the initial period of time under § 501.2 from a fixed 120-day period to a period of time designated by the Director, up to one year. Where the head of an intelligence agency has certified to the Attorney General that there is a danger that the inmate will disclose classified information posing a threat to the national security, there is no logical reason to suppose that the threat to the national security will dissipate after 120 days. This rule allows the Director to designate a longer period of time, up to one year, in order to protect the national security.

The rule also allows for the Director to extend the period for the special administrative measures for additional one-year periods, based on subsequent certifications from the head of an intelligence agency. This will ensure a continuing review by the Director and the intelligence community of the need for the special administrative measures in light of the ongoing risks to the national security. Given the serious nature of the danger to the national security, as determined by the head of the intelligence agency, this approach reflects an appropriate balancing of the interests of the individual inmates and of the public interest in protecting against the disclosure of such national security information.

In addition, this rule modifies the standard for approving extensions of the special administrative measures. The existing regulation requires that the head of the intelligence agency certify that ''the circumstances identified in the original certification continue to exist.'' This standard, however, is unnecessarily static, as it might be read to suggest that the subsequent certifications are limited to a reevaluation of the original grounds. Instead, this rule provides that the subsequent certifications by the head of an intelligence agency may be based on

any information available to the intelligence agency.

Changes to § 501.3 With Respect to Prevention of Acts of Violence and Terrorism

This rule makes no change in the substantive standards for the implementation of special administrative measures under § 501.3(a). The rule also retains the existing authority of the Director to extend the imposition of the special administrative measures for additional periods, based on subsequent certifications from the Attorney General or the head of a federal law enforcement or intelligence agency. By continuing to apply the existing standards under § 501.3(a), this rule preserves the balance struck in the 1997 final rule and ensures that the inmate's circumstances will be subject to a continuing review.

However, this rule also recognizes that the threats of violence or terrorism posed by an inmate's communications or contacts with his or her associates, whether those other persons are within the detention facility or in the community at large, may in many cases be manifested on a continuing basis, such that the periods for special administrative measures need not be limited to 120 days. Accordingly, this rule allows the Director, with the approval of the Attorney General, to impose special administrative measures for a longer period of time, not to exceed one year, in cases involving acts of violence or terrorism. In addition, the rule provides authority for the Director under certain circumstances to provide for extensions of the period for the special administrative measures for additional periods, up to one year.

This rule also modifies the standard for approving extensions of the special administrative measures. The existing regulation requires that the Attorney General or the head of the federal law enforcement or intelligence agency determine that ''the circumstances identified in the original notification continue to exist.'' Again, that standard is unnecessarily static, as it might be read to suggest that the subsequent determinations are limited to a reevaluation of the original grounds.

Recent incidents of terrorism and violence demonstrate, without question, that some criminal conspiracies develop and are carried out over a long period—far in excess of 120 days. During that time, as the plans may change or develop, there may be changes in the level of activity directed toward that conspiracy over time by the various participants. The level of participation by a particular inmate in the planning or orchestration of a terrorist or violent criminal conspiracy may vary over time.

The existing regulation fails to recognize that an inmate still may be an integral part of an ongoing conspiracy even though his or her activity may change over time—or, indeed, possibly even be dormant for limited periods of time. Those changes in an inmate's role over time, however, would not alter the significance of the inmate's role in planning acts of terrorism or violence and do not diminish the urgent need for law enforcement authorities to curb the inmate's ability to participate in planning or facilitating those acts through communications with others within or outside the detention facility. The phraseology of the existing rule also may raise questions about the relevance of more recently acquired information. For these reasons, it would not be appropriate to require a factual determination, in effect, that ''nothing has changed'' with respect to the initial determination.

Accordingly, this rule provides that the subsequent notifications by the Attorney General, or the head of the federal law enforcement or intelligence agency should focus on the key factual determination—that is, whether the special administrative measures continue to be reasonably necessary, at the time of each determination, because there is a substantial risk that an inmate'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. Where the Attorney General, or the head of a federal law enforcement or intelligence agency, previously has made such a determination, then the determination made at each subsequent review should not require a de novo review, but only a determination that there is a continuing need for the imposition of special administrative measures in light of the circumstances.

