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Preferring Order to Justice

Laura Rovner

Jeanne Theoharis

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Preferring Order to Justice

PREFERRING ORDER TO JUSTICE

LAURA ROVNER & JEANNE THEOHARIS*

In the decade since 9/11, much has been written about the “War on Terror” and the lack of justice for people detained at Guantanamo or subjected to rendition and torture in CIA black sites. A central focus of the critique is the unreviewability of Executive branch action toward those detained and tried in military commissions. In those critiques, the federal courts are regularly celebrated for their due process and other rights protections. Yet in the past ten years, there has been little scrutiny of the hundreds of terrorism cases tried in the Article III courts and the state of the rights of people accused of terrorism-related offenses in the federal system. The deference to assertions of national security that degraded protections for detainees at Guantanamo has similarly degraded the protections for Muslims facing terrorism charges in the federal courts. This Essay provides a close examination of one of those cases—that of Syed Fahad Hashmi—and reveals rights abridgement throughout the legal process (intrusive surveillance, vague material support charges, the use of prolonged pre-trial solitary confinement, classified evidence, the use of political activities to demonstrate mindset and intent). The federal courts have permitted such rights abridgements,

* Laura Rovner is the Ronald V. Yegge Director of Clinical Programs & Associate Professor of Law and the founding director of the Civil Rights Clinic at the *University of Denver Sturm College of Law*. Jeanne Theoharis is Professor of Political Science at *Brooklyn College of the City University of New York* and the Co-Founder of Educators for Civil Liberties. We are deeply grateful to Abu Yousuf, Amna Akbar, Alan Chen, Steve Downs, Sally Eberhardt, Peter Erlinder, Owen Fiss, Arnold Franklin, Susan Green, Karen Greenberg, Lisa Greenman, Faisal Hashmi, Shane Kadidal, Alan Mills, Pardiss Kebriaei, Christopher Lasch, Sean Maher, Justin Marceau, Alejandra Marchevsky, Bill Quigley, David Thomas, Steve Vladeck, and Eli Wald for their insights, feedback, and insistence that this was a story that must be told. We are also grateful to the editorial staff of the *American University Law Review* for their thoroughness and thoughtful edits. We have learned a great deal from recent conversations and correspondence between Jeanne Theoharis and Fahad Hashmi, but the arguments and analysis here are ours alone and do not speak for Hashmi or his counsel. Nevertheless, we remain concerned that just drawing attention to the rights issues in his case in this forum will subject him to harsh measures, just as the public attention around his case pretrial led the government to push for extra security measures in his trial.

Beginning with a first meeting with Hashmi’s counsel in January 2008, Professor Theoharis followed the case closely, attending the pretrial hearings and meeting with Hashmi’s counsel and family repeatedly. The research here is thus also drawn from her notes and observations of the pretrial process.

largely abdicating their role as a check on Executive power and imperiling the rights of those being tried in the Article III courts.

TABLE OF CONTENTS

Introduction.....	1332
I. Rights Issues Implicated by Charge/Arrest.....	1343
A. Criminalization of Islamic Political Speech and Association	1343
B. Material Support and the First Amendment.....	1348
C. Disparate Reaction to “Islamic Terrorism”	1357
II. Rights Violations in Preparing for Trial.....	1358
A. Conditions of Pretrial Confinement.....	1359
1. Effects on health	1363
2. Effects on due process/coercion	1366
3. The chilling effect of the SAMs on the accused and his counsel.....	1371
4. The unreviewability of the SAMs.....	1378
B. CIPA	1386
1. Rights concerns regarding CIPA evidence	1387
2. Unreviewability.....	1390
III. Trial.....	1391
A. Political Speech and Association as Evidence—But of What?.....	1391
B. Anonymous Jury	1397
IV. Post-Conviction Rights Issues.....	1403
A. Conditions of Confinement.....	1403
B. Unreviewability	1408
Conclusion	1411

INTRODUCTION

I must confess that over the past few years I have been gravely disappointed with the white moderate. I have almost reached the regrettable conclusion that the Negro’s great stumbling block in his stride toward freedom is not the White Citizen’s Counciler or the Ku Klux Klanner, but the white moderate, who is more devoted to “order” than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice.

—Martin Luther King, *Letter From Birmingham Jail*, 1963¹

In the fall of 2010, in taxicabs across New York City, Human Rights Watch premiered a new campaign entitled, “Try the Alleged 9/11

1. Martin Luther King, Jr., *Letter From Birmingham Jail* (Apr. 16, 1963), available at http://mlk-kpp01.stanford.edu/index.php/resources/article/annotated_letter_from_birmingham/.

Planners in New York: It Happened Here.”² An array of New Yorkers looked directly at the camera and spoke about why Guantanamo Bay prison detainees should be tried in the federal courts in New York, invoking the principles of fairness, justice, and closure.³ Midway through the video, a text box appeared, reading “[f]ederal courts have convicted more than 400 people on terrorism-related charges since 9/11.”⁴

In the decade since 9/11, much has been written about the “War on Terror” and the rights violations of people detained at Guantanamo, in naval brigs, or subjected to rendition and torture in CIA black sites.⁵ Much of this criticism has focused on the unreviewable nature of executive branch action due to the government’s assertions that constitutional protections do not apply to the detainees and/or the prerogative of the executive in matters of national security during times of “war.”⁶ Executive branch officials have used these grounds to deny detainees the opportunity to confront their accusers, have access to counsel, see evidence against them, and invoke the writ of habeas corpus to contest their indefinite detentions without charge.⁷

In challenging these detentions, advocates for the detainees focused their efforts on federal court habeas review, and more recently, as prosecutions of Guantanamo detainees have resumed, many commentators have invoked the federal courts as exemplars of justice, contrasting them to military commissions.⁸ Because of the

2. *It Happened Here: New Yorkers for 9/11 Justice*, HUMAN RIGHTS WATCH (Nov. 6, 2010), <http://www.hrw.org/video/2010/11/05/it-happened-here-new-yorkers-911-justice>.

3. *Id.*

4. The video goes on to note that “Guantanamo’s military commissions have only convicted five.” *Id.*

5. See, e.g., Owen Fiss, *Aberrations No More*, 2010 UTAH L. REV. 1085, 1089 (critiquing the Bush Administration’s use of interrogation under torture, imprisonment without trial, denial of habeas corpus, unfettered use of military commissions, and warrantless wiretapping in response to the “war on terror”); Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 OXFORD J. LEGAL STUD. 235, 238 (2006) (noting that the Supreme Court did not endorse the effective denial of habeas but failed to protect “the principle of freedom”); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1260 (2002) (arguing that the executive order establishing military tribunals for trials of alleged terrorists is unconstitutional).

6. See Fiss, *Aberrations No More*, *supra* note 5, at 1090.

7. See *id.* at 1087.

8. See Morris Davis, *Khalid Sheikh Mohammed Gets His Way*, SALON (May 2, 2012, 10:58 AM), http://www.salon.com/2012/05/02/khalid_sheikh_mohammed_gets_his_way/; Jonathan Hafetz, *Even Terrorists Deserve to be Sentenced*, HUFFINGTON POST (May 3, 2012, 4:23 PM), http://www.huffingtonpost.com/jonathan-hafetz/even-terrorists-deserve-to-be-sentenced_b_1475022.html; Laura Pitter, *Guantanamo’s System of Injustice: The First Trial of an Accused Terrorist Exposes the Flaws of “Reformed” Military*

prioritization of advocacy around Guantanamo detainees, many human rights groups and advocates have been reluctant to scrutinize and to speak out against the practices used in those courts for fear of giving ammunition to conservatives and contradicting their own message to bring the Guantanamo detainees into the system. The federal courts are thus often referenced as the “gold standard” of American justice and held up to show what due process looks like when it is done right.⁹

While liberals and conservatives disagree on whether Guantanamo detainees should be tried in Article III courts, they generally start from a similar premise: that the process available within the federal courts for suspects of terrorism-related offenses protects the rights of the accused and that reviewability reliably exists.¹⁰ For many conservatives, the concern is that the plentiful nature of those rights will allow dangerous people to walk free and compromise national secrets.¹¹ For many liberals, the federal legal process itself is equated with rights; most focus on the record of the federal courts to demonstrate the system’s toughness, flexibility, and array of legal

Commissions, SALON (Jan. 19, 2012, 1:14 PM), http://www.salon.com/2012/01/19/guantanamos_system_of_injustice/. *But see* Benjamin Wittes, *Human Rights Watch’s Laura Pitter on Military Commissions—A Response*, LAWFARE (Jan. 22, 2012, 11:11 PM), <http://www.lawfareblog.com/2012/01/human-rights-watchs-laura-pitter-on-military-commissions-a-response/> (responding to Pitter’s assessment of the military commission trial of *United States v. Al Nashiri*). Human Rights Watch asserts “[b]ut despite these new rules, the military commissions remain substandard proceedings that lack the independence, fairness, and time-tested procedures of US federal courts.” *The Guantanamo Trials*, HUMAN RIGHTS WATCH, <http://www.hrw.org/features/guantanamo> (last visited Apr. 19, 2012). The ACLU argues that “detainees should be prosecuted in federal courts, which are well equipped to accommodate the government’s legitimate national security interests without compromising the fundamental rights of defendants,” *Indefinite Detention: No Charges? No Trials? No Justice.*, AM. CIVIL LIBERTIES UNION, <http://www.aclu.org/indefinitedetention/questions.html> (last visited Apr. 19, 2012), where “[t]ime and again the federal courts have proven themselves capable of handling terrorism cases while protecting both American values and sensitive national security information,” *9/11 Defendants to be Tried in Federal Court*, AM. CIVIL LIBERTIES UNION (Nov. 13, 2009), <http://www.aclu.org/national-security/911-defendants-be-tried-federal-court>.

9. James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331, 331 (2009).

10. *But see* Gareth Peirce, *America’s Non-Compliance: The Case Against Extradition*, LONDON REV. OF BOOKS, May 13, 2010, at 18–22 (arguing that protections for terrorism suspects do not exist because political influence has undermined the independence of the judiciary); Glenn Greenwald, *Federal Judge Complicity*, SALON (Apr. 23, 2012, 9:53 AM), http://www.salon.com/2012/04/23/federal_judge_complicity/.

11. *See, e.g.*, Michael B. Mukasey, Op-Ed., *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, at A15; John Yoo, Op-Ed., *The KSM Trial Will Be an Intelligence Bonanza for al Qaeda*, WALL ST. J., Nov. 16, 2009, at A23; Vincent J. Vitkovsky, *Try Mohammed at Guantanamo*, HUFFINGTON POST (Mar. 19, 2010, 11:36 AM), http://www.huffingtonpost.com/Vincent-J-Vitkovsky/try-mohammed-at-guantanamo_b_505850.html.

tools to handle national security secrets and achieve justice—in sum, their longstanding ability to prosecute and convict terrorists.¹²

But the question of whether the rights of terrorism suspects actually are protected in the post-9/11 federal criminal justice system goes largely unexamined. The two most significant reports on federal terrorism prosecutions—the Center on Law and Security’s *Terrorist Trial Report Card*¹³ and Human Rights First’s *In Pursuit of Justice*¹⁴—are not predominantly concerned with the rights of terrorism suspects. Rather, they both reflect the position, outlined in the 2010 *Terrorist Trial Report Card*, that “the overwhelming evidence suggests that the structures and procedures, as well as the substantive precedents, provide a strong and effective system of justice for alleged crimes of terrorism.”¹⁵ Similarly, the opening of Human Rights First’s study of federal prosecutions states that “terrorism prosecutions can present difficult challenges” but found that “the federal courts have demonstrated their ability, over and over again, to effectively and fairly convict and incapacitate terrorists in a broad variety of terrorism cases . . . [and] that prosecuting terrorism defendants in the court system generally leads to just, reliable results.”¹⁶

The very definition of justice in federal terrorism prosecutions has been inextricably linked to conviction.¹⁷ Attorney General Eric

12. The incidences are too voluminous to cite in total. See, e.g., Daphne Eviatar, *Ghailani Trial and Sentence Affirms US Federal Court System*, HUFFINGTON POST (Jan. 25, 2011, 5:38 PM), http://www.huffingtonpost.com/daphne-eviatar/ghailani-trial-and-senten_b_813961.html; Donald J. Guter *Gitmo Trials ‘Not the U.S. at its Best,’* MIAMI HERALD (Apr. 30, 2012), <http://www.miamiherald.com/2012/04/30/v-print/2776177/gitmo-trials-not-the-us-at-its.html>; Pitter, *supra* note 8; Andrea Prasow, *Hidden Torture: Behind the Plea Bargain of Majid Khan*, JURIST (Mar. 2, 2012), <http://jurist.org/forum/2012/03/andrea-prasow-majid-khan.php>; Andrew Rosenthal, *Justice Delayed, Torture Classified*, N.Y. TIMES (May 4, 2012, 1:28 PM), <http://takingnote.blogs.nytimes.com/2012/05/04/justice-delayed-torture-classified>.

13. CTR. ON LAW & SEC., N.Y. UNIV. SCH. OF LAW, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001–SEPTEMBER 11, 2011 (2011) [hereinafter 2011 TERRORIST TRIAL REPORT CARD], available at <http://www.lawandsecurity.org/Portals/0/Documents/TTRC%20Ten%20Year%20Issue.pdf>; CTR. ON LAW & SEC., N.Y. UNIV. SCH. OF LAW, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001–SEPTEMBER 11, 2009 (2010) [hereinafter 2010 TERRORIST TRIAL REPORT CARD], available at http://www.lawandsecurity.org/Portals/0/documents/02_TTRCFinalJan142.pdf.

14. RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS (2008), available at http://www.law.yale.edu/documents/pdf/Alumni_Affairs/USLS-pursuit-justice.pdf.

15. 2010 TERRORIST TRIAL REPORT CARD, *supra* note 13, at iv.

16. RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS, 2009 UPDATE AND RECENT DEVELOPMENTS 1–2 (2009), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/090723-LS-in-pursuit-justice-09-update.pdf>.

17. See, e.g., *Fair Trials: Military Commissions*, AMNESTY INT’L, <http://www.amnestyusa.org/our-work/issues/security-and-human-rights/fair-trials>

Holder described the proposed trials of the alleged 9/11 plotters in federal court, as “cases that have to be won. . . . I don’t expect that we will have a contrary result.”¹⁸ While the U.S. government and international human rights advocacy groups typically argue that near-complete rates of conviction do not indicate an open legal system when evaluating the legal systems of other countries,¹⁹ advocates have avoided using similar measures of evaluation to assess the openness—or lack thereof—of the U.S. legal system.

Few scholars, then, have looked carefully at the hundreds of terrorism cases in the Article III courts and how the deference to assertions of national security that degraded protections for detainees at Guantanamo has similarly degraded the protections for defendants within the federal system.²⁰ Guantanamo (without the accent)²¹ is more than a prison in Cuba; it represents a particular way of seeing the Constitution, of constructing the landscape as a murky terrain of

(last visited Apr. 19, 2012) (“Federal courts successfully prosecuted 523 terrorism-related defendants between September 11, 2001, and December 31, 2009. The present conviction rate is 88%.”). Karen Greenberg critiques this tendency in *Guilty Until Proven Guilty: Threatening the Presumption of Innocence*, TOMDISPATCH.COM (Nov. 18, 2010, 3:05 PM), <http://www.tomdispatch.com/archive/175322/>, and notes that even those who ordinarily would question the assertion that a successful trial means a conviction have compromised that position in order to end military tribunals for Guantanamo Bay detainees.

18. Warren Richey, *Holder: ‘Failure Not an Option’ in New York 9/11 Terror Trial*, CHRISTIAN SCI. MONITOR (Nov. 19, 2009) (internal quotation marks omitted), available at <http://www.csmonitor.com/USA/Justice/2009/1119/p02s13-usju.html>.

19. See, e.g., BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP’T OF STATE, 2010 HUMAN RIGHTS REPORT: CHINA (INCLUDES TIBET, HONG KONG, AND MACAU) 15–16 (2011), available at <http://www.state.gov/documents/organization/160451.pdf> (spotlighting the inadequate remedies for defendants whose rights have been violated and the conviction rate of the Chinese criminal justice system—where only 1206 of 997,872 total defendants were acquitted in 2009). Condemning the Chinese legal system, the report observes: “According to the *China Law Yearbook*, in 2009 the combined conviction rate for first- and second-instance criminal trials was 99.9 percent. Of 997,872 criminal defendants tried in 2009, 1,206 were acquitted.” *Id.*

20. James Forman, Jr., in *Exporting Harshness*, explores five areas in which the U.S. criminal justice system has influenced our approach to the War on Terror and argues that “in contrasting the aberrant (Guantanamo) with the normal (our domestic criminal justice system) we become blinded to the profound abnormality of our domestic criminal system.” Forman, *supra* note 9, at 338. Indeed, many of the rights issues discussed in this Essay are not unique to terrorism prosecutions; rather, our point is that the aggregate impact of the abuses in these types of cases “transgresses . . . principle[s] of ‘fundamental fairness’ in operation.” *Medina v. California*, 505 U.S. 437, 448 (1992) (citation omitted).

21. We have omitted the accent on Guantanamo throughout this Essay. Its absence functions as a metaphor for how rights are treated in the War on Terror, both in the prison in Cuba and the United States. Aziz Huq also plays with the accent to suggest President Obama’s superficial changes and fundamental continuities with Bush Administration practice in *Obama’s Minimalist Approach to Guantanamo*, AM. PROSPECT (Jan. 22, 2009), <http://prospect.org/cs/articles?article=obamas-minimalist-approach-to-guantanamo>.

lurking enemies where rights must have substantial limits and the courts must be steadfast against such dangers. While many scholars and human rights advocates have elegantly demonstrated the dangers of these paradigms at work in the justification and maintenance of Guantanamo and the continued detention of 169 men there,²² this Essay argues that the federal system is similarly infected by such paradigms and itself can produce and sustain unreviewability for defendants facing terrorism-related charges.

This Essay's thesis is that the preponderance of attention to places such as Guantanamo,²³ Abu Ghraib, and Baghram and policies such as rendition, military commission trials, and indefinite detention²⁴ overshadow the rights violations endemic to the federal system, with particularly severe impact over the past decade on Muslims facing

22. See, e.g., Lakhdar Boumediene, Op-Ed., *My Guantánamo Nightmare*, N.Y. TIMES SUNDAY REVIEW, Jan. 8, 2012, at SR9; Julian Borger, *Guantanamo: Ten Years of Limbo*, JULIAN BORGER'S GLOBAL SEC. BLOG, THE GUARDIAN (Jan. 10, 2012, 12:50 PM), <http://www.guardian.co.uk/world/julian-borger-global-security-blog/2012/jan/10/guantanamo-legacy-afghanistan>; Julian Borger, *Guantanamo, Ten Years On*, HUMAN RIGHTS WATCH (Jan. 6, 2012), <http://www.hrw.org/news/2012/01/06/guantanamo-ten-years>; David Cole, *Guantánamo: Ten Years and Counting*, THE NATION (Jan. 23, 2012), <http://www.thenation.com/article/165443/guantanamo-ten-years-and-counting>; Murat Kurnaz, *Notes from a Guantánamo Survivor*, N.Y. TIMES SUNDAY REVIEW (Jan. 7, 2012), <http://www.nytimes.com/2012/01/08/opinion/sunday/notes-from-a-guantanamo-survivor.html>.

23. As Jenny Martinez has observed, discussing the importance of Guantanamo litigation and its appeal to litigators,

[t]he Guantanamo litigation in particular has generated enormous interest in the legal community. When *Rasul* was filed in early 2002, the memory of September 11th was still too fresh and the lawyers for the detainees received hundreds of pieces of hate mail and had difficulty finding local counsel. But as one lawyer involved put it, "By the time the case got to the Supreme Court, you had to beat the lawyers off with a stick."

Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1062 (2008). She notes, "[d]ozens of the nation's biggest law firms and hundreds of attorneys are currently involved in representing the Guantanamo detainees or filing amicus briefs on their behalf. At this point, a law firm that does not have its own Guantanamo detainee might have difficulty attracting summer associates." *Id.* at 1063.

24. National Defense Authorization Act for Fiscal Year 2012 (NDAA), Pub. L. No. 112-81, §§ 1021–22, 125 Stat. 1298, 1562–64 (2011). Commentary and criticism around the provisions and passage of the 2012 NDAA were voluminous. David Cole, *Gitmo Forever? Congress's Dangerous New Bill*, N.Y. REV. OF BOOKS BLOG (Dec. 8, 2011, 5:25 PM), <http://www.nybooks.com/blogs/nyrblog/2011/dec/08/gitmo-forever-dangerous-new-bill>; Glenn Greenwald, *Three Myths About the Detention Bill*, SALON (Dec. 16, 2011, 6:56 AM), http://www.salon.com/2011/12/16/three_myths_about_the_detention_bill; Benjamin Wittes & Robert Chesney, *NDAA FAQ: A Guide for the Perplexed*, LAWFARE (Dec. 19, 2011 3:31 PM), <http://www.lawfareblog.com/2011/12/ndaa-faq-a-guide-for-the-perplexed>; *President Obama Signs Indefinite Detention Bill Into Law*, AM. CIVIL LIBERTIES UNION (Dec. 31, 2011), <https://www.aclu.org/national-security/president-obama-signs-indefinite-detention-bill-law>; *US: Revised Detainee Bill Still Fundamentally Flawed*, HUMAN RIGHTS WATCH (Dec. 13, 2011), <http://www.hrw.org/news/2011/12/12/us-revised-detainee-bill-still-fundamentally-flawed>.

terrorism-related charges.²⁵ The lack of public attention to these issues stems in part from a post-civil rights paradigm that assumes the legal system in the United States is now relatively incorruptible, making it necessary to go *outside* of U.S. legal jurisdiction to circumvent the conundrum of the rights of terrorism suspects.²⁶

Accordingly, much of the focus on post-9/11 justice issues has framed the problem and solution around Guantanamo: the prison must be closed and the people either tried or released.²⁷ While certainly a crucial part of the solution, this view of Guantanamo as a discrete space and process—not just offshore, not just outside the rule of law, but contained—is extraordinarily. Many civil libertarians fear that raising questions about the fairness of the federal system will only embolden conservative pressure for military commissions.²⁸

25. Such treatment follows from the treatment of other people of color within the federal system. For a larger discussion of rights abuses at the hands of the federal courts and prisons, see generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 7-8 (2010), discussing how the racial disparities in prison rates for African Americans cannot be explained by drug-crime rates; KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* 1 (2010), stating “The U.S. prison population is larger than at any time in the history of the penitentiary anywhere in the world. Nearly half of the more than two million Americans behind bars are African Americans, and an unprecedented number of black men will likely go to prison during the course of their lives.” and ROBERT PERKINSON, *TEXAS TOUGH: THE RISE OF AMERICA’S PRISON EMPIRE* 2 (2010), noting “Along the margins of American society . . . imprisonment has become commonplace. One out of every six African American men has spent time in prison, one out of every thirteen Hispanics. If one takes a snapshot of those currently incarcerated, the socioeconomic indicators read more like a fact sheet from Afghanistan than the first world.”

26. It functions under the twin assumptions that systematic racial oppression is a flaw of the past and that the courts provide an able force in correcting civil rights and civil liberties violations. This ignores the long history of legal lynching in this country and the central role the law and the courts have played in upholding/masking racial injustice even since the civil rights movement. See generally MICHAEL J. PFEIFER, *ROUGH JUSTICE: LYNCHING AND AMERICAN SOCIETY, 1874–1947* (2004) (comparing mob justice and lynching with the death penalty system today); ELIZA STEELWATER, *THE HANGMAN’S KNOT: LYNCHING, LEGAL EXECUTION, AND AMERICA’S STRUGGLE WITH THE DEATH PENALTY* (2003) (overviewing the history of lynching and other forms of legalized execution in America).

27. See, e.g., Tom Parker, *10 Years On, 10 Reasons Guantanamo Must be Closed*, HUMAN RIGHTS NOW (Jan. 11, 2012, 9:28 AM), <http://blog.amnestyusa.org/waronterror/10-years-on-10-reasons-guantanamo-must-be-closed/> (outlining ten reasons why Guantanamo should be closed, including a legal requirement, disparate notions of fair trials depending on detainee’s country of origin, and a lack of truth and accountability); see also AM. CIVIL LIBERTIES UNION, *A CALL TO COURAGE: RECLAIMING OUR LIBERTIES TEN YEARS AFTER 9/11*, at 10 (2011), available at <http://www.aclu.org/files/assets/acalltocourage.pdf> (lauding the criminal justice system for prosecuting hundreds of suspected terrorists “in accordance with our laws,” and contrasting that with the “discredited military commissions system”).

28. We are in no way defending the use of military commissions and remain convinced of the urgency of moving the Guantanamo detainees into the federal system; our point is that the federal system has significant and systemic problems and that these must be—and should have been—highlighted at the same time as we push

However inadvertent, this has obscured the devolution of rights protection for people accused of terrorism-related charges here at home, the schisms of race and class that have long riven the criminal justice system and the disparate justice it produces,²⁹ and the ways that the prison at Guantanamo Bay is not an aberration but part of a larger way of thinking about rights and security.³⁰

An examination of the criminal terrorism cases in the Article III courts reveals a system similarly driven by fears of Muslim terror suspects and a corresponding excessive and dangerous deference to the prerogatives of the executive. A chilling tautology ensues in the federal courts: the invocation of national security by the executive proves the necessity of the government's conduct and thus demands its approval for the sake of national security. When it comes to terrorism-related cases in the federal system, actions by U.S. Attorneys, prison officials, or the Federal Bureau of Investigation (FBI) are often insulated from real reviewability or sanction, despite a process that is intended to ensure review.³¹ Perhaps the most insidious aspect of this is that the patina of due process obscures these rights violations—making it much harder to turn public attention to domestic rights abridgement that is as considerable as that occurring in Guantanamo. Indeed, one inadvertent result of the focus on habeas review in Guantanamo advocacy has been the lack of

for people to be moved into it.

29. See generally ALEXANDER, *supra* note 25, at 11 (likening the racial disparities in mass incarceration to Jim Crow laws); DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999) (highlighting the discrepancies among the representation of racial groups in American prisons and the ways the courts have increasingly shrunk the rights of individuals and suspects in the post-civil rights era); ANGELA Y. DAVIS, *ABOLITION DEMOCRACY: BEYOND PRISONS, TORTURE, AND EMPIRE* (2005); ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* (2003) (detailing the historical and longstanding patterns of racial and class injustice endemic to the criminal justice system and increasing role of federal criminal prosecutions); CHRISTIAN PARENTI, *LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS* (2008) (asserting that African Americans have suffered disproportionately from the expansion of the criminal justice system, which itself was designed to foster economic restructuring and end racial upheaval and political rebellion).

30. See DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* 3–19 (2007) (arguing that the exigencies of terrorism do not justify the broad curtailment of due process rights).

31. Courts on occasion have chastised the government's tactics. See, e.g., *United States v. Cromitie*, No. 09 Cr. 558 CM, 2011 WL 2693297, at *2–4 (S.D.N.Y. June 29, 2011) (agreeing with the defense that the prosecution had engaged in sentencing manipulation to ensure the defendant would receive a twenty-five year mandatory minimum); *Islamic Shura Council of S. Cal. v. FBI*, 779 F. Supp. 2d 1114, 1117 (C.D. Cal. 2011) (admonishing the government for providing false and misleading information to the court). But rarely have these rebukes been accompanied by penalty or decisive action against the government's interests.

rigorous investigation of due process and other rights issues in these federal cases.³²

Human Rights Watch and other civil libertarians regularly use the “400 convictions” figure without significant comment or caveat regarding what happened in these cases.³³ But a look at these 400 convictions raises questions about the protection of rights here at home. Many of those cases have involved racially- and religiously-targeted surveillance, the use of prolonged pretrial solitary confinement, secret evidence, entrapment, and other rights abridgement.³⁴ In this piece, we examine one of those “400” cases—that of Syed Fahad Hashmi.

Hashmi is a U.S. citizen who pled guilty to one count of conspiracy to provide material support to a foreign terrorist organization (FTO) in the Southern District of New York in 2010.³⁵ A granular examination of his case³⁶ reveals a series of rights deprivations by government officials that not only undermine the idea of fairness of the federal system, but are all the more insidious because they are sanctioned—indeed at times created—by the law itself. Subjecting Hashmi’s case to closer scrutiny reveals that what initially might be viewed as an individual instance of an “[im]perfect trial”³⁷ is actually more systemic in nature—not simply a stain on the fabric of the federal system but increasingly woven into the fabric itself. Indeed, it

32. See, e.g., *Category Archives: Guantanamo: Litigation*, LAWFARE, <http://www.lawfareblog.com/?cat=13> (last visited Apr. 19, 2012) (providing regular updates on litigation involving Guantanamo Bay detainees).

33. *It Happened Here: New Yorkers for 9/11 Justice*, *supra* note 2.

34. We do not have the space to detail the rights abridgement across the hundreds of cases, but rights concerns abound, including the use of pretrial SAMs (e.g., Oussama Kassir, Muhammad Warsame); inhumane pretrial conditions (e.g., Ehsanul Sadequee, Aafia Siddiqui); entrapment (e.g., Newburgh Four, Matin Siraj, Yassin Aref); the use of tortured evidence (e.g., Ahmed Abu-Ali); and the use of political speech and association as evidence (e.g., Tarek Mehanna). This Essay focuses on the rights issues attending criminal terrorism prosecutions and post-conviction treatment. There are numerous other areas of grave concern in the federal system that similarly reveal excessive deference to claims of “national security,” including: material witness and other pretextual arrests; the use of immigration “violations” to detain Muslims; the use of the state secrets doctrine to enable government secrecy; and the courts’ unwillingness to allow damages for extraordinary rendition and abuse in post 9/11-detentions. Regrettably, we do not have the space to consider them here.

