New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.nylj.com
VOLUME 235—NO. 64 TUESDAY, APRIL 4, 2006 ALM

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'Graymail' or the Right Defense?

The government's prosecution of Vice President Dick Cheney's former chief of staff, I. Lewis "Scooter" Libby, has again raised the question discussed in connection with the Oliver North prosecution during the late 1980s: Does a former government employee really need confidential documents to mount a defense—or is the need merely feigned in an attempt at graymailing the Department of Justice into dropping its charges?

Graymail is defined as "a means of preventing prosecution…by threatening to disclose government secrets during trial."[1] In the case of Oliver North, the defense team's efforts to seek the admission into evidence of classified information during the trial resulted in the dismissal of the central conspiracy count and other theft counts alleged against Mr. North.[2]

If it were graymail—it worked.

The legal and practical roadblocks that Congress and the courts have placed in front of a defendant who asserts the need to use government secrets, however, are substantial and often make such a defense strategy difficult and perhaps disadvantageous.

In Mr. Libby's case, his lawyers, one of whom, John Cline, was a member of Oliver North's defense team,[3] sought the production of a number of sensitive documents and information, including the President's Daily Briefings, claiming that they served to rebut the government's charges of obstruction of justice, making false statements to FBI agents, and perjury related to his grand jury testimony regarding disclosure to journalists of confidential information about the identity of a CIA agent, Valerie Plame. Prosecutor Patrick Fitzgerald has accused Mr. Libby of a "transparent effort" to graymail the government in seeking discovery of these highly classified documents.[4] In a decision rendered earlier this month, the district court granted Mr. Libby limited access to the top-secret documents.[5]

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When a defendant seeks to use classified information to rebut the government's charges, such as in the current U.S. District Court for the Southern District of New York prosecution of James Giffen, an American businessman with substantial ties to the Republic of Kazakhstan, the task is not a simple one. The defendant is required to jump through a multitude of procedural hoops to access the desired information. Initially, in order to review the top-secret documents, defense counsel is required to undergo detailed federal background checks, which may take a significant amount of time. Once the necessary clearance has been granted, the documents are gathered by a Court Security Officer and made available to counsel in a windowless "safe" room known as a Sensitive Compartmented Information Facility (SCIF). No information may be taken from the SCIF; notes made by counsel during document review must be shredded, and counsel is required to maintain a separate hard drive on the computer in the safe room which remains locked up in the SCIF with the classified documents.

Pleadings or briefs prepared by counsel containing information culled from the classified materials must be written in the SCIF, depriving defense counsel of the modern conveniences available at his office. Finally, the defense must contend with frequent disputes with the government regarding the scope of the documents they are entitled to see and use. This issue arose in the *Giffen* case, where the government has appealed the district court's decision denying its request to preclude Mr. Giffen's access to certain classified documents and his use of such documents in his defense.

In addition to these various procedural hurdles, defendants relying on classified information also must surrender significant substantive rights. Fundamental concepts of due process grant a criminal defendant the right to mount a defense in response to the government's charges by seeking related discovery and submitting exculpatory evidence. In addition, in a typical criminal case, a defendant's most potent weapon often is the secrecy of his or her defense, which can be withheld until the trial is under way. Thus, a defendant can rely upon the presumption of innocence by requiring the prosecution to set forth its entire case before revealing the defense. In cases involving the use of classified information, however, a defendant is required prematurely to reveal defense positions and declare the intention to present certain evidence at trial. These obligations are not only cumbersome, but place defendants in a disadvantageous position.

Classified Information Procedures Act

The procedure applied in cases in which a

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defendant seeks to rely on classified information is set forth in the Classified Information Procedures Act (CIPA). Courts examine the classified documents at issue in order to evaluate their sensitivity and relevance to a valid defense pursuant to the procedure set forth in CIPA.[6] CIPA was passed by Congress in 1980 as a means of accommodating a criminal defendant's right to exculpatory material with the government's right to protect classified information. One of the underlying purposes of CIPA was to deal with the problem of graymail which had arisen in the late 1970s as a result of the increased prosecution of spies by the Carter administration.[7] In those cases, many believed that members of the intelligence community accused of breaking the law would "hide behind" the fact that they knew classified information—which they would reveal at trial—in order to avoid prosecution. The dilemma faced by the government was that the rules of discovery often required the production of the sensitive classified information the government was seeking to protect. Accordingly, Congress concluded that "to foreclose defendants from graymailing the government, a procedure should be created that would require the defendant to disclose his intent to utilize classified information in his defense before the trial began."[8]

CIPA attempts to provide a procedural mechanism by which a court is able to balance a defendant's right to obtain and present exculpatory evidence with the potential damage to national security from the release of government secrets at trial.[9] CIPA defines "classified information" as "[a]ny information or material that has been determined by the United States government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security" and provides that "[a]t any time after the filing of an indictment…, any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution."

