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Turning the Tables: Using the Government's Secrecy and Security Arsenal for the Benefit of the Client in Terrorism Prosecutions

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TURNING THE TABLES: USING THE GOVERNMENT'S
SECRECY AND SECURITY ARSENAL FOR THE BENEFIT
OF THE CLIENT IN TERRORISM PROSECUTIONS

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I. INTRODUCTION

Defending a client charged with terrorism offenses presents many challenges not confronted in the ordinary case. Terrorism prosecutions have created a new legal battlefield with defense counsel positioned precariously in the middle. Counsel should not be a pawn for either side, but should provide the most complete, effective and zealous defense within the bounds of law and the canons of ethics.

Our involvement as co-counsel for Wadiah El-Hage, a defendant in the Embassy Bombings trial, provided us with first-hand experience in defending a terrorism case. At approximately 9:30 a.m. on August 7, 1998, powerful explosives were detonated simultaneously in vehicles at the United States' Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania. The blast in Kenya killed 211 people, while the bomb in Dar es Salaam killed eleven persons. Within months, the United States identified al Qaeda as the culprit and indicted seventeen defendants, including Osama bin Laden as the lead defendant. Six of the defendants were apprehended, and four ultimately proceeded to trial in January, 2001. The trial lasted until July, 2001, and ended in the conviction of all four defendants on all 302 counts. The jury rejected the death penalty, however, for the two defendants who had been convicted of capital offenses.¹

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1. All four defendants who proceeded to trial were sentenced to life without parole.

Mr. El-Hage was not charged with involvement in the Embassy Bombings themselves. Rather, he was charged with conspiring with al Qaeda to target through terrorist acts the United States, its nationals, and its interests. Mr. El-Hage, a United States citizen born in Lebanon, openly worked for Mr. bin Laden's business entities in the Sudan in the early 1990's. He lived in Kenya from 1994 to 1997 before returning to the United States with his family eleven months before the bombings. In addition to being found guilty after trial on the conspiracy charges, he was also convicted of twenty counts of perjury stemming from his two appearances before the grand jury in 1997 and 1998 (all of which charges were tried in the Embassy Bombings trial).

Difficulties that exist in conventional cases are aggravated in terrorism cases. Both the government and the client place additional obstacles in counsel's path. This Article will explain some of the lessons we learned about how a defense lawyer can surmount these additional obstacles and even use them to the *advantage* of the client. We will discuss three specific obstacles in terrorism cases that make the defense lawyer's task considerably more difficult: (1) the Special Administrative Measures (S.A.M.); (2) the Protective Orders imposed on discovery produced by the government; and (3) the Classified Information Procedures Act (CIPA). S.A.M.'s govern the defendant's conditions of confinement. The Protective Orders severely constrain the flow of information available to counsel. CIPA controls the use and dissemination of "classified" information relevant to the case. While each obstacle imposes considerable restrictions on the defendant and counsel, they can also aid the defense.

II. SPECIAL ADMINISTRATIVE MEASURES

S.A.M.'s are authorized by the Bureau of Prisons regulations for the confinement of particularly dangerous detainees.² S.A.M.'s impose particularly onerous conditions of confinement. Their

2. United States v. bin Laden, 109 F. Supp. 2d 211, 214 (S.D.N.Y. 2000), *citing* 28 C.F.R. § 501.3(a) (1999). *See bin Laden*, 109 F. Supp. 2d, at 213-15 (describing in general some provisions of the S.A.M.'s, and their adverse impact on defendants and the logistics of defense preparation) Special Administrative Measures are commonly referred to in the legal community as S.A.M.'s with an apostrophe.

harshness eclipses even the conditions for *convicted* prisoners, including those who have committed serious violations of prison rules.³ The S.A.M.'s did not begin with terrorism cases. Instead, they first were used for a convicted Latin Kings leader who had ordered murders from prison.⁴ The S.A.M.'s severely restrict an inmate's ability to communicate with the outside world, and thus constrain counsel in contacting third parties on the defendant's behalf.⁵ In addition, the defendant is segregated from the rest of the prison population and is denied many of the privileges ordinarily available to inmates. Mail and telephone calls are closely monitored, exercise is limited, and the defendant is held in solitary confinement.

S.A.M.'s impair counsel's ability to prepare the defense adequately in several ways. First, the defendant is focused on alleviating the onerous conditions rather than on the substance of the case. As a result, counsel is forced to develop a defense strategy without input from the client. In addition, counsel must spend an inordinate amount of time attempting to ameliorate the conditions by negotiating with prison officials, prosecutors, and, if necessary, the court. Furthermore, because the defendant is denied access to outside media, he or she cannot provide guidance and commentary with respect to potential occurrences that may have a bearing on the case, or warrant further investigation or exploration. This limitation is particularly problematic in a terrorism case because publicly reported developments often are relevant in ways counsel cannot fully understand without assistance from the client. Given the international character of the allegations, language issues, and cultural unfamiliarity, counsel cannot alone grasp the significance of *all* relevant witness issues, documents and information. Education and preparation of expert witnesses are hindered by the lack of access to defendants. Thus, the most important resource for the

3. The Attorney General's authority for imposition of the S.A.M.'s is codified at 28 C.F.R. § 501.3(c). See *United States v. Felipe*, 148 F.3d 101, 110 (2d. Cir. 1998); *United States v. Reid*, 214 F. Supp. 2d 84, 86 (D. Mass. 2002). The S.A.M.'s extend for one year at a time, and can be renewed indefinitely.

4. *Felipe*, 148 F.3d at 101.