35. Judgment in a Criminal Case, *United States v. Hashmi*, No. 1:06-cr-00442-LAP (S.D.N.Y. June 10, 2010), ECF No. 161.

36. Cf. Stephen I. Vladeck, *Terrorism Trials and the Article III Courts After Abu Ali*, 88 TEX. L. REV. 1501, 1504 (2010) (examining the federal trial of Ahmed Omar Abu Ali using a similar, one-case approach and reaching a different conclusion).

37. See *United States v. Abu Ali*, 528 F.3d 210, 256 (4th Cir. 2008) (noting that “while ‘the Constitution entitles a criminal defendant to a fair trial,’ it does not guarantee ‘a perfect one’” (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986))).

is precisely the ingrained nature of these problems that makes them so difficult to see; the courts' lack of review and substantive separation from the Executive becomes more pronounced with each repetition by the courts and the corresponding silence of civil libertarians.

Hashmi's case provides an appropriate lens to examine this issue for a series of reasons. First, his prosecution originated with a warrant issued by the U.S. District Court for the Southern District of New York, and his case was prosecuted through the Article III courts.³⁸ His prosecution was never connected to an act of terrorism or violence—on U.S. soil or anywhere in the world.³⁹ Hashmi's case—which involved a Muslim U.S. citizen accused of providing material support to a foreign terrorist organization—exemplifies the kind of terror prosecutions that have increasingly taken place over the last decade in the federal system.⁴⁰ Like many of these cases, media coverage was considerable at the outset about the successful apprehension of a “homegrown terrorist” who was providing “military gear to Al Qaeda,”⁴¹ but little mainstream media attention was subsequently paid to the nature of the case, evidence, or treatment of the suspect. The methods used in Hashmi's case are typical of many federal terrorism prosecutions over the past ten years⁴²—extensive surveillance, charges of “material support,” the imposition of Special Administrative Measures (SAMs), and use of the Classified Information Procedures Act (CIPA) and terrorism-expert testimony. One more unusual but significant aspect of Hashmi's prosecution is

38. *United States v. Hashmi*, 621 F. Supp. 2d 76, 78 (S.D.N.Y. 2008). This is unlike some of the more widely covered federal prosecutions including Jose Padilla, Ali Saleh Kahlhah Al-Marri, John Walker Lindh, and Ahmed Omar Abu Ali, where a portion of their prosecutions, incarceration, or interrogations occurred in other localities.

39. *See id.* (listing the four counts on which Hashmi was indicted: (1) “conspiracy to provide material support to al Qaeda”; (2) “substantive material support to al Qaeda”; (3) “conspiracy to make or receive a contribution of funds, goods or services to, and for the benefit of al Qaeda”; and (4) “a corresponding substantive charge”).

40. *See* 2011 TERRORIST TRIAL REPORT CARD, *supra* note 13, at 19–21 (“Since 2007, material support has gone from being charged in 11.6% of cases to 69.4% in 2010. In 2011 so far, 87.5% of cases involve a material support charge.” (emphasis omitted)).

41. *See Terror Suspect Fights Extradition*, BBC NEWS (June 7, 2006, 5:46 PM), http://news.bbc.co.uk/2/hi/uk_news/england/london/5054590.stm; *see also* Alison Gendar et al., *Terrorist Raised in New York: Suspect's Troubling Early Signs*, N.Y. DAILY NEWS (June 10, 2006), <http://www.nydailynews.com/archives/news/terrorist-raised-york-suspect-troubling-early-signs-article-1.630794>; Chris Zambelis, *Arrest of American Islamist Highlights Homegrown Terrorist Threat*, TERRORISM FOCUS, JAMESTOWN FOUND. (June 27, 2006, 3:09 PM), [http://www.jamestown.org/single/?no_cache=1&tx_ttnews\[tt_news\]=816](http://www.jamestown.org/single/?no_cache=1&tx_ttnews[tt_news]=816).

42. *See* 2011 TERRORIST TRIAL REPORT CARD, *supra* note 13.

the First Amendment issues that arose throughout his prosecution, not only in the material support charge itself, but also in the targeting of Hashmi as a political activist and the treatment of his (and others') Islamic political speech.

Second, Hashmi is a U.S. citizen and had a robust defense team⁴³ that attempted, however unsuccessfully, to use the process to protect his rights. Moreover, Hashmi grew up and was educated in New York, just miles away from where he was held and prosecuted, and people mobilized to bring more attention to the abridgement of his rights than many other terrorism prosecutions of the past decade.⁴⁴ Thus, if a terrorism suspect indeed has rights and protections that he could draw upon in federal court, it should have been Hashmi.

Finally, while completing his B.A. at Brooklyn College, Hashmi was enrolled in a political science seminar on civil rights with Professor Theoharis, where he wrote a paper on the abridgement of civil liberties that Muslim-American groups were facing in the U.S. post-9/11. So the question of his civil and human rights is not merely academic⁴⁵ but also provides a palpable reminder that one of the key issues to be examined as to how the federal courts have confronted the "War on Terror" must be the state of the rights of the terrorism suspect himself.

This Essay proceeds in five parts, moving chronologically through Hashmi's case and assessing the rights concerns at every stage. Doing so illuminates a rights abridgement that is greater than the sum of its parts and constitutive of the entire process.

Part I discusses the rights issues in the government's initial surveillance of Hashmi; his subsequent arrest, charge and extradition; and the rights concerns attendant to the charges of material support and the government's disparate reaction to "Islamic terrorism." Part

43. Hashmi was represented by criminal defense lawyer Sean Maher from the outset; David Ruhnke and Anthony Ricco subsequently joined his defense team.

44. Hashmi's family and supporters began the Free Fahad website to provide information and draw attention to the case. See *About Us*, FREEFAHAD, www.freefahad.com/?page_id=11 (last visited Apr. 19, 2012). Out of this grew the Muslim Justice Initiative (MJI), a group created to provide support and assistance for other families facing similar terrorism prosecutions. *Id.* According to its website, "MJI was founded in 2008 in response to a climate of religious intolerance, racism and curtailment of civil rights faced by Muslims including unwarranted surveillance, harassment, threats, imprisonment, and even torture." *About Us*, MUSLIM JUSTICE INITIATIVE, www.muslimsforjustice.org/aboutus.html (last visited Apr. 19, 2012).

45. Moreover, the lack of First Amendment protection for Muslim dissent is particularly jarring in light of the open airing of opposing perspectives and difficult ideas that is at the heart of university values. In the norms of the university classroom, it is unacceptable to simply dismiss an idea and demonize the speaker—let alone claim that an alternate perspective is not an idea—simply because a person disagrees with it.

II examines the rights violations on the road to trial, including the inhumane conditions of Hashmi's pretrial confinement; the effects of those conditions on his health and due process rights; and the use of CIPA, which impacted his ability to participate effectively in his own defense, his right to a speedy trial, and to review the evidence against him. Part III examines the First Amendment implications of the court's decisions to allow the government to present evidence of (and terrorism-expert testimony about) Hashmi's political speech and association, and to permit an anonymous jury. It also examines the First Amendment implications for those who sought to draw attention to the rights issues in his case. Part IV looks at post-conviction rights concerns, including the government's decision to send Hashmi to the federal Supermax prison and the conditions of confinement there. The piece concludes with an assessment of the ways that rights abridgement in terrorism trials has become stitched into the fabric of American law and common sense.

I. RIGHTS ISSUES IMPLICATED BY CHARGE/ARREST

We uphold the exclusion order as of the time it was made and when the petitioner violated it. In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. . . . Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier.

—*Korematsu v. United States*⁴⁶

A. Criminalization of Islamic Political Speech and Association

The rights concerns in Hashmi's case began even before his indictment. They started with the massive expansion of intrusive

46. 323 U.S. 214, 219 (1944) (citations omitted). The parallels between the U.S. response to 9/11 and Pearl Harbor are substantial. While a full discussion of those similarities is beyond the scope of this Essay, we are compelled to point out the most obvious: that is, the use of threats to national security to legitimate race-based action and the seeming absence of any requirement of evidence of a specific threat in order to intern people was legitimized by the Supreme Court, similarly cowed by fear and deference to executive claims of national security. The Court was adamant that Korematsu was not interned "because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures." *Id.* at 223. In May 2011, then-Acting Solicitor General Neal Katyal apologized for "the mistakes of that era" and acknowledged that the Solicitor General owes a "great responsibility and a duty of absolute candor in [making] representations to the Court." Tracy Russo, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, JUSTICE BLOG (May 20, 2011), <http://blogs.usdoj.gov/blog/archives/1346>.

surveillance initiated in the wake of the 9/11 terrorist attacks. Shortly after and in response to 9/11, the New York Police Department (NYPD) initiated an unprecedented transformation and expansion of its mission into a domestic counterintelligence unit and surveillance operation.⁴⁷ As Police Commissioner Raymond Kelly explained, “It became obvious we couldn’t rely solely on the federal government to protect this city.”⁴⁸ The extent of this conversion is still unknown; however, in a Pulitzer Prize-winning series of investigative pieces, the Associated Press has detailed how, with the help of the CIA, the NYPD in the decade since 9/11 has “become one of the nation’s most aggressive domestic intelligence agencies.”⁴⁹

According to the investigation, the NYPD Intelligence Division began operating a Demographics Unit that engaged in extensive surveillance and mapping of Sunni and Shi’a Muslim communities in New York City, Long Island, and New Jersey. The Unit’s activities include compiling information on 250 mosques, 12 Islamic schools, 31 Muslim student associations, and 263 places they termed “ethnic hotspots” such as businesses, bookstores, coffee shops and restaurants where Muslim New Yorkers ate, talked, and shopped.⁵⁰ The NYPD intensively monitored Muslim student associations at colleges and universities in New York City and across the Northeast, sending undercover detectives to spy on student groups (including at Brooklyn College).⁵¹

47. See *Counter-Terrorism Initiatives*, NYPD SHIELD, <http://www.nypdshield.org/public/initiatives.nypd> (last visited Apr. 19, 2012) (listing some of the methods in which the NYPD has engaged in counterterrorism since 9/11, including surveillance and tactical deployments).

48. *Day of Destruction: Decade of War*, MSNBC (Sept. 1, 2011), <http://www.msnbc.msn.com/id/44292512/>.

49. Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, ASSOCIATED PRESS (Aug. 24, 2011), available at <http://www.huffingtonpost.com/huff-wires/20110824/bc-us-sept-11-nypd-intelligence-abridged/>. The full compendium of articles can be found here: *Highlights of AP’s Probe into NYPD Intelligence Operations*, ASSOCIATED PRESS, <http://www.ap.org/media-center/nypd/investigation> (last visited May 6, 2012).

50. Leonard Levitt, *The NYPD: Spies, Spooks and Lies*, NYPD CONFIDENTIAL (Sept. 5, 2011), <http://nypdconfidential.com/columns/2011/110905.html>.

51. These colleges and universities included Brooklyn College, City College, Baruch College, Hunter College, Queens College, LaGuardia Community College, St. John’s University, Yale University, Rutgers University, Columbia University, Princeton University, Syracuse University, New York University and the University of Pennsylvania. Chris Hawley, *NYPD Monitored Muslim Students All Over Northeast*, ASSOCIATED PRESS (Feb. 18, 2012), <http://www.ap.org/Content/AP-In-The-News/2012/NYPD-monitored-Muslim-students-all-over-Northeast>; Garth Johnston, *NYPD Spying on Muslim College Kids Now*, GOTHAMIST (Oct. 11, 2011, 9:47 AM), http://gothamist.com/2011/10/11/nypd_spying_on_muslim_college_kids.php. This Essay focuses on the NYPD’s surveillance of Hashmi because of the recent public revelations into these NYPD programs. Hashmi was also under FBI surveillance but the extent is unknown publicly.

While he was studying at Brooklyn College and active in the Muslim student association on campus, Fahad Hashmi⁵² was a religious and outspoken activist in the Muslim community and member of the New York religious-political group Al Muhajiroun (ALM).⁵³ This led to government monitoring of him and his numerous political activities at Brooklyn College and around the New York metro area.⁵⁴ An avid debater in class and student meetings at Brooklyn College and on city streets, he distributed religious-political literature in Times Square and Jackson Heights, Queens and demonstrated outside various embassies protesting the treatment of Muslims in Kashmir, Chechnya and Palestine and calling for a caliphate in Pakistan. A May 2002 article in *Time* magazine entitled *Al Qaeda now*, which also appeared on the CNN website, included mention of Hashmi's political activities.⁵⁵ The article quoted him at a 2002 Brooklyn College Muslim student meeting "praising" John Walker Lindh and describing America as "the biggest terrorist in the world."⁵⁶ He decried the unjust treatment Muslims were facing in America and was deeply critical of U.S. foreign policy in the Middle East.⁵⁷ In the year before the beginning of the second Gulf War, Hashmi caused campus controversy for his speeches at various Muslim student associations across the New York area where he claimed that the United States had greater aspirations in the Middle East and was preparing to go to war against Iraq.⁵⁸

52. Because all of the men in Hashmi's family have the first name of Syed, he was known to friends and family as Fahad.

53. The United States has never declared ALM a terrorist organization. *Foreign Terrorist Organizations*, BUREAU OF COUNTERTERRORISM, U.S. DEP'T OF STATE (Jan. 27, 2012), <http://www.state.gov/j/ct/rls/other/des/123085.htm>. While it is difficult to get an accurate sense of ALM, the New York ALM appears to have been a small Queens, New York-based spin-off of or group related to the controversial British group Al Muhajiroun. The New York ALM may have transformed into the Queens-based Islamic Thinkers Society. Many members were young Muslim-Americans, a number of them the children of immigrants. The Islamic Thinkers Society's public mission centered on nonviolent public advocacy that was determinedly critical of U.S. policy and global atrocities against Muslims and called for the implementation of an Islamic state.

54. See *infra* at Part III.A (discussing government's reliance on Hashmi's political activities as a student during his trial).

55. *Al Qaeda now*, CNN (May 27, 2002), http://articles.cnn.com/2002-05-27/politics/time.alqaeda_1_qaeda-al-qaeda-francis-x-taylor?_s=PM:ALLPOLITICS.

56. *Id.*

57. *Id.*

58. Public statements made by non-Muslims have not led to the same type of law enforcement response. For example, Scott Roeder, the convicted killer of Dr. George Tiller, a provider of late-term abortions, had posted the following statement on an anti-abortion website: "Tiller is the concentration camp 'Mengele' of our day and needs to be stopped before he and those who protect him bring judgment upon our nation." Susan Saulny & Monica Davey, *Seeking Clues on Suspect in Shooting of Doctor*, N.Y. TIMES, June 2, 2009, at A1; see also Lawrence Rosenthal, *First Amendment*

Though his views were often well outside of mainstream political debate, Hashmi's activities fell within the customary protections of the First Amendment.⁵⁹ Yet, given the climate in the city and the ways the NYPD and FBI had redefined their mandate, his outspokenness precipitated extensive government surveillance of him.⁶⁰ In 2003, Hashmi completed his bachelors' degree in Political Science at Brooklyn College. He then matriculated at London Metropolitan University to pursue a Masters in International Relations. He completed his degree in 2006.

On June 6, 2006, Hashmi was preparing to travel to Pakistan when British police at Heathrow Airport arrested him on a warrant and indictment issued by the Southern District of New York.⁶¹ Thrown to the ground by British police, he had angry words for the arresting officers. According to government accounts, which Hashmi disputed, Hashmi told the arresting officers that he (or others) "will get you" and expressed his happiness about the deaths of British and American troops in Afghanistan and Iraq. Hashmi disputed the government's account of his remarks.⁶²

Investigations and the Inescapable Pragmatism of the Common Law of Free Speech, 86 IND. L.J. 1, 35–36 (2011).

59. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . ."); see also *Texas v. Johnson*, 491 U.S. 397, 411 (1989) ("[E]xpression of dissatisfaction with the policies of the country [is] situated at the core of our First Amendment values."); *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537–38 (1980) (noting that discussions are protected); *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (plurality) (observing that "political belief and association constitute the core of those activities protected by the First Amendment").

60. Targeting political activists has often worked at cross-purposes to national security and reliably finding saboteurs or spies, as was amply demonstrated during the Cold War. ATHAN G. THEOHARIS, *ABUSE OF POWER: HOW COLD WAR SURVEILLANCE AND SECRECY POLICY SHAPED THE RESPONSE TO 9/11*, at 106 (2011). The FBI had a robust record of surveilling and prosecuting political activists, but a rather shabby record of finding Soviet spies. *Id.* at 142–43. In its post-9/11 approach to counterterrorism, the FBI has fallen back on old patterns. ATHAN THEOHARIS, *THE QUEST FOR ABSOLUTE SECURITY* 245 (2007). The summer before 9/11, a Phoenix FBI agent had flagged a prospective terrorist in ALM member, Zakaria Soubra. *Id.* at 246. Attending flight school in Arizona, Soubra had made sweeping criticisms of U.S. foreign policy. The agent named him and nine others to watch. Unfortunately, this focus on Soubra may have worked to obscure the man attending flight school in Arizona who actually would help crash a plane on 9/11—Hani Hanjour. *Id.* Soubra stood by his criticisms of U.S. foreign policy but resolutely professed his innocence of any act of terrorism. Placed in federal detention without charge for a year, the government never filed any charges against him or linked him to any act of terrorism but still deported him to Lebanon.

61. Warrant for Arrest at 1, *United States v. Hashmi*, No. 1:06-cr-00442-LAP (S.D.N.Y. May 24, 2006).

62. There are numerous versions of what Hashmi allegedly said to British authorities during the arrest—an arrest not made by U.S. officials. There is no disagreement that Hashmi was forcibly arrested by multiple officers, and that he

Hashmi was charged with two counts of providing and conspiring to provide material support to al Qaeda and two counts of making and conspiring to make a contribution of goods or services to al Qaeda.⁶³ His arrest received considerable media attention.⁶⁴ As with many terror indictments, the media maintained little distance from the U.S. Attorney's press conference. The government had caught a "homegrown terrorist"⁶⁵—a "quartermaster" as they described Hashmi.⁶⁶ "If we are engaged in a war against terror—and we most certainly are," FBI Assistant Director Mark J. Mershon explained in the Bureau's press release, "then Syed Hashmi aided the enemy by supplying military gear to al Qaeda."⁶⁷ New York Police Commissioner Raymond Kelly declared "[t]his arrest reinforces the

spoke back to the officers. However imprudent or disrespectful, comments made upon arrest are certainly not anomalous to Hashmi or terrorism-related arrests, despite how his comments would subsequently be used to justify his conditions of confinement. Indeed, these comments became a bit of a moving target; in the government's last motion requesting an anonymous jury, they had added that Hashmi tried to bite British authorities. Government's Memorandum of Law in Support of Motion for Anonymous Jury & Other Related Protective Measures at 8, *United States v. Hashmi*, No. 1:06-cr-00442-LAP (S.D.N.Y. April 20, 2010), ECF No. 147.

63. Indictment at 1, *United States v. Hashmi*, No. 1:06-cr-00442-LAP (S.D.N.Y. May 24, 2006). The government charged Hashmi with conspiring to provide and providing "material support or resources" to a designated foreign terrorist organization (FTO) in violation of 18 U.S.C. § 2339B. *Id.* 18 U.S.C. § 2339B prohibits

knowingly provid[ing] material support or resources to a foreign terrorist organization, or attempt[ing] or conspir[ing] to do so To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . that the organization has engaged or engages in terrorist activity . . . or that the organization has engaged or engages in terrorism.

18 U.S.C. § 2339B (2006). The material support ban was first passed as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Pub. L. No. 104-132, § 303, 110 Stat. 1214, 1250. Hashmi was also charged with conspiracy to contribute and contributing "funds, goods, and services" thereto in violation of the International Emergency Economic Powers Act, 50 U.S.C. § 1705(b). Indictment, *supra*, at 3.

64. *E.g.*, Anemona Hartocollis & Al Baker, *U.S. Citizen Is Accused of Helping Al Qaeda*, N.Y. TIMES, June 8, 2006, at B3; Kevin Sullivan & Michelle Garcia, *Britain Holds Suspect in Al-Qaeda Case*, WASH. POST, June 8, 2006, at A18; *New York Man Accused of Supplying al Qaeda Faces Extradition to U.S.*, CNN WIRE (June 8, 2006), <http://www.cnn.com/2006/WORLD/europe/06/07/wednesday/index.html?iref=storysearch>.

65. Gendar et al., *supra* note 41; Zambelis, *supra* note 41.

66. *Terror Suspect Linked to Al Qaeda Loses Extradition Battle*, DAILY MAIL ONLINE, <http://www.dailymail.co.uk/news/article-443477/Terror-suspect-linked-Al-Qaeda-loses-extradition-battle.html> (last updated Mar. 20, 2007, 11:23 AM).

67. Press Release, U.S. Dep't of Justice, *United States Announces First Extradition from United Kingdom on Terrorism Charges 2* (May 26, 2007), <http://www.justice.gov/usao/nys/pressreleases/May07/hashmiextraditionpr.pdf>. Mershon added, "[i]n a global community, terrorism anywhere is a threat to people everywhere." *Id.*

... fact that a terrorist may have roots in Queens and still betray us,” and praised the NYPD and FBI “who understood this and kept Hashmi on our radar.”⁶⁸

B. Material Support and the First Amendment

Hashmi faced charges of providing material support to al Qaeda. Numerous scholars have argued that material support bans are the “black box” of domestic terrorism prosecutions—they allow all sorts of constitutionally protected activities to be classified as suspect, if not criminal.⁶⁹ Both the Bush and Obama administrations have relied on the statute’s vague nature—what the Bush Department of Justice (DOJ) described as “strategic overinclusiveness”—to advance the tactic of preventive prosecutions.⁷⁰ Justified, as President Bush asserted, by the “new threats we face,” the theory of preventive prosecution rests upon identifying dangerous characteristics that portend forthcoming terrorism.⁷¹

Material support charges carry comparatively high sentences.⁷² They often target small acts and religious and political associations, which are interpreted as manifestations of impending terrorist

68. *Id.*

69. See, e.g., DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* 198 (2006) (asserting that “[b]uilding on the 1996 Antiterrorism Act [AEDPA], the Patriot Act expanded guilt by association”); Eric Umansky, *Department of Pre-Crime: Why Are Citizens Being Locked Up for “Un-American” Thoughts?*, MOTHER JONES (Feb. 29, 2008, 12:00 AM), <http://motherjones.com/politics/2008/02/departement-pre-crime> (observing that the material support provisions “give the government a shot at convictions traditional criminal laws could never provide”).

70. Jeff Breinholt, *Terrorist Financing*, U.S. ATTORNEYS’ BULLETIN 6 (2003), available at www.justice.gov/usao/eousa/foia_reading_room/usab5104.pdf. They write, “[t]he need to prevent certain results is so great that we criminalize conduct that leads up to, but does not necessarily reach, the bad result we are seeking to prevent.” *Id.* In the months following the September 11 attacks, Attorney General Ashcroft was even more explicit about this approach, stating that “the central thrust of our campaign against terror must be proactive prevention and disruption, and not primarily reactive investigation and prosecution. We cannot wait for terrorists to strike to begin investigations and make arrests. We must prevent first and prosecute second.” Memorandum from John Ashcroft, Att’y Gen., to Heads of Components of the Dep’t of Justice (Nov. 8, 2001), available at http://www.justice.gov/opa/pr/2001/November/01_ag_580.htm.

For surveys of the use of material support and related criminal offenses as preemptive tools, see generally Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008); Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425 (2007).

71. See generally Chesney & Goldsmith, *supra* note 70.

72. 2011 TERRORIST TRIAL REPORT CARD, *supra* note 13, at 20. Material support charges can result in sentences of up to fifteen years per charge: “Where material support is the top charge, the resulting sentence is 7.8 times longer than for defendants not charged with terrorism or national security.” *Id.*

actions.⁷³ Indeed, Hashmi was never accused of being a member of al Qaeda, of having any direct contact to al Qaeda, or being involved in any act by al Qaeda. Rather, his prosecution hinged on his membership in ALM—a group deeply and religiously critical of the United States that had never been designated by the U.S. as a terrorist organization—and his involvement with a person alleged to have provided socks, raincoats, and ponchos to al Qaeda.⁷⁴

The Supreme Court legitimized this tradeoff of rights for national security in its decision in *Holder v. Humanitarian Law Project*.⁷⁵ Brought by the Humanitarian Law Project (HLP) and the Center for Constitutional Rights, the case challenged certain aspects of the material support ban—and its definition of material support—as overly vague and in violation of the First and Fifth Amendments.⁷⁶ The Supreme Court ruled for the first time in its history that speech advocating only lawful, nonviolent activity with or on behalf of FTOs can be subject to criminal penalty, even where the speakers' intent is to discourage violence, because such speech was potentially legitimizing of these groups.⁷⁷ According to the *HLP* Court, such

73. For a discussion of the ways in which the government has used religious speech as a proxy for terrorism risk, see Aziz Z. Huq, *The Signaling Function of Religious Speech in Domestic Counterterrorism*, 89 TEX. L. REV. 833 (2011). See also Umansky, *supra* note 69 (explaining that merely expressing political sympathy, driving a taxi, or donating money earmarked for peaceful activities have all been interpreted as materially supporting terrorist activities). In certain key ways, this functions as a new McCarthyism—inoculated through the fearsome—sounding “material support” but bearing a stark resemblance in practice to the criminalization of belief and association of a half century ago. Since the HUAC trials of the McCarthy period, the government has moved political repression outside the view of the public. There will be no video footage of prosecutors haranguing defendants HUAC-style because that type of public scrutiny did damage to the state's ability to extract confessions and tied defendants to wider publics by revealing the political nature of government targeting. See generally VICTOR S. NAVASKY, *NAMING NAMES* (1980) (providing an in-depth history of the McCarthy era); ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* (1998) (same); David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003) (tracing the evolution of political repression from the McCarthy era to the current post-9/11 climate).

74. See, e.g., Defendant's Response to Government's Motion to Admit Certain Evidence at Trial at 1–2, *United States v. Hashmi*, 1:06-Cr-442 (S.D.N.Y. 2009), ECF No. 123.

75. 130 S. Ct. 2705 (2010).

76. *Id.* at 2714. While the Supreme Court's ruling was devastating to anyone concerned with the First Amendment, the case itself was so narrowly constructed (focusing on nonviolent speech with a FTO, rather than nonviolent acts of association) that it would have pertained to only a small handful of the material support cases in the past decade, had the Court ruled otherwise. But it opened the door wider for even more material support prosecutions in the future.

77. *Id.* at 2728–29. For a discussion of the Court's differing applications of strict scrutiny in *HLP* and its decision in *Citizens United v. Federal Election Commission*, see David Cole, *The Roberts Court vs. Free Speech*, N.Y. REV. OF BOOKS (Aug. 19, 2010), available at <http://scholarship.law.georgetown.edu/facpub/424/>.

speech constitutes “material support” of terrorism as defined by 18 U.S.C. § 2339B.⁷⁸

With speech advocating only legal, peaceful activity imperiled by the Supreme Court’s ruling in *HLP*, the state of First Amendment protection for more controversial speech is even thinner.⁷⁹ So-termed “jihadist” ideas, membership in radical Islamic political groups, and even growing religiosity for Muslims are often treated not simply as political/religious beliefs or association, but as acts portending danger and intent in and of themselves.⁸⁰ The driving thesis for this sort of law enforcement was laid out in a 2007 NYPD report on radicalization and homegrown terrorism:

The NYPD’s understanding of the threat from Islamic-based terrorism to New York City has evolved since September 11, 2001. While the threat from overseas remains, terrorist attacks or thwarted plots against cities in Europe, Australia and Canada since 2001 fit a different paradigm. Rather than being directed from al-Qaeda abroad, these plots have been conceptualized and planned by “unremarkable” local residents/citizens who sought to attack their country of residence, utilizing al-Qaeda as their inspiration and ideological reference point. . . . Where once we would have defined the initial indicator of the threat at the point where a terrorist or group of terrorists would actually plan an attack, we have now shifted our focus to a much earlier point . . . a process of radicalization. The culmination of this process is a terrorist attack.⁸¹

Drawing a clear link between increased religiosity for Muslims, political activity, and terrorism, the report listed indications of possible growing radicalization, including: “[g]iving up cigarettes, drinking, gambling and urban hip-hop gangster clothes”; “[w]earing traditional Islamic clothing, growing a beard”; and “[b]ecoming involved in social activism and community issues.”⁸² The report cited

78. *HLP*, 130 S. Ct. at 2717–18.

79. There is much commentary condemning the *HLP* decision; some of the most incisive comes from Owen Fiss, who notes,

Like warrantless wiretapping, the risk of a criminal prosecution for political advocacy—for example, an utterance by an American citizen in an American forum that a foreign terrorist organization has a just cause—poses a threat to our democracy, but the danger is greater. The risk of warrantless wiretapping inhibits speech; the risk of a criminal prosecution stops it altogether.

Owen Fiss, *The World We Live In*, 83 TEMP. L. REV. 295, 296 (2011).

80. See, e.g., Mitchell D. Silber & Arvin Bhatt, *Radicalization in the West: The Homegrown Threat*, NYPD INTELLIGENCE DIV. 31 (2007), http://www.nypdshield.org/public/SiteFiles/documents/NYPD_Report-Radicalization_in_the_West.pdf.

81. *Id.* at 5.

82. *Id.* at 31.

