



# ILLUSION OF JUSTICE

Human Rights Abuses in US Terrorism Prosecutions

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COLUMBIA LAW SCHOOL

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# Illusion of Justice

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## Summary

Muslims are a fundamental part of the American family. In fact, the success of American Muslims and our determination to guard against any encroachments on their civil liberties is the ultimate rebuke to those who say that we're at war with Islam.

—US President Barack Obama, May 23, 2013

This community is under siege. And even if they're not under siege, they think they are.

—Tom Nelson, attorney, Portland, Oregon, August 13, 2012

Terrorism entails horrifying acts, often resulting in terrible losses of human life. Governments have a duty under international human rights law to take reasonable measures to protect people within their jurisdictions from acts of violence. When crimes are committed, governments also have a duty to carry out impartial investigations, to identify those responsible, and to prosecute suspects before independent courts. These obligations require ensuring fairness and due process in investigations and prosecutions, as well as humane treatment of those in custody.

However, since the September 11, 2001 attacks on New York and Washington, DC, the United States government has failed to meet its international legal obligations with respect to its investigations and prosecutions of terrorism suspects, as well as its treatment of terrorism suspects in custody.

This has been true with regard to foreign terrorism suspects detained at the US military detention center at Guantanamo Bay, Cuba, most of whom are being held indefinitely without charge. And, as this report documents, it is also too often true with regard to American Muslim defendants investigated, tried, and convicted of terrorism or terrorism-related offenses in the US criminal justice system.

This report examines 27 such cases—from initiation of the investigations to sentencing and post-conviction conditions of confinement—and documents the significant human cost of certain counterterrorism practices, such as aggressive

sting operations and unnecessarily restrictive conditions of confinement. Since the September 11 attacks, more than 500 individuals have been prosecuted in US federal courts for terrorism or related offenses—40 cases per year on average. Many prosecutions have properly targeted individuals engaged in planning or financing terror attacks. But many others have targeted individuals who do not appear to have been involved in terrorist plotting or financing at the time the government began to investigate them.

Indeed, in some cases the Federal Bureau of Investigation may have created terrorists out of law-abiding individuals by conducting sting operations that facilitated or invented the target's willingness to act. According to multiple studies, nearly 50 percent of the more than 500 federal counterterrorism convictions resulted from informant-based cases; almost 30 percent of those cases were sting operations in which the informant played an active role in the underlying plot. In the case of the "Newburgh Four," for example, a judge said the government "came up with the crime, provided the means, and removed all relevant obstacles," and had, in the process, made a terrorist out of a man "whose buffoonery is positively Shakespearean in scope."

In such instances, the government's purpose appears to have been preventive: to root out and prosecute individuals it believes might eventually plan and carry out terrorism. To this end, it has substantially changed its approach, loosening regulations and standards governing the conduct of terrorism investigations.

While some of these cases involved foreign nationals and conduct overseas, or individuals who are not Muslim, many of the most high-profile terrorism prosecutions have focused on "homegrown" terrorist threats allegedly posed by American Muslims.

Human Rights Watch and Columbia Law School's Human Rights Institute found that at times, in aggressively pursuing terrorism threats before they even materialize, US law enforcement overstepped its role by effectively participating in developing terrorism plots—in at least two cases even offering the defendants money to entice them to participate in the plot.

In theory, the defendants in these cases should be able to avoid criminal liability by making a claim of “entrapment.” However, US law requires that to prove entrapment a defendant show both that the government induced him to commit the act in question and that he was not “predisposed” to commit it. This predisposition inquiry focuses attention on the defendant’s background, opinions, beliefs, and reputation—in other words, not on the crime, but on the nature of the defendant. This character inquiry makes it exceptionally difficult for a defendant to succeed in raising the entrapment defense, particularly in the terrorism context, where inflammatory stereotypes and highly charged characterizations of Islam and foreigners often prevail. Indeed, no claim of entrapment has been successful in a US federal terrorism case to date. European human rights law—instructive for interpreting internationally recognized fair trial rights—suggests that the current formulation of the US defense of entrapment may not comport with fair trial standards.

Meanwhile, the law enforcement practices described in this report have alienated the very communities the government relies on most to report possible terrorist threats and diverted resources from other, more effective ways, of responding to the threat of terrorism. Its proclaimed success in convicting alleged terrorist conspirators has come with serious and unnecessary costs to the rights of many of those prosecuted and convicted, to their families and communities, to the public, and to the rule of law. Ultimately, these costs threaten to undermine the goal of preventing and effectively prosecuting and sanctioning terrorism crimes.

Our research explored cases from a chronological and geographic cross-section of the post-September 11 terrorism prosecutions. Cases spanned the months immediately after the September 11 attacks to more recent indictments, in order to explore which trends, if any, persisted or developed over time. We also sought cases from across the United States to examine the impact of such prosecutions on various American Muslim communities and to account for regional investigative and prosecutorial differences. Cases include prosecutions for material support and conspiracy, some resulting in sentences of more than 15 years or life imprisonment.

These cases do not constitute a representative sample that would allow us to generalize about all federal prosecutions, but they raise troubling questions about the fairness and effectiveness of many of the policies, practices, and tactics



employed by the Federal Bureau of Investigation (FBI), the Justice Department, and the Bureau of Prisons in terrorism cases.

In some cases, the unfairness arises from the application of certain laws, some of which Congress greatly expanded after September 11, including material support laws, the Foreign Intelligence Surveillance Act, and the Classified Information Procedures Act.

## Human Rights Concerns

We documented the following patterns that raise serious human rights concerns:

- Discriminatory investigations, often targeting particularly vulnerable individuals (including people with intellectual and mental disabilities and the indigent), in which the government—often acting through informants—is actively involved in developing the plot, persuading and sometimes pressuring the target to participate, and providing the resources to carry it out.
- Use of overly broad material support charges, punishing behavior that did not demonstrate intent to support terrorism.
- Prosecutorial tactics that may violate fair trial rights, such as introducing prejudicial evidence—including evidence obtained by coercion, classified evidence that cannot be fairly contested, and inflammatory evidence about terrorism in which defendants played no part; and limited ability to challenge surveillance warrants due to excessive government secrecy.
- Harsh and at times abusive conditions of confinement, which often appear excessive in relation to the security risk posed. These include:
- Prolonged solitary confinement and severe restrictions on communicating in pretrial detention, possibly impeding defendants' ability to assist in their own defense and contributing to their pleading guilty.
- Excessive lengthening of sentences and draconian conditions post-conviction, including prolonged solitary confinement and severe restrictions on contact with families or others, sometimes without explanation or recourse. One detainee called it “a touch of hell”: “My

children... could see, but not touch me as though I had some sort of contagious disease.”

Taken together, these patterns have contributed to cases in which individuals who perhaps would never have participated in a terrorist act on their own initiative and might not even had the capacity to do so, were prosecuted for serious, yet government-created, terrorism plots.

In other cases, people who contributed to charities in the Middle East ended up convicted of “material support” based on flimsy connections to alleged terrorism.

Illustrative examples of the cases documented in this report include:

- **Targeting People with Mental or Intellectual Disabilities in Stings—Rezwan Ferdaus:** Although an FBI agent even told Ferdaus’ father his son “obviously” had mental health problems, the FBI targeted him for a sting operation, sending an informant into Ferdaus’ mosque. Together, the FBI informant and Ferdaus devised a plan to attack the Pentagon and US Capitol, with the FBI providing fake weaponry and funding Ferdaus’ travel. Yet Ferdaus was mentally and physically deteriorating as the fake plot unfolded, suffering weight loss so severe his cheek bones protruded, loss of bladder control that left him wearing diapers, and depression and seizures so bad his father quit his job to care for Ferdaus. He was eventually sentenced on material support for terrorism and explosives charges to 17 years in prison with an additional 10 years of supervised release.
- **Use of Evidence Obtained by Coercion—Ahmed Omar Abu Ali:** Abu Ali, a US citizen, was swept up in a mass arrest campaign in Saudi Arabia in 2003. Ali alleged being whipped, denied food, and threatened with amputation, and ultimately provided a confession he says was false to Saudi interrogators. Later on trial in Virginia, the judge rejected Ali’s claims of torture and admitted his confession into evidence. He was convicted of conspiracy, providing material support to terrorists, and conspiracy to assassinate the president. He received a life sentence, which he is serving in solitary confinement at the supermax prison in Florence, Colorado.

- Abusive Detention Conditions—Uzair Paracha:** Uzair Paracha was held in solitary confinement for nearly two years before he was convicted on charges of material support. Nine months after his arrest and while he was refusing to take a plea deal, the federal government moved Paracha to a harsh regime of solitary confinement pursuant to Special Administrative Measures (SAMs)—special restrictions on his contact with others imposed on the grounds of protecting national security or preventing disclosure of classified material—ostensibly due to ties with Al-Qaeda. For a time, Paracha was only permitted to speak to prison guards. “You could spend days to weeks without uttering anything significant beyond ‘please cut my lights,’ ‘can I get a legal call/toilet paper/a razor,’ etc., or just thanking them for shutting our light,” he wrote to us. After he was convicted, the SAMs were modified to permit him to communicate with other inmates. “I faced the harshest part of the SAMs while I was innocent in the eyes of American law,” he wrote.
- Ignoring Alternative Solutions and Adverse Impact on American Muslim Communities—Adel Daoud:** Adel Daoud was 17 years old when undercover FBI employees began communicating with him through an online Islamic forum. At the time, Daoud was a reclusive student at an Islamic high school in a Chicago suburb, spending most of his time on the computer in his parents’ basement. He sought guidance from his parents about terms like jihad that he was reading about online; they told him jihad meant the struggle to be supportive of your parents. Yet online, undercover FBI employees slowly cultivated a fake plot with Daoud to attack a bar in downtown Chicago. Daoud’s arrest in fall 2013 shocked his community and others in the Chicago area, prompting speculation about why the FBI deployed undercover agents to ensnare the teenager, rather than contact his parents or community leaders. “These kids don’t wake up one day and decide, ‘I’m going to blow society up,’” a Muslim community advocate in Chicago told us, pointing out that just as some teenagers begin to turn to drugs, others may go online and start exploring extremist websites. Daoud’s trial is scheduled for November 2014.

While we examined more than two dozen specific cases in-depth, we also conducted a statistical analysis of the 494 cases the Justice Department identified as relating to international terrorism for the period from September 11, 2001 to December 31, 2011. Among the 494 cases examined, there were 917 separate convictions. The two most frequent offenses, “Providing Material Support” and “Conspiracy,” account for more than 1 in 4 of the convictions. The analysis examines the numbers and percentages of convictions secured through pleas or trials as well as the sentences that were meted out for certain offenses or combinations of offenses. While we documented problematic practices in 27 specific cases, others of the 494 raise similar concerns.

## **Adverse Impact on American Muslim Communities, Law Enforcement**

The cases we examined—and the hundreds of other terrorism prosecutions in the US since the September 11 attacks—have not occurred in a vacuum. At the same time as the government has aggressively sought out terrorism suspects, sometimes before the individual concerned has expressed any intention to use violence, it has sought to build relationships with American Muslim community leaders and groups, believing they are critical sources of information to prevent terrorist attacks.

It has also sought to build American Muslim communities’ sense of cohesion and trust in law enforcement, as part of a strategy for what it calls “Countering Violent Extremism.” However, many of the practices described in this report are counter to the goals of these policies: in some communities, they have led to anxiety and a fear of interacting with law enforcement.

Some Muslim community members said that fears of government surveillance and informant infiltration had negatively transformed the quality of the mosque from a place of spiritual sanctuary and togetherness to one of vigilance. Now, they said, they must watch what they say, to whom, and how often they attend services.

The impact on communities and individuals is not uniform. Many advocates and community leaders said they continue to have strong relationships with local law enforcement. But with some American Muslims less willing to reach out to law

enforcement, the FBI's goal of learning of potential terrorist plots before they progress may have been thwarted by its own abusive investigation tactics.

There are significant changes that the US government can implement immediately to reduce the rate of people being prosecuted with little or no evidence of intent to engage in terrorism, and to improve their relationships with American Muslim communities. These include:

## **Key Recommendations to the US Federal Government**

- Restrict the use of informants and ensure the practice is subject to robust oversight. Informants should not be sent into community or religious institutions in pre-investigation stages before there is particularized suspicion of wrongdoing.
- Develop rights-respecting partnerships with local community groups and support community-driven programs as an alternative to aggressive investigations that can lead to abuses and end up doing more harm than good.
- Ensure that prosecutors do not charge individuals or groups for providing material support based on activity protected under freedom of expression principles of international human rights law.
- Ensure humane prison conditions, and do not subject prisoners to prolonged solitary confinement.

## Methodology

This report is primarily based on interviews conducted between April 2012 and February 2013, information obtained from Freedom of Information Act (FOIA) requests, court documents, and other publicly available sources.

Human Rights Watch and Columbia Law School's Human Rights Institute conducted more than 215 interviews with individuals charged or convicted of terrorism-related crimes, members of their families and members of their communities, criminal defense attorneys, judges, current and former federal prosecutors, government officials, academics, and other experts.

In choosing which cases to investigate, we sought to explore cases that represented a cross-section of the post-September 11 terrorism prosecutions, ranging in time, geography, and type of investigation. We chose to examine cases that spanned the timeline from the months immediately after the September 11, 2001 attacks to those in which defendants were only recently indicted, in an effort to explore the broadest possible post-9/11 timeframe. Of the 27 cases we examined, 10 involved indictments before 2006, 10 involved indictments between 2006 and 2009, and 8 involved indictments since 2010. We sought cases from across the United States, in order to include the various narratives of Muslim communities and account for regional investigative and prosecutorial differences. Our cases generally fell into four regional clusters— northeast, midwest, south, and northwest—both for ease of research and to allow for in-depth examination of particular communities. We spoke with families and community members in 10 cities, frequently accounting for multiple Muslim communities within each city.

We closely reviewed 27 federal prosecutions that involved 77 total defendants by examining publicly available court documents recovered from public databases or defense counsel records. Of these 77 defendants, we examined in-depth the experiences of 42. We sought to speak with each individual, but were sometimes advised by defense counsel or families to refrain from corresponding with defendants due to ongoing litigation or for other reasons. In all 20 cases where litigation was no longer ongoing, or in which defense counsel or family assented to

our requests for interviews, we sought access from the Bureau of Prisons to a confidential in-person interview with detained individuals. We were granted access to four individuals. In denying two of our access requests, the Bureau of Prisons advised us to submit new requests detailing our research protocols, which we did in March and June 2013. We received no response.

Where the Bureau of Prisons denied our request to interview detained individuals, we sought to correspond with them by letter, email or telephone, and corresponded with an additional 12 detainees in this way. We also continued correspondence with two detainees with whom we were able to speak in person. In addition to our communication with defendants currently in Bureau of Prisons facilities, we interviewed in person three defendants who had completed their sentences in federal prison or who were held at a detention facility other than a federal prison.

For the 42 individuals involved in cases examined in this report, we conducted in-depth interviews with a total of more than 123 people, including defense counsel, family members, friends, defense experts, and representatives from civil society organizations that work on issues directly related to these cases. In addition, we requested interviews with prosecutors in 22 cases: three current prosecutors and four former prosecutors agreed to speak with us. The remainder either turned down or did not respond to our request.

While we attempted to speak with community members in most cities, mosque attendees were often reluctant to speak for fear of surveillance or government scrutiny for any association with the cases we were examining. When necessary, we provided family members and congregants the opportunity to be interviewed by us without providing a last name.

In each of the 27 cases that form the basis of this report, we obtained publicly available court records from Public Access to Court Electronic Records (PACER); occasionally we received copies of publicly filed court records from defendants, family members or their counsel.

For information on detention conditions, we documented the experience of solitary confinement for 32 individuals charged with or convicted of terrorism offenses or alleged to be involved in terrorism. Twenty-four of those individuals were held in solitary confinement prior to their conviction; 8 were held in solitary post-conviction. We also documented the experiences of 14 current or former Communications Management Unit (CMU) detainees in person, or via email or by telephone, and 6 individuals subjected to Special Administrative Measures (SAMs).

To account for the almost 500 cases that the National Security Division of the Department of Justice (DOJ-NSD) considers “terrorism or terrorism-related” prosecutions, we also conducted a statistical analysis of these cases using publicly available government and court records. On June 6, 2012, pursuant to a FOIA request, the DOJ-NSD released its most updated version of its chart of terrorism or terrorism-related crimes, documenting basic criteria of these cases. Those 494 cases span from September 11, 2001 to December 31, 2011.<sup>1</sup> The chart only includes those cases resulting in convictions.<sup>2</sup> In order to gauge statistical correlations across criminal charge, sentence, and detention conditions, we disaggregated the information from the static chart and input it into a database for analysis with additional information obtained from a variety of primary sources including: each case’s docket, the indictment or superseding indictment in the case, and the judgment entry in the case, when those documents were available. Detention status and location for each defendant were cross-checked with the Bureau of Prison’s Inmate Locator service between the dates of July 23, 2013 and July 25, 2013. Where relevant, those statistics were integrated into this report. That data is also publicly available online at <http://www.bop.gov/inmateloc/>.

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<sup>1</sup> In 2012, Human Rights First received these updated statistics from the Department of Justice through a Freedom of Information Act request, “Let the Numbers do the Talking: Federal Courts Work [Infographic],” Human Rights First press release, July 12, 2012, <http://www.humanrightsfirst.org/press-release/let-numbers-do-talking-federal-courts-work-infographic> (accessed June 18, 2014) ; US Department of Justice, National Security Division, “Introduction to National Security Division Statistics on Unsealed International Terrorism and Terrorism-Related Convictions,” June 6, 2012, <http://www.fas.org/irp/agency/doj/dojo6o612-stats.pdf> (accessed June 18, 2014).

<sup>2</sup> DOJ-NSD makes a distinction between “international terrorism” and “domestic terrorism,” and crimes related solely to domestic terrorism are explicitly excluded from its chart. See US Department of Justice, National Security Division, “Introduction to National Security Division Statistics on Unsealed International Terrorism and Terrorism-Related Convictions,” <http://www.fas.org/irp/agency/doj/dojo6o612-stats.pdf> (accessed June 28, 2014), pp. 1-2.



We pursued requests under the Freedom of Information Act from the Bureau of Prisons, the Federal Bureau of Investigation, and the Department of Justice National Security Division. We met with the FBI and DOJ-NSD in person, and conducted written correspondence. We submitted written questions to DOJ-NSD on February 25, 2013, which were answered in writing on May 23, 2013 (see Appendix - D). After an initial meeting with the FBI's Office of General Counsel and Office of Public Affairs, we submitted written questions to the FBI on November 21, 2012 (see Appendix - D). Between November 2012 and May 2013, we followed up with the FBI General Counsel's office eight times and received five emails assuring us that our questions were under review and that responses were being prepared or finalized. At time of writing, the FBI has not provided answers to our questions or formally declined to respond to our letter. We shared a copy of this report with DOJ-NSD and the FBI prior to publication.

All interviews were conducted in English when possible, with Arabic or Urdu used in **four** cases, via translator. All participants were informed of the purpose of the interview and consented orally or in writing. No interviewee received compensation for providing information. Where appropriate, Human Rights Watch and Columbia Law School's Human Rights Institute provided interviewees with contact information for organizations providing legal, counseling or social services.

# I. “Homegrown Terrorism” and the Preventive Approach to Investigations

Between 2002 and 2011, nearly 500 individuals were convicted of terrorism or terrorism-related offenses in the United States, with the federal government charging an average of about 40 individuals every year, according to Department of Justice data.<sup>3</sup>

Some of these cases resulted from what appear to have been deliberate attempts at terrorism or terrorism financing.<sup>4</sup> However, in most of the cases involving the use of informants we reviewed in depth for this report, the defendants do not appear to

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<sup>3</sup> See Methodology. In analyzing the data, we relied on publicly available information released by the Department of Justice. In September 2013, a federal audit revealed that the Justice Department had overstated the number of terrorism convictions, as well as several other key indicators. Ellen Nakashima, “Audit: Justice Department office overstated terrorism conviction statistics,” *Washington Post*, September 17, 2013, [http://articles.washingtonpost.com/2013-09-17/world/42141849\\_1\\_terrorism-charges-u-s-attorneys-horowitz](http://articles.washingtonpost.com/2013-09-17/world/42141849_1_terrorism-charges-u-s-attorneys-horowitz) (accessed June 18, 2014). It is not possible to determine how the audit’s findings relate to the information publicly released by the Justice Department because individual-level data were not provided, making it impossible to determine which inaccuracies, if any, were contained in the aggregated document.

<sup>4</sup> According to one study, since 9/11, terrorist attacks by American Muslims have caused 37 deaths within the US, spread over seven cases. Charles Kurzman, “Muslim-American Terrorism in 2013,” University of North Carolina, Chapel Hill, Department of Sociology, February 5, 2014, [http://sites.duke.edu/tcths/files/2013/06/Kurzman\\_Muslim-American\\_Terrorism\\_in\\_2013.pdf](http://sites.duke.edu/tcths/files/2013/06/Kurzman_Muslim-American_Terrorism_in_2013.pdf) (accessed June 18, 2014). There is no single definition of terrorism under international law, and many of the definitions used by countries are overly broad. However, the United Nations (UN) special rapporteur on human rights and counterterrorism has argued that the concept of terrorism includes only those acts or attempted acts “intended to cause death or serious bodily injury” or “lethal or serious physical violence” against one or more members of the population, or that constitute “the intentional taking of hostages” for the purpose of “provoking a state of terror in the general public or a segment of it” or “compelling a Government or international organization to do or abstain from doing something.” See UN Human Rights Council, Report of the Special Rapporteur on promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Ten areas of best practices in countering terrorism, A/HRC/16/51, December 22, 2010, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/178/98/PDF/G1017898.pdf?OpenElement> (accessed June 18, 2014), para. 28. Scheinin’s successor, Ben Emmerson, has stated he intends to “adopt and build” on these recommended practices. “Intervention,” UN Special Rapporteur on counter terrorism and human rights, Ben Emerson, speech before the Secretary-General’s Symposium on International Terrorism Cooperation, UN Headquarters New York, September 19, 2011, transcript at [http://www.un.org/en/terrorism/ctitf/pdfs/sr\\_on\\_ct\\_and\\_hr\\_sg\\_symposium.pdf](http://www.un.org/en/terrorism/ctitf/pdfs/sr_on_ct_and_hr_sg_symposium.pdf) (accessed June 18, 2014). Similarly, the UN Secretary-General’s High Level Panel on Threats, Challenges and Change concluded that for a violent act to be deemed terrorist, its purpose must be “to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.” UN High Level Panel on Threats, Challenges and Change, “A More Secure World: Our Shared Responsibility,” December 2004, [http://www.un.org/en/peacebuilding/pdf/historical/hlp\\_more\\_secure\\_world.pdf](http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf) (accessed June 18, 2014), para. 164(d). For more information, see Human Rights Watch, *In the Name of Security: Counterterrorism Laws Worldwide since September 11* (New York: Human Rights Watch, 2012), [http://www.hrw.org/sites/default/files/reports/global0612ForUpload\\_1.pdf](http://www.hrw.org/sites/default/files/reports/global0612ForUpload_1.pdf), pp.17-25.

have been involved in terrorist plotting or financing at the time the government began to investigate them. Rather, in these cases, the government's purpose appears to have been preventive: to root out and prosecute individuals the government believes might eventually plan and carry out acts of terrorism. To this end, the US government has substantially changed the way it conducts policing and investigations related to terrorism—loosening regulations and standards governing the conduct of investigations, and engaging in extensive surveillance and use of informants, particularly in American Muslim communities.

## Post 9/11 Changes to Priorities and Rules Governing Federal Terrorism Investigations

Following the September 11, 2001 attacks, the FBI reorganized to make prevention of terrorism its top institutional priority, shifting resources from traditional crime investigations to counterterrorism. More than 40 percent of the FBI's operating budget of \$3.3 billion is now devoted to counterterrorism.<sup>5</sup>

In 2006, then-Deputy Attorney General Paul McNulty described the Department of Justice's preventive approach as “doing everything in its power to identify risks to our nation's security at the earliest stage possible and to respond with forward-leaning—preventative—prosecutions.”<sup>6</sup> Congress assisted by allocating significant funding to the FBI to further the goal of prevention.<sup>7</sup>

At the same time, the US government substantially downgraded legal restrictions on the Department of Justice and FBI in particular, which had been designed to

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<sup>5</sup> See US Department of Justice, Federal Bureau of Investigation, “Report to the National Commission on Terrorist Attacks upon the United States: The FBI's Counterterrorism Program Since September 2001,” April 14, 2004, [http://www.fbi.gov/stats-services/publications/fbi\\_ct\\_911com\\_0404.pdf](http://www.fbi.gov/stats-services/publications/fbi_ct_911com_0404.pdf) (accessed June 18, 2014); US Department of Justice, Office of Inspector General, Audit Division, “The External Effects of the Federal Bureau of Investigation's Reprioritization Efforts,” Audit Report no. 05-37 (September 2005), <http://www.justice.gov/oig/reports/FBI/a0537/final.pdf> (accessed June 18, 2014); US Department of Justice, Federal Bureau of Investigation, FY 2013 Budget Request At A Glance, <http://www.justice.gov/jmd/2013summary/pdf/fy13-fbi-bud-summary.pdf> (accessed June 19, 2014).

<sup>6</sup> Deputy Attorney General Paul J. McNulty, “Prepared Remarks at the American Enterprise Institute,” Washington, DC, May 24, 2006, [http://www.justice.gov/archive/dag/speeches/2006/dag\\_speech\\_060524.html](http://www.justice.gov/archive/dag/speeches/2006/dag_speech_060524.html) (accessed June 19, 2014).

<sup>7</sup> See US Department of Justice, Federal Bureau of Investigation, “Report to the National Commission on Terrorist Attacks upon the United States: The FBI's Counterterrorism Program Since September 2001,” [http://www.fbi.gov/stats-services/publications/fbi\\_ct\\_911com\\_0404.pdf](http://www.fbi.gov/stats-services/publications/fbi_ct_911com_0404.pdf) (accessed July 11, 2014).

protect civil liberties during investigations and some of which had been introduced in response to past abusive behavior.<sup>8</sup> Instead of authorizing limited criminal investigations, the rules authorize and encourage the FBI to perform what amounts to expansive intelligence collection. These changes include:

- **Increased surveillance of communications:** Congress expanded the communications that may be subject to surveillance under the Foreign Intelligence Surveillance Act (FISA) (see section IV).
- **Expansive information collection:** The Department of Justice, under revised Attorney General Guidelines, gave the FBI expansive authority to conduct pre-investigation “assessments”—gathering information in the absence of suspicion of wrongdoing or threat to national security—for unlimited periods.<sup>9</sup> As a Brennan Center study notes, the FBI can now “gather and store in their databases information about where individuals pray, what they read, and who they associate with.”<sup>10</sup> The FBI may also task and recruit informants from a particular community without any articulable suspicion of criminal activity, in contrast to previous limits.<sup>11</sup>

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<sup>8</sup> See Amna Akbar, “Policing ‘Radicalization,’” *UC Irvine Law Review*, vol. 3, no. 4 (December 2013). For a description of past abuses and recommended reforms, see Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities, 94<sup>th</sup> Congress, 2<sup>nd</sup> Session, “Final Report on Intelligence Activities and the Rights of Americans,” Book II, Rep. No. 94-755, April 26, 1976, [http://www.intelligence.senate.gov/pdfs94th/94755\\_II.pdf](http://www.intelligence.senate.gov/pdfs94th/94755_II.pdf) (accessed June 19, 2014), p. 5. Human Rights Watch has previously documented abuses related to relaxation of legal standards regarding national security law enforcement practices. See Human Rights Watch, *Witness to Abuse: Human Rights Abuses under the Material Witness Law since September 11*, vo.17, no. 2(G), June 2005, <http://www.hrw.org/reports/2005/uso605/uso605.pdf>. For an analysis and comparison of the changing rules, see Brennan Center for Justice, *Domestic Intelligence: New Powers, New Risks* (New York: Brennan Center for Justice, 2011), <http://www.brennancenter.org/sites/default/files/legacy/AGGReportFINALed.pdf> (accessed June 19, 2014), p. 2.

<sup>9</sup> See John Ashcroft, US Department of Justice, The Attorney General’s Guidelines for FBI National Security Investigations and Foreign Intelligence Collection § II.A (2003) (Ashcroft Guidelines), <http://www.justice.gov.archive/olp/ag-guidelines-10312003.pdf> (accessed June 24, 2014) (authorizing “the proactive collection of information concerning threats to the national security, including information on individuals, groups, and organizations of possible investigative interest, and information on possible targets of international terrorist activities or other national security threats”).

<sup>10</sup> Brennan Center for Justice, *Domestic Intelligence: New Powers, New Risks*, p. 2.

<sup>11</sup> See Michael B. Mukasey, US Department of Justice, The Attorney General’s Guidelines For Domestic FBI Operations § II.A.4.e, f, j (2008) (Mukasey Guidelines), <http://www.justice.gov/ag/readingroom/guidelines.pdf> (accessed June 24, 2014). Under previous guidelines, informants were only allowed in full investigations, and after 1983, in preliminary inquiries. *FBI Domestic Security Guidelines*, Oversight Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 98th Cong. 67-85 (1983), § II.B.

- **Invasive investigation techniques:** FBI agents can now use invasive investigation methods—attending religious services or political events,<sup>12</sup> or tracking an individual’s movements—without having a reasonable indication that anyone is breaking the law. This is due to substantial revisions of the Attorney General Guidelines and the FBI’s Domestic Investigations and Operations Guide (DIOG).<sup>13</sup> (Some state and local law enforcement also engage in these activities, but they are not a focus of this report.)<sup>14</sup>

## Theories of “Homegrown Terrorism” and “Radicalization”

At the same time, the FBI—as well as state and local law enforcement—developed new theories about “homegrown terrorism” and “radicalization.” The notion was that Al-Qaeda would seek to recruit and radicalize American Muslims to conduct the next major terrorist attack, and use the US as a base for fundraising.<sup>15</sup> Over time,

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<sup>12</sup> See Ashcroft Guidelines, § VI.A and B; see also, US Department of Justice, Federal Bureau of Investigations, Domestic Investigation and Operations Guide § 18.5.5.3.C (DIOG) (2011), [http://vault.fbi.gov/FB%20Domestic%20Investigations%20and%20Operations%20Guide%20\(DIOG\)/fbi-domestic-investigations-and-operations-guide-diog-2011-version/](http://vault.fbi.gov/FB%20Domestic%20Investigations%20and%20Operations%20Guide%20(DIOG)/fbi-domestic-investigations-and-operations-guide-diog-2011-version/) (accessed June 24, 2014).

<sup>13</sup> For example, the 1976 Levi Guidelines, the high watermark of restrictions on the FBI’s powers, permitted a preliminary investigation only where there were “allegations or other information that an individual or group may be engaged in activities which involve or will involve the use of force or violence and which involve or will involve the violation of federal law.” Edward H. Levi, US Department of Justice, Domestic Security Investigation Guidelines § II.C. (1976). In contrast, the Ashcroft Guidelines permitted the initiation of preliminary investigations, which involve intrusive investigative methods, merely where “information is received of such a nature that some follow-up as to the possibility of criminal activity is warranted.” John Ashcroft, US Department of Justice, The Attorney General’s Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations § II.A (2002) <http://www.usdoj.gov/olp/generalcrimes2.pdf>; Mukasey Guidelines, § II.B.3.b; see also DIOG, § 18.6.

<sup>14</sup> A growing number of state and local law enforcement are part of Joint Terrorism Task Forces with the FBI, which exist in 103 US cities. See US Department of Justice, Federal Bureau of Investigation, “Protecting America from Terrorist Attack: Our Joint Terrorism Task Forces,” [http://www.fbi.gov/about-us/investigate/terrorism/terrorism\\_jtfts](http://www.fbi.gov/about-us/investigate/terrorism/terrorism_jtfts) (accessed June 19, 2014).

<sup>15</sup> In its 2004-2009 Strategic Plan, the FBI noted: “The FBI’s greatest concern currently is the threat from Al-Qaeda attack cells” that “maintain strict operational and communications security” with “militant Islamic groups and mosques in the United States.” It warned of “an extensive militant Islamic presence in the United States” focused on “fund-raising, recruitment, and training.” US Department of Justice, Federal Bureau of Investigation, Office of Victim Assistance, “Federal Bureau of Investigation Strategic Plan: 2004 – 2009,” September 9, 2004, <https://www.hsdl.org/?viewanddid=466149> (accessed June 19, 2004), pp. 26-27. NCJRS Abstracts Database (206803). See also, Donald Van Duyn, Deputy Assistant Director, Federal Bureau of Investigation Counterterrorism Division, testimony before the House Homeland Security Committee Subcommittee on Intelligence, Information Sharing, and Terrorism Risk Assessment, Washington, DC, September 20, 2006, transcript at <http://www.fbi.gov/news/testimony/islamic-radicalization> (accessed June 19, 2014) (“Al-Qaeda is also attempting to broaden its appeal to English-speaking Western Muslims”).

law enforcement also began to focus on the prospect of a “lone wolf” terrorist, who was inspired by Al-Qaeda ideology but acted alone.<sup>16</sup>

According to “radicalization” theories, “violent extremists”<sup>17</sup> progress through particular stages and adopt extremist beliefs that may lead them to take violent or illegal actions.<sup>18</sup> At least at the federal level, these theories appear to have driven actual federal terrorism investigations, with FBI behavioral analysts seeking to identify terrorism suspects at various stages of the process.<sup>19</sup> Some studies have debunked radicalization theories, and even federal agencies have conflicting views

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<sup>16</sup> In August 2011 President Obama stated, “[T]he most likely scenario that we have to guard against right now ends up being more of a lone wolf operation than a large, well-coordinated terrorist attack.” CNN Anchor Wolf Blitzer interview with Barack Obama, “Obama: Biggest terror fear is the lone wolf,” post to “CNN Security Clearance” (blog), *CNN.com*, August 16, 2011, <http://security.blogs.cnn.com/2011/08/16/obama-biggest-terror-fear-is-the-lone-wolf/> (accessed June 19, 2014). This transition in focus was accelerated by the December 2008 Fort Hood shooting by US Army Major Nidal Malik Hasan, who had sought guidance from Al-Qaeda in the Arabian Peninsula figure Anwar Al Awlaki but ultimately acted alone. See William H. Webster Commission, “Final Report of the William H. Webster Commission on the Federal Bureau of Investigation, Counterterrorism Intelligence, and the Events at Fort Hood, Texas on November 5, 2009,” July 19, 2012, <http://www.fbi.gov/news/pressrel/press-releases/final-report-of-the-william-h.-webster-commission> (accessed June 19, 2014).

<sup>17</sup> The government defines “violent extremists” as individuals who support or commit ideologically motivated violence to further political, social, or religious goals. Although the government recognizes that right-wing and other ideology-based violence is of concern, it “prioritize[s] preventing violent extremism and terrorism that is inspired by al-Qaida and its affiliates....” Executive Office of the President of the United States, “Strategic Implementation Plan for Empowering Local Partners to Prevent Violent Extremism in the United States,” December 1, 2011, <http://www.whitehouse.gov/sites/default/files/sip-final.pdf> (accessed June 19, 2014), p.2.

<sup>18</sup> The government’s theories of radicalization are not uniform. The New York Police Department’s (NYPD) “conveyor belt” theory, described in a 2007 report, argues that predictable behaviors and patterns mark the journey of a terrorist, through various stages of extremist indoctrination and toward “jihadization,” i.e., planning for a terrorist attack. New York Police Department Intelligence Division, “Radicalization in the West: The Homegrown Threat,” May 2, 2007, [http://www.nypdshield.org/public/SiteFiles/documents/NYPD\\_Report-Radicalization\\_in\\_the\\_West.pdf](http://www.nypdshield.org/public/SiteFiles/documents/NYPD_Report-Radicalization_in_the_West.pdf) (accessed June 19, 2014). In 2009, the NYPD issued a revised version of the report that disavowed some aspects of the 2007 report, although Muslim and civil liberties groups criticized it as continuing to include “numerous errors and harmful stereotypes.” “NYPD Clarification of Radicalization Report a ‘Welcome First Step,’” Muslim Public Affairs Council, September 10, 2009, <http://www.mpac.org/issues/national-security/nypd-clarification-of-radicalization-report-a-welcome-first-step.php> (accessed June 19, 2014). The FBI’s radicalization theory likewise described stages: preradicalization, identification, indoctrination, and action. Carol Dyer et al., “Countering Violent Islamic Extremism,” *FBI Law Enforcement Bulletin*, vol. 76, no. 12 (December 2007), <http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2007-pdfs/deco7leb.pdf> (accessed June 19, 2014), pp. 3-9.

<sup>19</sup> The FBI’s Behavioral Analysis Unit is involved in “operational threat assessment” and terrorism investigations, although we were only able to learn of its role as a consultant on the level of threat posed by an individual in one of our cases: Hosam Smadi (see section II). “Foiled: Inside the Smadi Case,” US Department of Justice, Federal Bureau of Investigation press release, November 5, 2010, <http://www.fbi.gov/news/stories/2010/november/terror-plot-foiled/terror-plot-foiled> (accessed June 19, 2010). For a general description of the unit, see US Department of Justice, Federal Bureau of Investigation, “Report to the National Commission on Terrorist Attacks upon the United States: The FBI’s Counterterrorism Program Since September 2001,” April 14, 2004, [http://www.fbi.gov/stats-services/publications/fbi\\_ct\\_g11com\\_0404.pdf](http://www.fbi.gov/stats-services/publications/fbi_ct_g11com_0404.pdf) (accessed June 28, 2014).

on their validity.<sup>20</sup> The FBI now believes that the threat and activity of “homegrown violent extremists,” though growing, is also unpredictable.<sup>21</sup>

Fears of homegrown terrorism and radicalization theories have driven federal agencies to treat American Muslim communities as uniquely susceptible to terrorist propaganda and to subject them to greater government scrutiny.<sup>22</sup> Yet this assumption is unsubstantiated. As a 2009 Pew study put it, “[v]iolent jihad is discordant with the values, outlook and attitudes of the vast majority of Muslim Americans, most of whom reject extremism.”<sup>23</sup>

## Widespread Surveillance of American Muslims and Use of Informants

With expanded authorities, and based on radicalization theories, the FBI has conducted surveillance on communities based on their religious and ethnic make-up. It has created demographic profiles to map the racial, ethnic and religious composition of neighborhoods, including the location of mosques and beliefs of congregants.<sup>24</sup> As we describe in section VII, the FBI has also used voluntary

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<sup>20</sup> For a discussion of divergent views of radicalization among US government agencies, see Faiza Patel, *Rethinking Radicalization* (New York: Brennan Center for Justice 2011), <http://www.brennancenter.org/publication/rethinking-radicalization> (accessed July 11, 2014), pp.13-18.

<sup>21</sup> “These individuals have no typical profile; their experiences and motives are often distinct,” Director of the FBI Robert S. Mueller told a US Senate committee in September 2012. “But they are increasingly savvy and willing to act alone, which makes them difficult to find and to stop.” Robert S. Mueller, Director, Federal Bureau of Investigation, statement before the Senate Committee on Homeland Security and Governmental Affairs, Washington, DC, September 19, 2012. “Supporters of these groups and their associated ideologies come from different socioeconomic backgrounds, ethnic and religious communities, and areas of the country, making it difficult to predict where violent extremist narratives will resonate.” Office of the President, “Empowering Local Partners to Prevent Violent Extremism in the United States,” August 2011, [http://www.whitehouse.gov/sites/default/files/empowering\\_local\\_partners.pdf](http://www.whitehouse.gov/sites/default/files/empowering_local_partners.pdf) (accessed July 10, 2014), p. 1.

<sup>22</sup> See section VII.

<sup>23</sup> The Pew Forum on Religion and Public Life, “Little Support for Terrorism Among Muslim Americans,” December 19, 2009, <http://www.pewforum.org/Politics-and-Elections/Little-Support-for-Terrorism-Among-Muslim-Americans.aspx> (accessed July 10, 2014).

<sup>24</sup> In 2003, *Newsweek* reported that top FBI officials had ordered each of the Bureau’s 56 field offices to develop “demographic” profiles of their localities that included tallies of the number of mosques, “to help set investigative goals.” Michael Isikoff, “Investigators: The FBI Says, Count the Mosques,” *Newsweek*, February 2, 2003, <http://www.thedailybeast.com/newsweek/2003/02/02/investigators-the-fbi-says-count-the-mosques.html> (accessed June 19, 2014). In October 2006, the New York Times reported the FBI’s adoption of a new program called Domain Management, a data-mining system used to “identify threats.” A high-level FBI officer reportedly put on a demonstration of Domain Management for other FBI agents, displaying a map of San Francisco “pocked with data showing where Iranian immigrants were clustered,” where, he said, “an F.B.I. squad was ‘hunting.’” Scott Shane and Lowell Bergman, “F.B.I. Struggling to Reinvent Itself to Fight Terror,” *New York Times*, October 10, 2006, <http://www.nytimes.com/2006/10/10/us/10fbi.html?pagewanted=print&r=0> (accessed June 19, 2014). Documents that the American Civil Liberties Union (ACLU) obtained through FOIA corroborate these reports.

interviews and activities presented as “community outreach” to solicit information from American Muslims, which have fed fears of law enforcement and distrust within communities.

As part of the “assessments” that the FBI now has the authority to conduct, the FBI has utilized undercover agents or paid informants. Posing as newcomers or converts, informants infiltrate religious and cultural institutions in communities of which they are not already a part. As several journalists have documented, these informants secretly gather information on religious practices and political beliefs of community members attending mosques and participating in cultural events.<sup>25</sup> Informants may also pose as newcomers at coffee shops, delis, and other local hangouts, seeking to gather information or befriend and inform on locals they meet. It is not clear how often the FBI uses paid and unpaid informants generally, or in national security cases in particular, but in a budget request from 2008 the FBI stated it has over 15,000 paid informants.<sup>26</sup>

The FBI has repeatedly denied conducting surveillance solely based on race or ethnicity<sup>27</sup> or sending informants into mosques to “troll” for leads, although as we describe in the next chapter, it has clearly done the latter.<sup>28</sup>

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American Civil Liberties Union, “ACLU EYE on the FBI: The FBI is Engaged in Unconstitutional Racial Profiling and Racial ‘Mapping,’” October 20, 2011, [https://www.aclu.org/files/assets/aclu\\_eye\\_on\\_the\\_fbi\\_alert\\_-\\_fbi\\_engaged\\_in\\_unconstitutional\\_racial\\_profiling\\_and\\_racial\\_mapping\\_o.pdf](https://www.aclu.org/files/assets/aclu_eye_on_the_fbi_alert_-_fbi_engaged_in_unconstitutional_racial_profiling_and_racial_mapping_o.pdf) (accessed June 19, 2014). For an analysis of this and related practices, see Akbar, “Policing ‘Radicalization,’” *UC Irvine Law Review*.

<sup>25</sup> For example, in February 2012, FBI informant Arvinder Singh alleged that the FBI asked him to infiltrate mosques throughout Iowa and particularly in Des Moines, giving him pictures of persons of interest and asking him to report on their conversations. Kiran Khalid, “Iowa Muslim Leader: Law enforcement betrayed us,” post to “In America” (blog), *CNN.com*, January 3, 2012, <http://inamerica.blogs.cnn.com/2012/02/03/iowa-muslim-leader-law-enforcement-betrayed-us/> (accessed June 19, 2014). In another case, paid informant Craig Monteilh alleged that the FBI directed him to “gather as much information on as many people in the Muslim community as possible” at an Irvine, California mosque in July 2006—only two months after reportedly assuring the local community that they were not under surveillance. See First Amended Complaint Class Action ¶¶ 86-146, *Fazaga v. FBI*, 844 F.Supp.2d 1022 (C.D. Cal. 2012) (No. 8:11-cv-00301-CJC(VBKx)); “This American Life: The Convert,” Chicago Public Radio, August 10, 2012; see also generally, Trevor Aaronson, “The Informants,” *Mother Jones* magazine, September/October 2011, <http://www.motherjones.com/politics/2011/08/fbi-terrorist-informants?page=2> (accessed June 19, 2014); Petra Bartosiewicz, “To Catch a Terrorist: The FBI hunts for the enemy within,” *Harper’s* magazine, August 2011, <http://harpers.org/archive/2011/08/to-catch-a-terrorist/> (accessed June 19, 2014).

<sup>26</sup> Department of Justice, Federal Bureau of Investigation, “FY 2008 Authorization and Budget Request to Congress,” <http://www.fas.org/irp/agency/doj/fbi/2008just.pdf> (accessed June 19, 2014), pp. 4-24.

<sup>27</sup> “The FBI does not investigate individuals, groups, or communities based on ethnicity or race.” “FBI Response to ACLU Report,” US Department of Justice, Federal Bureau of Investigation press release, October 20, 2011, <http://www.fbi.gov/news/pressrel/press-releases/fbi-response-to-aclu-report> (accessed June 19, 2014).



The FBI has justified its “domain mapping” program, in which the FBI collects information on where ethnic and religious communities are located, by arguing that “terrorist and criminal groups target ethnic and geographic communities for victimization and/or recruitment.”<sup>29</sup> This approach to investigations is discriminatory and counterproductive, undermining trust in authorities in precisely the communities where law enforcement claims to want to build that trust.

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<sup>28</sup> Matt Apuzzo and Adam Goldman, “With CIA help, NYPD moves covertly in Muslim areas,” *Associated Press*, August 23, 2011, <http://www.ap.org/Content/AP-in-the-News/2011/With-CIA-help-NYPD-moves-covertly-in-Muslim-areas> (accessed June 19, 2014) (quoting then-FBI General Counsel Valerie Caproni: “If you’re sending an informant into a mosque when there is no evidence of wrongdoing, that’s a very high risk thing to do. You’re running right up against core constitutional rights. You’re talking about freedom of religion.”).

<sup>29</sup> “FBI Response to ACLU Report,” US Department of Justice, Federal Bureau of Investigation press release, October 20, 2011, <http://www.fbi.gov/news/pressrel/press-releases/fbi-response-to-aclu-report> (accessed June 29, 2014).

## II. Discriminatory and Overly Aggressive Investigations Using Informants

All of the high-profile domestic terrorism plots of the last decade, with four exceptions,<sup>30</sup> were actually FBI sting operations—plots conducted with the direct involvement of law enforcement informants or agents, including plots that were proposed or led by informants. According to multiple studies, nearly 50 percent of the more than 500 federal counterterrorism convictions resulted from informant-based cases; almost 30 percent of those cases were sting operations in which the informant played an active role in the underlying plot.<sup>31</sup>

For this report, we reviewed in-depth 13 law enforcement investigations where informants played an active and central role.<sup>32</sup> At least eight of the investigations we examined were sting operations in which government officials identified someone as a potential target, helped him plan a terrorist attack and subsequently arrested him for involvement in that plan.<sup>33</sup>

In a traditional sting operation, law enforcement officials, through an informant or undercover agent, give their target an opportunity to commit a crime he or she might not have committed otherwise. Traditional stings tend to take place when

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<sup>30</sup> The four exceptions are: the Boston Marathon bombing in 2013, an attempted car bombing at Times Square in 2010 by Faisal Shahzad, a plot to bomb the New York City subway system in 2009 involving Najibullah Zazi, and the shooting at an El Al counter at Los Angeles airport in 2002 involving Hesham Hadayet.

<sup>31</sup> Journalist Trevor Aaronson conducted a statistical study of terrorism-related prosecutions of 508 defendants and found that nearly half of the investigations resulting in terrorist-related charges involved the use of confidential informants. Of the 508 defendants convicted on terrorism or terrorism-related charges, 243 cases involved the use of an informant, 158 involved a sting operation, and 49 defendants were actually guided by the informant in forming the plan which would ultimately lead to their convictions. Aaronson, “The Informants,” *Mother Jones* magazine, <http://www.motherjones.com/politics/2011/08/fbi-terrorist-informants?page=2>. “Since 2009, nearly 50 percent of terrorism cases have involved informants.” New York University School of Law, Center on Law and Security, “Terrorist Trial Report Card: September 11, 2001 – September 11, 2011,” (undated) <http://www.lawandsecurity.org/Portals/o/Documents/TTRC%20Ten%20Year%20Issue.pdf> (accessed June 28, 2014).

<sup>32</sup> Yassin Aref and Mohammed Hossain, Barry Bujol; Adel Daoud; Newburgh 4 (James Cromitie, Laguerre Payen, David Williams, Onta Williams); Rezwan Ferdaus; Fort Dix (Shain Duka, Dritan Duka, Eljvir Duka, Mohamed Shnewer, Sardar Tartar); Raja Khan; Mohammed Mohamud; Adnan Mirza; Portland Seven (Jeffrey Leon Battle; Muhammad Ibrahim Bilal, Ahmed Ibrahim Bilal, Patrice Lumumba Ford, Maher Hawash, Habis Abdulla al Saoub); Tarik Shah; Matin Siraj; Hossam Smadi.

<sup>33</sup> Barry Bujol; Adel Daoud; Rezwan Ferdaus; Fort Dix (Shain Duka, Dritan Duka, Eljvir Duka, Mohamed Shnewer, Sardar Tartar); Mohammed Mohamud; Newburgh 4 (James Cromitie, Laguerre Payen, David Williams, Onta Williams); Matin Siraj; Hossam Smadi.

there is evidence of similar past criminal activity by the target, or a propensity towards committing a certain kind of criminal act. For example, a person suspected of buying drugs may be approached by an undercover agent pretending to be a drug dealer, or someone known to view child pornography online may be approached with an offer to meet a child in person. A prosecutor can bring charges against the target of an investigation when he or she seizes on the proffered opportunity, such as buying the drugs or agreeing to meet a child for illegal sexual conduct. Former FBI agent Michael German told us:

Today's terrorism sting operations reflect a significant departure from past practice. When the FBI undercover agent or informant is the only purported link to a real terrorist group, supplies the motive, designs the plot and provides all the weapons, one has to question whether they are combatting terrorism or creating it. Aggrandizing the terrorist threat with these theatrical productions only spreads public fear and divides communities, which doesn't make anyone safer.<sup>34</sup>

In many of the sting operations we examined, informants and undercover agents carefully laid out an ideological basis for a proposed terrorist attack, and then provided investigative targets with a range of options and the weapons necessary to carry out the attack. Instead of beginning a sting at the point where the target had expressed an interest in engaging in illegal conduct, many terrorism sting operations that we investigated facilitated or invented the target's willingness to act before presenting the tangible opportunity to do so. In this way, the FBI may have created terrorists out of law-abiding individuals.

In these cases, the informants and agents often seemed to choose targets based on their religious or political beliefs. They often chose targets who were particularly vulnerable—whether because of mental disability, or because they were indigent and needed money that the government offered them. In some cases—which have been particularly troubling for American Muslim communities—targets were seeking spiritual guidance, and the government

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<sup>34</sup> Email from Michael German, fellow at the Brennan Center for Justice, to Columbia Law School's Human Rights Institute, April 8, 2014.

informants or agents guided them towards violence. Relevant aspects of these cases are described below.

## Identifying Targets for Investigation Due to Religious or Political Views

As previously noted, the FBI’s “radicalization theory” appears to consider certain beliefs, sympathy with particular causes, and even certain forms of religious expression as likely precursors to terrorist activity.<sup>35</sup> While there seems to be little evidence to support this theory—and there is a great deal of disagreement among government agencies about the validity of “radicalization theories”—the FBI appears to have relied on it to such an extent that it has entirely subverted its traditional approach to investigations.

In the 13 sting cases we examined closely, paid informants and law enforcement officials relied on various political or religious indicators to determine the extent to which a target was a potential threat.

Some of the cases we reviewed appear to have begun as virtual fishing expeditions, where the FBI had no basis to suspect a particular individual of a propensity to commit terrorist acts. In those cases, the informant identified a specific target by randomly initiating conversations near a mosque. Assigned to raise controversial religious and political topics, these informants probed their targets’ opinions on politically sensitive and nuanced subjects, sometimes making comments that appeared designed to inflame the targets. If a target’s opinions were deemed sufficiently troubling, officials concerned with nascent radicalization pushed the sting operation forward. For example:

- *Case of the Newburgh Four.* In the “Newburgh Four” case, one of the defendants, James Cromitie, first met FBI informant Shahed Hussain in the parking lot of the Musjid Al-Iklhas mosque in Newburgh, New York in June 2008. At the FBI’s direction, the informant had been frequenting the mosque for months and trying to strike up conversations about jihad with people there.<sup>36</sup>

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<sup>35</sup> See description of the “radicalization theory,” described above.

<sup>36</sup> Trial Transcript at 1398, *United States v. Siraj*, 468 F.Supp. 2d 408 (E.D.N.Y. 2007) (No. 05-CR-104(NG)).

- *Case of Shawahar Martin Siraj*: In this case, Osama Eldawoody, a New York Police Department (NYPD) informant, first identified Siraj as part of an assignment, which began in August 2003, to monitor mosques in Brooklyn and Staten Island.<sup>37</sup> No publicly available reports indicate that Eldawoody's surveillance was based on suspicion of criminal activity; on the contrary, Eldawoody's reports to his handlers merely covered demographics and religious behaviors, such as the number of people at prayer services and the subject matter of sermons.<sup>38</sup> He met Siraj in September 2003 on one of his routine surveillance visits to Brooklyn. At the time, Siraj was working at his uncle's bookstore next door to the Bay Ridge mosque to support his family after his father had become disabled.<sup>39</sup> Eldawoody, 50, posed as a terminally ill nuclear engineer with deep knowledge about Islam. He told Siraj that suicide bombings were forbidden in Islam, but "killing the killers" was not.<sup>40</sup> He also showed Siraj pictures of human rights abuses against Muslims. Siraj described them in a letter written from prison:

[H]e showed me grotesque abuses of the Muslim prisoners at Abu Ghraib and added his emotional voice as to not wanting to die without a purpose, of cancer. Then while I was inflamed with emotions at work, he would give me websites that I should visit when I got home to keep me insightful [sic] overnight. On one occasion I was given a site where a young Iraqi girl was being raped by an American [sic] guard-dog. She was terrified and it was a very inciteful [sic] experience to see that before retiring at night. There were

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<sup>37</sup> Columbia Law School's Human Rights Institute interview with Martin Stolar, defense attorney for Siraj, New York, May 30, 2012.

<sup>38</sup> On his first trip to the Staten Island mosque, for example, Eldawoody reported on the number of people at each prayer service, the language in which sermons were given, and the languages spoken by attendees. He reported the presence or absence of donation boxes in the mosque, and was instructed to take down license plate numbers in the parking lot. Trial Transcript at 1019-1020, 1022, *Siraj*, 468 F.Supp. 2d 408 (No. 05-CR-104(NG)).

<sup>39</sup> *Ibid.*, pp.2606-2607. (Witness Testimony of Shahina Parveen, mother of Martin Siraj: "He had supported his father, because his father is disabled from his both ears and he has hernia, and he couldn't work any heavy work... [Martin] was very much concerned about the difficulties of his father, and he helped his father. He supported.") Siraj's family had emigrated from Pakistan in 1998. Cato, "The Weaponization of Immigration," *Background - Center for Immigration Studies* (February 2008), <http://www.cis.org/sites/cis.org/files/articles/2008/back108.pdf> (accessed July 8, 2014), p. 4.

<sup>40</sup> Trial Transcript at 1573, *Siraj*, 468 F.Supp. 2d 408 (No. 05-CR-104(NG)).

articles and photos of children mangled or decapitated or burnt alive.<sup>41</sup>

Multiple sting cases we examined were initiated on the basis of tips from citizens reporting Muslim religiosity as dangerous, or reports that later proved unreliable. For example:

- *Case of the Fort Dix Five*: The government claims that its case began on January 31, 2006, when a store clerk contacted the FBI. As he was converting a customer's VHS tape to a DVD, the clerk saw men with beards, the brothers Dritan and Eljvir Duka, saying "*Allahuakba*" (God is Greatest) in Arabic at a shooting range, and contacted the authorities.<sup>42</sup> But, Mohamed Shnewer, one of the other defendants, had been in touch with FBI informant Mahmoud Omar for months before the clerk called the police, suggesting the sting operation had begun months earlier.<sup>43</sup>
- *Case of Rezwan Ferdaus*: Ferdaus came to the attention of the FBI after an owner of a gun shop reported someone "acting suspiciously." Ferdaus was not the person in the store, but the car's license plate traced back to the Ferdaus family—leading to the FBI questioning him at home in October 2010.<sup>44</sup> On December 17, 2010, the FBI sent a confidential informant into a mosque Ferdaus was attending in Worcester, Massachusetts.<sup>45</sup>
- *Case of Yassin Aref*: Aref was the imam of Masjid As-Salam, a small storefront mosque in Albany, New York. Aref, originally from Kurdistan in northern Iraq, immigrated to the US in October 1999 as a refugee and

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<sup>41</sup> Shahawar Matin Siraj, "Accounting for My Many Wrongs," p. 3 (on file with Human Rights Watch).

<sup>42</sup> Consolidated Brief for Appellee at 6, *United States v. Shnewer*, No. 1:07-cr-00459-001 (D.N.J. Apr. 29, 2009), *aff'd in part, rev'd in part sub nom.* *United States v. Duka*, 671 F.3d 329 (3d Cir. 2011) (No. 09-2292, 09-2299, 09-2300, 09-2301, 09-2302).

<sup>43</sup> Direct Examination of Mahmoud Omar: "First time I met Mohamed Shnewer, around 2005." See Trial Transcript at 2781, *Shnewer*, No. 1:07-cr-00459-001 (D.N.J. Apr. 29, 2009).

<sup>44</sup> Transcript of Detention Hearing, November 14, 2011, at 35-36, 52, *United States v. Ferdaus*, No. 11-10331-RGS, 2011 WL 5909547 (D. Mass. Nov. 28, 2011).

<sup>45</sup> See Indictment, *Ferdaus*, No. 11-10331-RGS, 2011 WL 5909547; Affidavit of Gary S. Cacace, *Ferdaus*, No. 11-10331-RGS, 2011 WL 5909547.

settled in Albany.<sup>46</sup> He and his wife Zuhur have four children. Prior to his arrest in August 2004, Aref had no criminal record.<sup>47</sup> He had served as imam of the Albany mosque for almost five years.<sup>48</sup> The FBI first took interest in Aref when it found his name, Albany address, and phone number listed in a notebook collected during a military raid in Rawah, Iraq in June 2003.<sup>49</sup> The notebook was written in Kurdish, but the FBI's Arabic translator incorrectly translated the word *kak*, a common word in Kurdish for "brother," as "commander."<sup>50</sup> Informant Shahed Hussain targeted Aref, as well as another Albany Muslim named Mohammed Hossain, and the Albany mosque, starting in August 2003.<sup>51</sup> The prosecutors claimed Aref was an Al-Qaeda operative throughout the trial and appeal, despite evidence suggesting that Aref was not the operative the FBI had believed him to be.<sup>52</sup>

In other cases, government agents identified vulnerable young men and individuals with mental or intellectual disabilities, and exploited their vulnerabilities. In some of those cases, informants met young men in online chat rooms and engaged them in discussions, sometimes urging them down the perceived path toward radicalization, as occurred in the cases of Adel Daoud and Hosam Smadi, described further below. While it is true that young men and individuals with mental or intellectual disabilities have, on occasion, been involved in terrorism, and therefore cannot be ruled out for investigation, there are special concerns when highly aggressive and invasive police tactics are used on such vulnerable people.

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<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Columbia Law School's Human Rights Institute interview with Shamshad Ahmed, president of Masjid As-Salam, Albany, New York, June 20, 2012.

<sup>49</sup> Petitioner's Brief at 30, *United States v. Aref*, 285 Fed.Appx. 784 (2d. Cir. 2008) (No. 07-0981-cr), *aff'g* No. 1:04-cr-00402-TJM-1 (N.D.N.Y. Mar. 19, 2007) (No. 1:04-cr-00402-TJM-1, 2007 Term; renumbered No. 07-0981-cr, 2008 Term).

<sup>50</sup> Ibid., p.15

<sup>51</sup> Trial Transcript at 1894-1896, *Aref*, No. 1:04-cr-00402-TJM-1 (N.D.N.Y. Mar. 19, 2007).

<sup>52</sup> A November 2011 response to a FOIA request filed by Yassin Aref revealed that the FBI believed that Aref was actually an Al-Qaeda operative named Mohammed Yassin. Aref's attorneys recently filed a Motion to Vacate Sentence Conviction, alleging that Mohammed Yassin was in fact an Al-Qaeda agent who was killed in a 2010 missile strike in Gaza. Despite constructive knowledge of that fact, the prosecution continued to allege in ex parte filings to the District and Circuit courts that Yassin Aref was an Al-Qaeda agent named Mohammed Yassin. Freedom of Information Act Response, received November 18, 2011.

## Vulnerable Targets: People with Mental, Intellectual Disabilities, Indigent People

The FBI appears to have frequently targeted particularly vulnerable individuals with mental or intellectual disabilities. At least eight of the defendants in cases we examined showed serious signs early on that they struggled with mental or intellectual disabilities—diagnosed mental health problems or significantly low intelligence or difficulty comprehending basic concepts. These included:

- *Case of Shahawar Matin Siraj*: According to his attorney, Siraj was more interested in cartoons than world affairs when NYPD informant Osama Eldawoody began visiting him.<sup>53</sup> Once Eldawoody showed Siraj grotesque pictures of abuses against Muslims, Siraj described himself as “blinded” by emotions; Eldawoody reported to his NYPD handlers that Siraj was “impressionable.”<sup>54</sup> A forensic psychologist who evaluated Siraj for sentencing on behalf of the defense described Siraj as having impaired critical thinking and analytical skills, and diminished judgment. “Based on his intellectual limitations” the expert said, “he is susceptible to the manipulations and demands of others.”<sup>55</sup>

Siraj’s sister Saniya described her brother’s juvenile interests, saying, “Every day he would watch cartoons [and] play video games, Pokémon in particular.”<sup>56</sup> Even after his conviction, when he was placed in the Communication Management Unit in Terre Haute, Indiana (see section VI), Siraj’s first request was access to Pokémon.<sup>57</sup> Siraj wanted to please Eldawoody, whose alleged terminal illness reminded him of his father’s disability.<sup>58</sup> In late June 2004, Siraj told Eldawoody that he was like a father to

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<sup>53</sup> Columbia Law School’s Human Rights Institute interview with Saniya Siraj, Queens, New York, August 14, 2012.

<sup>54</sup> Trial Transcript at 2289, *United States v. Siraj*, 468 F. Supp. 2d 408 (E.D.N.Y. 2007) (No. 05-CR-104(NG)), *aff’d*, 533 F.3d 99 (2d Cir. 2008).

<sup>55</sup> Appendix, Forensic Psychological Evaluation, Alan M. Goldstein, Ph.D., Oct. 14, 2006, at A-359 – A-382, *Siraj*, 533 F.3d 99 (2d Cir. 2008) (No. 07-CR-0244). The prosecution did not request an independent psychological evaluation, but instead rejected Goldstein’s report as based on false information and analysis. United States Attorney Todd Harrison, Letter re: sentencing as to Shahawar Matin Siraj at 8-12, *Siraj*, 468 F. Supp. 2d 408 (E.D.N.Y. 2007) (No. 05-CR-104(NG)).

<sup>56</sup> Columbia Law School’s Human Rights Institute interview with Saniya Siraj, Queens, New York, August 15, 2012.