5. The government's preoccupation with secrecy is categorical, as is its distrust of defense counsel, whom it worries will deliberately or inadvertently pass "coded" messages if permitted to transmit messages from the defendants to third parties.

defense, the defendant, is effectively unavailable to participate in the preparation of his defense.

As co-counsel for Mr. El-Hage, we retained Dr. Stuart Grassian, a Harvard professor and psychiatrist.⁶ Dr. Grassian examined Mr. El-Hage and concluded:

Although Mr. El-Hage has not become floridly ill during his incarceration in solitary at MCC, his psychological functioning has deteriorated. His thinking, concentration and memory are impaired, and he has become increasingly obsessional in his thinking, and uncharacteristically irritable and volatile. His relationship with his wife and with his attorney have both been comprised. His frustration, his feelings of helplessness, and his inability to have meaningful interaction with his wife and children, have also played a major role in this deterioration.⁷

Moreover, Dr. Grassian's prognosis for Mr. El-Hage was not sanguine:

Mr. El-Hage's psychological status has already seriously deteriorated, and his capacity to participate in his own defense has already been severely comprised. Yet his criminal trial remains at least nine months away, and there is little reason to expect that these difficulties will remit, absent a significant amelioration of his conditions of confinement; indeed, there is every reason for concern that the impairment of his attention, thinking, and emotional control, will only worsen with further confinement under the harsh conditions he has now experienced continually for almost one year.⁸

6. Dr. Grassian is a recognized leader in the field of the effects of solitary confinement and sleep deprivation.

7. Dr. Grassian's November 23, 1999 Report, submitted as part of Mr. El-Hage's bail application, on file with authors.

8. *Id.* Dr. Grassian also found, "for a defendant, such as Mr. El-Hage, who *realizes* that he can no longer even count on himself, the oppressive and disabling burden is even further magnified." *Id.* (emphasis in original). In general, Dr. Grassian is of the opinion that prolonged solitary confinement "inevitably impairs the defendant's capacity to participate meaningfully in the preparation of his own defense." *Id.*

We aggressively attacked the S.A.M.'s in the bail application we submitted on Mr. El-Hage's behalf. We knew bail would not be granted, but we hoped the court could be convinced to ease the conditions of confinement. We pointed out that Mr. El-Hage had spent fifteen months in solitary confinement under the S.A.M.'s and faced another eighteen to twenty-four months of the same before trial. We argued that the conditions impaired his cognitive and emotional capacity so severely that he could not participate in this defense. The court was sensitive to this issue and ordered, for a period of time, significant modifications in the S.A.M.'s.⁹ These modifications included bunking for the defendants, limited exercise time, expansion of available commissary items,¹⁰ receipt of Arabic newspapers, enhanced phone privileges, co-defendant meetings with only one counsel present, and more frequent medical and dental treatment.

While these changes were not ideal, they represented a vast improvement over the prior conditions. Unfortunately, however, unanticipated problems resulted not only in the reversal of all of these gains, but imposed even more onerous conditions. In November, 2000, just two months before the commencement of trial, one of Mr. El-Hage's co-defendants assaulted a corrections officer and stabbed him in the eye with a makeshift knife. The attack occurred with the alleged complicity of another co-defendant and the alleged knowledge of yet another. While Mr. El-Hage was never implicated in the attack, Bureau of Prisons officials did not make any distinction between him and his co-defendants.¹¹

9. In its opinion denying severance, the District Court acknowledged the significant negative impact of the S.A.M.'s on the defendants and their ability to prepare and contribute to their defense. *See* *United States v. bin Laden*, 109 F. Supp. 2d 211, 213-15 (S.D.N.Y. 2000).

10. This had been restricted beyond that for any other detainees, including those segregated for disciplinary reasons.

11. The severity of the Bureau of Prisons response to the attack, implemented without notice or explanation to Mr. El-Hage, was so dramatic that it not only retarded the progress he had made emotionally and cognitively under the more relaxed conditions, but it made his condition substantially worse than it had been prior to the modifications of the S.A.M.'s we had accomplished eight months earlier. The "one size fits all" application of the S.A.M.'s presents an intractable problem for individual defendants whose own behavior may not be violent, either in prison or even in the context of the particular charges in the underlying case, but who are lumped together with others who have committed violent acts either in the context of charged offenses or in prison.

In this restrictive environment, there is very little counsel can do to glean positive elements from the S.A.M.'s. Nevertheless, counsel's determination to be a zealous advocate can produce some positive effects. Counsel's willingness to vigorously challenge the S.A.M.'s in a manner that responds to the client's concerns and priorities can build the type of credibility and trust that promotes a productive attorney-client relationship. Such actions demonstrate to the client that the lawyer is not afraid to confront the prison administration, the prosecutors, and the court. Further, since success in challenging at least *some* of the S.A.M.'s provisions is likely, the client will have a basis for confidence in the attorney's ability to champion the client's cause.¹²

Client confidence often is extremely important in terrorism cases. The client is either a naturalized citizen or foreign national with limited experience in the United States. The client is likely to be from a non-democratic regime that does not have an independent or fair legal system, and the client may harbor negative preconceptions about the United States government and justice system. Culture and language differences can foster a lack of empathy by counsel, making it difficult to achieve consensus on case strategy. Moreover, the vast majority of defendants in terrorism cases are represented by court-appointed counsel. The complexity of the cases, the volume of discovery, the travel involved in effective investigation, the need to consult and retain experts, and the length of the trials make retention of private counsel of defendant's choice financially prohibitive. This exacerbates the problem because the client may resent a lawyer provided by the United States government.