Once an issue arises with respect to the disclosure of classified information, a court is required pursuant to §3 and upon the government's motion, to enter a protective order "to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case…." Although the parties' discovery obligations are governed by the Federal Rules of Criminal Procedure and relevant case law (such as *Brady* and *Giglio*), §4 of CIPA states that "[t]he court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting the relevant facts that the classified information would tend to prove."

Once discovery is complete, §§5 and 6 of CIPA set forth the steps to be followed in the use of confidential information at trial. First, a defendant must specify the precise information he intends to disclose through a pretrial written notice to the government and the court. Failure to do so precludes the defendant from using the evidence at trial. Once the defendant has identified the materials, CIPA mandates that upon the motion of the government, the court must hold a hearing to determine the use, relevance, and admissibility of the proposed evidence. Furthermore, the government may move that substitute summaries or redacted versions of the classified information that the court has ruled admissible be used at trial in lieu of the disclosure of classified information.

A defendant's need for classified information commonly arises in those cases in which he or she intends to assert a defense of public authority, arguing that the supposed crimes were in reality a legal response to a request from and with the authority of an agency of the government.

The U.S. Attorney's Criminal Resource Manual instructs that CIPA should serve the dual goals of preventing unnecessary or inadvertent disclosures of classified information and of advising the government of the national security costs incurred by going forward with a case.[10] CIPA is not without its critics. Many have noted that the cost of prosecuting defendants under a CIPA claim is high, as demonstrated in the Oliver North case in which the cost of maintaining an SCIF for North's defense team was $336,000 a year—a relatively small part of the more than $25 million the government is reported to have spent prosecuting the defendants in the Iran-contra cases.[11] In addition, defense counsel frequently complain about the burdens placed on the defense by CIPA.[12]

Public Authority Defense

A defendant's need for classified information commonly arises in those cases in which he or she intends to assert a defense of public authority, arguing that the supposed crimes were in reality a legal response to a request from and with the authority of an agency of the government. Such is the argument made by James Giffen in response to the government's 2003 indictment alleging that he violated the Foreign Corrupt Practices Act, mail and wire fraud, money laundering, and other federal statutes in his role as an oil adviser to the Republic of Kazakhstan. The government argues that Mr. Giffen made unlawful payments of more than $78 million to the President and former Prime Minister of Kazakhstan. Mr. Giffen acknowledges such payments, contending that his actions were taken with the knowledge and support of senior officials at U.S. intelligence and national security agencies who relied on his close business relationship with the former Soviet Union and, more recently, with the Republic of Kazakhstan.

Three types of public authority defenses have been asserted by defendants. First, is the affirmative defense of mistake of fact where the defendant mistakenly, but honestly, believed that he or she was performing the acts with the government's blessing. This defense attempts to negate the government's proof regarding the defendant's state of mind.[13] Second, is the affirmative defense of public authority where the defendant argues that he or she knowingly committed a crime in reasonable reliance on a grant of authority from a government official or agency. This defense is successful only when the government agent in question had actual

authority to empower the defendant to commit the criminal act. Where the government agent does not have actual authority, the defendant is deemed to have made a mistake of law, which generally does not excuse criminal conduct.[14] The final public authority defense is called "entrapment by estoppel" where a government official commits an error upon which the defendant relies and thereby commits a crime.[15]

When a defendant intends to use one of these public authority defenses, Federal Rule of Criminal Procedure 12.3 requires notice to the government well in advance of trial. The written notice must include: "(A) the law enforcement agency or federal intelligence agency involved; (B) the agency member on whose behalf the defendant claims to have acted; and (C) the time during which the defendant claims to have acted with public authority." Rule 12.3 further provides that the government must respond within 10 days of receipt of the notice, either admitting or denying that the defendant exercised public authority in committing the act charged. In addressing the defense of public authority, the U.S. Attorney's Criminal Resource Manual directs prosecutors to respond "quickly and aggressively," noting that where the defendant's claim of public authority involves classified information "it most certainly signals that the prosecutor must consider invoking CIPA" and its accompanying "administrative burdens."[16]

Pursuant to Rule 12.3 and the dictates of CIPA, Mr. Giffen sought to obtain certain classified documents from the government in order to evaluate and prepare a public authority defense. While acknowledging that Mr. Giffen had been in frequent contact with senior American intelligence officials, the government opposed his discovery request, arguing that discovery rules only required them to produce documents within the access and control of the prosecution and that the defense sought documents outside the scope that otherwise were in the possession of the Executive Branch.