<sup>57</sup> *Ibid.*

<sup>58</sup> Trial Transcript at 2676-2670, *Siraj*, 468 F. Supp. 2d 408 (No. 05-CR-104(NG)). (Cross-Examination of Eldawoody).



him. Eldawoody reciprocated, telling Siraj he was like his son.<sup>59</sup> The plot with which Siraj was eventually charged—to attack the 34<sup>th</sup> Street subway station at Herald Square in New York City—took shape as Eldawoody began planning with Siraj and Siraj’s friend, James Elshafay, a high school dropout with an alcohol and drug problem, who was ultimately diagnosed with paranoid schizophrenia with delusions.<sup>60</sup> Siraj never quite agreed to the attack, saying he first had to ask his mother.<sup>61</sup> Nonetheless, he was arrested on August 27, 2004 and eventually charged, in a superseding indictment, with four counts of conspiring to attack the station between June and August 2004.<sup>62</sup>

- *Case of Adel Daoud*: The son of immigrants, Daoud was a 19 year-old student at his neighborhood Islamic high-school at the time of his September 2012 arrest. His mother, Mona, said in an interview that Daoud required extra assistance in school, and was heavily dependent on her: “He's not the person with a complete mind. He didn't talk until five. He was the last one of my kids to talk. He doesn't even talk Arabic....like the rest of our family, because he's slow.”<sup>63</sup>

Without many friends at school, Daoud was socially isolated and took refuge in the Internet, his parents told us. According to the criminal complaint, Daoud came to the government’s attention when he posted on online message boards and emailed material relating to violent jihad.<sup>64</sup> In May 2012, less than six months after Daoud turned 18, two FBI online undercover employees began emailing with him.<sup>65</sup> In July, Daoud met with an undercover FBI employee.

In August, a member of Daoud’s mosque overheard him talking about

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<sup>59</sup> Ibid., pp. 1453, 1505.

<sup>60</sup> Ibid., pp.1932, 1943, 1935.

<sup>61</sup> Trial Exhibit 20a, Transcript of Audio Disc #1, Conversation #1, United States v. Siraj, 468 F. Supp. 2d 408 (E.D.N.Y. 2007) (No. 05-CR-104(NG)), *aff'd*, 533 F.3d 99 (2d Cir. 2008).

<sup>62</sup> Superseding Indictment, *Siraj*, 468 F.Supp. 2d 408 (No. 05-CR-104(NG)).

<sup>63</sup> Columbia Law School's Human Rights Institute interview with Mona Daoud and Ahmed Daoud, parents of Adel Daoud, Hillside, Illinois, October 8, 2012.

<sup>64</sup> Criminal Complaint at 3, United States v. Daoud, No. 1:12-cr-00723 (N.D. Ill. filed Sept. 15, 2012).

<sup>65</sup> Ibid., p. 4.

jihad.<sup>66</sup> The leader of Daoud's mosque and his father told Daoud to stop talking about these topics, and another local imam told him that engaging in violent jihad was wrong.<sup>67</sup> Daoud even discussed the topic of jihad with his mother at home, who told us:

He asked "What [is] jihad?"... We tried to explain there is no jihad here. .... I told him when you give money to the poor, this [is] jihad. When you stay with your mother and father who need you, this is jihad. And he was so convinced, he said, "I'll stay with you mom."<sup>68</sup>

At this point, Daoud hesitated about what was religiously proper, and sought further religious guidance from the undercover employee, asking if his sheikh overseas could issue a *fatwah* (religious decree) justifying attacks on Americans.<sup>69</sup> The undercover employee told him his sheikh could not provide the *fatwah* and continued to plan the plot with Daoud.<sup>70</sup> On September 14, 2012, the undercover employee drove Daoud to downtown Chicago, to a green jeep loaded with fake explosives.<sup>71</sup> Daoud drove the jeep to the target location—a bar in downtown Chicago.<sup>72</sup> Daoud exited the jeep and attempted to detonate the device, after which he was taken into custody by the FBI.<sup>73</sup>

Mona Daoud expressed her confusion at the government's pursuit of her son, contending that he would not have been capable of such a plot on his own:

They say that he went downtown. He's never been downtown in his life....'Til now when I tell them how to go to

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<sup>66</sup> Ibid., p. 27.

<sup>67</sup> Columbia Law School's Human Rights Institute interview with Mona Daoud and Ahmed Daoud, October 8, 2012; see also, Criminal Complaint at 27-28, *Daoud*, No. 1:12-cr-00723, (N.D. Ill. filed Sept. 15, 2012).

<sup>68</sup> Columbia Law School's Human Rights Institute Interview with Mona Daoud and Ahmed Daoud, October 8, 2012.

<sup>69</sup> Criminal Complaint at 28, *United States v. Daoud*, No. 1:12-cr-00723 (N.D. Ill. filed Sept. 15, 2012).

<sup>70</sup> Ibid., p. 29.

<sup>71</sup> Ibid., p. 34.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

Jewel [a grocery store less than a mile from the Daoud home],  
he gets lost. I have to tell his little sister to go with him.<sup>74</sup>

- *Case of Hosam Smadi*: The FBI first identified Smadi on a website promoting terrorism in January 2009.<sup>75</sup> Undercover FBI agents initiated correspondence with him, first online and then later in person. During their written correspondence, Smadi repeatedly emphasized that he did not know much about Islam, did not want to hurt innocents, and wanted to learn more about Islam before proceeding with any violence.<sup>76</sup> Yet rather than encourage these views, the FBI appears to have encouraged him to pursue violence.

Throughout the government's correspondence with Smadi, an FBI behavioral analyst assessed his progress along the "radicalization spectrum." For example, on April 28, 2009, the analyst noted that Smadi was "experiencing anger displacement" from his mother's death, and that he was "motivated to please his father."<sup>77</sup> The analyst further noted, "[h]is mother's death places him at the first stage of the radicalization process known as pre-radicalization."<sup>78</sup> The analyst also noted Smadi's discussions on "jihadist" websites, noting that Smadi's "singular nature of Internet use, affirms a hypothesis—SMADI is acting as a lone wolf exhibiting three of the four stages of the radicalization process 1) pre-radicalization, 2) identification and 3) indoctrination."<sup>79</sup>

In May, after viewing a video tape of Smadi's first in-person meeting with a government agent, the FBI analyst recommended that the government

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<sup>74</sup> Columbia Law School's Human Rights Institute interview with Mona Daoud and Ahmed Daoud, October 8, 2012.

<sup>75</sup> "Terror Plot Foiled: Inside the Smadi Case," US Department of Justice, FBI press release, November 5, 2010, <http://www.fbi.gov/news/stories/2010/november/terror-plot-foiled/terror-plot-foiled> (accessed June 28, 2014).

<sup>76</sup> Motion for Downward Departure and or Variance and Memorandum in Support at 20, United States v. Smadi, No. 3:09-CR-0294-M-(01) (N.D. Tex. Oct. 28, 2010), *app. dismiss. as frivolous per curiam*, No. 10-1162, 446 Fed. Appx 679 (5th Cir. 2011).

<sup>77</sup> Memorandum from Dallas Field Intelligence Group to Counterterrorism (other address information redacted), Apr. 28, 2009, p. 3. (On file with Human Rights Watch)

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*, p. 5; "Terror Plot Foiled: Inside the Smadi Case," US Department of Justice, Federal Bureau of Investigation press release, <http://www.fbi.gov/news/stories/2010/november/terror-plot-foiled/terror-plot-foiled> (Special Agent Tom Petrowski, who oversaw the investigation, emphasized this singularity: "What made Smadi's posting stand out from the other rhetoric was that he was saying, 'I want to act.' That's what really got our attention.").

agent should act more like a facilitator than a leader, noting that the agent was dominating the interaction. The agents encouraged Smadi to select a target and make plans for an attack, and praised him any time there was a move toward violence.<sup>80</sup>

After months of correspondence and meetings with government agents, Smadi agreed to take an explosive device (built by the government agents) to a parking garage under Fountain Place in Dallas, a large building which contained five banks and was made of glass. Smadi drove what he believed to be an explosive to the parking garage and then met an undercover agent in a waiting car.<sup>81</sup> From the car, he dialed a number on his cell phone that he believed was a code to detonate the explosive.<sup>82</sup> Smadi was charged with attempted use of a weapon of mass destruction and bombing a place of public use.<sup>83</sup> In May 2010, he pleaded guilty to attempted use of a weapon of mass destruction, and the government dropped the bombing charge.<sup>84</sup> He was sentenced to 24 years in prison.<sup>85</sup>

- *Case of the Newburgh Four*: two of the defendants in this case, James Cromitie and Laguerre Payen, had some history of mental disability. Cromitie was a former drug addict who had reportedly admitted to a psychiatrist that he heard and saw things that were not there.<sup>86</sup> Payen was diagnosed with schizophrenia<sup>87</sup> and after his arrest in May 2009, police

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<sup>80</sup> Motion for Downward Departure and or Variance and Memorandum in Support at 22-25, *United States v. Smadi*, No. 3:09-CR-0294-M-(01) (N.D.Tex. Oct. 28, 2010), *app. dism. as frivolous per curiam*, No. 10-1162, 446 Fed. Appx. 679 (5th Cir. 2011).

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> “Man Who Admitted Attempting to Use a Weapon of Mass Destruction to Bomb a Downtown Dallas Skyscraper is Sentenced to 24 Years in Federal Prison,” US Department of Justice press release, October 19, 2010, [http://www.justice.gov/usao/txn/PressRel10/smadi\\_sen\\_pr.html](http://www.justice.gov/usao/txn/PressRel10/smadi_sen_pr.html) (accessed June 20, 2014).

<sup>86</sup> “I was seeing things, I was downstate before I came up and I seen all kinds of stuff because I guess the drugs were still stimulant in my body.” James Cromitie, response to question during his Initial Parole Board Hearing, Fishkill Correctional Facility, New York, August 6, 1991, transcript at <http://www.thrnewmedia.com/assets/terror/cromitie91.pdf> (accessed June 20, 2014), p. 8, line 14.

<sup>87</sup> Objection to Presentence Investigation Report at 2, *United States v. Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011), *aff’d*, 727 F.3d 194 (2d Cir. 2013) (“He [Laguerre Payen] has been diagnosed as schizophrenic by several doctors over the last 10 years, and no doctor has ever repudiated that diagnosis.”); Chris Dolmetsch and

found his apartment strewn with bottles full of urine.<sup>88</sup> He did not show the intellectual aptitude to conduct a terrorist attack, telling others that he could not join a trip to the state of Florida to plan for the attack because he did not have a passport.<sup>89</sup>

### *Case of Rezwan Ferdaus*

On September 28, 2011, the FBI arrested Rezwan Ferdaus for a plot to attack the Pentagon and the Capitol building with remote-controlled airplanes packed with explosives. Yet he had severe mental health problems that even the FBI had acknowledged, raising questions about whether he would have been capable of following through with any plans on his own.

Ferdaus was born in 1985 to parents who had immigrated to the United States inspired by what they saw as its economic opportunity and political freedoms.<sup>90</sup> His father, a Muslim from Bangladesh, was a defense contractor. His mother, a Catholic of Portuguese descent raised in Angola, worked for the Massachusetts Department of Transitional Assistance. Ferdaus' parents and high school classmates describe him as a good student, and as having a typical American childhood in which he played sports and the drums in a band called Goosepimp.<sup>91</sup>

Ferdaus' parents told us that they began to have concerns about his mental health in late 2009. They suggested he see a psychiatrist beginning in early 2010, but he refused.<sup>92</sup> In October 2010, Ferdaus was questioned at home by FBI agents. An owner of

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Bob Van Voris, "New York Synagogue-Bomb Plotter Laguerre Payen Sentenced to 25 Years," *Bloomberg*, September 7, 2011, <http://www.bloomberg.com/news/2011-09-07/new-york-synagogue-bomb-plotter-laguerre-payen-sentenced-to-25-years.html> (accessed June 20, 2014) ("Samuel Braverman, Payen's attorney, disagrees with a pre-sentencing report that called his client's mental health claims 'unsupported.' He said Payen has been diagnosed as a schizophrenic by several doctors. Braverman requested that the judge ask the US Bureau of Prisons to place Payen in a facility with a medical center so his mental condition can be treated.").

<sup>88</sup> Paul Harris, "Newburgh Four: poor, black, and jailed under FBI 'entrapment' tactics," *Guardian*, December 12, 2011, <http://www.guardian.co.uk/world/2011/dec/12/newburgh-four-fbi-entrapment-terror> (accessed June 20, 2014).

<sup>89</sup> Ibid.

<sup>90</sup> Human Rights Watch interviews with Showket and Anamaria Ferdaus, Ashland, Massachusetts, November 24, 2012.

<sup>91</sup> See also, Showket M Ferdaus, "Standing up for Rezwan: Anatomy of a Terror Plot 'Orchestrated and Facilitated by the Government,'" *notmainstreamnews.com*, <http://www.notmainstreamnews.com/rezwan/standingupforrezwan.htm> (accessed June 20, 2014).

<sup>92</sup> Ferdaus, "Standing up for Rezwan," *notmainstreamnews.com*, <http://www.notmainstreamnews.com/rezwan/standingupforrezwan.htm>.

a gun shop had reported someone acting suspiciously. Ferdaus was not the person in the store, but the car's license plate traced back to the Ferdaus family—leading to the FBI questioning him.<sup>93</sup> Showket Ferdaus, Rezwan's father, who was present for the questioning, said that at the end of the meeting an FBI agent "told me, standing in the garage of our house, 'obviously [Rezwan] has mental issues.'"<sup>94</sup>

On December 17, 2010, the FBI sent a confidential informant into a mosque Ferdaus was attending in Worcester, Massachusetts.<sup>95</sup> Ferdaus and the confidential informant, a repeat criminal offender, communicated for several months. In March 2011, the informant introduced Ferdaus to two FBI undercover employees who posed as Al-Qaeda operatives. In May, Ferdaus traveled to Washington, DC, on a trip paid for with money from the informant—to perform surveillance of the targets in the "attack plan" on the Pentagon and Capitol building.<sup>96</sup>

Throughout the FBI operation, Ferdaus continued to manifest mental and physical health problems, including loss of control over his bladder, which began in December 2010. Showket Ferdaus described his son's deterioration:

He had lost a lot of weight, his cheek bones were visible and eyes were always red. He was highly irritable and sometimes disoriented. We again, suggested him to go see a doctor but he refused.... By March 2011, he gave up, no matter how demeaning it was, and agreed to wear diapers. I started buying 28 packs man's diapers, which he was using up in just four or five days.<sup>97</sup>

Ferdaus' father recalled an incident on February 11, 2011,<sup>98</sup> in which a person called the police to report that "there was a man [Ferdaus] in the road who wouldn't move

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<sup>93</sup> Transcript of Detention Hearing, November 14, 2011, at 35-36, 52, *United States v. Ferdaus*, No. 11-10331-RGS, 2011 WL 5909547 (D. Mass. Nov. 28, 2011).

<sup>94</sup> Ferdaus, "Standing up for Rezwan," *notmainstreamnews.com*, <http://www.notmainstreamnews.com/rezwan/standingupforrezwan.htm>.

<sup>95</sup> See Indictment, *Ferdaus*, 2011 WL 5909547 (No. 11-10331-RGS); Affidavit of Gary S. Cacace, *Ferdaus*, 2011 WL 5909547 (No. 11-10331-RGS).

<sup>96</sup> Indictment, Count I ¶¶(h)-(i), *Ferdaus*, 2011 WL 5909547 (No. 11-10331-RGS).

<sup>97</sup> Ferdaus, "Standing up for Rezwan," *notmainstreamnews.com*, <http://www.notmainstreamnews.com/rezwan/standingupforrezwan.htm>.

<sup>98</sup> Human Rights Watch interview with Shoket Ferdaus, November 24, 2012.

and appeared to have wet his pants.”<sup>99</sup> In a previous police report from the same month, Ferdaus was described as “disheveled.”<sup>100</sup>

In April 2011, Ferdaus father retired from his job in order to look after his son; he told us that Ferdaus “never smiled for two years, he was so sick, so very depressed.”<sup>101</sup> Ferdaus’ father recalled a specific incident in July 2011 when Ferdaus started shaking, “almost like he was having a seizure”; Ferdaus reportedly told his father that he was having “intrusive thoughts and cannot get rid of them.”<sup>102</sup> The following month, Ferdaus finally agreed to go to a mental health professional, and began taking medication for diagnosed depression.<sup>103</sup> Two weeks before his arrest, Ferdaus began taking a double dosage of his medication, as recommended by several psychiatrists he was seeing.<sup>104</sup> Ferdaus’ father described his sense of hope at that time: “I could feel, he had started to believe that he would be better when he start[ed] to take medicine. Obviously, his mother and I were ecstatic.”<sup>105</sup>

The FBI arrested Ferdaus on September 28, 2011, after FBI undercover employees delivered weapons to him and photographed him holding a gun.<sup>106</sup>

On July 20, 2012, Ferdaus pleaded guilty to attempting to damage and destroy a federal building by means of an explosive and attempting to provide material support for terrorism. Pursuant to the plea deal, he was sentenced to 17 years in prison, with 10 years of supervised release.<sup>107</sup> Today he is at Terre Haute, a medium security facility in Indiana.

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<sup>99</sup> Transcript of Detention Hearing, November 14, 2011, at 71-72, *Ferdaus*, 2011 WL 5909547 (No. 11-10331-RGS).

<sup>100</sup> *Ibid.*

<sup>101</sup> Human Rights Watch interview with Shoket Ferdaus, Ashland, Massachusetts, November 24, 2012.

<sup>102</sup> Ferdaus, “Standing up for Rezwan,” *notmainstreamnews.com*, <http://www.notmainstreamnews.com/rezwan/standingupforrezwan.htm>.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> Affidavit of Gary S. Cacace ¶81, *Ferdaus*, No. 11-10331-RGS, 2011 WL 5909547 (D. Mass. Nov. 28, 2011).

<sup>107</sup> “Man Sentenced in Boston for Plotting Attack on Pentagon and U.S. Capitol and Attempting to Provide Detonation Devices to Terrorists,” US Department of Justice, Federal Bureau of Investigation press release, November 1, 2012, <http://www.fbi.gov/boston/press-releases/2012/man-sentenced-in-boston-for-plotting-attack-on-pentagon-and-u.s.-capitol-and-attempting-to-provide-detonation-devices-to-terrorists> (accessed June 20, 2014).

- *Case of the “Portland Seven”*: The case against the “Portland Seven” is different from other informant cases because the informant was introduced after most of the alleged criminal conduct had already occurred. In the immediate aftermath of the September 11 attacks, six men flew from Portland to Hong Kong; from there they traveled to western China in an attempt to get to Afghanistan. After several unsuccessful attempts to get into Afghanistan, the group dispersed.<sup>108</sup> While the men were abroad, October Lewis, wife of defendant Jeffrey Battle, wired money to the group (she was later charged as the seventh defendant).<sup>109</sup> Most of the men eventually returned to Portland.

After Battle returned to Portland, the FBI sent confidential informant Khalid Mustafa to befriend some of the men and obtain evidence of criminal conduct. Mustafa had previously been charged with drug and weapons offenses, but the charges were later dismissed due to his cooperation with the Portland Seven investigation.<sup>110</sup>

The primary focus of the case was the attempted travel to Afghanistan—allegedly to support the Taliban and Al-Qaeda—conduct that had long since been completed by the time the informant was introduced.<sup>111</sup> However, while the informant did talk to the men about details of the group’s travel to China, it is troubling that the informant seemed to hone in on Battle—who may have had a mental disability—in an effort to elicit inflammatory statements from him. During recorded conversations, Battle made several references to shooting up Jewish schools and synagogues, saying, “So if every time they hurt or harm a Muslim over there, you go into that synagogue and hurt one over

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<sup>108</sup> Plea Agreement at 3-4, *United States v. Ford*, No. 3:02-00399-JO-2 (D. Or. Nov. 26, 2003).

<sup>109</sup> Original Indictment at 8, *United States v. Battle*, No. CR 3:02-00399-02-JO-1 (D. Or. Nov. 26, 2003).

<sup>110</sup> Deborah Howlett, “The two sides of one law, the two lives of one man,” *Newark Star-Ledger*, July 24, 2005, <http://www.nj.com/news/ledger/index.ssf?/news/ledger/stories/patriotact/partthree.html> (accessed June 20, 2014); Mark Larabee, “Hawash’s plea gives prosecutors vital voice,” *Portland Independent Media Center*, August 9, 2003, <http://portland.indymedia.org/en/2003/08/269532.shtml> (accessed June 20, 2014).

<sup>111</sup> Superseding Indictment, *Battle*, No. 02-399-JO-1 (D. Or. Nov. 26, 2003).



here.”<sup>112</sup> Battle reportedly rejected those ideas in subsequently recorded conversations.<sup>113</sup>

John Ransom, lawyer for October Lewis, told Human Rights Watch:

What really bothered me about this case was that Battle is the one the informant went after. Battle is mentally ill.... The informant would say inflammatory things ... and Battle would agree and then really get going. And then these are the statements that the prosecution [used] to paint a picture of Battle’s character. It seemed as if the informant had been put on [Battle] for the purpose of getting these outrageous statements.<sup>114</sup>

Prosecutors eventually used these statements against not only Battle, but also other members of the group—even though they had little bearing on the focus of the case, which was supposedly the travel to Afghanistan.

As one of the first wave of post-September 11 terrorism prosecutions, the case was politically charged from the beginning. On October 4, 2002, then-Attorney General John Ashcroft called a press conference and announced the arrest of the original co-defendants in the Portland

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<sup>112</sup> Howlett, “The two sides of one law, the two lives of one man,”

<http://www.nj.com/news/ledger/index.ssf?/news/ledger/stories/patriotact/partthree.html>. See also, Peter Y. Hong, “Portland Terror Suspect Released Pending Trial,” *Los Angeles Times*, October 11, 2002, <http://articles.latimes.com/2002/oct/11/nation/na-portland11> (accessed June 20, 2014). Similar information was given during Human Rights Watch interviews with prosecutor Charles Gorder and with defense attorneys involved in the case. Human Rights Watch interviews, Portland, Oregon, August 13-17, 2012.

<sup>113</sup> “But aside from contemplating killing Jews at a synagogue, an idea that Battle subsequently dropped....” Nick Budnick, “The Making of a ‘Terrorist’: John Ashcroft says native Portlander Patrice Lumumba Ford is a threat to national security—but friends and family are having trouble connecting the dots,” *Willamette Week*, October 16, 2002, [http://www.wweek.com/portland/article-1377-the\\_making\\_of\\_a\\_terrorist.html](http://www.wweek.com/portland/article-1377-the_making_of_a_terrorist.html) (accessed June 20, 2014); “Yet, according to the prosecutor’s filing, Battle asked about making a bomb in September 2002, after a series of conversations in which he spoke of his consideration and ultimate rejection of committing a terrorist act in the United States.” “Filing reveals new details of Portland jihad group,” *Associated Press*, November 20, 2003, [http://tdn.com/news/state-and-regional/filing-reveals-new-details-of-portland-jihad-group/article\\_6c3b482e-2e80-5762-b009-abfc1aade522.html](http://tdn.com/news/state-and-regional/filing-reveals-new-details-of-portland-jihad-group/article_6c3b482e-2e80-5762-b009-abfc1aade522.html) (accessed June 20, 2014).

<sup>114</sup> Human Rights Watch interview with John Ransom, Portland, Oregon, August 13, 2012.

Seven case, a guilty plea entered by Richard Reid, and the sentencing of John Walker Lindh:

Today is a defining day in America's war against terrorism. We have neutralized a suspected terrorist cell within our borders, convicted an attempted suicide bomber, and an American pledged, trained and captured in violent jihad is sentenced.<sup>115</sup>

There was no evidence that the defendants formed a terrorist “cell”—few had been in contact with each other after their return to the US. Kent Ford, the father of Patrice Lumumba Ford, recalled how the television and print news ran coverage of the Ashcroft press conference all weekend, showing “real fear-mongering stuff.”<sup>116</sup> The handling of the case was certainly influenced by the immediacy of terrorism concerns after 9/11 and the newness of federal terrorism-related prosecutions. Prosecutor Charles Gorder told Human Rights Watch, “There was little legal precedent that gave us guidance [at the time]. We had to anticipate where the law was going to move.”<sup>117</sup>

Between September 6 and October 16, 2003, the six defendants in detention<sup>118</sup> all pleaded guilty, to varying charges, resulting in sentences of three years for October Lewis, seven years for Maher Hawash, eight years for Muhammed Bilal, ten years for Ahmed Bilal, 18 years for Patrice Lumumba Ford and 18 years, later extended to twenty,

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<sup>115</sup> U.S. Department of Justice, Remarks of Attorney General John Ashcroft, Press Conference, October 4, 2002, <http://www.justice.gov/archive/ag/speeches/2002/100402agnewsconferenceportlandcell.htm> (accessed July 11, 2014).

<sup>116</sup> Human Rights Watch interview with Kent Ford, Portland, Oregon, August 13, 2012.

<sup>117</sup> Human Rights Watch interview with Charles Gorder, assistant US attorney, Portland, Oregon, August 16, 2012.

<sup>118</sup> Defendant Habis al-Saoub remained in Asia when the other defendants traveled back to the US. He reportedly joined Al-Qaeda and was killed in the Fall of 2003 in Pakistan. Hal Bernton, “Oregon conspirators attack war on terror, get 18-year jail terms,” *Seattle Times*, November 25, 2003, [http://seattletimes.com/html/localnews/2001800337\\_portlandseven25m.html](http://seattletimes.com/html/localnews/2001800337_portlandseven25m.html) (accessed June 20, 2014); Howlett, “The two sides of one law, the two lives of one man,” *Newark Star-Ledger*, <http://www.nj.com/news/ledger/index.ssf?/news/ledger/stories/patriotact/partthree.html>; “Two plead guilty in Oregon terror case,” *CNN News Online*, October 16, 2003, <http://www.cnn.com/2003/LAW/10/16/terror.suspects/> (accessed June 20, 2014).

for Jeffrey Battle (the latter two pleaded guilty to conspiracy to levy war against the United States).

In at least two cases that we examined, an informant—Shahed Hussain, the same in both cases—offered the defendants money to entice them to participate in the plot. These are:

- *The Newburgh Four*: Forty-five-year-old James Cromitie was struggling to make ends meet when, in 2009, FBI informant Hussain offered him as much as \$250,000<sup>119</sup> to carry out a plot which Hussain—who also went by “Maqsood”—had constructed on his own.<sup>120</sup> The plot involved firing rocket-propelled grenades at Stewart Air Base and placing bombs at a synagogue in Riverdale, New York. Cromitie initially responded enthusiastically, slapping hands with the informant.<sup>121</sup> Still, Cromitie was wary of proceeding with the plot and refused to speak to the informant for several weeks. But Cromitie had lost his job at Walmart and his financial situation became dire. He eventually called the informant to tell him he was broke and needed to make money. The informant immediately reiterated his original offer: “I told you, I can make you \$250,000, but you don’t want it brother. What can I tell you?” The transcript indicates that Cromitie agreed to see him.<sup>122</sup>

The promise of financial reward was also crucial to the recruitment of the other three members. Cromitie relayed the informant’s offer to David Williams, insisting that he would share the spoils with Williams to help with his sick brother’s medical costs.<sup>123</sup> Williams’ younger brother was sick with liver cancer and in need of a new liver. The pair drew in Laguerre Payen and Onta Williams with similar promises. The FBI also authorized the informant

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<sup>119</sup> Because Hussain was not authorized to offer this amount of money, he turned off the recording device when he made it and subsequently lied about the offer at trial. Trial Transcript at 773, *United States v. Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011), *aff’d*, 727 F.3d 194 (2d Cir. 2013). A month later, Hussain reminded Cromitie about the offer in a recorded phone conversation. *Ibid.*, p. 1572.

<sup>120</sup> The \$250,000 offer was not sanctioned by the FBI, but the court specifically found that the offer had been made, nonetheless. *Ibid.*, pp. 242, 3502-87.

<sup>121</sup> *Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011).

<sup>122</sup> Trial Transcript at 4484-4487, *Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011).

<sup>123</sup> Graham Rayman, “Were the Newburgh 4 Really Out to Blow Up Synagogues? A Defendant Finally Speaks Out,” *villagevoice.com*, March 2, 2011, <http://www.villagevoice.com/2011-03-02/news/were-the-newburgh-4-really-out-to-blow-up-synagogues/2/> (accessed June 20, 2012).

to separately offer money to the other men to participate in the plot, which he did, even distributing small amounts of cash for cell phones, rent, meals and groceries.<sup>124</sup> The informant frequently promised much more to come upon completion of their “mission.”<sup>125</sup>

- *Yassin Aref and Mohammed Hossain*: As in Newburgh, informant Shahed Hussain presented himself to the Albany community as a wealthy businessman.<sup>126</sup> Mohammed Hossain, a member of the Albany mosque, needed money to fix his properties and run his pizza shop, which Shahed Hussain—who went by the pseudonym “Malik”—readily offered.<sup>127</sup>

The informant proposed to lend Hossain \$50,000 in cash so long as he paid him back \$2,000 monthly until he had paid back \$45,000.<sup>128</sup> He offered Hossain the remaining \$5,000 as a gift. In keeping with Islamic religious requirements pertaining to borrowing money, Hossain would take the loan without interest, and proposed that Yassin Aref, then imam of the mosque, serve as the witness to the loan transaction.<sup>129</sup>

The informant at times told Hossain that he had the \$50,000 to lend from legitimate business deals.<sup>130</sup> But, on other occasions he also indicated that the money came from buying and selling a Chinese surface-to-air missile, which was to be given to a group called Jaish-e-Mohammed (JEM). FBI Agent Thomas Coll, who handled the informant during the investigation, explained that he suggested the informant talk about JEM because it was based in Pakistan and the informant was Pakistani, so “it would be a good cover story.”<sup>131</sup> Neither Hossain nor Aref had any preexisting relationship with

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<sup>124</sup> Cromitie Appellate Brief at 17, *United States v. Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011), *aff’d*, 727 F.3d 194 (2d Cir. 2013).

<sup>125</sup> Trial Transcript at 1018-19, 1032-34, 1659, *Cromitie*, 781 F. Supp. 2d 211 (No. 7:09-CR-00558).

<sup>126</sup> Transcript of Cooperating Witness’s Recordings, Dec. 3, 2003, *United States v. Aref*, No. 1:04-cr-00402-TJM-1 (N.D.N.Y. Mar. 19, 2007), *aff’d*, 285 Fed.Appx. 784 (2d Cir. 2008) (No. 1:04-cr-00402-TJM-1, 2007 Term; renumbered No. 07-0981-cr, 2008 Term).

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*

<sup>129</sup> Transcript of Cooperating Witness’s Recordings, Dec. 5, 2003, *Aref*, No. 1:04-cr-00402-TJM-1 (N.D.N.Y. Mar. 19, 2007).

<sup>130</sup> *Ibid.*

<sup>131</sup> Trial Transcript, Sept. 15, 2006, at 372, *Aref*, No. 1:04-cr-00402-TJM-1 (N.D.N.Y. Mar. 19, 2007) (Agent Coll’s Testimony).

JEM.<sup>132</sup> The informant implied that giving these loans to Hossain was beneficial for business purposes and that he was involved on the side with the sale of ammunition.<sup>133</sup> The government argued that the informant thereby offered both Hossain and Aref the opportunity to engage in illegal money laundering, for the benefit of JEM. Yet the government itself argued that Hossain's motive for participating in the loan transaction was money and that Aref was motivated by religious duty.<sup>134</sup> Aref's primary concern appeared to be in witnessing the loan transaction between Hossain and the informant, and ensuring there was proper documentation.<sup>135</sup> When the informant pulled out the missile's trigger—a rectangular metallic box—during a video-recorded meeting about the loan transaction in January 2004, Aref appeared preoccupied with counting the money the informant had handed him.<sup>136</sup> Aref argued that this was because he was not privy to the discussion about the missile transaction; the prosecution argued that it was because he was callous to it.<sup>137</sup> Throughout the sting operation, Aref appeared uninterested in Malik's attempts to discuss terrorist organizations. In response, Aref would simply give his opinion, as an imam, on whether Malik's conduct was appropriate according to Islam.<sup>138</sup> Both men were convicted and sentenced to 15 years on charges of material support and money laundering.<sup>139</sup>

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<sup>132</sup> Trial Transcript at 1918, *United States v. Aref*, No. 1:04-cr-00402-TJM-1 (N.D.N.Y. Mar. 19, 2007), *aff'd*, 285 Fed.Appx. 784 (2d. Cir. 2008) (No. 1:04-cr-00402-TJM-1, 2007 Term; renumbered No. 07-0981-cr, 2008 Term). Aref knew that JEM is a designated terrorist organization (Transcript of Cooperating Witness' Recordings, Jan. 14, 2004, *Aref*, No. 1:04-cr-00402-TJM-1 (N.D.N.Y. Mar. 19, 2007); Hossain initially got JEM confused with Jamaat-e-Islami (JEI) Bangladesh, which has not been designated a terrorist organization by the United States. Trial Transcript at 1212, *Aref*, No. 1:04-cr-00402-TJM-1 (N.D.N.Y. Mar. 19, 2007).

<sup>133</sup> Transcript of Recordings between Shahed Hossain and Yassin Aref, Jan. 14, 2004, at 5-15 to 6-10, *Aref*, No. 1:04-cr-00402-TJM-1 (N.D.N.Y. Mar. 19, 2007). (Yassin Aref indicates that he believed the transaction was intended to enable Hossain to pay his taxes.)

<sup>134</sup> Trial Transcript at 1942, *Aref*, No. 1:04-cr-00402-TJM-1 (N.D.N.Y. Mar. 19, 2007) (Government's Closing).

<sup>135</sup> *Ibid.*, p. 49. (Defendant Aref's Opening).

<sup>136</sup> Criminal Complaint at 4-5, *Aref*, No. 1:04-cr-00402-TJM-1 (N.D.N.Y. Mar. 19, 2007); Trial Transcript at 57, *Aref*, No. 1:04-cr-00402-TJM-1 (N.D.N.Y. Mar. 19, 2007) (Defendant Aref's Opening); "This is for Destroying Airplanes," video transaction between Aref and informant, *Mother Jones*, August 20, 2011, [https://www.youtube.com/watch?feature=player\\_embedded&v=jNikAlfjyxs](https://www.youtube.com/watch?feature=player_embedded&v=jNikAlfjyxs) (accessed July 11, 2014).

<sup>137</sup> Defendant Aref's Opening Brief, *Aref*, No. 1:04-cr-00402-TJM-1 (N.D.N.Y. Mar. 19, 2007).

<sup>138</sup> See discussion below about conversation between Malik and Aref on January 14 about JEM. Transcript of Cooperating Witness's Recordings, January 14, 2004, *Aref*, No. 1:04-cr-00402-TJM-1 (N.D.N.Y. Mar. 19, 2007); Judgment, *United States v. Aref*, No. 1:04-cr-00402-TJM-1 (N.D.N.Y. Mar. 19, 2007), *aff'd*, 285 Fed.Appx. 784 (2d. Cir. 2008) (No. 1:04-cr-00402-TJM-1, 2007 Term; renumbered No. 07-0981-cr, 2008 Term).

<sup>139</sup> Judgment, *Aref*, No. 1:04-cr-00402-TJM-1 (N.D.N.Y. Mar. 19, 2007); Judgment, *United States v. Hossain*, No. 1:04-cr-00402-TJM-2 (N.D.N.Y. Mar. 19, 2007), *aff'd* 285 Fed.Appx. 784 (2d. Cir. 2008) (No. 1:04-cr-00402-TJM-1, 2007 Term; renumbered No. 07-0981-cr, 2008 Term).

Indeed, in cases we examined, several defendants<sup>140</sup> were seeking money when the government approached them; some were extremely poor, others were even homeless. Their continued participation in the government plot ensured periodic payments and, for some, additional money upon accomplishment of the plot.

## Vulnerable Targets: Individuals Seeking Religious Guidance

In some cases we examined, a government agent appears to have taken on the role of a religious authority figure for a target who was searching for guidance about Islam because he was young, a recent convert, or socially outside the mainstream Muslim community due to race or ethnicity.

These cases are particularly troubling to many in American Muslim communities, where members feel law enforcement is exploiting the very paranoia described in detail in section VII. In some cases, the FBI employed versions of Islam when interacting with the target that led targets towards specific mindsets and actions. For example:

- *Case of the Fort Dix Five*: According to his family and friends, Mohammed Shnewer, who was 19 years old when informant Mahmoud Omar first approached him, was a loner.<sup>141</sup> Omar was 40 years old and exerted a powerful influence over Shnewer as the two became friends. He hounded Shnewer to collect and burn to DVD videos depicting jihad-oriented violence; he even purchased, with FBI funding, a DVD burner for Shnewer.<sup>142</sup> The fact that Shnewer watched these videos with the informant, and the existence of some of the violent videos themselves, was used against

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<sup>140</sup> Barry Bujol; James Cromitie; Mohammed Hossain; Raja Khan; Mohammed Mohamud; Laguerre Payen; Tarik Shah; David Williams; Onta Williams.

<sup>141</sup> Columbia Law School's Human Rights Institute interview with Lamese Shnewer, Cherry Hill, New Jersey, September 26, 2012; Columbia Law School's Human Rights Institute and Human Rights Watch interview with Dritan Duka, ADX Florence, July 19, 2012.

<sup>142</sup> Trial Transcript at 3014-15, United States v. Shnewer, No. 1:07-cr-00459-RBK (D.N.J. Apr. 29, 2009), *aff'd in part, rev'd in part sub nom.* United States v. Duka, 671 F.3d 329 (3d Cir. 2011) (No. 09-2292, 09-2299, 09-2300, 09-2301, 09-2302). (Cross-Examination of Mahmoud Omar: "Q. [D]id you indicate to Mr. Shnewer that you would be interested in receiving copies of videos like the ones you were showing? A. I believe I said something like that. Q. And in fact, not only did you indicate that you would be interested in receiving copies, you actually provided to him a device, a CD or DVD burner to facilitate his making copies for you, correct? ... A. The FBI bought it for me, I gave it to Mr. Mohamad Shnewer and he did not know how to operate it.") Columbia Law School's Human Rights Institute interview with Shain Duka, ADX Florence, July 18, 2012.

Shnewer at trial. Omar also regularly initiated conversation about politics, and encouraged Shnewer to turn from non-violent actions, like prayer, to action. In an August 1, 2006 recorded discussion between Shnewer and Omar, Shnewer brought up the conflict in Chechnya. Omar said, “Well then, what shall we do?” Shnewer, suggesting prayer, replied, “Call upon our lord.” Omar replied, “Should we pray only, Mohamed?” Omar also rejected Shnewer’s suggestion to provide charity and continued to push Shnewer to suggest something more tangible. Under Omar’s persistent pressure, Shnewer suggested a potential target to the informant: “If you want to do anything, there is Fort Dix.”<sup>143</sup>

Eventually, Mohamed Shnewer and four others were indicted in 2008 for conspiracy to murder members of the US military and possession of firearms.<sup>144</sup> On December 22, 2008, all five men were convicted; Shnewer was sentenced life in prison.<sup>145</sup>

- *Case of Barry Bujol*: Bujol was raised in a devout Baptist family in Louisiana. He converted to Islam as a student at Prairie View A & M. Tariq Ahmed, a lawyer with the Muslim Civil Liberties Union (MCLU) in Houston, told us that “Bujol was sincerely thinking about Islam and his obligations when he came about the topic of jihad,” but he couldn’t get answers from the local community, which feared that the African-American convert might be an informant (another member of their community, Adnan Mirza,

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<sup>143</sup> Government Exhibit 605-B, *Shnewer*, No. 1:07-cr-00459-RBK (D.N.J. Apr. 29, 2009).

<sup>144</sup> Indictment, June 5, 2007, *Shnewer*, No.1:07-cr-00459-RBK (D.N.J. Apr. 29, 2009).

<sup>145</sup> Mohamed Shnewer, Dritan Duka, and Shain Duka were sentenced to life plus 30 years; Eljvir Duka was given a life sentence and Serdar Tartar was sentenced to 33 years with a downward variance. On December 28, 2011, the Third Circuit upheld the convictions and sentences of these five men, except for Shnewer, whose weapons conviction and accompanying 30 year sentence was dismissed. Shnewer is still serving a life term for the coconspiracy conviction. “Two Additional Defendants Sentenced for Conspiring to Kill U.S. Soldiers,” US Department of Justice press release, April 29, 2009, <http://www.justice.gov/opa/pr/2009/April/09-nsd-408.html> (accessed June 20, 2014). The judge gave Tatar a lower sentence because he believed Tatar was the only defendant not motivated by radical Islamic views. Troy Graham, “Final 2 Ft. Dix plotters get jail There was another life term. Then the last of the five got 33 years,” *Inquirer*, April 30, 2009, [http://articles.philly.com/2009-04-30/news/25287654\\_1\\_shain-duka-fort-dix-dritan](http://articles.philly.com/2009-04-30/news/25287654_1_shain-duka-fort-dix-dritan) (accessed June 20, 2014); “U.S. appeals court uphold convictions in Fort Dix terror plot,” *Associated Press*, December 29, 2011, [http://www.nj.com/news/index.ssf/2011/12/us\\_appeals\\_court\\_upholds\\_convi\\_1.html](http://www.nj.com/news/index.ssf/2011/12/us_appeals_court_upholds_convi_1.html) (accessed June 20, 2014).

had been recently investigated and prosecuted—his case is also discussed in this report).<sup>146</sup>

In mid-2008, FBI agents pursuing a tip about someone else came across Bujol's email address and found that he had been in contact with Anwar Al-Awlaki—an alleged leader of Al-Qaeda in the Arabian Peninsula (AQAP), which is based in Yemen, and an American citizen, killed by a US drone strike in 2011.<sup>147</sup> Bujol had reached out to Al-Awlaki after listening to one of his earlier recorded CD sermons. Al-Awlaki forwarded to Bujol his book *42 Ways of Supporting Jihad*.<sup>148</sup> Bujol responded at least three times seeking further guidance.<sup>149</sup>

After placing Bujol under extensive surveillance for more than a year,<sup>150</sup> in about November 2009 the FBI planted a Muslim of Arab descent as a confidential informant (CI) in a jail cell alongside Bujol, who had been picked up for outstanding traffic tickets.<sup>151</sup> Bujol and the informant stayed in contact, and the informant told Bujol he was an operative for AQAP. MCLU attorney Ahmed raised concerns about the informant's profile and his relationship with Bujol:

From the very first recording you hear the CI asking questions about Islam, and you have Barry giving perfectly acceptable [non-violent]... responses. And the CI's instinct is to correct Barry. You can almost see Barry's face, he doesn't resist, he

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<sup>146</sup> Human Rights Watch Interview with Tariq Ahmed, Houston, Texas, June 26, 2012.

<sup>147</sup> Dane Schiller, "Former Prairie View student accused of terrorism not going quietly," *Houston Chronicle*, June 23, 2011, <http://www.chron.com/news/houston-texas/article/Former-Prairie-View-student-accused-of-terrorism-2078461.php> (accessed June 20, 2014); Government's Trial Brief at 9, United States v. Bujol, No. 4:10-cr-00368 (S.D.Tex. June 1, 2012), *aff'd per curiam*, No. 12-20393 (5th Cir. June 12, 2013) (No. 4:10-CR-368-1, 2012 Term; renumbered No. 12-20393, 2013 Term).

<sup>148</sup> *Ibid.*, p. 10.

<sup>149</sup> Human Rights Watch interview with Tariq Ahmed, June 26, 2012; Columbia Law School's Human Rights Institute telephone interview with Daphne Silverman, October 16, 2013.

<sup>150</sup> Joe Verela, Bujol's first defense counsel, noted: "Federal investigations generally have more man hours and money. But this one, they spent millions of dollars. Instead of one audio recorder there were three. Instead of one camera, there were six. There were backup cameras, backup recordings ... in a typical five defendant DEA case there's some audio and video, some eyeball surveillance...but this thing, they didn't leave too many stones unturned." Human Rights Watch phone interview with Joe Verela, Bujol's first defense counsel, June 21, 2012.

<sup>151</sup> Human Rights Watch email correspondence with Daphne Silverman, April 16, 2013.



just accepts it and tries to justify or accept what the CI said was the correct answer.... The effect on Barry was profound. Someone was finally willing to answer his questions.<sup>152</sup>

Daphne Silverman, Bujol's attorney at sentencing, said the informant encouraged Bujol to turn from "defensive jihad," related to the self or community, to "offensive jihad," marked by proactive violence. "Barry had always believed he had to participate in defensive jihad, but the CI told him he *has to do this*," she said.<sup>153</sup> Also, despite the FBI's instructions, the informant offered Bujol a job and gave money to his wife, telling him that "people" would support her while Barry was overseas.<sup>154</sup>

Mark Wells White, a federal prosecutor on the Bujol case during the investigation and original plea negotiations, disputed any concern about the FBI's investigative tactics: "Why did your guy get a bunch of stuff from [someone who said he was] an AQAP operative? Why did he get on a boat?"<sup>155</sup> White also defended the informant's conduct as "rapport-building."<sup>156</sup> White explained, "Barry was asking him questions [about religion, jihad], and the CI has to answer. He can't blow his cover."<sup>157</sup> But several defense advocates told us that the CI's responses did not accurately represent the mainstream Muslim advice that Bujol would have gotten had community members been available and willing to talk.<sup>158</sup>

With the encouragement of the government informant, Bujol eventually agreed to participate in a plot. A SWAT team arrested Bujol in May 2010 when, using a false ID provided by the informant, Bujol tried to board a ship with money, army manuals, phone cards, and GPS units that the informant

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<sup>152</sup> Human Rights Watch interview with Tariq Ahmed, June 26, 2012.

<sup>153</sup> Human Rights Watch interview with Daphne Silverman, Houston, Texas, June 25, 2012.

<sup>154</sup> Ibid.

<sup>155</sup> Human Rights Watch interview with Mark Wells White, Houston, Texas, June 25, 2012.

<sup>156</sup> Ibid.

<sup>157</sup> Ibid.

<sup>158</sup> Columbia Law School's Human Rights Institute and Human Rights Watch interviews with several defense advocates.

told him to carry to an AQAP contact in Algeria.<sup>159</sup> Bujol was arrested, and, after a bench trial, sentenced to 20 years in prison for attempting to provide material support to AQAP and aggravated identity theft.<sup>160</sup>

## Informants Ignoring Targets' Reluctance to Engage in Terrorism

In several of the cases we examined, after identifying their targets and cultivating them over months of close, intimate interaction, government agents proposed new theories, ideas or—eventually—plots to see if their targets might take the bait. If they did, the government appears to have considered itself vindicated in its early assessment of the individual's underlying threat.

The government appears unconcerned with whether these individuals would have actually had the interest, commitment, and ability to plan terrorist attacks without informants' aggressive recruitment or cultivation. On the contrary, in some cases where the defendant initially or repeatedly expressed a reluctance to engage in violence generally or even, in a planning stage, to go through with the plot, informants ignored those statements and instead pressed them to stay with the plot. For example:

- *Case of Shawahar Matin Siraj*: There are many indications that Siraj was hesitant to carry out the bombing in the days immediately leading up to it. When Eldawoody drove Siraj toward the 34th Street subway station where he would instruct Siraj to place false explosives in garbage cans, Eldawoody asked Siraj if he was committed to their plan. Siraj said he would not participate if the situation seemed dangerous.<sup>161</sup> “I have to, you know, ask my mom’s permission. Every single thing matters, you know?”<sup>162</sup> said Siraj (who, as previously noted, was found to have impaired critical thinking skills and diminished judgment). Siraj also emphasized that he would prefer to be a lookout to placing what he believed to be explosives in the subway.<sup>163</sup> When

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<sup>159</sup> Government’s Trial Brief at 15, *United States v. Bujol*, No. 4:10-cr-00368 (S.D.Tex. June 1, 2012), *aff’d per curiam*, No. 12-20393 (5th Cir. June 12, 2013) (No. 4:10-CR-368-1, 2012 Term; renumbered No. 12-20393, 2013 Term).

<sup>160</sup> “Texas Man Gets Max for Attempting to Provide Material Support to Al-Qaeda,” US Department of Justice press release, May 24, 2012, <http://www.justice.gov/usao/txs/1News/Releases/2012%20May/120524%20Bujol.html> (accessed June 22, 2014).

<sup>161</sup> Exhibit 20a, Transcript of Audio Disc #1, Conversation #1 at 17, *United States v. Siraj*, 468 F.Supp. 2d 408 (E.D.N.Y. 2007) (No. 05-CR-104(NG)), *aff’d*, 533 F.3d 99 (2d Cir. 2008).

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

the informant asked, “You willing to do it?” Siraj responded: “I will work with those brothers, that’s it. As a planner or whatever. But to putting them there? I’m not sure. I have to think about it.”<sup>164</sup> He was arrested a week later.

- *Case of the Newburgh Four*: Early in their relationship, James Cromitie was quick to engage the informant, Hussain, in hateful rhetoric and to fabricate lofty stories of past violence, including tall tales that involved shooting a drug-dealer’s son and firebombing NYPD stations.<sup>165</sup> Still, the informant had to expend considerable efforts to overcome Cromitie’s resistance to using violence.<sup>166</sup> For months, the informant encouraged Cromitie to turn his tough talk into action, but Cromitie refused,<sup>167</sup> even, initially, upon the offer of valuable incentives.<sup>168</sup> In many of their conversations, the informant responded to Cromitie’s expressions of anger by urging him toward violence in the name of Islam.<sup>169</sup> Cromitie, however, repeatedly explained that it was not for him to act since “Allah will take care of it.”<sup>170</sup> At one point, when the informant continued to insist on jihad, Cromitie

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<sup>164</sup> Ibid.

<sup>165</sup> Decision and Order Denying Defendants’ Renewed Motion to Dismiss the Indictment Based on Outrageous Government Misconduct at 11, *United States v. Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011), *aff’d*, 727 F.3d 194 (2d Cir. 2013); Trial Transcript at 687-688, *Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011); See also, Kareem Fahim, “On Tapes, Terror Suspects Brags and Reveals His Hate,” *New York Times*, August 30, 2010.

<sup>166</sup> Decision and Order Denying the Defendants’ Post Trial Motions at 12, *Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011); Trial Transcript at 816, 1708-1708, *Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011).

<sup>167</sup> Decision and Order Denying Defendant’s Renewed Motion to Dismiss the Indictment Based on Outrageous Government Misconduct at 10, *Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011). “But whenever Hussain asked Cromitie to act on those sentiments—make a plan, pick a target, find recruits, introduce the CI to like-minded brothers, procure guns, and conduct surveillance—Cromitie did none of the above.” (citations omitted)

<sup>168</sup> Trial Transcript at 843-844, 988, *Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011). As early as December 10, 2009 Hussain promised to give Cromitie his BMW if he joined the mission (Decision and Order Denying the Defendants’ Post Trial Motions at 7, *Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011); Trial Transcript at 893-894, *Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011)); The informant frequently reminded Cromitie that he and any potential recruits could make significant money in the mission (Trial Transcript at 816, 1708-1709, *Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011)); in the interim, he sometimes provided Cromitie with money—which the FBI provided—to pay his rent (Trial Transcript at 265, *Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011)). Hussain promised Cromitie various rewards for joining the mission, including “a post-attack getaway trip to Miami, Puerto Rico, or Costa Rica,” (Decision and Order Denying the Defendants’ Post Trial Motions at 7, *Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011); and his own barbershop (Trial Transcript at 1857, *Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011)).

<sup>169</sup> “On October 19, Cromitie met with Hussain again. Cromitie again complained about the treatment he received from some Jews. Hussain responded that according to the Prophet Mohammed, Jews ‘are responsible for all the evils in the world’ and should be ‘eliminated.’” Decision and Order Denying Defendant’s Renewed Motion to Dismiss the Indictment Based on Outrageous Government Misconduct at 9, *United States v. Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011), *aff’d*, 727 F.3d 194 (2d Cir. 2013).

<sup>170</sup> Trial Transcript at 545, *Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011).

responded that dying like martyrs is “not gonna change anything.”<sup>171</sup> As the trial judge, District Judge Colleen McMahon, noted in her decision:

Hussain tried to coax Cromitie into participating in a jihadist event by suggesting that he would be rewarded in the afterlife. But the promise of Paradise proved insufficient to get Cromitie to take any affirmative steps toward planning a jihadist attack. On December 10, Hussain pointed this out to Cromitie; defendant responded, “Maybe it’s not my mission then. Maybe my mission hasn’t come yet.”<sup>172</sup>

Even after the informant offered Cromitie \$250,000 to carry out an attack, Cromitie appeared hesitant and disappeared for six weeks, refusing to speak to the informant, despite the informant’s constant efforts to contact him. Cromitie sold a \$200 camera that the informant had bought him for surveillance of Stewart Air Base for around \$60.<sup>173</sup> But he had lost his job at Walmart, and eventually returned to the informant, who reiterated his offer. In the same conversation, the informant told Cromitie that he was concerned for his own safety, and hinted that harm could come to Cromitie as well if he failed to engage in a terrorist attack.<sup>174</sup> Cromitie then said he was willing to go forward with Hussain’s plan, but he did not want anyone to get hurt.<sup>175</sup>

## Informants Playing Key Roles in Generating or Furthering the “Plot”

In the cases examined, we found that informants not only encouraged targets to engage in violence, but came up with the “plot” themselves, and provided the targets with the means to carry it out. For example:

- *Case of Newburgh Four*: In this case, the FBI informant came up with a plot to detonate explosives near a synagogue in the Bronx and to shoot military

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<sup>171</sup> *Ibid.*, p. 721.

<sup>172</sup> *Cromitie*, 781 F. Supp. 2d 211, 219, *aff’d*, 727 F.3d 194.

<sup>173</sup> Trial Transcript at 827, 3054, *Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011).

<sup>174</sup> *Ibid.*, pp. 1824-1828.

<sup>175</sup> *Cromitie* Appellate Brief at 16, *United States v. Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011), *aff’d*, 727 F.3d 194 (2d Cir. 2013).

targets at Stewart Air National Guard Base in Newburgh, New York. He also played a primary role in preparing the plot and inducing action (including through the offer of substantial financial rewards) by the defendants. As Judge Reena Raggi put it in reviewing the case on appeal at the US Court of Appeals for the Second Circuit, “The government came up with the crime, provided the means, and removed all relevant obstacles.”<sup>176</sup>

Indeed, Cromitie was not even able to buy a gun in Newburgh, although Hussain, the informant, had asked him to do so more than a dozen times.<sup>177</sup> Hussain had to choose the targets, provide the plot and the weapons, and direct the recruitment of the other participants. He even had to drive them from place to place in order for them to carry out the simple missions he assigned them, such as photographing the targets and “inspecting” the weapons.<sup>178</sup> As trial judge McMahon put it:

The essence of what occurred here is that a government, understandably zealous to protect its citizens from terrorism, came upon a man both bigoted and suggestible, one who was incapable of committing an act of terrorism on his own.... I suspect that real terrorists would not have bothered themselves with a person who was so utterly inept. ... Only the government could have made a terrorist out of Mr. Cromitie, whose buffoonery is positively Shakespearean in scope.<sup>179</sup>

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<sup>176</sup> Transcript of Oral Argument, November 5, 2012, *United States v. Cromitie*, 727 F.3d 194 (2d Cir. 2013) (Nos. 11-2763(L), 11-2884(con), 11-2900(con), and 11-3785(con)), *aff’d* No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011).

<sup>177</sup> Trial Transcript at 411, *United States v. Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011), *aff’d*, 727 F.3d 194 (2d Cir. 2013).

<sup>178</sup> Decision and Order Denying Defendants’ Renewed Motion to Dismiss the Indictment Based on Outrageous Government Conduct at 23, *United States v. Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011), *aff’d*, 727 F.3d 194 (2d Cir. 2013). “Hussain translated Cromitie’s vague ‘do something to America’ comments, and his rants against Jews, into concrete ideas that most definitely did not originate with defendant: putting together a team (create a conspiracy) to plant IEDs at synagogues in Riverdale (commit terrorist activity), and to shoot Stinger missiles at Air Force aircraft in Orange County (an offense carrying a statutory 25 year minimum.) Then Hussain (not Cromitie) made it possible for those things to happen—or at least seem to happen” (footnotes omitted).

<sup>179</sup> Chris Dolmetsch and Patricia Hurtado, “New York City Synagogue Bomb Plotters Are Sentenced to 25 Years in Prison,” *Bloomberg*, June 29, 2011, <http://www.bloomberg.com/news/2011-06-29/new-york-city-synagogue-bomb-plotters-are-sentenced-to-25-years-in-prison.html> (accessed June 20, 2014).

Despite her strong statement, McMahon sentenced each of the defendants to 25 years in prison, based on a mandatory minimum required for Hussain's plot to target a military target (see section V).<sup>180</sup>

- *Case of Rezwan Ferdaus:* As previously noted (see above), Rezwan Ferdaus appeared to have suffered from physical and mental disabilities that raise serious doubts as to whether he would have been capable of carrying out the plots he was charged with. Miriam Conrad, the Boston federal defender and Ferdaus's attorney through sentencing, explained that since Ferdaus had no money, the preparation and materials for the plot for which he was arrested—to attack the Pentagon and Capitol building—were all provided or financed by the undercover employees:

At the time he was in contact with the informant and the undercover [agent] he was living at home with his parents in Ashland and he didn't have a car, he didn't have any money and he didn't have a driver's license because he owed \$100 and he didn't have \$100 to pay off the fine. In various parts of the investigation he didn't have a laptop and he didn't have a cellphone. At one point the informant gave him a cell phone.<sup>181</sup>

- *Case of Adnan Mirza:* For his entire five years in Houston, Mirza was an active member of the Muslim community, working to bridge gaps with non-Muslims in southeastern Texas by serving the needy,<sup>182</sup> and was part of a

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<sup>180</sup> Decision and Order Denying Defendants' Renewed Motion to Dismiss the Indictment Based on Outrageous Government Conduct at 23, *Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011).

<sup>181</sup> Alan Rozenshtein, "Lawfare Podcast #24: Federal Public Defender Miriam Conrad on the Rezwan Ferdaus Case," post to "Lawfare" (blog), Lawfare Institute, January 16, 2013, <http://www.lawfareblog.com/2013/01/lawfare-podcast-24-federal-public-defender-miriam-conrad-on-the-rezwan-ferdaus-case/> (accessed June 17, 2014).

<sup>182</sup> Mirza regularly went to restaurants around Houston and collected leftover food that had not been served; he would then go around the city's poorest areas and feed the homeless. He helped without regard to religion, delivered food on Christmas Day, and did so entirely on his own initiative. See Trial Transcript vols. 1, 2 at 539-555, and vol. 3, *United States v. Mirza*, No. 4:06-cr-00421-2 (S.D. Tex. Oct. 28, 2010), *aff'd*, No. 10-2075 (5th Cir. Oct. 25, 2011), *cert. denied*, 132 S.Ct. 1725 (2012) (No. H-06-421, 2010 Term; renumbered No. 10-2075, 2011 Term; renumbered No. 11-8595, 2012 Term); Human Rights Watch interview with representative of the Islamic Circle of North America, Houston, June 25, 2012; Human Rights Watch interview with David Adler, defense attorney at Mirza's trial, Houston, Texas, June 27, 2012.

group that provided cultural sensitivity training to the Houston Police Department about Islam.<sup>183</sup>

In 2004, Customs and Border Patrol officials in Big Bend National Park stopped two of Mirza's friends in a car, and found weapons. The FBI interviewed both friends; one of them was Jim Coates—who worked with Mirza on the “Why Islam” campaign that sought to educate people about Islam to reduce negative stereotypes and perceptions.<sup>184</sup> Coates agreed to become a paid informant for the FBI. In 2005, the government introduced an undercover agent named “Malik Mohammed” to the group of Coates, Mirza, and co-defendant Kobie Williams. Mohammed posed as someone with a military background who specialized in teaching hand-to-hand combat.<sup>185</sup> The group regularly went to a camping area in Willis, Texas, where they barbecued, shot at a shooting range, and engaged in discussions on a variety of topics, ranging from women to group travel to Afghanistan.<sup>186</sup> Based largely on their conversation, the prosecution in the case against Mirza alleged that these were “training camps” to prepare Mirza and his friends to go to Afghanistan and fight against US forces.<sup>187</sup> According to the defense and Mirza's acquaintances, though, these activities were far less menacing—little more than men going camping, with the shooting and “military training” sessions suggested and encouraged by the FBI agents. Mirza's attorney, David Adler, told Human Rights Watch that even at the most egregious moments of discussion, it seemed to him “similar to rednecks sitting around talking about the IRS.”<sup>188</sup>

Nonetheless, Mirza was eventually charged with eight counts of weapons charges and one count of conspiracy to provide material support.<sup>189</sup>

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<sup>183</sup> Trial Transcript vol. 2 at 255, *Mirza*, No. No. 4:06-cr-00421-2 (S.D. Tex. Oct. 28, 2010). Human Rights Watch interview with Shiraz Qazi, Mirza's cousin and defendant in related case, Houston, Texas, June 26, 2012; Human Rights Watch interview with representative of the Islamic Circle of North America, June 25, 2012.

<sup>184</sup> Human Rights Watch phone interview with person close to Jim Coates, June 21, 2012.

<sup>185</sup> Trial Transcript vol. 2 at 255, *Mirza*, No. No. 4:06-cr-00421-2 (S.D. Tex. Oct. 28, 2010).

<sup>186</sup> *Ibid.*, vol. 1, pp. 209-212.

<sup>187</sup> *Ibid.*, vol. 2, p. 274. (Testimony of Undercover).

<sup>188</sup> Human Rights Watch interview with David Adler, June 27, 2012.

<sup>189</sup> These charges included conspiracy to unlawfully possess firearms and ammunition while illegally in the US; conspiracy to support the Taliban with funds; six counts of possessing firearms while illegally in the US; and one

According to the prosecution, Mirza was the ringleader in collecting around \$1,000—provided by the FBI agents and co-defendant Williams—that he handed to a middleman with the intent that it go to families of Taliban fighters.<sup>190</sup> According to the defense at trial and several of Mirza’s acquaintances, the money was intended for a hospital in Pakistan. On cross-examination, the FBI agent admitted that Mirza never made a recorded statement about wanting the money to go to the Taliban; however, there were recorded statements about the money going to a hospital or to families in Pakistan.<sup>191</sup> The prosecution argued, through recordings of the group’s conversations, that the hospital was a cover for getting the money to the intended beneficiaries: the Taliban or the Taliban’s families.<sup>192</sup>

The remaining eight counts related to the handling of various guns and ammunition. For all but one of the gun-related charges—a shotgun Mirza personally owned—the possession occurred because the FBI agents brought the guns to the camping sites and provided them to Mirza to fire.<sup>193</sup>

According to an FBI agent’s own testimony, there was no evidence that Mirza wanted to practice shooting before the FBI informant came up with the idea.<sup>194</sup> There was no evidence Mirza was interested in meeting someone with a military background before the FBI introduced an undercover agent with that profile.<sup>195</sup> Coates, the paid informant, appears to have initially suggested the idea of traveling overseas.<sup>196</sup> The informant and

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count of possessing ammunition while illegally in the US. Superseding Indictment, August 19, 2009, United States v. Mirza, No. 4:06-cr-00421-2 (S.D. Tex. Oct. 28, 2010), *aff’d*, No. 10-2075 (5th Cir. Oct. 25, 2011), *cert. denied*, 132 S.Ct. 1725 (2012) (No. H-06-421, 2010 Term; renumbered No. 10-2075, 2011 Term; renumbered No. 11-8595, 2012 Term). See also, *Mirza*, No. H-06-421, 2010 WL 1427220 at 4.

<sup>190</sup> Trial Transcript vol. 1 at 188-89, *Mirza*, No. 4:06-cr-00421-2 (S.D. Tex. Oct. 28, 2010).

<sup>191</sup> *Ibid.*, vol. 2, pp. 361, 368-371, 422.

<sup>192</sup> *Ibid.*, vol. 2, pp. 286-287.

<sup>193</sup> *Ibid.*, vol. 2. (Cross-examination of Mohammed Malik by David Adler)

<sup>194</sup> Trial Transcript, vol. 1 at 212-214, United States v. Mirza, No. 4:06-cr-00421-2 (S.D. Tex. Oct. 28, 2010), *aff’d*, No. 10-2075 (5th Cir. Oct. 25, 2011), *cert. denied*, 132 S.Ct. 1725 (2012) (No. H-06-421, 2010 Term; renumbered No. 10-2075, 2011 Term; renumbered No. 11-8595, 2012 Term) (Cross-examination of FBI special agent John McKinley by David Adler: “Q. You didn’t find any evidence of Mr. Mirza wanting to go shooting before [confidential informant] Mr. Coates suggested it? A. No, sir.”).