Such a lack of individualized consideration of the necessity for the S.A.M.'s also crosses case lines; one source of opposition to relaxing the S.A.M.'s with respect to Mr. El-Hage and his co-defendants was the Bureau of Prisons' continued wariness resulting from an alleged escape attempt by another alleged Islamic terrorist (occurring some time earlier) in a completely different case.

12. While some of the remediation we were able to achieve may appear mundane, it did make a difference to Mr. El-Hage and his physical and mental state. For example, we were able to obtain much-needed dental treatment for him, double-bunking with a co-defendant instead of solitary confinement, group prayer sessions with his co-defendants, and a plastic chair upon which he could sit and read discovery and other litigation documents and write notes (as opposed to the exceedingly uncomfortable concrete slab in his cell that precluded extended reading and/or writing sessions).

Thus, counsel's commitment to the client and ability to accomplish the client's objectives can be demonstrated by concerted challenges to the S.A.M.'s. These challenges enable counsel to establish that he or she is reliable, is competent, listens to the defendant, and cares about the defendant's well-being. This leads to a more cooperative relationship between attorney and client, a better-informed defense lawyer, and a better-prepared and coordinated defense at trial.

Proper case management by the court in terrorism cases is essential. When defendants are held under harsh conditions, they often will take their frustrations out on their attorney. Any disputes or dissatisfaction between lawyer and client should be addressed *ex parte* and *in camera* because public airing of tensions can lead to statements from which there can be no functional retreat.

For example, in *United States v. Moussaoui*, discussions conducted in open court resulted in the defendant's election to proceed *pro se*. Although this is his right, the decision has not improved his chances for acquittal or for avoiding the death penalty if convicted. In contrast, disagreements between counsel and defendants in the Embassy Bombings case were handled *in camera*, without any government presence or participation. As a result, almost all disputes were resolved short of substitution of counsel,¹³ thus ensuring stability in the defense team.

Highlighting how the S.A.M.'s contribute to a defendant's degeneration can garner sympathy from the court and the media. A court's appreciation of these handicaps can lead to leeway in favor of the defense. The handicaps can also illustrate to the press the unfairness of the defendant's confinement and the damage those conditions pose to the preparation of the defense. Public reporting from that perspective can pressure the government and the court to modify the S.A.M.'s to the client's benefit.

13. There was some shuffling of counsel in the early stages of the case due to some client-attorney conflicts. Generally, the attorneys served as a lightning for client tension and dissatisfaction, since they were the defendants' only source of contact for the two years between the inception of the case and the trial. While certain conflicts proved intractable, many others were minimized by the court's handling of the complaints *ex parte* and *in camera*. By maintaining confidentiality, the court allowed the defendants to vent their frustrations while preserving the attorney-client relationship in the long run.

The S.A.M.'s may also provide appellate issues.¹⁴ If the S.A.M.'s render the defendant functionally unable to assist in his own defense, counsel can argue they deprived the defendant of due process and a fair trial.¹⁵

III. PROTECTIVE ORDERS APPLIED TO DISCOVERY

Protective Orders limit the dissemination of discovery material. They are *de rigueur* in terrorism prosecutions and prevent counsel from sharing discovery information covered by the Protective Order with anyone not pre-cleared by the government. In the Embassy Bombings case, the Protective Order categorized certain discovery as "Particularly Sensitive." This effectively "sealed" the material without further order of the court or agreement between the parties. This material could not be shared with persons outside the "cleared" defense team without government authorization and had to be redacted from publicly filed court submissions and exhibits.¹⁶ Such material is treated similarly to that covered by protective orders in military cases. In the Embassy Bombing case, however, under the specter of "national security," most of the discovery material was labeled "Particularly Sensitive."

Since the government had the power to designate discovery it produced, the "Particularly Sensitive" characterization was applied rather indiscriminately, reducing material that could be publicly disseminated to a small fraction of the voluminous discovery produced during the case. The Protective Order also required that all submissions to the court be presumptively sealed for five business

14. The S.A.M.'s have more recently become a bargaining chip in plea negotiations, and provide the government significant leverage in those discussions. Thus, as an incentive to plead guilty, the government has recently begun to offer defendants in terrorism cases the "carrot" of imprisonment after conviction *without* imposition of the S.A.M.'s. Considering the length of imprisonment defendants in terrorism cases face, the prospect of a long term of imprisonment under the S.A.M.'s is a strong motivator for choosing any alternative, including pleading guilty.

15. In its recent opinion in *Sell v. United States*, 539 U.S. 166 (2003), the Supreme Court recognized the constitutional importance of a defendant being functional in preparation for and at trial.

16. "Clearance" in the non-classified context involved submitting the name, date of birth, and social security number of the person to a government representative who ostensibly would not share the information about defense personnel with the prosecutors working on the case.

days pending objection to public filing by any other party. As a result of such objections by the government, we often produced redacted versions of documents that could be publicly filed.

These inconvenient procedures constrain and impede the defense's ability to act quickly and spontaneously. As a result, the preparation of the defense is uncoordinated and disorganized at times. Indeed, many of the same problems that the S.A.M.'s present, such as the inability to share information and pursue investigative leads due to a lack of communication, are replicated with "Particularly Sensitive" discovery material.¹⁷

The veil of secrecy in terrorism cases can actually help a defendant. Counsel may be able to keep defense information confidential and use the *ex parte* process to prepare the defense case. This allows the defense to operate in a confidential environment and educates the judge. As a consequence, the judge will be aware of the relevance and materiality of the defense's cross-examination, documents, and affirmative testimony when it is offered at trial.