With these changes, § 501.3 will still ensure a continuing, periodic review by the Director and the law enforcement and intelligence communities of the need for the special administrative measures in light of the ongoing risks of terrorism or violent crime. Given the serious nature of the danger to the public arising from such incidents, coupled with a determination by the Attorney General or the head of a federal law enforcement or intelligence agency regarding the danger posed by each particular inmate, this approach reflects an appropriate balancing of the interests of the individual inmates and of the public interest in detecting and deterring acts of terrorism and violence.

Although this rule does not alter the substantive standards for the initial imposition of special administrative measures under § 501.3, it is worth noting that the Bureau's final rule implementing this section in 1997 devoted a substantial portion of the supplementary information accompanying the rule to a discussion of the relevant legal issues. 62 FR 33730–31. As the U.S. Supreme Court noted in *Pell* v. *Procunier,* 417 U.S. 817, 822, 823 (1974), ''a prison inmate retains those First Amendment rights that are not inconsistent with his status as an inmate or with the legitimate penological objectives of the corrections system. * * * An important function of the corrections system is the deterrence of crime. * * * Finally, central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves.''

This regulation, with its concern for security and protection of the public, clearly meets this test. The changes made by this rule, regarding the length of time and the standards for extension of periods of special administrative measures, do not alter the fundamental basis of the rules that were adopted in 1997. Instead, they more clearly focus the provisions for extensions—both the duration of time and the standards—on the continuing need for restrictions on a particular inmate's ability to communicate with others within or outside the detention facility in order to avoid the risks of terrorism and violence. In every case, the decisions made with respect to a particular inmate will reflect a consideration of the issues at the highest levels of the law enforcement and intelligence communities. Where the issue is prevention of acts of violence and terrorism, it is appropriate for government officials, at the highest level and acting on the basis of their available law enforcement and intelligence information, to impose restrictions on an inmate's public contacts that may cause or facilitate such acts.

Monitoring of Communications With Attorneys To Deter Acts of Terrorism

In general, the Bureau's existing regulations relating to special mail (§§ 540.18, 540.19), visits (§ 540.48), and telephone calls (§ 540.103) contemplate that communications between an inmate and his or her attorney are not subject to the usual rules for monitoring of inmate communications. In specific instances, however, based on information from federal law

enforcement or intelligence agencies, the Bureau may have substantial reason to believe that certain inmates who have been involved in terrorist activities will pass messages through their attorneys (or the attorney's legal assistant or an interpreter) to individuals on the outside for the purpose of continuing terrorist activities.

The existing regulations, of course, recognize the existence of the attorney-client privilege and an inmate's right to counsel. However, it also is clear that not all communications between an inmate and an attorney would fall within the scope of that privilege. For example, materials provided to an attorney that do not relate to the seeking or providing of legal advice are not within the attorney-client privilege. Accordingly, such materials would not qualify as special mail under the Bureau's regulations.

The attorney-client privilege protects confidential communications regarding legal matters, but the law is clear that there is no protection for communications that are in furtherance of the client's ongoing or contemplated illegal acts. *Clark* v. *United States*, 289 U.S. 1, 15 (1933) (such a client ''will have no help from the law''); *United States* v. *Gordon-Nikkar*, 518 F. 2d 972, 975 (5th Cir. 1975) (''it is beyond dispute that the attorney-client privilege does not extend to communications regarding an intended crime''). The crime/fraud exception to the attorney-client privilege applies even if the attorney is unaware that his professional service is being sought in furtherance of an improper purpose, *United States* v. *Soudan*, 812 F.2d 920, 927 (5th Cir. 1986), and the attorney takes no action to assist the client, *In re Grand Jury Proceedings,* 87 F. 3d 377, 382 (9th Cir. 1996).