Hashmi's case as an example of dangerous radicalization, claiming that "by the time he graduated in 2003 with a degree in political science, Hashmi had become something of a magnet and powerhouse recruiter for al-Muhajiroun"—despite also noting that his case "did not involve any direct threat to New York City or to the U.S. homeland."⁸³

Hashmi was a public, outspoken activist extremely critical of U.S. foreign policy and the treatment of Muslims in America, and a Salafi Muslim whose utopia was a religious state. This combination draws particular suspicion in post-9/11 America. Certain Islamic political ideas critical of the United States—particularly those framed in religious terms—have largely been placed outside the protections of the Constitution because they are considered "jihadist" incitement or intent rather than ideas.⁸⁴ Islamic political dissent condemning U.S. practices and advancing religious prescriptions has become, as early twentieth-century political theorist Randolph Bourne might have described it, "subject to ferocious penalties," in this decade after 9/11.⁸⁵

For eleven months, American citizen Fahad Hashmi fought his extradition back to the United States, fearing the inhumane treatment he would face in U.S. courts and prisons.⁸⁶ He lost, in part, because he was a U.S. citizen. In May 2007, Hashmi became the first U.S. citizen to be extradited under terrorism laws relaxing standards for extradition passed after 9/11.⁸⁷ While the British government did

83. *Id.* at 66, 69.

84. A particularly troubling illustration of this is the prosecution of Tarek Mehanna, who was recently convicted of providing material support to an FTO for engaging in activities such as translating a publication called, "39 Ways to Serve and Participate in Jihad," from Arabic to English, watching "jihadi videos," and participating in online discussions. We discuss the Mehanna case in more detail *infra* at notes 96–100 and accompanying text.

For a discussion of the ways in which the government has used religious speech as a proxy for terrorism risk, see Huq, *supra* note 73.

85. Randolph S. Bourne, *The State*, in *UNTIMELY PAPERS* 143 (James Oppenheim ed., 1919).

86. Jeanne Theoharis, *My Student, The 'Terrorist'*, *THE CHRON.* (Apr. 3, 2011), <http://chronicle.com/article/My-Student-the-Terrorist/126937/>.

87. Alan Feuer, *In First for Britain, U.S. Citizen Is Extradited on Terror Charges*, *N.Y. TIMES* (May 30, 2007), <http://www.nytimes.com/2007/05/30/nyregion/30terror.html>. Several non-U.S. citizens apprehended in Britain and wanted by the United States have succeeded in delaying or preventing their extradition to the U.S. under international human rights provisions that prohibit inhumane treatment, such as prolonged solitary confinement and sensory deprivation. See, e.g., *Ahmad v. United Kingdom*, App. Nos. 24027/07, 11949/08, 36742/08 (Eur. Ct. H.R. 2010) [hereinafter *Eur. Ct. H.R. Partial Decision*], <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Babar%20%7C%20Ahmad&sessionid=91655196&skin=hudoc-en>. Here, Hashmi's citizenship may have worked against him as it gave the United States greater jurisdictional claims.

not ask much of the U.S. in terms of concrete assurances of fair treatment of Hashmi, it did require the U.S. to give a cursory account of the basis of the case against him. The “centerpiece” of their case, the U.S. government’s affidavit publicly asserted, was the testimony of a cooperating witness, Junaid Babar.⁸⁸

Babar—also a U.S. citizen—was an acquaintance of Hashmi’s from New York who stayed with him at his London apartment for two weeks in early 2004. During that time, according to Babar’s statement, Babar had in his luggage raincoats, ponchos, and waterproof socks and later delivered these materials to a senior member of al Qaeda in South Waziristan, Pakistan.⁸⁹ In addition, Hashmi allowed Babar to use his cell phone, which Babar allegedly used to call other co-conspirators in terrorist plots, including Omar Khyam.⁹⁰ Nonetheless, in Babar’s own statement, Hashmi had been “very much of an outsider.”⁹¹

88. Transcript of Bail Hearing at 5–6, 9, *United States v. Hashmi*, No. 1:06-cr-00442-LAP (S.D.N.Y. June 1, 2007). Defense counsel noted that in the same statement, Babar recounted interactions with over forty different individuals over a three-year period. *Id.* at 9.

89. *Id.* at 16; Indictment, *supra* note 63, at 2. This disclosure was invaluable for the pretrial civil rights advocacy around Hashmi’s case, as it meant that the government had publicly disclosed the “centerpiece” of its case. Given that much of the evidence was classified under CIPA, it would have been difficult, if not impossible, for counsel and other advocates to discuss the case otherwise, making any attention to the rights issues even harder to raise in absence of any clear and public sense of the case itself. The fuzziness of the indictment made it difficult to figure out what material support the government was alleging he provided. Over the course of the prosecution, besides the socks, ponchos, raincoats, and use of his cell phone, the government began to highlight a small amount of cash, \$300, that Hashmi gave Babar to help pay for a plane ticket to Pakistan—even though the FBI had Babar on tape saying that he had asked Hashmi for money for a plane ticket because his daughter was sick and he needed to go to Pakistan to see her, and not for any sort of conspiracy.

90. Transcript of Bail Hearing, *supra* note 88, at 7–8.

91. During questioning by the Royal Canadian Mounted Police, Babar had made a number of statements about Hashmi’s lack of knowledge or centrality in any conspiracy. Discussing one meeting with Khyam where Hashmi was present, Babar explained, “[n]othing of relevance was discussed this time because Fahad was present.” *Id.* at 9–10. In this testimony Babar provided in 2006, Babar was asked “[s]o as far as Fahad was concerned, was he part of the group, the organization or an outsider?” to which he responded “[h]e wasn’t part of the group . . . [h]e was a—very much an outsider.” *Id.* at 10. Further on in his testimony, Babar explains why nothing was discussed with Khyam during this aforementioned meeting:

Q: Can you help us, please, why nothing was discussed about Jihad during that car journey?

A: Well, one of the reasons was because Fahad was with me, and Ausman [Omar Khyam] had never met Fahad, and Ausman knew that Fahad was a member of Al Muhajiroun, so it wasn’t discussed in front of Fahad.

Q: Perhaps we are getting some idea of the sort of working but why not say anything about jihadism etc. in the presence of ALM or someone who was a member of ALM?

Despite the U.S. Attorney's and FBI's claims, what the DOJ had been compelled to reveal publicly was that the government was not actually accusing Hashmi of supplying military gear himself or of having any direct contact with al Qaeda. Rather, the accusation stemmed from Hashmi hosting an acquaintance who had materials in his luggage,⁹² and, the "military gear" in that luggage amounted to raincoats, ponchos and waterproof socks.⁹³

Returning to the U.S. from Pakistan in 2004, Babar himself had been arrested on five charges of material support and quickly cooperated with government authorities who interviewed him in a midtown hotel for two weeks.⁹⁴ Pleading guilty to five counts of material support, Babar agreed to serve as a government witness in terrorism cases in Britain and Canada as well as in Hashmi's trial, and received a reduced sentence in return for his cooperation. Hashmi's case was to be his last trial testimony.

The use of material support prosecutions to target religious political activists is not unique to Hashmi's case.⁹⁵ The recent prosecution of Tarek Mehanna, an American citizen and pharmacy school graduate from Sudbury, Massachusetts, presents a similar set of rights concerns. The government's surveillance of Mehanna who, like Hashmi, was deeply religious and determinedly critical of U.S. foreign policy and American treatment of Muslims, dated back at least to 2001; in 2008, the FBI interviewed him and sought his cooperation as an informant, which he refused.⁹⁶ In October 2009,

A: Because ALM is a very public group, and basically they just talk too much.

Id. at 11.

92. See Indictment, *supra* note 63, at 2–3 (charging Hashmi with "providing military gear to co-conspirators not named as defendants" and contributing "funds, goods, and services" to assist al Qaeda rather than alleging direct contact with them).

93. Transcript of Bail Hearing, *supra* note 88, at 16.

94. *Id.* at 12–13.

95. See Eric Lichtblau, *A Nation at War: Legal Issues; 1996 Statute Becomes the Justice Department's Antiterror Weapon of Choice*, N.Y. TIMES, Apr. 6, 2003, at B15 ("In several dozen cases both high profile and little noticed, [§ 2339B] has become the Justice Department's main weapon in pursuing people it contends are linked to terrorists").

96. *United States v. Mehanna*, 699 F. Supp. 2d 160, 160 (D. Mass. 2009) (alleging that from "sometime in 2001 until about the return of the Indictment in November, 2009, Mehanna conspired to provide material support and resources to terrorists"). In August 2006, while the Mehanna family traveled to Egypt for a summer holiday, the FBI entered the Mehanna home—using a "sneak and peek" warrant (a tactic legalized by the USA PATRIOT Act)—and surreptitiously went through his materials and made copies of his hard drives. Seven months after being interviewed by the FBI, he was arrested for false statements allegedly made to a federal officer two years earlier and released on bail. One year later, Mehanna, under curfew and FBI surveillance, was again arrested, this time on material support charges. He was held two years pretrial in solitary confinement. Defendant's Opposition to Government's Motion in Limine to Limit Defense Comment & Inquiry Regarding Inadmissible

the government filed charges of material support for terrorism against Mehanna, based on allegations that he had translated a publication, *39 Ways to Serve and Participate in Jihad*, from Arabic to English and participated in online discussions at Tibyan Publications; watched “jihadi videos” with friends; and loaned compact discs to people in the Boston area to create “like-minded youth.”⁹⁷ The ACLU wrote an amicus brief supporting Mehanna’s motion to dismiss the indictment, arguing that the entirety of the government’s case constituted protected expression and association.⁹⁸ At trial, the judge precluded the defense from introducing evidence that the FBI pressured Mehanna to become an informant.⁹⁹ In December 2011, Mehanna was found guilty of seven charges of material support and in April 2012, he was sentenced to seventeen-and-a-half years in prison.¹⁰⁰

The surveillance and targeting of Muslim critics such as Hashmi and Mehanna raises significant constitutional issues.¹⁰¹ The concern

Subject Matter (#279) at 8, *United States v. Mehanna*, No. 1:09-cr-10017-GAO (D. Mass. Oct. 11, 2011), ECF No. 292.

97. Second Superseding Indictment at 3, 7–8, *United States v. Mehanna*, No. 1:09-cr-10017-GAO (D. Mass. June 17, 2010), ECF No. 83. The prosecution also cited a trip that Mehanna took to Yemen in 2004, even though the government did not claim Mehanna had attended a training camp (in 2004 al Qaeda did not have an active presence in Yemen). *Id.* at 5.

98. [Proposed] Memorandum of Law Amicus Curiae of the American Civil Liberties Union of Massachusetts in Support of Defendant’s Motion to Dismiss Portions of the Second Superseding Indictment at 1, *United States v. Mehanna*, No. 09-cr-10017-GAO (D. Mass. July 29, 2011). The court denied permission for the memorandum to be filed, holding that it was not appropriate for a criminal prosecution at this level. Transcript of Motion Hearing at 5, *United States v. Mehanna*, No. 09-cr-10017-GAO (D. Mass. Aug. 10, 2011).

99. Government’s Motion in Limine to Limit Defense Comment & Inquiry Regarding Inadmissible Subject Matter at 5–6, *United States v. Mehanna*, No. 1:09-cr-10017-GAO (D. Mass. Oct. 3, 2011), ECF No. 279.

100. Milton J. Valencia, *Tarek Mehanna Guilty of Terror Charges*, BOS. GLOBE (Dec. 20, 2011), <http://www.bostonglobe.com/metro/2011/12/20/tarek-mehanna-guilty-terror-charges/chpbwimRMbvdNMOladJ08J/story.html>; see *Tarek’s Sentencing Statement*, FREE TAREK (Apr. 12, 2012), <http://www.freetarek.com/tareks-sentencing-statement/>. For commentary on the First Amendment implications, see Ross Caputi, *Tarek Mehanna: Punished for Speaking Truth to Power*, THE GUARDIAN (Apr. 16, 2012, 11:27 AM), <http://www.guardian.co.uk/commentisfree/cifamerica/2012/apr/16/tarek-mehanna-punished-speaking-truth>; David Cole, *39 Ways to Limit Free Speech*, N.Y. REV. OF BOOKS BLOG (Apr. 19, 2012, 3:15 PM), <http://www.nybooks.com/blogs/nyrblog/2012/apr/19/39-ways-limit-free-speech/>; Andrew F. March, *A Dangerous Mind?*, N.Y. TIMES (Apr. 21, 2012), http://www.nytimes.com/2012/04/22/opinion/sunday/a-dangerous-mind.html?_r=2. One of the jurors came to Mehanna’s sentencing to speak to the judge and plead for mercy; the judge refused to hear her. Milton J. Valencia, *Juror Says Mehanna Deserved Mercy*, BOS. GLOBE (Apr. 15, 2012), http://www.boston.com/news/local/massachusetts/articles/2012/04/15/juror_says_mehanna_deserved_mercy.

101. While selective prosecution on the basis of race, religion or protected speech would violate the First and Fifth Amendments, such violations are notoriously difficult to prove. See *Wayte v. United States*, 470 U.S. 596, 608 (1985) (noting that a

is not only the threat to speech by equating Islamic critiques of the U.S. with intent for or actions of material support. It is also the threat to freedom of association, because much of what material support prosecutions target are associations with or recruiting other “like-minded” people.¹⁰² Indeed, the material support statutes, as David Cole observes, are “materially indistinguishable from the McCarthy-era laws that penalized association with the Communist Party,” “require no ‘specific intent,’ and punish people solely for their associational support of specified groups.”¹⁰³

In its treatment of the threat of Islamic terrorism and the First Amendment, the Supreme Court has attempted to sidestep its own history during the McCarthy Era with a contorted reasoning that undermines the protections of the First Amendment while claiming otherwise.¹⁰⁴ In the *HLP* decision, the Court, in keeping with its precedents, refrained from criminalizing the right of an American to be a member of al Qaeda or other FTO.¹⁰⁵ However, it is unclear how

successful selective prosecution claim must allege that the decision to prosecute “had a discriminatory effect and that it was motivated by a discriminatory purpose”); *see also* *United States v. Armstrong*, 517 U.S. 456, 468 (1996) (applying a “rigorous standard for the elements of a selective-prosecution claim”). Indeed, Lawrence Rosenthal has argued that *Wayte* appears to hold that if the government can articulate a non-censoring reason for investigating a person based on his speech, the First Amendment does not bar such investigations, even if they might chill protected speech. Rosenthal, *supra* note 58, at 42. By way of example, he offers that “[s]urveillance of a mosque known for the radical views of its clergy and congregants . . . would easily pass the *Wayte* test because the government could claim that its purpose was to identify suspected terrorists, not to chill the expression of radical Islamist views.” *Id.* Glenn Greenwald has also noted the DOJ’s increasing number of prosecutions “[f]or disseminating political views the government dislikes or considers threatening.” Glenn Greenwald, *The DOJ’s Escalating Criminalization of Speech*, SALON (Sept. 4, 2011, 12:05 PM), http://www.salon.com/2011/09/04/speech_23/.

102. *See* Cole, *supra* note 73, at 10 (“The material support law is a classic instance of guilt by association. It imposes liability regardless of an individual’s own intentions or purposes, based solely on the individual’s connection to others who have committed illegal acts.”).

103. *Constitutional Implications of Statutes Penalizing Material Support to Terrorist Organizations: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 141–42 (2004) (testimony of David Cole). *See generally* Gordon Silverstein & John Hanley, *The Supreme Court and Public Opinion in Times of War and Crisis*, 61 *HASTINGS L.J.* 1453 (2010) (demonstrating the historical pattern between Supreme Court decisions and public opinion in times of war).

104. Corresponding to the climate, this includes the fear of the influence of the Communist Party as an agent of a foreign power, which motivated the Court’s rights-abridging decision in *Dennis v. United States*, 341 U.S. 494, 509, 515 (1951) (plurality opinion), and its return to more substantive First Amendment protections in *Yates v. United States*, 354 U.S. 298, 318 (1957), *Elfbrandt v. Russell*, 384 U.S. 11, 18–19 (1966), *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589, 597, 603, 605 (1967), and *United States v. Robel*, 389 U.S. 258, 262 (1967).

105. *See* *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2718, 2723 (2010) (affirming the constitutionality of the material support statute by noting that the statute does not prohibit mere membership in FTOs).

membership would be possible, given the difficulty of distinguishing between legal activities associated with mere membership and those activities that may rise to the level of material support by “legitimizing” or otherwise “coordinating” with the FTO.¹⁰⁶ The oral argument in *HLP* is revealing: Justice Scalia ahistorically minimizes the Court’s similar fears of Communism in the 1950s by referring to the Communist Party as “a philosophical organization” and seems unwilling to grant radical Islamic political ideas the status of a “philosophy,” implicitly rendering any ideas espoused by FTOs and their supporters outside of First Amendment protection:

JUSTICE SCALIA: I think it’s very unrealistic to compare these terrorist organizations with the Communist Party. Those cases involved philosophy. The Communist Party was . . . more than . . . an organization that . . . had some unlawful ends. It was also a philosophy of . . . extreme socialism. And . . . many people subscribed to that philosophy.

I don’t think that Hamas or any of these terrorist organizations represent such a philosophical organization.

MR. COLE: Your Honor, this . . . Court accepted Congress’s findings. Congress’s findings were not that this was a philosophical debating society, but that it was an international criminal conspiracy directed by our enemy to overthrow us through terrorism.

JUSTICE SCALIA: That may be, but people joined it for philosophical reasons.

MR. COLE: Oh, sure—

JUSTICE SCALIA: They joined it for philosophical reasons. These terrorist organizations have very practical objectives. And the only reason for joining them or assisting them is to assist those practical objectives.¹⁰⁷

In contrast to the Court’s obfuscation of these issues in *HLP*, Justice Douglass’ dissent in *Dennis v. United States*¹⁰⁸ is instructive. It illuminates the foundational constitutional issues now at stake in

106. *See id.* at 2725 (explaining that material support to FTOs, in adding legitimacy to the groups, “makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks”). Given the Court’s language, it is even more difficult to envision how a person could legally be a member of an FTO: Could he go to a meeting? Could he tell others that he was a member? Could he give someone a ride home after the meeting? Could he bring cookies to the meeting? Could he try to sign up other members?

107. Transcript of Oral Argument at 20–22, *HLP*, 130 S. Ct. 2705 (No. 08-1498), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1498.pdf.

108. 341 U.S. 494 (1951).

material support prosecutions such as Hashmi's.

There was a time in England when the concept of constructive treason flourished. Men were punished not for raising a hand against the king but for thinking murderous thoughts about him. The Framers of the Constitution were alive to that abuse and took steps to see that the practice would not flourish [in the U.S.]. *Treason was defined to require overt acts—the evolution of a plot against the country into an actual project.* The present case is not one of treason. But the analogy is close when the illegality is made to turn on intent, not on the nature of the act. We then start probing men's minds for motive and purpose [T]hey get convicted not for what they said but for the purpose with which they said it."¹⁰⁹

C. Disparate Reaction to “Islamic Terrorism”

To more fully illuminate the significance of the rights abridgement in the prosecution of cases like Hashmi's, a comparison to the government's reaction to and treatment of domestic terrorism is instructive. The most obvious difference is that material support charges can only be brought against individuals who have provided “material support” to any *foreign* organization the Secretary of State has designated as terrorist.¹¹⁰ There is no comparable legislation to prosecute those who provide “material support” to domestic terrorism; the already capacious charge of conspiracy is seen as sufficient power for the government to address these individuals, their criminal syndicates, and emergent conspiracies.¹¹¹

In the past few years, there have been several attacks by non-Muslims in the U.S. that inspired relatively muted official reactions

109. *Id.* at 583 (Douglas, J., dissenting) (emphasis added).

110. 18 U.S.C. §§ 2339(A)–(B) (2006). We do not have space to address this fully—and many others have done so more eloquently—but the designation of certain organizations as FTOs is a political decision and subject to political winds and shifting allegiances, as are who and which actions are then prosecuted as material support. The decision to designate Al Shabaab as a terrorist organization in March 2008 and al Qaeda in the Arabian Peninsula in December 2009 has resulted in a host of material support prosecutions for activities (travel, financial donations, etc.) that people had been engaging in for years. *Terrorist Groups: Al Shabaab*, NAT'L COUNTERTERRORISM CTR., http://www.nctc.gov/site/groups/al_shabaab.html (last visited Apr. 19, 2012). Relatedly, when Republican Party officials supported taking Mujaheddin-e Khalq (MEK) off the list because it was an opposition group in Iran, the DOJ did not prosecute those American public officials for providing material support to the organization. David Cole, *Chewing Gum for Terrorists*, N.Y. TIMES, Jan. 3, 2011, at A21.

111. See, e.g., Nick Bunkley, *U.S. Judge in Michigan Acquits Militia Members of Sedition*, N.Y. TIMES (Mar. 27, 2012), http://www.nytimes.com/2012/03/28/us/hutaree-militia-members-acquitted-of-sedition.html?_r=1 (detailing how members of a Christian militia charged with conspiracy were acquitted after the court held that the prosecutors failed to prove the members had concrete plans to attack anyone).

compared to the expansive security responses and legislation that often followed (even unsuccessful) attacks carried out by Muslims. For instance, James von Brunn, who had previously been arrested for attempting to kidnap members of the Federal Reserve Board, opened fire at the Holocaust Museum in Washington, D.C., killing a security guard.¹¹² John Bedell shot two Pentagon police officers at a security screening area before being killed himself.¹¹³ Andrew Stack flew a plane into a building containing IRS offices in Austin, Texas.¹¹⁴ Jared Loughner began shooting at a “Congress on Your Corner” gathering, seriously wounding Representative Gabrielle Giffords and killing six people, including U.S. District Judge John Roll.¹¹⁵ These crimes have been treated as the isolated actions of disturbed individuals and have not resulted in dramatic expansions of law enforcement power and surveillance over certain groups or populations.¹¹⁶

II. RIGHTS VIOLATIONS IN PREPARING FOR TRIAL

In addition to the rights issues leading to Hashmi’s indictment for material support, he also encountered significant rights deprivations during the three years he was held in New York awaiting trial. At the end of May 2007, Hashmi was flown back to New York and detained in the federal Metropolitan Correctional Center (MCC) in Lower Manhattan, thirteen miles from where he had grown up in Flushing, Queens.¹¹⁷ From his first moment back on U.S. soil, Hashmi was placed in solitary confinement.¹¹⁸ On June 1, 2007, the judge denied

112. Bill Mears, *Alleged Shooter Served 6 Years for Federal Reserve Incident*, CNN (June 10, 2009), http://articles.cnn.com/2009-06-10/justice/shooting.suspect.record_1_fake-bomb-von-brunn-trial?_s=PM:CRIME; *Guard Killed During Shooting at Holocaust Museum*, CNN (June 10, 2009), http://articles.cnn.com/2009-06-10/justice/museum.shooting_1_holocaust-museum-von-brunn-security-guard?_s=PM:CRIME.

113. Martha Raddatz et al., *Pentagon Shooter John Patrick Bedell Had Troubled Past, Run-Ins with the Law*, ABC WORLD NEWS (Mar. 5, 2010), <http://abcnews.go.com/WN/Politics/alleged-pentagon-shooter-john-patrick-bedell-troubled-past/story?id=10020408#.T0VldnJWoRK>.

114. Sarah Netter et al., *Austin Plane Crash Pilot May Have Raged Against IRS in Suicide Note*, ABC WORLD NEWS (Feb. 18, 2010), <http://abcnews.go.com/WN/texas-plane-crash-austin-office-complex-hit-single/story?id=9874966#.T0VNSnJWoRI>.

115. Richard Esposito & Lee Ferran, *Gabrielle Giffords’ Suspected Shooter Identified*, ABC WORLD NEWS (Jan. 8, 2011), <http://abcnews.go.com/Blotter/jared-lee-loughner-gabrielle-giffords-suspected-shooter-identified/story?id=12572164#.T0VMg3JWoRI>.

116. *But see* Tom Junod, *Counter-Terrorism Is Getting Complicated*, ESQUIRE (Jan. 18, 2012, 7:00 AM), *available at* <http://www.esquire.com/features/waffle-house-terrorists-0212> (examining a recent incident of government overreach with domestic terrorism).

117. Transcript of Bail Hearing, *supra* note 88, at 15–16; Theoharis, *supra* note 86.

118. Transcript of Oral Argument in SAMs Challenge Hearing at 2, United States v. Hashmi, No. 1:06-cr-00442-LAP (S.D.N.Y. Jan. 23, 2009).

him bail in a courtroom overflowing with family and friends,¹¹⁹ finding that Hashmi, a U.S. citizen with no criminal record, had a “lack of respect for the rule of law” of the United States, and “certainly nothing that would keep him here,” (even though a family friend had offered a \$500,000 surety bond and the defense’s bail motion included agreement for a GPS tracking device).¹²⁰ Indeed, Hashmi’s use of the legal process to protect his rights and challenge his extradition became part of the court’s reasoning for denying him bail.¹²¹

The government’s decision to impose draconian pretrial detention conditions on Hashmi—three years of solitary confinement and sensory deprivation under Special Administrative Measures (SAMs)—and to use CIPA to classify much of the evidence against him produced further rights deprivations. These deprivations degraded his health, his ability to participate in and prepare his defense, and his right to assistance of counsel.

A. *Conditions of Pretrial Confinement*

In the first months of Hashmi’s pretrial confinement at MCC, he was held in solitary confinement in the Special Housing Unit, but his family was allowed to visit him together and could discuss their visits with relatives and friends. He had a radio. He was able to receive and read newspapers and magazines. His lawyer could talk freely with others about his conversations with Hashmi.¹²²

Five months later, this changed. First, Hashmi was moved to the more-restrictive 10 South unit of MCC¹²³ and his conditions worsened considerably. Then a month later, at the end of October 2007, the Attorney General ordered Hashmi put under SAMs, which severely restrict a prisoner’s communication and contact with the outside world.¹²⁴ In later court documents, the government cited as the

119. Transcript of Bail Hearing, *supra* note 88, at 14–15, 31.

120. *Id.* at 17, 31–32.

121. *Id.* at 30–31.

122. Theoharis, *supra* note 86.

123. 10 South is widely regarded as the most restrictive unit at the Metropolitan Correctional Center in New York. See, e.g., Letter from Michael Young, Attorney, to Patrick Fitzgerald, Assistant U.S. Attorney (Nov. 5, 1998), available at <http://www.pbs.org/wgbh/pages/frontline/shows/binladen/upclose/letters.html> (describing 10 South as “the most restrictive housing unit in the facility”).

124. Memorandum & Order at 1, 4–6, United States v. Hashmi, No. 1:06-cr-00442-LAP (S.D.N.Y. Jan. 16, 2008), ECF No. 34; see also Memorandum for Harley G. Lappin, Dir., Fed. Bureau of Prison, from The Acting Att’y Gen., United States v. Hashmi, No. 1:06-cr-00442-LAP (S.D.N.Y. Jan. 16, 2008), ECF No. 21-2 [hereinafter Hashmi SAMs Document]. Hashmi’s SAMs were renewed each year until October 2011.

grounds for Hashmi's SAMs: (1) his former membership in an "Islamic fundamentalist organization [ALM] whose members promote the overthrow of Western society," a group the United States did not designate a terrorist organization; (2) the fact that Hashmi had allowed the cooperating witness to store luggage in his apartment and use his cell phone; and (3) Hashmi's alleged statements on arrest.¹²⁵

SAMs are prisoner-specific confinement and communication rules, imposed by the Attorney General but carried out by the Federal Bureau of Prisons (BOP).¹²⁶ Pursuant to 28 C.F.R. § 501.3, the Attorney General may authorize the Director of the BOP to implement SAMs only upon written notification "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."¹²⁷ The SAMs "may include housing the inmate in administrative detention and/or limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to protect persons against the risk of acts of violence or terrorism."¹²⁸ A prisoner's SAMs spell out in intricate detail the nature of this isolation; including, for example, how many pages of paper he can use in a letter or what part of the newspaper he is allowed to have and after what sort of delay.¹²⁹ It does not have to provide reasons for those particular restrictions.¹³⁰

Under his SAMs at the MCC, which remained in effect for the two-and-a-half-year duration of his pretrial detention, Hashmi was allowed no contact with anyone other than his lawyer, and eventually his

125. Memorandum & Order, *supra* note 124, at 4–5. To clarify: the government provided this justification in its briefs *only after* Hashmi challenged his SAMs in court. The government provided no such justification in the SAMs themselves.

126. 28 C.F.R. § 501.3 (2011). The authority for the SAMs derives mainly from two statutory provisions. First, 5 U.S.C. § 301 grants the directors of executive departments the power to create regulations designed to assist them in fulfilling their official functions and those of their departments. Second, 18 U.S.C. § 4001 vests the Attorney General with authority to control federal prisons and allows him to promulgate rules governing those prisons.

127. *Id.* § 501.3(a).

128. *Id.*

129. *See, e.g.*, Hamshi SAMs Document, *supra* note 124, at 14 (limiting Hashmi's correspondence only to immediate family members in letters of no more than three pieces of paper).

130. *See* 28 C.F.R. § 501.3(b) (requiring "written notification of the restrictions imposed and the basis for these restrictions," but providing that the "statement as to the basis may be limited in the interest of prison security or safety or to protect against acts of violence or terrorism").

parents and brother.¹³¹ Placed in solitary confinement, he was in almost complete isolation—even talking to other prisoners through the walls was forbidden.¹³² During his incarceration at MCC, according to Hashmi’s counsel, “one inmate tried to say ‘assalam alaikum,’ which basically means peace be unto you or hello, to another inmate who was under SAM, and that person received an incident report for saying hello to another detainee.”¹³³ Hashmi’s cell was electronically monitored inside and out, which meant he showered and used the toilet within view of the camera.¹³⁴ Cell and clothing sanitation declined; weeks would go by without a change of clothes or cell-cleaning supplies. The temperature in his cell was insufficiently regulated so that often it was too cold or too hot to concentrate. The window was frosted, letting in very little natural light.