As with the S.A.M.'s, alerting the court to the difficulties faced by counsel in preparing a case under a restrictive Protective Order may aid counsel in combating the government's evidence. When judges are fully aware of the difficulties, they tend to allow defense counsel to conduct more probing cross-examination and are more lenient in deciding whether defense evidence is admissible. Courts also are more willing to authorize expenses for experts, investigators, and other essential resources in terrorism cases where defense counsel is court-appointed under the Criminal Justice Act (CJA)¹⁸ and appeals to the judges to level the playing field.

In the Embassy Bombings case, we regularly made *ex parte* applications seeking authorization to hire experts and investigators or issue Rule 17(c)¹⁹ subpoenas. Once a court authorizes a CJA expense, it is more likely to justify the expense by declaring the ex-

17. While "Particularly Sensitive" discovery could be shared with the defendants (although after the November 1, 2000, assault on the corrections officer, certain materials that described violent conduct were removed from the defendants' cells and could not be shown to them), the inability to discuss the materials with all but a small group of lawyers and experts who were members of the defense team created the same situation with respect to using the outside world as a resource for the defense.

18. 18 U.S.C.A. § 3006A (2004).

19. Fed. R. Crim. P. 17(c) (2004).

pert's testimony or other evidence admissible. A judge who has been involved in the process from the outset is more easily persuaded that the evidence or expert is essential to the defense and to a fair trial.

The aura of secrecy surrounding the case enabled us to investigate the case as if it were the converse of a grand jury proceeding. We used the CJA process as our investigatory arm to counteract the Protective Order's constraints on defense investigation and preparation. The court also permitted us to call as an expert a witness who was one step removed from the events about which he testified. This witness's testimony concerned the United States July 12, 1993, helicopter TOW missile attack on civilians in Somalia. The event served as an important precursor to the events of October 3-4, 1993, chronicled in *Black Hawk Down* and were charged as an Overt Act in the indictment.²⁰ The judge accommodated us because he was aware of our difficulties in obtaining a first-hand witness because of the Protective Order and problems caused by CIPA, discussed below. He concluded that a fair trial required an opportunity to call the best available substitute witness.²¹

The secrecy permeating the case insured that the court would not make us share information with the government because there was so much information the judge knew the government had not shared with us. The government never learned of the theories we advanced with the court or the avenues we pursued with the CJA resources. The court also steadfastly refused to reveal why we could not get a first-hand witness with respect to the attack in Somalia noted above.²²

20. MARK BOWDEN, *BLACK HAWK DOWN: A STORY OF MODERN WAR* (1999). The government's theory was that (based on hearsay statements reported by cooperating al Qaeda witnesses) al Qaeda had trained persons, or the persons who trained the persons, who engaged the United States forces in Mogadishu, Somalia, on October 3-4, 1993, and downed two Black Hawk helicopters and killed eighteen United States servicemen. The defense theory was that the Somali resistance to the United States and United Nations forces in 1993 was entirely independent of al Qaeda or any fundamentalist Muslim forces, and that the indigenous combatants in Somalia, who had been engaged in civil war for several years prior, were sufficiently capable, supplied, and experienced to have carried out the October 3-4, 1993 attacks on their own.

21. As a result of our efforts, and the projected testimony by the witness, the government withdrew the Overt Act.

22. The government still does not know why.

The Protective Orders' constraints are also useful in obtaining appropriate time to prepare. For example, the identity of the government's principal witness was not known to counsel until four days before he testified. We were not permitted to inform our clients or anyone else of his identity until the day before he testified. As a result, we were afforded significant time by the court to review the voluminous discovery material provided for that witness, prepare for cross-examination, and even to conduct an investigation in another country.²³

The inaccessibility of Somalia and Sudan made it extremely difficult to gather information about potential witnesses, regardless of how much time the court gave us. To counteract these handicaps, defense counsel should seek to use Letters Rogatory²⁴ and to conduct foreign depositions under Rule 15 early in the case.²⁵ Counsel should also familiarize themselves with the statutes and regulations authorizing the procurement of documents from foreign governments and entities.²⁶ Since the procedures for arranging service and conducting depositions are technical and time-consuming, it is important to focus on them as soon as possible. Courts have denied requests for Rule 15 depositions on timeliness grounds.²⁷

Although Protective Orders may be detrimental, defense counsel should not view them as one-sided, but rather as an invitation to

23. Interestingly, we were given more time to prepare than defense counsel sometimes get in ordinary cases. Counsel often does not know the identity of a witness until just before the witness testifies, and counsel often is inundated with a last minute flood of discovery material that cannot be adequately digested before cross-examination commences.

24. See 18 U.S.C. § 3492 ("Commission to consular officers to authenticate foreign documents").

25. See Rule 15(a)(1), Fed.R.Crim.P., recently amended in 2002 to provide in pertinent part that:

(a)(1) IN GENERAL. A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated material that is not privileged, including any book, paper, document, record, recording, or data.

26. See, e.g., 18 U.S.C. § 3491 ("Foreign Documents"); 18 U.S.C. § 3493 ("Deposition to Authenticate Foreign Documents"); 18 U.S.C. § 3494 ("Certification of Genuineness of Foreign Document"); 18 U.S.C. § 3505 ("Foreign Records of Regularly Conducted Activity"); 18 U.S.C. § 3508 ("Custody and Return of Foreign Witnesses").