This rule provides specific authority for the monitoring of communications between an inmate and his or her attorneys or their agents, where there has been a specific determination that such actions are reasonably necessary in order to deter future acts of violence or terrorism, and upon a specific notification to the inmate and the attorneys involved. The rule provides for (1) protection of the inmate's right to counsel; (2) the use of a special ''privilege team'' to contemporaneously monitor an inmate's communications with counsel, pursuant to established firewall procedures, when there is a sufficient justification of need to deter future acts of violence or terrorism; (3) a procedure for federal court approval prior to the release or dissemination of information gleaned by the privilege team while monitoring the inmate's communications with counsel; and (4) an emergency procedure for immediate dissemination of information pertaining to future acts of violence or terrorism where those acts are determined to be imminent.

The Supreme Court has held 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. *See Weatherford* v. *Bursey*, 429 U.S. 545, 552–54 (1977). When the government possesses a legitimate law enforcement interest in monitoring such conversations, *cf. Massiah* v. *United States*, 377 U.S. 201, 207 (1964), no Sixth Amendment violation occurs so long as privileged communications are protected from disclosure and no information recovered through monitoring is used by the government in a way that deprives the defendant of a fair trial. The procedures established in this new rule are designed to ensure that defendants' Sixth Amendment rights are scrupulously protected. The circumstances in which monitoring will be permitted are defined narrowly and in a way that reflects a very important law enforcement interest: the prevention of acts of violence or terrorism. The monitoring is not surreptitious; on the contrary, the defendant and his or her attorney are required to be given notice of the government's listening activities. The rule requires that privileged information not be retained by the government monitors and that, apart from disclosures necessary to thwart an imminent act of violence or terrorism, any disclosures to investigators or prosecutors must be approved by a federal judge.

In following these procedures, it is intended that the use of a taint team and the building of a firewall will ensure that the communications which fit under the protection of the attorney-client privilege will never be revealed to prosecutors and investigators. Procedures such as this have been approved in matters such as searches of law offices, *See, e.g., National City Trading Corp.* v. *United States*, 635 F.2d 1020, 1026–27 (2d Cir. 1980). In a similar vein, screening procedures are used in wiretap surveillance. *See, e.g., United States* v. *Noriega*, 764 F. Supp. 1480 (S.D. Fla. 1991) (DEA agent unrelated to the case reviewed prison telephone tapes to determine whether they contained any privileged attorney-client communications; agent mistakenly reduced one such communication to memorandum form, but the assigned prosecutor stopped reading the memo once he realized it contained attorney-client conversation; the court cited the screening procedure as a factor in finding that the government's intrusion into the defense camp was unintentional, and that the intrusion had not benefitted the government). Likewise, firewalls have been built so that an entire prosecution office is not disqualified when a lawyer who formerly represented or had a connection to a defendant joins the prosecutor's office but has no involvement in his former client's prosecution. *See Blair* v. *Armontrout*, 916 F.2d 1310, 1333 (8th Cir. 1990).

This rule carefully and conscientiously balances an inmate's right to effective assistance of counsel against the government's responsibility to thwart future acts of violence or terrorism perpetrated with the participation or direction of federal inmates. In those cases where the government has substantial reason to believe that an inmate may use communications with attorneys or their agents to further or facilitate acts of violence or terrorism, the government has a responsibility to take reasonable and lawful precautions to safeguard the public from those acts.

Applicability to All Persons in Custody Under the Authority of the Attorney General

The existing §§ 501.2 and 501.3 cover only inmates in the custody of the Bureau of Prisons. However, there are instances when a person is held in the custody of other officials under the authority of the Attorney General (for example, the Director of the United States Marshals Service or the Commissioner of the Immigration and Naturalization Service). To ensure consistent application of these provisions relating to special administrative measures in those circumstances where such restrictions are necessary, this rule clarifies that the appropriate officials of the Department of Justice having custody of persons for whom special administrative measures are required may exercise the same authorities as the Director of the Bureau of Prisons and the Warden.

We are also clarifying the definition of ''inmate'' to avoid any question whether these regulations apply to all persons in BOP custody.