<sup>195</sup> *Ibid.*

<sup>196</sup> *Ibid.*



FBI undercover agent directed all aspects of the training.<sup>197</sup> And the FBI agents then handed Mirza the guns, and encouraged him to shoot the guns, that would provide the basis for many of the later charges against him.

On November 28, 2006, Mirza was arrested. After a four-day trial, the jury found Mirza guilty of all nine counts. He was sentenced to 15 years in prison.

### *Involving Third Parties in Conspiracies: The Case of the Fort Dix Five*

Mohamad Shnewer, Serdar Tatar, and the brothers Dritan, Eljvir, and Shain Duka were indicted in 2007 for conspiracy to murder members of the US military and possession of firearms.<sup>198</sup> Then-US attorney Chris Christie (now governor of New Jersey) praised law enforcement efforts as though a genuine plot had been stopped by detective work.<sup>199</sup>

In fact, the investigation involved two paid informants, more than a year of fruitless surveillance, and the dubious linking of an illegal gun purchase to a plot of which only two of the defendants were aware. After pressing 19-year old Mohammed Shnewer to come up with a plot to attack Fort Dix, the informant, “Mahmoud Omar,” said they would need more support to pull off an attack.<sup>200</sup> Shnewer offered to recruit the Duka brothers, but there is no indication that the informant Omar or a second informant on the case, Besnik Bakalli, ever spoke directly with the Dukas about an attack. At trial, Omar stated that he did not believe the Dukas knew about the Fort Dix plot.<sup>201</sup> Instead of direct conversation with the Duka brothers, Omar would inquire with Shnewer to the progress of the recruitment, and Shnewer would give alternating reports of progress. These conversations occurred in Arabic, which the Duka brothers do not speak.

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<sup>197</sup> Ibid. (Cross-examination of FBI special agent John McKinley by David Adler: “Q. And as far as this training—quote-unquote—that was going on out there in Willis, Mr. Coates and Mr. Mohammad directed all aspects of it? A. I believe Mr. Mirza said in his statement that they were designated as the trainers. Q. What kind of training did Mr. Mirza provide? A. None that I’m aware of.”)

<sup>198</sup> Indictment, United States v. Shnewer, No. 1:07-cr-00459-RBK (D.N.J. Apr. 29, 2009), *aff’d in part, rev’d in part sub nom.* United States v. Duka, 671 F.3d 329 (3d Cir. 2011) (No. 09-2292, 09-2299, 09-2300, 09-2301, 09-2302).

<sup>199</sup> “The philosophy that supports and encourages jihad around the world against Americans came to live here in New Jersey and threaten the lives of our citizens through these defendants. Fortunately, law enforcement in New Jersey was here to stop them.” US Attorney Christopher Christie, Press Conference, May 11, 2007, video clip, YouTube, [http://www.youtube.com/watch?v=\\_SBIQg8t-Xo](http://www.youtube.com/watch?v=_SBIQg8t-Xo) (accessed June 20, 2014).

<sup>200</sup> Trial Transcript at 3208, *Shnewer*, No. 1:07-cr-00459-RBK (D.N.J. Apr. 29, 2009).

<sup>201</sup> Ibid., pp. 3289, 2390.

The informant Omar also cultivated a relationship with defendant Serdar Tatar. Tatar was suspicious of the informant and reported him as a potential terrorist threat to a Philadelphia police sergeant who frequented the 7-Eleven convenience store where Tatar worked.<sup>202</sup> The police officer helped Tatar report Omar to the FBI.<sup>203</sup> However, Tatar ultimately provided Omar a map of Fort Dix which he had because his father's pizza shop delivered to it.<sup>204</sup> It is unclear why Tatar provided the map to Omar.

Tatar aspired to become a law enforcement officer himself, and was in the process of applying to multiple police departments.<sup>205</sup> A month passed between the time Omar first requested the map, and when Tatar actually gave it to him. Tatar claims that by stalling and eventually providing the map to Omar, he was attempting to support law enforcement efforts.<sup>206</sup> Tatar, for example, had made recordings of Omar at their mosque, which he attempted to present to the FBI.<sup>207</sup>

During the same period, the FBI deployed another informant named Besnik Bakalli, who befriended the Duka brothers.<sup>208</sup> Bakalli pretended to be seeking guidance on Islam and help in turning his life around.<sup>209</sup> The Duka brothers embraced Bakalli, a fellow Albanian, as someone who needed assistance and a sense of family.<sup>210</sup> As their relationship developed, Bakalli repeatedly asked the brothers about jihad, and whether it included violent acts. The brothers repeatedly told Bakalli that jihad was non-violent struggle to sustain their families and livelihood in the US.<sup>211</sup>

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<sup>202</sup> Ibid., p. 4714.

<sup>203</sup> Tatar, who himself was interested in entering law enforcement, offered his phone number and address for the sergeant to give to the FBI. The sergeant called the FBI's Philadelphia office from the 7-11, and left a detailed message with all of the information Tatar had provided. The FBI failed to contact the sergeant back for two weeks, at which time he was called down to the FBI office and briefed. Ibid., pp. 4722-4736.

<sup>204</sup> Trial Transcript at 4722-4724, United States v. Shnewer, No. 1:07-cr-00459-RBK (D.N.J. Apr. 29, 2009), *aff'd in part, rev'd in part sub nom.* United States v. Duka, 671 F.3d 329 (3d Cir. 2011) (No. 09-2292, 09-2299, 09-2300, 09-2301, 09-2302).

<sup>205</sup> Sergeant Sean Dandridge, who regularly visited Tatar's 7-11, testified at trial that Tatar frequently expressed ambitions about joining law enforcement, referring to specific applications he had submitted. Ibid., pp. 4717-4719.

<sup>206</sup> Columbia Law School's Human Rights Institute email correspondence with Serdar Tatar, April 4, 2013.

<sup>207</sup> Trial Transcript at 4731-4733, United States v. Shnewer, No. 1:07-cr-00459-RBK (D.N.J. Apr. 29, 2009), *aff'd in part, rev'd in part sub nom.* United States v. Duka, 671 F.3d 329 (3d Cir. 2011) (No. 09-2292, 09-2299, 09-2300, 09-2301, 09-2302).

<sup>208</sup> Ibid, p. 5423.

<sup>209</sup> Ibid, p. 5708. (Cross-examination of Besnik Bakalli by Michael Riley, indicating that Bakalli presented himself as an ethnic Albanian who "would like to learn more about their faith and maybe participate in that faith.")

<sup>210</sup> Ibid, pp. 5708-5709. (Cross-examination of Besnik Bakalli by Michael Riley)

<sup>211</sup> Ibid., p. 5586. (Cross-examination of Besnik Bakalli by Michael Huff) (Recorded conversation in which Eljvir and Dritan deny Bakalli's inference that jihad means to only a violent fight, but instead means to struggle and sacrifice against lust.)

Bakalli also accompanied the brothers on paintball trips in the Poconos and Cherry Hill. On one trip during a holiday weekend in 2006, Bakalli asked each brother, “We’re training, right?” According to the brothers, they answered no and were surprised at the question.<sup>212</sup> However, at trial their paintball trips were used to support the government’s claim that they were training for jihad.<sup>213</sup> The recordings of the informant’s conversations, inexplicably, leave off the period of time during which these particular conversations occurred.

In addition to the illegal gun sale, the government’s case against Tatar and the Dukas was based on various pieces of evidence introduced at trial, including videos of attacks on US troops abroad found on Mohammed Shnewer’s laptop, which prosecutors claimed served as inspiration and guidance for the Fort Dix operation. Prosecution expert witness Evan Kohlmann (see section IV) tried to connect these videos with the paintball and trips to the Poconos; he also tried to portray the acquisition of guns as evidence of jihadist activity. None of the prosecutors in the case responded to requests for comment.

All five men were convicted on December 22, 2008. Mohamad Shnewer and two of the Duka brothers were sentenced to life plus 30 years; Eljvir Duka was given a life sentence, and Serdar Tatar was sentenced to 33 years.<sup>214</sup>

## Informants with Criminal Histories

In the cases we reviewed, the FBI frequently used informants with criminal records who were known to be unreliable witnesses who engaged in highly questionable tactics.

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<sup>212</sup> Columbia Law School’s Human Rights Institute and Human Rights Watch interview with Shain Duka, USP Florence, July 18, 2012; Columbia Law School’s Human Rights Institute and Human Rights Watch Interview with Dritan Duka, July 19, 2012.

<sup>213</sup> Trial Transcript at 5143, United States v. Shnewer, No. 1:07-cr-00459-RBK (D.N.J. Apr. 29, 2009), *aff’d in part, rev’d in part sub nom.* United States v. Duka, 671 F.3d 329 (3d Cir. 2011) (No. 09-2292, 09-2299, 09-2300, 09-2301, 09-2302). (Direct examination of Besnik Bakalli: “Q. Now when you got back from the Poconos, how often did you go paintballing with the Duka brothers? A. Most every Friday. Q. And did you go paintballing sometimes on the weekends? A. Yes, Saturdays, Sundays too. Q. And had you done that before you went to the Poconos? A. No. Q: Did you do that in the Poconos? A. Yes. Q. And what did they tell you, the Duka brothers tell you paintball was for? A. Train.”)

<sup>214</sup> “Two Additional Defendants Sentenced for Conspiring to Kill U.S. Soldiers,” US Department of Justice press release, <http://www.justice.gov/opa/pr/2009/April/09-nsd-408.html> (accessed June 20, 2014). The judge gave Tatar a lower sentence because he believed Tatar was the only defendant not motivated by radical Islamic views. “Final 2 Ft. Dix plotters get jail,” *Inquirer*, [http://articles.philly.com/2009-04-30/news/25287654\\_1\\_shain-duka-fort-dix-dritan](http://articles.philly.com/2009-04-30/news/25287654_1_shain-duka-fort-dix-dritan).

The most notable example is Shahed Hussain, informant in the Newburgh Four and Yassin Aref cases, who admitted at one trial that by the time he was recruited by the FBI he had committed no fewer than 50 frauds.<sup>215</sup> In the case of the Newburgh Four, as noted above, Hussain offered James Cromitie \$250,000 to carry out a plot, apparently without authorization of his FBI handlers.<sup>216</sup> The trial judge concluded that Hussain committed perjury at the trial, though the appeals court concluded that Hussain's perjury did not affect the verdicts because his testimony was immaterial.<sup>217</sup> Hussain also admitted on cross-examination at the Newburgh trial that he had lied to his FBI handler about a conversation with a defendant on at least one occasion.<sup>218</sup> Yet the FBI continued to use him as an informant, including for a third sting operation in Pittsburgh.<sup>219</sup>

Other informants with criminal histories included "Khalil," informant in the Ferdaus case, and Mahmoud Omar, informant in the Fort Dix case.<sup>220</sup>

## Human Rights Concerns

The FBI investigation tactics described in this section raise serious human rights concerns, including discriminatory treatment on the basis of the target's protected political and religious expression and association, and violation of the right to fair trial due to criminal entrapment.

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<sup>215</sup> Trial Transcript at 1324, *United States v. Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011), *aff'd*, 727 F.3d 194 (2d Cir. 2013).

<sup>216</sup> Trial Transcript at 1803, *Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011) (Judge McMahon: Isn't it a fair view of the evidence that Agent Fuller did not know that he [Hussain] was throwing around quarter-million dollar offers.").

<sup>217</sup> *United States v. Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011), *aff'd*, 727 F.3d 194 (2d Cir. 2013).

<sup>218</sup> Hussain admitted telling Agent Fuller that Onta Williams, one of the defendants, had suggested that Laguerre Payen might be a snitch during a drive back from Stamford when in reality it was Hussain who had made the suggestion. Trial Transcript at 1435, *Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011).

<sup>219</sup> Hamed Aleaziz, "Wondering if Your 'Jihadist' Friend Is With the FBI?" March 20, 2012, <http://www.motherjones.com/mojo/2012/03/shahed-hussain-khalifah-al-akili> (accessed June 20, 2014).

<sup>220</sup> Trial Transcript at 2376-2382, *Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011). Omar lied to the FBI repeatedly over the course of the Fort Dix investigation, about issues ranging from investigation targets to fraudulently obtained Social Security numbers. (N.T. 10/27/08 at 2369 l. 19 to 2371 l. 19) (testimony of John Stermel, police officer with the Delaware River Port Authority assigned to FBI's joint terrorism task force) Despite these signs of unreliability, the FBI continued to depend on Omar, and paid him well for his efforts. Beginning in August 2006, the FBI paid Omar \$1,500 per week during the investigation. Omar received a total of \$240,000 from the FBI. This included: \$183,500 in payment unrelated to expenses, and \$54,000 for expenses incurred during the investigation including car repair and rent.

Under international law, a government may restrict freedom of association, expression or privacy for national security purposes within strict limitations.<sup>221</sup> However, a government may never do so in a discriminatory manner.<sup>222</sup> The UN Human Rights Committee, the international body of experts that monitors state compliance with the International Covenant on Civil and Political Rights (ICCPR), has repeatedly highlighted that restrictions on freedom of expression and privacy must be necessary to achieve a legitimate aim, and be proportionate to the aim pursued.<sup>223</sup>

Pursuing sting operations on the basis of individuals' religious practice or political beliefs violates the obligation under international law that investigations and prosecutions be impartial, and conducted in a non-discriminatory fashion.<sup>224</sup>

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<sup>221</sup> International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976. Under article 19, "1. Everyone shall have the right to hold opinions without interference; 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: ... (b) For the protection of national security or of public order (*ordre public*), or of public health or morals." While article 17 on the right to privacy and family does not specifically allow for national security restrictions, it prohibits any interference that is arbitrary or unlawful.

<sup>222</sup> See ICCPR, art. 2, which states that "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." According to Prof. Manfred Nowak in his authoritative analysis of the ICCPR, the restrictions specified in the rights to freedom of expression and association should be interpreted narrowly. For example, terms such as "national security" and "public safety" refer to situations involving an immediate and violent threat to the nation. See Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, (Kehl am Rhein: Engel, 2005), pp. 463-64, 504-05.

<sup>223</sup> See Human Rights Committee, General Comment 27, Freedom of movement (Art. 12), (Sixty-seventh session, 1999), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 (1993), p.174. See also, Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/HRC/10/3, February 4, 2009, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/106/25/PDF/G0910625.pdf?OpenElement> (accessed June 20, 2014), para. 65.

<sup>224</sup> See Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990), guideline 13, ("In the performance of their duties, prosecutors shall: (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination"). The right to freedom from discrimination based on religion, ethnicity or other grounds is enshrined in numerous international declarations and conventions, including, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights. Universal Declaration of Human Rights (UDHR), adopted December 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948), art. 2; International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted December 16, 1966, G.A. Res. 2200A(XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 9993 U.N.T.S. 3, entered into force January 3, 1976, arts. 2-3; International Covenant on Civil and Political Rights

Such investigations may also have a chilling effect on others' exercise of their basic rights.

### *What Constitutes Entrapment?*

The United States is obligated to provide criminal defendants with fair trials, both under US constitutional law and international human rights law.<sup>225</sup> So-called entrapment—where the government creates the opportunity for criminal activity, encourages an otherwise law-abiding person to engage in it, and then prosecutes him for it—may violate fair trial rights. US law allows criminal defendants to raise the affirmative defense of entrapment, but may not adequately protect their rights to fair trials.

Under US law a defendant can avoid criminal liability by showing both that the government induced him to commit the act in question and that he was not “predisposed” to commit it.<sup>226</sup> This “predisposition” inquiry focuses attention on the defendant’s background, opinions, beliefs, and reputation—in other words, not on the crime, but on the nature of the defendant. In effect, it asks whether the government induced a good person or a bad one, and leaves that character determination to the jury.<sup>227</sup> This character inquiry makes it exceptionally difficult for a defendant to succeed in raising the entrapment defense, particularly in the terrorism context, where inflammatory stereotypes and highly charged characterizations of Islam and foreigners often prevail. Indeed, no claim of entrapment has been successful in a US federal terrorism case to date.<sup>228</sup>

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(ICCPR), adopted December 16, 1966, G.A. Res. 2200A(XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, arts. 2-3, 26.

<sup>225</sup> U.S. CONST. amend. V.; ICCPR, arts. 14, 16; UDHR, arts. 6, 10, 11.

<sup>226</sup> See *Mathews v. United States*, 485 US 58, 63 (1988); *Jacobson v. United States*, 503 US 540, 549 (1992).

<sup>227</sup> Thomas Frampton, “Lambroso’s Ghost,” *New Inquiry*, March 7, 2013, <http://thenewinquiry.com/essays/lombrosos-ghost/> (accessed June 20, 2014) (arguing that this harkens back to positivist criminology, in which criminal laws were designed to root out segments of society that were deemed inherently problematic).

<sup>228</sup> “[T]here is a lengthy public record of guilty pleas and convictions in such cases. Federal courts and juries have overwhelmingly upheld the use of undercover operations in terrorism sting cases. While entrapment may routinely be cited as a defense in these cases, to date, no terrorism defendant since 9/11 has won acquittal using such a defense.” Radio Free Europe/Radio Liberty, Department of Justice National Security Division Spokesman Dean Boyd’s response to Trevor Aaronson’s *Terror Factory*, cited in “How the FBI Helps Terrorists Succeed,” *Atlantic*, February 26, 2013, <http://www.theatlantic.com/international/archive/2013/02/how-the-fbi-helps-terrorists-succeed/273537/> (accessed June 20, 2014).

In several cases we examined, political and religious views often appear to have been the primary “predisposition” leading authorities to conduct prolonged sting operations in which the authorities played a significant, if not leading, role in planning and financing the ultimate plot, raising serious fair trial concerns. For example, in the *Matin Siraj* case (see section IV), the evidence submitted by the prosecution to prove Siraj’s predisposition included a range of political statements including his empathy for Palestinian suicide bombers living under occupation, and his fascination with Osama Bin Laden. Particularly given the heightened jury emotions in terrorism cases, defense attorneys believe that it would be impossible to win on entrapment grounds.<sup>229</sup>

In contrast with US law, the European Court of Human Rights (ECtHR) of sting operations focuses on the whether inducement (also described as “incitement”) to a crime occurred—calling for the suppression of all evidence stemming from the incident. It also focuses on the defendant’s conduct up to the point when the government intervened by introducing an informant or undercover agent.

The United Kingdom House of Lords has laid out a similar standard.<sup>230</sup> The court asks whether there has been a violation of the right to a fair trial as a result of improper undercover tactics by examining two issues: the conduct of law enforcement, particularly whether it rises to “incitement,”<sup>231</sup> and the domestic procedural safeguards available to the defendant in arguing entrapment. While the ECtHR has rejected claims of incitement or entrapment where there was “concrete evidence” that the defendant had engaged in significant steps—or at least “initial steps”—toward committing the specific criminal offense before law enforcement

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<sup>229</sup> Columbia Law School’s Human Rights Institute interview with Martin Stolar, defense attorney for *Matin Siraj*, New York, May 30, 2012.

<sup>230</sup> “The only proper purpose of police participation is to obtain evidence of criminal acts which they suspect someone is about to commit or in which he is already engaged. It is not to tempt people to commit crimes in order to expose their bad characters and punish them.” *Loosely, R. v.* [2001] UKHL 53, [2002] 1 Cr App R 29 [56], available at <http://www.publications.parliament.uk>.

<sup>231</sup> European Court of Human Rights, *Ramanauskas v. Lithuania* [GC], no. 74420/01, ECHR 2008, para. 55. “Police incitement occurs where the officers involved—whether members of the security forces or persons acting on their instructions—do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution.”

began its undercover investigation,<sup>232</sup> it has found violation of the right to fair trial where the authorities “instigated the offence.”<sup>233</sup>

European human rights law—instructive for interpreting fair trial rights recognized by the ICCPR as well—suggests that the current formulation of the US defense of entrapment may not comport with fair trial standards. Moreover, law enforcement might not engage in some of the more problematic investigative tactics documented in this report if the entrapment defense involved a more searching inquiry into police conduct rather than an investigation into the defendant’s so-called predisposition to engage in terrorism offenses.

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<sup>232</sup> European Court of Human Rights, *Case of Veselov and Others v. Russia*, nos. 23200/10, 24009/07 and 556/10, 2 October 2012, para. 90. The court did not further explain the type of conduct that would be considered “initial steps.”

<sup>233</sup> European Court of Human Rights, *Case of Teixeira de Castro v. Portugal*, 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, para. 39.



### III. Broad Charges: Material Support Cases

Of the 494 individuals prosecuted in the United States for terrorism or terrorism-related crimes between September 11, 2001, and December 31, 2011, 225 were charged under one of 23 federal statutes directly related to international terrorism. The remaining 269—more than half of the total—were charged under some other statute. They are included as “terrorism-related” in government reports because the Justice Department’s National Security Division claims that the cases have some link to international terrorism.<sup>234</sup>

In tandem with the expansion of the FBI’s investigatory capabilities after the September 11 attacks, Congress amended its laws criminalizing the provision of material support or resources to terrorists or designated terrorist organizations to reach a broader range of conduct, leading to prosecutions that raise concerns about infringements on the rights to freedom of expression and association. At the same time, prosecutors have increasingly pursued material support charges against defendants. Indeed, the largest share of convictions in terrorism-related cases since September 11 is based on material support charges.

#### Changes to the Material Support Statute

The original incarnation of what is known as the material support statute, 18 USC §§ 2339A and B, was enacted in 1994 as a response to the 1993 World Trade Center bombing. It was intended to prohibit supply of weapons, physical goods,

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<sup>234</sup> While DOJ-NSD does distinguish between international and domestic terrorism, all of the cases we discuss here are considered “international terrorism” cases per DOJ-NSD classification, although many appear to have no international link. (See, for example, the *Matin Siraj* and *Fort Dix* cases discussed above.) 18 U.S.C. sec. 2331(1) defines “international terrorism” as activities that: “(1)(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) *occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum* [emphasis added].” The definition of domestic terrorism is the same, with the exception that such acts “occur primarily within the territorial jurisdiction of the United States.” See 18 U.S.C. sec. 2331(5).

money and training to terrorists and terrorist organizations.<sup>235</sup> It made explicit exceptions for humanitarian assistance<sup>236</sup> and traditionally protected expression.<sup>237</sup> Amendments to the statute in 1996, in response to the Oklahoma City bombing, narrowed the humanitarian assistance exception,<sup>238</sup> and removed restrictions on speech-based investigation.<sup>239</sup> The 1996 statute also expanded the scope of the statute to enable prosecution for material support to “designated foreign terrorist organizations” (FTOs) under 18 USC § 2339B.

In the wake of the September 11 attacks, Congress passed the controversial Uniting and Strengthening America by Providing the Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act), which dramatically expanded the material support law. It broadened the scope of prohibited “material support” to include “expert advice or assistance” to a designated FTO, substantially—and vaguely—widening the range of activities that qualified as support for terrorism.<sup>240</sup> It also provided the same maximum punishment for attempts and conspiracies to provide material support as for actually and directly providing material support.<sup>241</sup> In 2004, partially in response to litigation, Congress clarified some of the definitional language in the material support statutes.<sup>242</sup> Then in 2010, in *Holder v. Humanitarian Law Project*, a divided Supreme Court upheld the application of the law, including its criminalizing of peace and human rights-

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<sup>235</sup> The original statute, 18 USC § 2339A, made it a crime to provide or conceal “currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation and other physical assets” with the knowledge or intent that they be used to further an act of terrorism. Violent Crime Control and Law Enforcement Act, 1994, tit. XII § 120005(a) (§ 2339A(a-b)), H. R. 3355, Pub.L. 103-322 (1994).

<sup>236</sup> Ibid., excepting “humanitarian assistance to persons not directly involved in such violations.”

<sup>237</sup> The Violent Crime Control and Law Enforcement Act forbids investigations initiated based on “expressions of support or the provision of financial support for the nonviolent political, religious, philosophical, or ideological goals or beliefs of any person or group.” See *ibid.*

<sup>238</sup> The new 1996 material support statute allowed for the provision of “medicine or religious materials.” Antiterrorism and Effective Death Penalty Act, tit. III(A) § 323 (§ 2339A(b)), Pub.L. 104-132, 110 Stat. 1255 (1996).

<sup>239</sup> Ibid.

<sup>240</sup> “USA Patriot Act,” tit. VIII §§ 810(c) and 810(d), H. R. 3162, Pub.L. 107-56 (2002); The 2001 version also increased the maximum term of imprisonment for material support offenses from 10 to 15 years with a possible life sentence if a death occurs as a result of the support rendered.

<sup>241</sup> Ibid., § 811(f).

<sup>242</sup> The Intelligence Reform and Terrorism Prevention Act of 2004 amended the definition of “material support or resources” applying to both sections, and the meaning of “knowingly” was expanded to require “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.” “Intelligence Reform and Terrorism Prevention Act” tit. VI § 6603(b) (§ 2339A(b)(1)) and (§ 2339B(a)(1)), Pub.L. 104-458, 118 Stat. 3638 (2004).

promoting activities provided to a designated terrorist organization, if coordinated with that group.<sup>243</sup>

The law empowers prosecutors to prosecute conduct that might seem otherwise innocuous— translating books and publishing them online, or storing ponchos and socks, as described in two cases below—for the ostensible purpose of preventing terrorism. While US courts have interpreted this law as criminalizing conduct only—and not as infringing on freedom of association—many scholars disagree. David Cole, a law professor who also served as counsel for plaintiffs in *Holder v. Humanitarian Law Project*, has written, “what good is it to have a right to join or associate with a group if the government can make it a crime to do anything whatsoever on the group’s behalf?”<sup>244</sup> One former prosecutor told us that in the interest of security, the material support statute allows a prosecutor to act well before any harm is imminent: “From the perspective of a doctor who’s identified a cancer, you don’t want to take a chance. You take a bigger margin.”<sup>245</sup>

Our research suggests that the breadth of the material support laws has led federal prosecutors to levy criminal charges for religious or political conduct itself, or as the primary evidence of criminal activity.

## Waves of Material Support Prosecutions

Prior to September 11, 2001, section 2339A was used twice and section 2339B was used four times.<sup>246</sup> But the expanded material support law resulted in a substantial increase in prosecutions. Based on our analysis of 494 cases the Department of Justice categorizes as terrorism or terrorism-related since September 11, 2001, the

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<sup>243</sup> Human Rights Watch joined a brief of amicus curiae in the case, arguing that purely peaceable activities it conducts could fall within the ambit of the material support statute. Brief for Human Rights Watch et al. as Amici Curiae Supporting Humanitarian Law Project, *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (Nos. 08-1498 and 09-89).

<sup>244</sup> David Cole, “Terror Financing, Guilt by Association and the Paradigm of Prevention in the ‘War on Terror’” (Georgetown Public Law and Legal Theory Research Paper No. 1262792, Georgetown University Law Center, 2008), pp. 234-35.

<sup>245</sup> Columbia Law School’s Human Rights Institute Interview with Joseph Ferguson, former prosecutor and co-director of the National Security and Civil Liberties Program at Loyola University School of Law, Chicago, Illinois, October 10, 2012.

<sup>246</sup> Robert Chesney, “The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention,” *Harvard Journal on Legislation*, vol. 42, no. 1 (2005), pp. 19-20.

largest share of convictions—168 out of 917, or 18 percent of all convictions—were for charges under the material support statute (see chart in Appendix - D).<sup>247</sup>

The post 9/11 prosecutions occurred in two waves. First, in the years immediately following the expansion, the Justice Department pursued cases based on a “deep reservoir” of information about political activists and charitable organizations obtained through intelligence collected prior to September 11, according to a former assistant United States Attorney.<sup>248</sup> In some cases the alleged conduct took place prior to 2001—even decades before. The intelligence was newly available to the Justice Department as a result of the USA PATRIOT Act, passed in 2002, which knocked down the “wall” between the FBI and the Justice Department and permitted much greater sharing between intelligence gathering and prosecution.<sup>249</sup> The Justice Department moved quickly to prosecute based on that evidence, and publicly touted the indictments as successes in the war on terrorism. As noted above, while the Justice Department had only prosecuted a total of six material support charges in the six years before 9/11, federal prosecutors charged 92 material support cases in the first three years thereafter.<sup>250</sup>

The trend upward continued with a second generation of cases, beginning around 2005, which illustrate how the material support statutes offer law enforcement an alternative to resource-heavy sting operations.<sup>251</sup> In some of these cases, the

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<sup>247</sup> Among the 494 defendants in our analysis, there were 917 separate convictions. Of these, 18 percent (168 total) convictions, since September 11, 2001 have been pursuant to material support charges under sections 2339A or B. Another 10 percent of convictions (92) were for Conspiracy, and 6 percent (58) for False Statements. Human Rights Watch analysis of US Department of Justice data. See also, Human Rights First, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts – 2009 Update and Recent Developments* (New York: Human Rights First, 2009), <http://www.humanrightsfirst.org/wp-content/uploads/pdf/090723-LS-in-pursuit-justice-09-update.pdf> (accessed June 20, 2014).

<sup>248</sup> Columbia Law School's Human Rights Institute interview with Joseph Ferguson, October 10, 2012.

<sup>249</sup> “Thus, the relevant USAOs shall have access to information developed in full field investigations, shall be kept apprised of information necessary to protect national security, shall be kept apprised of information concerning crimes, shall receive copies of LHMs or successor summary documents, and shall have access to FBI files to the same extent as the Criminal Division.” Memorandum on Intelligence Sharing Procedures for Foreign Counterintelligence Investigations Conducted by the FBI from John Ashcroft, former attorney general, US Department of Justice, to Robert Mueller III, former director, United States Federal Bureau of Investigation, March 6, 2002, <https://www.fas.org/irp/agency/doj/fisa/ago30602.html> (accessed June 22, 2014).

<sup>250</sup> Human Rights Watch analysis of US Department of Justice data.

<sup>251</sup> According to a report by the Center on Law and Security, in 2007, material support charges were brought in only 12 percent of terrorism cases; in 2010, that number rose to 69 percent and in 2011 88 percent of terrorism cases involved a material support charge. New York University School of Law, Center on Law and Security, “Terrorist Trial Report Card: September 11, 2001 – September 11, 2011,” p. 19.

government has used evidence of political speech to link individuals to terrorist organizations and prosecuted seemingly non-criminal conduct.

The following cases raise concerns about the use of material support charges:

### *Case of Sami al-Arian*

In 2003, Dr. Sami Al-Arian, a professor of engineering at the University of Southern Florida, was charged with 53 counts of supporting Palestinian Islamic Jihad (PIJ), including charges of providing PIJ with material support. Al-Arian's case was one of the first material support prosecutions after September 11, 2001. DOJ reviewed almost 21,000 hours of wiretapped telephone recording amassed mostly pursuant to warrants under the Foreign Intelligence Surveillance Act (FISA). The crux of the prosecution's case centered on phone conversations Al-Arian had with PIJ prior to its designation as an FTO in 1995<sup>252</sup>; prosecutors then relied heavily on evidence of Al-Arian's political views to convince the jury to convict him without establishing a link to any specific act of violence.<sup>253</sup>

Ultimately, after a trial lasting more than five months, the jury was unable to reach a unanimous verdict. Rather than face the prohibitive costs of another trial, Al-Arian decided to negotiate a plea agreement. In April 2006, he pleaded guilty to one count of conspiracy to make and receive contributions to PIJ.<sup>254</sup> The judge departed from the government's recommendation in the plea agreement and sentenced Al-Arian to the maximum possible sentence under the agreement. Under that sentence, he was set to be released in April 2007.<sup>255</sup> After a series of contempt charges in Virginia, Al-Arian was released to house arrest in September 2008. On

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<sup>252</sup> Meg Laughlin, "In his plea deal, what did Sami Al-Arian admit to?" *St. Petersburg Times*, April 23, 2006, [http://www.sptimes.com/2006/04/23/Hillsborough/In\\_his\\_plea\\_deal\\_\\_wha.shtml](http://www.sptimes.com/2006/04/23/Hillsborough/In_his_plea_deal__wha.shtml) (accessed June 20, 2014). ("There was never any evidence in the trial to show that Al-Arian or his co-defendants were involved with any violent acts. At the trial, federal prosecutors presented dozens upon dozens of transcripts of phone conversations and fax exchanges that Al-Arian had with PIJ leaders before such communications became illegal in 1995.").

<sup>253</sup> Eric Lichtblau, "Not Guilty Verdicts in Florida Terror Trial Are Setback for U.S.," *New York Times*, December 7, 2005, <http://www.nytimes.com/2005/12/07/national/nationalspecial3/07verdict.html?pagewanted=all> (accessed June 20, 2014). ("The trial, lasting more than five months, hinged on the question of whether Mr. Arian's years of work in the Tampa area in support of Palestinian independence crossed the threshold from protected free speech and political advocacy to illegal support for terrorists.")

<sup>254</sup> Plea Agreement, *United States v. Al-Arian*, No. 8:03-cr-00077-CEH-TBM (M.D. Fla. Apr. 17, 2006). See also, 18 USC § 371.

<sup>255</sup> Judgment, *Al-Arian*, No. 8:03-cr-00077-CEH-TBM (M.D. Fla. May 1, 2006).

June 27, 2014, the government moved to dismiss the contempt charges against Al-Arian, and the motion was immediately granted. The government indicated its intention to proceed with his deportation pursuant to a May 2006 removal order.<sup>256</sup>

### *Holy Land Foundation Prosecution*

The FBI began investigating the Holy Land Foundation (HLF) long before the September 11 attacks. Although the case against HLF centered around its charitable contributions in the Occupied Palestinian Territories that allegedly assisted Hamas, much of the conduct at issue took place before Hamas was designated as a Foreign Terrorist Organization in 1997.<sup>257</sup>

The HLF, founded in 1989, was the largest Muslim charity in the US in 2001, raising around \$13 million a year. It provided funds directly to *zakat* committees in Palestine—so-called because *zakat*, or charity, is one of the Five Pillars of Islam. The investigation of HLF began in 1993 after US citizen Muhammad Salah was arrested in Israel for his alleged role in Hamas.<sup>258</sup> In 1993, Salah told Israeli interrogators that HLF provided support to Hamas, and the FBI began investigating HLF and other Muslim charities.<sup>259</sup> After word leaked to the media that HLF was

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<sup>256</sup> In May 2006, shortly after his plea agreement was entered, the same prosecutor who tried the case against Al-Arian in Florida charged him before a grand jury in Northern Virginia. Gordon Kromberg, the AUSA, was investigating whether Islamic charities in the area were providing material support to terrorists. Al-Arian refused to testify on the basis of the content of his plea agreement. The court held him in civil contempt in November 2006, with the days served for civil contempt not counting towards his plea agreement sentence. In December 2007, the court lifted the order, and he continued to serve the rest of his sentence pursuant to the plea agreement. He was subpoenaed again in October 2007 and March 2008. In June 2008, after two separate federal courts held that the plea agreement did not preclude him from testifying, he was indicted on two counts of criminal contempt. He was released to house arrest in September 2008. Motion to Dismiss, *United States v. Al-Arian*, no. 1:08-cr-00131-LMB (E.D. Va. June 27, 2014).

<sup>257</sup> In a January 24, 1995 Executive Order, then-President Bill Clinton declared Hamas (along with 10 other groups) terrorist organizations under US law. The order made it a felony to raise, donate, or transfer funds to Hamas and mandated a freeze on all Hamas' banking assets in the US. Douglas Jehl, "Clinton Orders Assets of Suspected Terrorist Groups Frozen," *New York Times*, January 25, 1995, <http://www.nytimes.com/1995/01/25/world/clinton-orders-assets-of-suspected-terrorist-groups-frozen.html> (accessed June 20, 2014). On October 8, 1997, the US State Department's Counterterrorism Bureau released its first official list of designated Foreign Terrorist Organizations (FTOs), which designated 21 organizations, including Hamas, as a FTO. "Foreign Terrorist Organizations," US Department of State, Bureau of Counterterrorism terrorism designations press release, May, 28, 2013, [www.state.gov/j/ct/rls/other/des/123085.htm](http://www.state.gov/j/ct/rls/other/des/123085.htm) (accessed June 20, 2014).

<sup>258</sup> Salah was eventually indicted but acquitted in the US of terrorism-related charges in 2007 (see section IV).

<sup>259</sup> Michael Deutsch and Erica Thompson, "Secrets and Lies: The Persecution of Muhammad Salah (Part I)," *Journal of Palestine Studies*, vol. 37, no. 4 (2008), <http://www.palestine-studies.org/journals.aspx?id=10022&id=1&ndhref=fulltext#> (accessed June 20, 2014). See also, Emily Ratner, "Anonymous Accusers in the Holy Land: Subverting the Right of Confrontation in the United States' Largest Terrorism-Financing Trial," *Loyola Journal of Public Interest Law*, vol. 13, no. 2 (Spring 2012), pp. 582-

being investigated for ties to Hamas, its members repeatedly sought to confirm that their charitable activities complied with US law. HLF hired former congressman John Bryant as its attorney. Bryant repeatedly spoke to people at the Israeli embassy, the FBI, the State Department and elsewhere; no one would provide him with information about whether HLF was violating US law, including whether it should stop funding any particular group.<sup>260</sup> Bryant described the prosecution as “a terrible, terrible tragedy.”<sup>261</sup> He believed the case was politically motivated, and described it as “grossly unjust.”<sup>262</sup>

The defendants were never accused of directly funding terrorist organizations or terrorist attacks nor were the individual *zakat* committees accused of doing so.<sup>263</sup> Rather, the prosecution’s case rested on the following argument: HLF provided funds to Palestinian charities; the charities implemented Hamas’ social programs, the social programs helped win the “hearts and minds” of the Palestinian people, and that support enabled Hamas’ military wing to carry out terrorist attacks. Former US Consul-General in Jerusalem Ed Abington called this the “house of cards” theory of Hamas financing.<sup>264</sup>

The first trial ended in a hung jury; all the defendants were convicted in a second trial.

The defendants could be prosecuted in this manner because the material support statutes do not require any showing that a defendant intended his or her support to be used for an illegal end. Instead, the statute as interpreted by the Supreme Court bars any support—even that aimed at encouraging compliance with international law—on the theory that it is fungible and frees up resources that terrorists can then use for criminal ends.<sup>265</sup> To be convicted of material support, an individual need not have intended to commit any underlying crime or even know how the terrorist

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83. (“During a 1993 interrogation that he would later say included torture, Palestinian American businessman Muhammad Salah told agents of the Israeli Security Agency (Shin Bet) that HLF provided financial support to the Palestinian militant group Hamas.”)

<sup>260</sup> Human Rights Watch interview with John Bryant, Dallas, Texas, June 25, 2012.

<sup>261</sup> Ibid.

<sup>262</sup> Ibid.

<sup>263</sup> Transcript of Oral Argument vol. 6 at 69, *United States v. Holy Land Found.*, 722 F.3d 677 (5th Cir. 2013) (No. 3:04-CR-0240-P).

<sup>264</sup> Human Rights Watch interview with Ed Abington, Ottawa, Canada, August 22, 2012.

<sup>265</sup> *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

group might use the support, though the support must be provided in coordination with the terrorist group.<sup>266</sup> The Justice Department has even argued that Congress in effect adopted an “irrebuttable presumption” that all support to FTOs furthers their terrorist ends.<sup>267</sup> Congressional findings concluded that, “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”<sup>268</sup>

### *Fahad Hashmi Prosecution*

Fahad Hashmi also likely could not have been prosecuted prior to the amendments to the material support law. Hashmi was a recent graduate of Brooklyn College when he traveled to the UK to pursue a Master’s degree. Hashmi, a devout Salafi Muslim, was an outspoken activist against US foreign policy.<sup>269</sup> He had voiced his criticism in public forums both in the United States and the UK.<sup>270</sup>

In 2006, the US government intercepted Hashmi at a UK airport as he was about to board a plane to Pakistan. It touted his arrest as the capture of a “quartermaster”<sup>271</sup> who had provided material support by aiding in the delivery of military gear to Al-Qaeda.<sup>272</sup> Yet, over time, it became clear that the government was not actually

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<sup>266</sup> Ibid.

<sup>267</sup> David Cole, “Terror Financing, Guilt by Association and the Paradigm of Prevention in the ‘War on Terror’” (Georgetown Public Law and Legal Theory Research Paper No. 1262792, Georgetown University Law Center, 2008), p. 238.

<sup>268</sup> In a journal article, Wadie E. Said finds that certain foreign terrorist groups raised funds for violent activity in the United States under humanitarian pretenses. Wadie E. Said, “The Message and Means of the Modern Terrorism Prosecution,” *Transnational Law and Contemporary Problems*, vol. 21 (2012), p. 188 (citing Antiterrorism and Effective Death Penalty Act, tit. III § 301, 110, Pub. L. 104-132, Stat. 1247 (1996)). See also, *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

<sup>269</sup> Columbia Law School’s Human Rights Institute and Human Rights Watch interview with Faisal Hashmi, brother of Fahad Hashmi, New York, June 1, 2012. “Fahad has been a vocal critical of the United States for a long period of time, and was intelligent in his approach.”

<sup>270</sup> Ibid.

<sup>271</sup> Laura Rovner and Jeanne Theoharis, “Preferring Order to Justice,” *American University Law Review*, vol. 61 (2012), p. 1347 (citing “Terror Suspect Linked to Al-Qaeda Loses Extradition Battle,” *Daily Mail Online*, March 20, 2007, <http://www.dailymail.co.uk/news/article-443477/Terror-suspect-linked-Al-Qaeda-loses-extradition-battle.html> (accessed June 22, 2014)); see also, “American extradited on terror charges,” *CNN*, May 26, 2007, <http://www.cnn.com/2007/LAW/05/26/terror.suspect/> (accessed on June 22, 2014) (quoting FBI Assistant Director, Mark J. Mershon: “If we are engaged in a war against terror—and we most certainly are—then Syed Hashmi aided the enemy by supplying military gear to Al-Qaeda.”). DOJ championed his arrest and eventual conviction as a victory. “U.S. Citizen Pleads Guilty in Manhattan Federal Court to Conspiring to Provide Material Support to Al Qaeda,” United States Department of Justice press release, April 27, 2010, <http://www.justice.gov/usao/nys/pressreleases/April10/hashmisyedpleapr.pdf> (accessed June 2, 2014).

<sup>272</sup> Rovner and Theoharis, “Preferring Order to Justice,” *American University Law Review*, p. 1347 (citing “United States Announces First Extradition from United Kingdom on Terrorism Charges,” US Department of Justice press



accusing Hashmi of providing military gear himself. Instead, the government alleged that Hashmi permitted an acquaintance, Junaid Babar, to stay in his apartment for two weeks, with his luggage.<sup>273</sup> The “military gear” described in the initial indictment turned out to be Babar’s luggage, containing raincoats, ponchos, and waterproof socks.<sup>274</sup> The government later alleged that Hashmi allowed Babar to use his cell phone, lent him \$300 to purchase a plane ticket to Pakistan, and aided him in delivering this luggage to a third-ranking member of Al-Qaeda by holding it in his apartment.<sup>275</sup> The government never presented evidence that Hashmi knew that Babar or his associates were members of Al-Qaeda; nor did it allege any direct contact between Hashmi and Al-Qaeda. Indeed, even Babar said that Hashmi was “very much an outsider.”<sup>276</sup> These were the only acts of alleged material support prosecutors presented against Hashmi (though they did point to evidence of Hashmi’s political views and speech in an attempt to bolster the case against him).<sup>277</sup>

The centerpiece of the case against him was the testimony of Babar, who himself faced terrorism charges in 2004 and quickly cooperated with government authorities in exchange for a reduced sentence.<sup>278</sup> Hashmi was charged with two counts of providing and conspiring to provide material support and two counts of making and conspiring to make a contribution of goods or services to Al-Qaeda.<sup>279</sup> After spending nearly three years in pretrial solitary confinement (see section IV), Hashmi pleaded guilty to one count of conspiring to provide material support.<sup>280</sup> He was sentenced to 15 years in prison.<sup>281</sup>

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release, May 26, 2007, <http://www.justice.gov/usao/nys/pressreleases/May07/hashmiextraditionpr.pdf> (accessed June 22, 2014)). (“Mershon added, “[i]n a global community, terrorism anywhere is a threat to people everywhere.”)

<sup>273</sup> Columbia Law School’s Human Rights Institute and Human Rights Watch interview with Faisal Hashmi, June 1, 2012.

<sup>274</sup> Indictment at 3, *United States v. Hashmi*, No. 1:06-cr-00442-LAP (S.D.N.Y. June 10, 2010).

<sup>275</sup> *Ibid.*, pp. 2-3.

<sup>276</sup> Transcript of Bail Hearing at 11, *Hashmi*, No. 1:06-cr-00442-LAP (S.D.N.Y. June 10, 2010).

<sup>277</sup> The government planned to submit excerpts depicting Hashmi at a public political protest and a meeting of an “Islamic fundamentalist organization.” Government’s Memorandum In Support of Its Motion to Admit Certain Evidence at Trial at 1, *Hashmi*, No. 1:06-cr-00442-LAP (S.D.N.Y. June 10, 2010). Columbia Law School’s Human Rights Institute and Human Rights Watch interview with Faisal Hashmi, June 1, 2012.

<sup>278</sup> Columbia Law School’s Human Rights Institute and Human Rights Watch interview with Faisal Hashmi, June 1, 2012. Transcript of Bail Hearing at 12-13, *Hashmi*, No. 1:06-cr-00442-LAP (S.D.N.Y. June 10, 2010).

<sup>279</sup> Indictment, *Hashmi*, No. 1:06-cr-00442-LAP (S.D.N.Y. June 10, 2010).

<sup>280</sup> “US Citizen Pleads Guilty in Manhattan Federal Court to Conspiring to Provide Material Support to Al-Qaeda,” US Department of Justice, Federal Bureau of Investigation press release, April 27, 2010, <http://www.fbi.gov/newyork/press-releases/2010/nyfoo42710b.htm> (accessed June 22, 2014).

<sup>281</sup> Hashmi was moved to the Communications Management Unit in Terre Haute, Indiana as of June 17, 2004.

One former prosecutor described Hashmi's case as running up against the outer limits of the material support laws. "That's the closest I've seen here. He had developed radical views and clearly sidled up to some bad folks, and ended up allowing someone to stay with him and store some gear."<sup>282</sup> He emphasized that the value of prosecuting someone like Hashmi is deterrence, both of the perpetrator and others: "Someone who is willing to support Al-Qaeda would be less likely to go for this after Hashmi."<sup>283</sup>

### *Tarek Mehanna Prosecution*

In April 2012, Tarek Mehanna was convicted on seven counts, including three material support charges and three charges of providing false statements to government officials. He was sentenced to 17 ½ years in prison.<sup>284</sup>

A pharmacist, Mehanna taught Arabic at a local mosque in Sudbury, Massachusetts, where he was a favorite among his students. Daoud Ali, a friend of Mehanna's from the Worcester Islamic Center, described Mehanna as a charismatic leader who was an outspoken critic of US foreign policy.<sup>285</sup>

Prior to arresting Mehanna in 2008, FBI agents approached him on three separate occasions, including at the pharmacy where he worked, during work hours. Agents asked him questions about his background, religious practice, travels and relationships.<sup>286</sup> These conversations would become the basis for false statement charges brought alongside material support charges against Mehanna in November 2008.<sup>287</sup> Mehanna said that on their third visit, outside a hospital where Mehanna

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<sup>282</sup> Columbia Law School's Human Rights Institute and Human Rights Watch Interview with former Assistant United States Attorney (name withheld), February 14, 2013.

<sup>283</sup> Ibid.

<sup>284</sup> "Tarek Mehanna Sentenced in Boston to 17 Years in Prison on Terrorism-Related Charges," US Department of Justice, Federal Bureau of Investigation press release, April 12, 2012, <http://www.fbi.gov/boston/press-releases/2012/tarek-mehanna-sentenced-in-boston-to-17-years-in-prison-on-terrorism-related-charges> (accessed June 23, 2014).

<sup>285</sup> Columbia Law School's Human Rights Institute interview with Daoud Ali, Boston, Massachusetts, October 5, 2012.

<sup>286</sup> Columbia Law School's Human Rights Institute email correspondence with Tarek Mehanna, December 6, 2012. "The conversation then immediately shifted to biographical inquiries (where I lived, where I attended mosque, how long I had left in school, etc)."

<sup>287</sup> Ibid., "The entire time, one agent simply stared at my face, while the other was asking the questions. They began by holding up photographs and asking if I recognized those pictured. Regarding one of them, Daniel Maldonado, they asked about the last time I had spoken to him (this particular question served as the basis for

had just finished a shift, federal agents pushed him to become an informant for the FBI.<sup>288</sup> He refused.

Soon afterwards, in 2008, Mehanna was arrested as he was leaving for Saudi Arabia to begin a new job as a clinical pharmacist, and charged with making false statements.<sup>289</sup> Mehanna was released on bail. Ten months later, in October 2009, Mehanna was arrested again in a raid on his family's Sudbury home, at which point the remaining charges—including the material support charges—were brought against him.<sup>290</sup>

The three material support counts rested on two concurrent theories of liability.<sup>291</sup> First, the government alleged that Mehanna had traveled with some friends to Yemen in 2004 in a failed attempt to find a jihadist training camp.<sup>292</sup> Mehanna claimed that he was travelling to Yemen to study classical Arabic and religion as he continued to explore his faith.<sup>293</sup> Both agreed that Mehanna returned after a short trip and never attended a training camp of any sort.<sup>294</sup>

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the false statement charge upon which I was arrested the first time, in November 2008). The majority of the time was then spent questioning me about details regarding my trip to Yemen nearly three years prior— who helped me financially and logistically, who accompanied me, who I met there, etc. After those questions, he said that they had evidence that I was not telling the truth, but they could not show me that evidence.”

<sup>288</sup> Ibid., “They said that they were planning to charge me with crimes of terrorism and giving false statements to the FBI. However, they were giving me a choice to do things the easy way, or the hard way (in court). They suggested I get a lawyer, and that he would tell me what the ‘easy way’ consisted of. I finally did, and it was made clear to me that they wanted me to become a government informant. They gave me a few days to make my decision, and I immediately asked my lawyer at the time to tell them that I was not going to do anything of the sort. I then awaited my arrest.”

<sup>289</sup> Transcript of Oral Argument at 4-6, *United States v. Mehanna*, 669 F. Supp. 2d 160 (D. Mass. 2009) (No. 09-cr-10017-GAO).

<sup>290</sup> “Massachusetts Man Charged With Conspiracy to Provide Material Support to Terrorists,” US Department of Justice, Federal Bureau of Investigation press release, October 21, 2009, <http://www.fbi.gov/boston/press-releases/2009/bs102109a.htm> (accessed on June 25, 2014).

<sup>291</sup> “The defendants conspired and attempted to provide themselves and each other as personnel in the form of personally participating in terrorist training and combat.” Government’s Opposition to Defendant’s Motion to Dismiss Portions of Counts One through Three of The Superseding Indictment at 5, *Mehanna*, 669 F. Supp. 2d 160 (No. 09-cr-10017-GAO).

<sup>292</sup> Brief of the United States at 16, *United States v. Mehanna*, 735 F.3d 32 (1st Cir. 2013) (No. 12-1461), *petition for cert. filed*, No. 13-1125 (U.S. Mar. 17, 2014).

<sup>293</sup> Brief of Defendant-Appellant Tarek Mehanna at 11, *Mehanna*, 735 F.3d 32 (No. 12-1461).

<sup>294</sup> Brief of the United States at 14, *Mehanna*, 735 F.3d 32 (No. 12-1461); Brief of Defendant-Appellant Tarek at 17, *Mehanna*, 735 F.3d 32 (No. 12-1461).

Second, the government pointed to documents and videos that Mehanna had translated from their original Arabic and posted online to a website called “At-Tibyan Publications,” which the government alleged amounted to providing material support to Al-Qaeda in Iraq (AQI) “in the form of [his] online activities of translating, editing and distributing certain pro-jihadi materials for terrorists and Al-Qaeda.”<sup>295</sup> The defense rejected the website’s association with AQI.<sup>296</sup> Particularly at issue was Mehanna’s translation of *39 Ways to Serve and Participate in Jihad*. At trial and on appeal the government insisted that the translation of this document alone was sufficient to garner a conviction.<sup>297</sup>

The trial judge denied a defense motion to dismiss the material support charges on the ground that the charges were based on activity protected by the First Amendment guarantee of free speech.<sup>298</sup> The judge also denied a motion by the defense requesting a special verdict form that would show whether the jury based any material support verdicts on speech protected by the First Amendment.<sup>299</sup> After an eight-week trial, the jury convicted Mehanna on all counts, including material support. While prosecutors argued that evidence of Mehanna’s speech and trip to Yemen were separate and sufficient bases for convicting him of material support, the jury did not indicate whether it considered speech alone to be sufficient.<sup>300</sup> Mehanna appealed the verdict on the basis of unduly prejudicial evidence and First Amendment violations. In November 2013, the First Circuit upheld the verdict,

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<sup>295</sup> Government’s Opposition to Defendant’s Motion to Dismiss Portions of Counts One Through Three of The Superseding Indictment at 5, *United States v. Mehanna*, 669 F. Supp. 2d 160 (D. Mass. 2009) (No. 09-cr-10017-GAO); See also, Brief of the United States at 14, *Mehanna*, 735 F.3d 32 (1st Cir. 2012) (No. 12-1461); Brief of Defendant-Appellant Tarek Mehanna at 21, *Mehanna*, 735 F.3d 32 (No. 12-1461) (“In any event, because the evidence amply established that Mehanna engaged in propaganda activities ‘in coordination with, or at the direction of, a foreign terrorist organization,’ Mehanna’s convictions were lawful.” (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010))).

<sup>296</sup> Brief of Defendant-Appellant Tarek Mehanna at 12, *United States v. Mehanna*, 669 F. Supp. 2d 160 (D. Mass. 2009) (No. 09-cr-10017-GAO).

<sup>297</sup> Brief of the United States at 35, *United States v. Mehanna*, 735 F.3d 32 (1st Cir. 2012) (No. 12-1461), *petition for cert. filed*, No. 13-1125 (U.S. Mar. 17, 2014). (“In any event, because the evidence amply established that Mehanna engaged in propaganda activities ‘in coordination with, or at the direction of, a foreign terrorist organization,’ Mehanna’s convictions were lawful.”)

<sup>298</sup> Docket, Electronic Clerk’s Notes Aug. 3, 2011, *United States v. Mehanna*, 669 F. Supp. 2d 160 (D. Mass. 2009) (No. 1:09-cr-10017-GAO). See also, Defendant’s Motion to Dismiss Portions of Counts One Through Three of the Second Superseding Indictment, *Mehanna*, 669 F. Supp. 2d 160 (No. 1:09-cr-10017-GAO).

<sup>299</sup> Transcript of Jury Trial, Day 35 at 75, *Mehanna*, 669 F. Supp. 2d 160 (No. 1:09-cr-10017-GAO).

<sup>300</sup> David Cole, “39 Ways to Limit Free Speech,” post to “NYR Blog” (blog), *New York Review of Books*, April 19, 2012, <http://www.nybooks.com/blogs/nyrblog/2012/apr/19/39-ways-limit-free-speech/> (accessed July 9, 2014).

finding that the evidence relating to the Yemen trip independently supported the conviction.<sup>301</sup> Mehanna's March 2014 petition for writ of certiorari before the Supreme Court is still pending.<sup>302</sup>

### *Raleigh 7 Case – Ziyad Yaghi and Omar Mohammad Hassan*

Ziyad Yaghi and Omar Mohammed Hassan were charged, along with five other defendants, with offenses related to an alleged terrorism conspiracy centered in Raleigh, North Carolina, aimed at violent jihad and support for and participation in terrorist activities outside the US.<sup>303</sup> Yet while the indictment charged conspiracy to provide material support to terrorists, it never specified to whom Yaghi and Hassan provided material support. Yaghi was also charged with conspiracy to murder, kidnap or maim, but the prosecution never specified where, when or how.<sup>304</sup>

The FBI began investigating Yaghi in 2006 after allegedly receiving tips from the Muslim community about him.<sup>305</sup> In late 2006, Yaghi told Daniel Boyd—who had established himself as a leader among Muslim youth in Raleigh—that he would be traveling to Jordan to visit his grandmother and other family, further his Islamic education, and hopefully, find a wife.<sup>306</sup> In response, Boyd recommended a mosque where Yaghi could study and gave him the name of a Muslim woman in Jordan looking to get married.<sup>307</sup> Prosecutors said that terms like “getting married,” “going to the beach,” and “getting engaged” were actually code words for advancing the conspiracy; the government then used expert witness Evan Kohlmann (see section IV) to lend credence to that theory.<sup>308</sup>

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<sup>301</sup> United States v. Mehanna, 735 F.3d 32, 50 (1st Cir. 2013) *petition for cert. filed*, No. 13-1125 (U.S. Mar. 17, 2014).

<sup>302</sup> The First Circuit denied appeal for an en banc rehearing in December 2013. Mehanna filed a Writ of Certiorari, appealing the First Circuit's decision to the Supreme Court, in March 2014. Order Denying Petition for Panel Rehearing and Rehearing en banc, *Mehanna*, 735 F.3d 32 (1st Cir. 2013) (No. 12-1461); United States v. Mehanna, 735 F.3d 32 (1st Cir. 2013), *petition for cert. filed*, No. 13-1125 (U.S. Mar. 17, 2014).

<sup>303</sup> “Seven Charged with Terrorism Violations in North Carolina,” US Department of Justice press release, July 27, 2009, <http://www.justice.gov/opa/pr/2009/July/09-nsd-725.html> (accessed June 25, 2014); Superseding Indictment at 3-4, United States v. Boyd, No. 5:09-CR-216-FL (E.D.N.C. Nov. 18, 2013).

<sup>304</sup> *Ibid.*, pp. 3, 13.

<sup>305</sup> Trial Transcript Day 2 at 72, United States v. Boyd, No. 5:09-CR-216-FL (E.D.N.C. Nov. 18, 2013).

<sup>306</sup> *Ibid.*, Day 7, p. 259.

<sup>307</sup> *Ibid.*, Day 7, pp. 60, 260, 267.

<sup>308</sup> *Ibid.*, Day 2, p. 85. “Going to the beach means getting to the battlefield. Getting married means getting actively involved in the fighting, itself. Getting engaged means essentially committing to getting married, that is, committing to getting involved with those who can bring you to the battlefield. Kohlmann can talk about that to you.”

Prosecutors alleged that Hassan and Yaghi, in collaboration with their co-defendants and guided by Daniel Boyd, traveled to the Middle East in an effort to train and join jihadi forces. Yaghi traveled to Amman, Jordan in October 2006, staying for about three months. There were three short phone calls, and three emails between Yaghi and Boyd during that time, and the government said the emails showed that Yaghi had criminal intent.<sup>309</sup> Yaghi had asked about the location of the mosque Boyd had recommended and questions about the ideology of violent jihad.<sup>310</sup> To bolster this point, the government used posts on Yaghi's Facebook profile, which included political opinions, observations, and self-styled "gangsta rap" lyrics.<sup>311</sup> The government used the same type of evidence against Hassan with respect to his 2007 trip to Jordan.<sup>312</sup> At trial, Boyd testified that he had never made any agreement to provide material support or to murder anyone in a foreign country.<sup>313</sup>

In February 2007, Yaghi learned that Boyd and his family were planning a trip to Israel/Palestine and asked if he and Hassan could join.<sup>314</sup> Boyd agreed to let Yaghi come but told him that the trip was a "family thing" and that Yaghi would be on his own.<sup>315</sup> The Boyds, Hassan and Yaghi were denied entry to Israel. Although they all eventually went to Jordan instead, Boyd had no contact with Hassan and Yaghi while they were overseas.<sup>316</sup> Hassan and Yaghi vacationed at a beach in Egypt before returning to the United States in July 2007.

FBI Agent Robert Powell acknowledged that the government found no evidence that Yaghi or Hassan engaged in any terrorism-related activities on the 2007 trip.<sup>317</sup>

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<sup>309</sup> Ibid., Day 10, pp. 23-24, 29.

<sup>310</sup> Trial Transcript Day 2 at 85 and Day 7 at 60, 63, United States v. Boyd, No. 5:09-CR-216-FL (E.D.N.C. Nov. 18, 2013).

<sup>311</sup> Ibid., Day 10, p. 71. "Writing a note, nope, won't catch this nigga z on dope. Know how to play the game, kuffar is all one in the same, Jew, Christian or munafiq, it's gonna drastic, won't catch me on the army's draft list. Rather be the last draft pick. Sentence me ta life for speaking truth, but I'm serving a life sentence just for being a youth"; Trial transcript day 10 at 69, "Yo, remember when I used to be fasiq, the results was drastic. Now I'm good so feds wanna stretch me like elastic. Kuffar wanna bring us down but they can't suppress the sound. When were screaming la illaha illah, stompin on the ground."

<sup>312</sup> Ibid., Day 10, p. 81. "Yo, one, two check it. I'm bout to reck it. So wuzup with nigga Z ... I used to smoke tree. But I don't do that shit no more ... Only think I smoke now is fuckin kuffar ..."

<sup>313</sup> Ibid., Day 7, p. 260.

<sup>314</sup> Ibid., Day 7, p. 81.

<sup>315</sup> Trial Transcript Day 7 at 79-82, 246, United States v. Boyd, No. 5:09-CR-216-FL (E.D.N.C. Nov. 18, 2013).

<sup>316</sup> Ibid., Day 7, pp. 98, 262-63.

<sup>317</sup> Ibid., Day 11, p. 29.

Hassan and Yaghi bought roundtrip tickets, paid for their own tickets, used their real names and proper identification documents, and openly told law enforcement authorities at several airports they were there to “see the sights” and see Daniel Boyd.<sup>318</sup> Nonetheless the government told the jury in its opening statement that “the evidence, in cumulative form, will show convincingly that [the 2007 trip] was for the purpose of finding a way to the battlefield, trying to get hooked up with terrorists overseas who can take them to the battlefield to kill Americans.”<sup>319</sup>

After Yaghi returned from Jordan in 2007, the FBI visited his home more than 10 times, though Yaghi’s mother, Leila Yaghi, told us that she refused them entry.<sup>320</sup> Yaghi and Hassan communicated with Boyd two times after returning from Jordan, meeting him at his store in Raleigh in the summer of 2008. They had no communication thereafter. Both men were arrested in July 2009. Boyd and his two sons pleaded guilty to the charges against them and testified against Yaghi and Hassan at trial.<sup>321</sup> Boyd was sentenced to 18 years in prison; his sons were sentenced to seven years each. Hassan and Yaghi were convicted and sentenced to 15 and 45 years, respectively.<sup>322</sup>

## Human Rights Concerns

Several of these cases raise serious concerns about violations of individuals’ rights to free speech and association under the US Constitution and international law. According the UN Human Rights Committee, “The criminalisation of expression relating to terrorism should be restricted to actual participation in terrorist acts or instances of intentional incitement to terrorism.”<sup>323</sup> Similarly, the government can only punish association with a group that intends to commit crimes if the association itself is intended to further the illegal aims.<sup>324</sup>

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<sup>318</sup> Ibid., Day 2, pp. 123-24.

<sup>319</sup> Ibid., Day 2, p. 88.

<sup>320</sup> Columbia Law School’s Human Rights Institute interview with Leila Yaghi, Raleigh, North Carolina, October 14, 2012.

<sup>321</sup> Sentencing Statement for Dylan and Zak Boyd at 10, 48, United States v. Boyd, No. 5:09-CR-216-FL (E.D.N.C. Nov. 18, 2013).

<sup>322</sup> United States v. Hassan, 742 F. 3d 104, 111 (4<sup>th</sup> Cir. 2014).

<sup>323</sup> UN Human Rights Committee, Draft General Comment No. 34 (Ninety-eighth session, 2010), U.N. Doc. CCPR/C/GC/34/CRP.2 (2010) para. 45.