27. See, e.g., *United States v. Chusid*, 2000 WL 1449873 (S.D.N.Y. 2000).

cultivate the environment of secrecy to the defendant's advantage. As long as counsel presents factual bases for such requests, a judge can be moved to afford a defendant privileges not afforded in ordinary cases.

Defense counsel should draw upon the increasing public and judicial debate over the proportionality and propriety of the government's response to terrorism cases. This permits counsel to invoke fundamental constitutional protections, such as the defendant's Sixth Amendment rights to confront witnesses, to effective assistance of counsel, and to assist in the preparation of his defense, and Fifth Amendment rights to Due Process, to a fair trial, and to present a defense. Defense counsel is only limited by their imagination and once counsel starts proceeding with the court in secret, counsel quickly learns why the government likes to proceed in that fashion.

IV. THE CLASSIFIED INFORMATION PROCEDURES ACT (CIPA)

The problems presented by the Protective Orders multiply exponentially with classified information.²⁸ Classified information cannot be revealed to the defendant or the outside world. Access to classified information is limited to other cleared persons with a "need to know"²⁹ and occurs only in the Secure Compartmentalized Information Facility (SCIF).³⁰

CIPA's unique restrictions strain the lawyer-client relationship because the defendants accused of terrorist offenses cannot obtain

28. Classified information is an extreme rarity in criminal cases, and before September 11, 2001, was rare even in terrorism cases.

29. In the CIPA context, "cleared" is a vastly different context than it is with respect to the "Particularly Sensitive" material covered by the Protective Orders. While "clearance" for the latter required only submission of a social security number and a date of birth to the "firewall" prosecutor, which then entitled the "cleared" person access to the "Particularly Sensitive" discovery, "clearance" to receive classified information involved a comprehensive security investigation, including a detailed history, lengthy personal interview and interviews of neighbors and professional colleagues. *See, e.g., United States v. bin Laden*, 58 F.Supp. 2d 113 (S.D.N.Y. 1999). Only after that process was completed and approval granted, could the person "cleared" for CIPA purposes gain access to classified materials.

30. The SCIF is the repository for all classified information given to the defense and in which all work on classified material – reading, review, motions, letters, stipulations, and any other submissions – must be performed and stored.

clearance to see classified materials.³¹ It also strains the relationship between lawyers for different defendants because they can only receive the classified material related either to all defendants or their particular client. CIPA thus makes coordination of strategy and tactics among defense counsel far more difficult. Counsel must continue to communicate while exercising appropriate discretion. If all of the attorneys are at least generally aware of the kind of evidence the government will use, surprises can be minimized.

CIPA was enacted in 1980 to prevent “greymailing” by defendants in possession of classified information, usually government officials charged with espionage or other misconduct. Greymailing is a threat by the defendant to disclose classified information by requiring a ruling on the admissibility of the classified information before trial.³² CIPA provides procedures for notifying the government prior to trial of any classified information that will be compromised by the case.³³

Historically, however, terrorism cases have not involved greymail. In terrorism cases, defendants are *not* in possession of the classified information and there is no chance that they will obtain the necessary clearance to view classified materials. Thus, the greymail opportunities are minimized since the defendant cannot threaten to reveal classified information other than that provided by the government in discovery.

31. The defendant in *United States v. Moussaoui*, No. Cr. 01-455-A (E.D. V.A. 2003) has added a new wrinkle to this issue by deciding to appear *pro se*. However, while the government and the Fourth Circuit, in *United States v. Moussaoui*, 336 F.3d 279, 280 (4th Cir. 2003), appear to anticipate that the defendant, Mr. Moussaoui, would participate in the depositions and therefore have access to classified information, the district court’s opinions do not appear to contemplate that level of participation (with the depositions instead being conducted by standby counsel). See *United States v. Moussaoui*, 2002 WL 1987964 at * 1 (E.D.V.A. 2003) (noting that defendant was well aware that choosing to proceed *pro se* would not result in his gaining access to classified discovery, and that the defendant’s rights were adequately protected by standby counsel’s access to such materials). The *Moussaoui* case (and its implications for future CIPA litigation), discussed in more detail post, is currently on appeal by the government to the Fourth Circuit.

32. *United States v. Pappas*, 94 F.3d 795, 799 (2d Cir. 1996) (quoting S. Rep. No. 96-823 at 2 (1980), citing *United States v. Wilson*, 721 F.2d 967, 975 (4th Cir. 1983)).

33. See *United States v. Collins*, 720 F.2d 1195, 1197 (11th Cir. 1983).

This dramatic difference renders the CIPA unconstitutional as CIPA deprives defendants of several Sixth Amendments rights.³⁴ They are deprived of effective assistance of counsel because counsel cannot discuss classified evidence with a defendant. This makes it very difficult to prepare a defendant to testify. Defendants are also denied the right to confront the evidence against them. The right to confrontation is a *personal* right and is not exercisable merely through counsel.³⁵ Defendants also are deprived of the rights to be present at the CIPA hearings to determine the admissibility of evidence, a critical stage of the proceedings, and to assist in the preparation and presentation of the defense.

In *United States v. Moussaoui*, the district court ruled that the defendant's Fifth Amendment right to due process – particularly in the context of a capital prosecution – and his Sixth Amendment right to compulsory process outweighed the government's national security interest with respect to access to government detainees who possessed relevant and material exculpatory information.³⁶ The district court also ruled that CIPA did not reduce the government's obligation under *Brady v. Maryland* to give to the defendant exculpatory information that could have an impact not only on the liability phase of the trial, but also upon sentencing (again, particularly in a capital prosecution).³⁷

CIPA also violates Fifth Amendment rights including the defendant's right to: (1) testify in his own behalf;³⁸ (2) present a defense, since classified evidence can be excluded and/or diminished pursuant to CIPA; and (3) remain silent, since in order to introduce classified evidence at trial, *even through his own testimony*, the

34. 18 U.S.C.S. Appx. § 3 (2004).