Administrative Procedure Act, 5 U.S.C. 553

The Department's implementation of this rule as an interim rule, with provision for post-promulgation public comment, is based on the foreign affairs exception, 5 U.S.C. 553(a), and upon

findings of good cause pursuant to 5 U.S.C. 553(b)(B) and (d).

The immediate implementation of this interim rule without public comment is necessary to ensure that the Department is able to respond to current intelligence and law enforcement concerns relating to threats to the national security or risks of terrorism or violent crimes that may arise through the ability of particular inmates to communicate with other persons. Recent terrorist activities perpetrated on United States soil demonstrate the need for continuing vigilance in addressing the terrorism and security-related concerns identified by the law enforcement and intelligence communities. It is imperative that the Department have the immediate ability to impose special administrative measures, and to continue those measures over time, with respect to persons in its custody who may wrongfully disclose classified information that could pose a threat to national security or who may be planning or facilitating terrorist acts.

In view of the immediacy of the dangers to the public, the need for detecting and deterring communications from inmates that may facilitate acts of violence or terrorism, and the small portion of the inmate population likely to be affected, the Department has determined that there is good cause to publish this interim rule and to make it effective upon publication, because the delays inherent in the regular notice-and-comment process would be ''impracticable, unnecessary and contrary to the public interest.'' 5 U.S.C. 553(b)(B), (d). Application of these measures is likely to affect only a small portion of the inmate population: those inmates who have been certified by the head of a United States intelligence agency as posing a threat to the national security through the possible disclosure of classified information; or for whom the Attorney General or the head of a federal law enforcement or intelligence agency has determined that there is a substantial risk that the inmate's communications with others could lead to violence or terrorism.

Regulatory Certifications

The Department has determined that this rule is a significant regulatory action for the purpose of Executive Order 12866, and accordingly this rule has been reviewed by the Office of Management and Budget.

The Department certifies, for the purpose of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), that this rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Act. Because this rule pertains to the management of offenders committed to the custody of the Department of Justice, its economic impact is limited to the use of appropriated funds.

This rule will not have substantial direct effects on the states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

List of Subjects in 28 CFR Parts 500 and 501

Prisoners.

Accordingly, pursuant to the rulemaking authority vested in the Attorney General in 5 U.S.C. 552(a), part 501 in subchapter A of 28 CFR, chapter V is amended as set forth below:

SUBCHAPTER A—GENERAL MANAGEMENT AND ADMINISTRATION

PART 500—GENERAL DEFINITIONS

1. The authority citation for 28 CFR part 500 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510; 28 CFR 0.95–0.99.

2. In § 500.1, paragraph (c) is revised to read as follows:

§ 500.1 Definitions.

* * * * *

(c) *Inmate* means all persons in the custody of the Federal Bureau of Prisons or Bureau contract facilities, including persons charged with or convicted of offenses against the United States; D.C. Code felony offenders; and persons held as witnesses, detainees, or otherwise.

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PART 501—SCOPE OF RULES

3. The authority citation for 28 CFR part 501 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4161–4166 (Repealed as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510; 28 CFR 0.95–0.99.

4. In § 501.2, paragraph (c) is revised and paragraph (e) is added, to read as follows:

§ 501.2 National security cases.

* * * * *

(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 a period of time as determined by the Director, Bureau of Prisons, up to 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, but only if the Attorney General receives from the head of a member agency of the United States intelligence community an additional written certification that, based on the information available to the agency, there is a danger that the inmate will disclose classified information and that the unauthorized disclosure of such information would pose a threat to the national security. The authority of the Director under this paragraph may not be delegated below the level of Acting Director.

* * * * *

(e) 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.

4. In § 501.3,

a. Paragraph (c) is revised;

b. Paragraph (d) is redesignated as paragraph (e); and

c. New paragraphs (d) and (f) are added to read as follows:

§ 501.3 Prevention of acts of violence and terrorism.

* * * * *

(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.

* * * * *

(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.

Dated: October 26, 2001.

John Ashcroft,

Attorney General.

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