<sup>324</sup> Brief for Human Rights Watch, et al. as Amici Curiae supporting *Humanitarian Law Project*, *Holder v. Humanitarian Law Project* at 34, 561 U.S. 1 (2010) (Nos. 08-1498 and 09-89). (“Implicit in the government’s

In 2007, then-UN special rapporteur on human rights while countering terrorism, Martin Scheinin, cautioned against material support laws that are “expressed in terms that are not exclusive [and which] thereby render[] the expression ‘material support’ too vague.”<sup>325</sup> This “lack of precision” leaves the boundaries of liability unclear and makes it “particularly problematic for communities, including Muslim ones, which are unable to determine whether the provision of funds by them to what they may believe are charities or humanitarian organizations abroad will be treated as material support to a terrorist entity.”<sup>326</sup>

Despite the US Supreme Court’s acceptance of an extremely broad interpretation of the material support laws, the US has international legal obligations regarding the cases it chooses to prosecute. Some of the cases discussed above raise serious questions about whether the US is complying with those obligations.

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arguments below was the proposition that expressive activity that would otherwise be protected by the First Amendment becomes unprotected when engaged in with a group that the executive branch has designated. Under the Court’s well-established precedents, however, association with a group that engages in unlawful activity cannot be punished unless it is intended to further the group’s unlawful aims. Hinging application of the statute on a disfavored association only compounds the constitutional problem by layering an impermissible restriction on the right to association upon an impermissible restriction on speech. “For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.” *Claiborne Hardware*, 458 US 898 at 920.”).

<sup>325</sup> UN Commission on Human Rights, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism Martin Scheinin, A/HRC/6/17/Add.3, Nov. 22, 2007, para 41.

<sup>326</sup> Ibid. ICCPR in article 14 requires, among other things, a fair and public hearing that includes the right to examine witnesses, and the right not to be compelled to testify against oneself.



## IV. Unfair Trials

Terrorism suspects, like all criminal defendants, have the right to a fair trial, guaranteed under both the US Constitution<sup>327</sup> and international human rights law.<sup>328</sup> A fair trial requires that defendants have access to competent counsel and adequate time and resources to prepare their defense. In a fair trial, if prosecutors seek to introduce evidence that would unfairly prejudice the jury, the judge will exclude the evidence. Defendants also have the right to challenge the basis for any warrant and to test whether law enforcement complied with the law during the investigation.

Terrorism cases in the US since September 11, 2001 have raised serious fair trial concerns. This is largely due to investigative and detention tactics that occur prior to trial including prolonged solitary confinement during pretrial detention, as well as procedural impediments imposed by the US Congress or courts; use of prejudicial evidence such as evidence obtained through coercion; classified evidence obtained by warrantless wiretaps that cannot be fairly contested; and inflammatory evidence, including evidence about terrorism in non-terrorism cases that unfairly plays on jurors' fears.

### Prejudicial Evidence

Terrorism is by definition terrifying. While most crimes have specific victims, a major purpose of terrorism is to instill in the general population a fear that they themselves at any time could be victims of a terrorist attack. This means that jurors in terrorism trials may already be frightened or anxious about the crimes in question and the defendant's role; these fears may be heightened by the introduction of certain forms of evidence at trial.

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<sup>327</sup> U.S. CONST. amend. VI.

<sup>328</sup> ICCPR, arts. 14(1), 14(3)(e), and 14(3)(g). The UN Human Rights Committee has said that the specific elements of article 14(3) are "minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing." UN Human Rights Committee, General Comment 13, Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14) (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, para. 5.

In a number of terrorism-related cases we examined, federal prosecutors have introduced, and federal judges have accepted, various types of evidence that should have been considered overly prejudicial—that is, evidence that might unfairly influence the jury. Such evidence may taint the jurors’ ability to judge objectively and deprive the defendant of a fair trial, which includes the absence of any influence on the judge or jury, regardless of motivation.<sup>329</sup>

Evidence that has been admitted in terrorism cases and that raises concerns includes statements obtained from the defendant by coercion, references to terrorism unrelated to the charges, and evidence that might be more prejudicial than probative. With the specter of terrorism looming largely over the case, some judges allowed witnesses to testify anonymously (including by shielding their true identity from the defense), making it difficult for the defendant to challenge the veracity of witness testimony, and permitted other witnesses to testify when their personal circumstances suggested they were biased or unreliable.

### *Evidence Obtained by Coercion*

Under international law, evidence obtained from defendants by coercion cannot be admitted against them.<sup>330</sup> Similarly, US law, following the 1966 Supreme Court ruling in *Miranda v. Arizona*,<sup>331</sup> requires law enforcement to give the defendant a series of advisories about his rights before the defendant’s confession can be admitted as evidence against him.

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<sup>329</sup> UN Human Rights Committee, General Comment 32, Article 14: Right to Equality Before Courts and Tribunals and To A Fair Trial (Ninetieth session, 2007), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. CCPR/C/GC/32 (2007), para. 25. (“Fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive. A hearing is not fair if, for instance, the defendant in criminal proceedings is faced with the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court, thereby impinging on the right to defence, or is exposed to other manifestations of hostility with similar effects.”).

<sup>330</sup> The ICCPR provides an individual with the right “not to be compelled to testify against himself or to confess guilt.” This right includes the right not to have confessions obtained by torture or other cruel, inhuman or degrading treatment introduced at trial. ICCPR, art. 14(3)(g). The committee also noted that sometimes torture or other forms of cruel, inhuman or degrading treatment or punishment (prohibited by article 7 of the ICCPR) are used to compel the accused to confess or testify against himself, and that “[t]he law should require the evidence provided by mean of such methods or any other form of compulsion is wholly unacceptable.” See UN Human Rights Committee, General Comment 13, para. 14.

<sup>331</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

The Miranda requirements do not apply to evidence taken by foreign agents. Accordingly, US courts have adopted a separate “voluntariness” standard, which provides that for a confession obtained by foreign agents to be admitted in a US court, it must be the product of the defendant’s “essentially free and unconstrained choice.”<sup>332</sup> If the defendant’s “will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.”<sup>333</sup>

However, in terrorism cases in the US, prosecutors have repeatedly introduced evidence that appears to have been the product of coercion, and courts have accepted it. For example:

### **Case of Muhammad Salah**

In 1993, Israeli authorities arrested Salah at a checkpoint between Israel and Gaza.<sup>334</sup> The Israeli Security Agency interrogated him for about 50 days.<sup>335</sup> In federal court proceedings in 2006, Salah alleged that, while in interrogation, an Israeli interrogator stripped Salah naked and threatened that his family would be harmed or killed if he did not cooperate.<sup>336</sup> Salah said the interrogator deprived him of sleep for 48 hours, and forced him to sit shackled on a slanted child-size chair while he interrogated Salah.<sup>337</sup> He then moved Salah to a 2 X 3 foot “refrigerator cell” with his hands handcuffed behind his back to a metal bar, all while wearing a hood reeking of vomit and urine.<sup>338</sup> Salah said he was subjected to loud music and the sound of people screaming in pain. Under these conditions, Salah signed two documents written in Hebrew—a language he did not speak or read. He wrote a third statement after being transferred to a cell where he was threatened by other inmates.<sup>339</sup>

When Salah challenged the admission of these statements against him at trial in the US, the judge found the testimony of his Israeli interrogators—who testified

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<sup>332</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973).

<sup>333</sup> *Bustamonte*, 412 US 218, 225-26 (quoting *Culombe v. Connecticut*, 367 US 568, 602 (1961)).

<sup>334</sup> *United States v. Marzook*, 435 F. Supp. 2d 708 (N.D. Ill. 2006).

<sup>335</sup> He was eventually convicted in Israel for helping to funnel \$650,000 to Hamas and sentenced to five years in an Israeli prison. *Ibid.*

<sup>336</sup> Affidavit of Muhammad Salah at 3, *Marzook*, 435 F. Supp. 2d 708 (No. 03 CR 978).

<sup>337</sup> *Ibid.*

<sup>338</sup> *Ibid.*

<sup>339</sup> *Marzook*, 462 F. Supp. 2d 708, 726 (N.D. Ill. 2006).

that they did not mistreat him, and in fact treated him “specially” because he was an American<sup>340</sup>—to be credible, despite Salah’s own testimony and that of two other Palestinians who had been interrogated by the same Israeli interrogator and described similar forms of abuse.<sup>341</sup> Much of the evidence from Israeli intelligence, including information about the security agencies’ typical interrogation procedures, was classified and withheld from the defense pursuant to the Classified Information Procedures Act (CIPA) (see discussion below). Salah was ultimately acquitted of terrorism charges in the federal case, though convicted of obstruction of justice and sentenced to 21 months in prison.<sup>342</sup>

### Case of Ahmed Abu Ali

In September 2002, Abu Ali, a US citizen, traveled to Saudi Arabia to study at the Islamic University in Medina. In May 2003, three compounds primarily occupied by Westerners in the Saudi capital of Riyadh, were bombed. The Saudi authorities engaged in mass arrests in Riyadh, Mecca, Medina, and elsewhere. In June 2003 the Saudi security service, the Mabahith al-Amma (General Investigations), detained Abu Ali, holding him for 20 months without charge. Abu Ali later said Saudi agents subjected him to physical abuse, including slapping, whipping, and scarring; threatened him with amputation; and denied him food and access to a lawyer.<sup>343</sup> Abu Ali made statements that he later claimed were involuntary and the product of torture.<sup>344</sup> He alleged that after about one month in detention, a captain of the Mabahith had him copy in his own handwriting a “confession” that his Saudi interrogators had summarized.<sup>345</sup> While Abu Ali was in Saudi custody, FBI officials

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<sup>340</sup> Ibid., p. 718.

<sup>341</sup> Ibid., pp. 736-37.

<sup>342</sup> United States v. Salah, No. 1:03-cr-00978-2 (N.D. Ill. July 23, 2007). Salah had also been placed on a “specially designated terrorist” list by the Department of Treasury in 1995, pursuant to Israeli proceedings, and was kept on the list despite his acquittals of terrorism related charges in 2007. The designation, which as imposed by executive order and without a means to challenge it, restricted Salah’s ability to work and conduct basic transactions. Annie Sweeney, “Bridgeview man taken off terrorist list,” *Chicago Tribune*, November 7, 2012, [http://articles.chicagotribune.com/2012-11-07/news/chi-bridgeview-man-taken-off-terrorist-list-20121107\\_1\\_bridgeview-man-terrorist-list-support-hamas-extremists](http://articles.chicagotribune.com/2012-11-07/news/chi-bridgeview-man-taken-off-terrorist-list-20121107_1_bridgeview-man-terrorist-list-support-hamas-extremists) (accessed on June 25, 2014).

<sup>343</sup> Jerry Markon, “Doctors Find Signs Plot Suspect was Tortured, Lawyer Says,” *Washington Post*, May 20, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/19/AR2005051901737.html> (accessed June 30, 2014) (discussing Psychiatrists Allen S. Keller and Lynne M. Gaby’s psychiatric evaluations of Ahmed Abu Ali, finding “historical, physical and psychological evidence supporting” Ali’s allegations of torture).

<sup>344</sup> United States v. Abu Ali, 395 F. Supp. 2d 338, 341 (E.D. Va. 2005).

<sup>345</sup> Brief for the United States in Opposition to Defendant’s Motion to Suppress at 14, *Abu Ali*, 395 F. Supp. 2d 338 (E.D. Va. 2005) (No. 1:05-cr-00053).

traveled to Saudi Arabia and watched from behind a two-way mirror while the Saudis interrogated him, including questions based on inquiries the FBI had provided.<sup>346</sup> The FBI also interrogated Abu Ali directly, with and without the presence of Saudi officials, though Abu Ali did not allege the FBI mistreated him.<sup>347</sup>

Nearly a year later, in May 2004, the FBI told a family friend of Abu Ali that the FBI had no further interest in his detention. Also that month, the US Embassy informed the Saudi government that there were no pending US legal proceedings against Abu Ali and that his detention should not continue at the behest of the US. Nevertheless, the Saudi authorities continued to hold Abu Ali. His parents filed a petition for his release in federal court in Washington, DC, arguing that he was in constructive US custody. In December 2004, District Judge John Bates ordered the US government to provide information regarding Abu Ali's arrest and detention.<sup>348</sup> Instead, a federal grand jury issued an indictment against him in the Eastern District of Virginia. In February 2005, Abu Ali was handed over to US authorities and flown to Virginia. The indictment charged him with providing material support to and conspiring to provide material support to terrorists and designated terrorist groups.<sup>349</sup>

During the trial, the defense moved to suppress videotaped "confessions" of Abu Ali made while in Saudi custody on the grounds that they were involuntary and the product of torture. The government conducted an "investigation within an investigation," to determine if his claims were credible.<sup>350</sup> Former prosecutor David Laufman told us that the prosecutors were aware of reports that Saudi Arabia had a record of torturing prisoners, including an annual US State Department country report on human rights.<sup>351</sup> Saudi officials testified via live video-feed that Abu Ali had not been tortured in Saudi custody, and other witnesses testified that Abu Ali's behavior in the period after his arrest was not consistent with someone who had recently been tortured.<sup>352</sup> District Judge Gerald Bruce Lee found the testimony of

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<sup>346</sup> *Abu Ali*, 395 F. Supp. 2d 338, 343.

<sup>347</sup> *Ibid.*

<sup>348</sup> *Ali v. Ashcroft*, 350 F. Supp. 2d 28, 31 (D.D.C. 2004).

<sup>349</sup> *Abu Ali*, 395 F. Supp. 2d 338, 341.

<sup>350</sup> Columbia Law School's Human Rights Institute interview with David Laufman, Washington, DC, September 20, 2012.

<sup>351</sup> *Ibid.*

<sup>352</sup> *United States v. Abu Ali*, 395 F. Supp. 2d 338, 373-4 (E.D. Va. 2005). For example, the judge found that "Mr. Abu Ali's claim about having been whipped to the point of having blood on his back seems implausible in light of

Saudi intelligence officials that Abu Ali was not tortured to be credible, expressed doubts about Abu Ali's own credibility during his cross-examination, denied the defendant's motion to suppress his confessions, and permitted the prosecution to introduce at trial the inculpatory statements obtained from Abu Ali while in Saudi custody.<sup>353</sup> The case was highly politically charged. In opposing Abu Ali's motion to suppress his statements, the prosecution brief began: "The defendant in this case represents one of the most dangerous terrorist threats that America faces in the perilous world after September 11, 2001: an Al-Qaeda operative born and raised in the United States, trained and committed to carry out deadly attacks on American soil."<sup>354</sup> The government deemed Abu Ali's allegations of torture "a fabrication" designed to "thwart justice" and relied heavily on the testimony of Saudi officials that they had treated Abu Ali humanely.<sup>355</sup> The judge did not allow the defense to introduce as evidence at trial the many reports by the US State Department and organizations like Amnesty International and Human Rights Watch that have documented torture in Saudi Arabia—including evidence of torture of two UK nationals in prison at the same time as Abu Ali.<sup>356</sup> The judge concluded that evidence of other individuals' torture was not relevant to whether Abu Ali had been tortured.<sup>357</sup>

Abu Ali was convicted of conspiracy and providing material support to terrorists, as well as conspiracy to assassinate former President George W. Bush. He was sentenced to 30 years in prison, which was later revised to a life sentence.<sup>358</sup>

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certain behaviors that he exhibited in the time frame of June 11 through June 15, 2003—immediately after the alleged whipping—that do not coincide with how a recently beaten person would behave." Ibid., p. 374.

<sup>353</sup> Ibid., pp. 343-346.

<sup>354</sup> Brief for the United States in Opposition to Defendant's Motion to Suppress at 1, *Abu Ali*, 395 F. Supp. 2d 338 (E.D. Va. 2005) (No. 1:05-cr-00053).

<sup>355</sup> Ibid., p. 2.

<sup>356</sup> US State Department, Bureau of Democracy, Human Rights, and Labor, "2004 Country Reports on Human Rights Practices: Saudi Arabia, Human Rights in Saudi Arabia: A Deafening Silence," February 28, 2005, <http://www.state.gov/j/drl/rls/hrrpt/2004/41731.htm> (accessed on June 25, 2014); Human Rights Watch, *Human Rights Watch Backgrounder, December 2001: Human rights in Saudi Arabia: A Deafening Silence*, December 2001, <http://www.hrw.org/legacy/backgrounder/mena/saudi/saudi.pdf>, p.12; Amnesty International, "The Trial of Ahmed Abu Ali – Findings of Amnesty International's Trial Observations," December 14, 2005, <http://www.amnesty.org/en/library/asset/AMR51/192/2005/en/902af71c-d480-11dd-8743-d305bea2b2c7/amr511922005en.pdf> (accessed on June 25, 2014), p. 5.

<sup>357</sup> Amnesty International, "USA: The Trial of Ahmed Abu Ali – Findings of Amnesty International's trial observations," December 14, 2005, <http://www.amnesty.org/en/library/asset/AMR51/192/2005/en/902af71c-d480-11dd-8743-d305bea2b2c7/amr511922005en.pdf> (accessed June 30, 2014), p.5.

<sup>358</sup> Jerry Markon, "Va. Man's Sentence Increased to Life in Terror Plot," *Washington Post*, July 28, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/27/AR2009072701384.html> (accessed June 25, 2014).

### *Inflammatory or Improper Evidence*

Particularly in cases that are the result of an FBI “sting” operation, prosecutors wish to show the defendants’ state of mind and pre-existing interest in terrorism. To do so, prosecutors frequently display videos or show websites found on defendants’ computers. They seek to introduce evidence about the defendants’ views of Islam and certain religious words or phrases. In a number of cases, prosecutors have introduced as evidence statements that were mistranslated, and as a result were much more inflammatory than they would have been if correctly translated. And in some cases where the charges have nothing to do with terrorism, prosecutors seek—and judges have permitted—the introduction of inflammatory evidence of terrorist violence unrelated to the case that is highly prejudicial.

### **Inaccurate Translations**

In many terrorism cases we reviewed, the prosecution’s expert asserted a singular, extreme and contested meaning of an Arabic word, which failed to accurately represent the subtleties of language. These translations often resulted in highly inflammatory—and inaccurate—evidence being presented against the defendant. For example:

- *Case of Adnan Mirza*: In this case, the judge allowed an FBI undercover employee involved in the sting operation who had no demonstrated expertise in Islam or Arabic to testify about the Arabic word “*Shaheed*,” which the undercover claimed Mirza had said he hoped he would get. According to the undercover employee, “‘*Shaheed*’ was, basically, the blessings that you would get if you lived a proper Muslim life and went out as a martyr, died as a martyr.”<sup>359</sup> The undercover employee did not explain—and probably did not have the expertise to even know—that the term has a broad meaning, which includes not only dying while fighting to defend Islam, but also dying because

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<sup>359</sup> The following exchange was between the prosecutor and the FBI employee: “Q. And what kind of travel were y’all talking about? A. Going over to the Pakistan/Afghanistan/Iraq region. Q. And then Mr. Mirza says in reference to that conversation, ‘I hope that I get’ —I’m pronouncing it wrong, I’m sure— ‘Shaheed’? A. Yes. ... Q. Can you describe from your experience, working as an undercover and working within the Muslim community, what this term meant? A. In my experience, ‘Shaheed’ was, basically, the blessings that you would get if you lived a proper Muslim life and went out as a martyr, died as a martyr.” Trial Transcript, vol. 2, pp. 265-67, *United States v. Mirza*, No. 4:06-cr-00421-2 (S.D. Tex. Oct. 28, 2010), *aff’d*, No. 10-2075 (5th Cir. Oct. 25, 2011), *cert. denied*, 132 S.Ct. 1725 (2012) (No. H-06-421, 2010 Term; renumbered No. 10-2075, 2011 Term; renumbered No. 11-8595, 2012 Term). Also problematic in this case is the fact that the terrorism-related conspiracy charge against Mirza related to sending money to the Taliban, not traveling directly to fight with the Taliban; this conversation does not appear particularly probative of the conspiracy charge of sending money.

of religious persecution, or for the well-being of others. It was also problematic that, over the defense's objection, the judge allowed the undercover employee, with no demonstrated expertise in Islam, to define for the jury an Islamic concept.<sup>360</sup> As with the repeated references to "jihad" in Mirza's trial and many other terrorism trials, the prosecution presented a definition that was the most extreme, ignoring other interpretations of key words like *Shaheed*.<sup>361</sup>

- *Case of Barry Bujol*: Evidence introduced against Barry Bujol also raised concerns about language. When the informant talked to Bujol about traveling to Yemen and fighting with the "holy warriors," Bujol often responded, "*Inshallah*"—an Arabic term that literally means "God willing." The prosecution presented this as demonstrating Bujol's clear determination to fight with Al-Qaeda in the Arabian Peninsula (AQAP). But, Bujol was a recent convert to Islam, and the word *inshallah* may be used in many different ways—such as simply to signal "okay"—particularly by those who have recently acquired an Islamic vocabulary.<sup>362</sup> The government's definition of other Arabic terms, including *hijrah*, or emigration, was likewise controversial.<sup>363</sup> In Bujol's case, because he chose to represent himself at trial, the government's use of inaccurate or disputed phrases went largely uncontested until the sentencing phase.

In some cases, mistranslation of recorded conversations between the defendants and the informants, or misidentification by the government of the speaker, may have distorted their meaning in ways that had a negative impact on the defense. For example:

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<sup>360</sup> Ibid.

<sup>361</sup> The word "*Shaheed*" comes from the root word "*Shahadat*," which means testimony or witness. A core tenet of Islam is the Shahada, in which Muslims bear witness to the oneness of God and the finality of Muhammed's prophecy. A Shaheed is any individual who dies as a witness to his or her faith. While it does apply to someone who dies fighting defending Islam, the term *Shaheed* can also refer to someone who dies as a sacrifice for the well-being of others, or someone persecuted for religious reasons.

<sup>362</sup> See, e.g., Human Rights Watch interview with Ali Sadiqi, Falls Church, Virginia, July 18, 2012 ("Americans often use it as 'okay, okay.' They've just learned an Arabic word, so they use it a lot, but it doesn't necessarily mean anything.") Sadiqi filed an expert report in Bujol's sentencing case. Report of Expert Witness Mawhabahullah Ali Sadiqi, Esq., United States v. Bujol, No. 4:10-cr-00368 (S.D.Tex. June 1, 2012), *aff'd per curiam*, No. 12-20393 (5th Cir. June 12, 2013) (No. 4:10-CR-368-1, 2012 Term; renumbered No. 12-20393, 2013 Term).

<sup>363</sup> Ibid., p. 10 (fn 8), 23.



- *Case of Matin Siraj* (see section II): one part of the transcription of a conversation between the informant and Siraj, which was conducted in Urdu (a Pakistani language), refers to “SUB #1” who described concern for people’s lives. The speaker was Siraj, yet was not labeled as such.<sup>364</sup> Siraj described in a letter from prison that later in the transcript “I clearly state ‘We have to drop it!’ which the transcriber identifies with a (?) mark, as if I were asking a question, as I was clearly declaring dropping the 34th Street station scheme.”<sup>365</sup> Siraj felt that the transcription failed to present that he was attempting to back out of the plot.
- *Case of Yassin Aref* (see section II): During the trial, Aref became extremely agitated and the defense proposed that another translator double-check the accuracy of the translations.<sup>366</sup> Aref said the government distorted almost all the recordings they had, particularly when he spoke in Kurdish.<sup>367</sup> Aref alleges the government also manipulated his statements to make him sound dangerous, for example by playing over and over recordings of terms like “jihad” that he or the Islamic Movement of Kurdistan (IMK) used in the 1990s, to make it look like the IMK was calling for jihad against the West or that he was praising *mujahideen*. “They knew very well that the jury took these words as though they were a call for using violence against civilians in the west, while they knew it was all about Kurdish *peshmerga* and their struggle for freedom. They had nothing to do with any ‘global jihad’ activity.”<sup>368</sup>

### *Evidence of Unrelated Terrorism or Violence*

The most frequent terrorism-related offenses—charges of providing material support to terrorism or terrorist organizations, or conspiracy—are extremely broad. A conspiracy charge in particular opens the door for the prosecution to introduce a

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<sup>364</sup> Matin Siraj, “Accounting for Many Wrongs,” p. 6.

<sup>365</sup> *Ibid.*

<sup>366</sup> Shamshad Ahmad, *Rounded Up: Artificial Terrorists and Muslim Entrapment After 9/11*, (New York: Troy Book Makers), p. 137. “It was in this information where the government had previously mistakenly translated a word (‘kak’) which meant ‘brother’ as ‘commander,’ and tried to use the mistranslation to justify jailing Mr. Aref until trial.” Reply Brief for Appellant Yassin Aref at 20, *United States v. Aref*, 285 Fed.Appx. 784 (2d. Cir. 2008), *aff’d* No. 1:04-cr-00402-TJM-1 (N.D.N.Y. Mar. 19, 2007) (No. 1:04-cr-00402-TJM-1, 2007 Term; renumbered No. 07-0981-cr, 2008 Term).

<sup>367</sup> Columbia Law School’s Human Rights Institute email correspondence with Yassin Aref, July 3, 2012.

<sup>368</sup> Columbia Law School’s Human Rights Institute email correspondence with Yassin Aref, June 27, 2012.

range of disturbing evidence, including graphic images of terrorist attacks, about which the defendant may know nothing. Prosecutors in US terrorism cases have sought to establish knowing participation in a conspiracy by showing videos or websites found on defendants' computers. Yet, often the videos have little relevance to the charges.

In the trial of Tarek Mehanna (see section III), the government presented a variety of inflammatory pictures to the jury: 28 different images of New York's World Trade Center in flames, 33 video clips and 95 thumbnail photos, many of which were only found as cache files on Mehanna's computer.<sup>369</sup> The prosecutors mentioned Osama Bin Laden 18 times before the close of the trial, even though there was no evidence presented of any relationship between Mehanna and Bin Laden.<sup>370</sup>

This tactic was particularly troubling in the case against the Fort Dix Five, where the prosecution showed numerous violent videos found on the defendants' computers, alleging that defendants possessed and viewed the videos, without even attempting to show that the defendants intended to commit acts similar to those in the videos. A journalist observing the trial described the videos as follows:

The [sniper] video opens with several scenes of American troops in Iraq, moments before a sniper's bullet cuts them down. Next comes a blaring air-raid siren, followed by still images of US troops lying on the ground or being dragged from the street, presumably dead or gravely wounded. Then Arabic singing fills the soundtrack as a montage of world leaders, including President Bush, former Secretary of Defense Donald Rumsfeld, and former British Prime Minister Tony Blair, appears on the screen. Crosshairs move across their faces, until gunshots are heard and a red dot appears on the forehead of each.<sup>371</sup>

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<sup>369</sup> Audio Recording of Oral Argument, July 30, 2013, *United States v. Mehanna*, 735 F.3d 32 (1st Cir. 2013) (No. 12-1461), *petition for cert. filed*, No. 13-1125 (U.S. Mar. 17, 2014), *available at* <http://media.ca1.uscourts.gov/files/audio/12-1461.mp3>.

<sup>370</sup> *Ibid.*

<sup>371</sup> Tony Graham, "Jurors see videos taken from defendants, some appear to be pained," *Philadelphia Inquirer*, October 23, 2008, [http://articles.philly.com/2008-10-23/news/25264414\\_1\\_video-fort-dix-shain-duke](http://articles.philly.com/2008-10-23/news/25264414_1_video-fort-dix-shain-duke) (accessed June 25, 2014). A more graphic description followed:

The videos also depicted beheadings. In response to a defense motion, the judge ordered that the actual decapitations not be shown to jurors, for fear of unduly prejudicing them against the defendants.

Shain Duka, one of the defendants, described one juror reacting to a lengthy video of US soldiers being killed in battle by insurgent snipers. The juror “got up from her seat before exiting for the break, gave us all a stare of death, turned around and slammed the binder of transcripts... Her mind has shut down and she can’t judge correctly.”<sup>372</sup> Indeed, Juror No. 3 told the *Philadelphia Inquirer* that while she was watching the video of the sniper, “I thought I was seeing my son getting hit,” though she said jurors did not let their emotions affect their judgment.<sup>373</sup>

### *Selective Use of Informant Evidence*

While most of the disturbing evidence introduced in the Fort Dix case came in through expert testimony, discussed below, another troubling aspect of the evidence adduced in the case involved the selective use of informant recordings. Informant Besnik Bakalli testified that after Dritan Duka watched a video of Anwar Al-Awlaki, the US-born Yemeni cleric who was killed by a US drone strike in September 2011, Dritan said he was “going to start something,” and that “we have enough people ... you can do a lot [of damage] with seven people.”<sup>374</sup> But in later recordings, Dritan essentially retracted his statement, telling Bakalli that people are not allowed to train with terrorists, and that to him jihad meant not

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Much of the content played like a jihadist version of MTV or Grand Theft Auto, with fast-cut action, screeching soundtracks, and heavy use of cartoonish graphics to accompany fetishistic violence. In addition to the surreptitiously shot sniper footage, prosecutors played a video tribute to Osama bin Laden, made with the same aesthetics. There also was video of roadside bomb attacks on US military Humvees and other vehicles in Iraq. In one, off-camera bombers shout, “*Alla Akbar*,” which means “God is great,” as they detonate the explosives. Another lengthy video depicted jihadist fighters setting up mortars and engaging in a nighttime firefight.

<sup>372</sup> Letter from Shain Duka to Columbia Law School’s Human Rights Institute, August 17, 2012 (on file with Columbia Law School’s Human Rights Institute).

<sup>373</sup> Troy Graham, “Fort Dix Juror: ‘They were going to do it,’” *Philadelphia Inquirer*, January 25, 2009, [http://articles.philly.com/2009-01-25/news/25280685\\_1\\_juror-fort-dix-split-verdict](http://articles.philly.com/2009-01-25/news/25280685_1_juror-fort-dix-split-verdict) (accessed June 25, 2014). (“Juror No. 3 has a son who served two tours with the Marines in Iraq, where he was wounded by shrapnel and received the Purple Heart and Bronze Star. One video in particular, called Baghdad Sniper, was difficult for her to watch, she said. In one scene, a sniper shoots an American serviceman in the back, the same place her son was wounded. “I thought I was seeing my son getting hit,” she said. Despite the gruesome footage, she said, the jurors kept their emotions from affecting their judgment. “These men on trial did not do these things,” she said. “They exposed themselves to that material.”).

<sup>374</sup> David Kocieniewski, “6 Men Arrested in Terror Plot Against Fort Dix,” *New York Times*, June 6, 2013, [http://www.nytimes.com/2007/05/09/us/09plot.html?pagewanted=print&\\_r=0](http://www.nytimes.com/2007/05/09/us/09plot.html?pagewanted=print&_r=0) (accessed July 6, 2013).

fighting, but spreading Islam. Dritan discussed the same Awlaki video mentioned above, and said “you listen to one [imam] and then you listen to another. You don’t know what to believe.”<sup>375</sup> The court refused to allow the additional recordings into evidence, reasoning that Dritan himself could testify if he wanted to rebut the initial recording. The ruling meant that if Dritan wanted to rebut the recording he would have to give up his right not to testify and expose himself to wide-ranging questioning from the government.<sup>376</sup>

### *Evidence Suggestive of Terrorism in Non-Terrorism Cases*

Some of the most troubling evidence we examined was adduced in non-terrorism cases, where the government nevertheless sought to draw connections between the defendant and known terrorists or terrorist activities. The issue is closely tied to the government’s use of the Foreign Intelligence Surveillance Act (FISA) (see discussion below). For example:

#### **Case of Pete Seda**

In February 2005 the government charged Pete Seda (born Pirouz Sedaghaty) with conspiracy to defraud the US government and filing a false tax return, in connection with an investigation into Al-Haramain Islamic Foundation, a charity based in Saudi Arabia; in 2000, Seda had founded the Ashland, Oregon branch of Al-Haramain. Seda was living overseas at the time he was indicted 2005; he voluntarily returned to the US to face charges in August 2005. At the outset of the trial, the federal prosecutor stressed that the government was not seeking to hold Seda to account for any terrorism offenses.<sup>377</sup>

Yet the specter of terrorism permeated Seda’s trial. The government used as a demonstrative exhibit (it was never admitted into evidence) a 3 x 4 foot chart with photographs of Seda, his co-defendant Soliman al-Buthe, an Al-Haramain

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<sup>375</sup> Appellants’ Joint Opening Brief and Joint Appendix Vol. I (Pages 1 -26) at 72, *United States v. Duka*, 671 F.3d 329, (3<sup>rd</sup> Cir. 2011) (nos. 09-2282, 09-2299, 09-2300, 09-2301, 092302), *cert denied*, 132 S.Ct. 2754 (2012).

<sup>376</sup> Under ICCPR, art. 14(3)(g), a defendant has the right not to be compelled to testify against himself.

<sup>377</sup> “The government is not accusing Mr. Sedaghaty for being a terrorist,” prosecutor Christopher Cardani said in his opening statement to the jury. “No terrorism charges. Tax count and a conspiracy count. There will be lots of evidence related to the whole atmosphere of violent events overseas but there are no terrorism charges.” Transcript of Aug. 30, 2010 Trial Proceedings at 6, *United States v. Sedaghty*, No. 05-60008-HO, 2011 WL 356315 (D. Or. Aug. 10, 2011), *aff’d in part, rev’d in part*, 728 F.3d 885 (9th Cir. 2013).

accountant from Saudi Arabia who was in Saudi Arabia at the time, and the Chechen *mujahideen* commander Ibn al Khattab, whom Seda had never met.<sup>378</sup> The government also elicited testimony about terrorism through the use of expert witness Evan Kohlmann (see below). The government's theory was that Seda falsified his tax returns in order to funnel money to the Chechen *mujahideen*.

One of Al-Haramain's activities in the US was the distribution of Qurans and other religious material to US prisons. One version of the Quran that Al-Haramain distributed was called the Noble Quran and included a controversial appendix describing forms of jihad. The prosecutors argued that Seda shared the mindset of the authors of the index, which, the prosecutors claimed, called on prisoners to "Perform jihad against polytheists by wealth, body, and tongue."<sup>379</sup> The judge did not permit Seda to introduce a volume of letters, articles, emails, and a book he had written about Islam that the defense argued would have countered the government's portrayal of him "as a fundamentalist supporter of terrorism."<sup>380</sup>

The Department of Justice touted Seda's conviction as a success in the fight against terrorism.<sup>381</sup> In contrast, prominent local attorney and Muslim convert Tom Nelson described Seda's trial as "Islamophobia on parade."<sup>382</sup>

In August 2013, the Ninth Circuit Court of Appeals affirmed in part and reversed in part Seda's conviction, ordering a new trial.<sup>383</sup> The opinion noted that Seda's "tax fraud trial was transformed into a trial on terrorism."<sup>384</sup> The court went on to note:

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<sup>378</sup> Ibid., pp. 8-9, 25, 29, 32.

<sup>379</sup> Transcript of Trial Proceedings at 38-40, *Sedaugthy*, No. 05-60008-HO, 2011 WL 356315.

<sup>380</sup> Many of the documents were excluded because they had been in Seda's possession or found on computers used by one of his employees. District Court Judge Michael Hogan concluded that Seda would have to testify and lay a foundation demonstrating he had knowledge of the documents in order for them to be admitted. Appellant's Opening Brief at 45, *Sedaugthy*, No. 05-60008-HO, 2011 WL 356315. Transcript of Pretrial Proceedings at 93, *Sedaugthy*, No. 05-60008-HO, 2011 WL 356315.

<sup>381</sup> The US Attorney for Oregon said in a press release, "The jury's verdict demonstrates once again the critical role—and effectiveness—of civilian criminal courts in the battle against terrorism." "Defendant Convicted of Lying About Funds Bound for Religious Extremist Militants Federal Jury Convicts Leader of Al-Haramain Islamic Foundation of Two Felonies," US Department of Justice, Federal Bureau of Investigation press release, September 10, 2010, <http://www.fbi.gov/portland/press-releases/2010/pd091010.htm> (accessed June 25, 2014).

<sup>382</sup> Human Rights Watch interview with Tom Nelson, Portland, Oregon, August 13, 2012.

<sup>383</sup> *United States v. Sedaghty*, 728 F.3d 885 (9th Cir. 2013), *aff'd in part and rev'd in part* No. 05-60008-HO, 2011 WL 356315 (D. Or. Aug. 10, 2011).

<sup>384</sup> Ibid., p. 891.

“The appeal illustrates the fine line between the government’s use of relevant evidence to document motive for a cover up and its use of inflammatory, unrelated evidence about Osama Bin-Laden and terrorist activity that prejudices the jury.”<sup>385</sup>

### **Case of Mehrdad Yasrebi**

Dr. Mehrdad Yasrebi, founder of Child Foundation, was charged with conspiring to defraud the Office of Foreign Assets Control (OFAC), the entity that enforces US economic and trade sanctions against other countries, including Iran. Yasrebi was initially charged with violations of the sanctions regime, as well as tax fraud and money laundering, though the indictment and superseding indictment remain sealed.<sup>386</sup> Though he was not charged with terrorism-related offenses, prosecutors attempted to draw connections between his charitable work and terrorism throughout the proceedings against him.

Child Foundation, based in Portland, Oregon, provided education and assistance to impoverished children in Iran, and Yasrebi accordingly had significant communication with individuals in Iran. In September 2000, Yasrebi contacted OFAC to inform it of his work and request a determination that his work did not violate the sanctions regime. Yasrebi was aware of a similar charitable organization that received information from OFAC that its charitable donations to Iran did not violate OFAC regulations and was represented by the same attorney that had represented that organization.<sup>387</sup>

OFAC responded to Yasrebi’s correspondence by noting that filing a license application or requesting information—as Child Foundation had—did not excuse noncompliance, but did not tell Yasrebi or Child Foundation that a license was required. OFAC then transferred Child Foundation’s request to its Enforcement Division. While noting that the ordinary procedure would be to issue a demand letter, internal OFAC documents indicate that “[b]ecause of the criminal investigative interest by the US Attorney’s Office and US Customs Service in this matter, OFAC Enforcement will not proceed with the issuance of a demand

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<sup>385</sup> Ibid. At time of writing a new trial date has not been set.

<sup>386</sup> Defendant Mehrdad Yasrebi’s Sentencing Memorandum at 15, *United States v. Yasrebi*, No. 05-CR-004130-KI (D. Or. Mar. 6, 2012).

<sup>387</sup> Ibid., pp. 6-7.

letter.”<sup>388</sup> OFAC also found relevant that Child Foundation had submitted another request in October 2001. The government initiated surveillance of Yasrebi shortly after September 11—it is not clear whether his second letter triggered the surveillance.<sup>389</sup>

For eight years, US authorities amassed a mountain of evidence, none of which appears to have shown any support for terrorism. Yet the case was investigated by the Joint Terrorism Task Force and FISA was utilized (see below). Yasrebi ultimately pleaded guilty to conspiring to defraud OFAC and the Internal Revenue Service. Prosecutors repeatedly made reference to terrorism even though Yasrebi was never charged with any terrorism-related offense. The sentencing judge, District Judge Garr King, noted that even though the money Child Foundation sent to Iran was for humanitarian purposes, it “did violate the embargo in effect at that time.”<sup>390</sup> The prosecution sought a sentence of 30 months’ imprisonment in part because of the “national security” and “terrorism” implications of the case,<sup>391</sup> which the judge apparently rejected in imposing one year of home detention in which Yasrebi could go out in consultation with his probation officer.<sup>392</sup>

Yasrebi’s defense attorney, David Angeli, told us that he felt that once the government suspected terrorism it was unable to let go of the idea. Recognizing that the volume of money transferred to Iran (\$10 million over several years) might reasonably arouse suspicion, he nevertheless felt that the government was unable to see the facts clearly:

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<sup>388</sup> Office of Foreign Assets Control License Determination, Referral #02-102-08, June 17, 2002 (on file with Human Rights Watch).

<sup>389</sup> Yasrebi’s defense memorandum explains: “[T]he government used FISA wiretaps to listen in on a voluminous number of telephone calls involving Dr. Yasrebi and others. On multiple occasions, the government also intercepted mail, faxes, and other communications to or from CF [Child Foundation], Dr. Yasrebi, and others. And in the middle of the night on December 10, 2006, government agents covertly entered CF’s offices, copied seven computer hard drives, rifled through CF’s files, photographed numerous documents, and left without leaving a trace that they had ever been there.” Defendant Mehrdad Yasrebi’s Sentencing Memorandum at 12, *Yasrebi*, No. 05-CR-004130-KI.

<sup>390</sup> *Ibid.*, pp. 81-82.

<sup>391</sup> Defendant Mehrdad Yasrebi’s Sentencing Memorandum at 15, *United States v. Yasrebi*, No. 05-CR-004130-KI (D. Or. Mar. 6, 2012).

<sup>392</sup> *Ibid.*, p. 97.

[W]hen you commit to something like that, maybe it's human nature that, even years later when [all the evidence shows otherwise,] that you just can't back off, that you think, "We've got to get a return on our investment." I really think that's a lot of what's going on here.... And the result is that these people's lives are just being destroyed.<sup>393</sup>

### Holy Land Foundation Case

In this case (see section III) the defendants were never accused of directly funding terrorist organizations or terrorist attacks, nor were the Palestinian charities they funded accused of doing so. Nonetheless, they were prosecuted on the notion that the social programs they financed help win the "hearts and minds" of Palestinian people for Hamas.

Former US Consul-General in Jerusalem Ed Abington told us that the United States Agency for International Development (USAID) had funded the same *zakat* committees that the Holy Land Foundation (HLF) provided funding to, and that clearly the US government did not consider them fronts for Hamas.<sup>394</sup> Abington testified at both HLF trials. He testified about personally visiting *zakat* committees, and noted that while some committees had members who were also members of Hamas, he did not believe the committees were controlled by Hamas.<sup>395</sup> Abington also testified that the Central Intelligence Agency (CIA) had assisted in the development of Palestinian security forces, and that Israel's intelligence—on which much of the case was based—was not reliable.<sup>396</sup>

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<sup>393</sup> Human Rights Watch telephone interview with David Angeli, December 18, 2012.

<sup>394</sup> *Ibid.*

<sup>395</sup> *Ibid.*; Defendants' Amended Joint Motion to Compel Discovery, *United States v. Holy Land Found.*, 722 F.3d 677 (5th Cir. 2013) (No. 3:04-CR-0240-P) ("At trial, defense witness Edward Abington, the former United States Consul General in Jerusalem, testified that he received regular briefings from CIA briefers with access to a wide range of intelligence and that he was never told that the *zakat* committees were part of, or controlled by, Hamas.") (citing Transcript of Record vol. 25 at 93-98, *Holy Land Found.*, 722 F.3d 677 (No. 3:04-CR-0240-P)).

<sup>396</sup> "Defense's Turn in Muslim Charity's Terror Trial: Ex-State Department official questions reliability of Israeli intelligence," *Associated Press*, September 5, 2007, [http://www.nbcnews.com/id/20606489/ns/us\\_news-giving/t/defenses-turn-muslim-charitys-terror-trial/](http://www.nbcnews.com/id/20606489/ns/us_news-giving/t/defenses-turn-muslim-charitys-terror-trial/) (accessed June 25, 2014); Jordan Hirsch, "Deception and Discord in Dallas: The Undoing of a Flagship Anti-Terrorism Case," *Current*, Spring 2008, <http://www.columbia.edu/cu/current/articles/spring2008a/deception-discord.html> (accessed June 25, 2014).



After the trial, the CIA sent Abington a letter saying he had spoken contrary to his obligation to keep information confidential, and that he could be prosecuted.<sup>397</sup> During the second trial, the CIA sent a lawyer to observe Abington's testimony, and the judge provided less latitude, limiting the scope of his testimony about CIA involvement in Israel.<sup>398</sup>

Because the defendants were accused of ultimately supporting a structure that permitted Hamas' military wing to engage in terrorist acts, the court admitted evidence pertaining to bombings committed by Hamas. It also admitted images of Palestinian school skits of suicide attacks with no relationship to the defendants, and images that were pulled from the defendants' computers even though they were images that automatically download onto a user's computer when viewing particular websites.<sup>399</sup>

Many US terrorism cases involve allegations that the defendant was either in contact with known terrorist groups (or believed he was when in fact he was communicating with an undercover agent or informant), or aspired to be associated with those groups. In order to prove a charge of providing material support for terrorism (discussed in section III), the prosecutors can introduce evidence of terrorist activities about which the defendant himself may have no knowledge.

They generally do so through the use of expert witnesses. Unlike eyewitnesses, expert witnesses have wide latitude to testify on matters about which they do not have firsthand knowledge. In particular with informant cases—in which the defendant may have believed he was in contact with a member of a terrorist group but actually was not—expert witnesses have provided evidence about terrorist groups about which the defendants themselves may have been entirely unaware.

One such expert witness who testified in nearly all the cases discussed in this report

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<sup>397</sup> Human Rights Watch interview with Ed Abington, Ottawa, Canada, August 22, 2012.

<sup>398</sup> Ibid.

<sup>399</sup> Brief for Petitioner-Appellant Ghassan Elashi (with Common Issues) at 61-71, *United States v. El-Mezain*, 664 F.3d 467 (5th Cir. Dec. 7, 2011, revised Dec. 27, 2011) (Nos. 09-10560, 08-10664, 08-10774, 10-10590 and 10-10586), *cert. denied*, 133 S.Ct. 525 (2012).

that went to trial is Evan Kohlmann. Kohlmann has testified as an expert in at least 24 federal cases and 2 military commissions.<sup>400</sup> While he wrote a thesis on Arab Afghans, Kohlmann does not speak fluent Arabic or any other language relevant to his research, meaning that his online research focuses on English-language material.<sup>401</sup> Nor does Kohlmann have an extensive history of travel to or field work in regions where Islamist armed groups operate.<sup>402</sup>

Yet Kohlmann's testimony has been relatively wide-ranging, arguably far outside his areas of expertise. For example, while Kohlmann more typically testifies about Al-Qaeda, the district judge in Yassin Aref's trial allowed him to testify about Jamaat-e-Islami (JEI) of Bangladesh, the Islamic Movement of Kurdistan, and other Kurdish groups. Kohlmann had 36 to 48 hours in which to prepare his written report, and during a deposition indicated that he did not know anything about the political situation in Bangladesh or the JEI of Bangladesh, including who its leaders were.<sup>403</sup> The Second Circuit Court of Appeals upheld the prosecution's use of Kohlmann's expert testimony, citing a "liberal standard for the admissibility of expert testimony."<sup>404</sup> The appeals court reviewed the trial judge's decision on an abuse of discretion standard, so Kohlmann's testimony on JEI Bangladesh was admissible even despite his professed lack of knowledge about it.

Often, Kohlmann's testimony reaches dramatic conclusions, suggesting that activities or materials linked to the defendants are characteristic of terrorism. When Kohlmann testified in the Seda case, which was later overturned and remanded for a

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<sup>400</sup> Flashpoint Partners, "Court Testimony – United States", undated, <http://69-195-107-79.unifiedlayer.com/consulting.php> (accessed June 25, 2014).

<sup>401</sup> Transcript of Proceedings, Dec. 6, 2011, at 28-7, *United States v. Mehanna*, 669 F. Supp. 2d 160 (D. Mass. 2011) (No. 1:09-cr-10017-GAO). (Testimony of Evan Kohlmann: Q. "And you indicated earlier that you've never been to Yemen and you also don't speak Arabic, correct? A. I don't speak Arabic fluently.") *But see*, Transcript of Daubert Proceedings, Aug. 16, 2011, at 54, *United States v. Sherifi*, 793 F. Supp. 2d 751 (D.N.C. 2011) (No. 5:09-CR-216-FL). (Testimony of Evan Kohlmann: "Q: You, yourself, which languages do you speak? A: I speak fluently English and French, and I also speak some Arabic.")

<sup>402</sup> Transcript of Proceedings, Dec. 6, 2011 at 28-59, 60, *Mehanna*, 669 F. Supp. 2d 160 (No. 1:09-10017-GAO). (Testimony of Evan Kohlmann: "Q. And you've indicated that you've never done field work in your career in a country where the native language is Arabic. A. That's correct. Yeah; that's correct.")

<sup>403</sup> Transcript of Proceedings, Sept. 27, 2006, at 1166-67, *United States v. Aref*, No. 1:04-cr-00402-TJM-1 (N.D.N.Y. Mar. 19, 2007), *aff'd*, 285 Fed.Appx. 784 (2d Cir. 2008) (No. 1:04-cr-00402-TJM-1, 2007 Term; renumbered No. 07-0981-cr, 2008 Term).

<sup>404</sup> *United States v. Aref*, 285 Fed.Appx. 784, 792 (2d Cir. 2008), *aff'g* No. 1:04-cr-00402-TJM-1 (N.D.N.Y. Mar. 19, 2007) (No. 1:04-cr-00402-TJM-1, 2007 Term; renumbered No. 07-0981-cr, 2008 Term).

new trial, he claimed that the former director of a Saudi charity had been an “old friend” of Osama Bin Laden’s in the 1980s.<sup>405</sup> The Ninth Circuit Court of Appeals noted that Kohlmann had no direct knowledge of the facts of the case.<sup>406</sup> In testifying at the Raleigh 7 case (discussed in section III), Kohlmann testified about the nature of homegrown terrorism without citation to any academic work or any known fieldwork analyzing the criteria for the development of homegrown terrorism. Nevertheless, he concluded that the defendants likely “fit the classic profile of contemporary violent extremists and that there is a high probability of the existence of a home-grown terrorist network.”<sup>407</sup>

Kohlmann believes that people overestimate the impact of his testimony and that his testimony is often useful to the defense as well as the prosecution.<sup>408</sup> Defense attorneys see it differently. Daphne Silverman, Barry Bujol’s attorney at sentencing, told Human Rights Watch:

Kohlmann is an expert in how to use the Internet, like my 12-year-old. He has found all the bad [stuff] about Islam, and testifies as if what he is reading on the Internet is fact. He was paid around \$30,000 to look at websites, documents, and testify.<sup>409</sup>

She contrasted that with a judge’s denial of Bujol’s request to call a religious expert at trial, concluding, “The [imbalance] in expert testimony is an injustice that is really coloring these trials—you end up with just a government show.”<sup>410</sup>

### *Anonymous Witnesses*

Trials in US courts are considered public, and virtually all witnesses testify using their true names. US and international law protect the right of defendants to confront witnesses against them.<sup>411</sup>

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<sup>405</sup> Transcript of Proceedings at 169, *United States v. Sedaghty*, No. 05-60008-HO, 2011 WL 356315 (D. Or. Aug. 10, 2011), *aff’d in part, rev’d in part*, 728 F.3d 885 (9th Cir. 2013).

<sup>406</sup> *Ibid.*

<sup>407</sup> Transcript of Daubert Hearing at 28, *United States v. Boyd*, No. 5:09-CR-216-FL (E.D.N.C. Nov. 18, 2013).

<sup>408</sup> Columbia Law School’s Human Rights Institute and Human Rights Watch interview with Evan Kohlmann, New York, December 7, 2012.

<sup>409</sup> Human Rights Watch phone interview with Daphne Silverman, June 6, 2012.

<sup>410</sup> *Ibid.*

However, in some terrorism cases, US courts have allowed the government to hide the identity of witnesses—including foreign agents and US officials—either for their own protection, or because the witness works in a sensitive position. At times the witness’ identity is hidden even from defense counsel, making it nearly impossible for the defense to investigate the person’s background.

The use of anonymous witnesses raises concerns about adequate protections of the right to a fair trial. International human rights law requires that everyone charged with a criminal offense be able to examine the witnesses against them.<sup>412</sup> The use of anonymous witnesses violates fair trial rights because it deprives the accused of the necessary information to challenge the witness’ reliability. The Human Rights Committee has said that anonymous testimony should not form the primary basis for conviction.<sup>413</sup> While the cases we documented did not rely exclusively or primarily on

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<sup>411</sup> The Confrontation Clause of the Sixth Amendment to the US Constitution requires that “in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.” See *Crawford v. Washington*, 541 US 36 (2005). International law provides for the right to a fair and public hearing, and that the accused has the right “[t]o examine, or have examined, the witnesses against him.” ICCPR, art. 14(3)(e). The UN Human Rights Committee considers the defendant’s right to confront witnesses in the same manner as the prosecution a necessary component of equal access and equality of arms. Equality of arms—equal rights for both the defense and prosecution—“is a key element of human rights protection and serves as a procedural means to safeguard the rule of law.” UN Human Rights Committee, General Comment No. 32, para. 2. The defendant is entitled to examine witnesses in the same manner as the prosecutors. The Human Rights Committee has interpreted this right “to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.” UN Human Rights Committee, General Comment 13, para. 12. While international law requires that trials be public, the ICCPR does permit closure of portions of trial to the public and media for national security reasons (the ICCPR also permits closure of trials for reasons of morals or public order). See ICCPR, art. 14(1). But the provision is about publicity, not the defendant’s right to be informed of all evidence against him.

<sup>412</sup> ICCPR, art. 14(3)(e).

<sup>413</sup> See UN Human Rights Committee, “Consideration of Reports Submitted by State Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Netherlands,” CCPR/CO/72/NET, August 27, 2001, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G01/443/74/PDF/G0144374.pdf?OpenElement> (accessed June 28, 2014), para. 12. The UN Office of the High Commissioner for Human Rights, in its training materials on fair trials states: “Testimony of anonymous victims and witnesses during trial is unlawful, but can in exceptional cases be used in the course of criminal investigations. The identity of anonymous victims and witnesses must be disclosed in sufficient time prior to the beginning of the court proceedings to ensure a fair trial.” United Nations, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, E.02.XIV.3 (New York and Geneva: United Nations Publications, 2003), <http://www.ohchr.org/Documents/Publications/training9chapter7en.pdf> (accessed June 28, 2014), p. 291. The international criminal tribunals and the European Court of Human Rights have not completely ruled out the use of anonymous witnesses. See, e.g., Rome Statute of the International Criminal Court (Rome Statute), A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, art. 68(5) (anonymity of a witness where necessary for that witness’s protection may be permitted so long as “[s]uch measures are exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial”); European Court of Human Rights, *Krasniki v. the Czech Republic*, no. 51277/99, 28 February 2006; European Court of Human Rights, *Doorson v. the Netherlands*, 26 March 1996, *Reports of Judgments and Decisions* 1996-II.

anonymous testimony, the use of such testimony for critical components of the case, including expert testimony, raises fair trial concerns.

Anonymous witnesses were used in the Holy Land Foundation case<sup>414</sup> and the case of Muhammad Salah. They were also used in the case of Mohamed Mohamud, who was convicted in January 2013 of attempting to use a weapon of mass destruction following a sting operation.<sup>415</sup> Mohamud twice thought he was detonating a bomb via his cell phone at a Christmas-tree lighting ceremony in Portland, Oregon. At trial, the FBI agents who had been involved in the sting operation testified using pseudonyms and in light disguise. In January 2013, Mohamud was convicted of attempting to use a weapon of mass destruction; in June 2014, the district court denied his motion for a new trial. At time of writing, Mohamud has not been sentenced.<sup>416</sup>

## Evidence from Warrantless Wiretaps under the Foreign Intelligence Surveillance Act

In dozens of terrorism cases, prosecutors have used as evidence information obtained by wiretaps or physical searches not subject to the standard probable cause requirements in criminal cases. In these cases, the government obtained information pursuant to either the Foreign Intelligence Surveillance Act (FISA), or the FISA Amendments Act (FAA)—two statutes that permit surveillance without a traditional warrant. Applications under FISA are reviewed by the specially created Foreign Intelligence Surveillance Court (FISC), which sits in secret and does not have any structures in place that would offer meaningful opposition to government requests. The FISC issues warrants based only upon a showing of probable cause that the target of surveillance is a foreign power or an agent of a foreign power, not that there is probable cause that the target is suspected of criminal activity.

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<sup>414</sup> In the Holy Land Foundation case, defendants claimed they had difficulty adequately challenging a fact witness and an expert witness who testified anonymously. Defendants found it particularly challenging to test the expert's credentials. See *United States v. El-Mezain*, 664 F.3d 467 (5th Cir. Dec. 7, 2011, revised Dec. 27, 2011), *cert. denied*, 133 S.Ct. 525 (2012).

<sup>415</sup> "Oregon Resident Convicted in Plot to Bomb Christmas Tree Lighting Ceremony," US Department of Justice, Federal Bureau of Investigation press release, January 31, 2013, <http://www.fbi.gov/portland/press-releases/2013/oregon-resident-convicted-in-plot-to-bomb-christmas-tree-lighting-ceremony> (accessed June 25, 2014).

<sup>416</sup> Helen Jung, "Mohamed Mohamud: Lawyers Seek Documents, Say Warrantless Wiretaps Tainted Trial," *Oregonian*, January 13, 2014, [http://www.oregonlive.com/portland/index.ssf/2014/01/mohamed\\_mohamud\\_lawyers\\_seek\\_d.html](http://www.oregonlive.com/portland/index.ssf/2014/01/mohamed_mohamud_lawyers_seek_d.html) (accessed June 15, 2014).

The FISC has rarely rejected a government request for a surveillance warrant. Since its inception, the FISC has received more than 30,000 applications for authority to conduct electronic surveillance or physical searches. Of those, it has denied nine, and partially denied another three.<sup>417</sup> Under the FAA, the government does not need any kind of warrant at all. Rather, it obtains year-long authorizations from the FISC to collect “foreign intelligence information,” defined broadly (see below) so long as one end of the communication is “reasonably believed” to be outside the US and the government follows certain procedures it submits to the FISC for approval, intended to minimize the amount of information collected on “US persons.”<sup>418</sup> In practice however, an enormous number of US-person communications are still swept up in the surveillance.<sup>419</sup>

### *Background: Broadening of the Foreign Intelligence Surveillance Act since 9/11*

The US Congress enacted FISA in 1978 in the wake of the Watergate scandal and other concerns about warrantless wiretapping.<sup>420</sup> FISA was intended to rein in government surveillance excesses by requiring judicial authorization to conduct surveillance to collect “foreign intelligence information” inside the US.<sup>421</sup>

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<sup>417</sup> In its 2012 annual report to Congress regarding FISA, the Justice Department noted that in that year the FISC reviewed 1,856 government applications “for authority to conduct electronic surveillance and/or physical searches for foreign intelligence purposes.” None of the requests for electronic surveillance were denied (although 40 were subject to unspecified modifications). The annual report to Congress does not make clear whether any requests for physical searches were denied or modified. US Department of Justice, FISA Annual Reports to Congress: 1979 - 2012, <http://www.fas.org/irp/agency/doj/fisa/index.html#rept> (accessed June 26, 2014).

<sup>418</sup> FISA Amendments Act of 2008, 154 Cong. Rec. H 1707, Title VII Sec. 703(a). Under the statute a US person is defined by the statute as a US citizen, lawful permanent resident, a US corporation, or an unincorporated association with a substantial number of US citizen or permanent resident members. 50 U.S.C. § 1801(i).

<sup>419</sup> See Jennifer Granick, “Reforming The Section 702 Dragnet (Part 1),” *Just Security*, January 30, 2014, <http://justsecurity.org/2014/01/30/reforming-section-702-drag-net-1/> (accessed June 26, 2014); Jennifer Granick, “Reforming 702: Does NSA Minimize Cloud Files?” *Just Security*, January 31, 2014, <http://justsecurity.org/2014/01/31/reforming-702-nsa-minimize-cloud-files/> (accessed June 28, 2014); “The NSA Hides Its Domestic Collection By Refusing to Count It,” *Empty Wheel*, June 26, 2014, <http://www.emptywheel.net/2013/10/13/the-nsa-refuses-to-reveal-all-the-domestic-content-it-refuses-to-count/> (accessed June 26, 2014).

<sup>420</sup> Nicholas J. Whilt, “The Foreign Intelligence Surveillance Act: Protecting the Civil Liberties that Make Defense of Our Nation Worthwhile,” *Southwestern University Law Review*, vol. 35 (2006), p. 385.

<sup>421</sup> See generally, Anthony M. Shults, “The ‘Surveil or Kill’ Dilemma: Separation of Powers and the FISA Amendments Act’s Warrant Requirement for Surveillance of U.S. Citizens Abroad,” *New York University Law Review*, vol. 86, no. 5 (November 2011), pp. 1593-98; Edward C. Liu, “The Reauthorization of the FISA Amendments Act,” *Congressional Research Service*, <http://www.fas.org/sgp/crs/intel/R42725.pdf> (accessed June 16, 2014), pp. 1-2.

Ordinarily, electronic searches and physical evidence-collection are governed by the Fourth Amendment to the US Constitution, which protects against “unreasonable searches and seizures.”<sup>422</sup> This generally requires that evidence used against a defendant be obtained through a warrant based on probable cause of criminal activity.<sup>423</sup> FISA does away with the traditional warrant requirement in certain circumstances, on the theory that the government has the inherent authority to conduct foreign intelligence surveillance, even inside the US, without a traditional warrant.<sup>424</sup> Instead, the government can obtain an order from the FISC in an *ex parte* (only one party) proceeding upon a showing of probable cause that the intended target of the surveillance is a foreign power or an agent of a foreign power.<sup>425</sup> FISA originally required that the collection of foreign intelligence information be a primary purpose of the surveillance, leading to what was colloquially referred to as the FISA “wall,” in which law enforcement could not be involved directly in coordinating surveillance with the intelligence community under FISA.<sup>426</sup>

However, after 9/11, Congress amended FISA in 2001, substantially broadening its scope. The amendments took down the wall, permitting law enforcement to become more directly involved in coordinating surveillance under FISA.<sup>427</sup> And Congress changed the requirement that foreign intelligence collection be “a primary purpose” to merely “a significant purpose.”<sup>428</sup>

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<sup>422</sup> US Constitution, amendment IV.

<sup>423</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>424</sup> See generally, Shults, “The ‘Surveil or Kill’ Dilemma,” *New York University Law Review*, pp. 1593-98; Liu, “The Reauthorization of the FISA Amendments Act,” *Congressional Research Service*, <http://www.fas.org/sgp/crs/intel/R42725.pdf>, pp.1-2.

<sup>425</sup> Foreign Intelligence Surveillance Act, 50 U.S.C. § 1881b(c)(1)(b)(ii).

<sup>426</sup> FISA originally required that the collection of foreign intelligence information be “the purpose” of the surveillance, but many courts interpreted that to mean it must be a “primary” purpose. Scott Glick, “FISA’s Significant Purpose Requirement and the Government’s Ability to Protect National Security,” *Harvard National Security Journal*, vol. 1 (May 2010), [http://harvardnsj.org/wp-content/uploads/2010/05/Vol.1\\_Glick\\_Final.pdf](http://harvardnsj.org/wp-content/uploads/2010/05/Vol.1_Glick_Final.pdf) (accessed June 26, 2014), p. 104.

<sup>427</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>428</sup> See, e.g., *Mayfield v. US*, 599 F.3d 964, 968 n.4 (9th Cir. 2010) “Prior to 2001, several federal courts construed FISA to authorize searches and electronic surveillance only when the government’s primary purpose was to collect foreign intelligence information”; *In re Sealed Case*, 310 F.3d 717 (FISCR 2002) (discussing pre-2001 cases). Following the September 11 attacks, Congress enacted the USA PATRIOT Act, which changed the original statutory language of “the purpose” to “a significant purpose.” Pub. L. No. 107-56, § 218, 115 Stat. 291 (2001) (amending 50 U.S.C. §§ 1804(a)(6)(B) and 1823(a)(6)(B)); Glick, “FISA’s Significant Purpose Requirement,” *Harvard National Security Journal*, pp. 87, 89-90.

As a result of the amendments, the government has contended that not only can the information from a FISA order be used in criminal prosecution, but intended criminal prosecution can be a reason for obtaining the FISA order in the first place, so long as it is not the sole purpose.<sup>429</sup> Surveillance that might previously have required a traditional warrant can now be authorized by the FISC *ex parte* and in secret.<sup>430</sup>

Additionally, beginning at least as of 2002 if not before, then-US President George W. Bush authorized warrantless surveillance—surveillance without either a traditional warrant or an order from the FISC—inside the US.<sup>431</sup> It is not clear to what extent information obtained pursuant to that program was used in criminal prosecutions.

