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PRISONS AND JAILS**Managing Communications by Potentially Dangerous Detainees: A Balancing Act**

BY ANDREW M. ST. LAURENT

Limiting communications to and from people detained by the government is, of course, nothing new. The people tried in the conspiracy to assassinate President Abraham Lincoln were kept under notoriously deplorable conditions.¹ However, developments in recent years have drawn increased scrutiny to the measures put in place to limit contact with detainees, as the use of such measures, their scope and breadth, and the number of people affected by them have grown. In the federal system, these restrictions are referred to as Special Administrative Measures, or SAMs, and are imposed and administered jointly by the Bureau of Pris-

¹ See Osborn H. Oldroyd, *The Assassination of Abraham Lincoln: Flight, Pursuit, Capture, and Punishment of the Conspirators* (1901) (cited in Williams, Frank, *Abraham Lincoln in Law and Lore: The Lincoln Conspirators' Trial By Military Commission*, 202 MIL. L. REV. 258, 265 (2009)).

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ons, the U.S. Attorney's Offices, and domestic law enforcement agencies.

Such SAMs may be appropriate in certain cases where inmates present clear and present dangers to public safety. However, the ad hoc nature of their imposition and administration may result in the unnecessary impingement upon or even de facto elimination of constitutionally protected rights.

Rights of Inmates

Before the 1960s, both pretrial detainees and prisoners were generally viewed as having no rights whatsoever, although as a practical matter corrections officials often allowed communication with the outside world in an effort to meet rehabilitative goals. However, if these rights were limited, most incarcerated people simply had no right to redress regardless of the conditions imposed upon them by the state.

Decisions by federal courts in the 1960s and 1970s, however, limited the ability of correctional authorities to infringe upon constitutionally protected rights. Unnecessarily restrictive or punitive treatment was banned.

In a 1987 case, *Turner v. Safley*,² the U.S. Supreme Court implemented the four-part test still applicable today. While inmates do not have the same rights as free persons, restrictions on constitutional rights must be both necessary to meet reasonable penological goals and proportionate. The *Turner* test requires consideration of whether: (1) there is a rational connection between the regulation and the concern prompting it; (2) there are alternative methods for the inmate to exercise the right affected; (3) accommodating the right in the way sought by the detainee would negatively affect facility operations; and (4) the regulation was motivated by legitimate penological concerns. As discussed in more detail below, there is good reason to believe that the imposition and administration of SAMs in at least some circumstances may not meet this test.

² 482 U.S. 78 (1987).

The Origin of SAMs

Special Administrative Measures arose not from any law passed by Congress but from regulations created by the Department of Justice in 1996, recorded at 28 C.F.R. 501.3, and discussed in Chapter Nine of the U.S. Attorneys' Manual.

Subsection (a) of 28 C.F.R. 501.3 provides in relevant part that the director of the Bureau of Prisons, or his or her designee, may impose these measures upon written notification from the attorney general or the head of a domestic law enforcement agency or intelligence agency "that there is a substantial risk that a prisoner'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." There is no requirement of a hearing before or after the imposition of such measures and no mechanism through which the affected inmate can appeal the decision to impose such measures.³ In the ordinary case, the Bureau of Prisons is then authorized to limit or even to eliminate the inmate's abilities to communicate with anyone other than his or her attorneys, by "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." 28 C.F.R. § 501.3(a).⁴

Moreover, in at least some cases, specifically those in which "reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism,"⁵ the monitoring of "all communications between the inmate and attorneys" is authorized, in addition to the other restrictions previously described (emphasis added). This amendment follows a temporary rule handed down by DOJ following the events of Sept. 11, 2001.

Chapter 9-24.100 et seq. of the U.S. Attorneys' Manual details the procedures to be followed both in imposing and maintaining Special Administrative Measures. In sum and substance, the manual provides for the requesting agency to coordinate with the appropriate members of law enforcement (or the intelligence community) to prepare a written submission for the Office of Enforcement Operations, which will then coordinate with the Bureau of Prisons and make a recommen-

³ The regulation does state that affected inmates "may seek review of any special restrictions imposed in accordance with paragraph (a) of this section through the Administrative Remedy Program, 28 CFR part 542." Unfortunately for such inmates, however, the program referred to is the general program available to an inmate with any concern about the conditions of his or her confinement. Given that SAMs are imposed by the director of the Bureau of Prisons at the request of the head of either the Department of Justice or another federal agency, it seems unlikely that any challenge to SAMs by a detainee would be susceptible to, for example, "informal resolution" with staff at a given facility. These considerations did not stop the Tenth Circuit from affirming the denial, without prejudice, of Ramzi Yousef's challenges to the SAMs for failure to exhaust these remedies as required by the Prison Litigation Reform Act. See *Yousef v. Reno*, 254 F.3d 1214, 69 CrL 479 (10th Cir. 2001).