He was allowed as many letters as he wanted to write to Congress but allowed only one letter a week to a single member of his immediate family.¹³⁵ He was forbidden any contact—directly or through his attorneys—with the news media.¹³⁶ He could read newspapers, but only limited portions approved by his jailers—and not until thirty days after publication.¹³⁷ He was allowed only one hour a day out of his cell to exercise in an indoor solitary cage (a privilege that periodically was denied him) rather than in MCC’s facility on the roof in fresh air.¹³⁸ Additionally, as a condition of being allowed to represent him, his lawyer was required to sign an affirmation acknowledging Hashmi’s SAMs and agreeing not to repeat anything he had talked about with Hashmi publicly.¹³⁹ The same applied for Hashmi’s parents and brother, who were forbidden from talking about their conversations with him, even with their extended family.¹⁴⁰

131. Hashmi SAMs Document, *supra* note 124, at 5, 7, 8, 11, 13 (limiting Hashmi to visits and contact with only his immediate family and attorneys).

132. *Id.* at 16.

133. Transcript of Oral Argument SAMs Challenge Hearing, *supra* note 118, at 6.

134. *Id.* at 5–6.

135. See Hashmi SAMs Document, *supra* note 124, at 14.

136. *Id.* at 15.

137. *Id.* at 17.

138. Transcript of Oral Argument SAMs Challenge Hearing, *supra* note 118, at 5–6.

139. Hashmi SAMs Document, *supra* note 124, at 1–3. The required attorney affirmation, especially for pretrial defendants under SAMs, has been the subject of some litigation. See *United States v. Reid*, 214 F. Supp. 2d 84, 92–94 (D. Mass. 2002) (holding that defense counsel are not required to sign the affirmation because to do so conflicts with the Sixth Amendment, even though the government modified the affirmation requirement to make it subject to judicial determination).

140. Hashmi SAMs Document, *supra* note 124, at 11–12.

Despite the presumption of innocence in criminal proceedings, Hashmi was prohibited from participating in group prayer, including Friday congregational prayer.¹⁴¹ In addition, the forced dirtiness of the cell (the cell contained a shower with no curtain)¹⁴² carried an added burden for a religiously devout Muslim who prayed on the floor five times a day. While Hashmi had a Qu'ran, other religious reading materials, including prayer timetables, were often circumscribed. News of the Muslim world was removed from his thirty-day-old newspaper.¹⁴³ Regardless of intent, these "administrative measures" imposed a disparate impact on an observant Muslim pretrial suspect such as Hashmi.

The conditions at MCC 10 South where Hashmi was held have drawn the criticism of human rights organizations. In February 2011, Amnesty International wrote Attorney General Holder to address the broader problem of inhumane pretrial conditions of confinement that existed for many Muslim defendants.¹⁴⁴ Amnesty focused its concern on the conditions in MCC 10 South, which, the group wrote, "fall short of the USA's obligations [under international law] in this regard" and asserted that "the combined effects of prolonged confinement to sparse cells with little natural light, no outdoor exercise and extreme social isolation amount to cruel, inhuman or degrading treatment."¹⁴⁵ Amnesty International further asserted that "[t]he conditions also appear incompatible with the presumption of innocence in the case of untried prisoners who have not committed offences within the institution and whose detention should not be a form of punishment."¹⁴⁶ Finally, Amnesty International observed that the pretrial conditions Hashmi and others faced at MCC 10 South rise to the level of torture by international standards:

The [UN Human Rights] Committee has noted that prolonged solitary confinement may amount to torture or other ill-treatment prohibited under Article 7 of the ICCPR (General Comment 20/44, 1992). The UN Committee against Torture has made similar statements, with particular reference to the use of solitary confinement during pre-trial detention.¹⁴⁷

141. *Id.* at 16.

142. Transcript of Oral Argument SAMs Challenge Hearing, *supra* note 118, at 6.

143. Hashmi SAMs Document, *supra* note 124, at 17.

144. Letter from Susan Lee, Program Dir., Ams. Reg'l Program, Amnesty Int'l, to Eric Holder, Att'y Gen. (Feb. 16, 2011), *available at* <http://www.amnesty.org/en/library/asset/AMR51/029/2011/en/867a8f0e-9fd1-4dbf-a084-cfe644c774b0/amr510292011en.pdf>.

145. *Id.* at 2.

146. *Id.*

147. *Id.* The Convention Against Torture and the International Covenant on Civil

While the U.S. is dismissive of international criticism of its own prison conditions, in judging other countries' human rights records, the U.S. State Department has regularly treated the use of prolonged solitary confinement as a human rights violation.¹⁴⁸

1. *Effects on health*

For prisoners such as Fahad Hashmi, the SAMs exacerbate conditions of confinement that already are extraordinarily isolating. Such isolation has serious health effects, as documented by virtually every mental health study that has examined long-term solitary confinement.¹⁴⁹ Dr. Craig Haney, a psychologist at UC-Santa Cruz who has studied the effects of solitary confinement for decades,¹⁵⁰

and Political Rights (ICCPR) both prohibit torture or cruel, inhuman, or degrading treatment, and the United States has ratified both instruments. *Id.*

148. Glenn Greenwald provides a powerful summary of this tendency:

As is true for so much of what it does, the U.S. Government routinely condemns similar acts—the use of prolonged solitary confinement in its most extreme forms and lengthy pretrial detention—when used by other countries. See, for instance, the 2009 State Department Human Rights Report on Indonesia (“Officials held unruly detainees in solitary confinement for up to six days on a rice-and-water diet”); Iran (“Common methods of torture and abuse in prisons included prolonged solitary confinement with extreme sensory deprivation . . . Prison conditions were poor. Many prisoners were held in solitary confinement . . . Authorities routinely held political prisoners in solitary confinement for extended periods . . .”); . . . Israel (“Israeli human rights organizations reported that Israeli interrogators . . . kept prisoners in harsh conditions, including solitary confinement for long periods”); Iraq (“Individuals claimed to have been subjected to psychological and physical abuse, including . . . solitary confinement in Ashraf to discourage defections”); Yemen (“Sleep deprivation and solitary confinement were other forms of abuse reported in PSO prisons . . .”); . . . Burundi (“Human rights problems also included . . . prolonged pretrial detention”).

Glenn Greenwald, *U.N. to Investigate Treatment of Bradley Manning*, SALON (Dec. 23, 2010, 5:24 AM), http://www.salon.com/2010/12/23/manning_4/singleton/.

149. See, e.g., CHRISTOPHER BURNEY, SOLITARY CONFINEMENT (2d ed. 1961); Frank Rundle, *The Roots of Violence at Soledad*, in *THE POLITICS OF PUNISHMENT: A CRITICAL ANALYSIS OF PRISONS IN AMERICA* 163–72 (Erik Olin Wright ed., 1973); Robert G. Slater, *Psychiatric Intervention in an Atmosphere of Terror*, 7 AM. J. OF FORENSIC PSYCHIATRY 5, 5–12 (1986); Robert G. Slater, *Abuses of Psychiatry in a Correctional Setting*, 7 AM. J. OF FORENSIC PSYCHIATRY 5, 5–10 (1986).

For detailed reviews of all of these psychological issues, and references to the many empirical studies that support these statements, see Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325 (2006); Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. 124 (2003); Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477 (1997). See also Expert Report of Dr. Craig Haney at 7, Silverstein v. Bureau of Prisons, No. 1:07-cv-02471-PAB-KMT (D. Colo. Apr. 13, 2009) (on file with authors) (citing BURNEY, *supra*; Rundle, *supra*; Slater, *Psychiatric Intervention in an Atmosphere of Terror*, *supra*; Slater, *Abuses of Psychiatry in a Correctional Setting*, *supra*).

150. See generally Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, *supra* note 149 (analyzing case studies from the 1970s, 1980s and 1990s,

summarizes the types of psychological harms suffered by prisoners held in long-term isolation.¹⁵¹ These include “appetite and sleep disturbances, anxiety, panic, rage, loss of control, paranoia, hallucinations, and self-mutilations,” as well as “cognitive dysfunction, hallucinations . . . aggression, and rage, paranoia, hopelessness, a sense of impending emotional breakdown . . . and suicidal ideation and behavior.”¹⁵² This constellation of symptoms, referred to as “isolation panic” by social psychologist Hans Toch, “mark[s] an important dichotomy for prisoners: the ‘distinction between imprisonment, which is tolerable, and isolation, which is not.’”¹⁵³

Haney has extensively documented the use of isolation, noting not only the harm it can cause, but also its use as a torture technique.¹⁵⁴ In fact, Haney notes, “many of the negative effects of solitary confinement are analogous to the acute reactions suffered by torture and trauma victims.”¹⁵⁵ Research suggests such effects are clear after sixty days.¹⁵⁶ Indeed, Haney concludes, “there is not a single published study of solitary or supermax-like confinement . . . lasting for longer than ten days . . . that failed to result in negative psychological effects.”¹⁵⁷ Psychological studies have repeatedly found that prolonged solitary confinement and sensory deprivation can cause or exacerbate mental illness.¹⁵⁸ Given this wealth of

including one of the author’s own from 1993, on health impacts of solitary confinement).

151. Expert Report of Dr. Craig Haney, *supra* note 149, at 5–22.

152. *See id.* at 8–9 (citing both U.S. and international literature on the adverse effects of solitary confinement).

153. *Id.* at 8 (citing HANS TOCH, *MEN IN CRISIS: HUMAN BREAKDOWNS IN PRISONS* 54 (1975)).

154. Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, *supra* note 149, at 131.

155. *Id.* at 131–32; *see also* DON FOSTER, *DETENTION & TORTURE IN SOUTH AFRICA: PSYCHOLOGICAL, LEGAL & HISTORICAL STUDIES* 71–76 (1987) (comparing effects of solitary confinement to post-traumatic stress syndrome and symptoms of concentration camp survivors); Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, 17 B.C. INT’L & COMP. L. REV. 275, 305–06 (1994) (discussing reports of South African government’s routine use of torture, including use of solitary confinement); Tim Shallice, *Solitary Confinement—A Torture Revived?*, NEW SCIENTIST, Nov. 28, 1974, at 666–67 (citing historical uses of solitary confinement to “break” prisoners and describing severe mental effects).

156. *See, e.g.*, Ivan Zinger et al., *The Psychological Effects of 60 Days in Administrative Segregation*, 43 CAN. J. CRIMINOLOGY 47 (2001).

157. Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, *supra* note 149, at 132.

158. *See* Grassian, *supra* note 149, at 329 (noting early experiments with the use of solitary confinement in American and European prison systems resulted in high incidences of severe mental disturbance, as well as aggravation of existing psychiatric illness). As a result, several states are examining their practices with respect to the use of solitary confinement—both through legislative initiatives and internal reform

documentation, in October 2011, United Nations Special Rapporteur on Torture, Juan Méndez, called for UN member states to outlaw the use of solitary confinement, with an absolute ban on uses in excess of fifteen days.¹⁵⁹ “Segregation, isolation, separation, cellular, lockdown, Supermax, the hole, Secure Housing Unit . . . whatever the name, solitary confinement should be banned by States as a punishment or extortion technique,” Méndez reported, noting it causes serious mental and physical harm and often amounts to torture.¹⁶⁰

Authorities—including the Supreme Court—have recognized the inherent harms of isolation for over a century. In *In re Medley*,¹⁶¹ the Court noted that prisoners subjected to solitary confinement:

fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.¹⁶²

of prison policies. See, e.g., Anita Kumar, *Legislators Ask[] for Federal Probe of Use of Solitary in Va. Prisons*, WASH. POST (Mar. 20, 2012), http://www.washingtonpost.com/blogs/virginia-politics/post/legislators-asks-for-federal-probe-of-use-of-solitary-in-va-prisons/2012/03/20/gIQAYbaAQS_blog.html (Virginia state legislators’ call for a federal probe into the state prison system’s use of solitary confinement and potential abuses); Rina Palta, *California’s Lawmakers Question Use of Isolation Cells*, INFORMANT (Aug. 24, 2011), <http://informant.kalwnews.org/2011/08/californias-lawmaking-question-use-of-isolation-cells/> (California Department of Corrections and Rehabilitation announces plans to reform the policies of the controversial Security Housing Units (SHUs), home to thousands of inmates held in solitary confinement for an average of 6.8 years amid protests across the state); Lance Tapley, *Reducing Solitary Confinement*, PORTLAND PHOENIX (Nov. 2, 2011), <http://portland.thephoenix.com/news/129316-reducing-solitary-confinement/?page=1#TOPCONTENT> (Maine reduced its use of solitary confinement by 70%); *Interim Charges Relating to Criminal Justice*, TEX. SENATE (Jan. 13, 2012), http://www.senate.state.tx.us/assets/pdf/Senate_CJ_Charges_2012.pdf (Texas Lieutenant Governor Dewhurst orders a legislative study on the overuse and abuse of solitary confinement in Texas prisons).

159. Press Release, United Nations Office of the High Comm’r for Human Rights, UN Special Rapporteur on Torture calls for the prohibition of solitary confinement (Oct. 18, 2011), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11506&LangID=E>.

160. *Id.* Méndez himself spent three days in solitary confinement as a political prisoner during the military dictatorship in Argentina in the 1970s. Press Release, United Nations, Press Conference by Human Rights Experts on Issue of Torture (Oct. 18, 2011), http://www.un.org/News/briefings/docs/2011/111018_Torture.doc.htm. He called it “the longest three days of my life.” *Id.*

161. 134 U.S. 160 (1890).

162. *Id.* at 168; see also *McClary v. Kelly*, 4 F. Supp. 2d 195, 208 (W.D.N.Y. 1998) (stating the notion that “prolonged isolation from social and environmental stimulation increases the risk of developing mental illness does not strike this Court as rocket science”).

And yet, despite this recognition, the expansion of this pretrial practice for terrorism suspects and post-conviction for tens of thousands of prisoners has remained largely unchecked.

2. *Effects on due process/coercion*

What is especially troubling about the use of pretrial isolation is its potential as a coercive tool. Although public debate has circled around the efficacy of using torture for gathering intelligence, inhumane treatment—particularly the use of prolonged solitary confinement—can be an effective means to secure convictions.¹⁶³ These methods can psychologically break down the accused, making it difficult for them to participate effectively in their own defense. It does so by severely impairing detainees' mental health, compromising their ability to focus, and making them more willing to fire their lawyers or interrupt their own trials with impromptu harangues.¹⁶⁴ In turn, authorities can use behavior problems caused by prolonged isolation to justify imposing further draconian conditions.¹⁶⁵ And the conditions make it more likely that people will take a plea rather than risk a lifetime in such isolation.¹⁶⁶

Originally, the federal government created SAMs to target gang leaders and prisoners in cases in which “there is a substantial risk that a prisoner’s communications or contacts with persons could result in

163. See Joshua L. Dratel, *Ethical Issues in Defending a Terrorism Case: How Secrecy and Security Impair the Defense of a Terrorism Case*, 2 CARDOZO PUB. L., POL'Y & ETHICS J. 81, 84, 86 (2003) (asserting that SAMs severely impact the attorney-client relationship); Peirce, *supra* note 10, at 19 (suggesting the threat of solitary confinement or an indefinite sentence might induce a person to take a guilty plea or agree to cooperate as a witness).

164. Neither the Center for Law and Security's *Terrorist Trial Report Card* or Human Rights First's *In Pursuit of Justice*, the two research reports on domestic terrorism prosecutions, keep track of the use of prolonged pretrial solitary confinement.

165. See, e.g., Grassian, *supra* note 158, at 331 (noting “even a few days of solitary confinement will predictably shift the [EEG] pattern toward an abnormal pattern characteristic of stupor and delirium”); Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, *supra* note 149, at 130 (discussing case studies that found a host of harmful effects from solitary confinement); Eric Lanes, *The Association of Administrative Segregation Placement and Other Risk Factors with the Self-Injury-Free Time of Male Prisoners*, 48 J. OF OFFENDER REHABILITATION 529, 539–40 (2009) (presenting data showing increased incidents of self-injurious behavior by prisoners in administrative segregation); Deborah Sontag, *Video is a Window into a Terror Suspect's Isolation*, N.Y. TIMES (Dec. 4, 2006), http://www.nytimes.com/2006/12/04/us/04detain.html?_r=1&oref=slogin (citing lawyers for terror suspect Jose Padilla who argued their client was unfit for trial because prolonged interrogation had made him incapable of trusting his attorneys and damaged his mental functioning to such an extent that prison staff remarked “his behavior was like that of ‘a piece of furniture’”).

166. See Peirce, *supra* note 10, at 21 (highlighting the UN special rapporteur's appreciation of the coercive power of solitary confinement).

death or serious bodily injury to persons.”¹⁶⁷ They instituted this ban on communication for prisoners with a demonstrated reach beyond prison.¹⁶⁸ For example, in *United States v. Felipe*,¹⁶⁹ the Second Circuit cited 28 C.F.R. § 501.3 in upholding the extraordinarily restrictive conditions of confinement imposed on a leader of the Latin Kings who had a documented history of directing murderous conspiracies from prison and communicating with an extensive network of co-conspirators inside and outside of prison.¹⁷⁰

When the SAMs regulations were first promulgated by the Department of Justice in 1996, civil libertarians raised a series of alarms, particularly around prisoners’ First Amendment rights to free speech and their Sixth Amendment rights to counsel.¹⁷¹ But during the initial notice and comment process, there was no explicit discussion of these measures being used pretrial. After 9/11, the DOJ substantially changed the standard for imposing and renewing SAMs.¹⁷² Finding the SAMs application and renewal process burdensome and “unnecessarily static,” DOJ relaxed the standards

167. Scope of Rules: National Security; Prevention of Acts of Violence and Terrorism, 61 Fed. Reg. 25,120, 25,120 (May 17, 1996) (interim rule with request for comments); *see also* Dratel, *supra* note 163, at 84 (noting SAMs first appear in case law in the context of a case involving the leader of the Latin Kings gang).

168. Scope of Rules: National Security; Prevention of Acts of Violence and Terrorism, 61 Fed. Reg. at 25,120.

169. 148 F.3d 101 (2d Cir. 1998). Felipe’s communication restrictions, however, were not SAMs, nor were they imposed pursuant to 28 C.F.R. § 501.3. Rather, the restrictions on his conditions of confinement were imposed by the sentencing court pursuant to 18 U.S.C. § 3582(d), which “allows district courts to limit the associational rights of defendants convicted of racketeering offenses.” *Id.* at 109; *see also* 18 U.S.C. § 3582(d) (2006). This is a significant difference for two reasons. First, 18 U.S.C. § 3582 is applicable only in situations where the prisoner has been convicted of the crime that serves as the basis for the restrictions, whereas pretrial SAMs are justified solely by an accusation. Second, § 3582 restrictions are imposed by a judge—an impartial decisionmaker—rather than by the executive branch, which is prosecuting the SAMs prisoner for the very crimes that may be the basis for the imposition of the SAMs.

170. 148 F.3d at 105, 107, 110 (reasoning that preventing Felipe from ordering killings was a legitimate interest and the restrictions on his communications were reasonably related to that interest).

171. *See* Scope of Rules: National Security; Prevention of Acts of Violence and Terrorism, 62 Fed. Reg. 33,730, 33,730 (June 20, 1997) (responding to public comments complaining of SAMs alleged infringement on First Amendment rights); 2010 TERRORIST TRIAL REPORT CARD, *supra* note 13, at 51 (noting that SAMs have raised concern among rights activists).

172. *Compare* National Security; Prevention of Acts of Violence and Terrorism, 72 Fed. Reg. 16,271, 16,272 (Apr. 4, 2007) (conditioning renewal of SAMs on certification that some reason for SAMs exist), *with* Scope of Rules: National Security; Prevention of Acts of Violence and Terrorism, 62 Fed. Reg. at 33,732 (conditioning renewal of SAMs on certification that the original reasons for SAMs continues to exist). The post 9/11 changes also expanded the definition of an “inmate” against whom SAMs could be imposed. 28 C.F.R. § 500.1(c) (2011).

considerably and expanded their use.¹⁷³ The government now had the ability to impose SAMs for a year, whereas previously the period was limited initially to 120 days. For renewals, the government did not have to demonstrate that the original reason the person was put under SAMs still existed, just that there was *a* reason to maintain the measures.¹⁷⁴ Significantly, the government expanded pretrial use of SAMs.¹⁷⁵ Cases in which the government asserted a relationship of the accused to “terrorist activities”—particularly alleged connections to al Qaeda—often could be enough to justify these measures, thereby eliminating the need to establish “demonstrated reach.”¹⁷⁶ Courts gave the executive branch wide discretion to impose and renew SAMs.¹⁷⁷ In the Southern District of New York, according to Joshua Dratel, SAMs were often applied “reflexively,” with courts unwilling to scrutinize them.¹⁷⁸

In Hashmi’s case, the government never alleged he had any reach outside prison, or even any direct contact to al Qaeda,¹⁷⁹ even though the regulations authorizing the imposition of SAMs were created to apply to prisoners with a demonstrated reach from behind bars. Which raises the issue—why were the SAMs put on Hashmi?

173. National Security; Prevention of Acts of Violence and Terrorism, 72 Fed. Reg. at 16,272 (extending the maximum initial period for which SAMs can be authorized from 120 days to one year and expanding the category of inmates covered by the rule); see Press Release, Dep’t of Justice, Fact Sheet: Prosecuting and Detaining Terror Suspects in the U.S. Criminal Justice System (June 9, 2009), <http://www.justice.gov/opa/pr/2009/June/09-ag-564.html> (describing the purpose of SAMs as to “prevent acts of terrorism, acts of violence, or the disclosure of classified information”); see also Press Release, Dep’t of Justice, Ahmed Ghailani Transferred from Guantanamo Bay to New York for Prosecution on Terror Charges (June 9, 2009), <http://www.justice.gov/opa/pr/2009/June/09-ag-563.html>.

174. 28 C.F.R. § 501.3.

175. See 28 C.F.R. § 500.1(c) (defining “inmates” covered by the rule to include pretrial detainees and material witnesses).

176. See 2010 TERRORIST TRIAL REPORT CARD, *supra* note 13, at 52 (finding that as of 2010, thirty of forty detainees subject to SAMs were charged with terrorism-related offenses); Dratel, *supra* note 163, at 104 (noting the “mantra—like resort to ‘terrorism’ and ‘national security’” to justify measures that restrict defendants’ rights).

177. See, e.g., *United States v. El-Hage*, 213 F.3d 74, 77, 81–82 (2d. Cir. 2000) (*per curiam*) (upholding pretrial restriction imposed on a suspect awaiting trial in the Embassy bombing case); *United States v. Ali*, 396 F. Supp. 2d 703, 711 (E.D. Va. 2005) (deciding pretrial SAMs were not imposed for punishment and served a legitimate government interest).

178. See Kareem Fahim, *Restrictive Terms of Prisoner’s Confinement Add Fuel to Debate*, N.Y. TIMES, Feb. 5, 2009, at A27.

179. Memorandum of Law in Support of Defendant’s Motion for Emergency Hearing to Prohibit the Attorney General from Restricting Defense Counsel’s Access to Defendant & Impairing Defendant’s Constitutional Rights at 3, *United States v. Hashmi*, No. 1:06-cr-00442-LAP (S.D.N.Y. Nov. 15, 2007), ECF No. 21 (arguing the government violated Hashmi’s rights by imposing SAMs that were not uniquely suited to the circumstances of his case and the allegations against him).

While challenging his extradition, Hashmi had been housed at Britain's severe Belmarsh prison. Still, during his eleven months there, Hashmi was permitted to talk, pray, exercise, and interact with other prisoners.¹⁸⁰ No complaint was ever made about his behavior at Belmarsh, nor did the British government ever seek any charges against him.¹⁸¹ Similarly, there was no complaint about Hashmi's behavior during his first five months at MCC when he was not under SAMs, and no evidence was ever proffered that he communicated or attempted to communicate with dangerous individuals while in custody.¹⁸²

The government publicly cited Hashmi's "proclivity for violence" as the reason for the SAMs, even though he had no criminal record and was neither charged with committing an actual act of violence, nor linked to any specific act of violence.¹⁸³ Moreover, given that 14,773 people held in federal prison at the end of 2009 were convicted of a violent crime,¹⁸⁴ "proclivity for violence" seemed an implausible justification for Hashmi's SAMs since thousands of people behind bars had demonstrated actual use of violence. The fact that Hashmi talked back to British police when he was being arrested also became part of the U.S. Attorney's justification for his SAMs and the court's assent to the government's wishes.¹⁸⁵ Still, this would have been the case when Hashmi was returned to the United States in May, five months prior to the imposition of the SAMs.¹⁸⁶

The fact that Hashmi was not willing to cooperate with authorities provides an alternate explanation for the imposition of the SAMs. The harshness of the conditions—which, in Hashmi's case, worsened over time—are a powerful inducement on the SAMs prisoner to

180. See Sentencing Transcript at 16, *United States v. Hashmi*, No. 1:06-cr-00442-LAP (S.D.N.Y. June 9, 2010) (describing, in his own words, Hashmi's conditions of confinement in Belmarsh).

181. See Government's Letter in Opposition to Defense Motion at 2, *United States v. Hashmi*, No. 1:06-cr-00442-LAP (S.D.N.Y. Jan. 16, 2009), ECF 75-2 (describing Hashmi's arrest in London and his extradition, with no reference to charges filed by British authorities).

182. See Memorandum of Law in Support of Defendant's Motion for Emergency Hearing to Prohibit the Attorney General from Restricting Defense Counsel's Access to Defendant & Impairing Defendant's Constitutional Rights, *supra* note 179, at 3 (noting absence of allegations warranting SAMs).

183. Hashmi SAMs Document, *supra* note 124, at 4.

184. U.S. DEP'T OF JUSTICE, PRISONERS IN 2009, at 8, 33 (revised Oct. 27, 2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf>.

185. See Government's Letter in Opposition to Defense Motion, *supra* note 181, at 2–3 (stating reasons for initial implementation of Hashmi's SAMs).

186. Outbursts are not uncommon during arrests, yet the court was willing to ascribe almost magical powers to Hashmi's, which was treated as proof of the danger of his communication.

break, cooperate, and plead. In 2008, on the eve of the DOJ's decision whether to renew Hashmi's pretrial SAMs for a second year, the Brennan Center for Justice at New York University's Law School sent the Attorney General a letter highlighting their concerns about Hashmi's health, his due process rights, and the potentially coercive nature of his SAMs restrictions: "we are concerned that the harsh measures thus far imposed on Mr. Hashmi's pretrial detention may, whether intentionally or inadvertently, have the practical effect of pressuring him into a plea bargain to which he otherwise might not agree."¹⁸⁷ Such use is not merely speculative. The Director of the Defense Intelligence Agency, Vice Admiral Lowell E. Jacoby, suggested as much in his declaration in *Padilla v. Rumsfeld*,¹⁸⁸ where he stated that José Padilla's total isolation for nearly a year was necessary to build the "dependency" interrogators required to exploit his intelligence value.¹⁸⁹ But as Hashmi explained in a speech at his sentencing three years later, "in all reality, I had nothing to cooperate about A fact that even the government knows."¹⁹⁰

Pretrial SAMs appear to be disproportionately applied against Muslim defendants in terrorism prosecutions.¹⁹¹ On May 31, 2009, as Hashmi awaited trial in isolation under SAMs, Scott Roeder walked into a Wichita church and shot abortion provider George Tiller.¹⁹² A Christian militant, Roeder committed a premeditated act of murder stemming from his militant anti-abortion politics.¹⁹³ He was

187. Letter from the Brennan Ctr. for Justice at N.Y. Univ. Law Sch. to Michael B. Mukasey, Att'y Gen. 2 (Oct. 20, 2008), *available at* http://brennan.3cdn.net/301ff4d661c066cf21_p7m6bryn.pdf.

188. 243 F. Supp. 2d 42 (S.D.N.Y. 2003).

189. Declaration of Vice Admiral Lowell E. Jacoby at A58–A59, *Padilla*, 243 F. Supp. 2d 42 (No. 02 CIV. 4445), 2002 WL 34342502; *see* Fiss, *The War Against Terrorism and the Rule of Law*, *supra* note 5, at 237 (suggesting Lowell's declaration implied interrogators aimed to inspire a "complete sense of dependency on [Padilla's] interrogators and to convince him of the hopelessness of his situation").

190. Sentencing Transcript, *supra* note 180, at 16–17. This also has a disturbing parallel in Cold War practice. *See* generally VICTOR NAVASKY, *NAMING NAMES* (1980); ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* (1998), arguing that fears that Communists were infiltrating the fabric of American institutions meant that political activists summoned before House Un-American Activities Committee in the 1950s were often pushed to name names. In many cases, the government knew who they knew—and, in a number, knew those summoned had no crucial information to provide but sought to compel people to submit, to cow dissident voices.

191. There is no published source that lists the prisoners under pretrial SAMs, only numbers; we have worked back from the numbers, using information gathered from lawyers, advocates, court documents, and media reports.

192. *See AP: Man Admits Killing Kansas Abortion Doctor*, MSNBC (Nov. 9, 2009, 10:29 PM), http://www.msnbc.msn.com/id/33802796/ns/us_news-crime_and_courts#.TmPxPpgxW_E.