In 2008, Congress broadened FISA even further, by passing the FISA Amendments Act (FAA), which permits the attorney general and director of national intelligence to issue one-year blanket authorizations for surveillance of non-US persons “reasonably believed” to be outside the United States in order to acquire “foreign intelligence information” without a warrant.<sup>432</sup> “Foreign intelligence information” is defined very broadly, to include not just information important to national security, such as information about weapons of mass destruction or terrorism, but also information that merely “relates to” the “security” or “foreign affairs” of the US.<sup>433</sup>

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<sup>429</sup> Glick, “FISA’s Significant Purpose Requirement,” *Harvard National Security Journal*, p. 101; *In re Sealed Case*, 310 F.3d 717, 735 (FISACR 2002) (“If the certification of the application’s purpose articulates a broader objective than criminal prosecution—such as stopping an ongoing conspiracy—and includes other potential non-prosecutorial responses, the government meets the statutory test. Of course, if the court concluded that the government’s sole objective was merely to gain evidence of past criminal conduct—even foreign intelligence crimes—to punish the agent rather than halt ongoing espionage or terrorist activity, the application should be denied.”).

<sup>430</sup> 50 U.S.C. § 1803 (2006).

<sup>431</sup> James Risen and Eric Lichtblau, “Bush Lets U.S. Spy on Callers Without Courts,” *New York Times*, December 16, 2005, <http://www.nytimes.com/2005/12/16/politics/16program.html> (accessed June 26, 2014); see also, Glenn Greenwald, “Obama’s New FBI Chief Approved Bush’s NSA Warrantless Wiretapping Scheme,” *Guardian*, May 30, 2013, <http://www.theguardian.com/commentisfree/2013/may/30/james-comey-fbi-bush-nsa> (accessed June 16, 2014).

<sup>432</sup> FISA Amendments Act of 2008, 154 Cong. Rec. H 1707, Title VII Sec. 703(a).

<sup>433</sup> 50 U.S.C. § 1801(e). (“Foreign intelligence information” means--(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against-- (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to--(A) the national defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States.”)



Acquisitions under the FAA are subject to “minimization” and “targeting” procedures approved annually. These procedures are purportedly intended to minimize the acquisition of US-person communications as well as apply limits to the use and dissemination of the information obtained.<sup>434</sup> These procedures are classified, though the US has declassified some minimization procedures in response to certain Freedom of Information Act (FOIA) requests. It is not clear if these procedures will be made available to the public going forward. As for targeting procedures, the only ones made available to the public thus far are a 2009 version that was leaked to the media<sup>435</sup> by former National Security Agency contractor Edward Snowden.<sup>436</sup> Both the one-year authorizations as well as the targeting and minimization procedures must be approved by the FISC, but once approved, there is no requirement that the court monitor how the rules are applied or conduct oversight.<sup>437</sup>

When the government plans to use the FISA-obtained evidence in a criminal prosecution against a defendant who was under surveillance,<sup>438</sup> the attorney general must give advance notice.<sup>439</sup> However, if the evidence was obtained through FISA but not directed at the defendant—for example, if a co-defendant or witness was subject to surveillance or physical searches pursuant to a FISA order—FISA does not require the government to notify the defendant in advance of its plans to use the evidence.<sup>440</sup> Because FISA orders are issued in secret, the subjects

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<sup>434</sup> 50 U.S.C. §1881a(d) and (e) and 50 U.S.C. §1801(h).

<sup>435</sup> Glenn Greenwald and James Ball, “Top Secret Rules That Allow NSA To Use US Data Without a Warrant,” *Guardian*, June 20, 2013, <http://www.theguardian.com/world/2013/jun/20/fisa-court-nsa-without-warrant> (accessed June 26, 2014).

<sup>436</sup> Letter from Human Rights Watch to the Privacy and Civil Liberties Oversight Board, “Comments of Human Rights Watch to the Privacy and Civil Liberties Oversight Board (PCLOB),” August 1, 2013, [http://www.hrw.org/sites/default/files/related\\_material/Comment%20HRW%20PCLOB%20Final%208-1-13\\_o.pdf](http://www.hrw.org/sites/default/files/related_material/Comment%20HRW%20PCLOB%20Final%208-1-13_o.pdf), p. 5; “Strengthening Privacy Rights and National Security Oversight of FISA Surveillance Programs,” testimony of Jameel Jaffer, Deputy Legal Director of the American Civil Liberties Union, and Lara W. Murphy, Director, Washington Legislative Office, American Civil Liberties Union, before the Senate Judiciary Committee, Washington, DC, July 31, 2013, pp. 8-15, [https://www.aclu.org/files/assets/testimony.sjc\\_073113.final\\_.pdf](https://www.aclu.org/files/assets/testimony.sjc_073113.final_.pdf) (accessed June 26, 2014); Charlie Savage, “N.S.A. Said to Search Content of Messages to and From U.S.,” *New York Times*, August 8, 2013, [http://www.nytimes.com/2013/08/08/us/broader-sifting-of-data-abroad-is-seen-by-nsa.html?hpand\\_r=0](http://www.nytimes.com/2013/08/08/us/broader-sifting-of-data-abroad-is-seen-by-nsa.html?hpand_r=0) (accessed June 26, 2014).

<sup>437</sup> See generally, 50 U.S.C. § 1881a.

<sup>438</sup> Specifically, this applies when the government plans to use the information against an “aggrieved person” — defined as “a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance.” 50 U.S.C. § 1801(k).

<sup>439</sup> 50 U.S.C. § 1806(c).

<sup>440</sup> *Ibid.*

of the orders generally only learn of them if they are prosecuted; if criminal charges are never brought, the existence of the FISA order remains secret.<sup>441</sup>

In January 2014, President Obama announced a presidential policy directive establishing new measures intended to restrict the use,<sup>442</sup> retention and dissemination of information obtained by intelligence agencies—though it left open the possibility of continued bulk collection.<sup>443</sup> It is not clear from the directive how the new restrictions will relate to information collected under the FAA because the directive specifically exempts data “temporarily acquired to facilitate targeted collection” from the use restrictions placed on continued bulk data collection<sup>444</sup> and does not define “targeted collection.”

### *Use of FISA-derived Evidence at Trial*

Defendants have the right to challenge the prosecution’s use of information obtained pursuant FISA or FAA authorities by moving to suppress the evidence,

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<sup>441</sup> The US also collects foreign intelligence information under Executive Order No. 12333, which defines foreign intelligence information even more broadly to allow for the collection of information merely about the “capabilities, intentions, or activities of ... foreign persons.” Executive Order No. 12333, sec. 3.5(e), “United States Intelligence Activities,” signed December 4, 1981; See also, “Presidential Policy Directive – Signals Intelligence Activities,” White House press release, January 17, 2014, <http://www.whitehouse.gov/the-press-office/2014/01/17/presidential-policy-directive-signals-intelligence-activities> (accessed June 26, 2014). Little is known about how information collected under that order is used in criminal cases. The scope and scale of surveillance taking place under Executive Order 12333 is at the discretion of the president and thus subject to even less oversight than that taking place under traditional FISA or the FAA. Ali Watkins, “Most of NSA’s Data Collection Authorized by Order Ronald Reagan Issued,” *McClatchy*, November 21, 2013, <http://www.mcclatchydc.com/2013/11/21/209167/most-of-nsas-data-collection-authorized.html> (accessed June 26, 2014); See also, Mark M. Jaycox, “Three Leaks, Three Weeks, and What We’ve Learned About the US Government’s Other Spying Authority: Executive Order 12333,” post to “Deeplinks Blog” (blog), Electronic Frontier Foundation, November 5, 2013, <https://www.eff.org/deeplinks/2013/10/three-leaks-three-weeks-and-what-weve-learned-about-governments-other-spying> (accessed June 26, 2014). In July 2014, *The Intercept* reported that documents obtained by Snowden indicated previous FISA surveillance of at least five US-persons, who were never prosecuted. All five were prominent American Muslims, including the co-founder of the Council on American-Islamic Relations, Nihad Awad. Gleen Greenwald and Murtaza Hussain, “Meet the Muslim-American Leaders the FBI and NSA Have Been Spying On,” *Intercept*, July 9, 2014, <https://firstlook.org/theintercept/> (accessed July 11, 2014).

<sup>442</sup> The use restrictions announced pertained only to continued “bulk” collection.

<sup>443</sup> “Transcript of President Obama’s January 17 Speech on NSA Reforms,” *Washington Post*, January 17, 2014, [http://www.washingtonpost.com/politics/full-text-of-president-obamas-jan-17-speech-on-nsa-reforms/2014/01/17/fa33590a-7f8c-11e3-9556-4a4bf7bcbd84\\_story.html](http://www.washingtonpost.com/politics/full-text-of-president-obamas-jan-17-speech-on-nsa-reforms/2014/01/17/fa33590a-7f8c-11e3-9556-4a4bf7bcbd84_story.html) (accessed June 26, 2014); “Presidential Policy Directive – Signals Intelligence Activities,” White House press release, January 17, 2014, <http://www.whitehouse.gov/the-press-office/2014/01/17/presidential-policy-directive-signals-intelligence-activities> (accessed June 30, 2014).

<sup>444</sup> *Ibid.*, section II, note 5. The “use restrictions” are themselves quite general, namely, that use should be for a permissible general purpose such as countering various types of security threats, rather than for an obviously impermissible purpose, such as discrimination.

either on the basis that it was obtained illegally, or that the surveillance exceeded the bounds of what was authorized.<sup>445</sup>

In practice, however, it is extremely difficult for the defense to exercise this right due to the secrecy that pervades the collection of evidence pursuant to FISA and the FAA. If the prosecution intends to use evidence obtained from electronic surveillance under FISA, the attorney general must disclose in advance intent to use that information.<sup>446</sup> However, if the defendant challenges that information, the attorney general may file an affidavit indicating that disclosing the information pertaining to the order would harm national security; if he does so, the court must consider the application and any order *in camera*, and the defense cannot participate.<sup>447</sup> The court can disclose certain information to the defense to help determine if the surveillance was lawful, but “only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.”<sup>448</sup> This means that the defense must operate blindly, challenging the legality of the order (or surveillance absent a FISC order), or law enforcement’s compliance with it, without being able to see the materials that initially supported the surveillance.

The statute requires that similar notice be provided if information obtained pursuant to the FAA is to be used.<sup>449</sup> Yet until recently, the government refused to provide such notice by instead using FAA-obtained information to support a FISA application. Defendants were provided notice that information was obtained under FISA, but the fact that the basis for the investigation originated from warrantless surveillance under the FAA was not disclosed. If the defendants had been aware that they were subject to warrantless surveillance, they might have filed constitutional or other challenges.<sup>450</sup> Following an internal Justice Department

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<sup>445</sup> 50 U.S.C. § 1806(e).

<sup>446</sup> 50 U.S.C. § 1806(c).

<sup>447</sup> 50 U.S.C. § 1806(f).

<sup>448</sup> *Ibid.*

<sup>449</sup> The attorney general is required to provide the same notice of intent to use information obtained pursuant to the FAA as for information obtained pursuant to FISA. 50 U.S.C. § 1881(e).

<sup>450</sup> In July 2013, FBI Deputy Director Sean Joyce publicly described warrantless surveillance of Basaaly Moalin, five months after he and his co-defendants had been convicted of conspiracy and material support for terrorism, among other offenses. Moalin’s defense attorney had sought information about warrantless surveillance, but his motions had been denied. After Joyce’s statement, the defense filed a motion for a new trial, raising, among other things, the constitutionality of warrantless surveillance. The defense motion for a new trial was denied. See United

debate about whether to disclose the fact that warrantless surveillance formed part of the chain of information that led to a FISA order,<sup>451</sup> in 2013 the government began providing such notice.<sup>452</sup>

Since 2007, the FBI has used secret evidence obtained under FISA to prosecute at least 27 accused terrorists.<sup>453</sup> These include the following:

- *Case of Amina Ali and Hawa Hassan:* Amina Ali and Hawa Hassan were arrested in August 2010 as part of a country-wide investigation into support for the Islamist armed group Al-Shabaab in Somalia.<sup>454</sup> They were convicted of providing material support for terrorism for sending clothing and money to Al-Shabaab. On the same day they were arrested, the Department of Justice unsealed indictments against 12 other individuals in two other states.<sup>455</sup> Only during the trial did the public learn that Ali's and Hassan's phones had been tapped for months. Ali's attorney said the order authorizing the surveillance was pursuant to FISA but that he never saw the order or the underlying facts cited in support for its acquisition. He said he did not know when the surveillance began or ended.<sup>456</sup> Although he filed motions to suppress evidence obtained pursuant to a FISA order, the

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States v. Moalin, No. 10-cr-4246 JM, 2013 WL 6079518 (S.D. Cal. Nov. 18, 2013), *amending and superseding* No. 10-cr-4246 JM, 2013 WL 6055330 (S.D. Cal. Nov. 14, 2012).

<sup>451</sup> Charlie Savage, "Door May Open For Challenge To Secret Wiretaps," *New York Times*, October 16, 2013, <http://mobile.nytimes.com/2013/10/17/us/politics/us-legal-shift-may-open-door-for-challenge-to-secret-wiretaps.html> (accessed June 26, 2014).

<sup>452</sup> Government's Response to Defendant's Motion for Full Discovery Regarding Surveillance, United States v. Mohamud, No. 3:10-CR-00475-KI, 2012 WL 5208173 (D. Or. Oct. 22, 2012); see also, Government's Response to Defendants' Motion for Reconsideration of the Court's Order Granting In Camera, Ex Parte Hearing, United States v. Qazi, No. 12-60298-CR-Sco1a, 2012 WL 7050588 (S.D. Fla. Dec. 19, 2012). In providing supplemental notice following Mohamud's conviction, the government noted that it had determined "that information obtained or derived from Title I FISA collection may, in particular cases, also be derived from prior Title VII FISA collection." Government's Supplemental FISA Notification, *Mohamud*, No. 3:10-CR-00375-KI, 2012 WL 5208173.

<sup>453</sup> It is not clear how many of these cases may also have relied on information obtained pursuant to the FAA. John Shiffman, Kristina Cooke and Mark Hosenball, "Insight: FBI relies on secret US surveillance law, records show," *Reuters*, June 18, 2013, <http://www.reuters.com/article/2013/06/18/us-usa-security-fisa-insight-idUSBRE95H03220130618> (accessed June 28, 2014).

<sup>454</sup> John Shiffman, Kristina Cooke, and Mark Hosenball, "FBI Secrets: Feds Reportedly Used Secret Evidence Obtained Under Secret Surveillance Law to Prosecute Accused Terrorists," *Huffington Post*, June 18, 2013, [http://www.huffingtonpost.com/2013/06/18/fbi-secrets\\_n\\_3457258.html](http://www.huffingtonpost.com/2013/06/18/fbi-secrets_n_3457258.html) (accessed June 28, 2013).

<sup>455</sup> "Fourteen Charged with Providing Material Support to Somalia-Based Terrorist Organization Al-Shabaab: Two Arrested in Minnesota in Connection with the Charges," US Department of Justice press release, August 10, 2010, <http://www.justice.gov/opa/pr/2010/August/10-ag-898.html> (accessed June 28, 2014).

<sup>456</sup> Human Rights Watch interview with Dan Scott, Minneapolis, Minnesota, July 24, 2012.

application was reviewed *ex parte* and *in camera*. The government filed a lengthy memorandum in opposition to the defense motion to suppress, yet the public version contains almost no information about the case and instead includes only standard legal arguments.<sup>457</sup> The secrecy connected to FISA warrants prompted others in the American-Somali community in Minneapolis to fear that they were also under surveillance.<sup>458</sup>

- *Case of Mehrdad Yasrebi* (see above): A FISA warrant was also used in the case against Mehrdad Yasrebi, prosecuted for violating OFAC sanctions against Iran. David Angeli, Yasrebi's defense attorney, told Human Rights Watch that he considered the process behind obtaining FISA orders to be fraught with problems and prone to abuse:

In every other case, I get to see the basis for a search warrant. Here, no one gets to see if the government lied or if it didn't present certain evidence.... If [a defense attorney] has secret clearance, just like the prosecutors do, we should have the same access. When you remove the defense counsel from the process and don't have that check, it creates very real possibilities for abuse.... And when the government thinks there might be something related to terrorism involved, the incentive for them to step over the line is even greater.<sup>459</sup>

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<sup>457</sup> Government's Redacted Memorandum in Opposition to Defendants' Motions to Suppress FISA-Derived Evidence and Motions for Disclosure of FISA Applications and Orders, *United States v. Ali*, 822 F. Supp. 2d 916 (D. Minn. 2011) (No. 10-CR-187 MJD/JSM), *aff'd in part, vacated in part*, 682 F.3d 705 (8th Cir. 2012).

<sup>458</sup> Human Rights Watch interview with Jeanne Cooney, Minneapolis, Minnesota, July 26, 2012; Human Rights Watch interview with members of the Somali-American community, Minneapolis, Minnesota, July 26, 2012.

<sup>459</sup> Human Rights Watch interview with David Angeli, Portland, Oregon, August 16, 2012. See also, Defendant Mehrdad Yasrebi's Sentencing Memorandum at 12, fn 6, *United States v. Yasrebi*, No. 05-cr-00413-KI (D. Or. Mar. 6, 2012) ("Defense counsel has not been permitted to see the FISA application materials, but given that the FISA order was issued, the government apparently claimed to a FISA court that the requirements for such an order—including, for example, that 'the target of the electronic surveillance [was] a foreign power or an agent of a foreign power,' and that 'a significant purpose of the surveillance [was] to obtain foreign intelligence information' that '[could not] reasonably be obtained by normal investigative techniques,' 50 U.S.C. § 1804(a)(3)(A), (6)(B)-(C)—were satisfied. Generally speaking, an 'agent of a foreign power' is defined as a person who engages in intelligence-gathering or acts of terrorism on behalf of a foreign power. See 18 U.S.C. § 1801(b). Defense counsel is unaware of any evidence even suggesting that Dr. Yasrebi ever engaged in either of those activities.")

- *Case of Abdelhaleem Ashqar*: In 1993, likely in response to information obtained from Muhammad Salah while under interrogation in Israel, the FBI obtained a FISA order for electronic surveillance of Abdelhaleem Ashqar, a former business administration professor at Howard University.<sup>460</sup> The FBI also searched Ashqar's house in December 1993.<sup>461</sup> Ashqar first learned of the surveillance in court in August 2004 when documents from that search were entered into evidence against him on charges of criminal enterprise in violation of federal racketeering laws.<sup>462</sup> Documents seized from Ashqar's home were also used as evidence in the Holy Land Foundation case. The FBI first learned about conference in Philadelphia, which was a key element of the case, through the wiretap of Asqhar's communications.<sup>463</sup>
- *Holy Land Foundation case*: The case against the Holy Land Foundation involved significant information obtained pursuant to FISA orders. In both trials, the defendants moved to compel production of the underlying applications for the FISA orders, and to suppress the evidence acquired pursuant to them. The district judges reviewed the information *ex parte* and *in camera* and denied the defense requests.<sup>464</sup>
- *Case of the Fort Dix Five*: Some of the evidence in the Fort Dix Five case came from a FISA order. While the government declassified much of the evidence, the underlying affidavits supporting the orders were not declassified.<sup>465</sup>

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<sup>460</sup> "FBI investigations and federal grand jury probes focusing on Hamas financing began to proliferate around the country; all were directly related to Salah's statements made to the Shin Bet under torture. Indeed, the tentacles of almost every known Hamas-related investigation or prosecution in the United States, including the case against the Holy Land Foundation (the largest Muslim charity in the United States), lead back to Salah's coerced confession." Michael E. Deutsch and Erica Thompson, "Secrets and Lies: The Persecution of Muhammad Salah (Part I)," *Journal of Palestine Studies*, vol. 37, no. 4 (Summer 2008), p. 15.

<sup>461</sup> The initial electronic surveillance was authorized before amendments to FISA permitting physical searches as well; the FBI did search Ashqar's house in December 1993, though they did so pursuant to Executive Order 12,333, which permitted certain intelligence activities in accordance with Attorney General guidelines. *United States v. Marzook*, 435 F. Supp. 2d 778, 787 (N.D. Ill. 2006).

<sup>462</sup> Defendant Ashqar's Motion to Suppress the December 26, 2003 Warrantless Break-In and Search of His Residence at 7 Rubin Dr., Oxford, Mississippi at 2, *Marzook*, 435 F. Supp. 2d 778 (No. 03 CR 0978).

<sup>463</sup> See, e.g., Transcript of Oral Argument, vol. 35 at 47, *United States v. Holy Land Found.*, 722 F.3d 677 (5th Cir. 2013) (No. 3:04-CR-0240-P).

<sup>464</sup> *United States v. El-Mezain*, 664 F.3d 467 (5th Cir. Dec. 7, 2011, revised Dec. 27, 2011), *cert. denied*, 133 S.Ct. 525 (2012).

<sup>465</sup> Protected Order for Classified Materials at 2-9, *United States v. Shnewer*, No. 1:07-cr-00459 -RBK (D.N.J. Apr. 29, 2009), *aff'd in part, rev'd in part sub nom.* *United States v. Duka*, 671 F.3d 329 (3d Cir. 2011) (No. 09-2292, 09-

Although the judge reviewed the underlying FISA application materials, including for relevance to discovery, his ability to assess discoverability was hindered by not knowing early on what defenses would be asserted.<sup>466</sup>

Although the defendants challenged the constitutionality of FISA on appeal, their challenge was denied.<sup>467</sup>

### *Al-Haramain's Challenge to FISA Surveillance*

In a parallel proceeding to the prosecution of Pete Seda, the charity Al-Haramain came to believe that it was subject to warrantless electronic surveillance in violation of FISA in 2004; in 2006, it filed suit. In 2007, the Ninth Circuit Court of Appeals ruled that the suit was not barred by the state secrets privilege.<sup>468</sup> On remand, the district court found that Al-Haramain had established it had been surveilled and the government had presented no evidence that established it had a warrant.<sup>469</sup>

The judge granted summary judgment to the plaintiffs, and awarded \$20,400 each to two Al-Haramain attorneys in liquidated damages for the FISA violation, and \$2.5 million in attorneys' fees and costs.<sup>470</sup> On appeal, however, the Ninth Circuit ruled that the suit was barred by sovereign immunity, "effectively bring[ing] to an end the plaintiffs' ongoing attempts to hold the Executive Branch responsible for intercepting telephone conversations without judicial authorization."<sup>471</sup> The plaintiffs elected not to appeal to the Supreme Court.<sup>472</sup> The Ninth Circuit's ruling means that even if a plaintiff can establish violation of FISA, as Al-Haramain did, it has no recourse in court. If other circuits follow that reasoning, the government will remain immune from liability for violating FISA.

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2299, 09-2300, 09-2301, 09-2302). Federal Judicial Center, "National Security Case Studies: *Special Case-Management Challenges*," June 25, 2013, [http://www.fjc.gov/public/pdf.nsf/lookup/TS130625.pdf/\\$file/TS130625.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/TS130625.pdf/$file/TS130625.pdf) (accessed June 29, 2014), pp. 223-224, (citing Robert T. Reagan interview with Hon. Robert B. Kugler, December 15, 2009).

<sup>466</sup> Federal Judicial Center, "National Security Case Studies," [http://www.fjc.gov/public/pdf.nsf/lookup/TS130625.pdf/\\$file/TS130625.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/TS130625.pdf/$file/TS130625.pdf), p. 224, (citing Robert T. Reagan interview with Hon. Robert B. Kugler, December 15, 2009).

<sup>467</sup> *United States v. Duka*, 671 F.3d 329, 337-38 (3d Cir. 2011), *cert denied*, 132 S.Ct. 2754 (2012).

<sup>468</sup> *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1192 (9th Cir. 2007), *rev'g* 451 F. Supp. 2d 1215 (D. Or. 2006).

<sup>469</sup> *In re Nat'l Sec. Agency Telecomm'n Records Litig. v. Obama*, 700 F. Supp. 2d 1182 (N.D. Cal. 2010).

<sup>470</sup> Order, *In re Nat'l Sec. Agency Telecomm'n Records Litig.*, 700 F. Supp. 2d 1182 (No. 3:07-cv-109).

<sup>471</sup> *Al-Haramain Islamic Found., Inc.*, 705 F.3d 845, 848.

<sup>472</sup> Jon Eisenberg, "Finding Success in the Absence of Victory," *Islam Daily*, January 6, 2013, <http://www.islamdaily.org/en/charities/11518.article.htm> (accessed June 24, 2014).

## Classified Evidence

Another challenge for the defense in terrorism cases involves the frequent introduction of classified evidence, which often causes delays and obstacles to discovery that may affect the fairness of the trial.

The Classified Information Procedures Act (CIPA), enacted in 1980, provides procedures for prosecuting federal criminal cases involving classified information, including at both the discovery and trial stages.<sup>473</sup> CIPA was originally passed in 1980 to address cases of “graymail,” or “the tactic of a defendant who threatens to disclose classified information in the course of a prosecution,” particularly in cases of espionage.<sup>474</sup> Today, CIPA and CIPA-inspired procedures (in civil cases) are frequently used in terrorism cases where classified information is in play, usually in the form of classified evidence provided by the government against the defendant.<sup>475</sup>

CIPA requires both parties to provide notice when classified information is at issue, initially at a pretrial conference.<sup>476</sup> Courts applying CIPA procedures are called on to determine whether discoverable classified information can be “(1) omitted, (2) summarized, or (3) substituted with an admission.”<sup>477</sup> While this usually occurs *ex parte*, the record is preserved for appeal.<sup>478</sup> Upon the government’s request, the court can issue a protective order preventing defense from disclosing classified information to a defendant.<sup>479</sup> Where a court authorizes disclosure of specific classified information, the government may request that in lieu of disclosure the information be substituted with a summary or an admission.<sup>480</sup> Finally, where fair trial necessitates the disclosure of classified information that the government is unwilling to disclose, remedies include dismissal of the indictment or of certain counts.<sup>481</sup> Throughout this

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<sup>473</sup> Robert T. Reagan, *National Security Case Management: An Annotated Guide* (Washington, DC: Federal Judicial Center, 2011), [http://www.fjc.gov/public/pdf.nsf/lookup/TSGuid01.pdf/\\$file/TSGuid01.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/TSGuid01.pdf/$file/TSGuid01.pdf) (accessed June 29, 2014), p.3.

<sup>474</sup> Richard P. Salgado, “Government Secrets Fair Trials, and the Classified Information Procedures Act,” *Yale Law Journal*, vol. 98 (December 1988), p.427.

<sup>475</sup> *Ibid.*, p. 4.

<sup>476</sup> 18 U.S.C. app. 3 §§ 5(a)(6)(b).

<sup>477</sup> 18 U.S.C app. 3 § 4.

<sup>478</sup> *Ibid.*

<sup>479</sup> 18 U.S.C app. 3 § 3.

<sup>480</sup> 18 U.S.C app. 3 § 6(c).

<sup>481</sup> 18 U.S.C app. 3 § 6(e).



process, the defendant must retain “substantially the same ability to make his defense as would disclosure of the specific classified information.”<sup>482</sup>

CIPA causes significant delays, both because counsel must obtain security clearances, and because the process of substitutions and summaries can add months or even years to discovery and pretrial proceedings. Several lawyers involved in the Barry Bujol case (see section II) said that key evidence against Bujol was classified, and they faced delays in getting access to that evidence while waiting for clearance.

CIPA presents particular challenges when it comes to discovery. Defense counsel may have trouble identifying what information they believe the prosecution has that would be helpful to the defense. Defense counsel must do so without consulting their client, affecting the client’s ability to have effective assistance of counsel. And even if defense attorneys do identify relevant material, CIPA permits the court to provide summaries or make substitutions, meaning the defense will never have access to the original evidence.<sup>483</sup>

Evidence obtained by foreign governments is frequently classified. In the earlier post-September 11 cases, this tended to involve evidence obtained when Americans were picked up in foreign countries and interrogated by foreign agents, often at the behest of the United States.

The following cases illustrate how the introduction of classified evidence can create serious difficulties for the defense and undermine the fairness of the trial:

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<sup>482</sup> 18 U.S.C. app. 3 § 6(c)(1). Classified evidence may not be shown to the jury but withheld from the defendant. “The district court’s admission of the classified versions of the documents as evidence for consideration by the jury without disclosing the same versions to Abu Ali . . . was clearly contrary to the rights guaranteed to Abu Ali by the Confrontation Clause.” *US v. Abu Ali*, 528 F.3d 210, 253 (4th Cir. 2008).

<sup>483</sup> See, for example, Jonathan Hafetz, *Habeas Corpus after 9/11: Confronting America’s New Global Detention System* (New York: NYU Press, 2011), p. 224. “To help facilitate this review, courts have ordered disclosure only to members of the defense team with a security clearance and barred the defendant himself from seeing the information. This ‘cleared counsel’ solution, however, presents a problem from a defense perspective. It prevents a defendant from helping his lawyer assess the relevance of materials, thus impairing a defendant’s constitutional right to the effective assistance of counsel. It also can jeopardize a defendant’s constitutional right to self-representation, since defendants typically lack the security clearance necessary to review classified information themselves. Furthermore, judges can evaluate the relevance of materials requested in discovery ex parte, considering arguments by the government but excluding the defendant and his counsel from participating.” See also, Ellen Yaroshesky, “Secret Evidence Is Slowly Eroding the Adversary System: CIPA and FISA in the Courts,” *Hofstra Law Review*, vol. 34 (2006), p. 1067.

- *Case of Mohamed Warsame*: Warsame was held in solitary confinement while awaiting trial for five-and-a-half years, the longest recorded period of time for any pretrial detainee in the federal system (see below). In an interview, District Judge John Tunheim attributed part of that delay to the length of time involved in processing classified material under CIPA.<sup>484</sup> The district judge had personally compared all of the unclassified substitutions proposed by the government with the classified source material.<sup>485</sup> The slow process contributed to Warsame's lengthy pretrial detention under abusive conditions.
- *Case of Ahmed Abu Ali*: In this case, the court appointed private attorney Nina Ginsberg well into the proceedings to review classified evidence for the defense, although she was not otherwise part of Abu Ali's defense team. Abu Ali's main defense lawyers, who did not have security clearances,<sup>486</sup> were not allowed access to any classified information or permitted to be present at hearings determining the admissibility of classified evidence and the sufficiency of evidence meant to substitute for the classified evidence. This situation hampered Abu Ali's defense overall, with Abu Ali's long-standing defense attorneys completely in the dark about the defenses Ginsberg had raised in the classified hearings. "Part of how you develop your defense is people talking to each other and developing strategies," Ginsberg explained. "I wasn't allowed to tell them anything that was classified, and I thought there were substantial issues that ought to have been part of the defense that were excluded by the judge....There were entire other defenses that were the subject of classified hearings which we lost."<sup>487</sup> Yet Ginsberg was never able to share these with the main defense team.

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<sup>484</sup> Human Rights Watch interview with District Judge John Tunheim, Minneapolis, Minnesota, July 23, 2012. Judge Tunheim previously had significant exposure to classified information, as he served as the chair of the US Assassination Records Review Board, an independent federal agency in charge of declassifying the government records on the assassination of John F. Kennedy, from 1994-98. Tunheim is the current chair of the US Judicial Conference Committee on Court Administration and Case Management. His experience presiding over cases involving CIPA prompted him to consider proposing revisions; in particular, he believes judges should be able to review classified material electronically.

<sup>485</sup> Federal Judicial Center, "National Security Case Studies,"

[http://www.fjc.gov/public/pdf.nsf/lookup/TS130625.pdf/\\$file/TS130625.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/TS130625.pdf/$file/TS130625.pdf), p. 254.

<sup>486</sup> The government denied one of the defense attorneys security clearance, while the other attorney did not apply. Columbia Law School's Human Rights Institute phone interview with Nina Ginsbert, September 27, 2012.

<sup>487</sup> Ibid.

### *Classified Statements by Persons Subjected to Torture*

The difficulties the defense can face when seeking access to classified information were dramatically evident in the case against Uzair Paracha. Paracha sought the testimony of Majid Khan, Ammar al Baluchi, and Khalid Sheikh Mohammed, who at the time were believed to be in secret custody of the US government.<sup>488</sup>

While not conceding that they were in US government custody, the prosecution argued that for the purposes of the motion, if they were in government custody, producing them would damage national security by allowing “Al-Qaeda operatives [to] use the US legal system to interfere with the military’s prosecution of the war on terrorism.”<sup>489</sup>

The judge determined that Mohammed’s testimony was not material, but that both Khan and al Baluchi likely had material and favorable evidence to present. Saying that he was balancing the government’s concerns of national security against Paracha’s right to present such evidence, Judge Stein ordered that unclassified summaries of statements provided by the two men could be admitted, along with instructions to the jury detailing the circumstances in which the statements were obtained.

The jury instruction included that “[t]he witnesses’ statements were obtained under circumstances that were designed to elicit truthful and accurate information from witnesses because the statements are relied upon by United States officials responsible for making national security decisions.”<sup>490</sup> As we now know, the men were held in secret CIA custody for years and subjected to incommunicado detention and torture, calling into question the veracity of their statements.<sup>491</sup> The government—and the judge—willingly vouched for the truthfulness of statements obtained by people subjected to torture by the same government, highlighting the problems that can ensue when a

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<sup>488</sup> In September 2006, then-president Bush announced that Khalid Sheikh Mohammed and 13 other “high-value” detainees had been transferred to Guantanamo Bay from overseas detention facilities run by the CIA. Khan and al Baluchi were among them. “President Bush’s Speech on Terrorism,” *New York Times*, September 6, 2006, [http://www.nytimes.com/2006/09/06/washington/06bush\\_transcript.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all&_r=0) (accessed June 26, 2014).

<sup>489</sup> Opinion at 22, *United States v. Paracha*, No. 1:03-cr-01197-SHS (S.D.N.Y. Jan. 3, 2006), *aff’d*, 313 Fed.Appx. 347 (2d Cir. 2008).

<sup>490</sup> *Ibid.*, p. 27.

<sup>491</sup> See, e.g., International Committee of the Red Cross, “ICRC Report on the treatment of Fourteen ‘High Value’ Detainees in CIA Custody,” February 2007, <http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf> (accessed July 12, 2014).

defendant is denied full access to information because it is purportedly classified.

Paracha's case is somewhat unusual because it was the defendant, not the government, who had an interest in establishing the veracity of witness statements that may have been taken under duress. Judge Stein did not permit the government to use the statements affirmatively, perhaps in acknowledgment of that fact.

Because the defense does not have the ability to review the classified information, it operates blindly when challenging the adequacy of a summary or substitution. While the system relies on prosecutors and district court judges to protect the rights of the defendant, the system can fail, either through bad faith or because structurally the absence of the defense means the trial judge will not have the benefit of hearing all sides of an issue (though the defense can present its theory of the case to the judge in order for him or her to take it into consideration when reviewing the classified material).

In Pete Seda's case, the Ninth Circuit found the government's failure to make an appropriate substitution—and the district judge's acceptance of the inadequate substitution—an additional basis for ordering a new trial for Seda. The appeals court concluded “that the substitution's language unfairly colored presentation of the information and, even more problematic, that the substitution omitted facts helpful to Seda's defense.”<sup>492</sup> Although the court did not find bad faith on the part of the prosecutors, it found that “the government appears to have looked with tunnel vision at limited issues that it believed were relevant.”<sup>493</sup>

## Anonymous and Biased Juries

While the majority of terrorism cases (like most criminal cases) do not go to trial, those that do face challenges obtaining unbiased juries, as well as the use of anonymous jurors—a practice rare in criminal cases though used in high-profile, organized crime trials.

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<sup>492</sup> United States v. Sedaghty, 728 F.3d 885, 905 (9th Cir. 2013), *aff'd in part and rev'd in part* No. 05-60008-HO, 2011 WL 356315 (D. Or. Aug. 10, 2011).

<sup>493</sup> *Ibid.*, p. 906.

Anonymous juries—that is, juries whose names and identities are shielded from the public, and sometimes even from the parties and judge, in order to protect their safety—were used in several of the cases we examined, including the cases of Fort Dix Five, Abdelhaleem Ashqar and Mohammed Salah. If a judge declares the jury “anonymous,” usually for security reasons, defense lawyers may be hampered from examining prospective jurors for bias.

Moreover, identifying unbiased jurors, whether anonymous or not, is particularly challenging in terrorism cases, especially those involving Muslims. In federal terrorism prosecutions, some judges have elected to use written jury questionnaires, which allow them ask a broad range of questions that may root out more prospective jurors who may have bias towards the defendant. In the case of Hossam Smadi (who pleaded guilty shortly before he was scheduled to go to trial) the judge provided a questionnaire to the approximately 175 members of the jury pool. One of Smadi’s defense attorneys, Richard Anderson, described the judge as “outstanding” and felt that the questionnaire was appropriately crafted to identify bias.<sup>494</sup> But many judges do not use questionnaires, which can make it harder to identify biases.

## Pretrial Solitary Confinement and Other Conditions of Confinement

The US government frequently imposes solitary confinement on suspects in terrorism cases prior to trial.<sup>495</sup> Prolonged pretrial solitary confinement not only raises concerns of cruel and inhumane treatment or punishment, but it also has an impact on defendants’ ability to assist in their own defense, and may compel them to waive their trial rights and accept plea deals.<sup>496</sup>

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<sup>494</sup> Human Rights Watch interview with Richard Anderson, Dallas, Texas, June 26, 2012. The 86-question survey included categories of questions covering “Knowledge, Experience, and Beliefs about Arabic, the Middle East, and Islam” in addition to the usual biographical questions, and questions about military experience. *United States S v. Smadi*, Jury Questionnaire, on file with Human Rights Watch. It also asked, “What three people do you admire the most? The least?”

<sup>495</sup> We discuss post-conviction solitary confinement in section VI.

<sup>496</sup> The European Committee on the Prevention of Torture has emphasized that pretrial solitary should only be imposed “where there is direct evidence in an individual case that there is a serious risk to the administration of justice if the prisoner concerned associates with particular inmates or others in general” and that it should be subject to judicial review on a “frequent” basis. See European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), “The CPT Standards, Substantive Sections of the CPT’s General Reports,” CPT/Inf/E (2002) 1-Rev. 2004, <http://www.cpt.coe.int/en/documents/eng-standards-prn.pdf> (accessed June 29, 2014), para. 57(a).

We documented the experiences of 24 men who were held in solitary confinement on terrorism charges prior to conviction, often for months or years on end.<sup>497</sup> In some of these cases, solitary confinement was imposed as “administrative segregation,” that is, not for a disciplinary infraction but purportedly for the security of the prison or the personal security of the detainee.<sup>498</sup>

For example, Syed Hashmi was held in solitary confinement for about three years, imposed as administrative segregation and pursuant to Special Administrative Measures (SAMs)—special restrictions imposed to protect national security or prevent disclosure of classified material (SAMs are discussed in detail in section VI)—for much of that time.<sup>499</sup> The UN special rapporteur on torture, Juan Mendez, who sought information from the US government about Hashmi, said its explanation of the case “made no mention of Mr. Hashmi’s behavior in custody as a reason for any disciplinary sanction” but appeared based on “the seriousness of the charges he faced.”<sup>500</sup> He concluded that Hashmi’s prolonged pretrial solitary confinement constituted a violation of his rights under the Convention against Torture “absent contrary evidence.”<sup>501</sup>

Barry Bujol was kept in isolation in his cell for 19 months prior to his sentencing, in the special housing unit of the federal detention center in downtown Houston.<sup>502</sup> Bujol had only one hour of recreation out of his cell each day, during which he

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<sup>497</sup> For a list, see charts in Appendix.

<sup>498</sup> Solitary confinement in US prisons is imposed for different reasons, but most commonly it is used as punishment for breaches of discipline (“disciplinary segregation”) or to manage prisoners considered to be particularly difficult or dangerous (“administrative segregation”). Corrections officials prefer to use terms such as “segregation” rather than solitary confinement. We consider the terms interchangeable since both refer to 22 to 24 hours a day in cell confinement.

<sup>499</sup> Hashmi was held at MCC 10-South from May 25, 2007 to on or around April 27, 2010 when he pleaded guilty to one count of material support of terrorism—that is, for at least three years, ten months, and 20 days. *United States v. Hashmi*, No. 1:06-cr-00442-LAP (S.D.N.Y. June 10, 2010); Letter in Response to Defendant’s Motion to Modify Pretrial Confinement Conditions, *Hashmi*, No. 1:06-cr-00442-LAP (S.D.N.Y. June 10, 2010).

<sup>500</sup> Email from Juan Mendez to Jeanne Theoharris, January 2014.

<sup>501</sup> UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Mendez, Observations or communications transmitted to Governments and replies received, A/HRC/22/53/Add.4, March 4, 2013, <http://unispal.un.org/UNISPAL.NSF/o/D16FoD0004E40FD985257B33005CD747> (accessed June 29, 2014), para. 179.

<sup>502</sup> Bujol was held in pretrial solitary confinement at the Federal Detention Center FDC Houston between an October 2010 court hearing and his sentencing in May 2012. Human Rights Watch phone interview with lawyer involved in the Bujol case (name withheld), June 21, 2012.

“occasionally, but rarely” had someone else in the recreation room with him.<sup>503</sup> Bujol expressed his suffering in a story he drafted prior to his sentencing, titled *Dungeon in the Sky*. He begins the piece:

Solitude can be many things. It can be a time for reflection, a healthy and therapeutic exercise that inspires creativity. It can be a sanctuary for spiritual growth and self-discovery.... Unless of course solitude is how you live daily—and you’re forced to. Then it becomes much more than that. Then it becomes what people in here call it—a hole. A hole that swallows the spirit like a black hole in space swallows all light and matter. Then it strips the hours of their significance and the days of their meaning[,] turning them instead into a perpetual void of timelessness. It becomes a living tomb constricting movements, thoughts, and every thing else that makes us human[,] the way a boa constricts its prey. At least for the prey death is imminent.<sup>504</sup>

In at least some cases we reviewed, the government’s restrictions appear to have far exceeded what was necessary to address the stated security concerns. For example, in the cases of Adnan Mirza and Tarek Mehanna, who were ultimately convicted of non-violent crimes, each was held in pretrial solitary confinement for more than two years. They then were told they were being held in solitary for their own security. Yet it is hard to justify the severe restrictions on their human contact on those grounds: it took three weeks for Mirza to receive mail from his family, even from those who lived in Texas, and he was allowed only a single 15-minute phone call to his family a month.<sup>505</sup> Jay Carney, Mehanna’s attorney, noted that, “You can protect an inmate and still allow him to have contact with other people on a regular basis, and not be put in that cell sometimes 24 hours a day.”<sup>506</sup>

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<sup>503</sup> Human Rights Watch phone interview with Daphne Silverman, Bujol’s defense attorney at sentencing, June 6, 2012.

<sup>504</sup> Barry W. Bujol, Jr., *Dungeon in the Sky*, unpublished document on file with Human Rights Watch, p. 1, 2012,

<sup>505</sup> Human Rights Watch email correspondence with Adnan Mirza, February 25, 2013.

<sup>506</sup> Columbia Law School’s Human Rights Institute phone interview with Jay Carney, October 18, 2012.

### *Mohammed Warsame: Five Years in Pretrial Detention*

Mohammed Warsame, originally held as a material witness, was subjected to pretrial solitary confinement for five-and-a-half years. He was held in a 10 x 10-foot cell in a state prison alongside prisoners convicted of serious crimes.<sup>507</sup> He was permitted one hour of out-of-cell exercise and one shower a week.<sup>508</sup>

“He has not been outside nor been near an open window, let alone look out a closed window to the outside prison yard” for four years, his lawyer wrote in 2007, “except for the few times he has been transported to court.”<sup>509</sup>

District Judge John Tunheim grew so concerned about Warsame’s solitary confinement that at times he would hold status conference hearings simply to allow Warsame to leave the prison and go to court, he told us.<sup>510</sup> Warsame ultimately pled guilty to charges of conspiracy to provide material support for terrorism. Under the plea deal, he was sentenced to 92 months in prison, including time served, and immediately deported to his home country of Canada. As professors Laura Rovner and Jeanne Theoharis put it, “forcing Warsame to leave the country seems at odds with the immediate danger repeatedly asserted by the government of Warsame’s unmonitored communication.”<sup>511</sup>

### *Other Ill-Treatment in Pretrial “Special Housing Unit” Detention*

More than half of all individuals being held pretrial by the Bureau of Prisons who are charged with terrorism or terrorism-related offenses—30 out of 52—are held in Special Housing Units (SHUs).<sup>512</sup>

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<sup>507</sup> Warsame was originally held as a material witness but, after he refused to cooperate with the government, he was indicted on material support charges. Position of Defendant with Respect to Sentencing at 1, 7, United States v. Warsame, No. 0:04-cr-00029-JRT-FLM, 2009 WL 2173047 (D. Minn. filed July 2, 2009).

<sup>508</sup> Human Rights Watch interview with Dan Scott, Minneapolis, Minnesota, July 24, 2012.

<sup>509</sup> Response to Government’s Motion to Vacate Order Re: Conditions of Detention and Request For Stay, Warsame, No. 0:04-cr-00029, 2007 WL 5827586.

<sup>510</sup> Human Rights Watch interview with District Judge John R. Tunheim, July 24, 2012.

<sup>511</sup> Laura Rovner and Jeanne Theoharis, “Preferring Order to Justice,” *American University Law Review*, vol. 61 (2012), <http://www.aulawreview.org/pdfs/61/61-5/Rovner-Theoharis.website.pdf> (accessed June 26, 2014).

<sup>512</sup> Bureau of Prisons documents obtained from Freedom of Information Act requests made by Human Rights Watch on August 24, 2012 (on file with Human Rights Watch).



SHUs segregate these individuals from the general prison population, putting them in solitary confinement or other “restrictive conditions.”<sup>513</sup> Many individuals held in pretrial SHUs reported poor conditions and treatment that, particularly when considered cumulatively with conditions of physical and social isolation, could amount to ill-treatment in violation of international law (see section VI). Human Rights Watch has previously documented similarly abusive conditions of confinement in SHUs for individuals held as “special interest” detainees shortly after 9/11 and individuals held under the material witness statute.<sup>514</sup>

Among the poor conditions faced by many individuals held in solitary confinement was extreme cold, including for defendants at New York Metropolitan Correctional Center (MCC) “10-South,” and other defendants in metropolitan detention facilities, such as the Fort Dix Five defendants held at Philadelphia FDC.

### *Conditions at MCC 10-South*

MCC 10-South is a SHU in New York City that includes six individual cells that have repeatedly housed individuals indicted on terrorism or terrorism-related charges, including those under Special Administrative Measures (SAMs) (discussed in section VI). Individuals are held in 23 or 24-hour solitary confinement. Public access to 10-South is severely limited and many prisoners there are under SAMs that bar them from speaking with the media or anyone other than their attorneys and family members (who are, in turn, barred from relaying any information). These restrictions limited our ability and the ability of other researchers to document conditions there. However, former detainees have described harsh conditions and harassment:

- Tarik Shah, a professional jazz bassist and martial arts instructor who was prosecuted after an elaborate sting operation that spanned four years and involved two informants, spent 33 months in solitary confinement at 10-South.

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<sup>513</sup> See Bureau of Prisons Program Statement, “Special Housing Units,” no. 5270.10, July 29, 2011, [http://www.bop.gov/policy/progstat/5270\\_010.pdf](http://www.bop.gov/policy/progstat/5270_010.pdf) (accessed June 26, 2014).

<sup>514</sup> Human Rights Watch, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, vol. 14, no. 4(G), August 2002, <http://www.hrw.org/reports/2002/us911/USAO802.pdf>, pp. 67-84; Human Rights Watch, *Witness to Abuse*, pp. 41-44.

In a letter to his sister, he described a “bright light on for twenty-four hours” a day.<sup>515</sup> He described his cell as “extremely cold throughout the year”: “[W]e could not purchase hats, gloves, extra sweats or extra thermals, so I wore an extra pillow case on my head, three pairs of socks on my feet, a pair of socks on my hands for gloves...just to be somewhat insulated.”<sup>516</sup>

- Uzair Paracha was held in pretrial solitary confinement at 10-South for 23 months. “Some officers...came to the door and looked straight at me through the windows while I was sitting on the toilet,” he wrote. “Other times I overheard them talking to me or about me while I was on the toilet, talking about how we would clean ourselves afterwards.... I felt too embarrassed and humiliated to discuss or complain about it.”<sup>517</sup> Paracha also described guards taking his blankets and clothes in wintertime, and blasting the radio while he and other Muslims prisoners were praying, turning it down when they finished. “They knew we couldn’t talk or do other things during our prayer,” Paracha wrote, and would purposefully deliver food or ask for food trays back while Paracha was praying.<sup>518</sup>

Some defendants or their families also reported harassment by particular correctional officers at pretrial facilities. For example, all of the Duka brothers described prison officials at Philadelphia FDC ransacking their cells and throwing

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<sup>515</sup> Letter from Tarik Shah to Kalimah Jenkins (undated).

<sup>516</sup> Ibid.

<sup>517</sup> Letter from Uzair Paracha to Human Rights Watch, December 26, 2012.

<sup>518</sup> Ibid. Attorneys for Fahad Hashmi and Oussama Kassir also described mistreatment at MCC 10-South, including denial of access to out-of-cell exercise and denial of phone calls to family for fabricated or exaggerated infractions. See Columbia Law School’s Human Rights Institute interview with Pardiss Kebriaei, appellate attorney for Fahad Hashmi, January 28, 2012; Amnesty International, “USA: Open Letter to Eric H. Holder, Attorney General: Special Housing Unit in the Metropolitan Correctional Center, New York,” February 11, 2011, <http://www.amnesty.org/en/library/asset/AMR51/029/2011/en/god2f93d-4e88-46cc-b4c3-f84da8e0e681/amr510292011en.html> (accessed June 27, 2014). They and other MCC 10-South prisoners have challenged their conditions of confinement, including those related to SAMs: *United States v. Basciano*, 763 F. Supp. 2d 303 (E.D.N.Y. 2011) (ordering defendant’s release from administrative detention in 10 South); *United States v. Bout*, 860 F. Supp. 2d 303 (E.D.N.Y. 2012) (granting defendant’s request to be transferred to general population after 15 months in 10 South); *United States v. Ghailani*, 751 F. Supp. 2d 502 (S.D.N.Y. 2010) (considering defendant’s request to stop body cavity searches at 10 South as a prerequisite to his attendance at court appearances); Motion for Modification of Pre-trial Conditions, *United States v. Hashmi*, No. 1:06-cr-00442-LAP (S.D.N.Y. June 10, 2010); *United States v. El-Hage*, 213 F.3d 74 (2d Cir. 2000), *aff’d* No. 1:98-cr-01023-LAK (S.D.N.Y. Jan. 13, 2000) (affirming denial of El Hajj’s application for substantial modification of his SAMs on the basis of conditions of confinement).

religious materials, including the Quran, on the floor while leaving non-religious materials untouched.<sup>519</sup>

Ahmed Bilal, one of the “Portland Seven” (see section II), said that harassment by guards in one facility was so severe that members of the white supremacist gang European Kindred, who were housed with him, began standing up for him against the guards.<sup>520</sup> Bilal said that attorney visits that took place through a glass wall did not require strip-searching so he would request that type of visit, but the guards would strip-search him anyway.<sup>521</sup>

Dr. Sami Al-Arian<sup>522</sup> was subject to frequent strip searches at the SHU at Coleman USP, a court order stopped them, even though he was denied any contact visits.<sup>523</sup> Al-Arian complained that he was shackled at his ankles and wrists whenever he left his cell. Prison guards refused to carry his legal documents to meetings with counsel, so Al-Arian had to bend over and balance a stack of files on his back while walking, “[l]ike an animal,” his attorney Linda Moreno said.<sup>524</sup>

### *Impact of Pretrial Solitary Confinement on Pleas and Trial Preparation*

In some cases, the emotional and psychological toll of solitary confinement may have impeded defendants’ abilities to prepare for their defense or impaired their judgment—even if the confinement was for days, rather than weeks or months.<sup>525</sup> A

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<sup>519</sup> Human Rights Watch interview with Shain Duka, Florence, Colorado, July 18, 2012.

<sup>520</sup> Human Rights Watch interview with Ahmed Bilal, Portland, Oregon August 15, 2012.

<sup>521</sup> Ibid. Individuals held in SHUs as “special interest” detainees or under the material witness statute have reported similar physical and verbal abuse by guards. Human Rights Watch, *Presumption of Guilt*, pp. 73-75; Human Rights Watch, *Witness to Abuse*, pp. 43-44.

<sup>522</sup> Al-Arian was a professor of computer engineering at the University of Southern Florida who was indicted in February 2003 on charges of supporting Palestinian Islamic Jihad (PIJ), designated as a foreign terrorist organization, through an elaborate network of front organizations including schools and charitable organizations across the United States. Al-Arian was acquitted of several charges but prosecuted later for criminal contempt. In June 2014, the Justice Department dropped the contempt charge.

<sup>523</sup> Columbia Law School’s Human Rights Institute interview with (name withheld), September 20, 2012; Amnesty International, “Amnesty International raises concern about prison conditions of Dr Sami Al-Arian,” July 30, 2003, <http://www.amnesty.org/fr/library/asset/AMR51/110/2003/en/64d81573-d6aa-11dd-ab95-a13b602c0642/amr511102003en.pdf> (accessed June 27, 2014).

<sup>524</sup> Robyn E. Blumner, “For some defendants, an American gulag,” *St. Petersburg Times*, March 14, 2003, [http://www.sptimes.com/2004/03/14/Columns/For\\_some\\_defendants\\_.shtml](http://www.sptimes.com/2004/03/14/Columns/For_some_defendants_.shtml) (accessed June 27, 2014).

<sup>525</sup> See Joshua L. Dratel, “Ethical Issues in Defending a Terrorism Case: How Secrecy and Security Impair the Defense of a Terrorism Case,” *Cardozo Public Law, Policy and Ethics Journal*, vol. 2, iss. 1 (Fall 2003), pp. 81, 84-85.

number of defendants, their relatives, or attorneys said the experience of solitary affected the defendants' interactions with attorneys and willingness to plead guilty:

- *Case of Oussama Kassir*: Kassir, who has a documented history of mental illness, spent one-and-a-half years at MCC 10-South and was held continuously in a cell with no natural light.<sup>526</sup> Under SAMs, Kassir was barred from talking with other inmates or correctional staff. Denied phone calls to his family for seven months, Kassir's only human contact was with his lawyers, consulate officials and prison staff.<sup>527</sup> His "only exercise facility was the provision of a cell identical to his own," according to a statement his defense counsel provided to the European Court of Human Rights.<sup>528</sup> Kassir's attorney, Marc DeMarco, told us that Kassir often spent the first hour of their meetings only able to speak about the horrible conditions of confinement.<sup>529</sup> Though Kassir was an intelligent person, his focus on his conditions made him seem like a "rambling lunatic" during their discussions.<sup>530</sup> Kassir's counsel moved to lift the SAMs, arguing that they were restricting legal access, destroying Kassir's mental well being, and harming his ability to prepare for trial.<sup>531</sup> The motion was denied.<sup>532</sup>
- *Case of Yassin Aref*: Aref, an imam convicted in October 2006 of providing material support for witnessing a loan agreement between an informant and mosque congregant, and who had no criminal record or history of violence (see section II), began having trouble communicating after he was in solitary confinement at Raybrook prison, his attorneys told us.<sup>533</sup> According to attorney Kathy Manley: "When he was at Raybrook, he was

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<sup>526</sup> See European Court of Human Rights, *Babar Ahmad and Others v. the U.K.* (dec.), nos. 24027/07, 11949/08 and 36742/08, § 85, 6 July 2010.

<sup>527</sup> See Letter from Susan Lee, Programs Director, Americas Regional Program, Amnesty International, to Eric Holder, Attorney General, US Department of Justice, "RE: Special Housing Unit in the Metropolitan Correctional Centre," February 16, 2011, <http://www.amnesty.org/en/library/asset/AMR51/028/2011/en/c175ece2-d33a-4db9-a577-039ed17c5fb4/amr510292011en.pdf> (accessed June 28, 2014).

<sup>528</sup> See ECHR, *Babar Ahmad and Others v. the U.K.* (dec.), nos. 24027/07, 11949/08 and 36742/08, § 85, 6 July 2010.

<sup>529</sup> For a description of his conditions, see section IV.

<sup>530</sup> Human Rights Watch phone interview with Marc DeMarco, May 17, 2012.

<sup>531</sup> *United States v. Kassir*, No. 1:04-cr-00356-JFK, 2008 WL 2695307 (S.D.N.Y. July 8, 2009).

<sup>532</sup> *Ibid.*

<sup>533</sup> Aref was detained at Raybrook pretrial in solitary confinement for nearly a month. After conviction but before his sentencing, he was held in solitary confinement for 17 months, according to his attorneys. Columbia Law School's Human Rights Institute email correspondence with Kathy Manley, October 18, 2012.

shaking and crying, he couldn't put thoughts together, which was unusual for him. He couldn't put together coherent sentences after being in solitary confinement. He was in shock." An activist who visited Aref at Raybrook said: "I said something to him and he was trying to say something. He couldn't get the words out, he was just trembling."<sup>534</sup>

- *Case of Raja Khan*: Khan, who bragged to undercover FBI agents about a connection to Ilyas Kashmiri (a senior Pakistani leader of Harkat-ul-Jihad al-Islami) but who never actually made any such contact, was held in solitary confinement in the SHU at Chicago's Metropolitan Detention Center for about 16 months, from his arrest until he was released after taking a plea deal.<sup>535</sup> Khan's presentence investigation report (a report that informs a court's sentencing decision, and that is typically prepared by a probation officer) found that his 16 months of pre-conviction solitary confinement "had serious and permanent consequences on his physical and mental health."<sup>536</sup> According to Khan's son-in-law, Waseem Serwer, he developed arthritis and became unable to walk.<sup>537</sup> Khan lost up to 45 pounds and developed high blood pressure, high cholesterol, dry and itchy eyes, and sinus problems that he did not have prior to his detention.<sup>538</sup> Khan's wife told the court that the 16 months of solitary confinement had "destroyed his health."<sup>539</sup> Khan reported suffering "depression so severe...that he would have committed suicide had it not been for his religion."<sup>540</sup> Serwer told us that when they talked on the phone, Khan appeared depressed and ready to give up hope: "He started talking about not making it, [asking us to] take care of his other kids... He was distressed to the point of not knowing

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<sup>534</sup> See Columbia Law School's Human Rights Institute group interview with Kathy Manley, Stephen Downs and Lynne Jackson, Albany, New York, June 20, 2012.

<sup>535</sup> His lengthy time in the SHU was imposed as administrative segregation, and was not for disciplinary reasons. Defendant's Objections to the Presentence Investigation Report, Position Paper, Commentary on Sentencing Factors, and Response to the Government's Sentencing Memorandum, *United States v. Khan*, No. 1:10-cr-00240-1 (N.D. Ill. June 8, 2012) (copy on file with Columbia Law School's Human Rights Institute).

<sup>536</sup> *Ibid.*

<sup>537</sup> Columbia Law School's Human Rights Institute interview with Waseem Sarwar, Chicago, Illinois, October 8, 2012.

<sup>538</sup> Defendant's Objections to the Presentence Investigation Report, Position Paper, Commentary on Sentencing Factors, and Response to the Government's Sentencing Memorandum, *Khan*, No. 1:10-cr-00240-1 (N.D. Ill. June 8, 2012) (copy on file with Columbia Law School's Human Rights Institute).

<sup>539</sup> Presentence Investigation Report at 13, *Khan*, No. 1:10-cr-00240-1 (N.D. Ill. June 8, 2012).

<sup>540</sup> *Ibid.*, p. 16.

what happened to himself.”<sup>541</sup> Khan’s family believes he took the plea deal rather than contest the charges at trial because he was traumatized and feared long-term solitary confinement. Serwer said: “He knew only what he had seen, and he based his decision on that.”<sup>542</sup>

- *Case of Uzair Paracha*: Paracha was put under SAMs nine months after his December 2003 arrest, at a time when he was refusing a plea deal (he was ultimately convicted at trial of providing material support for terrorism and other offenses and sentenced to 30 years). The SAMs initially barred him from talking to any other inmates, and he was only permitted to speak to prison guards. “You could spend days to weeks without uttering anything significant beyond ‘please cut my lights,’ ‘can I get a legal call/toilet paper/ a razor,’ etc., or just thanking them for shutting our lights,” Paracha wrote in an email to Human Rights Watch. Paracha developed claustrophobia and would eventually be diagnosed with depression that required medication: “Many times during the day I saw myself doing things that I saw people with psychological problems do. The way I sounded (my voice), my gestures,” he stated.<sup>543</sup> Paracha’s SAMs were purportedly based on the government’s belief in Paracha’s dangerousness and connections with Al-Qaeda, yet that rationale evidently did not extend far: the government offered Paracha a plea bargain of only 22 months’ imprisonment, which he refused.<sup>544</sup> “I faced the harshest part of the SAMs while I was innocent in the eyes of American law,” Paracha wrote. After Paracha was convicted in December 2006, the SAMs were modified, permitting him to communicate with other inmates. “The fact that they became more lenient about a month after my conviction was counterintuitive and made the SAMs look more like a pressure tactic and less like any security measures,” Paracha wrote.<sup>545</sup>

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<sup>541</sup> Columbia Law School’s Human Rights Institute interview with Fatima Sarwar, Chicago, Illinois, October 8, 2012.

<sup>542</sup> Ibid.

<sup>543</sup> Letter from Uzair Paracha to Human Rights Watch, December 26, 2012.

<sup>544</sup> While Paracha has sought SAMs memos concerning this period of confinement through Freedom of Information Act requests, he has not received them. However, his SAMs extension memo describes the origin of his SAMs and ongoing justifications. See Memorandum from Matthew W. Friedrich, Acting Assistant Attorney General, to Harley G. Lappin, director, Bureau of Prisons, “Extension of Special Administrative Measures (SAM) Pursuant to 28C.F.R. § 501.3 for Federal Prisoner Uzair Paracha” (SAMs extension memo), November 24, 2008; Letter from Uzair Paracha to Human Rights Watch, June 26, 2013.

<sup>545</sup> Human Rights Watch email correspondence with Uzair Paracha, August 29, 2012.

## V. Disproportionate Sentences

Sentences in terrorism and terrorism-related cases vary considerably. In the 494 terrorism and terrorism-related prosecutions we reviewed based on Department of Justice data, defendants who went to trial received a median sentence of 11.3 years, while those who took plea agreements received a median sentence of 3.2 years. More than one-third of those who took a plea deal received either no prison sentence or a sentence of time served.<sup>546</sup>

However, 91 defendants received sentences of 15 years or more, including 19 life sentences (which, in the federal system, means life without the possibility of parole).<sup>547</sup> Over one in ten of defendants who were convicted by trial received a life sentence.<sup>548</sup> In many of the cases we documented, these lengthy sentences appeared disproportionate to the underlying offense.

Lengthy sentences violate international human rights law and US constitutional law when they are grossly disproportionate to the offense committed and the individual's culpability.<sup>549</sup> Both US and international human rights jurisprudence on sentencing emphasize the importance of a judicial determination based upon individualized consideration of the defendant.<sup>550</sup>

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<sup>546</sup> See sections Methodology and Appendix.

<sup>547</sup> Ibid.

<sup>548</sup> Ibid.

<sup>549</sup> Under international human rights law, the “essential aim” of a penitentiary system should be the “reformation and social rehabilitation” of prisoners, and sentencing that is solely retributory is disfavored. See ICCPR, art.10(3) (“The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”); UN Human Rights Committee, General Comment 21, Replaces general comment 9 concerning human treatment of persons deprived of liberty (Art. 10) (Annex VI, B) (Forty-fourth Session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.9 (Vol.1) (1994), [http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9%28Vol.1%29\\_%28GC21%29\\_en.pdf](http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9%28Vol.1%29_%28GC21%29_en.pdf) (accessed June 20, 2014), para. 10. (“No penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner”). Excessive punishment may constitute cruel, inhuman, or degrading punishment in violation of the ICCPR and the Convention against Torture, and it may constitute arbitrary deprivation of liberty in violation of the right to liberty. See ICCPR, arts. 7 and 9; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 22, 2006, art.16; see also, Dirk van Zyl Smit and Andrew Ashworth, “Disproportionate Sentences as Human Right Violations,” *Modern Law Review*, vol. 67, no. 4 (July 2004), p. 543; *Roper v. Simmons*, 543 U.S. 551, 572 (2005).