⁴ Similar regulations are in place for those inmates alleged to have committed specified offenses threatening national security, usually espionage. See 28 C.F.R. § 501.2.

⁵ 28 C.F.R. § 501.3(d).

dation to the attorney general. These procedures are entirely internal to DOJ and do not involve any input from the affected inmate, his or her attorneys, or the court in which the inmate's case is or was proceeding.

Purpose of SAMs

These procedures arose in the context of numerous prosecutions of criminal defendants for trying to or actually carrying out acts of terrorism in the United States. Trials proceeded in the Southern District of New York in 1997 against the conspirators in the first World Trade Center bombing attack in 1993, including Ramzi Yousef, who was convicted for masterminding the attack. Arising from that same investigation, a separate conspiracy was discovered headed by Omar Abdel-Rahman, who was convicted in 1995 of plotting to destroy various structures in New York, among numerous other terrorist acts. In 1996, Khalid Sheik Mohammed, the architect of the 9/11 plot, was indicted (although not arrested) for plotting with Yousef to destroy commercial airplanes flying between the United States and Asia. Accordingly, at the time the regulations governing SAMs were promulgated, the U.S. government was prosecuting in civilian courts and detaining in U.S. jails people who had committed and intended to commit acts of large-scale violence against U.S. persons and property. Not only were such people dedicated to attacking the United States, its citizens, and property, but they also had support from large and active networks that could assist them in achieving such goals even while incarcerated.⁶

There can be no question that preventing incarcerated people from participating in or directing further acts of terrorism or violence is an appropriate goal for the government to pursue. The devil, of course, is in the details: to whom the measures are applied and with what level of severity.

Applications

The most well-known case involving the use of Special Administrative Measures was the criminal prosecution and conviction of attorney Lynne Stewart, who had violated the terms of those SAMs in the course of her post-conviction representation of Omar Abdel-Rahman.

Prior to and as a condition of her representation of Rahman, Stewart was required to sign under penalties of perjury an attorney affirmation stating that she had read and agreed to abide by the SAMs. This affirmation, among other obligations, required Stewart to agree "that neither she nor any member of her office would

⁶ Such concerns obviously apply not only to foreign-born terrorists but also to U.S. citizens who led or were otherwise involved with large-scale criminal organizations. Separate and apart from the SAMs discussed here, courts have imposed, as a condition of sentence, significant restrictions on the ability of such people to communicate while serving sentence. In one prominent example, following a jury verdict that found that Luis Felipe had committed acts of racketeering activity, including conspiracy to murder, while incarcerated in a New York state prison, a district court judge directed that he not be permitted to communicate with people other than his attorney, prison employees, and five people approved by the court. These conditions were upheld on appeal. See *United States v. Felipe*, 148 F.3d 101 (2d Cir. 1998).

'forward any mail received from inmate Abdel Rahman to a third person' nor would she 'use [her] meetings, correspondence or phone calls with Abdel Rahman to pass messages between third parties (including, but not limited to, the media) and Abdel Rahman.'⁷

In violation of these terms, Stewart assisted in communicating messages both to and from Rahman, most relating to the continuance of a cease-fire that an Egyptian terrorist group, al-Gama'a, had made with the Egyptian government. In addition, Stewart personally conveyed a message from Rahman to a reporter as to Rahman's opinion regarding the continuance of the cease-fire. Stewart was subsequently indicted for conspiring to defraud the United States and making false statements by falsely promising to abide by the terms of the SAMs, as well for providing material support to a conspiracy to kidnap and kill people in a foreign country, among other charges. She was convicted following jury trial and, following the government's appeal of a 28-month sentence, sentenced to 10 years' incarceration.