193. *See* Monica Davey, *Doctor's Killer Puts Abortion on the Stand*, N.Y. TIMES, Jan. 29, 2010, at A1.

unrepentant, admitting to the Associated Press in a pretrial interview that he had killed because “preborn children’s lives were in imminent danger.”¹⁹⁴ Roeder was affiliated with various radical Christian movements including Christian Identity and the “Sovereign Citizen” and Freeman movements.¹⁹⁵ Many anti-abortion activists celebrated and wrote to Roeder in jail; some even came to visit. David Barstow of the *New York Times* was allowed a pretrial “jailhouse interview” with Roeder and noted in his cover story the “fan mail” Roeder was receiving.¹⁹⁶ Even though this was a pre-meditated killing based on a religious-political belief that had a movement of supporters who credited Roeder and expressed joy that Tiller’s clinic was finally closed, Roeder’s rights and those of his supporters were honored. Roeder was allowed to have mail, speak with the press, make and receive calls, and have visitors. He was not put under SAMs.¹⁹⁷

3. *The chilling effect of the SAMs on the accused and his counsel*

The chilling effect of SAMs also gives rise to First Amendment concerns. A particularly disturbing aspect of the measures is that detailed exposition of the impact of SAMs itself becomes illegal.¹⁹⁸ This is because everyone in contact with a person under SAMs, including lawyers and immediate family members, becomes subject to the SAMs by virtue of the requirement that they not divulge any communication with that person to a third party.¹⁹⁹ Lawyers and family members face prosecution if they provide details of any conversation or interaction with the detainee, thus making it illegal

194. AP: *Man Admits Killing Kansas Abortion Doctor*, *supra* note 192.

195. See S. POVERTY LAW CTR., TERROR FROM THE RIGHT: 75 PLOTS, CONSPIRACIES AND RACIST RAMPAGES SINCE OKLAHOMA CITY 36 (2009), available at http://www.splcenter.org/sites/default/files/downloads/publication/terror_from_the_right_0.pdf (noting Roeder’s involvement with anti-government groups); Leonard Zeskind, *Racism, Anti-Semitism and the Murder of Dr. Tiller*, HUFFINGTON POST (June 2, 2009, 9:56 AM), http://www.huffingtonpost.com/leonard-zeskind/racism-anti-semitism-and_b_210196.html.

196. David Barstow, *An Abortion Battle, Fought to the Death*, N.Y. TIMES, July 26, 2009, at A1.

197. See Amy Goodman, *Two Standards of Detention*, TRUTHDIG (July 8, 2009), www.truthdig.com/report/item/20090708_two_standards_of_justice/.

198. See *United States v. Stewart*, 590 F.3d 93, 105, 110 (2d Cir. 2009) (observing that after a sentencing court implements SAMs, an attorney representing that prisoner who has agreed to comply with the SAMs limitations can be prosecuted for disclosing information obtained from the prisoner in the course of representation).

199. See Hashmi SAMs Document, *supra* note 124, at 9, 11–12 (setting out non-divulgence requirement for Hashmi’s legal and non-legal contacts).

to speak out publicly against the damage the SAMs are having on the inmate.²⁰⁰

In comparison, when civil libertarians sought to draw attention to the draconian conditions Bradley Manning faced at Quantico, they were assisted by reports from Manning's lawyer, David Coombs, and from David House, a co-founder of the Bradley Manning Support Network.²⁰¹ In detailed reports about Manning's confinement, Coombs and House recounted their conversations with Manning—providing examples of the dehumanizing nature of his conditions, including Manning being forced to sleep naked and stand naked for morning parade—as well as comments directly from Manning to counter Pentagon claims about how he was being treated.²⁰² In contrast, if Hashmi were to have written a letter to his attorneys while under SAMs detailing his treatment at MCC, or provided specific details about his confinement during visits with his parents, his attorneys and family would have been prohibited under threat of criminal sanction from publicly disseminating that information.²⁰³

Pursuant to the SAMs, an attorney who represents a client is required to sign an affirmation as a condition of being able to communicate with her client and to represent him.²⁰⁴ SAMs requirements state that “[b]y signing the affirmation, the attorney acknowledges his/her awareness and understanding of the SAM provisions and his/her agreement to abide by these provisions, particularly those that relate to contact between the inmate and his attorney.”²⁰⁵ The terms effectively prohibit counsel from disclosing information learned from clients to anyone unless it is for the “sole

200. See *id.* at 1, 3 (exhibiting the attorney affirmation required under Hashmi's SAMs); see also *Stewart*, 590 F.3d at 112 (illustrating that an attorney who has signed an affirmation agreeing to comply with SAMs can be prosecuted for disclosing information obtained from the prisoner in the course of representation).

201. See Glenn Greenwald, *The Inhumane Conditions of Bradley Manning's Detention*, SALON (Dec. 15, 2010, 2:15 AM), http://www.salon.com/2010/12/15/manning_3/ (citing House's descriptions of Manning's “palpable changes in . . . physical appearance and behavior” over the course of his confinement); Denver Nicks, *Bradley Manning's Life Behind Bars*, THE DAILY BEAST (Dec. 17, 2010, 1:36 AM), <http://www.thedailybeast.com/articles/2010/12/17/bradley-manning-wikileaks-alleged-sources-life-in-prison.html>.

202. Ed Pilkington, *Stripped Naked Every Night, Bradley Manning Tells of Prison Ordeal*, THE GUARDIAN (Mar. 10, 2011), <http://www.guardian.co.uk/world/2011/mar/11/stripped-naked-bradley-manning-prison>; Michael Whitney, *Breaking: Military Harassing David House, Jane Hamsher for Visiting Bradley Manning*, FIREDOGLAKE (Jan. 23, 2011, 11:25 AM), <http://fdlaction.firedoglake.com/2011/01/23/breaking-military-harassing-david-house-jane-hamsher-for-visiting-bradley-manning>.

203. See Hashmi SAMs Document, *supra* note 124, at 1–3.

204. *Id.*

205. *Id.* at 6.

purpose of preparing the inmate's defense."²⁰⁶ And the entity that defines the scope of what might legitimately be included in this purpose is the government itself—in other words, the opposing counsel.²⁰⁷

The vague language of the SAMs provisions coupled with the Attorney General's demonstrated willingness to prosecute violations of these types of provisions can result in a chilling of lawyer speech. Attorneys representing clients under SAMs are scared—and rightly so. Josh Dratel, counsel to the defendants who were under SAMs in the 1998 "Embassy Bombings case,"²⁰⁸ articulates the fear in this way: "The S.A.M.s also unquestionably exert a chilling effect upon counsel. Given the nature and scope of the proscriptions, it is doubtful that any lawyer could maintain a perfect record of compliance. Thus, the government has maximum discretion regarding *whom* to prosecute, for *what* conduct, and *when*."²⁰⁹

The prosecution of lawyer Lynne Stewart and court-appointed translator Mohamed Yousry²¹⁰ provides a cautionary tale for contravening these rules. Stewart was convicted in 2005 of five counts of conspiracy to provide material support and making false statements.²¹¹ Stewart made a statement to the press about Sheikh

206. *Id.* at 7–8.

207. *See id.* at 10 (stating that if a government official determines the inmate is using contact with his attorney to make non-legal communications, the inmate's ability to contact his attorney may be suspended or eliminated).

208. *United States v. Bin Laden*, 156 F. Supp. 2d 359, 361–63 (S.D.N.Y. 2001).

209. Dratel, *supra* note 163, at 88.

210. Although it was equally as chilling as Stewart's case, the successful prosecution of the court-appointed translator Mohamed Yousry received less attention. While pursuing his doctorate at New York University in Middle Eastern Studies, Yousry served as the court-appointed translator for Rahman's attorneys. Michael Powell & Michelle Garcia, *Translator's Conviction Raises Legal Concerns*, WASH. POST (Jan. 16, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/01/15/AR2006011500940_pf.html. Pursuant to his responsibilities as a court-appointed translator, he translated Abdel-Rahman's statements that Stewart subsequently shared with the press. As a translator, Yousry had not been required to sign the SAMs paperwork. But upon the urging of his graduate school advisor, Yousry also interviewed the blind cleric Sheikh Abdel-Rahman for his dissertation, which focused on Muslim fundamentalism in Egypt. Notebooks of his discussions with the Sheikh, drafts of his dissertation and other books on Muslim fundamentalism—in other words, the *study* of Islamic fundamentalism—became part of the government's case against him. One of the jurors explained the guilty verdict against Yousry: "People are so fearful that if you disagree with the government on one thing it makes you a terrorist. I have to plead guilty to being a coward. It doesn't feel good, but I punked out." *Id.*

211. The charges against Stewart in the superseding indictment included: "conspiring to defraud the United States in violation of 18 U.S.C. § 371"; "conspiring, in violation of 18 U.S.C. § 371, to provide and conceal material support to be used in preparation for, and in carrying out, the conspiracy"; "providing and concealing material support to the . . . conspiracy, in violation of 18 U.S.C. §§ 2339A and 2"; and "making false statements in violation of 18 U.S.C. § 1001." *United States v. Sattar*,

Omar Abdel Rahman's thoughts on the Egyptian ceasefire while serving as his counsel.²¹² She committed this violation in 2000 and was reprimanded—but not prosecuted—by the Clinton Administration for violating the terms of Abdel Rahman's SAMs.²¹³ In the new political climate of spring 2002, however, John Ashcroft announced the indictment of Stewart on several charges of conspiring to provide material support for a terrorist offense. She was convicted in February 2005.²¹⁴

The successful prosecution of Stewart has had a chilling effect on lawyers throughout the country; many will not take these terror cases, and those who do operate with excessive caution about what they say in public and whom they consult for legal strategy.²¹⁵ Sean Maher, Hashmi's lawyer and co-chair of the national security committee of the National Association of Criminal Defense Lawyers, told the *New York Times* he "knew talented private lawyers who were refusing to take on terrorism cases because of potential violations of their privacy, including monitoring of their communications with clients."²¹⁶ He observed, "I find it unfathomable that in our adversarial system, we've created a process to weed out qualified defense counsel."²¹⁷ Lynne Stewart raised a related concern,

[T]he fear, to me is, not the people who will say, "No, I won't do

314 F. Supp. 2d 279, 286 (S.D.N.Y. 2004).

212. See *United States v. Stewart*, 590 F.3d 93, 98–99, 103–04 (2d Cir. 2009).

213. Abbe Smith, *The Bounds of Zeal in Criminal Defense: Some Thoughts on Lynne Stewart*, 44 S. TEX. L. REV. 31, 34 (2002).

214. Stewart's prosecution is illuminated by comparison to the contempt of court citations and four month prison sentences imposed by Judge Harold Medina on the defense attorneys in *Dennis*. Upon being cited for contempt, lawyer George Crockett commented, "I regard it as a badge of honor to be adjudicated in contempt for vigorously prosecuting what I believe to be the proper conception of the American Constitution." STEVE BABSON ET AL., *THE COLOR OF LAW: ERNIE GOODMAN, DETROIT, AND THE STRUGGLE FOR LABOR AND CIVIL RIGHTS* 194 (2010). Compare this with Stewart's comment after receiving her initial 28-month sentence: "I can do that [time] standing on my head." *Stewart*, 590 F.3d at 108 n.9 (alteration in original). On remand from the U.S. Court of Appeals for the Second Circuit, Judge Koedt cited the lack of remorse exhibited by Stewart's post-sentencing comments as a justification for increasing her sentence from 28 to 120 months. Brief & Special Appendix for Appellant-Defendant at 40, 49, *United States v. Sattar*, No. 10-3185 (S.D.N.Y. Mar. 30, 2011).

215. Philip Shenon, *Lawyers Fear Monitoring in Cases on Terrorism*, N.Y. TIMES, Apr. 28, 2008, <http://www.nytimes.com/2008/04/28/us/28lawyers.html?pagewanted=all>. In order to correspond or speak with a prisoner who is under SAMs—even for purposes of receiving a request for representation—a lawyer must submit to a background check and sign an affirmation acknowledging her awareness of the SAM provisions and agreement to abide by these provisions. Some of those provisions are extremely onerous and many lawyers understandably do not wish to subject themselves—or their staff—to them.

216. *Id.*

217. *Id.*

those cases,” which may also be an outgrowth—but the people who *will* do the cases, but will now do them with an eye over their shoulder to make sure that they’re doing [them] the way the government thinks that the case should be done. In other words, no challenge, no client-centered defense will take place if you’re thinking all the time, “What am I going to do if they indict me like they did Lynne Stewart.”²¹⁸

The issue of *how* lawyers will represent clients charged with—or convicted of—terrorism-related offenses after Lynne Stewart’s prosecution has significant implications for the attorney-client relationship and the constitutional rights of lawyers and clients.²¹⁹ The fact that a client’s SAMs restrictions prohibit his lawyer from speaking to the media about the client’s situation implicates both constitutional and ethical issues. Twenty years ago, in *Gentile v. State Bar of Nevada*,²²⁰ the United States Supreme Court recognized that zealous representation of a client might require actions by lawyers outside the courtroom. The Court emphasized that attorneys should take steps before trial to protect the reputation of their clients and limit the adverse consequences of the indictment, especially in cases where the prosecution may be acting with improper motives.²²¹

The ABA Model Rules of Professional Conduct also recognize this obligation of attorneys in the pretrial stages. While prohibiting attorneys from “mak[ing] an extrajudicial statement that . . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter,” the rules also expressly permit counsel to “make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client.”²²²

218. *Convicted Attorney Lynne Stewart: “You Can’t Lock Up the Lawyers,”* DEMOCRACY NOW (Feb. 11, 2005), http://www.democracynow.org/2005/2/11/convicted_attorney_lynne_stewart_you_cant; see also Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 MD. L. REV. 173, 174 (2003) (discussing the issue of a lawyer’s “affective, positional, and operational solidarity” with clients with reference to the Stewart case).

219. In somewhat unusual recognition of one aspect of this problem, Judge Young issued an order modifying the provision of Richard Reid’s SAMs, which restricted dissemination by Reid’s defense attorneys of communications from Reid to anyone. Noting that “for years I have taught trial lawyers that: ‘[w]hen you get a case, shop your ideas. Ask someone, ‘What about this? . . . Have you ever had a case where . . . ? What if I argued . . . ? How do you think this would work?’” and recognizing that “[t]his is still a profession,” Judge Young found that the provision restricting dissemination “prevented precisely this type of trial preparation generally deemed necessary for a proper defense.” *United States v. Reid*, 214 F. Supp. 2d 84, 90 (D. Mass. 2002) (quoting WILLIAM G. YOUNG, REFLECTIONS OF A TRIAL JUDGE 102 (1998)).

220. 501 U.S. 1030 (1991).

221. *Id.* at 1043 (plurality opinion).

222. MODEL RULES OF PROF’L CONDUCT R. 3.6(a), (c) (2011).

By prohibiting lawyers from disclosing information about their clients, the SAMs can effectively muzzle defense lawyers in the public sphere, raising serious legal and ethical questions regarding these lawyers' ability to zealously represent their clients.²²³ Indeed, in recent years, some commentators have argued not only that lawyers have a right to practice "litigation public relations," but that they have a professional obligation to do so—especially when confronted with media attention from the opposing side.²²⁴ As British solicitor Gareth Peirce observed, the U.S. terrorism prosecutions demonstrate all too clearly that "[t]here is no reticence in America in commenting on an arrest, a trial, or the evidence the prosecution claims loudly, from the outset, to possess."²²⁵ But this coverage, at least for those under SAMs, is overwhelmingly one-sided.

This one-sided media coverage was amply demonstrated in the reporting surrounding Ahmed Ghailani's trial. In June 2009, Ghailani was transferred from Guantanamo to MCC to stand trial for his alleged role in the embassy bombings in Kenya and Tanzania.²²⁶ He was immediately placed under SAMs. Tremendous media attention followed his case, yet almost none of it noted the conditions he was held under at MCC.²²⁷ What reached the media and the public was skewed toward the government's position because the defense was forbidden from speaking publicly about discussions with their client. The most journalistically egregious article was a lengthy *New York Times* piece about Ghailani's mental state and insights on the American legal process.²²⁸ In the article, Ghailani, who is

223. The ambiguity of some of the SAMs provisions makes the situation even more frightening from the lawyer's perspective, as she does not necessarily have a clear idea of which disclosures are likely to be perceived to be unauthorized in the eyes of the government, who is also the opposing counsel.

224. See, e.g., John C. Watson, *Litigation Public Relations: The Lawyers' Duty to Balance News Coverage of Their Clients*, 7 COMM. L. & POL'Y 77, 78–79 (2002) (arguing that today's litigants have both personal and legal interests at risk with regard to news coverage and thus lawyers must now interact with reporters in order to ensure balanced coverage of their client's litigation).

225. Peirce, *supra* note 10, at 20. Peirce contrasts prosecutorial pretrial publicity in the United States with that in the United Kingdom, explaining that "[i]n the UK, the inhibiting Contempt of Court Act demands that any reporting that might influence a jury be prohibited; the flurry occasioned by arrest and charge, even in the most dramatically newsworthy cases, is immediately silenced until the trial begins." *Id.*

226. *United States v. Ghailani*, 751 F. Supp. 2d 515, 525–26 (S.D.N.Y. 2010).

227. See Benjamin Weiser, *Report Shows Detainee's Insight Into Legal Process*, N.Y. TIMES, Sept. 27, 2010, at A16 (explaining that Ghailani was moved from Guantanamo, which he describes as a "more pleasant" and "more relaxed" facility, to the MCC, but does not mention Ghailani's SAMs which would have provided context for his comments).

228. See *id.*

described as eating Snickers and discussing John Grisham novels, gives his impressions of the ways the federal system is better than Guantanamo—all taken from the notes of the government psychiatrist because the defense psychiatrist and counsel were forbidden by the SAMs from commenting publicly about discussions with their client. *New York Times* readers thus were treated to a piece on Ghailani's mental state and opinions, without a chance for the defense to put out alternate information—and without even a mention in the article that the defense was *forbidden by the government* to do so. This is particularly notable because the defense had unsuccessfully challenged MCC's strip-searching of Ghailani.²²⁹ According to court proceedings, Dr. Katherine Porterfield, the defense psychiatrist who examined him, found that strip-searching “trigger[ed] the defendant's P.T.S.D. and thus ma[de] him unable to assist in his defense.”²³⁰ Porterfield's notes, however, could not be made public due to the SAMs.

Such one-sided media attention is troubling, not only for the accused whose right to a fair trial may be compromised by his lawyer's inability to rebut prosecution statements to the media, but also for the public, who is entitled—perhaps obligated as a matter of civic responsibility—to know what goes on in America's prisons. As Justice Kennedy eloquently exhorted in his 2003 address to the American Bar Association, “[t]he subject is the concern and responsibility of every member of our profession and of every citizen. This is your justice system; these are your prisons.”²³¹ Observing that “[w]hen the door is locked against the prisoner, we do not think about what is behind it,”²³² Justice Kennedy urged “a greater responsibility. As a profession, and as a people, we should know what happens after the prisoner is taken away.”²³³ Prisons—no less than courts—are part of the justice system and public awareness of what goes on inside them is crucial to the transparency that is a central value of that system. The SAMs' prohibition on the public disclosure of information from

229. See Larry Neumeister, *Ahmed Khalfan Ghailani, Guantanamo Detainee: I'll Skip Trial if Strip Searches Continue*, HUFFINGTON POST (May 6, 2010, 8:08 PM), http://www.huffingtonpost.com/2010/05/06/ahmed-khalfan-ghailani-gu_n_566517.html.

230. Benjamin Weiser, *Federal Judge Rejects Terrorism Suspect's Plea to Halt His Strip-Searches*, N.Y. TIMES, June 18, 2010, at A23. Judge Kaplan ruled the strip-searches “justified by the legitimate governmental interest in protecting the safety of prison and court personnel and other inmates.” *Id.*

231. Anthony M. Kennedy, Assoc. Justice, Supreme Court of the U.S., Address Before the American Bar Association Annual Meeting 2 (Aug. 9, 2003).

232. *Id.* at 3.

233. *Id.*

the prisoner directly or via his lawyer or immediate family deprive the public of the opportunity to know the conditions in which those who await trial or have been convicted of crimes are being held.²³⁴

In comparison, the level of secrecy around SAMs surpasses, in certain regards, the secrecy encountered by counsel for Guantanamo detainees. Under the terms of a protective order governing access to the men held at Guantanamo, information received from detainees is deemed presumptively classified, but there is a process for reviewing attorney notes from client meetings and detainee legal mail and clearing at least some information for use in the representation of detainees. Indeed, lawyers' access to the detainees and the information they were able to bring back was critical in making known some of the torture and abuse occurring at Guantanamo and generating coverage by the media and advocacy by human rights groups. This attention led to widespread public outrage and condemnation, and eventually led to change in conditions there. While the protective order raises significant confidentiality and other rights concerns, in the SAMs context there is no process at all. All communications from a prisoner are effectively classified and remain so for as long as his SAMs are in effect, without a determination as to the nature of the information that an attorney or a family member may want to disseminate and whether security concerns are implicated.²³⁵

4. *The unreviewability of the SAMs*

Compounding the rights deprivations inherent in pretrial conditions for a SAMs prisoner are the courts' unwillingness to

234. In doing so, the SAMs arguably also infringe upon the First Amendment right of publishers and the press to publish and decide what to publish, as well as the right of non-inmates to receive that information. Where the prisoner or his lawyer is forced to forego communicating with the press, the rights of the publisher to publish and to decide what to publish will be affected. *See Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957) (detailing that an essential element of the liberty of free press is freedom from all censorship over what shall be published); *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1271 (10th Cir. 1989) (stating that the right to publish and to exercise "editorial discretion concerning what to publish" is protected).

The liberty of free press also affects the rights of non-inmates to receive and read the information published or reported. *See Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) ("[F]reedom [of speech and press] . . . necessarily protects the right to receive." (quoting *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943)) (internal quotation marks omitted)); *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 395 (1950) ("[T]he public has a right to every man's views . . ."). First Amendment protection is afforded "to the communication, to its source and to its recipients both." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976).

235. We are grateful for discussions with Guantanamo attorney Pardiss Kebriyai of the Center for Constitutional Rights for illuminating the details of this disparity.

intervene. While a pretrial prisoner is able to challenge the application and conditions of his SAMs in court,²³⁶ Hashmi's case demonstrates that the process often does not result in substantive reviewability. Rather, once the words "national security" are invoked, the court almost always defers to the Executive.²³⁷

Hashmi first challenged the constitutionality of his SAMs in late 2007, shortly after the Attorney General first imposed them.²³⁸ On January 16, 2008, the court found that it had jurisdiction to rule on his conditions.²³⁹ In *Bell v. Wolfish*,²⁴⁰ the Supreme Court held that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."²⁴¹ Under a due process analysis, however, "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment,'" and is therefore constitutional.²⁴² In setting forth this standard, the Supreme Court carefully distinguished between generalized restrictions imposed for the safety of the institution and those that may constitute punishment prior to conviction in violation of the Due Process Clause.²⁴³

236. Prisoners who have had SAMs imposed pretrial generally have not been subject to the administrative exhaustion requirement of the Prison Litigation Reform Act, and instead have sought to challenge them through motions filed in their criminal cases. *See, e.g.,* *United States v. Hashmi*, 621 F. Supp. 2d 76, 85–86 (S.D.N.Y. 2008).

237. *See* *United States v. El-Hage*, 213 F.3d 74, 77, 81–82 (2d Cir. 2000) (per curiam) (upholding SAMs imposed on a pretrial detainee—a secretary of Osama Bin Ladin connected to the Kenya and Tanzania Embassy bombing cases—to prevent his communication with co-conspirators); *United States v. Ali*, 396 F. Supp. 2d 703, 704, 711 (E.D. Va. 2005) (upholding SAMs imposed on an alleged member of al Qaeda charged, inter alia, with conspiracy to assassinate the President and conspiracy to commit air piracy). As evidenced by these cases, the court's decision not to disturb Hashmi's pretrial SAMs was not unique.

238. *See Hashmi*, 621 F. Supp. 2d at 79–80.

239. *Id.* at 76, 85–86. The government had simultaneously argued that Hashmi had not exhausted his administrative remedies, as well as making the substantive argument that the SAMs did not abridge Hashmi's rights. *Id.* at 84.

240. 441 U.S. 520 (1979).

241. *Id.* at 535–37 (in evaluating the constitutionality of conditions of pretrial detention, proper inquiry is whether those conditions amount to punishment of the detainee for under Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law); *see also* *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977) ("[T]he State does not acquire the power to punish . . . until after it has secured a formal adjudication of guilt in accordance with due process of law."); *United States v. Lovett*, 328 U.S. 303, 317–18 (1946) (holding that the Constitution prohibits legislative adjudication of guilt by proscribing bills of attainder). Pretrial conditions of confinement also may not unduly burden a detainee's Sixth Amendment right "to a vigorous defense by an independent attorney." *United States v. Reid*, 214 F. Supp. 2d 84, 92 (D. Mass. 2002).

242. *Bell*, 441 U.S. at 539.

243. *Id.* at 538–39. Deprivations and restrictions on pretrial detainees that

In Hashmi's case, the court held that "the SAMs are reasonably related to legitimate penological interests."²⁴⁴ In arriving at this conclusion, the court specifically relied on "the evidence of the Defendant's willingness to provide aid to Al-Qaeda through his cell phone and use of his apartment; the Defendant's stated intention to overthrow the United States through whatever means necessary; and the Defendant's threatening statements to British authorities."²⁴⁵

There are two reasons why this outcome is constitutionally troubling. First, the factual basis for the SAMs upon which the court relied had not been (and ultimately never was) established; namely, the crimes with which Hashmi was charged.²⁴⁶ Given that everything the government invoked to justify Hashmi's SAMs related to his charges—none of which alleged a specific act of violence—and not any previous, separate, or already-proven demonstrated ability to cause violence from behind bars, the presumption of innocence was effectively abandoned. In this way, the serious deprivations entailed by the SAMs effectively constituted punishment inflicted on an individual pretrial detainee that could not be justified by deference to the prison administrator's expertise concerning the safety and security of the institution. As a result, the Attorney General's decision to unilaterally impose the SAMs arguably violated Hashmi's due process right to be free from punishment prior to conviction.²⁴⁷

Additionally problematic is the court's reasoning that blurs the distinction between a detention facility's ability to impose appropriate rules and regulations that apply to all pretrial detainees, and the unilateral imposition of *particularized* severe restrictions by order of the Attorney General on a specific pretrial detainee through a SAM. The latter is constitutionally far different, as it constitutes punishment imposed by a non-judicial official on an un-convicted defendant.²⁴⁸ Here, the fact that the SAMs were directed and tailored

implicate other constitutional guarantees are constitutionally acceptable if imposed by prison officials because they are related to institutional security and discipline, as evaluated under the *Turner* test, and if they are not an exaggerated response to such concerns.

244. *Hashmi*, 621 F. Supp. 2d at 86.

245. *Id.*

246. See Hashmi SAMs Document, *supra* note 124, at 4 (providing that the Attorney General's reasoning for imposing SAMs on Hashmi was based on his interaction with co-conspirators in his crimes).

247. Such an interpretation would not have left the Attorney General without a remedy. He could have petitioned the court for an order imposing various restrictions on Hashmi's pretrial confinement, which is governed by the provisions of the Bail Reform Act of 1984, 18 U.S.C. § 3141 (2006).

248. See *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (prohibiting punishment of pretrial detainees).

solely to Hashmi strongly suggests their punitive character, especially given the severity of the rights deprivations of a person not alleged to have violated any institutional rule or to have violated the law while incarcerated.²⁴⁹

Another example of the deference to the determinations of corrections officers occurred during the summer of 2008, when Hashmi was punished for unauthorized gestures and insubordination for practicing martial arts in his cell.²⁵⁰ According to the incident report, a correctional officer observed Hashmi “practicing shadow boxing and other martial arts moves. [The officer] approached . . . [and gave] Inmate Hashmi a direct order to cease his physical actions and to inquire as to why he was performing such activities. Inmate Hashmi stated to [the officer], ‘I AM PRACTICING FOR YOU GUYS.’”²⁵¹ In the administrative disciplinary proceeding, Hashmi provided a written statement contesting the charges:

In the name of Allah . . . I totally deny that events occur as the two-face individual (Berrios) claimed. I was exercising to relieve stress as I normally do and this two-face individual (Berrios) came and asked in a[n] entrapping way “Ah you[’re] practicing?” Neither did he give any orders to stop working out. Proof of this can be found in the audio recording which the Unit Manager gets a daily transcript of from the FBI.²⁵²

The government never produced the tape, and Hashmi lost his limited family visits for three months and commissary for two months.²⁵³

Hashmi’s SAMs were renewed for a second year. On January 22, 2009, President Obama signed executive orders prohibiting torture and ordering the closure of the Guantanamo prison.²⁵⁴ The next day,

249. See, e.g., *id.* at 537–38 (noting that the same considerations used to evaluate whether an act of Congress is penal or regulatory also bear on the issue of whether the regulation constitutes unconstitutional punishment of a pretrial detainee); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963) (setting out factors for evaluating the penal versus regulatory character of statutes). Applying the *Mendoza-Martinez* factors, the SAM involves “an affirmative disability or restraint,” which has been historically “regarded as a punishment.” *Bell*, 441 U.S. at 538 (citation omitted) (internal quotation marks omitted).

250. See Incident Report at 1, *United States v. Hashmi*, No. 1:06-cr-004220-LAP (S.D.N.Y. Jan. 16, 2009), ECF No. 75-4.

251. *Id.*

252. *Id.* at 3.

253. *Id.* at 1; see also Transcript of Oral Argument SAMs Challenge Hearing, *supra* note 118, at 12–13 (showing that Hashmi’s punishment was imposed without the BOP providing evidence of his actions via audio or video).

254. Exec. Order No. 13,491, 3 C.F.R. § 199 (2010); Exec. Order No. 13,492, 3 C.F.R. § 203 (2010).

Hashmi challenged his SAMs in court for the second time.²⁵⁵ At the hearing, Hashmi's attorneys presented considerable medical evidence of the impact that long-term solitary confinement and sensory deprivation have on a person's mental and physical health, and the ways that these conditions hampered Hashmi's ability to participate in his own defense.²⁵⁶ The defense asked for a modest set of changes to the SAMs: that Hashmi's parents be allowed to visit him together, as they had for the first five months of his incarceration at MCC; that he be allowed exercise in MCC's recreational facility on the roof and with other prisoners; and that he be allowed to attend group prayer and have a Muslim cellmate.²⁵⁷ The government, in its argument, reminded the court that when it first imposed the SAMs on Hashmi in late fall 2007, the court rejected Hashmi's motion because of the danger he posed to national security.²⁵⁸ The government reasserted the need for the measures to protect national security and in accordance with the administrative needs of the prison.²⁵⁹

The court saw no urgency in Hashmi's conditions²⁶⁰ and rejected all of his requested modifications on the grounds that the government provided "sufficient evidence" to support the conclusion that "the SAMs are reasonably related to legitimate penological interests."²⁶¹ The court cited the martial arts incident as further proof of Hashmi's danger. Hashmi's counsel requested the tape of the incident to corroborate his statement and provide an independent witness, since Hashmi's cell was constantly monitored.²⁶² Failing to respond to defense counsel's request for audio evidence of the incident while claiming that Hashmi had provided no rebuttal witnesses, the court noted that "Hashmi was found guilty of practicing boxing and threatening the staff."²⁶³ Moreover, this incident was deemed

255. Transcript of Oral Argument SAMs Challenge Hearing, *supra* note 118, at 2.

256. *Id.* at 2–11.