<sup>550</sup> See *Kennedy v. Louisiana*, 552 U.S. 407 (2008); see also, *Vinter and Others v. the United Kingdom*, nos. 66069/09, 130/10 and 3896/10, § 93, 17 January 2012.

Disproportionate sentences are a pervasive problem in the US criminal justice system, as Human Rights Watch has documented in various contexts.<sup>551</sup> Under federal law, sentences should be no longer than necessary to further the purposes of punishment.<sup>552</sup> In the terrorism context, disproportionate sentences can occur due to the use of “terrorism adjustments” which may be based on allegations of terrorist involvement that are not proven in a criminal trial.

## The “Terrorism Adjustment”

Federal judges making sentencing determinations for any federal crime are to take into account as a starting point the guidelines issued by the US Sentencing Commission. Because the guidelines are advisory, judges may depart from the sentencing ranges they establish to lengthen or reduce sentences.<sup>553</sup> By statute they must consider a range of factors in sentencing, including the individual characteristics of the defendant and the purposes of sentencing as applied to a particular case.<sup>554</sup>

The sentencing guidelines establish sentencing ranges based on a matrix, which cross-references 43 “offense levels” with six “criminal history” categories.<sup>555</sup> For example, the offense level for homicide is the highest, 43, while involuntary manslaughter starts at level 12.<sup>556</sup> The guidelines also contain “adjustments” based on qualities of the offense, the offender, or the victim. These adjustments

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<sup>551</sup> See, e.g., Human Rights Watch, *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty* (New York: Human Rights Watch, 2013), <http://www.hrw.org/reports/2013/12/05/offer-you-can-t-refuse>; Human Rights Watch, *Old Behind Bars: The Aging Prison Population in the United States* (New York: Human Rights Watch, 2012), <http://www.hrw.org/reports/2012/01/27/old-behind-bars-o>; and Human Rights Watch, *Cruel and Usual: Disproportionate Sentences for New York Drug Offenders*, *Cruel and Unusual: Disproportionate Sentences for New York Drug Offenders*, vol. 9, no. 2(B), March 1997, <http://www.hrw.org/reports/1997/usny/>.

<sup>552</sup> 18 U.S.C. § 3553.

<sup>553</sup> Congress created the US Sentencing Commission (USSC) in 1984 and authorized it to promulgate mandatory guidelines, with the aim of reducing “unwarranted sentencing disparities.” Sentencing Reform Act of 1984, 28 U.S.C. § 991. A 2005 Supreme Court case made the guidelines advisory. *United States v. Booker*, 543 US 220 (2005).

<sup>554</sup> See 18 U.S.C. § 3553(a)(1)-(7); see also, *Gall v. United States*, 552 U.S. 28 (2007).

<sup>555</sup> United States Sentencing Commission (USSC), “2012 Federal Sentencing Guidelines Manual,” November 1, 2012, [http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2012/manual-pdf/2012\\_Guidelines\\_Manual\\_Full.pdf](http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2012/manual-pdf/2012_Guidelines_Manual_Full.pdf) (accessed June 29, 2014), chapter 1; See Human Rights Watch, *An Offer You Can't Refuse*.

<sup>556</sup> In addition, mandatory minimum sentences require judges to impose specified minimum prison terms. Created by various federal statutes, mandatory minimum sentences are typically triggered by aspects of criminal offense conduct or a defendant’s criminal history, and result in longer sentences. USSC, “2012 Federal Sentencing Guidelines Manual,” [http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2012/manual-pdf/2012\\_Guidelines\\_Manual\\_Full.pdf](http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2012/manual-pdf/2012_Guidelines_Manual_Full.pdf), chapter 1 or 2. Taking into regard criminal history, first-time offenders have a criminal history level of 1, which increases to 2 to 6 usually depending upon the number, duration, and nature of previous sentences. *Ibid.*, chapter 4.



have the effect of raising, and in some cases lowering, the offense level or criminal history category level.<sup>557</sup>

Among all of the adjustments in the federal sentencing guidelines system, the terrorism adjustment has the most drastic effect of lengthening sentences, and it stands out for applying across a wide range of conduct.<sup>558</sup> (The history of the adjustment is briefly explained below.) The adjustment raises the offense level by 12, and if the resulting offense level is less than 32, it creates a minimum offense level of 32—regardless of the character of the actual crime. It also automatically raises a defendant’s criminal history level to category 6, the highest category, regardless of the defendant’s actual criminal history.<sup>559</sup> As one judge in a terrorism case put it, the effect is to “impute to a defendant who has had no criminal history a fictional history of the highest level of seriousness.”<sup>560</sup>

The government has successfully sought the terrorism adjustment for 259 individuals since 2002, the first year statistics are available. In 2012, the adjustment applied to 46 defendants, while in previous years, it applied to an

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<sup>557</sup> In addition, mandatory minimum sentences require judges to impose specified minimum prison terms. Created by various federal statutes, mandatory minimum sentences are typically triggered by aspects of criminal offense conduct or a defendant’s criminal history, and result in longer sentences. *Ibid.*, chapter 1. See also, USSC, “Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System,” October 2011, [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter\\_01.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_01.pdf) (accessed June 28, 2014), p. 4; USSC, “2012 Federal Sentencing Guidelines Manual,” [http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2012/manual-pdf/2012\\_Guidelines\\_Manual\\_Full.pdf](http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2012/manual-pdf/2012_Guidelines_Manual_Full.pdf), chapter 1. In addition, mandatory minimum sentences require judges to impose specified minimum prison terms. Created by various federal statutes, mandatory minimum sentences are typically triggered by aspects of criminal offense conduct or a defendant’s criminal history, and result in longer sentences. See USSC, “Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System,” [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter\\_01.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_01.pdf), p. 4.

<sup>558</sup> All other independent enhancements set forth in chapter 3 (the “Adjustments” chapter) of the Guidelines (that is, enhancements that are not tied to any particular offense, but rather may be applied to any of them) entail an increase of only 1 to 5 levels. Though some specific offenses also involve upward adjustments, none exceeds the severity of the terrorism enhancement since it increases both the offense level increase and criminal history category assignment. See generally, USSC, “2012 Federal Sentencing Guidelines Manual,” [http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2012/manual-pdf/2012\\_Guidelines\\_Manual\\_Full.pdf](http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2012/manual-pdf/2012_Guidelines_Manual_Full.pdf), chapter 3. All other independent enhancements set forth in chapter 3 (the “Adjustments” chapter) of the Guidelines entail an increase of only 1 to 5 levels. Though some specific offenses also involve upward adjustments, none exceeds the severity of the terrorism enhancement since it increases both the offense level increase and criminal history category assignment.

<sup>559</sup> *Ibid.*, § 3A1.4(a)-(b).

<sup>560</sup> *Sentence, United States v. Mehanna*, 669 F. Supp. 2d 160 (D. Mass. 2009) (No. 1:09-cr-10017-GAO).

average of 28 cases per year, according to our calculations based on information publicly available on the US Sentencing Commission website.<sup>561</sup>

In real terms, application of the terrorism adjustment results in an absolute minimum sentence of 17.5 years for an offense (unless the offense carries a lesser statutory maximum). On its own, an increase of 12 offense levels can add as much as 20 years to a sentence, while a jump to the highest criminal history categorization can also add several years to a sentence. Taken together, the two aspects of the terrorism adjustment have the potential to add 30 years to a sentence or lead to life imprisonment for a crime that, without the adjustment, might otherwise entail only a sentence of five years.<sup>562</sup>

In addition, mandatory minimum sentences require judges to impose specified minimum prison terms. Created by various federal statutes, mandatory minimum sentences are typically triggered by aspects of criminal offense conduct or a defendant's criminal history, and result in longer sentences.<sup>563</sup> As Human Rights Watch has reported in the past, mandatory minimums are one of the most significant obstacles to fair sentencing in the criminal justice system.<sup>564</sup>

## Lengthy Sentences Based on Unproven Conduct

Under the federal sentencing system, sentences are not limited to the conduct for which an individual was charged or convicted but rather are based on a court's determination of a defendant's "actual conduct."<sup>565</sup> As a result, an individual's

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<sup>561</sup> This average is based on the years 2007 to 2011, including 2008 when it was applied only 11 times. Between 2002 and 2006, the adjustment was applied to between 8 and 13 cases per year, with the exception of 2004 when it applied to 22 cases. Human Rights Watch analysis of United States Sentencing Commission Federal Sentencing Statistics, [http://www.ussc.gov/Research\\_and\\_Statistics/index.cfm](http://www.ussc.gov/Research_and_Statistics/index.cfm) (accessed June 29, 2014).

<sup>562</sup> For example, Stanislas Gregory Meyerhoff, an environmental activist who was charged with conspiracy to commit arson and destroy an energy facility, faced a sentence of 70 to 87 months without imprisonment; with the terrorism adjustment it "leaps to 30 years to life imprisonment." Defendant's Memorandum of Law in Opposition to Application of the Terrorism Enhancement, *United States v. Meyerhoff*, No. 6:06-cr-60078 (D. Or. June 2, 2014).

<sup>563</sup> See USSC, "Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System," [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter\\_01.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_01.pdf), p. 4.

<sup>564</sup> Human Rights Watch, *An Offer You Can't Refuse*, pp. 30-31.

<sup>565</sup> See U.S.S.G. § 1A1.1, editorial note, Pt.A(4)(a). USSC, "2012 Federal Sentencing Guidelines Manual," [http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2012/manual-pdf/2012\\_Guidelines\\_Manual\\_Full.pdf](http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2012/manual-pdf/2012_Guidelines_Manual_Full.pdf), chapter 1, p. 5.

sentence may be dramatically lengthened based on accusations of conduct that were not assessed by a jury, let alone determined beyond a reasonable doubt. (Mandatory minimum cases are a recent exception.)<sup>566</sup> Although this sentencing scheme has been upheld by the Supreme Court,<sup>567</sup> it raises due process concerns particularly in the context of the terrorism adjustment, where the potential for government abuse—making inflammatory suggestions of a terrorism connection, invoking secrecy to explain evidentiary gaps—is too high, and the cost of a vastly lengthened sentence is too great.

For example, Abdelhaleem Ashqar was sentenced to about 11 years (135 months) for obstruction of justice and criminal contempt, after he refused to testify before a grand jury (see section IV). These offenses usually carry sentences of five years or less, but after the trial and during the sentencing stage the prosecution asserted Ashqar had “engaged in numerous violations of federal law”—offenses that it had not charged or convicted him on—“all in the service of a terrorist organization.”<sup>568</sup> It asserted that Ashqar’s refusal to testify before a grand jury was likewise “in the service” of a terrorist organization, although this question was never put to a jury.<sup>569</sup>

To punish defendants for conduct that was not alleged or proven at trial deprives them of the opportunity to fully develop the facts and evidence necessary to refute accusations of terrorist connection or affiliation. Moreover, it creates perverse incentives for the government, which can charge lesser conduct that is easier to establish at trial, and then invoke inflammatory allegations of terrorist connection at the sentencing stage.<sup>570</sup>

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<sup>566</sup> However, in 2013, the Supreme Court held that in mandatory minimum cases, any fact that increases a mandatory minimum is an “element” of the crime that must be submitted to the jury. See *Alleyne v. United States*, 133 S.Ct. 2151 (2013).

<sup>567</sup> In *Booker v. US*, the Supreme Court held that mandatory sentencing guidelines were unconstitutional where they imposed punishment for conduct without proof to a jury beyond a reasonable doubt. However, the Court’s remedy was not to bar the use of non-proven conduct; rather, it was to make the guidelines advisory. See *Booker v. United States*, 543 U.S. 220, 243-44 (2005). See also, *United States v. Battle*, 499 F.3d 315, 322-23 (4th Cir. 2007) (“When applying the Guidelines in an advisory manner, the district court can make factual findings using the preponderance of the evidence standard.”).

<sup>568</sup> Government’s Memorandum In Response to Defendant Ashqar’s Objection to PSR and Sentencing Position Memorandum at 22, *United States v. Marzook*, 435 F. Supp. 2d 778 (N.D. Ill. 2006) (No. 03 CR 978).

<sup>569</sup> *Ibid.*

<sup>570</sup> See Kate Stith, “The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion,” *Yale Law Journal*, vol. 117 (2008), p. 1479 (noting that where prosecutors do not have to prove the facts that are the basis for enhancements, they have less incentive to exercise discretion by agreeing to a plea and sentence bargain more

## Lengthy Sentences Based on Non-Violent Conduct

When the terrorism adjustment was first introduced in 1994, it applied to a relatively small category of offenses: any felony that “involves or is intended to promote international terrorism” if the felony did not already involve terrorism as an element of the crime.<sup>571</sup> However, in April 1996—in a law passed in response to the 1995 Oklahoma City bombing—Congress directed the US Sentencing Commission to expand the terrorism adjustment to apply domestically, without requiring an international nexus.<sup>572</sup>

Today, the terrorism adjustment applies to any “federal crime of terrorism”—a category that is defined expansively by statute. Accordingly, the terrorism adjustment may apply as much to violent offenses—such as using weapons of mass destruction and missile systems designed to destroy aircraft—as it does to non-violent offenses such as engaging in financial transactions with a country supporting international terrorism. Indeed, between 2006 and 2011, 46 of the terrorism adjustments applied were for material support to a foreign terrorist organization, according to information publicly available on the US Sentencing Commission website.

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favorable to defendants); James P. McLoughlin, “Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations,” *Law and Inequality*, vol. 28, no. 1 (2010), p. 93 (the enhancements give prosecutors “overwhelming leverage” over defendants). Human Rights Watch has previously reported on how prosecutors use the threat of sentencing enhancements to obtain pleas. See Human Rights Watch, *An Offer You Can't Refuse*.

<sup>571</sup> See USSC, “Appendix C (Volume I) - Amendments to the Guidelines Manual,” November 1, 2003, [http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2011/manual-pdf/Appendix\\_C\\_Vol\\_I.pdf](http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2011/manual-pdf/Appendix_C_Vol_I.pdf) (accessed June 26, 2014), amendment 526; Violent Crime Control and Law Enforcement Act of 1994, Pub.L. 103-322 (1994), sec. 120004 (“The United States Sentencing Commission is directed to amend its sentencing guidelines to provide an appropriate enhancement for any felony, whether committed within or outside the United States, that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime.”). Prior to 1994, the Sentencing Guidelines did not include an enhancement for conduct relating to terrorism offenses. Instead, the Guidelines included a policy statement that provided: “If the defendant committed the offense in furtherance of a terroristic action, the court may increase the sentence above the authorized guideline range.” See USSC, “1994 Federal Sentencing Guidelines Manual,” November 1, 1994, <http://www.ussc.gov/guidelines-manual/1994-federal-sentencing-guidelines-manual> (accessed June 26, 2014), § 5K2.15.

<sup>572</sup> See USSC, “Appendix C (Volume I) - Amendments to the Guidelines Manual,” [http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2011/manual-pdf/Appendix\\_C\\_Vol\\_I.pdf](http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2011/manual-pdf/Appendix_C_Vol_I.pdf), amendment 539; Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. p. 104-132, sec. 730 (“The United States Sentencing Commission shall forthwith, in accordance with the procedures set forth in section 21(a) of the Sentencing Act of 1987, as though the authority under that section had not expired, amend the sentencing guidelines so that the chapter 3 adjustment relating to international terrorism only applies to Federal crimes of terrorism, as defined in section 2332b(g) of title 18, United States Code.”); 18 U.S.C. Ch. 113B (defining “federal crime of terrorism”); see also, 18 U.S.C. § 2332B(g)(5) (defining other offenses as federal crimes of terrorism when those acts are “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct”).

In the Holy Land Foundation case, Shukri Abu Baker was convicted of conspiracy to provide material support and providing material support (see sections III and V)—charges that each carry a statutory maximum of 15 years. Yet Baker was sentenced to 65 years in prison based on a terrorism adjustment.<sup>573</sup> The government did not allege that the Holy Land Foundation or Baker was involved in violent activity of any kind, or that Baker or the organization ever provided money directly to a terrorist organization. Instead, the allegations were that by contributing to charitable work in the Occupied Palestinian Territories, the Holy Land Foundation helped Hamas gain supporters among the civilian population. Though Baker had no criminal history whatsoever, his sentence was based on a criminal history level equal to that of someone who had been convicted of second-degree murder.<sup>574</sup>

After Sabri Benkahla was acquitted of charges that he had attended a terrorist training camp and fired weapons there, he was questioned by the FBI and subpoenaed to testify before a grand jury on the same matter. The government then launched a second prosecution, charging that Benkahla had lied to the FBI and a grand jury by denying his personal involvement and knowledge of acquaintances' involvement in training camps. After a second trial, Benkahla was convicted of obstructing justice on account of false declarations to a grand jury and of making false statements to the FBI. Though the judge reasoned that Benkahla's false declarations "neither directly 'involved' nor were 'intended to promote' a federal crime of terrorism," he applied the terrorism adjustment, reasoning that the false declarations had actually obstructed the FBI's investigation of a terrorism crime.<sup>575</sup> Without the adjustment, Benkahla faced a sentence of two and three-quarters to three and a half years (33 to 41 months). With it, he faced a sentence of about 17 to 22 years (210 to 262 months)—the same or worse sentence as

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<sup>573</sup> United States v. Abu Baker, No. 3:04-CR-0240-P-2 (N.D. Tex. May 29, 2009).

<sup>574</sup> USSC, "2012 Federal Sentencing Guidelines Manual,"

[http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2012/manual-](http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2012/manual-pdf/2012_Guidelines_Manual_Full.pdf)

[pdf/2012\\_Guidelines\\_Manual\\_Full.pdf](http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2012/manual-pdf/2012_Guidelines_Manual_Full.pdf), §§2A1.2, 2M5.3. The base offense level for second-degree murder is 38.

The base offense level for providing material support to a foreign terrorist organization is 26 and with the terrorism enhancement, becomes 38. Instead of starting in a potential range of 63 to 78 months, the terrorism enhancement automatically placed him within a base range (not taking into account another form of upward departure) of 235 to 293 months. *Ibid.*, p. 394 (Sentencing Table).

<sup>575</sup> The judge speculated that Benkahla "may have been motivated out of a desire not to be seen as involved with illegal activities" or "have been concerned about potential hardship he might cause others." United States v. Benkahla, 501 F.Supp.2d 748, 751, 759-61 (E.D. Va. 2007), *aff'd*, 500 F.3d 300 (4th Cir. 2008).

defendants who committed “more severe, violent offenses,” like the kind of which Benkahla was acquitted in his first trial.<sup>576</sup>

Judges have the discretion to “depart downward” from sentences that the Guidelines recommend, but even where they exercise their discretion, the terrorism adjustment drives up the length of sentences significantly. In Benkahla’s case, the judge concluded the likelihood he would commit another crime was “infinitesimal,” and he sentenced Benkahla to 10 years. Yet this was still almost seven years more than Benkahla would have faced without the terrorism adjustment.<sup>577</sup>

## Lengthy Sentences in Informant Cases

In some of the cases we reviewed involving informants, defendants received particularly harsh sentences based on elements of the crimes that informants suggested.

The Newburgh Four case (see section II) is perhaps the most egregious example. The informant in the case introduced the idea of attacking Stewart Air Force Base with a Stinger missile and provided the fake missile to the defendants. As District Judge Colleen McMahon explained:

There is no way that these four defendants would have dreamed up the idea of shooting a Stinger missile at an airplane or anything else; there is certainly no way they could have acquired a Stinger missile, operative or inert, unless the government provided them one.<sup>578</sup>

Without the Stinger missile, the government could still have sought life imprisonment for the defendants based on other aspects of the case; however, the men would have been eligible for a judge’s discretionary reduction in sentence length. The Stinger missile element enabled the government to use a mandatory minimum sentence to ensure that if convicted, the defendants would receive at

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<sup>576</sup> Ibid.

<sup>577</sup> Ibid.

<sup>578</sup> Decision on Sentencing Entrapment/Manipulation, *United States v. Cromitie*, No. 7:09-cr-0558-CM-1 (S.D.N.Y. July 8, 2011), *aff’d*, 727 F.3d 194 (2d Cir. 2013).

least 25 years.<sup>579</sup> The judge concluded that she had no discretion to sentence the defendants to anything less, though she expressed concern that “the only reason the Government introduced the missile element into this case was to prohibit me from sentencing the defendants to less time than that.”<sup>580</sup>

The terrorism adjustment can result in individuals charged with conspiracy and attempts receiving the same sentences imposed for actual commission of murder.<sup>581</sup> This outcome is of particular concern especially where the defendants did not propose the conduct that served as the basis for the terrorism adjustment, as in the case of the three Duka brothers, who were sentenced to life imprisonment in the Fort Dix Five case (see section II), based on a fake plot negotiated in conversations held in Arabic between one of the informants and the co-defendant Mohammed Shnewer; the Duka brothers, who spoke English and Albanian alone and did not understand Arabic, were not included in any discussions about a plot.<sup>582</sup> The Dukas were convicted of one count of conspiracy to commit murder and three counts of illegal possession of firearms. Conspiracy to murder, without the terrorism adjustment, carries a sentence ranging between 12 <sup>3</sup>/<sub>4</sub> years to 24 <sup>1</sup>/<sub>2</sub> years (135 months to 293 months), depending on the defendant’s criminal history, but with the terrorism adjustment the guidelines recommend the same sentence that first-degree (premeditated) murder carries: life imprisonment.<sup>583</sup> The Duka brothers were in their 20s at the time of their sentence; without the adjustment, they would have been middle-aged men at the time of their release, while with it they will spend perhaps as much as 60 years in prison, and die there.

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<sup>579</sup> 18 U.S.C. § 2332g(c)(1).

<sup>580</sup> *Ibid.*

<sup>581</sup> Since 2006, courts have applied the terrorism adjustment to 28 attempt or conspiracy to murder cases, compared to just eight cases of first-degree murder, compared according to statistics we calculated based on information publicly available on the US Sentencing Commission website. See USSC Research and Federal Sentencing Statistics, [http://www.ussc.gov/Research\\_and\\_Statistics/index.cfm](http://www.ussc.gov/Research_and_Statistics/index.cfm) (accessed June 28, 2014).

<sup>582</sup> The Arabic-speaking informant, Mahmoud Omar, testified at trial that two of the brothers “have nothing to do with the matter,” that is, that they had no knowledge of any plot. Trial Transcript at 3289, *United States v. Shnewer*, No. 1:07-cr-00459-RBK (D.N.J. Apr. 29, 2009), *aff’d in part, rev’d in part sub nom.* *United States v. Duka*, 671 F.3d 329 (3d Cir. 2011) (No. 09-2292, 09-2299, 09-2300, 09-2301, 09-2302).

<sup>583</sup> The base offense level for conspiracy to commit murder is 33, and the resulting sentence could have been anywhere from 135 months, with the lowest criminal history category, to 293 months with the highest criminal history category. Due to the terrorism adjustment, the Duka brothers’ criminal history category levels were raised to the highest criminal history category level and the offense level was raised 12 levels, to the highest level of 43, the same base offense level as first degree murder. See USSC, “2012 Federal Sentencing Guidelines Manual,” [http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2012/manual-pdf/2012\\_Guidelines\\_Manual\\_Full.pdf](http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2012/manual-pdf/2012_Guidelines_Manual_Full.pdf), p. 394 (Sentencing Table).

## VI. Imprisonment and Treatment

US prisons held 475 people indicted on or convicted of terrorism or terrorism-related offenses as of October 2013, according to the government response to our FOIA request.<sup>584</sup> Some are held in prisons under harsh conditions that include prolonged solitary confinement and severe restrictions on their communication with family and others.

Some restrictions are imposed pursuant to Special Administrative Measures (SAMs), which apply to certain prisoners—not only terrorism detainees—on the grounds that they are necessary to protect national security or prevent disclosure of classified material (as previously noted, these conditions may also be imposed pretrial, raising concerns over fair trial rights). Other prisoners were placed in Communication Management Units (CMUs), which monitor prisoners 24 hours a day.

We reviewed the treatment and conditions of 35 defendants and prisoners in terrorism cases, 9 of whom were not involved in the main cases we focused on for this report (for a list, see Appendix - B). While the Bureau of Prisons denied 16 out of 20 requests we made to meet with prisoners, we were able to communicate with 12 incarcerated men by phone, letters, or email.

In several of these cases, the Bureau of Prisons did not inform the detainee of the basis for imposing the restrictions—whether it was based on an assessment of the severity of the crime, the security of the facility or of the detainee, or for other reasons. Accordingly, it was impossible to independently assess whether the restrictions were disproportionate to the government’s objective. In many cases, this secrecy also stymied prisoners’ ability to learn about the basis for their treatment, or what steps they could take to end their solitary confinement or restrictions on their communications with family.

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<sup>584</sup> Bureau of Prisons documents obtained from Freedom of Information Act requests made by Human Rights Watch on August 24, 2012 (on file with Human Rights Watch).



## Background: Tightening of Restrictions in Response to “Prisoner Radicalization”

In the years after the September 11, 2001 attacks, media and congressional concern over supposed “prisoner radicalization”—the idea that prisons are a “fertile ground” for inmate conversion to politicized and violent ideology related to Islam<sup>585</sup>—led the Bureau of Prisons to impose significantly harsher restrictions on terrorism detainees and prisoners.<sup>586</sup>

In 2006, seeking to monitor “100 percent” of all terrorism inmate communications,<sup>587</sup> the Bureau of Prisons began adopting policies and practices to restrict the “volume, frequency, and methods” of terrorism inmate communications,<sup>588</sup> and it began to

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<sup>585</sup> Then-FBI Director Robert Mueller repeatedly described prisons as “fertile ground for extremists” in 2005 and 2006. See Robert S. Mueller III, Director, Federal Bureau of Investigation, statement before the Senate Committee on Homeland Security and Governmental Affairs, Washington, DC, September 19, 2012, transcript at <http://www.fbi.gov/news/testimony/homeland-threats-and-agency-responses> (accessed July 11, 2014), p. 24; Robert S. Mueller III, Director, Federal Bureau of Investigation, speech at the City Club of Cleveland, Cleveland, Ohio, June 23, 2006, transcript at <http://www.fbi.gov/news/speeches/the-threat-of-homegrown-terrorism> (accessed June 27, 2014). Beginning in 2003, scholarship and government reports suggested Al-Qaeda was seeking to recruit American converts to plan terrorist attacks from prison. See, e.g., John S. Pistole, Assistant Director, Federal Bureau of Investigation, statement before the Senate Judiciary Committee, Subcommittee on Terrorism, Technology, and Homeland Security, Washington, DC, October 14, 2003, transcript at <http://www.fbi.gov/news/testimony/terrorist-recruitment-in-prisons-and-the-recent-arrests-related-to-guantanamo-bay-detainees> (accessed June 27, 2014). A growing literature now characterizes prisoner radicalization in hyperbolic terms—as “a threat of unknown magnitude” and “a problem unlike any other faced by correctional administrators today, or at any other time in history”—which the government has repeated or alluded to in defending its detention policies. See George Washington University Homeland Security Policy Institute and University of Virginia Critical Incident Analysis Group, “Out of the Shadows: Getting Ahead of Prisoner Radicalization,” September 2006, <http://www.investigativeproject.org/documents/testimony/345.pdf> (accessed June 27, 2014), p. i; Mark S. Hamm, “Terrorist Recruitment in American Correctional Institutions: An Exploratory Study of Non-Traditional Faith Groups Final Report,” December 2007, <https://www.ncjrs.gov/pdffiles1/nij/grants/220957.pdf> (accessed June 27, 2014), p. 111. In litigation regarding bans on group Islamic prayer, the government has cited both reports. See *Lindh v. Warden*, No. 2:09-cv-00215-JMS-MJD (S.D. Ind. Jan. 11, 2013).

<sup>586</sup> As Human Rights Watch previously reported, such restrictions have also been implemented on a piecemeal basis, including when the federal government detained approximately 1,200 individuals as “special interest” detainees immediately following September 11, and also the detention of approximately 70 or more individuals under the material witness statute. In both cases, Human Rights Watch documented harsh restrictions and conditions of confinement, all for individuals who were not charged with any crime. Human Rights Watch, *Presumption of Guilt: Human Rights Watch, Witness to Abuse*.

<sup>587</sup> See US Department of Justice, “Fact Sheet: Security at the Department of Justice Bureau of Prisons Administrative Maximum Security Facility,” February 21, 2007, [http://www.justice.gov/opa/pr/2007/February/07\\_opa\\_104.html](http://www.justice.gov/opa/pr/2007/February/07_opa_104.html) (accessed June 27, 2014).

<sup>588</sup> Declaration of Leslie Smith, Chief of the Counter Terrorism Unit, *Lindh*, No. 2:09-cv-00215-JMS-MJD (S.D. Ind. Jan. 11, 2013).

extensively monitor prisoner communication with family and attorneys, and prohibit contact visits with families (discussed below).<sup>589</sup>

The Bureau of Prisons also made plans to “consolidate all international terrorist inmates in approximately six institutions for enhanced management and monitoring.”<sup>590</sup> We are only aware of three special units—two Communication Management Units (CMUs) and a unit at the Florence supermaximum security prison (“ADX Florence”).<sup>591</sup>

## Prolonged Solitary Confinement and Restrictions on Family Contact

As Human Rights Watch has previously documented,<sup>592</sup> jails and prisons across the United States often respond to prison or inmate management challenges by segregating individuals from the general population, often through prolonged physical and social isolation, for hours, days, weeks, or even years. Isolation for 22 hours per day or more, and for one or more days, fits the generally accepted definition of solitary confinement.<sup>593</sup> When it is prolonged, solitary confinement

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<sup>589</sup> See generally, US Department of Justice, Office of the Inspector General, Evaluation and Inspections Division, “The Federal Bureau of Prisons’ Monitoring of Mail for High Risk Inmates,” September 2006, <http://www.justice.gov/oig/reports/BOP/eo609/final.pdf> (accessed June 27, 2014).

<sup>590</sup> *Ibid.*, p. 50.

<sup>591</sup> In 2013, the Bureau of Prisons confirmed that it plans to convert Thomson Correctional Institution in Thomson, Illinois—a former state facility purchased by the federal government—at least in part into a new administrative maximum. See James Ridgeway and Jean Casella, “Welcome to the New Federal Supermax,” *Mother Jones*, February 11, 2013, <http://www.motherjones.com/politics/2013/02/thompson-federal-supermax-solitary-illinois-dick-durbin> (accessed June 27, 2014).

<sup>592</sup> Solitary confinement in general has a long history, and Human Rights Watch has done extensive research on the isolated—and solitary—confinement of adults and juveniles. See, for example: Human Rights Watch, *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States* (New York: Human Rights Watch, 2012), <http://www.hrw.org/sites/default/files/reports/us1012ForUpload.pdf>; Written Statement from Human Rights Watch to the Senate Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Human Rights, “US: Look Critically at Widespread Use of Solitary Confinement,” June 18, 2012, <http://www.hrw.org/news/2012/06/18/us-look-critically-widespread-use-solitary-confinement>.

<sup>593</sup> Jail and prison officials do not generally use the term “solitary confinement” to refer to the range of segregation and isolation practices they employ to manage inmates. They are correct in noting that conditions are not exactly like those used in the earliest facilities to employ the practice. But because the conditions and effects of various segregation practices are substantially the same, Human Rights Watch uses a single definition based on the degree of deprivation. At the same time, this report’s focus on solitary confinement should not be read to endorse segregation and isolation practices that do not fit this definition. Any use of physical and social isolation, including those of shorter duration, can raise serious human rights concerns. The same is true for the practice of holding two inmates in conditions that would otherwise constitute solitary confinement (Human Rights Watch and mental health professionals have raised serious concerns about this practice). UN General Assembly, Interim report of the Special Rapporteur of the Human Rights Council on

can constitute cruel, inhuman or degrading treatment prohibited by human rights treaties to which the US is party.<sup>594</sup> For 23 men whose experiences we documented, the length of pretrial or post-conviction solitary confinement was measured in months or years, not weeks.<sup>595</sup> The mental pain and suffering caused by isolation was sometimes exacerbated by uncertainty about how long solitary would last.<sup>596</sup>

Prisoners with whom we spoke or corresponded described their solitary confinement as resulting from decisions to put them in administrative segregation based on their security classification. Prisoners in medium-security and low-security prisons experienced solitary as punishment (often called disciplinary segregation).<sup>597</sup>

### *Special Units for “Terrorism” Prisoners: ADX and CMUs*

The Bureau of Prisons says it places the “most dangerous terrorists” at the Administrative Maximum Penitentiary (ADX) in Florence, Colorado, while other so-called “terrorist” inmates have been transferred to Communication Management

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torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/66/268, August 5, 2011, <http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf> (accessed June 28, 2014).

<sup>594</sup> The UN Special Rapporteur on Torture has defined solitary confined to be prolonged when it exceeds 15 days. He reported that he is “aware of the arbitrary nature of the effort to establish a moment in time which an already harmful regime becomes prolonged and therefore unacceptably painful ... [and] concludes that 15 days is the limit between solitary confinement and prolonged solitary confinement because at that point, according to the literature surveyed, some of the harmful psychological effects of isolation can become irreversible” (citing Ken Strutin, “Solitary Confinement,” *LLRX.com*, August 10, 2010). *Ibid.*, para. 26.

<sup>595</sup> We documented the cases of eight individuals who spent at least a year in post-conviction solitary confinement, all at ADX Florence. Some of them were eventually transferred to medium or low-security facilities. See Appendix - B. We were unable to document conditions of some prisoners who are held in solitary confinement and whose cases we otherwise reviewed, in part because the Bureau of Prisons denied our visit requests. We also reviewed the cases of prisoners who experienced solitary for shorter periods, sometimes in “holdover status” in transit to a prison or for disciplinary reasons, but we do not include them in this analysis.

<sup>596</sup> Studies have found that numerous adults who have no history of mental health problems develop psychological symptoms in solitary confinement. While many of those studies are open to questions about the mental health status of individuals before entering solitary confinement, there is agreement that solitary confinement can cause or exacerbate mental health problems. For a discussion, see Human Rights Watch, *Growing Up Locked Down*, p. 23. Many defendants we spoke to or corresponded with reported little direct emotional suffering, saying that their religious faith and practice sustained them, though some described the mental suffering of other inmates. Some scholars believe that prisoners tend to underreport or play down their mental health problems, perhaps out of belief that such confinement is an overt attempt by prison authorities to “break them down” psychologically. See Sharon Shalev, *A Sourcebook on Solitary Confinement* (London: Mannheim Centre for Criminology, London School of Economics, 2008), [www.solitaryconfinement.org/sourcebook](http://www.solitaryconfinement.org/sourcebook) (accessed June 27, 2014), p. 12; Stuart Grassian, “Psychiatric Effects of Solitary Confinement,” *Washington University Journal of Law and Policy*, vol. 22 (2006), <http://law.wustl.edu/journal/22/p325grassian.pdf> (accessed June 27, 2014), p. 333.

<sup>597</sup> For background on solitary confinement policies, see generally, Human Rights Watch, *Growing Up, Locked Down*.

Units “to consolidate them” and “increase the monitoring and management of these inmates.”<sup>598</sup> According to our review of DOJ data, more than a quarter of prisoners convicted of terrorism or terrorism-related offenses were held in these facilities as of July 2013.<sup>599</sup>

### ADX Florence

The Bureau of Prisons held 41 prisoners it designated as “terrorists” at ADX Florence, the federal supermax where nearly all prisoners are held in at least 23-hour solitary confinement, as of October 2013.<sup>600</sup> One of the prison’s former wardens has described ADX as a “clean version of hell.”<sup>601</sup>

For two days a week, a typical ADX prisoner spends the entire day secluded to his single cell, which measures between 75 and 87 square feet, depending on the unit.<sup>602</sup> He is deprived of almost all human contact during these periods, except for perfunctory, impersonal exchange with correctional staff.<sup>603</sup> On the other days, the

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<sup>598</sup> John M. Vanyur, Assistant Director, Correctional Programs Division, Bureau of Prisons, statement before the Subcommittee on Intelligence, Information Sharing, and Terrorism Risk Assessment, Committee on Homeland Security, United States House of Representatives concerning “Radicalization, Information Sharing and Community Outreach: Protecting the Homeland from Homegrown Terror,” Washington, DC, April 5, 2007, transcript at <http://www.investigativeproject.org/documents/testimony/283.pdf> (accessed June 27, 2014).

<sup>599</sup> In July 2013, we used the Bureau of Prisons’ inmate locator to determine the placement of 494 defendants convicted of terrorism or terrorism-related offenses according to the Department of Justice. One hundred and thirty seven of them were, at the time, held in Bureau of Prisons facilities; 143 had been released, were not in Bureau of Prisons custody, or were in transit. Nearly thirty percent of those in Bureau of Prisons facilities were held at the CMUs or ADX Florence (15 at Terre Haute FCI; 9 at Marion USP; and 13 at ADX Florence).

<sup>600</sup> Bureau of Prisons documents obtained from Freedom of Information Act requests made by Human Rights Watch on August 24, 2012 (on file with Human Rights Watch); See US Government Accountability Office, “Guantánamo Bay Detainees: Facilities and Factors for Consideration if Detainees Were Brought to the United States” (report no. GAO-13-31, submitted to the Chairman, Select Committee on Intelligence, US Senate, November 2012), <http://www.gao.gov/products/GAO-13-31> (accessed July 2, 2014), p. 40.

<sup>601</sup> “Supermax: A Clean Version of Hell,” 60 Minutes (CBS News), June 19, 2009, [http://www.cbsnews.com/8301-18560\\_162-3357727.html](http://www.cbsnews.com/8301-18560_162-3357727.html) (accessed June 27, 2014).

<sup>602</sup> There are nine units within ADX, divided into six security levels: the Control Unit (or “Bravo” Unit); the disciplinary Special Housing Unit (also called “Zulu” Unit, the “SHU,” or the “Hole”); the so-called “Range 13” unit where prisoners have virtually no human contact; four so-called “General Population” Units (“Delta,” “Echo,” “Fox,” and “Golf” Units); the Special Security Unit (for prisoners under SAMs); and two units (“J” Unit and “K” Unit) for prisoners in the Step Down program described later in this section. ECHR, *Babar Ahmad and Others v. the U.K.*, nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, § 83, 10 April 2012; see also, Complaint, *Cunningham v. Fed. Bureau of Prisons*, No. 1:12-cv-01570 (D. Colo. filed June 18, 2012) (describing conditions at each unit). Here, we describe conditions typical for prisoners in the General Population and Special Security Units, where many individuals convicted of terrorism or terrorism-related offenses are held.

<sup>603</sup> No defense lawyers or inmates we spoke to complained of harassment by correctional staff at ADX, in contrast to reports we heard about other prisons in which inmates convicted of terrorism or terrorism-related offenses are held.

prisoner remains confined this way for 22 or 23 hours a day, but is given an hour of indoor recreation, alone in a room completely bare but for a pull-up bar; or an hour of outdoor recreation, in a cement enclosure so small that he is only able to take a few steps in each direction.<sup>604</sup> Every time he leaves his cell for recreation, he is strip-searched.<sup>605</sup> For most prisoners at ADX Florence, communication with other inmates is never directly face-to-face and is always mediated by bars or concrete walls—or involves shouting through toilets and vents.<sup>606</sup>

Dritan Duka, who is held in solitary confinement at ADX Florence,<sup>607</sup> described even recreation time as dehumanizing:

You can only see the sky. It's all steel. You feel like an animal in a cage. When it's time to eat, they feed you... Actually [dogs] have more freedom than we do. ... We're in a cage all day, they shove foods in the cell. Then we got a little walk. Then they put us in another cell. I'd rather be in a zoo than over here. People walking by, looking at you like an animal in a caged exhibition.<sup>608</sup>

Dritan said he is able to communicate with other prisoners on his “range” (prison floor and section) by screaming through doors and, during outdoor recreation,

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<sup>604</sup> See Plaintiff's Response to Defendants' Motion for Summary Judgment, *Ayyad v. Holder*, No. 05-cv-02342 (D. Colo. filed May 17, 2012); Columbia Law School's Human Rights Institute phone interview with Pardiss Kebriaei, staff attorney, Center for Constitutional Rights, January 28, 2012.

<sup>605</sup> ECHR, *Babar Ahmad and Others v. the U.K.* (dec.), nos. 24027/07, 11949/08 and 36742/08, § 90, 6 July 2010. However, not all ADX prisoners are subjected to strip searches. See Professor Laura Rovner, testimony before the US Senate Committee on Judiciary Subcommittee on Constitution, Civil Rights, and Human Rights congressional hearing “Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences,” Washington, DC, June 15, 2012, transcript at <http://www.law.du.edu/documents/student-law-office-clinical-programs/laura-rovner-university-of-denver-sturm-college-of-law.pdf> (accessed July 2, 2014).

<sup>606</sup> See Plaintiff's Response to Defendants' Motion for Summary Judgment, *Ayyad*, No. 05-cv-02342 (D. Colo. filed Jan. 9, 2012). Columbia Law School's Human Rights Institute phone interview with Pardiss Kebriaei, staff attorney, Center for Constitutional Rights, January 28, 2012. A 2012 European Court of Human Rights ruling upheld the extradition of prisoners to the United States despite the risk of their placement at ADX, finding the isolation suffered by ADX prisoners was “partial and relative,” because they could communicate with each other through “the ventilation system” and during recreation periods. ECHR, *Babar Ahmad and Others v. the U.K.*, nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, § 222, 10 April 2012.

<sup>607</sup> In June 2013, Dritan Duka was transferred from ADX General Population to ADX's J Unit, the first phase of the Step Down program described below. Although provided greater phone and visitation privileges, he remains in solitary confinement. Columbia Law School's Human Rights Institute and Human Rights Watch interview with Dritan Duka, July 19, 2012.

<sup>608</sup> Columbia Law School's Human Rights Institute and Human Rights Watch interview with Dritan Duka, July 19, 2012.

talking to prisoners who are in separate cages.<sup>609</sup> These brief periods of communication were insignificant compared to his overall experience of isolation: “There’s a lot of times the walls are caving in. It’s—you can’t talk to nobody... It’s like staying alone in a bathroom for three days.”<sup>610</sup>

Human Rights Watch has previously reported on conditions at ADX Florence, which houses not only terrorism detainees but also leaders of violent gangs and prisoners with a history of committing violent offenses against other prisoners or corrections officers. We noted in 2001 that inmates there could be subjected to “years of confinement in conditions of extreme social isolation, reduced sensory stimulation, and rigorous security control.”<sup>611</sup> After a 2007 visit to ADX Florence, Human Rights Watch wrote to the Bureau of Prisons to express concern about serious problems, including the mental health impact of long-term isolation and highly limited exercise there, and reports of force feeding inmates on hunger strikes.<sup>612</sup>

While we have not, for this report, conducted a thorough examination of conditions at ADX Florence, the cases we examined continue to raise human rights concerns because of the degree of isolation for prisoners and the inadequate process for securing transfer out of the prison into a less restrictive facility.

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<sup>609</sup> Another prisoner, who was held at ADX for several years, described screaming through sink drain pipes and wrote that in some units that have two sets of doors, prisoners would “shout or scream on tops of their lungs...trying to get their voices across the second solid door.” Columbia Law School’s Human Rights Institute email correspondence with Shah Wali Khan Amin (self-identified as Osama Haidar Turkistani), July 22, 2013.

<sup>610</sup> Columbia Law School’s Human Rights Institute and Human Rights Watch interview with Dritan Duka, July 19, 2012.

<sup>611</sup> Letter from Kenneth Roth, Executive Director, Human Rights Watch, to John Ashcroft, US Attorney General, March 21, 2001, <http://www.hrw.org/news/2001/03/20/us-attorney-general-ashcroft-urged-act-human-rights-agenda>. See also, Letter from Jamie Fellner, Executive Director, US Program, Human Rights Watch and Jennifer Daskal, Advocacy Director, US Program, to Harley G. Lappin, Federal Bureau of Prisons, May 2, 2007, <http://www.hrw.org/news/2007/05/01/letter-harley-g-lapin-federal-bureau-prisons-re-adx-florence>; Human Rights Watch, *Locked up Alone: Detention Conditions and Mental Health at Guantanamo* (New York: Human Rights Watch, 2008), [http://www.hrw.org/sites/default/files/reports/uso608\\_1.pdf](http://www.hrw.org/sites/default/files/reports/uso608_1.pdf), pp. 20-23.

<sup>612</sup> Letter from Human Rights Watch to Harley G. Lappin, Federal Bureau of Prisons, May 2, 2007, <http://www.hrw.org/news/2007/05/01/letter-harley-g-lapin-federal-bureau-prisons-re-adx-florence>.

## Communication Management Units

Another 77 post-conviction prisoners designated as “international terrorists” or “domestic terrorists” are in two Communication Management Units (CMUs).<sup>613</sup> The Bureau of Prisons describes the CMUs as units for prisoners who do “not need the security requirements at [ADX] Florence” but nevertheless require “closer monitoring.”<sup>614</sup> Of the first 54 prisoners transferred to the CMUs, 39 were Muslim.<sup>615</sup> Civil liberties groups and activists allege that the Bureau of Prisons subsequently transferred environmental and political activists convicted of terrorist offenses to the CMUs in response to media criticism that it was targeting Muslims.<sup>616</sup>

“Other than ADX, the CMUs are the most restrictive facilities in the federal system,” a federal appeals court judge wrote in 2010.<sup>617</sup> The CMUs are similar to medium-security units in terms of permitting inmates to interact extensively with each other outside of their cells. However, inmates are constantly surveilled and their communication with the outside world is heavily restricted (including with their families, as described below). There are cameras and listening devices positioned throughout the CMUs, and all inmate conversations are audio-recorded and monitored by the government (except for inmate conversations with their attorneys).<sup>618</sup>

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<sup>613</sup> Bureau of Prisons documents obtained from Freedom of Information Act requests made by Human Rights Watch on August 24, 2012 (on file with Human Rights Watch). However, a government report describes only 44 such prisoners. See US Government Accountability Office, “Guantánamo Bay Detainees: Facilities and Factors for Consideration if Detainees Were Brought to the United States” (report no. GAO-13-31, submitted to the Chairman, Select Committee on Intelligence, US Senate, November 2012), <http://www.gao.gov/products/GAO-13-31> (accessed July 2, 2014), p. 43.

<sup>614</sup> See Harley G. Lappin, “Testimony of Harley G. Lappin before House Appropriations Subcommittee on Commerce Justice, Science and Related Agencies,” US Congress, Washington, DC, March 12, 2008, (on file with Human Rights Watch).

<sup>615</sup> US Department of Justice, Federal Bureau of Prisons, Counter Terrorism Unit, “Inmates Housed in a Communication Management Unit,” updated November 25, 2013. As of November 25, 2013, 47 of the 94 prisoners at Marion and Terre Haute were Muslim (23 of 47 at Marion, and 24 of 47 at Terre Haute). Bureau of Prisons documents obtained from Freedom of Information Act requests made by Human Rights Watch on August 24, 2012 and received January 31, 2014 (on file with Human Rights Watch).

<sup>616</sup> See, e.g., Center for Constitutional Rights, “Communications Management Units: The Federal Prison System’s Experiment in Social Isolation,” March 2013, [http://www.ccrjustice.org/files/CCR\\_CMU\\_Factsheet\\_March2013.pdf](http://www.ccrjustice.org/files/CCR_CMU_Factsheet_March2013.pdf) (accessed July 3, 2014).

<sup>617</sup> *Rezaq v. Nalley*, 677 F.3d 1001, 1009 (10th Cir. 2012).

<sup>618</sup> See *Lindh v. Warden, Fed. Correctional Inst., Terre Haute, Ind.*, No. 2:09-cv-00215-JMS-MJD (S.D. Ind. Jan. 11, 2013).

Prisoners and defense lawyers described poor prison conditions at both the Terre Haute and Marion CMUs.<sup>619</sup> At the Terre Haute CMU, they described extreme cold during the winter, insects and rodents, flooding during rainstorms, and extreme heat during the summer with fans so loud that “they gave us earplugs to put in our ears, to keep from damaging our hearing,” a former inmate told us.<sup>620</sup> One defendant described it as “dangerously and poorly ventilated,” explaining that windows on either side of the building were “bricked in from the outside,” making the building “like an oven” in summer.<sup>621</sup>

The recreation area at the Marion CMU is “all kennels on concrete,” environmental activist Andy Stepanian, who was among the first inmates at the facility, told us. In the recreation area, “the ceiling was a chain-link fence and dome of razor wire. So there was open sky but there was razor wire and dead birds between you.”<sup>622</sup>

Several prisoners and their families reported problems accessing medical treatment at the CMU, particularly on weekends and holidays.<sup>623</sup> The CMU functions like “a bubble,” as one defense lawyer explained: prisoners could move freely within the unit, but any movement outside of it was highly constrained, leading to delays in medical attention.<sup>624</sup> Inmates also have few opportunities for work and education in comparison to other federal inmates in medium- or low-security prisons.<sup>625</sup>

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<sup>619</sup> Terre Haute CMU is a former federal death row unit and Marion CMU was the Secure Housing Unit of a US penitentiary that closed in 2005.

<sup>620</sup> Columbia Law School’s Human Rights Institute interview with Avon Twitty, Washington, DC, September 20, 2013 (quoted); Letter from Eljvir Duka to Columbia Law School’s Human Rights Institute and Human Rights Watch, November 6, 2012. According to family members of Sabri Benkahla, flooding was so severe that Benkahla had to roll up his mattress during rainstorms to keep it from getting wet. Human Rights Watch Interview with Anthony Benkahla and Souhail Benkahla, Falls Church, Virginia, August 1, 2012.

<sup>621</sup> Letter from Eljvir Duka to Columbia Law School’s Human Rights Institute and Human Rights Watch, November 6, 2012.

<sup>622</sup> Columbia Law School’s Human Rights Institute interview with Andy Stepanian, New York, February 28, 2013.

<sup>623</sup> Columbia Law School’s Human Rights Institute email correspondence with Mohamad Shnewer, March 18, 2013; Columbia Law School’s Human Rights Institute interview with Andy Stepanian, February 28, 2012.

<sup>624</sup> Columbia Law School’s Human Rights Institute phone interview with Alan Mills, legal director, Uptown People’s Law Center, February 7, 2012.

<sup>625</sup> Columbia Law School’s Human Rights Institute interview with Avon Twitty, September 20, 2013; Email from Mufid Abdulqader to his attorney, March 25, 2012 (on file with Human Rights Watch); Columbia Law School’s Human Rights Institute email correspondence with Mohamad Shnewer, March 18, 2013; Letter from Eljvir Duka to Columbia Law School’s Human Rights Institute and Human Rights Watch, November 6, 2012; Columbia Law School’s Human Rights Institute email correspondence with Shukri Abu Baker, Terre Haute inmate, March 1, 2013 and March 2, 2013; Letter



Several CMU inmates and defense lawyers also described harassment, intimidation and retaliation by CMU prison guards against Muslim inmates.<sup>626</sup> While a significant majority of the CMU inmates are Muslim, inmates described few accommodations made for Islamic religious practice in comparison with other religions.<sup>627</sup>

Current and former inmates reported arbitrary denials and delays in their ability to send and receive correspondence, including legal mail. Mail is monitored by the Bureau of Prisons' Counterterrorism Unit.<sup>628</sup> Eljvir Duka, who is currently held at

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from Matin Siraj to Sarah Qureshi and Rules Unit, Office of General Counsel, Bureau of Prisons, "Communications Management Units: Comments Submitted to the Federal Bureau of Prisons," ed. Center for Constitutional Rights, June 2010, [http://ccrjustice.org/files/Complete\\_Selection\\_Comments-2010.0618.pdf](http://ccrjustice.org/files/Complete_Selection_Comments-2010.0618.pdf) (accessed July 5, 2014), pp. 35-38; Daniel McGowan, "Tales from Inside the U.S. Gitmo," *Huffington Post*, June 8, 2009, [http://www.huffingtonpost.com/daniel-mcgowan/tales-from-inside-the-us\\_b\\_212632.html](http://www.huffingtonpost.com/daniel-mcgowan/tales-from-inside-the-us_b_212632.html) (accessed June 27, 2014).

<sup>626</sup> Columbia Law School's Human Rights Institute interview with Avon Twitty, September 20, 2013; Letter from Eljvir Duka, November 6, 2012; Columbia Law School's Human Rights Institute email correspondence with Mohamad Shnewer, March 18, 2013. They reported that Muslim prisoners are disciplined for conduct that, though it is technically prohibited, is routine for non-Muslim prisoners, such as keeping food in their cells. Columbia Law School's Human Rights Institute phone interview with Elisabeth L. Owen, executive director, Colorado Prison Law Project, February 6, 2013; Columbia Law School's Human Rights Institute email correspondence with Mohamad Shnewer, March 18, 2013; Letter from Eljvir Duka to Columbia Law School's Human Rights Institute and Human Rights Watch, November 6, 2012; Law School's Human Rights Institute email correspondence with Shukri Abu Baker, Terre Haute inmate, March 1, 2013 and March 2, 2013.

<sup>627</sup> The Bureau of Prison's policy is to "provide inmates of all faith groups with reasonable and equitable opportunities to pursue religious beliefs and practices, within the constraints of budgetary limitations and consistent with the security and orderly running of the institution and Bureau of Prisons." Bureau of Prisons Program Statement, "Religious Beliefs and Practices," no. P5360.09, December 31, 2004, [http://www.bop.gov/policy/progstat/5360\\_009.pdf](http://www.bop.gov/policy/progstat/5360_009.pdf) (accessed July 3, 2014). At the Marion CMU, inmates reported being denied halal food items for their Eid Al Adha holiday or on their commissary list, although Jewish inmates may purchase items from a Passover list, and a Christmas list includes special items for purchase. Email from Mufid Abdulqader to his attorney, April 25, 2012 (on file with Human Rights Watch). One inmate at Terre Haute CMU told us that MP3 players are permitted in the CMU and that while Islamic songs and recitations are banned, there are six Christian genres available. Letter from Eljvir Duka to Columbia Law School's Human Rights Institute and Human Rights Watch, November 6, 2012. Since June 2007, Terre Haute CMU has banned group prayer other than *jumma* service (Friday congregational prayer), arguing that "extremist inmates could use the religious services to radicalize and recruit other inmates." Declaration of Harvey G. Church, Associate Warden, Federal Correctional Center Terre Haute, ¶ 14, *Lindh v. Warden, Fed. Correctional Inst., Terre Haute, Ind.*, no. 2:09-cv-00215-JMS-MJD, 2013 WL 139699 (S.D. Ind. Jan. 11, 2013). In January 2013, a federal district court found that the ban violated federal law by imposing a substantial burden on religious exercise. The court found that the ban violated the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1, by imposing a substantial burden on religious exercise by inmate John Walker Lindh, and because the government failed to establish either a compelling government interest or that the ban was the least restrictive means of furthering that interest. Facts and Conclusions of Law, *Lindh*, no. 2:09-cv-00215-JMS-MJD (S.D. Ind. Jan. 11, 2013).

<sup>628</sup> Mufid Abdulqader, a defendant in the Holy Land Foundation case who is currently serving a 20-year sentence at the Marion CMU said that an email he wrote that cost him \$20 (the Bureau of Prisons charges inmates 5 cents a minute to read, write and review emails) was pending for two weeks before the Bureau of Prisons Counterterrorism Unit rejected it without providing a reason. He described the email as mainly about "my own story of what happened to me at the time of my arrest before my trial and the extreme hardship my family and I suffered thru it."

Marion CMU, said he has continuously been denied receipt of materials his attorney sent him: audio recordings of conversations the informants in his case taped for the FBI, which were provided through the discovery process of his trial.<sup>629</sup> Though they are vital to his ability to prepare for his habeas corpus petition, the CMU returned the material to his attorney without allowing him access.<sup>630</sup>

### *Special Administrative Measures*

In about three dozen terrorism cases,<sup>631</sup> the government has used Special Administrative Measures (SAMs): restrictions imposed to protect national security or prevent disclosure of classified material. SAMs ordinarily prohibit defendants, attorneys and their families from communicating about the SAMs to each other—or anyone else.

This “gag order” of sorts limited our ability to document the impact of SAMs, because family members and defense lawyers were concerned that by speaking with us or providing certain details, they might inadvertently violate SAMs. Bars on communicating with journalists, which are often imposed through SAMs, have also resulted in an information void about the government’s practices.<sup>632</sup> We nevertheless documented, in limited form, the experiences of six prisoners currently or formerly under SAMs. We also reviewed, in redacted form, the SAMs modification and extension orders for between 20 and 22 prisoners, which the Department of Justice provided in response to our FOIA.<sup>633</sup>

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Email from Mufid Abdulqader to his attorney, May 10, 2012 (on file with Human Rights Watch). Abdulqader is pursuing an administrative remedy and appeal regarding the rejection of his email.

<sup>629</sup> Columbia Law School’s Human Rights Institute email correspondence with Eljvir Duka, December 13, 2012.

<sup>630</sup> Ibid.

<sup>631</sup>As of May 2013, there were a total of 55 prisoners under SAMs: 31 termed “terrorism-related inmates,” 16 “violent-crime related inmates, and 8 termed “national security inmates (such as espionage).” Reply Letter from National Security Division, Department of Justice to Human Rights Watch, May 23, 2013 (on file with Human Rights Watch). In response to our Freedom of Information Act request, the Bureau of Prisons identified 9 prisons where inmates under SAMs are currently held: ADX Florence, FCC Butner, MCC New York, MDC Brooklyn, USP Terre Haute, USP Allenwood, USP Lee, FMC Devens, and FMC Carswell.

<sup>632</sup> SAMs generally preclude prisoners from contacting the press, communicating with the press through their attorneys, or responding to reporters’ inquiries. Bureau of Prisons documents obtained from Freedom of Information Act requests made by Human Rights Watch on August 24, 2012 (on file with Human Rights Watch); Rachel Bunn, “Silencing stories: Special administrative measures handcuff First Amendment,” *News Media and The Law*, vol. 36, no. 1 (Winter 2012), <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-winter-2012> (accessed July 5, 2014).

<sup>633</sup> Bureau of Prisons documents obtained from Freedom of Information Act requests made by Human Rights Watch on August 24, 2012 (on file with Human Rights Watch). Due to extensive redactions, we could not determine

Two regulations authorize SAMs: the National Security rule and the Prevention of Acts of Violence and Terrorism (“Terrorism”) rule.<sup>634</sup> Both rules provide that SAMs “ordinarily may include housing the inmate in administrative detention” and may limit, among other privileges, “correspondence, visiting, interviews with representatives of the news media, and use of the telephone.”<sup>635</sup> In addition, the Terrorism rule permits the attorney general to order monitoring of attorney-client communication.<sup>636</sup> After 9/11, the SAMs regulations broadened to apply not just to post-conviction inmates, but also defendants detained pretrial, witnesses, and immigration violators.<sup>637</sup>

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the identity of the prisoners about whom we were given information. We received 22 sets of documents about prisoners, consisting of modification or extension orders. Two of the documents were only modification orders, creating uncertainty about whether they pertained to distinct individuals.

<sup>634</sup> US Department of Justice, Bureau of Prisons, “National Security; Prevention of Acts of Violence and Terrorism, Supplementary Information,” 66 FR 55062-66 (October 31, 2001) (codified as 28 C.F.R. § 501.2 and § 501.3). Both regulations were introduced in the mid-1990s, according to some observers, in response to the 1993 World Trade Center bombing and 1995 Oklahoma City bombing, and they were finalized in June 1997. See US Department of Justice, Bureau of Prisons, “Scope of Rules: National Security; Prevention of Acts of Violence and Terrorism,” 62 Fed. Reg. 33730-32 (June 20, 1997), <http://www.gpo.gov/fdsys/pkg/FR-1997-06-20/pdf/97-16208.pdf> (accessed June 27, 2014) OR US Department of Justice, Bureau of Prisons, “National Security; Prevention of Acts of Violence and Terrorism, Supplementary Information,” 66 FR 55062 (October 31, 2001), <http://www.gpo.gov/fdsys/pkg/FR-2001-10-31/pdf/01-27472.pdf> (accessed June 27, 2014) (codified as 28 C.F.R. § 501.2 and § 501.3). The timing of the initial introduction of the regulations, particularly the National Security rule, coincides with the arrest of Ramzi Yousef, one of the masterminds of the March 1995 World Trade Center bombing—though SAMs were only imposed on him beginning in February 1998. See *Yousef v. Reno*, 254 F.3d 1214, 1216 (10th Cir. 2001); American Civil Liberties Union, “Actions for Restoring America: Transition Recommendations for President-Elect Barack Obama,” (paper presented to President Barack Obama, December 15, 2008), [http://www.aclu.org/files/images/asset\\_upload\\_file734\\_37256.pdf](http://www.aclu.org/files/images/asset_upload_file734_37256.pdf) (accessed July 3, 2014).

<sup>635</sup> 28 C.F.R. § 501.2(a) and § 501.3(a). The National Security rule permits the government to impose SAMs that are “reasonably necessary to prevent disclosure of classified information” upon written certification from the head of a US intelligence agency that unauthorized disclosure of the information would “pose a threat to the national security” and that there “is a danger that the inmate will disclose such information.” 28 C.F.R. § 501.2 (1997; 2007). The Terrorism rule permits SAMs that are “reasonably necessary to protect persons against the risk of death or personal bodily injury” to be imposed upon written notification by the Attorney General or another government official. 28 C.F.R. § 501.3 (1997; 2007). The regulation appears to permit certification, at the Attorney General’s direction, by the head of a federal law enforcement agency or member agency of the intelligence community. In a letter to Human Rights Watch, the DOJ stated that all SAMs under the terrorism rule must be authorized by the DOJ, but the Bureau of Prisons may be informed of SAMs by the head of a federal law enforcement agency, or the head of a member agency of the intelligence community. Reply Letter from National Security Division, Department of Justice to Human Rights Watch, May 23, 2013 (on file with Human Rights Watch). The attorney general can issue SAMs upon a finding that “there is a substantial risk that a prisoner’s communications 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.” *Ibid*.

<sup>636</sup> 28 C.F.R. § 501.3(d).

<sup>637</sup> US Department of Justice, Bureau of Prisons, “National Security; Prevention of Acts of Violence and Terrorism,” 72 FR 16274 (April 4, 2007), <http://www.gpo.gov/fdsys/pkg/FR-2007-04-04/pdf/E7-6265.pdf> (accessed June 27, 2014) (SAMs can be imposed on “pretrial inmates, witnesses, and immigration violators”).

Figure 1 – Prisoners under SAMs<sup>638</sup>



The number of inmates under SAMs has grown since regulations were substantially broadened the month after 9/11. In November 2001, there were only 16 individuals under SAMs—“a very small group of the most dangerous inmates,” according to then-Assistant Attorney General Michael Chertoff.<sup>639</sup> Since 2009 the number of prisoners under SAMs termed “terrorism-related inmates” has held steady at about 30.<sup>640</sup> The increase may partly owe to a 2006 recommendation from the Department

<sup>638</sup> Reply Letter from National Security Division, Department of Justice to Human Rights Watch, May 23, 2013 (on file with Human Rights Watch); Letter from the Permanent Mission of the United States to the UN Office of the High Commissioner of Human Rights and Juan Mendez, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, February 23, 2012 (reporting there were 45 prisoners under SAMs as of February 2012); See “Fact Sheet: Prosecuting and Detaining Terror Suspects in the U.S. Criminal Justice System,” US Department of Justice press release, June 9, 2009, <http://www.justice.gov/opa/pr/2009/June/09-ag-564.html> (accessed July 3, 2014) (reporting that as of June 2009, there were 44 inmates subject to SAMs, 29 were incarcerated on “terrorism-related charges,” 11 on “violent crime crime-related charges (gangs, organized crime, etc.),” and four on espionage charges); “Fact Sheet: Security at the Department of Justice Bureau of Prisons Administrative Maximum Security Facility,” US Department of Justice press release, February 21, 2007, [http://www.justice.gov/opa/pr/2007/February/07\\_opa\\_104.html](http://www.justice.gov/opa/pr/2007/February/07_opa_104.html) (accessed July 3, 2014) (reporting that 33 of its 213 “terrorist inmates” were subject to Special Administrative Measures); Michael Chertoff, Assistant Attorney General, statement before the Senate Committee of the Judiciary hearing “DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism,” Washington, DC, November 28, 2001, <http://www.gpo.gov/fdsys/pkg/CHRG-107shrg81998/pdf/CHRG-107shrg81998.pdf> (accessed July 3, 2014), p. 14 (describing 16 prisoners under SAMs).