35. *See, e.g.*, *Faretta v. California*, 422 U.S. 806, 819 (1975).

36. 2003 WL 21263699 (E.D.V.A. 2003). *See also* *Moussaoui*, 282 F. Supp. 2d at 482; *United States v. Moussaoui*, 2003 WL 22258213 (E.D.V.A. 2003).

37. *Moussaoui*, 2003 WL 21263699 at 4 (citing *Brady v. Maryland*, 373 U.S. 83 (1963)).

38. Even defendants who have knowledge of classified information are denied this right because they are not free to testify about such matters without first previewing such testimony for the Court and the government, and having it subject to the CIPA process, which includes potential substitutes for the classified information itself.

defendant must notify the government in advance of precisely the evidence the defense seeks to have admitted in evidence.³⁹

The practical problems of reviewing classified discovery without client input are manifest. Counsel is deprived of the client's reaction to the material. The client is unable to assist in the preparation of cross-examination of government witnesses and even the preparation of his own defense strategy and testimony. Requiring the attorney to keep secrets can negatively affect the attorney-client relationship if the client does not understand the lawyer's obligation to abide by CIPA's terms. *Not* informing the defendant of the *existence* or content of classified material requires discipline on counsel's part that is antithetical to the conventional full disclosure requirements.

The negative aspects of CIPA are obvious.⁴⁰ However, the defense can use it as a sword as much as the government uses it as a shield. Inventive thinking can result in significant advantages because CIPA provides a means to introduce the defense *theory* in a concise and coherent manner. CIPA is a subtle offensive weapon for the defendant and requires some finesse. It also requires strict compliance with the protocols for using classified information.⁴¹

39. In the Embassy Bombings case, we made a motion to declare CIPA unconstitutional on these grounds. The District Court's opinion denying the motion is reported at *United States v. bin Laden*, 2001 WL 66393 (S.D.N.Y. 2001).

40. In addition to CIPA, the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C.S. § 1801 involves secret submissions and proceedings. However, the defense *never* sees the underlying applications for search or eavesdropping warrants under FISA (eliminating FISA as a discovery device akin to an ordinary suppression motion). See *United States v. Nicholson*, 955 F.Supp. 588, 592 (E.D. V.A. 1997) ("this Court knows of no instance in which a court has required an adversary hearing or disclosure in determining the legality of a FISA surveillance. To the contrary, every court examining FISA-obtained evidence has conducted its review *in camera* and *ex parte*"), although the interceptions and seized property are eventually declassified and disclosed. In the twenty-five year history of FISA, the statute has invariably survived constitutional attack, and not a single piece of FISA-generated evidence, by either search and seizure or electronic surveillance, has ever been suppressed, nor has the government ever had a FISA warrant application denied. See *In re Sealed Care*, 310 F.3d 717 (FISCR 2002), reversing *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F.Supp. 2d 611 (FISC 2002). Consequently, unless the interceptions or seized materials are exculpatory, there is very little defense counsel can do to make FISA work for the defendant.

41. CIPA is administered by a Court Security Officer (CSO) from Washington, D.C., assigned by the Department of Justice. The CSO is not part of the prosecution team, and is often provided copied of classified submissions as a courtesy. However,

Nevertheless, defense counsel must be careful not to err *too* much on the side of caution. Rather, counsel must avoid censoring and limiting themselves unnecessarily and should remain aggressive within the confines of CIPA's provisions.

CIPA does provide defense counsel some opportunities. For example, counsel may be able to provide the jury with far more than the inference or argument that the classified evidence would permit. Using substitutions for classified information, the defense can present the very conclusion that counsel would use the underlying evidence to make. This not only presents the defense theory in a coherent and direct form but constrains the government to stand mute in response. Once counsel realizes that the defense theory can be introduced without government rebuttal, the opportunities are limitless. The first task for counsel is to shift from offering *evidence* to crafting the defense *theory* of the case. The second task is to envision the defense in an affirmative manner by creating a narrative of the defense in the abstract — in essence, a “wish list” of the facts counsel wishes to prove and the themes counsel wishes to convey to the jury. The next step is translating the classified discovery into relevant, material, and admissible evidence that corresponds to those facts and themes. The subsequent negotiations with the government should yield uncontradicted substitutions and stipulations that provide substance to the defense.⁴²

In the Embassy Bombings trial, there was a government witness who testified that Mr. El-Hage asked him about transporting Stinger missiles by airplane from Afghanistan to Sudan on behalf of Osama bin Laden in 1992. We had potential cross-examination material that the government wanted to remain classified. In return for not using that material, we obtained a stipulation that was completely different than the projected cross-examination material, but

since these submissions are to the court and/or the government, attorney-client or defense team confidentiality are not implicated by providing the CSO with a copy.