257. *See id.* at 14–17 (arguing that family visitation has "positive penological effects," that the prison should take adequate precautions to permit communal prayer in accordance with Mr. Hashmi's faith, and that outdoor exercise would give Hashmi much needed natural sunlight and vitamin D).

258. *See id.* at 30 (explaining that the defense did not provide evidence showing that the SAMs are no longer related to the penological purpose, and that the government's initial national security concerns remained valid).

259. *Id.* at 25.

260. *Id.* at 26. During the hearing, the court was impatient with the idea of any urgency around Hashmi's conditions (more than a year under SAMs plus a year and a half of solitary confinement). *Id.* at 29.

261. Transcript of Oral Argument SAMs Challenge Hearing, *supra* note 118, at 26.

262. *Id.* at 12–13.

263. *Id.* at 27.

evidence of his continuing danger, and Hashmi's request to relax the SAMs was denied because doing so "could well endanger BOP personnel."²⁶⁴

Never acknowledging the body of medical and scholarly evidence the defense presented on the impact of solitary confinement, the court once again held, "As I've already found, the conditions of Hashmi's confinement are related to legitimate penological interests, and thus are administrative and not punitive in nature, and thus are constitutional."²⁶⁵ Given the harshness of Hashmi's isolation, it is difficult to imagine what conditions the court would consider punitive, rather than administrative, regarding a Muslim suspect accused of terrorism-related crimes.²⁶⁶ In October 2009, Attorney General Holder renewed Hashmi's SAMs for another year.²⁶⁷

The court's approval of Hashmi's three years of pretrial solitary confinement was not an aberration. The longest case of pretrial SAMs has been that of Canadian citizen and U.S. legal resident Mohammed Warsame in Minnesota.²⁶⁸ Warsame's case bears similarities to Hashmi's in terms of the pretrial imposition of SAMs by the DOJ, the coercive potential of these measures, and the court's unwillingness to intervene. In December 2003, the government questioned and arrested Warsame, believing he had testimony to provide on Zacarias Moussaoui.²⁶⁹ Six weeks later, after it became

264. *Id.* at 27. To support the request that Hashmi's elderly parents be allowed to visit Hashmi together, the defense presented a doctor's note attesting to his mother's hearing problem. *Id.* at 15. During this court proceeding, the government asserted that it conveyed Hashmi's mother's hearing issue to BOP, and "because, based on BOP's observations there does not appear to be one, we have reached an impasse on that particular issue." *Id.* at 24. The court again did not choose to follow up on the doctor's attestation and instead took the BOP's alleged observations of Hashmi's mother's hearing as sufficient evidence for denying the request. *Id.* at 27.

265. *Id.* at 29.

266. Interestingly, when confronted with a non-Muslim prisoner convicted of arms trafficking who was in isolation for an even shorter amount of time and who did not have SAMs, Judge Shira Scheindlin ordered the government to transfer him to an open population unit, noting that "I cannot shirk my duty under the Constitution . . . to ensure that Bout's confinement is not excessively harsh." Opinion & Order at 17, *United States v. Bout*, 1:08-cr-00365-SAS (S.D.N.Y. Feb. 24, 2012), ECF No. 79.

267. See Hashmi SAMs Document, *supra* note 124.

268. Position of Defendant with Respect to Sentencing at 1, 7, *United States v. Warsame*, No. 0:04-cr-00029-JRT-FLN (D. Minn. July 2, 2009), ECF No. 169.

269. On December 8, 2003, Warsame was picked up at his home and taken for two days for "voluntary" questioning to Camp Ripley in Northern Minnesota (about 100 miles from his home), where law enforcement officials had constructed an elaborate structure to interrogate him. *Id.* at 12-22. Believing he had information on Zacarias Moussaoui, they held Warsame in a specially-outfitted house for questioning, while in the other house, a broad array of law enforcement (including the FBI, CIA, and a live feed to the SDNY), unbeknownst to Warsame, could listen in. While they had the capability to tape these interrogations, they did not. After Warsame asked to be brought back to Minneapolis and to see a lawyer, they returned him but promptly

clear that Warsame had no testimony, the government filed material support charges against him for teaching English to Taliban nurses, eating in the same room with Osama bin Laden, and sending \$2,000 to people in Afghanistan whom the government claimed were assisting Taliban efforts.²⁷⁰ The Attorney General put Warsame under SAMs.²⁷¹ Warsame spent the next five-and-a-half years in pretrial detention, most of it in solitary confinement.²⁷² Similar to Hashmi, the government claimed the danger of Warsame's communication was due to the severity of the charges and Warsame's supposed associates being at large.²⁷³ After five years of pretrial detention, the court seemed poised to modify Warsame's conditions.²⁷⁴ The government objected, arguing: "There is every reason to believe that if the defendant were moved to 'a more normal pretrial detention facility,' the Marshals Service would not be able to adequately limit the defendant's ability to communicate with and contact known and suspected terrorists."²⁷⁵ The government indicated it was open to discussion with defense counsel about Warsame's conditions. The court stayed the order, and Warsame's SAMs remained in place.²⁷⁶

Six months later, Warsame accepted a government plea bargain of one count of conspiracy to provide material support (the government dropped the other four charges) and agreed to deportation following

arrested him on material witness charges. Even after they flew him to New York to pressure him to testify against Moussaoui, Warsame maintained he had no testimony to provide. *Id.*

270. Government's Position with Respect to Sentencing at 3–4, 11, 18, *United States v. Warsame*, No. 0:04-cr-00029-JRT-FLN (D. Minn. July 2, 2009), ECF No. 171.

271. See Position of Defendant with Respect to Sentencing, *supra* note 268, at 25–26 (detailing the conditions of Warsame's pretrial detention). Similar to the point raised earlier regarding the application of Hashmi's SAMs, the timeline of Warsame's case and SAMs raises questions about the application of SAMs being related to non-cooperation. Warsame was originally wanted as a material witness; after his unwillingness to testify, the government filed terrorism-related charges against him. Motion to Vacate Order Directing the Marshals Service to Change Defendant's Conditions of Detention at 1, *United States v. Warsame*, No. 0:04-cr-00029-JRT-FLN (D. Minn. Sept. 21, 2007), ECF No. 122. Many of the facts in the case were uncontested by the defense—both sides concurred that Warsame had gone to Afghanistan in 2000—but their meanings were sharply disputed. See Position of Defendant with Respect to Sentencing, *supra* note 268, at 8–9 (stating that "Mr. Warsame came to see Afghanistan as an Islamic utopia" at a time when the Taliban was the legal government of Afghanistan and not considered an enemy of the United States).

272. Position of Defendant with Respect to Sentencing, *supra* note 268, at 25–26.

273. Motion to Vacate Order Directing the Marshals Service to Change Defendant's Conditions of Detention, *supra* note 271, at 1–2.

274. *Id.*

275. *Id.* at 4.

276. Order at 2, *United States v. Warsame*, No. 0:04-cr-00029-JRT-FLN (D. Minn. Sept. 28, 2007), ECF No. 123.

his prison term.²⁷⁷ Given that the government and the court considered Warsame's word dangerous enough to merit more than five years under SAMs, its willingness to drop four counts and insist on rapid deportation seems curious. Warsame was sentenced to 92 months in prison, including time served.²⁷⁸ The court noted that "both the prosecution and Warsame agreed that a sentence below the guidelines was appropriate in this case" and that "the Court has *seen nothing in the record or the last five years of proceedings* demonstrating that Warsame poses an immediate danger."²⁷⁹ If the court had seen *nothing* that suggested he posed an immediate danger, why had it been reluctant to suspend Warsame's SAMs?²⁸⁰ The similarities surrounding the use of pretrial SAMs on both Warsame and Hashmi are notable, and in both cases they raise significant questions about the purpose of the SAMs, their coercive potential, and their effect on the fairness of the process afforded.

277. Judgment in a Criminal Case at 1–2, *United States v. Warsame*, No. 0:04-cr-00029-JRT-FLN (D. Minn. July 17, 2009), ECF No. 177.

278. *United States v. Warsame*, 651 F. Supp. 2d. 978, 982 (D. Minn. 2009).

279. *Id.* at 981 (emphasis added). The court did note, however, that Warsame "admittedly trained at two terrorist training camps, and had access to al Qaeda leadership" prior to the start of the proceedings. *Id.*

280. The plea and 92-month sentence raises questions as to whether Warsame posed a significant security threat. Further, that one of the conditions of the plea agreement was immediate deportation (Warsame's American citizen wife and children still lived in Minnesota) raised similar questions of arbitrary punitiveness. If the government insisted on the administrative necessity of over five years of SAMs and incarceration post-plea at the CMU in Terre Haute, forcing Warsame to leave the country seems at odds with the immediate danger repeatedly asserted by the government of Warsame's unmonitored communication. Amy Forliti, *Mohammed Abdullah Warsame, Terror Suspect, Deported to Canada*, HUFFINGTON POST (Oct. 8, 2010, 8:38 PM), http://www.huffingtonpost.com/2010/10/08/mohammed-abdullah-warsame_n_756263.html.

Here again, the similarities to *Korematsu* are too striking to go without mention. See *Korematsu v. United States*, 323 U.S. 214, 216–17, 219, 223 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 92, 95, 101 (1943). One of the most egregious aspects of *Korematsu* was the Court's willingness to uphold the constitutionality of the evacuation order despite its apparent recognition of the lack of threat posed by Japanese-American citizens. 323 U.S. at 216–17, 219, 223. In *Ex parte Endo*, 323 U.S. 283 (1944), decided the same day as *Korematsu*, the Court held that the continued detention of Japanese-Americans was unwarranted. *Id.* at 302, 304. Unfortunately, the *Endo* decision was not announced until December 18, 1944—one day after the Roosevelt Administration announced that it would release the internees. Many believe that the Court intentionally delayed its decision to allow the President, rather than the Court, to end the internment. See ERIC K. YAMAMOTO ET AL., *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* 174–75 (2001); see also Brief of Amicus Curiae Fred Korematsu In Support of Petitioners at 17, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343); PETER IRONS, *JUSTICE AT WAR* 344–45 (1983).

B. CIPA

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

—*Greene v. McElroy*²⁸¹

The application and use of SAMs in Hashmi's case were one part of a host of rights issues on the road to trial. The inability of Hashmi to review the evidence against him raises further concern. Similar to the court's legitimization of Hashmi's pretrial conditions of confinement, here again the court prioritized the government's national security claims and was unwilling to take steps to protect Hashmi's right to review the evidence against him.

As a citizen charged in federal district court, Hashmi was prosecuted based on evidence classified under the Classified Information Procedures Act (CIPA).²⁸² Enacted in 1980 to prevent graymailing by former U.S. intelligence officers accused of espionage who could threaten to reveal U.S. secrets if prosecuted, CIPA provides a way for the accused to use classified information in his defense pursuant to an express set of conditions; notably, that carefully delineated information is subject to a protective order preventing its release.²⁸³ In enacting CIPA, Congress accepted this balance in an attempt to "reconcile two often conflicting interests: the defendant's right to a fair trial and the government's need to protect national security information involved in the trial."²⁸⁴

As a result of the use of CIPA in Hashmi's case, his lawyers underwent a security clearance, which took the better part of a year, in order to review the government's evidence against him. Lawyers seeking CIPA top-secret clearance must undergo background checks that include an FBI review of their financial and medical records.²⁸⁵

281. 360 U.S. 474, 496 (1959).

282. Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified at 18 U.S.C. app. §§ 1-16 (2006)).

283. Brian Z. Tamanaha, *A Critical Review of The Classified Information Procedures Act*, 13 AM. J. CRIM. L. 277, 277 (1986).

284. *Id.*

285. See *United States v. Bin Laden*, 58 F. Supp. 2d 113, 118-23 (S.D.N.Y. 1999), *aff'd by In re Terrorist Bombings of U.S. Embassies in East Africa*, 532 F.3d 93 (2d Cir. 2008) (holding that counsel must submit to DOJ-initiated security clearance procedure in order to have access to classified information).

These clearances took many months, further degrading Hashmi's right to a speedy trial and his health. To give his defense counsel time to actually review the CIPA evidence, Hashmi was continually impelled to agree to exclude the time from the Speedy Trial Act calculation.²⁸⁶ Hashmi's counsel was required to travel to an undisclosed Secure Compartmentalized Information Facility to review the classified evidence in their client's case. This process added considerable time to counsel's case preparation,²⁸⁷ which Hashmi spent in isolation.

Furthermore, Hashmi's attorneys were forbidden from discussing much of the government's evidence with him and with outside experts who did not have security clearances.²⁸⁸ This sort of stipulation makes preparing a case exceedingly difficult as it cordons off defense counsel from a broader array of eyes and opinions on the material. Given the CIPA requirements, Hashmi's defense also was required to preview their case for the government and to make a premature decision about whether Hashmi would testify.²⁸⁹

1. *Rights concerns regarding CIPA evidence*

The use of CIPA is typically cited as a flexible feature of the federal system to protect classified information. Civil liberties groups and scholars have pointed to the benefits of CIPA to shield classified information used in terrorism prosecutions in the federal courts.²⁹⁰ But this skirts a hallowed facet of due process: the right of the defendant to confront his accuser and see the evidence against him.²⁹¹

286. See Speedy Trial Act, 18 U.S.C. § 3161(a) (2006).

287. See Ellen Yaroshefsky, *Secret Evidence is Slowly Eroding the Adversary System: CIPA and FISA in the Courts*, 34 HOFSTRA L. REV. 1063, 1075 n.56 (2006) (explaining that the "mechanics of reviewing CIPA materials is necessarily onerous and time consuming").

288. Classified Information Procedures Act, Pub. L. No. 96-456, § 9, 94 Stat. 2025, 2027 (1980) (codified at 18 U.S.C. app § 9 (2006)). Only a lawyer who has received a security clearance from the government is entitled to review the classified material. See *Bin Laden*, 58 F. Supp. 2d at 118. Counsel's review of such documents is subject to a protective order that precludes any release of the information—including to the defendant. CIPA § 3.

289. CIPA §§ 5–6.

290. See 2011 TERRORIST TRIAL REPORT CARD, *supra* note 13, at 2, 5, 13 (providing a comprehensive report of prosecution of terrorism-related crimes, including use of CIPA in such prosecutions and calling the strategy of federal terrorism prosecution "confident and focused"); ZABEL & BENJAMIN, *supra* note 14, at 81–90 (detailing the use of CIPA procedures and terrorism cases and reporting CIPA's effectiveness in such cases).

291. See, e.g., *Specht v. Patterson*, 386 U.S. 605, 610 (1967) ("Due process . . . requires that [the defendant] be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own.").

According to the court, the evidence in Hashmi's case was "voluminous."²⁹² Faced with that vast quantity of evidence, his counsel faced difficulty adequately sorting through what might be exculpatory or revealing without input and guidance from Hashmi himself. For instance, certain cell phone records, photographs, or emails might seem insignificant or irrelevant to a defense lawyer, but if the defendant himself were to see them, he might see meaning in something his lawyer did not. Thus, requests to declassify evidence for Hashmi's review were necessarily guesswork from his counsel, and could not fairly approximate what the scope of review would have looked like if all the material were available initially to Hashmi to make his own determination.

Moreover, such prohibitions strain the lawyer-client relationship. The client cannot obtain clearance to see classified materials,²⁹³ and the attorney is forbidden from discussing the materials, leading to frustration and corroding the trust between attorney and client. The defendant is effectively kept in the dark and cannot actively participate in preparing his own case. The alienation produced by CIPA evidence erodes rapport and the ability to build an effective defense.²⁹⁴

The current uses of CIPA stray significantly from its origins, as terrorism cases do not typically involve the potential of graymail since the defendant is not the one in possession of the classified evidence.²⁹⁵ As Sam Schmidt and Joshua Dratel have argued, the Fifth and Sixth Amendment implications of the use of CIPA in terrorism-related cases are thus considerable:

Defendants are . . . denied the right to confront the evidence against them. The right to confrontation is a *personal* right and is not exercisable merely through counsel. 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. . . . CIPA also violates Fifth Amendment rights including the defendant's right to: (1) testify in his own behalf; (2)

292. See Transcript of Oral Argument SAMs Challenge Hearing, *supra* note 118, at 30.

293. Sam A. Schmidt & Joshua L. Dratel, *Turning the Tables: Using the Government's Secrecy and Security Arsenal for the Benefit of the Client in Terrorism Prosecutions*, N.Y.L. SCH. L. REV. 69, 80–81 (2004). For a thoughtful critique of CIPA from an ethics perspective, including its effects on the attorney-client relationship, see Ellen C. Yaroshefsky, *The Slow Erosion of the Adversary System: Article III Courts, FISA, CIPA and Ethical Dilemmas*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 203, 207–14 (2006).

294. Schmidt & Dratel, *supra* note 293, at 81–82.

295. *Id.* at 81.

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 defendant must notify the government in advance of precisely the evidence the defense seeks to have admitted in evidence.²⁹⁶

In terrorism trials, CIPA threatens to erode the adversarial process that is at the heart of and necessary for just criminal prosecutions. The government acts both as opposing counsel and the entity responsible for classifying and de-classifying evidence.²⁹⁷ Moreover, CIPA effectively results in waiver of the work-product privilege.²⁹⁸ Defense thoughts and impressions are supposed to be protected, including documents and statements given to defense counsel during the case's investigation or defense.²⁹⁹ Yet Hashmi was required to provide notice to the court if he "reasonably expect[ed] to disclose or to cause the disclosure of classified information."³⁰⁰ Moreover, by asking for certain documents to be declassified and by previewing witnesses, the defense is forced to reveal its thinking and its strategy

296. *Id.* at 82–83.

297. Classified Information Procedures Act, Pub. L. No. 96-456, § 4, 94 Stat. 2025, 2025 (1980) (codified at 18 U.S.C. app § 4 (2006)).

298. The work product doctrine applies to criminal litigation, protecting counsel's mental processes, opinions, and strategy from disclosure. FED. R. CRIM. P. 16(b)(2); *see also* United States v. Nobles, 422 U.S. 225, 238 (1975) (noting that "[a]lthough the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital [because] [t]he interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case").

299. *See* FED. R. CRIM. P. 16(b)(2) (excluding information on litigation plans from disclosure requirements); *Nobles*, 422 U.S. at 238–39 (stating that the work-product privilege should be grounded in the realities of litigation, and thus applied liberally, but can also be waived voluntarily).

300. CIPA § 5(a). This statutory command forces the defense to furnish crucial details of the defense case to the prosecution, including: (1) the defendant's own anticipated classified testimony at trial; (2) the anticipated classified testimony of all other defense witnesses; (3) the contents of all classified documents that the defense intends to introduce at trial; (4) the classified information contained in counsel questions and that the defense expects to elicit from prosecution witnesses on cross-examination; and (5) all classified matter in defense counsel's opening and closing statements.

Following submission of the CIPA section 5 notice, the hearing requirement of section 6 demands further disclosure of the defense case. Upon request by the prosecution, section 6 forces the defense to explain to the court and the government, before trial, the relevance and significance to the defense of all of the classified information set forth in the CIPA section 5 notice. *Id.* § 6(a). In practice, the CIPA notice and hearing requirements compel the defense to disclose pretrial the theory of its case, the means it will use to test the government's case, and virtually every detail of the supporting evidence.

to the prosecution.³⁰¹ These broad notice and hearing requirements, enforceable through preclusion of evidence at trial, burdened Hashmi's constitutional rights, including the privilege against compelled self-incrimination, the right to testify in his own defense,³⁰² the right to cross-examine adverse witnesses, and the right to due process of law.

2. *Unreviewability*

Despite defense challenges to the CIPA restrictions, the court was again unmoved by arguments surrounding infringements on Hashmi's constitutional rights, ruling:

The [c]ourt has no trouble concluding the CIPA strikes the right balance. . . . [T]he "penalty" the Defendant faces is the *possible* preclusion of undisclosed classified information possible because preclusion is not mandatory under CIPA § 5(b). This potentiality, when compared to the Government's interest in protecting classified information, is a legitimate regulatory interest like others the law recognizes.³⁰³

The court based its decision on its finding that "no governmental interest is more compelling than the security of the Nation. While requiring security clearances may, to some extent, impose on the Defendant's right to his counsel of choice, that interest is outweighed by countervailing government interests."³⁰⁴ According to the court, the assertion of national security—regardless of whether it was substantiated—thus trumped infringement of Hashmi's rights.³⁰⁵

Additionally, the court's determination that the preclusion of undisclosed classified information was only "possible" side-stepped

301. See generally *id.* §§ 4–5 (setting forth the discovery process of classified information by defendants and requiring defendants to give notice to the government of intent to disclose classified information).

302. The requirement that Hashmi disclose pretrial his own classified testimony placed an impermissible burden on his "right to take the witness stand and to testify in his . . . own defense," guaranteed by the Fifth and Sixth Amendments. *Rock v. Arkansas*, 483 U.S. 44, 49 (1987). CIPA sections 5 and 6 required Hashmi to pay a price—in the form of pretrial disclosure to the prosecution—solely to preserve his constitutional right to testify about relevant and admissible classified information. CIPA §§ 5–6.

303. Memorandum & Order, *supra* note 124, at 11.

304. *Id.* at 16 (citation omitted). Hashmi argued that CIPA infringed on his right to counsel of his choice because of the onerous and lengthy process required for lawyers to obtain CIPA clearance. In upholding the use of CIPA in his case, the court appeared not to consider that the denial of Hashmi's Sixth Amendment right to choice of counsel could constitute structural error. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148, 150 (2006) (holding that denial of criminal defendant's right to choice of counsel was structural error requiring reversal without harmless error analysis).

305. Memorandum & Order, *supra* note 124, at 25.

the first substantive step of the CIPA process, which is the volume of classified evidence that defense counsel initially reviews; only then does counsel ask for a portion of the evidence to be declassified for the client.³⁰⁶ The court then rules on the relevance of that evidence, and then the government decides whether to release it, to make an adequate substitute for the classified information, or to face possible dismissal.³⁰⁷ Under the current CIPA process, no defense counsel can reasonably go to the court and say, “I think all the evidence is relevant and should be declassified.” Thus the preclusion is not simply “possible” but actual. In situations such as Hashmi’s, “CIPA’s purpose is distorted . . . [because] the defendant never had and never will have access to the material.”³⁰⁸ In this way, the invocation of CIPA in terrorism cases becomes a tool the government can wield to its legal advantage.

III. TRIAL

Adding to the earlier constellation of rights issues were several pretrial rulings regarding the admissibility of evidence that, individually and collectively, called into question both the fairness of Hashmi’s trial as well as broader First Amendment concerns in the realm of Islamic political speech and association.

A. *Political Speech and Association as Evidence—But of What?*

While acknowledging Hashmi’s First Amendment right to express his political beliefs, the government was prepared to introduce tapes of his political speeches at trial.³⁰⁹ It planned, for instance, to show a tape of a 2002 demonstration outside the Indian Embassy where, in a speech, Hashmi expressed his “approval of Hezbollah, Hamas, and the Taliban” and called the President of the United States a “terrorist.”³¹⁰ That the government had such tapes indicates the

306. *Id.* at 11.

307. Classified Information Procedures Act, Pub. L. No. 96-456, § 6, 94 Stat. 2025, 2026 (1980) (codified at 18 U.S.C. app. § 6 (2006)).

308. Yaroshefsky, *supra* note 293, at 210.

309. Government’s Memorandum of Law in Support of its Motion to Admit Certain Evidence at Trial at 1, *United States v. Hashmi*, No. 1:06-cr-00442-LAP (S.D.N.Y. Oct. 23, 2009), ECF No. 114.

310. *Id.* at 6. They also had an “undercover journalist” report from a student meeting at Queens College where Hashmi allegedly explained, “We are not Americans. We’re Muslims and they are going to deport and attack us,” and then purportedly went on to say, “We reject the UN, reject the US, reject all law and order. Don’t lobby Congress or protest, we don’t recognize Congress! The only relationship you should have with America is to topple it!” *Id.* at 6–7. That “undercover journalist” was Aaron Klein, who writes for the conservative *World Net Daily* and whose current book, *THE MANCHURIAN PRESIDENT: BARACK OBAMA’S TIES TO*

considerable surveillance of Hashmi's student political activities.³¹¹ The defense filed a motion requesting that the FISA warrant by which such information had been obtained be provided to the defense and asked that materials derived from this surveillance be excluded.³¹² The court denied the motion.³¹³

In response to objections from the defense regarding the threat to Hashmi's First Amendment rights and the ways that these political views might unduly influence the jury, the government claimed the tapes were necessary and demonstrated his "jihadist" state of mind—and thus his intent—years later.³¹⁴ The court allowed the speeches to be used, finding they were "admissible as direct evidence of the charged offense."³¹⁵ Yet the speeches never mention al Qaeda, nor do they show either Babar or Hashmi telling people that jihadists need provisions like socks and ponchos (in fact, the tapes do not show Babar at all).³¹⁶ What they show is Hashmi making public political speeches at open events, which invites the question: what about them is "direct evidence of the charged offense," except that they show Hashmi making pointed criticisms of the United States and the treatment of Muslims world-wide?

In assessing the use of Hashmi's prior speech and the court's

COMMUNISTS, SOCIALISTS, AND OTHER ANTI-AMERICAN EXTREMISTS (2010), raises questions as to his journalistic integrity and reliability as a government source. Klein's report on this Queens meeting can be found at: Aaron Klein, *Soda, Pizza, and the Destruction of America*, WORLD NET DAILY (Mar. 18, 2003, 1:00 AM), <http://www.wnd.com/2003/03/17795>.

311. History again provides a cautionary tale of the ways such surveillance takes on a life of its own. Perhaps the most well-known example of the Cold War era is Hoover's persistent surveillance of Martin Luther King, Jr., under grounds of potential Communist subversion. While the Bureau never found any ties to the Communist Party, they did find evidence of King's adultery—which they then made use of by attempting to blackmail King in 1964. They also showed it to friendly journalists who the FBI hoped would publish it and discredit King, despite that the information possessed no real relevance to national security. See generally David J. Garrow, *The FBI and Martin Luther King*, ATL. MONTHLY, July/Aug. 2002, at 80.

312. Motion for Disclosure & Review of All FISA Applications, Review of Rulings Made by the FISC, & Suppression of All FISA-Derived Evidence at 1, United States v. Hashmi, No. 1:06-cr-00442-LAP (S.D.N.Y. Jan. 8, 2009), ECF No. 64. For a persuasive critique of warrantless wire-tapping and misuse of FISA by numerous scholars and advocates, see Letter from Ronald Dworkin et al. to Congress, On NSA Spying: A Letter to Congress (Feb. 9, 2006), available at <http://www.nybooks.com/articles/archives/2006/feb/09/on-nsa-spying-a-letter-to-congress/>.

313. Order at 1, United States v. Hashmi, No. 1:06-cr-00442-LAP (S.D.N.Y. Mar. 5, 2009), ECF No. 92.

314. Government's Memorandum in Support of Its Motion to Admit Certain Evidence at Trial, *supra* note 309, at 8, 13.

315. Transcript of Hearing on Defendant's Motion in Limine to Exclude Testimony of Evan Kohlmann at 15, United States v. Hashmi, No. 1:06-cr-00442-LAP (S.D.N.Y. Nov. 12, 2009).

316. See Government's Memorandum in Support of Its Motion to Admit Certain Evidence at Trial, *supra* note 309, at 6–7.

rulings regarding its admissibility, it is important to recall the charges asserted against him, as well as those *not* asserted. Hashmi was charged with providing and conspiring to provide material support to al Qaeda.³¹⁷ The government did not allege that he was a member of al Qaeda, that he provided weapons to al Qaeda, that he assisted al Qaeda in any act of violence, that he participated in a specific plot or al Qaeda act, or, for that matter, that he had any direct contact at all with al Qaeda.³¹⁸ To try to establish the necessary link to al Qaeda for purposes of the material support and conspiracy charges, the government sought to focus on Hashmi's association with ALM, a religious-political group deeply critical of the United States government that, as noted above, had never been designated by the U.S. as a terrorist organization and was not charged in the conspiracy.³¹⁹ By providing the jury with examples of Hashmi's political speech and his association with ALM, the government sought to demonstrate, by implication, that Hashmi satisfied the mens rea necessary for the crime of providing material support to al Qaeda.³²⁰

In this way, a troubling elision between dissent and terrorism was invoked by the government and approved by the court to justify including Hashmi's political activities in the trial. The court explained, "[t]he evidence at issue here, that this defendant participated and spoke at an ALM protest and took part in a meeting in 2003 to the same effect, is certainly not unfairly prejudicial in light of the nature of the charges made against him."³²¹ To put it another way, because Hashmi was charged with a terrorism-related crime, his considerable criticisms of U.S. policy could be used to bolster the government's case that he had provided material support for terrorism. If the prosecution of Hashmi was not about his politics but about the actions he took, why were those actions not enough for the

317. *Id.* at 3; *see* 18 U.S.C. § 2339B (2006).

318. Defendant's Motion in Limine to Limit Evidence Related to Al Qaeda, Osama bin Laden, Al Muhajiroun, Hamas, Hezbollah, & the Taliban at 2, *United States v. Hashmi*, No. 1:06-cr-00442-LAP (S.D.N.Y. Oct. 23, 2009), ECF No. 116.