Stewart's violation of the SAMs unquestionably was the key to her convictions. Her convictions for most of the offenses depended entirely on her intentional violation of the terms of the SAMs. In addition, proving the other offenses—in particular, the element of criminal intent—would have been much more difficult absent her violation of the SAMs. There have been reasonable questions raised as to the propriety of the Stewart prosecution,⁸ but the message being delivered to defense attorneys by DOJ in prosecuting the case and by the federal courts in upholding the conviction and vacating the original sentence on the government's appeal is clear.

The actual prophylactic effect of the SAMs in general and the Stewart verdict in particular cannot, of course, be accurately measured. But there can be no doubt that they have had and will continue to have a profound effect on the manner in which defense lawyers represent clients subject to such measures.

Effect on Attorney-Client Privilege

The most direct and obvious effect on the attorney-client relationship has been the use of SAMs to justify the monitoring or recording of attorney-client privileged communications as contemplated by 28 C.F.R. § 501.3(d). While the attorney-client privilege has historically been subject to meaningful exceptions when such communications are made to advance a crime or continue a fraud (the so-called "crime fraud" exception), the privilege otherwise has been held near sacrosanct, surviving even death.⁹

By contrast, SAMs contemplate constant real-time monitoring of attorney-client communications by government employees. Such an intrusion, in any other context, would result in the waiver of the privilege¹⁰ be-

⁷ *United States v. Sattar*, 686 F.3d 156 at n. 1, 91 CrL 518 (2d Cir. 2012).

⁸ See, for example, Elaine Cassel, *The Lynne Stewart Guilty Verdict: Stretching the Definition of "Terrorism" to Its Limits* available at <http://writ.news.findlaw.com/cassel/20050214.html>.

⁹ See *Swidler & Berlin v. United States*, 524 U.S. 399 (1998).

¹⁰ While no court has held that attorney-client communications in this context would result in a waiver, there is a reasonable argument that such communications are not protected by

cause courts have generally held that statements made between attorney and client in the presence of third parties to whom the privilege does not attach are not protected.¹¹ SAMs are a far greater intrusion on the privilege than the "crime fraud" exception, which is, after all, applied by the courts,¹² not prosecutors or Bureau of Prisons employees, and starts with the presumption that such communications are protected unless and until the party seeking such information can show that there is a good reason to believe they should not be so protected.

Accordingly, the monitoring of otherwise privileged communications contemplated by the SAMs is indeed a historic and unprecedented intrusion on the privilege. Even if engaging in such monitored communications does not result in the waiver of the privilege, as a practical matter such surveillance cannot but have a chilling effect on the attorney-client relationship. After all, the client sharing information with his attorney has nothing but the promise from the very government prosecuting him that such statements will not be used against him. The elimination of the foundation of the attorney-client relationship at the outset will result in more strained relationships between such attorneys and their clients and less effective representation overall of such clients.

SAMs and the Attorney-Client Relationship

Even in the absence of the monitoring of communications between attorneys and their clients, the other restrictions imposed on attorneys by SAMs prevent the attorneys from carrying out many other ancillary functions flowing from the attorney-client relationship. Attorneys are allowed to disseminate communications only for the purposes of the legal defense of the client and for advancing requests for post-sentence relief.¹³ While such a restriction may seem innocuous, and even a matter of common sense, in reality these restrictions can have a drastically limiting effect on attorney-client relationships.

Attorneys, including criminal defense attorneys, play a number of different roles in representing their clients. This can include communicating with family members, which is of particular importance for incarcerated clients whose ability to communicate is sharply restricted, by acting as spokespersons for them in the media (exactly the conduct for which Stewart was convicted), and by advising and sometimes taking an active hand in a client's business affairs, among other functions. By preventing attorneys from undertaking such tasks (under pain of arrest and incarceration), the SAMs further undermine the development of a functioning attorney-client relationship.¹⁴

the privilege. See Marjorie Cohn, *The Evisceration of the Attorney-Client Privilege in the Wake of September 11, 2001*, 71 *FORDHAM L. REV.* 1233, 1245 (2003).

¹¹ See, e.g., *In re Condemnation by City of Philadelphia*, 981 A.2d 391, 397 (Pa. Commw. Ct. 2009) ("Confidentiality is key to the [attorney-client] privilege, and the presence of a third-party during attorney-client communications will generally negate the privilege.")