42. The *Moussaoui* defense team's framing of the issue — that the testimony of witnesses the government refused to make available because their information was deemed classified was relevant and admissible because it would establish that Mr. Moussaoui was not among the plotters or facilitators of the September 11 attacks — provides an excellent example of how the defense can fashion the possible impact of classified information for maximum advantage to the defendant. See *United States v. Moussaoui*, 2003 WL 212636699, at * 4 - 5; *United States v. Moussaoui*, 282 F. Supp. 2d 480, 486 (E.D.V.A. 2003).

which made our point explicitly. We wanted the jury to know that during the Soviet invasion and occupation of Afghanistan during the 1980's, the United States had supplied the Afghan resistance, the *mujahedeen*, with Stinger missiles. Thus, the possession of Stinger missiles by bin Laden was far less suspicious, particularly at that early stage of al Qaeda's development. That stipulation accomplished much more than the cross-examination would have. Even a perfectly executed cross-examination would not have established that bin Laden's possession of Stinger missiles was arguably legitimate.

Another example of using CIPA restrictions to our benefit involved cross-examination materials. Potential impeachment material was classified, and the government objected to revealing its existence. The solution was a prearrangement with the government and the court that the witness would be instructed to provide answers that made the impeachment unnecessary. Thus, during that part of the cross-examination, the witness was appropriately pliant. Moreover, we were able to fashion a set of questions that made our point crystal clear.

Although this approach lacks the drama of confronting a witness with impeaching material, there was no guarantee that the witness, who was hostile and capable of hiding behind a language barrier, would have conceded anything. Cross-examination is unpredictable. Government objections could frustrate the inquiry, and the court might become impatient with counsel's refusal to accept the court's view of an appropriate substitution or stipulation and limit cross-examination as a result.

In addition, the meaning and significance of cross-examination is not always readily apparent to a jury. This problem is considerably reduced by scripting the question and answer dialogue or providing a narrative stipulation. Substitutions and stipulations obviate the need to argue issues of marginal admissibility of classified material in the middle of cross-examination. Since courts recognize the difficulties CIPA presents counsel with respect to investigation and access,⁴³ the use of hearsay, summaries, investigative reports, and

43. In our case, for example, we could not call as a witness or obtain first-hand information from many of the sources of the classified material for a variety of reasons,

conclusions can be leveraged to gain evidentiary concessions from the government.

In the Embassy Bombings case, two stipulations were designed to present defense theories for Mr. El-Hage that we could never have established through witnesses or documents. For example, the history of the Somalia conflict and how it led to the events of October 3 - 4, 1993, could not have been presented in the testimony of a single witness. Also, first-hand accounts by participants were impossible to obtain from a country that had no functioning government for more than a decade. Our insistence on access to classified information regarding the United States' and United Nations' military and diplomatic involvement in Somalia and the particulars of the combat that occurred October 3 - 4, 1993, enabled us to negotiate a wide-ranging stipulation that incorporated all of the essential elements of Mr. El-Hage's defense with respect to al Qaeda's alleged involvement in the deaths of U.S. soldiers in Somalia. Similarly, we engineered another stipulation that would have established principles of Mr. El-Hage's defense – that the specific planning for the 1998 Embassy bombings did not commence until well after Mr. El-Hage had returned to the U.S. from Kenya – that we could never have proven with available or admissible evidence.

However, those two stipulations did not reach fruition. The other defendants believed their interests diverged from Mr. El-Hage's with respect to the issues involved and would not agree to the stipulations. That difference in opinion reflects the importance of coordination among defense counsel in multi-defendant terrorism cases. Joint defense agreements are advisable at the pre-trial stage, as are cooperation with respect to motions, organizing discovery, consulting and preparing experts, digitization, domestic and overseas investigation, and subpoenas. During trial, it is imperative that counsel confer and alert each other to strategic and tactical decisions that could have an impact on other defendants. In addition, jury selection should be a collaborative effort. In the Embassy Bombings case, however, the mixture of capital and non-capital defendants made the *voir dire* process difficult.

including non-disclosure of their identities and/or their location beyond the subpoena power.

Lack of cooperation among defense counsel only exacerbates the secrecy that accompanies CIPA litigation. CIPA, like the Protective Orders, severely limits counsel's ability to interview prospective witnesses and discover the facts of the case. As a result, co-defendants' counsel are an invaluable source of intelligence and assistance. The same benefits that counsel can derive from the Protective Orders are applicable to CIPA as well. In fact, CIPA is even more useful in expanding the scope of discovery with respect to *nonclassified* materials because the court uses that remedy to compensate for CIPA's proscription on communication and investigation.

Counsel can also use their "cleared" status to seek from the government or the court information that would otherwise be sealed or submitted *ex parte*. Counsel is already privy to classified information and prohibited from revealing it to the defendant(s). Counsel can seek disclosure of other nonclassified but still confidential government information subject to the same proviso that it not be shared with the defendants. This is especially effective if, as in the Embassy Bombings case, the defense counsel has a perfect record of *not* leaking any sealed information to the public.

Another aspect of CIPA that defendants can exploit is the nature of the classification process. The adversary at trial is the United States Attorney's Office, a division of the Department of Justice. That department, however, is *not* the classifying agency. Some other government entity, such as the Central Intelligence Agency or the Department of State, is responsible for designating information as classified, and the interests of that agency can have a profound impact on the prosecutor's strategy. At times, the government's "intelligence" function supersedes the "prosecutorial" function.⁴⁴

For example, intelligence agencies are loathe to expose sources by public disclosure of classified information. The State Department is extremely careful to protect foreign governments that have assisted the United States in investigating and appre-

44. Of course, the converse effect of this ordering of priorities creates certain caveats for defense counsel as well. While criminal prosecutors may not be comfortable eavesdropping (either telephonically or electronically) on defense counsel's conversations or cyber-correspondence, there is not any reason to believe that the intelligence apparatus would feel so constrained if it thought for a second that such interceptions would increase its fund of knowledge of al Qaeda, its members, and/or its targets.

hending terrorism suspects because aiding the United States can have negative political repercussions. Moreover, with respect to al Qaeda in particular, there is a fear that identifying such nations, especially in certain parts of the globe, would lead to violent reprisals against them.