319. *Id.* at 2–3.

320. On the mens rea required for a material support conviction, the statute states that the defendant "must have knowledge that the organization is a designated terrorist organization . . . that the organization has engaged or engages in terrorist activity . . . or that the organization has engaged or engages in terrorism." 18 U.S.C. § 2339B(a)(1). Until the *HLP* decision, exactly what this meant was somewhat unclear. In *HLP*, the majority adopted the most expansive construction—mere knowledge of an FTO's connection to terrorism. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2731 (2010).

321. Transcript of Hearing on Defendant's Motion in Limine to Exclude Testimony of Evan Kohlmann, *supra* note 315, at 16.

government to support its case, particularly given that it had a cooperating witness? Moreover, even though the government's case was only focused on conduct during a two-week period in London, public political speeches Hashmi made more than a year earlier in New York were considered directly relevant as evidence.³²²

To solidify for the jurors the connection between "anti-American" ideology and terrorist action, the government also was prepared to call on terrorism-expert Evan Kohlmann.³²³ Willing to draw sweeping associations among militant Islamic groups, Kohlmann has testified for the government in more than twenty terrorism cases.³²⁴ His basic methodology is to monitor jihadist websites and Muslim extremist news sources.³²⁵ He does not read or speak Arabic, Urdu, Bengali, Pashtun, Chechen, or any other languages native to the Middle East or Asia, and he pays a student assistant to translate the materials for him.³²⁶ He has no fieldwork experience and has never published a peer-reviewed article or book.³²⁷ Kohlmann often accompanies his testimony with inflammatory slideshows that include pictures of Osama bin Laden and graphic photos of gruesome violence, even in

322. Government's Memorandum in Support of Its Motion to Admit Certain Evidence at Trial, *supra* note 309, at 4, 8–9.

323. See Transcript of Hearing on Defendant's Motion in Limine to Exclude Testimony of Evan Kohlmann, *supra* note 315, at 23, 25; Expert Report I: U.S. v. Syed Hashmi, United States v. Hashmi, No. 1:06-cr-00442-LAP (S.D.N.Y. Oct. 23, 2009), ECF No. 115-3 (describing Kohlmann's background and expertise as an "International Terrorism Consultant").

324. See *About Us*, NEFA FOUND., <http://nefafoundation.org//index.cfm?pageID=26> (last visited Apr. 14, 2012) (listing cases).

325. With an undergraduate degree from Georgetown and a law degree from the University of Pennsylvania, Kohlmann is not an academic but a paid government expert who grosses more than \$100,000 yearly for these testimonies. A senior investigator for the "Nine Eleven Finding Answers" (NEFA) Foundation, he runs his own website, globalterroralert.com, which features reports on terrorist activities and threats on places as diverse as Bosnia, Somalia, Saudia Arabia, Libya, Chechnya, Afghanistan, and Yemen. Not only is Kohlmann financially dependent on the money he receives from such testimony (the bulk of the income he brings in each year comes from this work), but it would be difficult to argue, given his lack of faculty appointment, peer review, or other independent academic confirmation of his research, that Kohlmann's qualifications exist independent of the government's validation of him. Wesley Yang, *The Terrorist Search Engine*, N.Y. MAG., December 5, 2010, available at <http://nymag.com/news/features/69920/>.

While Federal Rule of Evidence 702 expressly contemplates the use of experts who possess not only scientific and technical but also "other specialized knowledge," the advisory note rejects the idea that opinions based on such knowledge should be treated "more permissively." Instead, "[a]n opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist." See FED. R. EVID. 702 advisory committee's note—2000 Amendment.

326. Yang, *supra* note 325.

327. Tom Mills, *Evan Kohlmann; The Doogie Howser of Terrorism?*, SPINWATCH (Apr. 29, 2008), <http://www.spinwatch.org/-articles-by-category-mainmenu-8/74-terror-spin/4850-evan-kohlmann-the-doogie-howser-of-terrorism>.

cases with no direct tie to bin Laden or the violence depicted.³²⁸

In Hashmi's case, the government sought to have Kohlmann testify about "the genesis, history and structure of al Qaeda," "the genesis, history and structure of al Muhajiroun," and "the terrorist organizations known as Hamas, Hezbollah, and the Taliban"³²⁹—despite Hashmi's willingness to stipulate that he knew what al Qaeda was and what it does—the purported reason for Kohlmann's testimony.³³⁰ When the defense challenged Kohlmann's qualifications as well as the methodology he uses to render opinions about al Qaeda's "web of support," the court found that academic training and peer review were not necessary to make such connections,³³¹ and qualified Kohlmann to provide expert testimony on ALM, along with al Qaeda, Hamas, and Hezbollah (even though the charges did not involve Hamas or Hezbollah).³³² In doing so, the court gave the government significant latitude to put Hashmi's politics on trial, facilitating the prosecution's efforts to use Hashmi's

328. See Carol J. Williams, *Guantanamo Jurors Shown Graphic Film on Al Qaeda*, L.A. TIMES, July 29, 2008, at A8 (describing the video that Kohlmann produced for the Guantanamo military commissions' trial of Salim Hamdan called "The Al Qaeda Plan"). According to the military tribunal's chief prosecutor, the film (which was sponsored by the Office of Military Commissions) was intended to arouse emotions: "It is prejudicial, which is why we show it." *Id.*; see also *United States v. Amawi*, 552 F. Supp. 2d 669, 671 (N.D. Ohio 2008) (barring Kohlmann's testimony that included a video montage of suicide bombings, civilian executions, and sniper shootings of American soldiers even though the prosecution did not allege the defendants had any connection to any foreign terrorist group, because of the very considerable potential for unfair prejudice to the defendants).

329. Defendant's Motion in Limine to Limit Evidence Related to Al Qaeda, Osama Bin Laden, Al Muhajiroun, Hamas, Hezbollah, & the Taliban, *supra* note 318, 2–3.

330. Alternatively, the proffer of Kohlmann's testimony could be viewed as an attempt to have an expert witness testify to a defendant's mens rea in violation of Federal Rule of Evidence 704(b), which states that "[n]o expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone." FED. R. EVID. 704(b); see Brian R. Gallini, *To Serve and Protect? Officers as Expert Witnesses In Federal Drug Prosecutions*, 19 GEO. MASON L. REV. 363, 407 (2012) (suggesting that when the mens rea to support conviction is a matter of factual knowledge, there is reason for concern that an expert's testimony goes beyond merely factual matters and "rather implicitly indicate[s] that those facts satisfy the statutory mens rea requirement"). And there is a First Amendment layer to this as well, since Kohlmann's testimony would have effectively amounted to an expert testifying that certain *political speech* is evidence of criminal mens rea.

331. Transcript of Hearing on Defendant's Motion in Limine to Exclude Testimony of Evan Kohlmann, *supra* note 315, at 25, 28, 33 (noting "no particular difference between Mr. Kohlmann's background and these topics and those of Mr. Geroges," who is a Sarah Lawrence chaired professor and served as defense expert witness).

332. *Id.* at 31–33.

association with ALM as evidence of his intent.³³³ In permitting Kohlmann's testimony, the court allowed him to play on the fears of a lower Manhattan jury using examples of unrelated terrorist violence, thus giving an "expert" veneer to the common prejudice that all militant Muslims are connected to terrorism.³³⁴

The court's decision to admit this evidence raises significant First Amendment concerns, as it is easy to envision the chilling effect on future Islamic political speech and association for anyone familiar with Hashmi's case. Indeed, what happened to Hashmi, a politically-active young man who grew up and stood trial in New York, works as a cautionary tale for those who would engage in inflammatory speech or who are members of unpopular organizations—especially those associated with more militant Islamic political ideals.³³⁵

These kinds of concerns have motivated some scholars to reexamine First Amendment jurisprudence and its relationship to

333. *Id.* at 33.

334. *See* FED. R. EVID. 403 (requiring courts to exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice"). As Hashmi's counsel argued:

The danger of this evidence is two-fold. The first level of danger is that the jury will see it not as, quote unquote, background, but as simple propensity that anybody—because Mr. Hashmi has expressed the kind of speech that he has, and the government doesn't argue that this is anything but protected First Amendment speech, because he has expressed views, he is more likely to have acted with the intent that the government charges him with. The second level is that the jury, hearing views that may in fact be troublesome and offensive to many jurors, will convict Mr. Hashmi not because of what he did, but because of what he believes.

Transcript of Hearing on Defendant's Motion in Limine to Exclude Testimony of Evan Kohlmann, *supra* note 315, at 9. While "[t]he First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent," *United States v. Salameh*, 152 F.3d 88, 112 (2d Cir. 1998) (per curiam) (quoting *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993)) (internal quotation marks omitted), the First Amendment does bar the evidentiary use of speech to air a defendant's "abstract beliefs" in front of a jury, *see Dawson v. Delaware*, 503 U.S. 159, 167 (1992) (finding that "[w]hatever label is given to the evidence presented, . . . [the defendant's] First Amendment rights were violated by the admission of the Aryan Brotherhood evidence in this case, because the evidence proved nothing more than [the defendant's] abstract beliefs"). This is especially true when such evidence is "employed simply because the jury would find these beliefs morally reprehensible." *Id.*

335. *See* Huq, *supra* note 73, at 852 (arguing that to the extent that post 9/11 law enforcement efforts have targeted Islamic religious speech as a "signal" of terrorism, such practices have the potential not only to chill individuals' constitutionally protected speech and association, but also their autonomy). Huq also notes that:

Because that speech concerns matters at the core of many individuals' understanding of their identity, a chilling effect will impinge on "individual autonomy understood as the practical power to choose one's ends" that is at the heart of some conceptions of the speech and association components of the First Amendment.

Id. (quoting Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 178 (2003)).

Fourth and Fifth Amendment doctrine in the context of information-gathering by the government.³³⁶ Starting from the premise that “[d]emocracy depends upon citizens who are free to formulate their own beliefs” and the idea that “[g]overnment information gathering can threaten the ability to express oneself, communicate with others, explore new ideas, and join political groups,” Daniel Solove argues for the development of what he calls “First Amendment criminal procedure” to protect against government information gathering that implicates First Amendment interests.³³⁷ As Solove explains:

The chilling effect doctrine recognizes that the First Amendment can be implicated indirectly and not just through direct legal prohibitions on speech. The key to chilling effect is deterrence: “A chilling effect occurs when individuals seeking to engage in activity protected by the [F]irst [A]mendment are deterred from so doing by governmental regulation not specifically directed at that protected activity.”³³⁸

Based on the government’s treatment of Hashmi, there is a significant risk that those who witnessed this process and who share his political views would feel chilled by the central role that his political activities played in the government’s case against him.

B. *Anonymous Jury*

In yet another troubling aspect of Hashmi’s case, attempts to highlight infringements of his rights also came under suspicion from the government and the court. From the very outset, Hashmi’s family and friends and Muslim Student Associations at universities across the New York metro area sought to draw attention to his case.³³⁹ More than 550 academics and writers signed a Statement of Concern noting issues around “the conditions of [Hashmi’s] detention, constraints on his right to a fair trial, and the potential threat his case

336. See, e.g., Linda E. Fisher, *Guilt By Expressive Association: Political Profiling, Surveillance, and the Privacy of Groups*, 46 ARIZ. L. REV. 621, 622 (2004); Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 117 (2007) (asserting that “there are doctrinal, historical, and normative foundations for the First Amendment to play a significant role in regulating government information gathering”).

337. Solove, *supra* note 336, at 121, 142.

338. *Id.* at 142–43 (alterations in original) (quoting Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect,”* 58 B.U. L. REV. 685, 693 (1978)). While the Supreme Court has held that law enforcement presence or recording of public speeches alone do not constitute cognizable First Amendment injuries, lower courts have recognized such injuries when plaintiffs have been able to produce evidence of deterrence or “indication[s] of palpable harmful future uses of the information.” Solove, *supra* note 336, at 144–45 (citing *Laird v. Tatum*, 408 U.S. 1, 10–11 (1972)).

339. Theoharis, *supra* note 86.

pose[d] to the First Amendment rights of others.”³⁴⁰ In October 2009, Theaters Against War began holding weekly vigils outside MCC featuring Broadway actors, playwrights, and musicians to protest the conditions under which Hashmi and other terrorism suspects were being held in New York.³⁴¹ Muslim students, professors, clergy, law students, anti-war activists, mothers with children, high school students, prisoner rights advocates, and Hashmi’s own extended family gathered each week outside MCC for the six months preceding his trial.

Because of this growing grassroots movement, progressive media began to take an interest in Hashmi’s case and its attendant civil rights issues.³⁴² A week before trial, the Center for Constitutional Rights, Amnesty International USA, and the Council on American Islamic Relations-NY released an open letter expressing their concerns about Hashmi’s upcoming trial—calling attention to the severity of his pretrial conditions of confinement, their impact on his mental health, and his ability to effectively participate in his own defense.³⁴³ Many people concerned about the rights issues at stake in the case planned to attend the trial. There was an organizing campaign, termed “500@500,” that asked New Yorkers to come observe the trial at the federal courthouse (located at 500 Pearl Street).³⁴⁴

In response, the U.S. Attorney filed a motion citing the public interest in the case as growing and dangerous, thus necessitating

340. *Statement of Concern*, EDUCATORS FOR CIVIL LIBERTIES, <http://www.educatorsforcivil liberties.org/> (last visited Apr. 14, 2012).

341. See generally THEATERS AGAINST WAR, www.thawaction.org (last visited Apr. 14, 2012).

342. See, e.g., William Fisher, *Feel Safer Now?*, HUFFINGTON POST (Apr. 6, 2010, 9:03 AM), http://www.huffingtonpost.com/william-fisher/feel-safer-now_b_526675.html; Chris Hedges, *SAMs—The Creepy, Inhumane Legal Weapon the State Uses to Break Prisoners*, ALTERNET (June 13, 2011), http://www.alternet.org/world/151280/hedges:_sams__the_creepy_inhumane_legal_weapon_the_state_uses_to_break_prisoners/?page=entire (“Justice has become as unattainable for Muslim activists in the United States as it was for Kafka’s frustrated petitioner.”); Amitava Kumar, *Kidnapped by the State*, HUFFINGTON POST (Feb. 8, 2010, 11:17 AM), http://www.huffingtonpost.com/amitava-kumar/kidnapped-by-the-state_b_453462.html; Bill Quigley, *Not Just Guantanamo: US Torturing Muslim Pre-Trial Detainee in NYC*, HUFFINGTON POST (Apr. 3, 2010, 1:34 PM), http://www.huffingtonpost.com/bill-quigley/not-just-guantanamo-us-to_b_524226.html; Jeanne Theoharis, *Guantánamo at Home*, THE NATION (Apr. 2, 2009), <http://www.thenation.com/article/Guantanamo-home>; *Guantanamo at Home*, DEMOCRACY NOW (June 5, 2009), <http://www.democracynow.org/2009/6/5/hashmi>.

343. *Rights Groups Issue Open Letter on Upcoming NYC Trial of Syed Fahad Hashmi and Severe Special Administrative Measures*, CENTER FOR CONSTITUTIONAL RIGHTS (Apr. 23, 2010), <http://ccrjustice.org/newsroom/press-releases/rights-groups-issue-open-letter-upcoming-nyc-trial-syed-fahad-hashmi-and-sev>.

344. Theoharis, *supra* note 86.

different security measures for jurors.³⁴⁵ The government noted increased media attention to the case:

Based upon the considerable local press coverage of this case over the past three years since the defendant was returned to New York, it is clear that the actual trial of this matter will generate a substantial amount of publicity. Indeed, certain of Hashmi's supporters have worked hard to make sure that this is the case. One need only look at the website dedicated to this case—www.freefahad.com—to conclude that some are seeking as much media attention for this case as possible. Moreover, those affiliated with the website are organizing a demonstration outside of the Courthouse called “500@500”. According to the website, “500@500” is “an effort to gather 500 people at SDNY's courthouse” at 500 Pearl Street on the morning of the first day of trial. A flyer promoting the demonstration is attached. It is clear that the trial of this case will receive at least substantial local press coverage.³⁴⁶

Although the government did not mention it in its brief, the media attention had consisted of progressive media questioning the government's tactics in the case. There still had been almost no mainstream media coverage of Hashmi's case after the initial stories around his indictment and extradition, many of which were based on press releases from the U.S. Attorney's office.³⁴⁷

The government's motion asked that the identities of jurors be kept anonymous and that the jury be picked up and dropped off at a secret location each day by bus and brought in and out of the courthouse together with a security escort.³⁴⁸ Nearly all of the legal precedent cited by the government in support of their motion involved actual evidence of jury tampering, but the prosecution provided no evidence that Hashmi was seeking to do any such

345. Government's Memorandum of Law in Support of Motion for Anonymous Jury & Other Related Protective Measures, *supra* note 62, at 1, 9 (requesting that the jurors remain anonymous and that the court provide transportation for them each day).

346. *Id.* at 9–10.

347. Indeed, save one story in the *New York Times* metro section on his conditions of confinement, Kareem Fahim, *Restrictive Terms of Prisoner's Confinement Add Fuel to Debate*, N.Y. TIMES, Feb. 5, 2009, at A27, the local media had largely ignored the case since the indictment and extradition, except for the liberal *Village Voice*. Nat Hentoff, *A Brooklyn College Grad Experiences the Constitution in a Cage*, VILLAGE VOICE (Nov. 5, 2008), <http://www.villagevoice.com/2008-11-05/columns/a-brooklyn-college-grad-experiences-the-constitution-in-a-cage/>.

348. Government's Memorandum of Law in Support of Motion for Anonymous Jury and Other Related Protective Measures, *supra* note 62, at 2. The introduction to the Government's motion revealed their confidence that the court would again defer to the government: “Indeed, since at least 1993, anonymous juries have been used *in every terrorism case in this District in which they have been requested.*” *Id.* (emphasis added).

thing.³⁴⁹ Rather, the government's brief focused on the identity of the court observers and the danger they posed, or their appearance as such.³⁵⁰ The U.S. Attorney concluded, "jurors will see in the gallery of the courtroom a significant number of the defendant's supporters, naturally leading to juror speculation that at least some of these spectators might share the defendant's violent radical Islamic leanings."³⁵¹ The fact that people wanted to watch the trial was framed as a problem and evidence of danger.³⁵² The 500@500 poster became Exhibit A in the government's brief.³⁵³

Suggesting guilt by implication, such measures would signal danger to the jury before Hashmi stepped into the courtroom.³⁵⁴ By demonizing those who wanted to see the process as potentially violent, radical Islamists, the government's motion turned observers in court into a cause for suspicion. The right of the public to watch a trial was reformulated as something questionable and requiring extra concern.

On April 26, 2010, over the defense's considerable objections that such measures would compromise the presumption of innocence and frighten the jury, the court granted the government's motion.³⁵⁵ The

349. *Id.*

350. *See id.* at 9.

351. *Id.* Similar concerns were articulated by the government to justify using military tribunals. *See* Elisabeth Bumiller & David Johnston, *Bush to Subject Terrorism Suspects to Military Trials*, N.Y. TIMES, Nov. 14, 2001, <http://www.nytimes.com/2001/11/14/national/14DETA.html> ("White House officials said the tribunals were necessary to protect potential American jurors from the danger of passing judgment on accused terrorists.").

352. Government's Memorandum of Law in Support of Motion for Anonymous Jury and Other Related Protective Measures, *supra* note 62, at 9–10.

353. *Id.* at 10.

354. *See* *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (noting that ensuring the presumption of innocence requires trial courts to attend to factors that undermine the fairness of fact-finding procedures in a criminal trial); Christopher Keleher, *The Repercussions of Anonymous Juries*, U.S.F. L. REV. 531, 532 (2010) (observing that "[t]he state may not create trial conditions adversely affecting jurors' perception of a defendant"). Christopher Keleher has identified three repercussions of anonymous juries:

First, it casts the defendant as a dangerous person. Second, it undermines the presumption of innocence. Third, it hampers jury selection. The Sixth Amendment and Due Process Clause guarantee a defendant the right to an impartial jury. Analyzing the Sixth Amendment, Justice Harlan remarked, "jurors will perform their respective functions more responsibly in an open court than in secret proceedings."

Id. at 553 (quoting *Estes v. Texas*, 381 U.S. 532, 588 (1965) (Harlan, J., concurring)). Citing psychological research demonstrating that "[a]ccountability and anonymity are connected," and asserting that "[t]hose held not accountable are more likely to vote guilty," Keleher calls for additional social science research into the psychological effects of anonymity on juror honesty, accountability and bias. *Id.* at 564–65, 570.

355. Benjamin Weiser, *Jury to Be Anonymous in Trial of Ex-Student Accused of Aiding Al Qaeda*, N.Y. TIMES, Apr. 27, 2010, at A20.

fact that people were concerned with the civil rights issues in Hashmi's case had led the court to defer to the government's request to further circumscribe his rights.

One day after the court ordered an anonymous jury, Hashmi agreed to a government plea bargain of one count of conspiracy to provide material support.³⁵⁶ He made this decision having spent three years in solitary confinement, having not seen his family in more than five months, having not had the opportunity to consult with an imam, and having been denied letters or visits except from his lawyers.

The day before trial, the government dropped the other three charges.³⁵⁷ That the prosecution was willing to offer a one-count plea on the eve of trial raises the question as to whether they had applied these draconian pretrial conditions not because they considered Hashmi a high-level terrorist, but because they wanted to induce his cooperation and conviction.

Hashmi's final agreement to a government plea bargain also follows a larger pattern of government "success" in these types of domestic terrorism cases. In August 2011, *Mother Jones* and the Investigative Reporting Program at the University of California-Berkeley released findings from a year-long study into the prosecutions of 508 defendants in terrorism-related cases in the Article III courts.³⁵⁸ Of the 508 cases they reviewed, 333 defendants had pled guilty, 110 had been found guilty, and 65 were awaiting trial, leading the researchers to conclude: "Once terrorism defendants have been indicted, a charge is *virtually certain to stick*."³⁵⁹ The fact that the federal system has yet to issue a single complete acquittal in a post-9/11 terrorism-related case strongly suggests that the state of these criminal prosecutions weighs overwhelmingly in favor of the government.³⁶⁰

356. Judgment in a Criminal Case, *supra* note 277.

357. Benjamin Weiser, *Ex-Brooklyn College Student Admits Conspiring to Help Al Qaeda*, N.Y. TIMES, Apr. 27, 2010, <http://www.nytimes.com/2010/04/28/nyregion/28hashmi.html>.

358. *Terror Trials by the Numbers*, MOTHER JONES, Sept./Oct. 2011, available at <http://motherjones.com/politics/2011/08/terror-trials-numbers>.

359. *Id.* (emphasis added).

360. As George Washington University professor Jonathan Turley has pointed out, the United States criticizes such legal patterns when they happen in other countries. Jonathan Turley, *10 Reasons the U.S. Is No Longer the Land of the Free*, WASH. POST, Jan. 13, 2012, http://www.washingtonpost.com/opinions/is-the-united-states-still-the-land-of-the-free/2012/01/04/gIQAvCD1wP_story.html. For further analysis of the flaws of some of these prosecutions, see Mark Arax, *The Agent Who Might Have Saved Hamid Hayat*, L.A. TIMES, May 28, 2006, <http://articles.latimes.com/2006/may/28/magazine/tm-wedick22>; Petra Bartosiewicz, *To Catch a Terrorist: The FBI Hunts for the*

Six weeks later, Hashmi was sentenced to fifteen years in prison with three additional years of supervision.³⁶¹ Far beyond luggage in his apartment, what was made clear at his sentencing was that he posed a threat because of his ideology.³⁶² The federal prosecutor explained the danger as “an ideology that was developed over years while Mr. Hashmi was growing up here in New York as a product of New York City public schools as well as local New York City universities, an ideology of violence and intolerance.”³⁶³ As the government’s case turned on no actual act of violence, the U.S. Attorney focused on Hashmi’s beliefs and associations, noting that “not every person who supports Al Qaeda is going to pull a trigger, or throw a bomb or launch an attack.”³⁶⁴ In accepting the government’s sentencing recommendation in front of a packed courtroom and overflow room that included many young Muslim-Americans, the court echoed this logic of deterrence: “[W]hile it is self-evident that specific deterrence is important in this case, deterring other United States citizens—as well as those who are permitted to reside here—from working to undermine our national security while aiding foreign terrorist organizations is vital.”³⁶⁵

At his sentencing, Hashmi was permitted to make his first public statement in four years. Laden with numerous references to the Qu’ran, he spoke extremely hurriedly, so quickly that the judge asked him to slow down. He apologized, noting he had not been able to speak much in the past years because of the SAMs.³⁶⁶

In his speech, Hashmi took responsibility for his association with Babar, apologizing for it and the ways he now saw that it violated his own religious beliefs while also noting that Babar had forced himself

Enemy Within, HARPER’S, Aug. 2011, [http://harpers.org/archive/2011/08/0083545;Entrapment or Foiling Terror? FBI’s Reliance on Paid Informants Raises Questions About Validity of Terrorism Cases](http://harpers.org/archive/2011/08/0083545;Entrapment%20or%20Foiling%20Terror?%20FBI%27s%20Reliance%20on%20Paid%20Informants%20Raises%20Questions%20About%20Validity%20of%20Terrorism%20Cases), DEMOCRACY NOW (Oct. 6, 2010), http://www.democracynow.org/2010/10/6/entrapment_or_foiling_terror_fbis_reliance.

361. Transcript of Sentencing Hearing at 27, *United States v. Hashmi*, 1:06-cr-00442-LAP (S.D.N.Y. June 9, 2010).

362. *Id.* at 24 (discussing the ways in which “facilitators and sympathizers” should be punished for supporting terrorism).

363. *Id.* at 19.

364. *Id.* at 21. The Assistant U.S. Attorney made an interesting slippage regarding the criminalization of belief, stating that “[t]here is an entire network that spans the globe . . . without which Al Qaeda simply could not survive. And it is for this reason that these individuals, *sympathizers*, facilitators, the groups like the group that . . . Hashmi [was] a part of . . . are essential to Al Qaeda.” *Id.* at 21–22 (emphasis added).

365. *Id.* at 24–25.

366. *Id.* at 6–7.

on him using religious codes of hospitality.³⁶⁷ He also thanked people, Muslim and non-Muslim, for speaking out about the rights issues in his case:

To the non-Muslims . . . I hope insha Allah that Allah gives me the opportunity to me to repay you your kindness. Clearly, you saw the injustices of the cruel and unusual conditions that the government put me under, and you stood up to protest against the government's tyranny. . . . I hope insha Allah that the bridges of dialogue and debate that were built around this case remain so.³⁶⁸

In his speech, he did not shy away from criticizing the U.S. government for the “lies” it had told about him, along with the injustice of its policies and its treatment of Muslim prisoners, including his “brothers” at Guantanamo.³⁶⁹ He spoke of the “Noble Mugahideen,” and with allusions to Moses and the Pharaoh, criticized the government for its inhumane treatment of him and other Muslim-Americans.³⁷⁰

On June 10, 2010, Hashmi began serving his sentence. In December 2010, Judge Victor Marrero sentenced Junaid Babar—who had been out on bail since 2008—to “time served” (four-and-a-half years out of a possible seventy), citing his “exceptional” service.³⁷¹

IV. POST-CONVICTION RIGHTS ISSUES

A. *Conditions of Confinement*

In August 2010, Hashmi was transferred to the federal high security prison in Florence, Colorado, where he was again held in solitary

367. *Id.* at 11–13.

368. *Id.* at 8.

369. *Id.* at 15–17.

370. *Id.* at 17. He questioned, “[I]s this the past favor you reproach me with . . . ?” *Id.*

371. The court’s statement that Babar “began co-operating even before his arrest”; his ability to visit the U.S. embassy in Pakistan without question (despite a public interview in November 2001 from Pakistan attesting that “[t]here is no negotiation with Americans . . . I will kill every American that I see”); his ability to fly from Pakistan to the United States in March 2004 with no problems; his apprehension a month later without force or even handcuffs; his subsequent interview with government officials in an Embassy Suites in downtown Manhattan (without a lawyer); and his own lawyer’s incredulity at the sentencing at how nice the U.S. Attorney was being, all raised questions in Britain as to whether Babar had a relationship with the U.S. government before his apprehension in April 2004. See Shiv Malik, *Mohammed Junaid Babar Left Prison Still Advocating Violence*, THE GUARDIAN (Mar. 9, 2011, 2:45 PM), <http://www.guardian.co.uk/world/2011/mar/09/mohammed-junaid-babar-prison-violence?intcmp=srch>; Shiv Malik, *The al-Qaida Supergrass and the 7/7 Questions that Remain Unanswered*, THE GUARDIAN (Feb. 13, 2011), <http://www.guardian.co.uk/uk/2011/feb/14/al-qaida-supergrass-77-questions>.

confinement under SAMs renewed by the Attorney General in October 2010. He was then transferred to the U.S. Penitentiary-Administrative Maximum (ADX) at the Florence complex. In October 2011, the Attorney General did not renew Hashmi's SAMs, but he remains in ADX and continues to be held in isolation.³⁷²

ADX is the most restrictive prison in the federal system. It houses less than one-third of one percent of the entire federal inmate population, or approximately 400 people.³⁷³ All of the prisoners in ADX—whether under SAMs or not—are in solitary confinement.³⁷⁴ In an interview with “60 Minutes,” one of the prison's own former wardens described it as “a clean version of hell.”³⁷⁵

ADX has been criticized by Amnesty International and Human Rights Watch for its inhumane conditions.³⁷⁶ In the “general population”³⁷⁷ unit of ADX, prisoners are in solitary confinement for twenty-two hours a day, five days a week and twenty-four hours a day for the other two days, in cells that measure 87 square feet.³⁷⁸ Each cell contains a poured concrete bed and desk as well as a steel sink, toilet, and shower. ADX prisoners eat all meals alone inside their cells, within arm's length of their toilet. Each cell has a small window to the outside; however, the only view is of the cement “yard.”³⁷⁹

372. See *Inmate Locator*, FED. BUREAU OF PRISONS, <http://www.bop.gov/iloc2/LocateInmate.jsp> (last visited Apr. 14, 2012).