¹² See *United States v. Zolin*, 491 U.S. 554, 562-63 (1989).

¹³ See *Sattar*, 686 F.3d 156 at n. 1.

¹⁴ Even for destitute clients who may have no need for an official spokesperson, the SAMs still meaningfully complicate the attorney's role. An attorney cannot even tell a family member, for example, that "Client X says he is feeling better."

The existence of SAMs can complicate even the creation of an attorney-client relationship. Because incarcerated individuals subject to such measures cannot communicate with people not already approved by prison authorities, they have no ability, barring leniency from DOJ, to contact attorneys even to discuss the client's retaining them. There is anecdotal evidence suggesting that the Bureau of Prisons refuses to allow law student interns to communicate with detainees subject to SAMs (although paralegals and investigators can) even if they agree to be bound by their terms. The result is that people subject to SAMs get no help or assistance from law school clinics, a significant source of aid to incarcerated people. This is particularly important for those prisoners whose convictions have exhausted their appeals, as criminal defendants do not have a constitutional right to the assistance of an attorney after their convictions have become final.

Effect on Clients

The effects that such SAMs can have on incarcerated people have been noted by numerous human rights organizations.¹⁵ It is beyond question that the isolation from other inmates and the termination or limitation of communications with nonincarcerated people can have serious psychological and even physical effects on a person's well-being.¹⁶ Human rights organizations have compared the isolation imposed on detainees at so-called "supermax" prisons—where, not coincidentally, most people subject to SAMs will be detained—to torture.¹⁷

While the appropriate level of restriction to be imposed on any given detainee must depend on the unique circumstances surrounding that person's confinement, any balancing analysis must include the likely psychological effects of the resulting isolation on the detainee as a factor weighing against imposition of SAMs restrictions.

¹⁵ See, e.g., *Terrorist Trial Report Card: September 11, 2001-September 11, 2009*, Center on Law & Security, New York University School of Law (Jan. 2010) at 51-52.

¹⁶ See, e.g., Jeffrey L. Metzner, M.D., and Jamie Fellner, Esq., *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW (March 1, 2010).

¹⁷ United Nations Human Rights Committee: Consideration of reports submitted by States parties under Article 40 of the Covenant, concluding observations of the Human Rights Committee, United States of America. New York: UNHRC, UN Doc. CCPR/C/USA/CO/3, 2006.

Balancing of Competing Interests

In sum, while the implementation of SAMs was motivated by appropriate concerns, their use, and in particular their use against classes of people other than presumed terrorists, must be carefully monitored. Moreover, there are numerous ways in which their implementation could be improved.

Perhaps most important in assuring effective representation by counsel, DOJ should end monitoring of attorney-client privileged communications and the prohibition on the dissemination of information by attorneys for purposes other than criminal defense. The same prophylactic goals could be met by much less restrictive measures, such as by screening the attorneys assigned to represent such defendants, a process that would likely be more effective in achieving those goals as well. It should not be difficult to find competent attorneys who can effectively represent defendants but will refuse to allow themselves to be used as vehicles for the commission of violence.

Given the drastic consequences for the affected detainee, detainees (and their attorneys) should also be allowed input into whether and how such measures will be implemented in the first instance as well as whether they should be continued. Currently the regulations require review of SAMs restrictions once a year.¹⁸ One way for the *Turner* balancing test to be met is for such review to be vigorous and meaningful and include review not only of the attitude of the detainee toward the threatened acts of violence that justified their imposition in the first instance but also of whether a given detainee still has the ability to instigate violence while incarcerated. For many, if not most, detainees, their ability to inspire acts of violence will diminish over time.

SAMs are without question a valuable and in some cases necessary tool in the fight against organized violence. Nonetheless, they are drastic measures that have very significant negative effects both on the detainee and on the quality of representation the detainee is afforded. Courts, prosecutors, and defense attorneys all have important roles to play in ensuring that such measures are imposed and maintained responsibly.

¹⁸ 28 C.F.R. 501.3(c) states that SAMs can be imposed for only "120 days, or with the approval of the Attorney General, a longer period of time not to exceed one year." As a practical matter, once approved, SAMs remain in effect subject to annual review. As might be expected, continued imposition of SAMs is usually approved.