In the Embassy Bombings case, we peppered the government with a long list of discovery requests regarding the United States military's operations in Somalia in 1992-1993. Many of these relevant document requests were, as we anticipated, classified. Since the Department of Defense is extraordinarily circumspect regarding military operations, particularly with respect to such matters as equipment used, ordinance expended, rules of engagement, casualty assessments (for Somalis), and "after action" reports, the prosecutors elected to bargain for a stipulation that encompassed the factual foundation of our defense rather than try to persuade the Department of Defense to release the materials to us.

These considerations are separate from the priorities of a criminal prosecutor and do not exist in ordinary cases. The prosecutor is under enormous pressure to resist disclosure and to accommodate defendants with generous substitutions and stipulations in order to preserve the secrecy of classified information. In the Embassy Bombings case, these bureaucratic imperatives forced the prosecutor to forego *inculpatory* evidence that was classified. This occurred because the classifying agency objected to revealing it or because declassification of such evidence would have necessitated the declassification of *other, exculpatory* classified material that was even more sensitive.

CIPA thus can provide defense counsel more leverage in extracting particularly helpful substitutions and stipulations. If counsel knows which agency is involved and the stakes involved in disclosure, he or she can bargain more aggressively with the government and the court regarding what substitutions and stipulations are acceptable. The goal should be to obtain a substitution or stipulation that offers the defense *more* both substantively or strategically than it would have gained from the classified evidence itself.

Counsel can justify aggressively seeking favorable stipulations and substitutions by arguing that counsel is losing the opportunity to conduct dramatic and effective impeachment using the primary

documents, recordings, or prior inconsistent statements. Counsel can also argue that the defendant must be given some incentive to accept the substitute or stipulation to aid counsel in explaining the matter to the defendant. A court employing proper case management techniques would not attempt to have counsel accept a substitution or stipulation that did not offer some additional advantage beyond the evidence itself. In sum, CIPA can be used to support the defense theory and factual conclusions through substitutions and stipulations, rather than merely using the statute to obtain recitation of neutral facts.

Sometimes, though, substitutions and stipulations offered by the government simply do not suffice. In those situations, if the court is amenable, the defendant can resist any substitute for the classified material itself, and force the government into more significant strategic concessions.

For example, in *Moussaoui*, the district court agreed with the defense that “because of its unreliability, incompleteness and inaccuracy, the Government’s Proposed Substitution will not ‘provide the defendant with substantially the same ability to make his defense as would’ the court-ordered, videotaped deposition[s].”⁴⁵ Moreover, in imposing sanctions for the government’s subsequent failure to allow the defense access to the detainees for pretrial depositions, the district court rejected both sides’ suggestion that dismissal was appropriate, and instead ruled that the government would not be permitted to seek the death penalty against Mr. Moussaoui and/or make any argument or offer any evidence at trial “suggesting that the defendant had any involvement in, or knowledge of, the September 11 attacks.”⁴⁶

Thus, by resisting the government’s substitutions and using CIPA aggressively to its advantage, the defense team in *Moussaoui* obtained a significant victory in terms of the scope of penalty and proof available to the government – an achievement it likely could not have achieved via any other pretrial motion or strategy.

45. United States v. Moussaoui, 2003 WL 21277161 (E.D.V.A. 2003).

46. 282 F. Supp. 2d at 486-87 (footnote omitted).

V. CONCLUSION

CIPA anticipates that counsel will be aggressive in pursuing the admissibility of relevant and material classified evidence. Although such efforts are completely appropriate, courts are not encouraged to accommodate that approach. As the Senate Report accompanying the statute predicted, the problems CIPA was designed to rectify were not "limited to instances of unscrupulous or questionable conduct by defendants since wholly proper defense attempts to obtain or disclose classified information may present the government with the same 'disclose or dismiss' dilemma."⁴⁷

If the court appears reluctant to afford counsel adequate rein over classified material, counsel should always be quick to remind the court that CIPA does not change the laws of discovery. For example, material's classified status does not make it *less* discoverable or admissible. A court should also be reminded that CIPA is not supposed to place the defendant in any worse position than he or she would be absent the classified status of the unavailable evidence.⁴⁸

The avenues for reversing the impact of the S.A.M.'s, Protective Orders and CIPA are not limited to those set forth in this article. Rather, they are as broad as defense counsel's imagination, diligence and commitment to the case. Each of these facets is designed to intimidate, discourage and disable the defense. However, they are hurdles that can be surpassed and even used to propel the defense forward in ways not conceivable in conventional cases.

47. S. Rep. No. 96-823, at 3 (1980); *see also* *United States v. Moussaoui*, 336 F.3d 279 (4th Cir. 2003) (denying rehearing *en banc*) (Luttig, J., *dissenting*).

48. *See* *United States v. Piondexter*, 698 F.Supp. 316, 320 (D.D.C. 1988); *see also* *United States v. The LaRouche Campaign*, 695 F.Supp. 1282 (D. Mass. 1988) ("manifest objective of CIPA is that classified information should not be disclosed to anyone needlessly," and that "when classified information is not yet in the hands of defendants and their attorneys and they are making demands for disclosure, the court must consider whether defendant's rights can be fully protected by an alternative procedure that does not result in the disclosure of classified information").