<sup>639</sup> Chertoff, Assistant Attorney General, statement before the Senate Committee of the Judiciary hearing “DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism,” Washington, DC, November 28, 2001, pp. 8-24.

<sup>640</sup> Reply Letter from National Security Division, Department of Justice to Human Rights Watch, May 23, 2013 (on file with Human Rights Watch).

of Justice Office of Inspector General to consider the application of SAMs for each “pretrial or convicted inmate associated with terrorism.”<sup>641</sup>

Our review of the known cases suggests that typically these individuals were accused of having some link with Al-Qaeda or Al-Qaeda-affiliated individuals, although these accusations were not necessarily established at trial or an essential part of the conduct underlying conviction. None of the SAMs cases we reviewed involved the use of informants, where there was limited or no actual communication between the defendant and the alleged terrorist organizations.

### **Severe Restrictions Imposed Through SAMs**

SAMs often require the imposition of extreme physical and social isolation. In the orders we obtained through a FOIA regarding 20 to 22 prisoners, SAMs banned at least 20 prisoners from “making statements audible to other prisoners or sending notes” and required them to be housed in single cells “separated as much as possible in cellblock area from other inmates.”<sup>642</sup>

As we described, Oussama Kassir spent one and a half years in pretrial isolation because under SAMs he was barred from talking with other inmates or correctional staff.<sup>643</sup> He was permitted “virtually no recreation or exercise, and [was] never allowed to be outside or enjoy natural light or air.”<sup>644</sup> He was also barred from purchasing food at the prison commissary to supplement his limited meals, a

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<sup>641</sup> See US Department of Justice, Office of the Inspector General, Evaluation and Inspections Division, “The Federal Bureau of Prisons’ Monitoring of Mail for High Risk Inmates,” report no. I-2006-009 (September 2006), <http://www.justice.gov/oig/reports/BOP/eo609/final.pdf> (accessed July 2, 2014), p. 94. (Memorandum from Paul R. Johnson, Acting Executive Officer of U.S. Department of Justice Criminal Division, to Paul A. Price, Assistant Inspector for Evaluations and Inspections.)

<sup>642</sup> In most of the orders we reviewed, the SAMs also provided that SAM prisoners were only permitted to speak with other SAMs prisoners at “designated times,” in monitored or recorded sessions where no physical touching was allowed. Bureau of Prisons documents related to SAMs obtained on November 21, 2013 from Freedom of Information Act requests made by Human Rights Watch on August 24, 2012 (on file with Human Rights Watch); Letter from Wilson Moorer to Columbia Law School’s Human Rights Institute and Human Rights Watch, “Re: Request for Information, FOIA Request No. 2012-11904,” November 21, 2013 (on file with Human Rights Watch) (stating that SAMs prisoners are permitted to communicate “with other SAM inmates verbally and/or physically as well, during certain designated times”).

<sup>643</sup> See ECHR, *Babar Ahmad and Others v. the U.K.* (dec.), nos. 24027/07, 11949/08 and 36742/08, § 85, 6 July 2010.

<sup>644</sup> Memorandum of Law in Support of Defendant Kassir’s Motion to Lift the Special Administrative Measures that Have Been Imposed on Him, *United States v. Mustafa*, No. S2 04 CR. 356, 2008 WL 888942 (S.D.N.Y. May 19, 2008).

restriction with little evident connection to national security.<sup>645</sup> (SAMs orders we reviewed typically barred prisoners from access to “any material/objects that could be converted to dangerous objects”).

SAMs can also heighten social isolation by blocking prisoners from receiving information about the outside world, including through widely available books.<sup>646</sup> Prison officials initially denied Ahmed Omar Abu Ali access to President Obama’s two memoirs, *Dreams from My Father* and the *The Audacity of Hope*.<sup>647</sup> SAMs prisoners can communicate with their immediate family members, but subject to restrictions that have no evident and direct connection to the security risk they pose: letters are limited to “3 pieces of paper, double-sided, once per week, single recipient”; family visits require 14 days’ notice and can include only one adult at a time.<sup>648</sup>

The Department of Justice, in reply to our letter, wrote that all decisions to house prisoners in “single-cell status” were made on a “case-by-case basis,” and that SAMs are not intended to “routinely include complete curtailment of privileges.”<sup>649</sup>

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<sup>645</sup> Memorandum of Law in Support of Defendant Kassir’s Motion to Lift the Special Administrative Measures that Have Been Imposed on Him, Exhibit A ¶ 9(a), *Mustafa*, No. S2 04 CR. 356, 2008 WL 8888942.

<sup>646</sup> In the SAMs documentation we obtained through FOIA, nearly all of the SAMs modification and extension orders stated that the prisoner “shall have access to materials determined not to facilitate criminal activity or be detrimental to national security.” Fahad Hashmi’s experience of physical and social isolation was heightened by prohibitions on his listening to television or radio news, and a 30-day delay on receiving newspapers. Memorandum of Law in Support of Mr. Hashmi’s Motion for Modification of Pretrial Conditions of Detentions and Accompanying Order from Acting Agent Matthew W. Friedrich to Director of Federal Bureau of Prisons Harry G. Lappin, extending SAMs for Syed Hashmi at 3, *United States v. Hashmi*, No. 1:06-cr-00442-LAP (S.D.N.Y. June 10, 2010); “Rights Groups Issue Open Letter on Upcoming NYC Trial of Syed Fahad Hashmi and Severe Special Administrative Measures,” Center for Constitutional Rights press release, April 23, 2010, <http://ccrjustice.org/newsroom/press-releases/rights-groups-issue-open-letter-upcoming-nyc-trial-syed-fahad-hashmi-and-sev> (accessed July 3, 2014).

<sup>647</sup> Prison officials twice denied Abu Ali access to the books, but in November 2008 decided to permit them. See “Al-Qaida inmate gets access to Obama’s books,” *Associated Press*, July 10, 2009, [http://www.nbcnews.com/id/31854575/ns/us\\_news-security/t/al-qaida-inmate-gets-access-obamas-books/](http://www.nbcnews.com/id/31854575/ns/us_news-security/t/al-qaida-inmate-gets-access-obamas-books/) (accessed June 27, 2014). Mohamed Rashed Al-Owhali, a prisoner under SAMs at ADX Florence, challenged the Bureau of Prisons’ denial of Jimmy Carter’s book *Palestine: Peace Not Apartheid*; though a court dismissed the complaint because he failed to provide more information, it wrote: “We cannot imagine how this book could have raised safety concerns or facilitated terrorist activity.” *Al-Owhali v. Holder*, 687 F.3d 1236, 1243 (10th Cir. 2012). Kassir was permitted to receive a newspaper “heavily censored” to remove international news, but only at least 30 days after its publication date. Defendant’s Sentencing Memorandum at 4, *United States v. Kassir*, No. 1:04-cr-00356-KBF-3, 2009 WL 3149523 (S.D.N.Y. Aug. 28, 2009).

<sup>648</sup> Bureau of Prisons documents related to SAMs obtained on November 21, 2013 from Freedom of Information Act requests made by Human Rights Watch on August 24, 2012 (on file with Human Rights Watch). These restrictions likely relate to required monitoring of communications, see above.

<sup>649</sup> Reply Letter from National Security Division, Department of Justice, to Human Rights Watch, May 23, 2013 (see Appendix – E); Letter from the Permanent Mission of the United States to the UN Office of the High Commissioner

The SAMs orders we obtained through FOIA do reflect that prisoners sometimes obtained modifications regarding family visits. Yet the SAMs restrictions we reviewed uniformly barred communication with other prisoners, raising the concern that these restrictions were not individualized or narrowly tailored to each defendant, at least initially.<sup>650</sup>

### **ADX “H Unit” Conditions for Post-Conviction SAMs Prisoners**

According to the Bureau of Prisons, 37 individuals under SAMs are held at ADX Florence.<sup>651</sup> We reviewed the SAMs restrictions of 18 of these prisoners about whom the government provided documentation.

All SAMs prisoners at ADX are housed in the Special Security Unit, also known as “H Unit.”<sup>652</sup> Prisoners there are held in 22- to 24-hour solitary confinement, receiving a minimum of five hours of out-of-cell recreation a week (half that of ADX General Population inmates).<sup>653</sup> They live in cells that measure 75.5 square feet, so small that prisoners reportedly eat their meals within an arm’s length from their toilet.<sup>654</sup> During recreation, inmates pace alone in an outdoor cage, or an indoor room slightly bigger than their cell, and are barred from speaking with other inmates.

Compounding the isolation of solitary confinement are the SAMs bars on communication with the outside world, through letters and phone calls. “For the most part conditions are like those in other solitary units,” Uzair Paracha, who was

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of Human Rights and Juan Mendez, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, February 23, 2012. The government also contends that SAMs are based on “an appropriate balancing of the interests of the individual inmates and of the public interest.” See “National Security; Prevention of Acts of Violence and Terrorism, Supplementary Information,” 66 FR 55062 (October 31, 2001). See also, *United States v. Reid*, 214 F.Supp.2d 84, 92 (D. Mass. 2002) (describing SAMs as “prisoner specific; that is, each prisoner upon whom SAMs are imposed has a set of SAMs issued for him, and him alone, based on the circumstances of his case”).

<sup>650</sup> Bureau of Prisons documents related to SAMs obtained on November 21, 2013 from Freedom of Information Act requests made by Human Rights Watch on August 24, 2012 (on file with Human Rights Watch).

<sup>651</sup> Letter from Wilson Moorer to Columbia Law School’s Human Rights Institute and Human Rights Watch, “Re: Request for Information, FOIA Request No. 2012-11904,” Nov. 21, 2013 (on file with Human Rights Watch).

<sup>652</sup> Defendant’s Motion to Dismiss Plaintiff’s Claims as Moot, Exhibit A-6, Declaration of Mark Collins, unit manager for the General Population Units, Bureau of Prisons, ¶ 8, *Reid v. Wiley*, No. 07-cv-01855-PAB-KMT, (D. Colo. filed Nov. 12, 2009).

<sup>653</sup> *Ibid.*

<sup>654</sup> ECHR, *Babar Ahmad and Others v. the U.K.*, nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, § 83, 10 April 2012; Laura Rovner and Jeanne Theoharis, “Preferring Order to Justice,” *American University Law Review*, vol. 61, no. 5 (2012), p. 1404.

held at ADX Florence from 2003 to 2009, wrote.<sup>655</sup> “[B]ut every inmate there is subjected to the SAMs, cutting prisoners off from the outside world.”<sup>656</sup> Paracha described “non-stop hunger strikes” at the H Unit since 2002, when it was created, causing “many illnesses” and “psychological issues” for prisoners there.<sup>657</sup>

### *SAMs and the Attorney-Client Relationship*

SAMs permit the government to monitor any and all attorney-client communications—without first seeking court approval—if federal law enforcement agencies have a reasonable suspicion that a defendant may use the attorney-client communication to “further or facilitate acts of terrorism.”<sup>658</sup> Monitoring is permitted “to the extent determined to be reasonably necessary for the purpose of deterring future acts of violence or terrorism.”<sup>659</sup> A “privilege team” monitors communication but cannot disclose any information unless it gets court approval.<sup>660</sup> It also cannot retain any communications that are found to be privileged.<sup>661</sup> According to the Bureau of Prisons, as of November 2013 the government was monitoring the attorney-client communications of one prisoner in its custody.<sup>662</sup>

Full confidentiality of communications between lawyers and prisoners is a key aspect of the right to counsel under international human rights law.<sup>663</sup> In practice,

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<sup>655</sup> Letter from Uzair Paracha to Human Rights Watch, December 2, 2012.

<sup>656</sup> *Ibid.*

<sup>657</sup> *Ibid.*

<sup>658</sup> The rule permits “the monitoring or review of communications between that inmate and attorneys or attorneys’ agent who are traditionally covered by the attorney-client privilege.” 28 C.F.R. § 501.3(d).

<sup>659</sup> Unlike other rules limiting attorney-client privilege, with SAMs there is no initial judicial oversight over the decision to monitor communications; the Attorney General alone decides the extent of “reasonably necessary” monitoring. For a comparison of SAMs with other limitations on attorney client privilege and communications, see Marianne Kerber and Alexis M. Thomas, “The Erosion of Privacy After September 11: A Call to Arms for the Protection of the Attorney-Client Relationship in the Face of a National Crisis,” *Georgetown Journal of Legal Ethics*, vol. 16 (Summer 2003), p.693.

<sup>660</sup> 28 C.F.R. § 501.3 (d)(3).

<sup>661</sup> Under SAMs, communications remain covered by attorney-client privilege unless they could “facilitate criminal acts or a conspiracy to criminal acts” or are not related to legal advice—categories of information that would be covered by well-recognized exceptions to the attorney-client privilege. See 28 C.F.R. § 501.3(d)(2)(ii).

<sup>662</sup> Letter from Wilson Moorer, November 21, 2013.

<sup>663</sup> See UN Human Rights Committee, General Comment 13, para. 9 (Interpreting the ICCPR as requiring “counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications,” and noting, “[l]awyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue



“surveillance cannot but have a chilling effect on the attorney-client relationship,” a lawyer who has worked with a SAMs defendants notes.<sup>664</sup> “The client sharing information with his attorney has nothing but the promise from the very government prosecuting him that such statements will not be used against him.”<sup>665</sup>

In three cases we reviewed, attorneys complained that SAMs undermined their ability to prepare for trial, in particular, due to delays they encountered when trying to communicate with their clients and get information from them.<sup>666</sup> Jay Carney, attorney for Tarek Mehanna, told us that Mehanna’s facility repeatedly rejected attorney-client emails he sent to Mehanna and, in one instance, seized as “contraband” evidence that was from the trial (see section III).<sup>667</sup> SAMs also impose restrictions on attorneys themselves, leading to delays in attorneys’ communication with potential witnesses, defense experts, investigators, paralegals, and interpreters.<sup>668</sup>

### *Restrictions on Family Contact*

Many prisoners who were convicted of terrorism or terrorism-related offenses are denied any physical contact during visits with their families, meaning they are only permitted to see each other through glass or by video monitor, and speak through

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interference from any quarter.”); see also, UN Human Rights Committee, General Comment 32, para. 34 (“Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.”). Numerous UN guidelines likewise require “full confidentiality” of communications. See Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles), adopted December 9, 1988, G.A. Res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49A) at 200, U.N. Doc. A/45/49 (1990), principle 18(3)(4); Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990), principles 8, 22; United Nations Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules), adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of July 31, 1957, and 2076 (LXII) of May 13, 1977, para. 93. See also, Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, approved by the Commission during its 131<sup>st</sup> regular period of sessions, held from March 3-14, 2008, O.A.S. Res. 1/08, O.A.S. Off. Rec. OEA/Ser/L/V/II.131, adopted March 13, 2008, principle 5.

<sup>664</sup> Andrew M. St. Laurent, “Managing Communications by Potentially Dangerous Detainees: A Balancing Act,” *Bloomberg BNA*, October 10, 2012, <http://www.bna.com/managing-communications-by-potentially-dangerous-detainees-a-balancing-act/> (accessed July 3, 2014).

<sup>665</sup> *Ibid.*

<sup>666</sup> These were the case of Fahd Hashmi, Abu Ali, and Tarek Mehanna, discussed above.

<sup>667</sup> Columbia Law School’s Human Rights Institute phone interview with Jay Carney, October 18, 2012.

<sup>668</sup> Joshua L. Dratel, “Ethical Issues in Defending a Terrorism Case: How Secrecy and Security Impair the Defense of a Terrorism Case,” *Cardozo Public Law, Policy and Ethics Journal*, vol. 2, issue 1 (Fall 2003), pp. 81, 85.

a telephone receiver. These include all inmates under SAMs<sup>669</sup>; all inmates at the CMUs<sup>670</sup>; all inmates at ADX Florence<sup>671</sup>; and some inmates held in pretrial facilities or other facilities post-conviction, according to interviews we conducted.

This is in contrast to general Bureau of Prisons policy, which permits “handshakes, hugs, and kisses (in good taste)” at the beginning and end of visits.<sup>672</sup> Moreover, while the Bureau of Prisons’ general policy is to provide inmates 300 phone call minutes a month,<sup>673</sup> in the cases we documented individuals frequently received far less: one 15-minute phone call per month in pretrial detention and for inmates under SAMs; at the CMUs, two 15-minute phone calls a week since 2009, which may be reduced to a single 15-minute phone call per month under a proposed rule.<sup>674</sup> Where imposed as a regular policy, rather than a punishment, such restrictions could last years or even a lifetime.

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<sup>669</sup> US Department of Justice, Office of the Inspector General, Evaluation and Inspections Division, “The Federal Bureau of Prisons’ Monitoring of Mail for High Risk Inmates,” report no. I-2006-009 (September 2006), <http://www.justice.gov/oig/reports/BOP/eo609/final.pdf> (accessed July 2, 2014), p. 94 (Memorandum from Paul R. Johnson, Acting Executive Officer of U.S. Department of Justice Criminal Division, to Paul A. Price, Assistant Inspector for Evaluations and Inspections: “All social visits for SAMs inmates are non-contact and are monitored contemporaneously by the FBI as well as recorded for later monitoring and analysis”).

<sup>670</sup> US Government Accountability Office, “Guantánamo Bay Detainees: Facilities and Factors for Consideration if Detainees Were Brought to the United States,” report to the Chairman, Select Committee on Intelligence, US Senate, GAO-13-31 (November 2012), <http://www.gao.gov/products/GAO-13-31> (accessed July 2, 2014), p. 44 (“no physical contact is allowed during visits”); US Department of Justice, Federal Bureau of Prisons, “Institutional Supplement,” no. THX-5270.07A, November 30, 2008, [https://www.prisonlegalnews.org/media/publications/terre\\_haute\\_cmu\\_institution\\_supplement\\_2006.pdf](https://www.prisonlegalnews.org/media/publications/terre_haute_cmu_institution_supplement_2006.pdf) (accessed July 1, 2014), p. 5; US Department of Justice, Federal Bureau of Prisons, “Institutional Supplement,” no. MAR-5270.07A, March 20, 2008, [https://www.prisonlegalnews.org/media/publications/bop\\_marion\\_cmu\\_institution\\_supplement\\_2008.pdf](https://www.prisonlegalnews.org/media/publications/bop_marion_cmu_institution_supplement_2008.pdf) (accessed July 1, 2014), p. 4; US Department of Justice, Federal Bureau of Prisons, “Institutional Supplement,” no. MAR-5321.07A, November 13, 2008, [https://www.prisonlegalnews.org/media/publications/bop\\_operation\\_and\\_security\\_of\\_the\\_cmu\\_11-13-2008.pdf](https://www.prisonlegalnews.org/media/publications/bop_operation_and_security_of_the_cmu_11-13-2008.pdf) (accessed July 1, 2014).

<sup>671</sup> US Department of Justice, Federal Bureau of Prisons, “Institutional Supplement,” no. FML 5267.08C, May 7, 2014, [http://www.bop.gov/locations/institutions/flm/FLM\\_visit\\_hours.pdf](http://www.bop.gov/locations/institutions/flm/FLM_visit_hours.pdf) (accessed July 3, 2014) (permitting five non-contact visits a month in “isolated rooms”).

<sup>672</sup> “Visiting Room Procedures,” Federal Bureau of Prisons, accessed July 3, 2014, <http://www.bop.gov/inmates/visiting.jsp>.

<sup>673</sup> Bureau of Prisons Program Statement, “Inmate Telephone Regulations,” no. P5264.08, February 11, 2014, [http://www.bop.gov/policy/progstat/5264\\_008.pdf](http://www.bop.gov/policy/progstat/5264_008.pdf) (accessed July 3, 2014), p. 14.

<sup>674</sup> Inmates at the CMUs were previously permitted only one phone 15-minute phone call a week. See *Aref v. Holder*, 774 F.Supp. 2d 147, 154 (D.D.C. 2011). In March 2013, the Bureau of Prisons reopened the period for public comment on a rule it proposed in 2010 that would limit CMU prisoners to a single 15-minute phone call and restrict them to one hour of family visitation a month (they currently receive eight hours). See US Department of Justice, Bureau of Prisons, “Proposed Rule: Notice to Reopen Comment Period,” 28 C.F.R Part 540; Department of Justice, Bureau of Prisons Docket No. 1148-N; US Department of Justice, Bureau of Prisons, “Communication Management Units,” 75 FR 17324 (April 6, 2010).

Prisoners described the ban on contact visits as exacerbating the pain of solitary confinement or other restrictive conditions. Dritan Duka, who is serving a life sentence at ADX Florence, described the prohibition on physical contact during visits as “the most difficult thing to deal with”:

We all want to touch our children. You want to hug and kiss them. You got to be patient. Otherwise you’ll break down like other people. ... If you’re not strong this place will destroy you.<sup>675</sup>

In a phone interview, Aref told us: “My daughter was five years old and I have never hugged or kissed her. I never touched her because she was born after my arrest. If I knew why—but I do not have any reason.”<sup>676</sup>

Shukri Abu Baker, a defendant in the Holy Land Foundation case, termed the CMU a “touch of hell.”<sup>677</sup> In a letter, he described no-contact visits: “my children...could see, but not touch me as though I had some sort of a contagious disease that the government wanted to protect them from.”<sup>678</sup> He also described trying to call his hospitalized and terminally ill daughter after having exhausted his allowance of two 15-minute phone calls and a single “compassion” call:

I would panic thinking she was dying on me....The most dreadful thought I had was that she is gone before could [s]ay goodbye. The CMU has some good compassionate men who tried to help me but their hands were tied up because it was the Counter Terrorism Unit in the [Bureau of Prisons] that managed my communications....all I wanted was to be able to hear the voices of my loved ones and be heard.<sup>679</sup>

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<sup>675</sup> Columbia Law School’s Human Rights Institute and Human Rights Watch interview with Dritan Duka, July 19, 2012; Columbia Law School’s Human Rights Institute email correspondence with Shain Duka, June 14, 2013.

<sup>676</sup> Columbia Law School’s Human Rights Institute phone interview with Yassin Aref, February 23, 2012. Aref was reportedly permitted to meet and hold his newborn daughter at least twice prior to being sent to a CMU. He did not hold her again until after he was transferred out of the CMU, when she was six years old. See Complaint, Aref v. Holder, No. 1:10-cv-00539-BJR-DAR (D.D.C. filed Apr. 1, 2010).

<sup>677</sup> Letter from Shukri Abu Baker to Columbia Law School’s Human Rights Institute, March 1, 2013.

<sup>678</sup> Columbia Law School’s Human Rights Institute email correspondence with Shukri Abu Baker, March 19, 2013.

<sup>679</sup> Letter from Shukri Abu Baker to Columbia Law School’s Human Rights Institute, March 1, 2013.

As Representative Sheila Jackson Lee emphasized in a 2010 letter to the Bureau of Prisons regarding CMU inmates: “the ways in which prisoners are prevented from maintaining family ties has the possibility to rise to cruel punishment, and serves no legitimate purpose.”<sup>680</sup>

Because international terrorism inmates are frequently held at facilities that are hundreds of miles from their families, many of the families we spoke to reported they were only able to visit once or twice a year. This is in contrast to most prisoners’ placements, as the Bureau of Prisons’ general policy is to place prisoners within a 500-mile radius of their release residence.<sup>681</sup>

The government’s stated purpose for imposing these family contact restrictions is to ensure complete audio monitoring of inmate communications and detect terrorist or criminal activity.<sup>682</sup> Yet in practice the outcomes raised human rights concerns by escalating the degree of social isolation beyond what is necessary.

Nor are these restrictions necessary to address concerns about prisoner radicalization expressed by Congress or the Department of Justice.<sup>683</sup> Even assuming that complete monitoring of inmate communications is a necessary and legitimate goal, the Bureau of Prisons could meet it by designing contact visitation rooms that permit audio monitoring, and increasing the resources it devotes to monitoring to permit more frequent and longer inmate phone calls.

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<sup>680</sup> Letter from Congresswoman Sheila Jackson Lee to Federal Bureau of Prisons, c/o Director Harley Lappin, November 22, 2010 (on file with Columbia Law School’s Human Rights Institute).

<sup>681</sup> “If an inmate is placed at an institution that is more than 500 miles from his/her release residence, generally, it is due to specific security programming, or population concerns.” “Custody and Care: Designations,” Federal Bureau of Prisons, accessed July 2, 2014, [http://www.bop.gov/inmates/custody\\_and\\_care/designations.jsp](http://www.bop.gov/inmates/custody_and_care/designations.jsp).

<sup>682</sup> See Declaration of Leslie Smith, Chief of the Counter Terrorism Unit, *Lindh v. Warden*, No. 2:09-cv-00215-JMS-MJD (S.D. Ind. Jan. 11, 2013) (“As a result of documented problems with ongoing communications from some federal prisoners, the volume, frequency and methods of allowing CMU inmates contact with person in the community must be restricted as required by the goal of complete monitoring of their communications”). However, communication limitations for SAMs prisoners are due to the Department of Justice, not the Bureau of Prisons, as we describe below. Moreover, for inmates held at pretrial facilities and at Bureau of Prisons prisons, we were not able to find bureau-level policies on contact and phone privileges, and many decisions may be made at the warden-level. Some denial of contact and phone visits occurs when inmates are placed in special housing units.

<sup>683</sup> See US Department of Justice, Office of the Inspector General, Evaluation and Inspections Division, “The Federal Bureau of Prisons’ Monitoring of Mail for High Risk Inmates,” report no. I-2006-009 (September 2006), <http://www.justice.gov/oig/reports/BOP/eo609/final.pdf> (accessed July 2, 2014).

## Obstacles to Challenging Prisoner Classification and Seeking Transfer to Less Restrictive Facilities

Individuals whose cases we reviewed frequently voiced a sense of helplessness and bewilderment at their indefinite social isolation, restrictions on their communication with family, and other conditions. We spoke to many prisoners who had searched the labyrinth of prison administration for answers about the decision to impose certain restrictions on them and their recourse. They were repeatedly blocked by prison officials at multiple levels.

### *Challenging “Terrorism” Designations*

Designation as an “international terrorist” and “domestic terrorist” can result in prisoners’ placement in special units, solitary confinement, and deprivation of contact visits, communication, and other privileges. Yet the Bureau of Prisons’ own policies and statements about terrorism designations are opaque and at times conflicting.<sup>684</sup> A search of Bureau of Prisons manuals and directives yielded little information about terrorism designations—leaving prisoners and their families with minimal access to an explanation of how to challenge designation decisions and treatment.<sup>685</sup>

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<sup>684</sup> For example, while in 2008 the director of the Bureau of Prisons told Congress that it had about 1200 “terrorist” inmates in custody, in November 2013, it told us there were only 475 such inmates in pre-conviction and post-conviction custody. In 2008, then-Bureau of Prisons director Harley Lappin told Congress there were “211 international terrorists” and a little more than 1,200 total “[i]f you throw in the domestic terrorists.” Asked where these “terrorists” were from, Lappin said, “[y]ou know, primarily the Middle East.” He later provided a breakdown indicating these “international terrorists” were citizens of 37 countries, including the United States, as well as countries as varied as Belize, Haiti and Japan. The designation as “international” rather than “domestic” terrorist does not appear to be related to an inmate’s US versus foreign citizenship. Nor does it appear to track the inmate’s citizenship in a country that the US considers to be a hotbed of activity by Al-Qaeda or any groups the U.S. describes as affiliated with Al-Qaeda. It is thus hard to discern the underlying basis for these different designations. In addition, Lappin’s figure of 211 “international terrorist inmates” is far fewer than the Department of Justice’s number of 494 individuals convicted of international terrorism or terrorist-related offenses. In February 2012, Bureau of Prisons reported to the Government Accountability Office that it had 373 inmates “charged with or convicted of federal crimes related to terrorism” in its custody. In November 2013, the Bureau of Prisons told us there were 332 post-conviction prisoners designated as “international terrorism” and 91 as “domestic terrorism,” while there were 52 pre-conviction prisoners so designated in their custody. See Harley G. Lappin, “Testimony of Harley G. Lappin before House Appropriations Subcommittee on Commerce Justice, Science and Related Agencies,” US Congress, March 12, 2008, (on file with Human Rights Watch); US Government Accountability Office, “Guantánamo Bay Detainees: Facilities and Factors for Consideration if Detainees Were Brought to the United States,” report to the Chairman, Select Committee on Intelligence, US Senate, GAO-13-31 (November 2012), <http://www.gao.gov/products/GAO-13-31> (accessed July 2, 2014); Bureau of Prisons documents related to SAMs obtained on November 21, 2013 from Freedom of Information Act requests made by Human Rights Watch on August 24, 2012 (on file with Human Rights Watch).

<sup>685</sup> In 2007, the Bureau of Prisons released a “fact sheet” describing a system to classify individuals as “terrorist inmates,” defined broadly as “those having been convicted of, charged with, associated with, or linked to terrorist

Only due to our Freedom of Information Act request and following a court order did the Department of Justice confirm the existence of “an assignment system that identifies inmates with a nexus to terrorism”—based not just on their convictions, conduct and affiliations established at trial or while in prison, but an array of “open source information, intelligence provided by other law enforcement agencies, [and] other information subject to validation.”<sup>686</sup> The government did not describe any process for challenging the validity of information derived from these sources.<sup>687</sup> Nor is it clear that the Bureau of Prison’s designation review processes available to prisoners under other Security Threat Group assignments (e.g. for alleged gang affiliations) are available to prisoners designated as “terrorists.” To the extent prisoners are placed in solitary confinement and subject to other potentially abusive conditions because of their designations as “terrorists,” failure to provide a review process for designations raises due process concerns under international human rights law. (US courts have generally failed to uphold similar due process claims.)

In some cases we reviewed, the taint of terrorism subjected prisoners to harsh measures that did not appear to plausibly relate to any potential threat the prisoner poses. For example, Sabri Benkahla is a US citizen who was acquitted of providing material support for terrorism but later convicted of making false statements to a grand jury and the FBI (see above). The district judge in the case was unequivocal that “Sabri Benkahla is not a terrorist” and found that Benkahla’s false statements were not based on intent to promote a terrorist activity but “out of a desire not to be seen as involved with illegal activities.”<sup>688</sup> Although Benkahla

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activities, or belonging to organizations that planned and/or executed violent and destructive acts against the government and/or privately owned US corporations. Department of Justice, Fact Sheet: Security at the Department of Justice Bureau of Prisons Administrative Maximum Security Facility, February 21, 2007.

<sup>686</sup> Letter from Preet Bharara, US Attorney’s Office for the Southern District of New York, Department of Justice, Re: Human Rights Watch v. Dep’t of Justice Fed. Bureau of Prisons, 13 Civ. 7360 (HB), January 17, 2014 (on file with Human Rights Watch).

<sup>687</sup> The Bureau of Prisons may base an initial placement decision on a prisoner’s security score, which is calculated based on several factors, including the sentencing court’s recommendation and the prisoner’s criminal history. If the Bureau of Prisons seeks to place an individual at a higher or lower-security prison, inconsistent with his security score, it must base its decision on a “management variable.” The Bureau of Prison’s Program Statement on inmate placement does not reference terrorism offenses or “terrorist inmates” at any point. However, it describes one management variable as “Central Inmate Monitoring,” applying to “certain inmates who present special needs for management.” It is possible that individuals deemed “terrorist inmates” are placed at prisons inconsistent with their security scores, but without further information we could not determine if this was the case. See US Department of Justice, Federal Bureau of Prisons, “Program Statement: Inmate Security Designation and Custody Classification,” September 12, 2006, [http://www.bop.gov/policy/progstat/5100\\_008.pdf](http://www.bop.gov/policy/progstat/5100_008.pdf) (accessed June 26, 2014).

<sup>688</sup> *United States v. Benkahla*, 501 F.Supp.2d 748, 760 (E.D. Va. 2007), *aff’d*, 500 F.3d 300 (4th Cir. 2008).

received a terrorism enhancement (see section V) to his sentence, the judge concluded: “His likelihood of ever committing another crime is infinitesimal.”<sup>689</sup> Benkahla was classified as a minimum security prisoner and had never been charged with a disciplinary violation when, in October 2007, he was sent to a CMU. There, he was denied any contact visits from his family and permitted only one 15-minute phone call per week.<sup>690</sup> The American Civil Liberties Union filed a lawsuit challenging his confinement in the CMU in June 2009, and he was transferred out of it in July 2010.

The Bureau of Prisons has sometimes transferred prisoners to less restrictive conditions over time, suggesting that the “terrorist inmate” designation does not prevent all individualized inquiry and review. Indeed, we found that nearly a quarter of prisoners convicted of terrorism or terrorism-related offenses were held in low-security prisons, as of July 2013.<sup>691</sup> However, in the cases we reviewed, prisoners transferred to lower-security prisons did not know the reasons for the transfer, and feared being returned to more restrictive conditions.

### *Transferring Out of ADX*

After 9/11, the Bureau of Prisons transferred several Muslim men convicted of terrorism-related offenses from less restrictive prisons to solitary confinement at ADX, although they did not have significant disciplinary histories or any involvement in the 9/11 attacks.<sup>692</sup> The Bureau of Prisons later changed its policies to permit prisoners to be sent to ADX if they were “convicted of, charged with,

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<sup>689</sup> Ibid., p.759.

<sup>690</sup> Amended Complaint, Benkahla v. Fed. Bureau of Prisons, No. 2:09-cv-00025-WTL-DML (S.D. Ind. filed July 7, 2009), pp. 9-12.

<sup>691</sup> In July 2013, we used the BOP’s inmate locator to determine the placement of 494 defendants convicted of terrorism or terrorism-related offenses according to the Department of Justice. Thirty-two of the prisoners were held in low-security facilities; 41 in medium-security facilities. Thirteen prisoners were held at high-security prisons other than ADX Florence.

<sup>692</sup> See Human Rights Watch Letter to Harley G. Lappin, Federal Bureau of Prisons, May 2, 2007, <http://www.hrw.org/news/2007/05/01/letter-harley-g-lapin-federal-bureau-prisons-re-adx-florence>; Memorandum from Michael B. Cooksey, Assistant Director Correctional Programs Division, Federal Bureau of Prisons to all Chief Executive Officers, “Guidance for Handling of Terrorists and Recent Detainees,” October 1, 2001 (“Following the tragic events of September 11, 2001, all inmates in the custody of the Bureau of Prisons 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.” (quoted and discussed in Laura Rovner and Jeanne Theoharis, “Preferring Order to Justice,” *American University Law Review*, Vol. 61 (2012), <http://www.aulawreview.org/pdfs/61/61-5/Rovner-Theoharis.website.pdf> (accessed June 26, 2014), p. 1331.)).

associated with, or in any way linked to terrorist activities and as a result of such, presents national security management concerns.”<sup>693</sup>

As Human Rights Watch has previously reported, prisoners transferred to ADX based on their convictions and alleged past conduct, rather than their disciplinary history, exist in a bleak limbo.<sup>694</sup> Even if they have no disciplinary history and are not believed to pose an ongoing threat, prisoners may languish in solitary confinement at ADX Florence because their placement stems from their conviction—past conduct that they can never undo. A 2007 Human Rights Watch investigation found that in a number of cases, the good conduct of prisoners had been acknowledged, yet they were denied transfer to less restrictive conditions because the “reason for placement at the ADX has not been sufficiently mitigated.”<sup>695</sup>

ADX has a four-phase “Step Down” program through which inmates can receive incrementally greater privileges of communicating with other inmates, greater phone privileges, and eventual transfer out of the prison.<sup>696</sup> However, ADX prisoners must spend at least three years at the prison to progress out of ADX, and transfer remains rare.<sup>697</sup>

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<sup>693</sup> Neither the term “terrorist activities” nor “national security management concerns” are defined. Memorandum from Michael K. Nalley, Regional Director, Federal Bureau of Prisons, North Central Regional Office, November 2, 2007 (quoted in Rovner and Theoharis, “Preferring Order to Justice,” *American University Law Review*, p. 1331).

<sup>694</sup> See Human Rights Watch Letter to Harley G. Lappin, Federal Bureau of Prisons, May 2, 2007, <http://www.hrw.org/news/2007/05/01/letter-harley-g-lapin-federal-bureau-prisons-re-adx-florence>; see also, Human Rights Watch letter to Paul Harvey, Registrar, European Court of Human Rights, re: Appl. No. 36004/08, *Gary McKinnon v. United Kingdom*, August 27, 2008 (on file with Human Rights Watch).

<sup>695</sup> Human Rights Watch Letter to Harley G. Lappin, Federal Bureau of Prisons, May 2, 2007, <http://www.hrw.org/news/2007/05/01/letter-harley-g-lapin-federal-bureau-prisons-re-adx-florence>.

<sup>696</sup> US Government Accountability Office, “Improvements Needed in Bureau of Prisons’ Monitoring and Evaluation of Impact of Segregated Housing,” report to Congressional Requestors, GAO-13-429 (May 2013), <http://www.gao.gov/assets/660/654349.pdf> (accessed July 1, 2014), p. 9. The 2012 European Court of Human Rights decision upholding extradition of prisoners to ADX cited the Step Down program, reasoned that while there might be a violation of the European Convention on Human Right’s prohibition on torture and ill-treatment for inmates who “spent significant periods of time” at ADX, the prison provided a way out for prisoners. However, ADX prisoners must spend at least three years at the prison to progress out of ADX. ECHR, *Babar Ahmad and Others v. the U.K.*, nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, § 88, 10 April 2012.

<sup>697</sup> ECHR, *Babar Ahmad and Others v. the U.K.*, nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, § 88, 10 April 2012; US Government Accountability Office, “Improvements Needed in Bureau of Prisons’ Monitoring and Evaluation of Impact of Segregated Housing,” Report to Congressional Requestors, GAO-13-429 (May 2013), <http://www.gao.gov/assets/660/654349.pdf>, p. 9. Fewer than 5 percent of ADX prisoners have completed the Step Down program in just three years. Appellants’ Opening Brief at 10, *Rezaq v. Nalley*, 677 F.3d 1001 (10th Cir. 2012). A study of 110 ADX prisoners reported that the average length of solitary confinement at the prison was 8.2 years. See also, Professor Laura Rovner, testimony before the US Senate Committee on Judiciary Subcommittee on Constitution, Civil Rights, and Human Rights, congressional hearing “Reassessing Solitary Confinement: The



In 2009, an updated Bureau of Prisons manual set out a six-month review process for ADX prisoners conducted by the Step Down Screening Committee, charged with deciding whether a prisoner can advance through the Step Down process. The manual describes clear disciplinary records and completion of educational programs as factors weighing in favor of successful progress.<sup>698</sup> Nonetheless, the Bureau of Prisons may keep a prisoner at ADX if his “original reason for placement still exists,” in other words, it appears that a prisoner could remain stuck in ADX due to his conviction, and regardless of his good behavior, if that was the basis of his placement.<sup>699</sup>

### *Transferring out of CMUs*

Unlike other similarly situated Bureau of Prisons inmates,<sup>700</sup> prisoners are designated for a CMU and transferred there without prior notice or pre-transfer

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Human Rights, Fiscal, and Public Safety Consequences,” Washington, DC, June 15, 2012, transcript at <http://www.law.du.edu/documents/student-law-office-clinical-programs/laura-rovner-university-of-denver-sturm-college-of-law.pdf> (describing Bureau of Prisons’ resistance to providing relevant statistics and discussing study finding that 43 prisoners at ADX Florence and USP Marion had been in solitary confinement for more than eight years) (accessed July 2, 2014).

<sup>698</sup> See ECHR, *Babar Ahmad and Others v. the U.K.*, nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, § 88, 10 April 2012 (describing 2009 Supplement); US Department of Justice, Federal Bureau of Prisons, “Institutional Supplement,” no. FML 5321.06(1), November 21, 2011.

<sup>699</sup> *Ibid.*; US Government Accountability Office, “Improvements Needed in Bureau of Prisons’ Monitoring and Evaluation of Impact of Segregated Housing,” Report to Congressional Requestors, GAO-13-429 (May 2013), <http://www.gao.gov/assets/660/654349.pdf>, p. 60. In litigation before the European Court of Human Rights, the US government reported that since the 2009 manual came into effect, it has moved an increasing percentage of prisoners to ADX’s less restrictive units. ECHR, *Babar Ahmad and Others v. the U.K.*, nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, § 88, 10 April 2012. Indeed, we are aware of at least two prisoners who successfully completed the Step Down program and were transferred out of ADX, although one described irregularities in the review system. Elvir Duka was transferred from ADX to a CMU in August 2011 after completing only two Step Down phases, and his family reported that they could not learn why he was transferred before completing the program. Shain Duka was transferred from ADX to Big Sandy USP after completing the Step Down program: he spent one year in ADX General Population, six months in ADX’s J Unit, six months in K-Unit, and one year in the Delta Bravo Unit. Columbia Law School’s Human Rights Institute email correspondence with Shain Duka, June 14, 2013. However, defense lawyers remain concerned about the prospects for transfer out of ADX and argue that only a minority of ADX prisoners have progressed through the program. ECHR, *Babar Ahmad and Others v. the U.K.*, § 191, 10 April 2012 (discussing testimony and evidence submitted by defense lawyer and solitary confinement expert Laura Rovner). According to the government’s September 2011 response to the European Court of Human Rights, there were only 89 prisoners in the Step Down program, which is about a quarter of the population eligible for it (this excludes ADX prisoners under SAMs and in the Control Unit, who are subject to different procedures). Of those in the program, 25 were in the third and final phase—forming about only 7 percent of the ADX prisoner population eligible for the program. In response to a request by the European Court of Human Rights, the Department of Justice in September 2011 reported that there were 252 prisoners at ADX in General Population.

<sup>700</sup> For example, before a prisoner is transferred to a Bureau of Prisons Control Unit (a type of unit for inmates believed to pose a threat to other inmates or to prison security), he or she is entitled to 24-hour advance notice of the charges and the specific acts or evidence forming the basis for the transfer recommendation, a live hearing

opportunity to contest their placement. Instead, within five days of transfer to a CMU, an inmate receives a “Notice of Transfer to Communications Management Unit.” Our review of these notices from several cases suggests they do not describe specific acts or evidence underlying a designation that would permit a prisoner to challenge them.<sup>701</sup> In some cases, the notices state that “reliable evidence” indicates the prisoner has been involved in “radicalization efforts,” but we are aware of no notices that describe the evidence.<sup>702</sup> The Bureau of Prisons is not required to document or substantiate CMU designations.<sup>703</sup> Decisions to place prisoners at the CMUs appear to bypass the Bureau of Prisons’ general designation and placement system, which by statute must include consideration of factors including the sentencing court’s statements.<sup>704</sup>

According to the Bureau of Prisons, as of October 2013, 45 individuals have been released or transferred from the CMUs based on a Step Down process, but it was unpredictable and ineffective in some cases.<sup>705</sup> Indeed, of the nearly 100 CMU detainees, the Bureau of Prisons said only four were currently in the Step Down process.<sup>706</sup> Whereas the Bureau of Prisons requires review of prisoners’ placement

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with representation by a staff member, and the opportunity to call witnesses and present documentary evidence and a written decision. 28 C.F.R. § 541.40 (describing control unit programs) and § 541.43.

<sup>701</sup> There is typically a one-page form that only includes enough space for a brief paragraph, which commonly describes the prisoner’s conviction and underlying conduct, with an emphasis on his communication with other individuals or terrorist groups. See, e.g., Complaint, Exhibit E, “Notice to Inmate of Transfer to Communication Management Unit,” Reg. No. 12778-052 (Aref, Yassin Muhiddin), *Aref v. Holder*, No. 1:10-cv-00539-BJR-DAR (D.D.C. filed Apr. 1, 2010) (describing, *inter alia*, his offense conduct as including “communicating in code and teaching others how to commit crimes of arson”); Complaint, Exhibit E, “Notice to Inmate of Transfer to Communication Management Unit,” Reg. No. 39551-039 (Jayyousi, Kifah), *Aref*, No. 1:10-cv-00539-BJR-DAR (D.D.C. filed Apr. 1, 2010) (describing his offense conduct as including “significant communication...to al-Qaida”).

<sup>702</sup> See, e.g., Complaint, Exhibit E, “Notice to Inmate of Transfer to Communication Management Unit,” Reg. No. 12778-052, 052 (Aref, Yassin Muhiddin), *Aref*, No. 1:10-cv-00539-BJR-DAR (D.D.C. filed Apr. 1, 2010) (stating “[r]eliable evidence indicates your crimes and incarceration conduct have included involvement in recruitment and radicalization efforts, including of other inmates, through extremist, violence oriented indoctrination methods to intimidate or coerce others”); Motion to Add and Remove Defendants, Attachment No. 4, *Benkahla v. Fed. Bureau of Prisons*, No. 2:09-cv-00025-WTL-DML (S.D. Ind. July 29, 2010). But see, Defendant’s Cross Motion for Summary Judgment, Exhibit 3, Attachment 1, *Lindh v. Warden*, No. 2:09-cv-00215-JMS-MJD (S.D. Ind. Jan. 11, 2013).

<sup>703</sup> For a critique of the CMU designation process, see Center for Constitutional Rights, et al, “Communications Management Units: Comments Submitted to the Federal Bureau of Prisons,” comments submitted to US Department of Justice, Federal Bureau of Prisons, Office of General Counsel, June 2010, [http://ccrjustice.org/files/Complete\\_Selection\\_Comments-2010.0618.pdf](http://ccrjustice.org/files/Complete_Selection_Comments-2010.0618.pdf) (accessed June 26, 2014).

<sup>704</sup> See 18 U.S.C. § 3621(b).

<sup>705</sup> US Department of Justice, Federal Bureau of Prisons, Counter Terrorism Unit, “Communications Management Units (CMU) Population Tracking,” November 25, 2013, obtained from Freedom of Information Act requests by Human Rights Watch (on file with Human Rights Watch).

<sup>706</sup> *Ibid.*

at control units every 30 days, there is no required Bureau of Prisons review of CMU prisoners' ongoing placement.<sup>707</sup> In October 2009, the Bureau of Prisons issued a memo requiring staff to review CMU prisoners' designation every six months. But this process does not provide prisoners the opportunity to address specific allegations or evidence, as is possible in the reviews for control unit prisoners.<sup>708</sup>

Mohamed Shnewer, a defendant in the Fort Dix case, said he had been imprisoned at Marion CMU for four years. In an email, he described the review process:

I asked how can I get out of here, I was told when my "crime" I was convicted [of] changes. It's the same every time, there is never a discussion, this "review" usually takes less than two minutes. I sign a few places, take the papers they have ready for me, then leave the room.<sup>709</sup>

Defense lawyers who have visited the Marion CMU told us that the men they met had no disciplinary histories, and their continued placement at the CMU was based on their terrorism convictions. "That is only done for terrorism cases, everyone else is classified according to what they do in the prison system," a defense lawyer explained.<sup>710</sup> "The effect of that means they can never change their security classification, because their underlying crime will remain the same—so no matter how they behave, they're forever stuck."<sup>711</sup>

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<sup>707</sup> 28 C.F.R. § 541.49 (providing for review by a control unit team every 30 days and by the "Executive Panel" every 60 to 90 days).

<sup>708</sup> US Government Accountability Office, "Improvements Needed in Bureau of Prisons' Monitoring and Evaluation of Impact of Segregated Housing," report to Congressional Requestors, GAO-13-429 (May 2013), <http://www.gao.gov/assets/660/654349.pdf> (accessed July 1, 2014), p. 54; The US Government Accountability Office reviewed ten files of CMU prisoners and found that for two prisoners, the BOP "did not include documentation that unit team staff regularly monitored the inmate's CMU status every six months." US Government Accountability Office, "Improvements Needed," p. 58; see Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 31-36, *Aref v. Holder*, No. 1:10-cv-00539-BJR-DAR (D.D.C. filed March 23, 2014).

<sup>709</sup> Columbia Law School's Human Rights Institute email correspondence with Mohamed Shnewer, March 18, 2013.

<sup>710</sup> Columbia Law School's Human Rights Institute phone interview with Alan Mills, legal director, Uptown People's Law Center, February 7, 2013; see Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 33-34, *Aref*, No. 1:10-cv-00539-BJR-DAR (D.D.C. filed March 23, 2014) (describing Bureau of Prisons' staff confusion over criteria for continued designation to CMUs).

<sup>711</sup> *Ibid.*

Some CMU prisoners have filed administrative appeals, in a process that applies Bureau of Prisons-wide.<sup>712</sup> Nongovernmental organizations (NGOs) and advocates with whom we spoke said that no one's placement in a CMU has ever been reversed through the administrative appeals process.<sup>713</sup> The Bureau of Prisons did not reply to our letter requesting information about the process, although they released statistics pursuant to our FOIA.<sup>714</sup>

### *Challenging SAMs*

Under post-9/11 rules, the timeframe for imposing SAMs was extended from 120 days to one year;<sup>715</sup> renewal of SAMs became contingent on certification that “based on the information available” the SAMs were still necessary, rather than, as previously required, that “the circumstances identified in the original certification continued to exist.”<sup>716</sup>

The government contends that “[i]nmates under SAMs are afforded due process.”<sup>717</sup> Indeed, there are signs that the government is willing to modify and remove SAMs over time: a significant proportion of the overall number of post-conviction

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<sup>712</sup> See US Department of Justice, Federal Bureau of Prisons, “Institutional Supplement,” no. THX-5270.07A, November 30, 2008, [https://www.prisonlegalnews.org/media/publications/terre\\_haute\\_cmu\\_institution\\_supplement\\_2006.pdf](https://www.prisonlegalnews.org/media/publications/terre_haute_cmu_institution_supplement_2006.pdf) (accessed July 1, 2014), p. 5; US Department of Justice, Federal Bureau of Prisons, “Institutional Supplement,” no. MAR-5270.07A, March 20, 2008, [https://www.prisonlegalnews.org/media/publications/bop\\_marion\\_cmu\\_institution\\_supplement\\_2008.pdf](https://www.prisonlegalnews.org/media/publications/bop_marion_cmu_institution_supplement_2008.pdf) (accessed July 1, 2014), p. 4; US Department of Justice, Federal Bureau of Prisons, “Institutional Supplement,” no. MAR-5321.07A, November 13, 2008, [https://www.prisonlegalnews.org/media/publications/bop\\_operation\\_and\\_security\\_of\\_the\\_cmu\\_11-13-2008.pdf](https://www.prisonlegalnews.org/media/publications/bop_operation_and_security_of_the_cmu_11-13-2008.pdf) (accessed July 1, 2014), p. 5. See also, 28 C.F.R. § 542.10-19.

<sup>713</sup> Letter from the Brennan Center for Justice to Sarah Qureshi, Office of General Counsel, Bureau of Prisons, from Brennan Center for Justice, June 2, 2010, <http://www.ccrjustice.org/files/Public%20Comment%20Volume%20Former%20Corrections%20Officers-2010.0602.pdf> (accessed July 1, 2014); Columbia Law School's Human Rights Institute phone interview with Alexis Agathocleous, staff attorney at Center for Constitutional Rights, August 27, 2012; Columbia Law School's Human Rights Institute phone interview with Laura Rovner, director of Civil Rights Clinic at Sturm College of Law, University of Denver, February 6, 2013.

<sup>714</sup> See letter from Columbia Law School's Human Rights Institute to Charles E. Samuels, Director of the Bureau of Prisons, November 29, 2013. We received a letter from the Bureau of Prisons Research Review Board directing us to submit a research proposal; letter from Jody Klein-Saffran, Human Subjects Protection Officer, Bureau of Prisons to Columbia Law School's Human Rights Institute, January 23, 2013. We submitted a research proposal on March 15, 2013 and at time of writing had received no response.

<sup>715</sup> 28 C.F.R. § 501.2(c) and § 501.3(c) (2007).

<sup>716</sup> 28 C.F.R. § 501.2(c) and § 501.3(c) (2007); 28 C.F.R. § 501.2(c) and § 501.3(c) (1997).

<sup>717</sup> Letter from the Permanent Mission of the United States to the UN Office of the High Commissioner of Human Rights and Juan Mendez, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Feb. 23, 2012.

prisoners under SAMs has been transferred out of ADX Florence—11, as of January 14, 2011.<sup>718</sup> We are aware that at least some prisoners have been able to secure modification of their SAMs without pursuing an administrative remedy.

But prisoners are not given a hearing where they can contest the initial imposition of SAMs.<sup>719</sup> Nor do they have adequate notice of the process for securing SAMs modification and removal, nor of the conduct that will make modification and removal more likely.

After SAMs are imposed, inmates can, in theory, challenge the restrictions through the Bureau of Prisons' Administrative Remedy Program,<sup>720</sup> or they can seek modification of their SAMs by making a request to a Bureau of Prisons staff member<sup>721</sup> or during a six-month Bureau of Prisons review.<sup>722</sup> But the Bureau of Prisons has argued in litigation that it in fact has “no authority to remove or amend any restrictions imposed” through SAMs.<sup>723</sup> One prisoner formerly held in solitary confinement under SAMs said: “The wardens of ADX used to tell us that there is nothing that they can do to improve our conditions as long as the SAMs is in place. That’s why the inmates in ADX were in an endless hunger strike,” he wrote. “[T]here

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<sup>718</sup> Defendants' Reply in Support of Motion for Summary Judgment at 53, *Mohammed v. Holder*, No. 1:07-cv-02697-MSK-BNB, 2014 WL 2743935 (D. Colo. June 17, 2014).

<sup>719</sup> Plaintiff's Response to Defendants' Motion for Summary Judgment, Part Three at 60, *Mohammed v. Holder*, No. 1:07-cv-02697-MSK-BNB, 2014 WL 2743935 (D. Colo. June 17, 2014).

<sup>720</sup> 28 C.F.R. § 501.3(e); 28 C.F.R. § 542.11(a)(3) (Administrative Remedy Program).

<sup>721</sup> Once the request for modification is “made known,” information concerning the proposed modification is forwarded to the prosecuting United States Attorneys Office and the FBI for review and consideration. Defendants' Motion for Summary Judgment at 37, *Ayyad v. Holder*, No. 05-cv-02342 (D. Colo. filed Mar. 25, 2011).

<sup>722</sup> During a review that occurs every six months, the Bureau of Prisons collects recommendations from staff and the prisoner regarding the SAMs and current conditions of confinement. Staff also review requests, grievances, and/or administrative remedies submitted by the prisoner throughout the year, disciplinary information from throughout the year, correspondence to/from the prisoner, types of educational materials requested, types of leisure materials requested, and participation in the various programming offered by the institution. Plaintiff's Response to Defendants' Motion for Summary Judgment, Exhibit 3 at 15, *Mohammed v. Holder*, No. 1:07-cv-02697-MSK-BNB, 2014 WL 2743935 (D. Colo. June 17, 2014). Since 2009, the review provides an in-person meeting with the prisoner and his unit team approximately one week following the submission of written comments by the prisoner. While this process allows for some input from the prisoner, it is inadequate because the Bureau of Prisons has limited authority to modify or remove SAMs yet the the Bureau of Prisons is the only institution the prisoner can questions from and with which he may discuss his concerns.

<sup>723</sup> See Plaintiff's Response to Defendants' Motion for Summary Judgment at 54, *Ayyad*, No. 05-cv-02342 (D. Colo. filed May 17, 2012); Plaintiff's Response to Defendants' Motion for Summary Judgment, Exhibit 21 at 12, *Mohammed v. Holder*, No. 1:07-cv-02697-MSK-BNB, 2014 WL 2743935 (D. Colo. June 17, 2014) (“[T]he Bureau’s role in such matters is to inform you of the SAMs restrictions and ensure the measures are followed. To this extent, unit staff have influence as to how the restrictions are applied, and can affect appropriate modifications provided such approval would not jeopardize security concerns”).

is no way for them out except if SAMs is removed, and that is in the hands of the [Attorney General].”<sup>724</sup>

There is also an annual renewal process for each prisoner’s SAMs. Prisoners have long had the opportunity to provide written comments regarding SAMs renewal. In August 2010, the Bureau of Prisons established a process including an in-person meeting for ADX inmates under SAMs, which includes the prisoner, ADX personnel and the FBI case agent assigned to the prisoner’s case.<sup>725</sup> But the prisoner does not have an opportunity to address the specific allegations of the US Attorney’s office requesting SAMs renewal. Prisoners are ordinarily not given an explanation of why their SAMs are being renewed that is detailed enough for them to meaningfully contest.<sup>726</sup> Instead, they simply receive a boilerplate letter stating their SAMs are being renewed because they “continue to show a proclivity for violence.”<sup>727</sup>

Under a three-stage Step Down program (distinct from the regular ADX program), SAMs prisoners at ADX Florence can gain incrementally more out-of-cell time and phone privileges.<sup>728</sup> We were only able to discern the parameters of this Step Down

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<sup>724</sup> Columbia Law School’s Human Rights Institute email correspondence with Shah Wali Khan Amin (self-identified as Osama Haidar Turkistani), March 21, 2013.

<sup>725</sup> Following the meeting with the inmate, ADX staff prepare a memorandum summarizing the discussion with the prisoner, which is then routed to ADX personnel who are in a position to provide additional input about the prisoner. See Defendants’ Motion for Summary Judgment at 32, *Ayyad v. Holder*, No. 05-cv-02342 (D. Colo. filed March 25, 2011). The US Attorney’s Office and the DOJ’s Office of Enforcement Operations also receive information after this meeting.

<sup>726</sup> See, e.g., Plaintiff’s Response to Defendants’ Motion for Summary Judgment, Exhibits Part 4 at 17, *Mohammed*, No. 1:07-cv-02697-MSK-BNB, 2014 WL 2743935 (“Based upon information provided to me of your proclivity for violence there is substantial risk that your 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 serious bodily injury to persons.” This explanation does not provide any evidence of the prisoner’s “proclivity of violence,” other than the original conviction of a terrorism crime, and merely tracks the statutory language for imposing SAMs).

<sup>727</sup> *Ibid.*

<sup>728</sup> In 2012, Director of the Bureau of Prisons Samuels described a “three phase program with increased out of cell time or increased telephone calls monthly based upon positive adjustment and programming, again depending upon the specific SAMs conditions.” Charles E. Samuels, Jr., Director, Federal Bureau of Prisons, statement before the US Senate Committee on Judiciary Subcommittee on Constitution, Civil Rights, and Human Rights congressional hearing “Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences,” Washington, DC, June 19, 2012, transcript at <http://www.justice.gov/ola/testimony/112-2/06-19-12-bop-samuels.pdf>, p. 9. The “Special Security Unit Program” is the counterpart of the Step Down Program for ADX General Population inmates. According to the Bureau of Prisons, its purpose is “to confine inmates with SAMs under close controls while providing them opportunities to demonstrate progressively responsible behavior and participate in programs in a safe, secure environment.” In 2009, ADX increased these prisoners out-of-cell recreation time from five to ten hours, which is the same as non-SAMs prisoners. Defendants’ Reply in Support of Motion for Summary Judgment at 46, *Mohammed v. Holder*, No. 1:07-cv-02697-MSK-BNB, 2014 WL 2743935 (D. Colo. June 17, 2014); Defendants’ Reply in Support of Motion for Summary Judgment, Exhibit Q-1, Declaration of ADX Associate Warden Louis J. Milusnic, ¶ 34, *Mohammed*, No. 1:07-cv-02697-MSK-BNB, 2014 WL 2743935.

process by reviewing the government’s responses in litigation; however, no attorneys we spoke with were able to confirm how the process works in practice—either because they were unaware of it, or because they believed the terms of their SAMs precluded them speaking about the process.<sup>729</sup>

### *Ahmed Abu Ali—Serving Life in the “H” Unit*

Ahmed Abu Ali is currently serving a life sentence in ADX’s “H Unit.” He was convicted largely on the basis of a confession, which he says was false and extracted by Saudi officials who tortured him (see section IV). Abu Ali’s SAMs were apparently modified to permit him less restrictive conditions over time: while Abu Ali was previously in 23-hour lockdown with an hour of indoor exercise, he is now permitted at least two hours of interaction with other inmates a day, and an hour and a half of outdoor recreation. Still, his attorney told us they were not notified of the SAMs modification and that the Step Down process was unclear, making the duration of these ameliorated conditions—and the potential that Abu Ali could be put back in 23-hour isolation—unknown. “I have no understanding of what that process is,” the attorney told us. “There’s no handout or handbook. There’s nothing that I can point to, to say, ‘This is how you can step down in the future.’ There’s no clear guidance.”<sup>730</sup>

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<sup>729</sup> In litigation, the Bureau of Prisons has described a review process for “H Unit” prisoners that occurs every six months. To be eligible for Step Down, prisoners must have a minimum of twelve months of clear conduct (no disciplinary infractions), positive behavior, respectful conduct toward staff and other prisoners, and “positive overall institutional adjustment.” Defendants’ Reply in Support of Motion for Summary Judgment at 48, *Mohammed v. Holder*, No. 1:07-cv-02697-MSK-BNB, 2014 WL 2743935 (D. Colo. June 17, 2014). Inmates must also participate and complete recommended programs. While the prisoner participates in his six-month program review, he is not entitled to have counsel or call witnesses. See Implementation of the Special Security Unit Program, December 21, 2009, p. 3. In the first and second phases, prisoners progress from getting two 15-minute non-legal phone calls per month to three such calls. See Charles E. Samuels, Jr., Director, Federal Bureau of Prisons, statement before the US Senate Committee on Judiciary Subcommittee on Constitution, Civil Rights, and Human Rights, congressional hearing “Reassessing Solitary Confinement,” Washington, DC, June 19, 2012, transcript at <http://www.justice.gov/ola/testimony/112-2/06-19-12-bop-samuels.pdf>; *Ibid.*, p. 47; Defendants’ Reply in Support of Motion for Summary Judgment, Exhibit Q-1, Declaration of ADX Associate Warden Louis J. Milusnic, ¶¶ 19-20, *Mohammed*, No. 1:07-cv-02697-MSK-BNB, 2014 WL 2743935. In the third phase of the program, prisoners get their first opportunity to have physical contact with other individuals—a minimum of 1.5 hours with a small group of inmates—although like other ADX prisoners they are still denied any contact visits. Defendants’ Reply in Support of Motion for Summary Judgment at 47-48, *Mohammed*, No. 1:07-cv-02697-MSK-BNB, 2014 WL 2743935; Defendants’ Reply in Support of Motion for Summary Judgment, Exhibit Q-1, Declaration of ADX Associate Warden Louis J. Milusnic, ¶ 21, *Mohammed*, No. 1:07-cv-02697-MSK-BNB, 2014 WL 2743935. As of September 2011 there were only six prisoners in this phase of the program. Opinion and Order, *Mohammed*, No. 1:07-cv-02697-MSK-BNB, 2014 WL 2743935. To get to the third phase, inmates must get their SAMs modified, though the procedure for obtaining modification is unclear.

<sup>730</sup> Columbia Law School’s Human Rights Institute interview with attorney (name and location withheld), July 13, 2012.

The Convention against Torture requires governments to systematically review arrangements for the custody and treatment of persons subjected to any form of confinement with a view to ensuring there is no inhuman or degrading treatment.<sup>731</sup>

Limited opportunities to contest conditions of confinement, including transfer into special units where prisoners are subject to solitary confinement or restrictions on their communication, raise concerns under the convention. In units that hold prisoners designated as “terrorists,” internal review systems too often fail to provide an effective check on unnecessary or prolonged solitary confinement or other restrictive conditions.

This is compounded by the fact that US law imposes unfair limitations on US prisoners’ ability to seek redress through litigation for abuse and dangerous conditions of confinement.<sup>732</sup>

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<sup>731</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 22, 2006, art. 11. If a person alleges ill-treatment, he or she has a right to complain to, and to have his case promptly and impartially examined by, authorities of the jurisdiction in question. Convention against Torture, arts. 12 and 13.

<sup>732</sup> Human Rights Watch, *No Equal Justice: the Prison Litigation Reform Act in the United States* (New York: Human Rights Watch, 2009), <http://www.hrw.org/sites/default/files/reports/uso609webwcover.pdf>.