District Court Judge William H. Pauley rejected this argument. Although the court noted that the prosecution "need not… produce documents from agencies that did not participate in the investigation of the defendant or documents of which it is unaware," it found that Mr. Giffen was entitled to production of those documents that the prosecution had reviewed or to which it had access.[17]

After the production of some documents pursuant to CIPA procedure, Mr. Giffen notified the government that he intended to advance a public authority defense at trial. The prosecution moved to preclude the defense and stop Mr. Giffen from offering certain classified information relevant to the defense. The court denied the government's motion finding that the proffer made by Mr. Giffen was sufficient to allow him to proceed in his defense strategy. Furthermore, the court dismissed the government's motion to preclude the presentation of certain classified evidence pursuant to §5 of CIPA as premature, finding that Mr. Giffen may be entitled to additional discovery from the government that would allow the defense to make a complete and accurate proffer as contemplated under CIPA.[18]

Invoking the interlocutory appeal provision contained in §7 of CIPA, the government appealed the district court's decision. Government briefs filed with the U.S. Court of Appeals for the Second Circuit stated that prosecutors may be forced to drop the case against Mr. Giffen because of Judge Pauley's decision allowing Mr. Giffen to present a public authority defense. The government asserted that many of the highly classified documents sought by the defense were irrelevant and that Mr. Giffen's review of the top-secret information would jeopardize national security interests and place the government in an "untenable" position. The defense responded simply that Mr. Giffen believed himself to be working for the CIA and other U.S. government agencies and, therefore, is entitled to assert a public authority defense.[19] Oral argument was heard by the Second Circuit on Jan. 25, 2006; a decision has not been rendered.

Despite the government's tendency to label every request for classified information an attempt at graymail, legitimate circumstances exist under which a defendant properly may seek classified information to defend himself against the government's indictment. The fact that a defendant's use of secret information may force the government to alter the charges or drop them altogether does not make the defendant's actions graymail. As the North, Libby, and Giffen cases demonstrate, many of these cases involve individuals in unique circumstances. Courts presiding in these cases must and do balance the government's concerns with the defendant's right to defend himself. In examining each side's position, a court should acknowledge that the scales already are tipped in the governments' favor; the existence of the procedural requirements of CIPA not only grants the government extensive protection from the inadvertent disclosure of classified information, but place defendants in a disadvantageous position with respect to their substantive and procedural rights.

1. Random House Unabridged Dictionary (1997).
2. Walsh Iran/Contra Report—Chapter 2, *United States v. Oliver L. North* (available at http://www.fas.org/irp/offdocs/walsh/chap_02.htm).
3. American Political Network, The Hotline, Volume 10, No. 9 (Feb. 21, 2006).
4. *United States v. Libby*, CR 05-394 (RBW) (D.D.C.) March 10, 2006 Memorandum Opinion.
5. See *United States v. Libby*, CR 05-394 (RBW) (D.D.C.) March 10, 2006 Memorandum Opinion.
6. 18 U.S.C. App. III (2000).
7. Jeff Jarvis, "Protecting the Nation's National Security: The Classified Information Procedures Act," Thurgood Marshall Law Review, Spring 1995; see also *United States v. Sarkissian*, 841 F.2d 959, 965 (9th Cir. 1988) (noting that Congress passed CIPA to respond to "graymail" threats).
8. Jarvis, 20 T. Marshall L. Rev. 319, 320; see also 126 Cong. Rec. H9309 (daily ed. Sept. 22, 1980).
9. Jarvis, 20 T. Marshall L. Rev. at 321; David L. Greenberger, "An Overview of the Ethical Implications of the Classified Information Procedures Act," Georgetown Journal of Legal Ethics, Fall 1998.
10. United States Attorney Criminal Resource Manual Section 2054 (available at http://www.usdoj.gov/usao/eousa/foia_readingroom/usam/title9/crm02054.htm).
11. Jarvis, 20 T. Marshall L. Rev. at 344-345.
12. Id.
13. See *United States v. Baptista-Rodriguez*, 17 F.3d 1354 (11th Cir. 1994); *United States v. Juan*, 776 F.2d 256 (11th Cir. 1985).
14. *United States v. Anderson*, 872 F.2d 1508, 1515 (11th Cir.), cert. denied, 493 U.S. 1004 (1989); see also *United States v. Rosenthal*, 793 F.2d 1214, modified on other grounds, 801 F.2d 378 (11th Cir. 1986), cert. denied, 480 U.S. 919 (1987).
15. *United States v. Burrows*, 36 F.3d 875 (9th Cir. 1994); *United States v. Hedges*, 912 F.2d 1397 (11th Cir. 1990).
16. United States Attorney Criminal Resource Manual §2055 (available at http://www.usdoj.gov/usao/eousa/foia_readingroom/usam/title9/crm02055.htm).
17. *United States v. Giffen*, S1 03 Cr. 404 (WHP) (S.D.N.Y.) July 2, 2004 Memorandum and Order.
18. Id. Oct. 12, 2005 Sealed Memorandum and Order.
19. Mark Hamblett, "Judge's Ruling Poses Dilemma for U.S. Prosecutors of Bribery," New York Law Journal (Jan. 26, 2006).