373. Declaration of R. Wiley ¶ 6, *United States v. Hamza* (Gr. Brit. Magis. Ct. Oct. 3, 2007). The Declaration also notes that “95 percent of the inmate population was transferred to the ADX from other facilities, while only 5 percent are direct court commitments.” *Id.*

374. The only exception to this is those prisoners who have been admitted to the Step-Down Program. Those prisoners are still housed in single cells, but have limited opportunities to interact with a handful of other prisoners for brief periods of time. Prisoners under SAMs, however, are not eligible for the Step-Down Program. Third Amended Complaint ¶¶ 93–127, *Ayyad v. Holder*, No. 05-cv-02342-WYD-MJW (D. Colo. Apr. 13, 2009).

375. 60 Minutes, *Supermax: A Clean Version of Hell* (CBS television broadcast June 19, 2009), available at <http://www.cbsnews.com/video/watch/?id=5101352n&tag=related>.

376. Letter from Jamie Fellner & Jennifer Daskal, Human Rights Watch, to Harley G. Lapin, Dir. of the Fed. Bureau of Prisons (May 2, 2007) (on file with authors); *The Psychological Effects of Supermax Prisons*, INSIDE PRISON (Apr. 2006), http://www.insideprison.com/supermax-prisons-psychological-effects_2.asp.

377. The term “general population,” as it is typically used in the correctional field is different than its meaning in the ADX context; at ADX, “general population” cells are actually solitary confinement cells that are the most restrictive in the entire federal BOP. Appellants' Opening Brief at 4 n.1, *Rezaq v. Nalley*, Nos. 11-1069, 11-1072, 2012 WL 1372151 (10th Cir. Apr. 20, 2012). In any other BOP prison, these cells would be termed “administrative segregation.” *Id.*

378. *Rezaq*, 2012 WL 1372151, at *1–2.

379. Maryanne Vollers, *Inside Bombers Row: How America's Most Dangerous Criminals Mix with a Who's Who of the Global Jihad in a Colorado Prison*, TIME, Nov. 13, 2006, at 37–39.

Prisoners at ADX cannot see any nature—not the surrounding mountains or even a patch of grass.³⁸⁰

The only time prisoners are regularly allowed outside of their cells is for limited recreation, which occurs either in an indoor cell that is empty except for a pull-up bar, or in an outdoor solitary cage.³⁸¹ The outside recreation cages are only slightly larger in size than the inside cells and are known as “dog runs” because they resemble animal kennels.³⁸² The warden can cancel recreation for any reason he deems appropriate, including weather, shakedowns, or lack of staff.³⁸³ Accordingly, ADX prisoners sometimes go for days without ever leaving their cells.³⁸⁴

Contact with others is rare. The prison was specifically designed to limit all communication among the people that it houses.³⁸⁵ Accordingly, the cells have thick concrete walls and two doors, one with bars and a second made of solid steel. The only “contact” ADX prisoners have with other inmates in the “general population” unit is attempted shouting through the thick cell walls, doors, toilets, and vents. All visits are non-contact, meaning the prisoner and visitor are separated by a plexi-glass barrier.³⁸⁶

Formal opportunities for rehabilitation are extremely limited. All educational programming occurs via closed-circuit television in the prisoners’ cells.³⁸⁷ “Classes” consist of broadcasting shows such as “World of Byzantium,” “Parenting I and II,” and “Peloponnesian War I and II,” with the prisoner filling out a short quiz.³⁸⁸ There is no interaction with an educator or other students.³⁸⁹ Perhaps most significant for many Muslim prisoners, religious practice at ADX is severely curtailed. Religious services are shown on the closed-circuit television and group prayer is prohibited.³⁹⁰

When it opened in 1994, ADX was originally conceived by the BOP as a “behavior management” facility in which prisoners earned their way in through a demonstrated inability to function in less restrictive prison settings, and could earn their way out by demonstrating clear

380. *Id.*

381. *Rezaq*, 2012 WL 1372151, at *1, 11.

382. *Id.* at *11.

383. Appellants’ Opening Brief, *supra* note 377, at 5.

384. *Id.*; Vollers, *supra* note 379, at 40.

385. Appellants’ Opening Brief, *supra* note 377, at 5.

386. *Id.*

387. *Id.* at 7.

388. *Id.*

389. *Id.*

390. *Id.*

conduct over time.³⁹¹ This policy changed after 9/11. Pursuant to a series of orders from the BOP,³⁹² Muslim men convicted of terrorism-related crimes were transferred to ADX from less restrictive prisons, despite a lack of evidence that they had “earned their way in” through their conduct while in prison or by being involved in any way with the events of 9/11.³⁹³

After several lawsuits challenged the transfer and continued confinement of these men at ADX as violating their right to due process,³⁹⁴ the BOP codified this practice. In yet another memo, the BOP listed a set of criteria for placement in ADX.³⁹⁵ The first of these is that “[t]he inmate is subject to . . . [SAMs,] or based on

391. U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF PRISONS PROGRAM STATEMENT 5100.07 ch. 10, at 11, 13 (1999). There have been some exceptions to this; high profile prisoners such as Theodore Kaczynski, Eric Rudolph, and Terry Nichols were all sent to ADX as their initial designation.

392. Memorandum from Michael B. Cooksey, Assistant Dir. of the Corr. Programs Div. of the Fed. Bureau of Prisons on Guidance for Handling of Terrorist Inmates and Recent Detainees (Oct. 1, 2001) (on file with authors) (“Following the tragic events of September 11, 2001, all inmates in the custody of the BOP who were convicted of, charged with, associated with, or in any way linked to terrorist activities were placed in Administrative Detention as part of an immediate national security endeavor.”). The memo purports to “provide[] guidance regarding the continuing management and monitoring of select inmates having a Security Threat Group assignment of ‘terrorist’ and inmates detained as a result of events that occurred on September 11, 2001.” It proceeds to classify these inmates into four groups and specifies that all of them “are to be housed in the Special Housing Unit under the tightest restrictions allowed by our Administrative Detention policy,” and that they are to be “housed and recreated alone.” *Id.* Their transfers to the ADX were directed by a second memorandum. Memorandum from Michael B. Cooksey, Assistant Dir. of the Corr. Programs Div. of the Fed. Bureau of Prisons on Guidance for Handling Pre-September 11th Terrorist Inmates Currently Housed in Administrative Detention (Mar. 28, 2002) (on file with authors).

393. An additional memo states that

[a]s of March 9, 2005, BOP facilities house 143 inmates or detainees identified as having ties to terrorism. Each of these individuals has been classified for appropriate monitoring and management. All inmates with a conviction or verified major role in terrorism have been transferred to the Administrative Detention Center (ADX) in Florence, Colorado, for appropriate management, monitoring and control.

Memorandum from Dawn Zobel, Fed. Bureau of Prisons, on Management Procedures for Terrorist Inmates Summary to Joyce Conley (Mar. 11, 2005) (on file with authors).

394. See Second Amended Consolidated Complaint at 4–6, 10–11, 26, *Saleh v. Fed. Bureau of Prisons*, No. 05-cv-02467-PAB-KLM (D. Colo. Feb. 6, 2009), ECF No. 251 (alleging that in the hours after the September 11th attacks, despite having no connection to the events of that day, and absent notice or opportunity to be heard, the plaintiffs—all Muslim men convicted of crimes related to the 1993 World Trade Center bombing—were moved from open population units in various penitentiaries to segregation units and subsequently to ADX). Professor Rovner, Director of the Civil Rights Clinic at the University of Denver College of Law, supervised the student attorneys who represented the plaintiffs in this action.

395. See Memorandum from Michael K. Nalley, Reg'l Dir., Fed. Bureau of Prisons N. Cent. Reg'l Office 3 (Nov. 2, 2007) (on file with authors).

documented reliable information from a government agency that the inmate was convicted of, charged with, associated with, or in any way linked to terrorist activities and as a result of such, presents national security management concerns.”³⁹⁶ The term “terrorist activities,” however is not defined, meaning that even conduct such as Hashmi’s is sufficient reason to be sent to ADX—a facility purportedly reserved for the most violent and unmanageable prisoners in the federal system.

Moreover, similar to pretrial, there appears to be a disproportionate tendency to impose and maintain SAMs on Muslim prisoners convicted of terrorism-related charges as compared to non-Muslims convicted of terrorism-related charges. For instance, radical Christian-militant Eric Rudolph was convicted of the Centennial Olympic Park bombing, as well as bombing a lesbian bar and abortion clinics in Atlanta and Birmingham.³⁹⁷ He is serving a life sentence and is presently housed at ADX.³⁹⁸ A website posts his current writings on abortion, the Iraq war, racism, and conditions at ADX, along with numerous Biblical quotations and a justification for bombing the Birmingham “abortion mill” and his use of deadly force.³⁹⁹

When questions were raised by victims in Birmingham about Rudolph’s continued ability to disseminate his ideas, U.S. Attorney Alice Martin, one of the prosecutors for the Alabama bombing, said the prison could not restrict Rudolph, and that “[a]n inmate does not lose his freedom of speech.”⁴⁰⁰ The website provides coordination and dissemination of information on many anti-abortion prisoners; it includes a link to send a “thank you” card to Scott Roeder and writings by other prisoners such as Shelley Shannon, convicted for burning abortion clinics, including her essays justifying the use of

396. *Id.*

397. See *Rudolph Agrees to Plea Agreement*, CNN JUSTICE (Apr. 12, 2005), http://articles.cnn.com/2005-04-08/justice/rudolph.plea_1_emily-lyons-eric-robert-rudolph-atlanta-attacks?_s=PM:LAW.

398. See *Inmate Locator*, FED. BUREAU OF PRISONS, <http://www.bop.gov/iloc2/LocateInmate.jsp>, (last visited May 6, 2012).

399. Rudolph explains,

I had nothing personal against either of these individuals, Sanderson and Lyons. I did not target them for who they were—but for what they did. . . . My actions that day were motivated by my recognition that abortion is murder. Because it is murder, I believe that deadly force is indeed justified in an attempt to stop it.

Eric Rudolph’s Homepage, ARMY OF GOD, <http://www.armyofgod.com/EricRudolphHomepage.html> (last visited Apr. 14, 2012).

400. *Extremist Taunts His Victims from Prison*, USA TODAY (May 15, 2007, 10:13 AM), http://www.usatoday.com/news/nation/2007-05-14-rudolph-prison_N.htm.

deadly force against clinics and providers and admonitions about the pressures of law enforcement.⁴⁰¹ Replete with Biblical quotations, the website provides religious justification for the violent actions of anti-abortionists such as Shelley, Roeder, and Rudolph and provides politically-like-minded people ways to support and correspond with these prisoners.⁴⁰² Respecting the constitutional protections covering their Christian political views, the government has not placed Shannon, Roeder and Rudolph under SAMs.⁴⁰³ Such recognition has been considerably less forthcoming for Muslim inmates at ADX.⁴⁰⁴

B. *Unreviewability*

Despite the severe restrictions ADX confinement imposes on prisoners—particularly those under SAMs—there is virtually no procedural due process provided, either before or after the SAMs are imposed and renewed.⁴⁰⁵ While federal regulations state that “[d]esignated staff shall provide to the affected inmate, as soon as practicable, written notification of the restrictions imposed and the basis for these restrictions,” the regulations also allow that “[t]he notice’s statement as to the basis may be limited in the interest of prison security or safety.”⁴⁰⁶ As a practical matter, some SAMs prisoners are given only very general allegations as to the reason for the SAMs restrictions, such as that they have been convicted of a terrorism-related crime.⁴⁰⁷

Once they have exhausted the administrative remedy process,

401. ARMY OF GOD, <http://www.armyofgod.com/> (last visited Apr. 14, 2012). Postings on the website also urge surreptitiousness among those contemplating similar acts: “[Do] not tell ANYONE; *before, during or after*, if you are planning on taking action. Your family, pro-lifers and your church ‘friends’ will sell you out in a heartbeat, thinking they are doing God’s will.” *Id.*

402. *Id.*

403. There also seems to be an arbitrariness—and political character—as to which domestic actions are deemed terrorism (and relatedly, given a terrorism enhancement), such as animal rights and environmental actions. The rights questions in such designations are also significant. *See* Animal Enterprise Terrorism Act, Pub. L. No. 109-374, 120 Stat. 2652 (2006) (codified at 18 U.S.C. § 43 (2006)).

404. Two recent decisions that suggest that at least some consideration exists for the First Amendment rights of Muslims convicted of terrorism-related offenses are *Sattar v. Holder*, No. 07-CV-02698-PAB-KLM, 2012 WL 882401 (D. Colo. Mar. 15, 2012), and *Mohammed v. Holder*, No. 07-CV-02697-MSK-BNB, 2011 WL 4501959 (D. Colo. Sept. 29, 2011).

405. *See* Second Amended Consolidated Complaint, *supra* note 394, at 7–8, 13 (describing lack of notice given to inmates); *see also* Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579, 671 (2010) (suggesting that the same due process concerns that exist concerning Guantanamo Bay detainees also exist in relation to federal inmates spending long periods of time in isolation).

406. 28 C.F.R. § 501.3(b) (2011).

407. *See, e.g.*, Third Amended Complaint, *supra* note 374, ¶ 106 (Apr. 13, 2009).

prisoners may attempt to challenge their SAMs in court. So far, however, the same deference to the Executive demonstrated by the pretrial SAMs rulings in Hashmi's case is also evident in post-conviction challenges to the SAMs brought in conditions of confinement cases. In the few cases in which prisoners have sought to challenge their SAMs in the federal courts,⁴⁰⁸ the courts have declined to closely scrutinize the executive's decision to impose or maintain the SAMs.⁴⁰⁹ To date, we have been unable to locate a single case in which a federal court has held that the conditions of confinement for a prisoner under SAMs give rise to a due process violation.⁴¹⁰

A recent example is *Al-Owhali v. Holder*,⁴¹¹ in which a SAMs prisoner at ADX filed suit challenging multiple aspects of his SAMs on

408. There have been relatively few cases challenging post-conviction SAMs. There are several reasons for this, including a dearth of lawyers willing to litigate these cases. And even where counsel is available and willing to represent prisoners in cases challenging their SAMs. The government has occasionally impeded access to counsel. *See, e.g.*, Order Granting Defendant's Motion for Reconsideration at 6–7, *Ayyad v. Holder*, No. 05-cv-02342-WYD-MJW (D. Colo. July 31, 2008) (upholding government's decision to deny clearance for law students working for the Civil Rights Clinic at the University of Denver College of Law, which was representing two prisoners who were challenging their confinement at ADX and their SAMs). By doing so, the court made it impossible for the Clinic to represent the prisoners. The lack of counsel in these cases makes an already difficult situation even harder due to the following factors: (1) most of these prisoners are not familiar with law (particularly assertions such as national security and law enforcement privileges, deliberative process privilege and other issues that can be extraordinarily complex); (2) unfamiliarity with the U.S. judicial system; (3) English may not be the first language of some of these prisoners; (4) SAMs prisoners frequently are not permitted to see some of evidence used by government; and (5) prisoners have limited access to legal research resources.

409. While a few of these cases have survived motions to dismiss on due process grounds, none has yet survived a motion for summary judgment on a procedural due process claim. Currently, Professor Rovner serves as counsel to two prisoners under SAMs in a lawsuit challenging their conditions of confinement on first amendment and procedural due process grounds. The government's motion for summary judgment on all claims is before the court. *See* Motion for Summary Judgment by Defendants, *Ayyad v. Holder*, No. 05-cv-02342-WYD-MJW (D. Colo. Mar. 25, 2011).

410. *See, e.g.*, *Sattar v. Holder*, No. 07-CV-02698-PAB-KLM, 2012 WL 882401, at *11 (D. Colo. Mar. 15, 2012) (granting government's motion for summary judgment on procedural due process claim); *Mohammed v. Holder*, No. 07-CV-02697-MSK-BNB, 2011 WL 4501959, at *12 (D. Colo. Sept. 29, 2011) (same); *Al-Owhali v. Holder*, No. 07-cv-02214-LTB-BNB, 2011 WL 288523, at *1–3 (D. Colo. Jan. 27, 2011) (same); *Jabarah v. Garcia*, No. 08 Civ. 3592, 2010 WL 3834663, at *4–5 (S.D.N.Y. Sept. 30, 2010) (refusing to consider challenges to SAMs because not brought pursuant to habeas statute). Nor have we located any decisions in which a court has permitted an Eighth Amendment challenge to a prisoner's SAMs to survive summary judgment. As of this writing, there are only two cases in which a federal court has permitted *any* challenge to a prisoner's SAMs to proceed to trial, and those are in the First Amendment context. *See Sattar*, 2012 WL 882401, at *4–6; *Mohammed*, 2011 WL 4501959, at *7–10.

411. No. 07-cv-02214-LTB-BNB, 2011 WL 288523 (D. Colo. Jan. 27, 2011).

constitutional grounds.⁴¹² In his decision granting the Government's Motion to Dismiss, the district judge wrote:

At oral argument, the Court engaged in dialogue with counsel alluding to the Kafka-esque nature of this case. It was a poor and inept analogy as Joseph K, Kafka's fictional character, never even knew the nature of his charges against him. Indeed, he never had a trial at all. In contrast, of course, Mr. Al-Owhali received the full panoply of constitutional and procedural rights to which he was entitled before he was duly convicted and sentenced for his key role in the August 7, 1998 bombing of the American Embassy in Nairobi, Kenya . . . [and h]is conviction was affirmed on appeal. *Such is the nature of a terrorist and the Government's rational interest in setting the conditions of confinement.*⁴¹³

The court in *Al-Owhali* effectively concluded that because a prisoner has been afforded a criminal trial on the terrorism charges asserted against him, there is no role for the federal courts in reviewing his conditions of confinement post-conviction.⁴¹⁴ The sole fact of the terrorism conviction justifies absolute deference to the Executive in determining the prisoner's conditions—even when those conditions raise serious constitutional and human rights concerns.⁴¹⁵

The presumption is that the extreme conditions of confinement

412. See Proposed Second Amended Complaint at 16–22, *Al-Owhali*, 2011 WL 288523 (No. 07-cv-2214-LTB-BNB) (asserting that plaintiff's SAMs violate his right to: procedural and substantive due process; equal protection; to be free from cruel and unusual punishment; freedom of speech, expression and association; and right to communicate with counsel).

413. *Al-Owhali*, 2011 WL 288523, at *4 (emphasis added) (citations omitted).

414. See *id.* at *3–4 (rejecting magistrate's recommendation because magistrate did not give enough deference to the government).

415. Additionally, to date no court has ever held that confinement in ADX—even for upwards of thirteen years—gives rise to a protected liberty interest meriting due process. See, e.g., *Rezaq v. Nalley*, Nos. 11-1069, 11-1072, 2012 WL 1372151 (10th Cir. Apr. 20, 2012); *Saleh v. Fed. Bureau of Prisons*, No. 05-cv-02467-PAB-KLM, 2010 WL 5464294, *4–5 (D. Colo. Dec. 29, 2010) (agreeing with magistrate that plaintiff's due process rights were not violated by imprisonment at ADX); *Rezaq v. Nalley*, No. 07-cv-02483-LTB-KLM, 2010 WL 5157313, at *1 (D. Colo. Dec. 14, 2010) (same); *Georgacarakos v. Wiley*, No. 07-cv-01712-MSK-MEH, 2010 WL 1291833, at *12–13 (D. Colo. Mar. 30, 2010) (finding conditions in the present case were comparable to those in *Jordan v. Federal Bureau of Prisons*, 191 F. App'x 639 (10th Cir. 2006), a case in which the court ruled there was no liberty interest in avoiding incarceration at ADX). Even in cases about conditions of confinement from prisoners convicted of non-terrorism crimes, court review of those conditions is quite deferential since the Supreme Court's resurrection of the “hands off” approach to prisoners' rights cases. See, e.g., *Procunier v. Martinez*, 416 U.S. 396, 404–05 (1974) (“[T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree.”), *overruled by Thornburgh v. Abbott*, 190 U.S. 401 (1989) (adopting flexible reasonableness standard from *Turner v. Safley*, 482 U.S. 78 (1987)).

for prisoners post-conviction, including the SAMs, are justified because those prisoners had a fair pretrial process. Indeed, the fact of a trial, of a legal process, becomes grounds for the treatment. But as Hashmi's situation illustrates, these cases beg the question: What kind of process?

CONCLUSION

It would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties . . . which make the defense of the Nation worthwhile.

—*United States v. Robel*⁴¹⁶

We no longer ask of a judicial ruling or a legislative act: is it good? Is it fair? Is it just? Is it right? . . . Those used to be the political questions, even if they invited no easy answers. We must learn once again to pose them.

—Tony Judt, *Ill Fares the Land*⁴¹⁷

Fahad Hashmi's case demonstrates that having a legal process in a terrorism case is not the same as having a just process; indeed, it shows that the fact of a legal process can be a mechanism for enabling injustice. The cascading series of rights deprivations—beginning with the initial surveillance of Hashmi's student political activities and the subsequent material support charges brought against him; his three years of pretrial solitary confinement under SAMs that degraded his health and ability to participate effectively in his own defense; his inability as a U.S. citizen to review all the evidence against him and the long process for his lawyers to be granted clearance to see the CIPA evidence; the government's use of his political activities as evidence at trial and the casting of public concern around his case as dangerous—happened in daylight, were justified by the government's assertion of national security, and were upheld by the court. That this took place in New York, just a dozen miles from where Hashmi grew up, and not in a place like Guantanamo, where individuals were held and abused in a zone that was believed to be outside the reach of U.S. law, is disturbing, particularly because of the court's role in legitimizing it.⁴¹⁸ That

416. 389 U.S. 258, 265 (1967).

417. TONY JUDT, *ILL FARES THE LAND* 1–2 (2010).

418. Though disturbing, it is not unique in the annals of American jurisprudence. A review of African-American history, for instance, demonstrates that many of the worst human rights violations needed the law and government bureaucracy to give them common sense and force, from slavery, segregation and voting rights denial, to school zoning, urban renewal, and red-lining. For discussions of these issues, see

rights abridgement occurred throughout the process reveals that this was not an unfortunate or aberrational occurrence. Rather, it demonstrates how the rights protections of Muslims accused of terrorism-related crimes in post-9/11 America can be and have been treated as expendable.

This significant pattern of rights violations within the federal system has in part been obscured by equating a trial in an Article III court with rights and reviewability. Many civil libertarians have focused on the urgency of the situations of Guantanamo detainees and thus contributed, however unintentionally, to the misimpression that systemic injustice and rights degradation occur primarily outside the reach of the American legal process. Hashmi's case and those of many other Muslim men and women facing terrorism-related charges in the federal system are a disturbing counterpoint to the situation at Guantanamo, precisely because they occur within the law.

There are troubling questions that often go unasked. In a War on Terror costing billions of dollars that requires evidence of the effectiveness of law enforcement, a record of arrest, indictment, and conviction is paramount. Vast sums of money have been devoted to counterterrorism in the past decade,⁴¹⁹ and such expenditures must be justified. The pressures and demands on law enforcement produce an environment that can lead to overreaching. To counter these pressures, courts must be more vigilant and provide more oversight.

And history is again instructive. Times of war have often been when, beset with national imperatives and fear, the government has severely overreached, yet these are also the times when courts have been the most deferential. Indeed, as the Supreme Court dissents in *Korematsu* and *Dennis* presciently remind us, in the moment these decisions occur, judicial deference is cast as necessary and wise for the safety and security of the nation—but later comes to be regretted as imperiling constitutional protections.⁴²⁰

generally A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND THE PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* (1996); KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985); MARK S. WEINER, *BLACK TRIALS: CITIZENSHIP FROM THE BEGINNINGS OF SLAVERY TO THE END OF CASTE* (2004); CRAIG STEVEN WILDER, *A COVENANT WITH COLOR: RACE AND SOCIAL POWER IN BROOKLYN* (2000); *THE MYTH OF SOUTHERN EXCEPTIONALISM* (Matthew D. Lassiter & Joseph Crespino eds., 2010).

419. See Dana Priest & William M. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST, July 19, 2010, at A1 (illustrating the massive expenditures devoted to counterterrorism).

420. "Public opinion being what it now is," Justice Hugo Black wrote, "few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some

The belief that the federal courts are now immune to this kind of distortion is ahistorical and has largely insulated them from critique. Jenny Martinez has recognized in the context of the Guantanamo cases a point equally, if not more, applicable to domestic terrorism trials—that having a procedure often covers up the injustice embedded in the process:

Those who are not looking too closely may think that justice has been done because the litigants have already had their day (or year) in front of a neutral, objective federal court. In other words, the legitimizing role that procedure plays in perceptions of justice may be part of the problem, not the solution.⁴²¹

For many in post-9/11 America, a trial in the Article III courts has become emblematic of American values—as U.S. District Judge William Young stated to “shoe bomber” Richard Reid: “we all know that the way we treat you . . . is the measure of our own liberties.”⁴²² The federal courts are held up as the “anti-Guantanamo”—the converse of indefinite detentions, military commissions and other manifestations of second-class due process. But whether this view is warranted for Muslims charged with terrorism-related offenses is a debatable proposition. As Fahad Hashmi’s case demonstrates, it is important to look closely—and the tendency to avoid scrutinizing the federal process has allowed these practices to occur and take root over the past decade.

Nancy Murray of the ACLU has referred to this differential standard as the “Muslim exemption.”⁴²³ Perhaps we should not be surprised by this kind of jettisoning of rights; history has shown that the courts, like the other branches of government, are not immune to the pressures and prejudices of wartime.⁴²⁴ Although some

later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.” *Dennis v. United States*, 341 U.S. 494, 581 (1951) (Black, J., dissenting).

421. Martinez, *supra* note 22, at 1087.

422. Reid: ‘I Am at War with Your Country,’ CNN (Jan. 31, 2003, 11:10 AM), <http://www.cnn.com/2003/LAW/01/31/reid.transcript/>.

423. Carol Rose, *It’s Official. There Is a Muslim Exemption to the First Amendment*, BOS. GLOBE ON LIBERTY BLOG (Apr. 12, 2012, 5:00 PM), http://boston.com/community/blogs/on_liberty/2012/04/its_official_there_is_a_muslim.html.

424. See generally *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding internment of Japanese-Americans during WWII). Additionally, as Justice Robert Jackson observed in 1948:

No one will question that this power is the most dangerous one to free government in the whole catalogue of powers. It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by the Judges under the influence of the same passions and pressures.

commentators have argued that a form of “social learning”⁴²⁵ occurs in the wake of crises like Japanese internment and the McCarthy era that makes future overreactions less likely, there is ample reason to believe, as David Cole suggests, that this social learning may simply consist of government decision-makers learning to more effectively mask the repetition of past civil liberties violations.⁴²⁶

During such periods, the role of the courts as a check on Executive power becomes even more critical. And yet as Hashmi's case illustrates, the courts' deference to claims of national security has eroded such separation. Such deference is made all the more dangerous by the ways it has gone largely unseen, obscured by the binary drawn by many civil libertarians between the unchecked Executive power at Guantanamo and the rights and reviewability of the federal system. Indeed, as such rights violations occur as part of the federal process and are sanctioned by the courts, they become woven into the fabric of the justice system. And as they become more ingrained in the fabric itself, the violations are not only harder to see, they are also harder to remove,⁴²⁷ affecting not only those charged

Woods v. Cloyd W. Miller Co., 333 U.S. 138, 146 (1948) (Jackson, J., concurring).

425. See generally Mark Tushnet *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273 (articulating the “social learning” theory as the idea that courts tend to learn from past crisis periods that government claims of national security have, in retrospect, often been exaggerated, thus making people more skeptical about such claims in the present context). We disagree with Professor Tushnet, as our review of history suggests that national security issues are always rendered as unique, urgent, and unparalleled, thus requiring new, expansive responses.

426. Cole, *supra* note 73, at 2 (“In short, just as we did in the McCarthy era, we have offset the decline of traditional forms of repression with the development of new forms of repression. A historical comparison reveals not so much a *repudiation* as an *evolution* of political repression.”).

427. Others have warned that the risk of trying terrorism suspects in federal courts is that the extraordinary measures, departures, and/or exceptions deemed necessary for such trials will become fixed in the law and applied in non-terrorism cases, “what we might characterize as either a ‘distortion effect’ or a ‘seepage problem.’” Vladeck, *supra* note 36, at 1501. To address this concern, some scholars have advocated the use of emergency executive powers exercised in a way that is expressly extra-constitutional, in order to avoid “contaminating and manipulating” the ordinary legal system with emergency powers. Oren Gross, *Chaos And Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1099, 1133 (2003); see also Tushnet, *supra* note 425, at 306–07. Indeed, the “seepage” risk has led some scholars to conclude either that trial by military commissions is necessary or to advocate for the creation of “national security courts.” Amos N. Guiora, *Creating a Domestic Terror Court*, 48 WASHBURN L.J. 617 (2009).

with and convicted of terrorist-related crimes in the Article III courts, but also the Constitution itself.⁴²⁸

428. As Owen Fiss has observed,

What is missing from this calculus . . . is a full appreciation of the value of the Constitution—as a statement of the ideals of the nation and as the basis of the principle of freedom—and even more, a full appreciation of the fact that the whole-hearted pursuit of any ideal requires sacrifices, sometimes quite substantial ones. It is hard for the Justices, or for that matter anyone, to accept that we may have to risk the material well-being of the nation in order to be faithful to the Constitution and the duties it imposes. Still, it must be remembered that the issue is not just the survival of the nation—of course the United States will survive—but rather the terms of survival.

Fiss, *The War Against Terrorism and the Rule of Law*, *supra* note 5, at 256.