## VII. Law Enforcement Relations with American Muslim Communities

Since the 9/11 attacks, successive US administrations have said that they are seeking to build relationships with American Muslim community leaders and groups, as they are critical sources of information to prevent terrorist plots. They have also said that they seek to help build American Muslim communities' sense of cohesion and trust in law enforcement, to counter violent extremism. Many of the policies and practices we have described in this report, however, run counter to these purported goals: in some communities, they have generated fear of interacting with law enforcement.

### Community Outreach and Countering Violent Extremism

"If the public understands the FBI's mission and views the FBI as cooperative and trustworthy, they are more likely to report a crime, return a telephone call or respond positively to being approached by an FBI agent," FBI official Brett Hovington told Congress in March 2010, in explaining the FBI's outreach with American Muslim communities.<sup>733</sup> The FBI and other parts of the Justice Department have promoted this vision of community-law enforcement partnerships by, for example, creating local advisory boards and meeting with local community groups.<sup>734</sup>

This vision was in some ways expanded with the White House's adoption in August 2011 of a strategy paper on "Countering Violent Extremism" (CVE).<sup>735</sup> The stated

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<sup>733</sup> "Working with Communities to Disrupt Terror Plots," Brett Hovington, Chief, Community Relations Unit, Office of Public Affairs, Federal Bureau of Investigation, statement before the House Committee on Homeland Security, Subcommittee on Intelligence, Information Sharing, and Terrorism Risk Assessment, Washington, DC, March 17, 2010, transcript at <http://www.fbi.gov/news/testimony/working-with-communities-to-disrupt-terror-plots> (accessed July 1, 2014).

<sup>734</sup> One positive result is the development of culturally and religiously sensitive guidelines for the FBI's arrest practices. Moreover, several U.S. Attorneys have publicly written or spoken out against stigmatization and vilification of Muslim communities, and sometimes they have sent powerful messages of support by investigating and prosecuting hate crimes. See Todd Jones, US Attorney for the District of Minnesota, "Arab and Muslim Engagement: Countering Violent Extremism through Community-Based Approaches," <http://www.justice.gov/usao/mn/oped.html> (accessed July 1, 2014); Curtis Morgan, "Feds work to build trust with Muslim community," *Miami Herald*, May 16, 2011, <http://www.mcclatchydc.com/2011/05/16/114255/feds-work-to-build-trust-with.html> (accessed June 26, 2014).

<sup>735</sup> Executive Office of the President of the United States, "Empowering Local Partners to Prevent Violent Extremism in the United States," August 1, 2011, [http://www.whitehouse.gov/sites/default/files/empowering\\_local\\_partners.pdf](http://www.whitehouse.gov/sites/default/files/empowering_local_partners.pdf) (accessed July 1, 2014), introduction.

goal of CVE is to “support and help empower American communities and their local partners in their grassroots efforts to prevent violent extremism,” including by “strengthening cooperation with local law enforcement.”<sup>736</sup> The Department of Homeland Security and DOJ were tasked with cultivating strong relationships with American Muslim communities throughout the country through community roundtables and presentations.<sup>737</sup>

The White House’s December 2011 “Strategic Implementation Plan” suggests that communities’ sense of cohesion and trust in law enforcement is critical to countering violent extremism:

Violent extremist narratives espouse a rigid division between “us” and “them”... Activities that reinforce our shared sense of belonging and productive interactions between government and the people undercut this narrative and emphasize through our actions that we are all part of the social fabric of America. As President Obama emphasized, when discussing Muslim Americans in the context of Al-Qaeda’s attempts to divide us, “we don’t differentiate between them and us. It’s just us.”<sup>738</sup>

### *Fears of Surveillance and Targeting in American Muslim Communities*

Despite this rhetorical commitment against stigmatizing American Muslim communities, many of the investigatory and prosecution practices described in this report undermine the vision and goals of “Countering Violent Extremism” and community outreach by generating a fear among communities that law

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<sup>736</sup> Ibid.

<sup>737</sup> Sahar F. Aziz, “Protecting Rights as a Counterterrorism Tool: The Case of American Muslims,” September 10, 2012, <http://dx.doi.org/10.2139/ssrn.2144299> (accessed June 20, 2014).

<sup>738</sup> Executive Office of the President of the United States, “Strategic Implementation Plan for Empowering Local Partners to Prevent Violent Extremism in the United States,” December 1, 2011, <http://www.whitehouse.gov/sites/default/files/sip-final.pdf> (accessed June 19, 2014), p. 8; see also, Benjamin B. Wagner, US Attorney for the Eastern District of California, “United Front is Best Against Terrorism,” *Merced Sun-Star*, April 9, 2011, <http://www.mercedsunstar.com/2011/04/09/1845500/benjamin-b-wagner-united-front.html> (accessed July 1, 2014).

enforcement views them with generalized suspicion and is monitoring their ordinary behavior.<sup>739</sup>

“This community is under siege,” said Tom Nelson, an attorney with several clients in Portland, Oregon’s American Muslim community. “And even if they’re not under siege, they think they are.”<sup>740</sup> In Dallas, Texas, Khalil Meek of the Muslim Legal Foundation Association said, “the community has an absolutely healthy feeling that everything it does is monitored.”<sup>741</sup>

We visited seven mosques around the country. At some mosques, congregants were initially suspicious of us and appeared alarmed by any mention of terrorism or law enforcement. Some mosque leaders told us that their communities had not been impacted by high-profile prosecutions and that they maintained cordial and frank relationships with law enforcement. Yet, in many mosques, we repeatedly heard suspicions of surveillance. Some of these accounts would have smacked of exaggerated suspicion were it not for the undeniable reality of government surveillance policies.

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<sup>739</sup> Our research, conducted in communities perhaps most likely to be fearful because of the publicized arrests and prosecutions of local Muslims, corroborates other reports by media and NGOs documenting fear of law enforcement. See, e.g., Muslim American Civil Liberties Coalition (MACLC), Creating Law Enforcement Accountability and Responsibility (CLEAR) project and Asian American Legal Defense and Education Fund (AALDEF), “Mapping Muslims: NYPD Spying and its Impact on American Muslims,” March 11, 2013, <http://www.law.cuny.edu/academics/clinics/immigration/clear/Mapping-Muslims.pdf> (accessed June 30, 2014), p. 29; Paul Vitello and Kirk Semple, “Muslims Say F.B.I. Tactics Sow Anger and Fear,” *New York Times*, December 18, 2009, <http://www.nytimes.com/2009/12/18/us/18muslims.html> (accessed June 26, 2014); Alejandro J. Beutel, “Muslim Americans and US Law Enforcement: Not Enemies, But Vital Partners,” *Christian Science Monitor*, December 30, 2009, <http://www.csmonitor.com/Commentary/Opinion/2009/1230/Muslim-Americans-and-US-law-enforcement-not-enemies-but-vital-partners> (accessed June 26, 2014); Nick Meyer, “US Attorney General Holder Addresses Detroit Community, Arabs, Muslims,” *New America Media*, November 24, 2009, [http://news.newamericamedia.org/news/view\\_article.html?article\\_id=73bf47330d40738abf2c6594076287ao](http://news.newamericamedia.org/news/view_article.html?article_id=73bf47330d40738abf2c6594076287ao) (accessed June 26, 2014); Jerry Markon, “Tension Grows Between Calif. Muslims, FBI after informant infiltrates mosque,” *Washington Post*, December 5, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/04/AR2010120403710.html> (accessed June 26, 2014); Teresa Watanabe and Paloma Esquivel, “L.A. area Muslims say FBI surveillance has a chilling effect on their speech and religious practices,” *Los Angeles Times*, March 1, 2009, <http://articles.latimes.com/print/2009/mar/01/local/me-muslim1> (accessed June 26, 2014); Jacqueline L. Salmon, “Muslim American Leaders at Odds Over FBI Contact,” *Washington Post*, March 28, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/27/AR2009032702178.html> (accessed June 26, 2014).

<sup>740</sup> Human Rights Watch interview with Tom Nelson, Portland, Oregon, August 13, 2012.

<sup>741</sup> Columbia Law School’s Human Rights Institute interview with Khalid Meek, Richardson, Texas, July 26, 2012.

Many mosque congregants described what they believed were signs of surveillance by local law enforcement or the FBI: unmarked cars parked outside of the mosque, unknown individuals writing down license plate numbers of cars parked at the mosque, or even showing up to hear Friday sermons and introducing themselves to other congregants and offering to help with jobs, loans or charity work.

Many people told us they believed that informants were eavesdropping on their conversations. Some expressed fear that informants were targeting Muslim youth—encouraging them to split off from the main congregation, form their own groups and detach themselves from mosque elders and leaders.<sup>742</sup> Advocates who work with Muslim communities told us that the fear of informants posing as fellow Muslims was damaging communities’ sense of safety and internal cohesion. The fear exists for everyone, from mosque leaders “to people who just go to Friday prayer,” said Mohamed Sabur, an attorney at the organization Muslim Advocates who regularly speaks with mosque and community leaders in California and the Pacific Northwest region. “[W]hether it’s people approaching other people in mosques, or in gyms, or elsewhere...[it] leaves no space in the Muslim community where there is trust.”<sup>743</sup>

Investigations and prosecutions involving local religious leaders have had a chilling effect on some communities we visited. For example, at Masjid as-Salam in Albany, New York, the FBI raided the mosque in connection with the investigation of its imam, Yassin Aref (see section II). After the raid, there was “a tremendous amount of fear and anger from the Muslim community,” said mosque president, Dr. Shamshad Ahmad. There was a perception that the government was coming after “religious, simple minded people, and [people] thought that this was a blanket movement so people became scared.”<sup>744</sup>

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<sup>742</sup> Muslim leaders have also described fears about the targeting of youth in media articles. See Alejandro J. Beutel, “Muslim Americans and U.S. Law Enforcement: Not Enemies, But Vital Partners,” *Christian Science Monitor*, December 30, 2009, <http://www.csmonitor.com/Commentary/Opinion/2009/1230/Muslim-Americans-and-US-law-enforcement-not-enemies-but-vital-partners> (accessed June 26, 2014).

<sup>743</sup> Columbia Law School’s Human Rights Institute email correspondence with Mohamed Sabur, Muslim Advocates, November 8, 2012.

<sup>744</sup> Columbia Law School’s Human Rights Institute interview with Shamshad Ahmad, president of Masjid as-Salam, Albany, New York, June 20, 2012. In another example, at Oregon’s largest mosque, Masjed As-Saber, the FBI has reportedly put at least five men affiliated with the mosque, including its longtime religious leader, on a no-fly list. “There’s this sense of nervousness...No one knows who’s secretly the FBI,” one congregant said. Helen Jung, “Masjed As-Saber, Oregon Mosque Under FBI Scrutiny,” *Religion News Service*, June 17, 2012,

### *Damage to American Muslim Community Institutions*

The US government says it considers mainstream American Muslim community institutions to be natural bulwarks against violent extremist ideology, and says it aims to strengthen them.<sup>745</sup> Yet, in some communities, the government's counterterrorism practices are driving people away from mosques and other community spaces.<sup>746</sup>

Many individuals described a generalized anxiety and a fear that they put themselves at risk of law enforcement surveillance and targeting whenever they engaged with Muslim and community institutions, for example, by attending mosque, contributing to charity organizations, volunteering or helping organize community events. They reported that this fear had, during some periods, driven them or their acquaintances to avoid expressing political opinions or engaging in basic religious practices such as group prayer. (However, other community members said that mosque attendance was not significantly affected by possible surveillance or other practices.)<sup>747</sup>

Some community members said that fears of surveillance and informant infiltration had negatively transformed the quality of the mosque—from a place of spiritual sanctuary and community togetherness to a place where they had to be on their guard, watch what they said, with whom they spoke, and even how often they attended services.<sup>748</sup>

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[http://www.huffingtonpost.com/2012/06/17/masjed-as-saber-oregon-mosque-fbi-scrutiny\\_n\\_1598520.html](http://www.huffingtonpost.com/2012/06/17/masjed-as-saber-oregon-mosque-fbi-scrutiny_n_1598520.html) (accessed June 26, 2014).

<sup>745</sup> According to “Preventing Violent Extremism,” “Countering radicalization to violence is frequently best achieved by engaging and empowering individuals and groups at the local level to build resilience against violent extremism. Law enforcement plays an essential role in keeping us safe, but so too does engagement and partnership with communities.” Executive Office of the President of the United States, “Empowering Local Partners to Prevent Violent Extremism in the United States” August 1, 2011, [http://www.whitehouse.gov/sites/default/files/empowering\\_local\\_partners.pdf](http://www.whitehouse.gov/sites/default/files/empowering_local_partners.pdf) (accessed June 19, 2014), p. 2.

<sup>746</sup> Ibid.

<sup>747</sup> Columbia Law School's Human Rights Institute interview with Mariam Abu Ali, July 13, 2012; Columbia Law School's Human Rights Institute interview with Khalid Meek, Richardson, Texas July 26, 2012; Human Rights Watch and Columbia Law School's Human Rights Institute interview with Daoud Ali, October 5, 2012; Columbia Law School's Human Rights Institute interview with Fatima Sarwar, Chicago, Illinois, October 8, 2012.

<sup>748</sup> Columbia Law School's Human Rights Institute interview with Leila Yaghi, Raleigh, North Carolina, October 14, 2012; Columbia Law School's Human Rights Institute interview with Fatima Sarwar, Chicago, Illinois, October 8, 2012; Human Rights Watch and Columbia Law School's Human Rights Institute interview with Imam Shaker Elsayed, July 13, 2012; Columbia Law School's Human Rights Institute interview with Shamshad Ahmed, Albany, New York, July 21, 2012. Charity and community groups have also reported having a harder time recruiting volunteers due to the climate of fear.

Muslim Advocates attorney Sabur meets regularly with Muslim communities across the country. He told us that American Muslims are more reluctant than ever to give to charity. “Eleven years after 9/11, things are engrained in the community. Some people go to the extent to not give to any Muslim cause. They don’t want to risk being scrutinized after the fact. After all, \$150 million to one organization led to a 20-year investigation.”<sup>749</sup> (Referring to the investigation of the Holy Land Foundation—see section III).

### *Damage to Community-Law Enforcement Trust*

Some American Muslims are reluctant to engage with law enforcement because they believe it could lead to their being arbitrarily targeted—either to become an informant, or to be prosecuted. As a result, they are wary of talking with law enforcement, which can have ramifications for their willingness to report a crime or fully cooperate in bona fide terrorism investigations.

American Muslims are most likely to engage with the FBI in two settings: in FBI “voluntary interviews” (visits to their homes, schools, and places of work) or in their own cultural or religious spaces. FBI agents have in some cases presented their attendance at mosque or cultural events, or their visits to individuals’ homes and schools, as “community outreach”—friendly and casual—but instead collected intelligence on the behaviors of law-abiding American Muslim individuals and communities.<sup>750</sup> This runs counter to the FBI’s own policy of separating

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American Civil Liberties Union, *Blocking Faith, Freezing Charity: Chilling Muslim Charitable Giving in the “War on Terrorism Financing”* (New York: ACLU, June 2009),

<https://www.aclu.org/files/pdfs/humanrights/blockingfaith.pdf#page=70> (accessed June 30, 2014), p. 69; Columbia Law School’s Human Rights Institute phone interview with Jennifer Turner, ACLU Human Rights Program, August 22, 2012.

<sup>749</sup> Columbia Law School’s Human Rights Institute email correspondence with Mohamed Sabur, Muslim Advocates, November 8, 2012.

<sup>750</sup> Multiple sources, including former and current government officials, told us that when the FBI attends or organizes events under the banner of “community outreach,” it sometimes gathers information on communities that it uses as intelligence, that is, to feed into analyses of radicalization and extremism, and as potential bases for investigations into particular individuals. Columbia Law School’s Human Rights Institute interview with (name and date withheld); Columbia Law School’s Human Rights Institute interview with (name and date withheld); see also, Sahar Aziz, “Protecting Rights as a Counterterrorism Tool: The Case of American Muslims.” Suspicions of the FBI’s misuse of community outreach that we heard from local activists and community organizations are difficult to corroborate by their nature, but there is strong documentary evidence regarding incidences in San Francisco where FBI agents who participated in community outreach events recorded notes on presentations and sermons at mosques and conversations at community and religious dinners. Though the FBI agents presented their efforts to outsiders as part of an outreach program, some of the information gathered was stored in FBI intelligence files, according to documents obtained through a Freedom of Information Act request by the ACLU. See ACLU,

investigation work from community outreach.<sup>751</sup> It has the effect of tainting all FBI community partnership efforts as insincere, and fuels the perception that the FBI views all American Muslims as inherently suspect.<sup>752</sup> It also drives speculation within communities that the FBI is taking advantage of their willingness to engage to perform clandestine investigations and ultimately build prosecutions against vulnerable community members.

Perhaps most damaging to community-law enforcement trust is that in parts of the country the FBI has pressured law-abiding individuals to become informants within their own communities—that is, to provide information on friends and community members. While there is no recent and large-scale study of these incidents, some American Muslims have described them as involving intimidation and harassment.

For example, the Minnesota chapter of the Council on American-Islamic Relations (CAIR) told us that since May 2012, it has received as many as three complaints each week from individuals the FBI allegedly approached to act as informants, typically in the Somali-American community. Saly M. Abd Alla, civil rights director at CAIR-Minnesota, recalled a recent case in which the FBI approached a 17-year-old student and offered to get him a “nice smartphone.”<sup>753</sup> Abd Alla added that in some cases, the FBI uses coercive tactics to get informants, for example, by threatening to stall their asylum application.

Journalists, local NGOs and national advocacy groups have also reported numerous cases where the FBI used pending immigration-related applications, immigration violations or placement on a “no-fly” list as leverage to pressure

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“Community Outreach as Intelligence Gathering,” December 1, 2011, [http://www.aclu.org/files/assets/aclu\\_eye\\_on\\_the\\_fbi\\_alert\\_community\\_outreach\\_as\\_intelligence\\_gathering\\_o.pdf](http://www.aclu.org/files/assets/aclu_eye_on_the_fbi_alert_community_outreach_as_intelligence_gathering_o.pdf) (accessed June 26, 2014).

<sup>751</sup> FBI policy requires that “the data regarding outreach contact should be kept separate from other databases where liaison information is stored.” See FBI National Press Office, “Response to ACLU Report on FBI’s Community Outreach Program,” Federal Bureau of Investigation press release, December 1, 2011, <http://www.fbi.gov/news/pressrel/press-releases/response-to-aclu-report-on-fbis-community-outreach-program> (accessed June 26, 2014).

<sup>752</sup> For a critical analysis, see Amna Akbar, “Policing ‘Radicalization,’” *UC Irvine Law Review*, vol. 3, no. 4 (December 2013).

<sup>753</sup> Columbia Law School’s Human Rights Institute phone interview with Saly M. Abd Alla, Civil Rights Director, CAIR-Minnesota, April 9, 2013.

individuals to become informants.<sup>754</sup> Some advocates have raised concerns that the FBI is particularly targeting youth to become informants.<sup>755</sup> Such tactics are not unique to the terrorism context, and are a long-standing practice in drug cases involving immigrant communities.<sup>756</sup> The FBI has denied these allegations, arguing that it is prohibited from using threats or coercion.<sup>757</sup> Some reports suggest the FBI does not use direct threats, but retaliates against individuals who refuse to become informants.<sup>758</sup>

Grand jury investigations, which can have consequences that reach far beyond the individuals who are ultimately indicted, have also contributed to mistrust. For example, some of the mistrust in the Muslim community in Minnesota stems from a lengthy grand jury investigation into several Somali-American youth believed to have traveled to Somalia to fight with Al-Shabaab, a Somali militant group with ties to Al-Qaeda.<sup>759</sup> The case against Amina Ali and Hawa Hassan (see section IV) stemmed in part from that grand jury investigation.

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<sup>754</sup> See, e.g., Trevor Aaronson, *The Terror Factory* (Brooklyn, New York: Ig Publishing, 2013), p. 99-100; Samreen Hooda, "Muslims On No-Fly List Now Suing FBI, Pressured to be Informants," *Huffington Post*, May 17, 2012, [http://www.huffingtonpost.com/2012/05/17/muslim-no-fly-list-fbi-informant\\_n\\_1524419.html](http://www.huffingtonpost.com/2012/05/17/muslim-no-fly-list-fbi-informant_n_1524419.html) (accessed June 26, 2104); Peter Waldman, "A Muslim's Choice: Turn U.S. Informant or Risk Losing Visa," *Wall Street Journal*, July 11, 2006, <http://online.wsj.com/article/SB115258258431002991.html> (accessed June 26, 2014); Shirin Sadeghi, "U.S. Citizen Put on No-Fly List to Pressure Him Into Becoming FBI Informant," *Truthout*, June 12, 2012, <http://truthout.org/news/item/9748-placement-on-no-fly-list-as-pressure-to-become-fbi-informant-the-latest-victim> (accessed June 26, 2014); Christian Farr and BJ Lutz, "Case of Marine on No-Fly List Not Isolated: CAIR," *NBC Chicago*, March 22, 2011, <http://www.nbcchicago.com/news/local/mashal-marine-no-fly-118468714.html> (accessed June 26, 2014); "FBI Looking at Somali Man's Intimidation Complaint," *Associated Press*, January 30, 2013, <http://minnesota.cbslocal.com/2013/01/30/fbi-looking-at-somali-mans-intimidation-complaint/> (accessed June 26, 2014); Council on American-Islamic Relations (CAIR), Greater Los Angeles Area Chapter, "The FBI's Use of Informants, Recruitment and Intimidation within Muslim Communities: Annotated Source List: News Articles and Cases Reported to CAIR," March 26, 2009, [http://ca.cair.com/download.php?f=/downloads/CAIR\\_FBI\\_Abuses\\_Annotated\\_Source\\_List-Articles\\_and\\_Cases.pdf](http://ca.cair.com/download.php?f=/downloads/CAIR_FBI_Abuses_Annotated_Source_List-Articles_and_Cases.pdf) (accessed June 26, 2014), p. 1.

<sup>755</sup> See, e.g., Alejandro J. Beutel, "Muslim Americans and U.S. Law Enforcement: Not Enemies, But Vital Partners," *Christian Science Monitor*, December 30, 2009, <http://www.csmonitor.com/Commentary/Opinion/2009/1230/Muslim-Americans-and-US-law-enforcement-not-enemies-but-vital-partners> (accessed June 26, 2014).

<sup>756</sup> See Colleen Melody, "Trading Information for Safety: Immigrant Informants, Federal Law-Enforcement Agents, and the Viability of Non-Deportation Agreements," *Washington Law Review*, vol. 83, no. 4 (November 2008), p. 599.

<sup>757</sup> Aaronson, *The Terror Factory*, p. 100 (quoting FBI spokesperson Kathleen Wright).

<sup>758</sup> For example, a Somali man approached by the FBI to become an informant reported that he was threatened by them, and shortly after their initial contact visit was fired from his job. "Muslim Group Seeks DOJ Probe of FBI 'Retaliation' in Minnesota," Council on American-Islamic Relations (CAIR) press release, February 18, 2013, <http://cair.com/press-center/press-releases/11722-muslim-group-seeks-doj-probe-of-fbi-retaliation-in-minnesota.html> (accessed June 30, 2014).

<sup>759</sup> Andrea Elliott, "A Call to Jihad, Answered in America," *New York Times*, July 11, 2009, [http://www.nytimes.com/2009/07/12/us/12somalis.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2009/07/12/us/12somalis.html?pagewanted=all&_r=0) (accessed June 30, 2014).



The Holy Land Foundation case included a list of 245 unindicted co-conspirators, including mainstream Muslim organizations such as CAIR.<sup>760</sup> Although the list of unindicted co-conspirators was confidential, it was leaked to the public.<sup>761</sup> The naming of the co-conspirators had wide-ranging consequences. The FBI, which previously worked closely with CAIR, dropped its formal association.<sup>762</sup>

In this context of distrust, some members of communities may view leaders and others who cooperate with the FBI as disconnected from their concerns. Ashraf Nubani, a Muslim lawyer based in Virginia who often speaks to national Muslim audiences at religious and cultural meetings across the country, said some community members might see Muslim leaders “hosting Iftar dinners” with government guests as “Uncle Toms” when the FBI later holds up the arrest of a teenager as “catching a big terrorist.”<sup>763</sup>

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<sup>760</sup> Government's Trial Brief, Attachment A, *United States v. Holy Land Found.*, 722 F.3d 677 (5th Cir. 2013) (No. 3:04-CR-0240-P).

<sup>761</sup> *Ibid.*; “U.S. Muslim Coalition Considers Suspending Relations with FBI,” PRNewswire news release, March 17, 2009, <http://www.prnewswire.com/news-releases/us-muslim-coalition-considers-suspending-relations-with-fbi-61857222.html> (accessed June 30, 2014); see also, Paloma Esquivel, “Some Influential Muslim Groups Question FBI's Actions,” *Los Angeles Times*, April, 20 2009, <http://articles.latimes.com/2009/apr/20/local/me-muslims-fbizo> (accessed June 26, 2014).

<sup>762</sup> US Department of Justice, Office of the Inspector General, Evaluation and Inspections Division, “Review of FBI Interactions with the Council on American-Islamic Relations,” report no. I-2013-007R (September 2013), <http://www.justice.gov/oig/reports/2013/eo707r-summary.pdf> (accessed July 11, 2014), p.1. The effects also reached beyond the US. One of the unindicted co-conspirators was a Canadian charity, the International Relief Fund for the Afflicted and Needy (Canada) (IRFAN-Canada). In a Canadian Revenue Agency (CRA) audit of IRFAN that started in 2008, the CRA cited the HLF list of unindicted co-conspirators as a factor in questioning IRFAN-Canada's previous representation that it was not aware of any credible allegation that organizations with which it worked were connected to Hamas. See Chloé Fedio, “Former charity funded terror group: federal audit,” *Toronto Star*, April 15, 2011, [http://www.thestar.com/news/gta/2011/04/15/former\\_charity\\_funded\\_terror\\_group\\_federal\\_audit.html](http://www.thestar.com/news/gta/2011/04/15/former_charity_funded_terror_group_federal_audit.html) (accessed June 24, 2014). No criminal charges were ever brought and CRA concluded its first audit action against IRFAN-Canada in late December 2004 without adverse outcome. In 2008, CRA commenced a second audit of IRFAN-Canada which continued until 2011, with CRA alleging, among other things, that the charity redistributed funds collected for other issues and sent them to the West Bank and Gaza. In a letter to IRFAN-Canada's lawyers in 2010, CRA noted that “court documents released during the successful 2008 conviction in the United States of the Holy Land Foundation for Relief and Development (HLF) on terrorist financing charges named IRFAN-Canada on a list of unindicted co-conspirators considered to be ‘entities that are and/or were part of the Global Hamas financing mechanism.’” See Letter from Charities Directorate, Canada Revenue Agency, to Carters Professional Corporation, December 14, 2010 (on file with Human Rights Watch). CRA considered this a factor in questioning IRFAN-Canada's previous representation that it was not aware of any credible allegation that organizations with which it worked were connected to Hamas. In 2011, IRFAN-Canada lost its charitable status. On April 29, 2014, IRFAN-Canada was declared a terrorist entity; IRFAN-Canada's appeal of the denial of its charitable status is on hold due to its recent designation. See US Department of Justice, Office of Inspector General, Evaluation and Inspections Division, “Executive Summary: Review of FBI Interactions with the Council on American-Islamic Relations,” no. I-2013-007R (September 2005), <http://www.justice.gov/oig/reports/2013/eo707r-summary.pdf> (accessed July 9, 2014), p. 1.

<sup>763</sup> Columbia Law School's Human Rights Institute interview with Ashraf Nubani, Vienna, Virginia, September 20, 2012.

In the worst cases, communities come to view Muslim leaders who cooperate with the FBI as unable or unwilling to protect them.<sup>764</sup> Sahar Aziz, a former civil rights advisor at DHS, warned that government use of community outreach to gather intelligence about Muslim communities, among other factors, is driving genuine leaders away, leaving the government to engage with “purported leaders of no repute within the communities and willing to tell the government whatever it wants to hear.”<sup>765</sup>

## Necessary Alternatives

Many community members and advocates—including some who maintained close, cooperative relationships with local law enforcement and FBI field offices—told us they were bewildered at the government’s choice to use surveillance and informants in mosques to track a community member believed to pose a terrorist threat, instead of approaching community leaders about it.

They questioned the government’s devotion of resources to investigation and prosecution, instead of to supporting community and religious institutions to detect and address pathways to crime, for example, through funding counseling and social services.

Some community advocates expressed frustration at the lack of government investment in community support. A few weeks after the government indicted 19-year-old Adel Daoud, who had been a student at a local Islamic school when undercover FBI agents began communicating online with him about planning a terrorist attack, we spoke with a Muslim community-based advocate in Chicago: “These kids don’t wake up one day and decide ‘I’m going to blow society up,’” she said, pointing out that they may have problems and start exploring extremist

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<sup>764</sup> As a 2013 study put it: “[B]ecause individuals who are prominent in the American Muslim community, or perceived to be leaders, are often primary candidates for [FBI] interviews, there is also an assumption that community leaders are compromised.” MACLC, “Mapping Muslims: NYPD Spying and its Impact on American Muslims,” March 11, 2013, <http://www.law.cuny.edu/academics/clinics/immigration/clear/Mapping-Muslims.pdf> (accessed June 30, 2014), p. 29.

<sup>765</sup> Sahar F. Aziz, “Protecting Rights as a Counterterrorism Tool: The Case of American Muslims,” [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2144299](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2144299) (accessed July 13, 2014); see also, “Federal Civil Rights Engagement with Arab and Muslim American Communities Polst 9/11,” Sahar F. Aziz, written testimony before the US Commission on Civil Rights, Washington, DC, November 9, 2012, testimony at [http://www.ispu.org/pdfs/aziz\\_testimony\\_usccr.pdf](http://www.ispu.org/pdfs/aziz_testimony_usccr.pdf) (accessed June 30, 2014).

websites, just as they might turn to drugs. The advocate told us she had approached various government agencies about funding for social services. “You cannot direct your attacks and assaults on this community and not invest in infrastructure for this community.”<sup>766</sup>

Corey Saylor of CAIR echoed calls for a counseling- and social service-based approach:

Many of these kids are salvageable when they first come to the attention of law enforcement. We could send an imam in and snap the kid back straight. That would be better than an informant walking him down the path, providing the means. I have no sympathy for someone who thinks they're pushing the button. But it never should have gotten there. Intervention can work. There are examples. When they're introduced to a mentor, a friend who has influence, instead of surfing around on the Internet—instead of violent extremists and undercover law enforcement. Some of these kids can be saved.<sup>767</sup>

There are significant reasons to be cautious about involving law enforcement in such interventions.<sup>768</sup> Yet the FBI's activities cut off any possibility of such an approach and contribute to a climate of fear, undermining the efforts of other federal agencies that engage with American Muslim communities.

The UK's Channel program involves local government authorities, community members and organizations from the education sector, social services, and children's and youth services, for social services-based interventions to identify and prevent “extremism.” It was established in 2007 as part of a larger program to

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<sup>766</sup> Columbia Law School's Human Rights Institute interview with (name withheld), Chicago, Illinois, October 10, 2013.

<sup>767</sup> Columbia Law School's Human Rights Institute phone interview with Corey Saylor, national legislative director for CAIR National, February 14, 2012.

<sup>768</sup> See Arun Kundhani, *Spooked! How Not to Prevent Violent Extremism* (London: Institute of Race Relations, 2009), <http://www.irr.org.uk/pdfz/spooked.pdf> (accessed June 30, 2014), pp. 28-34 (“What is at issue is whether professionals providing non-policing local services, such as youth workers and teachers, should be expected to routinely provide information to the counter-terrorist police not just on individuals who might be ‘at risk’ of committing a criminal offence but also on the political and religious opinions of young people, and the dynamics of the local Muslim community as a whole.”).

prevent “radicalization” and “extremism” among UK Muslims.<sup>769</sup> It has significant problems, including troubling reports that the UK has used these programs to gather intelligence from community organizations, effectively making the programs a “cover” for surveillance.<sup>770</sup> Yet Channel also illustrates the potential for community support as an alternative to prosecutions.<sup>771</sup> Individuals who are referred to the Channel program are not prosecuted. The program has received about 2,500 cases since it was established.<sup>772</sup>

In the US, there are at least a handful of cases where the government adopted a “soft intervention” approach and referred individuals to local community partners.<sup>773</sup> These past cases also show the feasibility of alternatives to abusive investigation and prosecutions. Yet any approach that involves the FBI and targets individuals based on their religious beliefs or political opinions raises serious concerns about respect for the freedom of expression.<sup>774</sup> Rights-respecting

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<sup>769</sup> United Kingdom Secretary of State for the Home Department, *Prevent Strategy* (London: The Stationary Office, June 2011), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/97976/prevent-strategy-review.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97976/prevent-strategy-review.pdf) (accessed July 10, 2014).

<sup>770</sup> See House of Commons, Communities and Local Government Committee, *Preventing Violent Extremism: Sixth Report of Session 2009-10* (London: The Stationary Office Limited, 2010), <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcomloc/65/65.pdf> (accessed June 30, 2014).

<sup>771</sup> The UK Association of Chief Police Officers describes Channel as using “early interventions to protect and divert people away from the risk [of committing terrorist-related activity] they face before illegality occurs.” “Channel – Protecting Vulnerable People from Being Drawn Into Terrorism,” Association of Chief Police Officers, <http://www.acpo.police.uk/ACPOBusinessAreas/PREVENT/Channel.aspx> (accessed June 30, 2014); Channel is part of a wider government strategy for preventing violent extremism known as Prevent. “Protecting the UK against terrorism,” last modified March 26, 2013 <https://www.gov.uk/government/policies/protecting-the-uk-against-terrorism/supporting-pages/prevent>. Prevent was updated in 2011 following significant criticism. See, “Updated anti-extremism strategy,” *BBC News Online*, June 8, 2011, <http://www.bbc.co.uk/news/uk-13679360> (accessed June 26, 2014).

<sup>772</sup> Columbia Law School’s Human Rights Institute interview with Arun Kundnani, New York, April 8, 2013; see also, Kundnani, *Spooked!*; Arun Kundnani, “Still Spooked,” *IRR News Service*, July 7, 2011, <http://www.irr.org.uk/news/still-spooked/> (accessed June 30, 2014). One danger of the Channel program is that community and organization partners may be pressured to provide information to the government not just about individuals who might be “at risk” of committing a criminal offense, but about the political and religious opinions of local communities and their members, which may be used as intelligence. The government may also use Channel to collect information from referred individuals to prosecute their friends or relatives. Furthermore, although the police purport to refer only serious cases to the Prevent program, referrals are based on activity, such as visiting extremist websites or making political statements, which may raise freedom of expression concerns.

<sup>773</sup> Columbia Law School’s Human Rights Institute interview with (name withheld), February 24, 2012; Columbia Law School’s Human Rights Institute phone interview with (name withheld), February 14, 2012.

<sup>774</sup> Some advocates question whether the FBI would use “soft interventions” as a pretext to gather information on communities and particular individuals, for the ultimate purpose of prosecutions. And others have noted that in the absence of a clear direction from the Department of Justice to regularize what is now an ad-hoc practice, FBI agents would face overwhelming pressure from their colleagues and other government agencies to take the risk-averse approach of investigation (for the purpose of prosecution).

interventions could be community-driven and based on community institutions such as mosques and schools.

While federal officials increasingly recognize the importance of developing such alternatives, the reality is that counterterrorism efforts, including surveillance and the use of informants, cause such significant harm to community-law enforcement trust that they may understandably deter communities from accepting any government support. Mosque and community leaders may also be reluctant to engage with youth and other members they identify as at risk of committing a crime, out of fear that they will be tainted by association and come under government scrutiny themselves. This underscores that the success of CVE depends in large part on the government limiting the use of informants and undercover agents and ending overbroad material support prosecutions.

In addition, the government should recognize that focusing CVE on American Muslim communities is stigmatizing and unwarranted. Indeed, various ideologies and social dynamics—not only Al-Qaeda inspired extremism—have resulted in domestic terrorism in recent years.<sup>775</sup> As a former US official explained, the current approach “risks perpetuating the ‘us-versus-them’ dichotomy that the White House is trying to overcome,” because the subtext is, “You Muslims are a potential threat and we, the government have to co-opt you.”<sup>776</sup>

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<sup>775</sup> See Executive Office of the President of the United States, “Empowering Local Partners to Prevent Violent Extremism in the United States” August 1, 2011, [http://www.whitehouse.gov/sites/default/files/empowering\\_local\\_partners.pdf](http://www.whitehouse.gov/sites/default/files/empowering_local_partners.pdf) (accessed June 19, 2014), p. 2. A focus on Al-Qaeda-inspired extremism and American Muslim communities finds that since 9/11, many acts of mass violence and terrorism in the United States have not been related to Al-Qaeda. One study estimates that there have been 33 terrorism-related fatalities in the United States in the 11 years since 9/11 involving Muslims; in comparison, there were 66 deaths from mass shootings by non-Muslims in 2012 alone. See Charles Kurzman, *Muslim-American Terrorism: Declining Further*, (Chapel Hill, North Carolina: Triangle Center on Terrorism and Homeland Security, 2013), [http://kurzman.unc.edu/files/2011/06/Kurzman\\_Muslim-American\\_Terrorism\\_February\\_1\\_2013.pdf](http://kurzman.unc.edu/files/2011/06/Kurzman_Muslim-American_Terrorism_February_1_2013.pdf) (accessed June 30, 2014). Another study notes that between 9/11 and 2012, more than 250 Americans have been killed in attacks by far-right individuals and groups, including white supremacists and Christian fundamentalists, and describes a “dramatic rise in the number of attacks and violent plots” inspired by far-right ideologies since 2007. Arie Perliger, *Challengers from the Sidelines: Understanding America's Violent Far - Right* (West Point, NY: Combating Terrorism Center, US Military Academy, 2013), p. 3, 100.

<sup>776</sup> Will McCants and Clinton Watts, “U.S. Strategy for Countering Violent Extremism: An Assessment,” *Foreign Policy Research Institute E-Notes* (December 2012), [http://www.fpri.org/docs/McCants\\_Watts\\_Countering\\_Violent\\_Extremism.pdf](http://www.fpri.org/docs/McCants_Watts_Countering_Violent_Extremism.pdf) (accessed July 6, 2014). McCants is a former State Department senior adviser for Countering Violent Extremism, and Clinton Watts is a former FBI special agent on a Joint Terrorism Task Force.

The government should not “try to make officers into religious experts or narrow their sensory field by focusing them on only one of dozens of strains of terrorism they might encounter.”<sup>777</sup>

Ultimately, the best approach to terrorism prevention may be to have a truly community-driven approach that focuses on addressing a wide array of threats, rather than merely one possibility.<sup>778</sup>

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<sup>679</sup> McCants and Watts, “U.S. Strategy for Countering Violent Extremism: An Assessment,” *Foreign Policy Research Institute E-Notes*.

<sup>778</sup> As the Homeland Security Advisory Council put it in 2010, while “community-based law enforcement efforts hold great promise in preventing violent crime that is terrorism-related, that promise will be best realized when local authorities work with community members to understand and mitigate all threats facing local communities.” Homeland Security Advisory Council, “Countering Violent Extremism (CVE) Working Group,” Spring 2010, [http://www.dhs.gov/xlibrary/assets/hsac\\_cve\\_working\\_group\\_recommendations.pdf](http://www.dhs.gov/xlibrary/assets/hsac_cve_working_group_recommendations.pdf) (accessed July 6, 2014).

## VIII. Full Recommendations

### To the US President

- Urge the attorney general, Department of Justice, and Bureau of Prisons to reform investigative, trial and detention practices.
- Ensure UN special rapporteurs have full access to facilities and prisoners to ensure compliance with international human rights standards.
- Direct reform of “Countering Violent Extremism” and Community Outreach programs.
  - Direct all federal agencies to ensure that activity conducted as “community outreach” or under the auspices of “countering violent extremism” (CVE) is not being used for intelligence purposes and that these programs are not exploited for intelligence collection.
  - Direct all federal agencies to ensure that counterterrorism and CVE programs are based on sound academic and empirical research methods, rather than discredited “radicalization” theories.
  - Direct federal agencies to support community-driven and rights-respecting programs as an alternative to the use of informants and abusive investigations.
    - Support social service providers and community organizations that develop programs based on needs they have identified.
    - Do not base referrals for soft intervention on religious behavior, political opinion, or other activity protected by the right to freedom of expression under international law.
  - Reconceptualize CVE to focus on domestic terrorism of all ideological forms.

## To the US Attorney General

- Reform investigation authorities.
  - Amend the attorney general's Guidelines for Domestic FBI Operations ("Guidelines") to:
    - clearly establish that decisions to initiate assessments, preliminary investigations, or investigations may not be made on the basis of religious behavior, political opinion, or other activity protected by the right to freedom of expression under international law;
    - prohibit the recruiting and tasking of informants in assessment and preliminary investigation phases, as under previous versions of the guidelines;
    - permit the FBI to initiate a full investigation only if it is supported by articulable facts giving rise to a reasonable indication that a violation of federal law may occur, as required under previous versions of the guidelines.
  - With minimal redactions to protect legitimately secret information, declassify and make public key portions of the FBI's Confidential Human Source Validation Standards Manual, in order to allow more robust public oversight of informant conduct and approval procedures.
- Permit challenges to material support charges: Permit individuals charged with material support under 18 USC § 2339B to challenge the underlying designation of the Foreign Terrorist Organization.
- Reform Special Administrative Measures: Revise the regulations governing Special Administrative Measures (SAMs), 28 C.F.R. § 501.2 and § 501.3.
  - Establish procedures enabling prisoners and their lawyers to directly challenge the imposition and renewal of SAMs, including resulting conditions such as solitary confinement, through a pre-deprivation hearing that includes opportunity to review evidence justifying SAMs, submit rebuttal evidence and provide witness testimony.



- Change the standard time for imposition of SAMs from one year to 120 days, as under previous versions of the regulation.
- Limit Monitoring of Attorney-Client Communications. Rescind the regulation that directs the Bureau of Prisons to facilitate the monitoring or review of communications between detainees and attorneys.

## **To the Federal Bureau of Investigation**

- Ensure that decisions to initiate assessments, preliminary investigations or investigations are not made on the basis of religious behavior, political opinion, or other activity protected by the right to freedom of expression under international law.
- Revise the Domestic Investigations Operations Guide (DIOG) to prohibit the recruiting and tasking of informants in assessment and preliminary investigation phases.
- Declassify and make public key portions of the DIOG detailing guidance provided to FBI agents for initiating monitoring of religious and political institutions.
- Report to congressional committees on the deployment of informants into community or religious spaces, including the number of informants and the scope of their activities.
- Ensure that information obtained through community outreach is not used for intelligence purposes, in accordance with existing FBI policy.
- Ensure that law enforcement agents do not use threats, including those involving the “no-fly” list, when recruiting informants.

## **To the Department of Justice National Security Division and US Attorneys’ Offices**

- Reform material support charging practices.
  - When charging under the material support statutes, 18 USC § 2339A and B:

- do not charge individuals or groups for providing material support based on activity protected by the right to freedom of expression under international law;
  - charge *only* individuals or groups who intended to further unlawful activity.
- Reform trial practices.
  - Review standards for introduction of evidence about terrorism that is not directly linked to defendants' conduct to ensure such evidence is not overly prejudicial.
  - Request anonymity of lay witnesses only to protect the witness from physical harm.
  - Request anonymity of law enforcement witnesses only in rare circumstances when absolutely necessary to protect ongoing investigations. Ensure defense receives adequate information to compensate for anonymity and permit thorough cross-examination of anonymous witnesses.
  - Where possible, only use as expert witnesses individuals whose identity and background can be made public.
  - Ensure expert witnesses have particular expertise in the precise matter at issue in each case.
- Reform sentencing: Adopt standards to restrict the seeking of the terrorism adjustment, particularly for cases where defendants did not intend physical harm to persons to result from their activities.
- Restrict use of Special Administrative Measures (SAMs).
  - In orders imposing SAMs, provide specific justifications for imposing severe restrictions, e.g., bars on communication with other inmates or on receipt of information, and ensure that restrictions are proportionate to the particular dangers or threats identified.

- During the SAMs renewal process, provide prisoners and their lawyers the opportunity to directly petition the prosecuting US Attorney's Office that makes the renewal request.
- Limit orders to monitor attorney-client communications to the cases in which no other means are available to protect against serious threats to national security, particularly for pretrial prisoners, and require court authorization and notification to defense counsel.
- Cease use of evidence obtained without warrant or court order: Do not seek to introduce evidence against defendants in criminal cases derived from warrantless surveillance conducted under section 702 of the FISA Amendments Act.

## To the Bureau of Prisons

- End prolonged solitary confinement: Prohibit all prolonged solitary confinement and indefinite solitary confinement. Where solitary confinement is used, ensure its duration is as short as possible and for a definite term, with notice to prisoners. Ensure periodic, individualized review of prisoners' placement in solitary confinement and provide prisoners a meaningful opportunity to challenge the specific justifications and evidence underlying their placement.
- Permit challenges to terrorism designations: Provide notice to prisoners of their designation as "terrorist" prisoners—whether domestic or international—and an opportunity to challenge the designation and related restriction or conditions of confinement.
- Improve conditions in detention.
  - Ensure that all prison facilities comply with Bureau of Prison regulations regarding minimum amount of time in recreation and that prisoners in pretrial detention are promptly notified of their rights.
  - End policies that prohibit all contact visits for prisoners convicted of terrorism offenses or who are otherwise deemed to have terrorist ties. Consistent with the Bureau of Prisons' general policy

recognizing the importance of the visitation for rehabilitation, permit contact visits unless evidence establishes a specific security risk with regard to communication or contact with particular individuals. For inmates for whom there are specific security risks, design contact visitation rooms that permit audio and visual monitoring.

- Increase phone call allowances for prisoners whose communication the Bureau of Prisons monitors, including prisoners under SAMs and at CMUs, to levels matching other prisoners under their security classification.
- Ensure humane prison conditions, including adequate lighting, heating and cooling, and ventilation, including at the CMUs and in pretrial detention Special Housing Units.
- Improve conditions at the Communication Management Units (CMUs).
  - Ensure adequate and timely access to medical and mental health services.
  - Investigate allegations of harassment, intimidation, and retaliation against Muslim and Arab prisoners.
  - Ensure all prisoners are given adequate accommodations for religious practices, including the opportunity for group prayer for any prisoners for whom it is a religious requirement.
  - Permit prisoners to challenge their CMU designation through a hearing and review process, for example similar to the process afforded to prisoners placed in a control unit, including a live hearing, advance notice of charges and the acts or evidence at issue, and the right to call witnesses and present documentary evidence.
  - Provide due process protections for prisoners prior to CMU designation, including meaningful notice of all reasons for CMU placement, and a hearing.

- Ensure meaningful and periodic review of CMU placement every 6 months and provide clear criteria for gaining transfer out of the CMU.
- Ensure the right to an effective defense.
  - Do not impose pretrial solitary confinement based solely on the severity of the offenses charged; ensure any imposition of pretrial solitary is imposed under meaningful judicial supervision, including of the impact on the defendant's ability to participate in preparation of a defense.
  - Do not unduly delay or arbitrarily block letters, visits and other forms of communication between prisoners and their lawyers.
- Reform Special Administrative Measures: In carrying out SAMs orders, apply the least restrictive conditions of confinement for prisoners and do not impose solitary confinement if reasonable alternatives are available. Provide prisoners meaningful opportunity to challenge conditions of confinement imposed due to SAMs, including prohibitions of contact visitations and receipt information.
- Improve procedures for transfer at Administrative Maximum in Florence, Colorado ("ADX Florence").
  - Notify prisoners of the specific evidence and factual allegations justifying their placement at ADX Florence and provide detailed guidance on the Step Down program to prisoners and their lawyers.
  - Ensure that prisoners with clear disciplinary records and good behavior have meaningful opportunity to progress through the Step Down program and be placed in less restrictive conditions, and do not base placement decisions exclusively on such prisoners' criminal convictions.
  - Allow prisoners who will not become eligible for Step Down for several years, but who have good behavioral history and who do not pose a specific threat to staff or other prisoners, the opportunity to have group meals, group recreation, group prayer, and group

therapy so as to alleviate the most psychologically damaging and punitive aspect of placement at the ADX.

## **To the Department of Justice Office of Inspector General**

- Review the use of informants in terrorism-related cases, including the FBI's oversight, the effectiveness of the rules under the Attorney General's Guidelines Regarding the FBI's Use of Confidential Human Sources and the FBI Domestic Investigations and Operations Guide, and the impact of national security exceptions.
- Review the impact of the most recent revisions to the Attorney General's Guidelines for Domestic Intelligence Operations, including its use of assessments and investigative techniques that were not previously authorized, on FBI investigation practices, FBI-community relations, and respect for freedom of expression and association rights in American Muslim communities.
- Review the conditions and restriction of privileges for prisoners charged or convicted of terrorism or terrorism-related offenses.

## **To the US Sentencing Commission**

- Conduct a study assessing whether the current system of sentence enhancements for terrorism is furthering appropriate criminal justice goals and is well-tailored to best meet those goals.
- Revise the Sentencing Guidelines' terrorism adjustment to apply only to federal crimes of terrorism, as defined in 18 U.S.C. 2332b(g), rather than any offense that "involved, or was intended to promote" such a crime.

## **To Federal Court Judges**

- Evidence and Witnesses:
  - In weighing the probative value of evidence against its potential prejudicial effects, take into account the context of heightened fear about terrorism.

- Permit fact witnesses to testify anonymously only in cases where their personal safety may be at risk by public disclosure of their identities.
- If it is necessary for an expert witness to testify anonymously—and no similarly qualified expert is available—ensure adequate measures are taken to permit the defense to effectively challenge their qualifications.
- Seek to provide specific recourse in judicial orders, ensuring that defendants under SAMs or otherwise held in Special Housing Units maintain adequate access to counsel in order to properly prepare their defense, in line with international human rights law standards.
- Ensure that sentencing decisions reflect the goal of rehabilitation.
- Do not impose terrorism adjustments on the basis of unproven conduct; use judicial discretion to depart from the US Sentencing Guidelines where an individual was not convicted of committing a violent offense.

## To the US Congress

- Investigations:
  - Request that the Office of the Inspector General of the Justice Department review the impact of the most recent revisions to the Attorney General’s Guidelines for Domestic Intelligence Operations on the FBI’s practices, including its use of assessments and investigative techniques that were not previously authorized.
  - Hold hearings and conduct robust oversight of the FBI’s activities, particularly with regard to the recruitment and tasking of informants.
  - Amend the material support statutes, 18 USC § 2339A and § 2339B, to:
    - Include a requirement for proof of specific intent to further unlawful activity before imposing criminal liability.

- Remove or clarify overbroad and impermissibly vague language in material support statute, including “training,” “service,” and “expert advice and assistance.”
- Detention: Enact legislation requiring the Bureau of Prisons and all federal agencies that operate or contract for prisons to prohibit prolonged solitary confinement and indefinite solitary confinement.
- Request that the Government Accountability Office review the Bureau of Prison’s treatment of prisoners under Special Administrative Measures and in Communication Management Units, including the use of solitary confinement and prohibition on contact visits.
- Sentencing: Enact legislation directing the US Sentencing Commission to amend the Sentencing Guidelines to modify the adjustment so that it does not artificially raise the defendant’s criminal history level to the highest level.
- Trials: Reform FISA Amendments Act to make clear that the Justice Department shall not introduce into as evidence in a criminal case information obtained pursuant to collection under section 702.



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The Columbia Law School’s Human Rights Institute is grateful to the Open Society Foundations and Bullitt Foundation for their financial support of the Institute’s Counterterrorism and Human Rights Project, and to Columbia Law School for its ongoing support.

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## Appendix

### A. Cases Reviewed

Case	Age at Time of Offense	Sting	Material Support	Fair Trial Concerns
Ahmed Abu Ali	21			Evidence Obtained by Coercion; Classified Evidence
Sami Al-Arian	Age at arrest: 45		Broad Charges	
Amina Ali/Hawa Hassan	Amina Ali: 32 Hawa Hassan: 61			Use of FISA-Derived Evidence at Trial
Yassin Aref/Mohammed Hossain	Yassin Aref: 34 Mohammed Hossain: 49	Identifying Targets for Prosecution Based on Religious or Political Views; Particularly Vulnerable Targets: Mental Illness, Indigence; Informants with Criminal Histories		Inflammatory Evidence/Improper Evidence of Terrorism – Inaccurate Translations; Terrorism “Experts”
Abdulhaleem Ashqar	45			Use of FISA-Derived Evidence at Trial
Sabri Benkahla	28			

Offense – Conviction	Sentencing Concerns (Including Sentence)	Setention 7 Treatment
(1) Conspiracy to provide material support and (2) providing material support and resources to a designated foreign terrorist organization (Al-Qaeda); (3) conspiracy to provide and (4) providing material support to terrorists; (5) contribution of services to Al-Qaeda and (6) receipt of funds from Al-Qaeda; (7) conspiracy to assassinate the president of the United States; (8) conspiracy to commit aircraft piracy; (9) conspiracy to destroy aircraft	Life in prison (originally 30 years)	SAMs, Challenging SAMs
Pleaded guilty: Conspiracy to contribute services to a designated foreign terrorist organization	57 months, with credit for time served	Pretrial Solitary Confinement: Other Physical Conditions and Treatment in Pretrial “Special Housing Unit” Detention
Conspiracy to provide material support to Foreign Terrorist Organization; Material Support to Foreign Terrorist Organization (12 counts)	Amina Ali: 20 years Hawa Hassan: 10 years	
Conspiracy to launder monetary instruments; laundering of monetary instruments; conspiracy to provide material support to terrorists; providing material support to designated foreign terrorist organizations; providing false statements to the FBI (Aref only)	Yassin Aref: 15 years Mohammed Hossain: 15 years	Pretrial Solitary Confinement – Impact of Pretrial Solitary on Pleas and Trial Preparedness; Restrictions on Family Contact
Obstruction of justice; criminal contempt	Lengthy Sentences Based on Unproven Conduct; Sentence: 11 years	
Obstruction of justice; providing false statements to the FBI	Lengthy Sentences Based on Non-Violent Conduct; 17-22 years	Obstacles to Challenging Prisoner Classification and Seeking Transfer to Less Restrictive Facilities

Case	Age at Time of Offense	Sting	Material Support	Fair Trial Concerns
Barry Bujol	29	Particularly Vulnerable Targets: Individuals Seeking Religious Guidance		Inflammatory Evidence/Improper Evidence of Terrorism – Inaccurate Translations; Terrorism “Experts”; Classified Evidence
Adel Daoud	19	Particularly Vulnerable Targets: Mental Illness, Indigence		Use of FISA-Derived evidence at trial
Rezwan Ferdaus	26	Identifying Targets for Prosecution Based on Religious or Political Views; Particularly Vulnerable Targets: Mental Illness, Indigence; Informants Playing a Key Role in Generating or Furthering the “Plot,” Informants with Criminal Histories		
Fort Dix Five	Dritan Duka: 28 Eljvir Duka 23 Shain Duka: 26 Mohammed Shnewer: 22 Serdar Tatar: 23	Identifying Targets for Prosecution Based on Religious or Political Views, Particularly Vulnerable Targets: Individuals Seeking Religious Guidance, Informants Playing Key Roles in Generating or Furthering the “Plot”		Evidence of Unrelated Terrorism or Violence; Use of FISA-Derived Evidence at Trial; Anonymous Juries, Selective Use of Informant Evidence
Fahad Hashmi	24-26		Broad Charges	
Hossam Smadi	19	Particularly Vulnerable Targets: Mental Illness, Indigence		

Offense – Conviction	Sentencing Concerns (including Sentence)	Detention and Treatment
Attempt to provide material support to a foreign terrorist organization; aggravated identity theft	20 years	Pretrial Solitary Confinement, Other Conditions and Impact on Rights to a Fair Trial and Counsel
Attempt to use a weapon of mass destruction	Pretrial (mandatory life imprisonment if convicted)	
Pleaded guilty: conspiracy to destroy national defense premises, conspiracy to damage and destroy buildings owned by the US government; conspiracy to provide material support to a designated foreign terrorist organization	17 years	
Conspiracy to murder members of the US military	Lengthy Sentences in Informant Cases; Dritan Duka: life imprisonment Eljvir Duka: Life imprisonment Shain Duka: life imprisonment Mohammed Shnewer: life imprisonment Serdar Tatar: 33 years	Pretrial Solitary Confinement, Other Conditions - Other Physical Conditions and Treatment in Pretrial “Special Housing Unit” Detention; Special Units for “Terrorism” Detainees: ADX and CMUs – ADX Florence, Restrictions on Family Contact, Transferring out of CMUs
Pleaded guilty: conspiracy to provide material support to a foreign terrorist organization	15 years	Pretrial Solitary Confinement, Other Conditions and Impact on Rights to a Fair Trial and Counsel; Special Administrative Measures – Severe Restrictions Imposed Through SAMs
Attempted use of a weapon of mass destruction	24 years	

Case	Age at Time of Offense	Sting	Material Support	Fair Trial Concerns
Oussama Kassir	33-34			Impact of Pretrial Solitary on Pleas and Trial Preparation
Raja Khan	55-56			
Tarek Mehanna	Indictment period lasted from 2001-2009; 26 years old when arrested		Broad Charges	Evidence of Unrelated Terrorism or Violence; Terrorism “Experts”
Adnan Mirza	28-29	Informants Playing Key Roles in Generating or Furthering the “Plot”		Inflammatory Evidence/Improper Evidence of Terrorism – Inaccurate Translations
Mohammed Mohamud	19			Anonymous Witnesses
Newburgh Four	James Cromitie: 45 David Williams: 28 Onta Williams: 32 Laguerre Payen: 27	Identifying Targets for Prosecution Based on Religious or Political Views; Particularly Vulnerable Targets: Mental Illness, Indigence; Informants Ignoring Targets’ Reluctance to Engage in Terrorism; Informants Playing Key Roles in Generating or Furthering the “Plot;” Informants with Criminal Histories		

Offense – Conviction	Sentencing Concerns (including Sentence)	Detention and Treatment
Conspiracy to provide material support to terrorists; providing material support to terrorists; conspiracy to provide material support to a foreign terrorist organization; providing material support to a foreign terrorist organization; conspiracy to kill or maim persons overseas; and distributing information relating to explosives, destructive devices, and weapons of mass destruction	Life imprisonment	Impact of Pretrial Solitary on Pleas and Trial Preparation; Special Administrative Measures – Severe Restrictions Imposed Through SAMs
Pleaded guilty: attempt to provide material support to a designated foreign terrorist organization	7.5 years	Pretrial Solitary Confinement, Other Conditions and Impact on Rights to a Fair Trial and Counsel - Impact of Pretrial Solitary on Pleas and Trial Preparation
Conspiracy to provide material support to a designated foreign terrorist organization; conspiracy to provide material support to terrorists; provision of material support to terrorists; conspiracy to kill in a foreign country; conspiracy to provide false statements; provision of false statements;	17 years	Special Administrative Measures – SAMs and the Attorney-Client Relationship
Conspiracy to provide material support to a designated foreign terrorist organization; unlawful possession of weapons	15 years	Pretrial Solitary Confinement, Other Conditions and Impact on Rights to a Fair Trial and Counsel
Attempt to use a weapon of mass destruction	Not yet sentenced	
Conspiracy to use weapons of mass destruction in the US; attempt to use weapons of mass destruction in the US; conspiracy to acquire and use anti-aircraft missiles; attempt to acquire and use anti-aircraft missiles; conspiracy to kill officers and employees of the US; attempt to kill officers and employees of the US (D. Williams and Cromitie)	Lengthy Sentences in Informant Cases; Cromitie: 25 years David Williams: 25 years Onta Williams: 25 years Laguerre Payen: 25 years	



Case	Age at Time of Offense	Sting	Material Support	Fair Trial Concerns
Portland Seven	Jeffrey Leon Battle: 28 Muhammad Ibrahim Bilal: 20 Ahmed Ibrahim Bilal: 18 Patrice Lumumba Ford: 27 Maher Hawash: 24 Martinique Lewis: 22	Particularly Vulnerable Targets: Mental Illness		
Uzair Paracha	23			
Raleigh 7 – Ziyad Yaghi/Omar Hassan	Ziyad Yaghi: 18-19 Omar Hassan: 22		Broad Charges	Terrorism “Experts”
Muhammad Salah	49			Prejudicial Evidence - Evidence Obtained by Coercion; Anonymous Witnesses; Anonymous Juries
Pete Seda/Al-Haramain				Evidence Suggestive of Terrorism in Non-Terrorism Cases; Terrorism Experts; Use of FISA-Derived Evidence at Trial
Portland Seven	Jeffrey Leon Battle: 28 Muhammad Ibrahim Bilal: 20 Ahmed Ibrahim Bilal: 18 Patrice Lumumba Ford: 27 Maher Hawash: 24 Martinique Lewis: 22	Particularly Vulnerable Targets: Mental Illness		

Offense – Conviction	Sentencing Concerns (including Sentence)	Detention and Treatment
Jeffrey Leon Battle and Patrice Lumumba Ford: conspiracy to levy war against the US Muhammad Ibrahim Bilal and Ahmed Ibrahim Bilal: conspiracy to provide material support to a foreign terrorist organization Maher Hawash: conspiracy to provide material support to a foreign terrorist organization Martinique Lewis: laundering monetary instruments	Jeffrey Leon Battle and Patrice Lumumba Ford: 18 years Muhammad Ibrahim Bilal: 10 year Ahmed Ibrahim Bilal: 8 years Maher Hawash: 7 years Martinique Lewis: 3 years	Other Physical Conditions and Treatment in Pretrial “Special Housing Unit” Detention
Conspiracy to and provision of material support to a terrorist organization; conspiracy to make a contribution of funds, goods, or services to Al-Qaeda; making or receiving a contribution of funds, goods, or services to Al-Qaeda; identification document fraud	30 years	Pretrial Solitary Confinement, Other Conditions and Impact on Rights to a Fair Trial and Counsel; Classified Evidence ; Special Administrative Measures – ADX “H Unit” Conditions for Post-Conviction SAMs Prisoners
Conspiracy to provide material support to terrorists; conspiracy to murder, kidnap, maim and injure persons (Yaghi)	Yaghi: 30.5 years Hassan: 15 years	
Obstruction of justice	21 months	
Conspiracy to defraud the US government; filing a false tax return (overturned in part, new trial ordered)	33 months	
Jeffrey Leon Battle and Patrice Lumumba Ford: conspiracy to levy war against the US Muhammad Ibrahim Bilal and Ahmed Ibrahim Bilal: conspiracy to provide material support to a foreign terrorist organization Maher Hawash: conspiracy to provide material support to a foreign terrorist organization Martinique Lewis: laundering monetary instruments	Jeffrey Leon Battle and Patrice Lumumba Ford: 18 years Muhammad Ibrahim Bilal: 10 year Ahmed Ibrahim Bilal: 8 years Maher Hawash: 7 years Martinique Lewis: 3 years	Other Physical Conditions and Treatment in Pretrial “Special Housing Unit” Detention

## B. Detention Conditions<sup>779</sup>

Pretrial Solitary	Pretrial Special Housing Unit	Post-Conviction Solitary	ADX Florence
<ul style="list-style-type: none"> <li>• Ahmed Abu Ali</li> <li>• Sami Al-Arian</li> <li>• Yassin Aref</li> <li>• Ahmed Ibrahim Bilal</li> <li>• Barry Bujol</li> <li>• Dritan Duka</li> <li>• Eljvir Duka</li> <li>• Shain Duka</li> <li>• Rezwan Ferdaus</li> <li>• Maher Hawash<sup>780</sup></li> <li>• Fahad Hashmi</li> <li>• Oussama Kassir</li> <li>• Raja Khan</li> <li>• Tarek Mehanna</li> <li>• Adnan Mirza</li> <li>• Uzair Paracha</li> <li>• Shifa Sadequee</li> <li>• Tarik Shah</li> <li>• Mohammad Shnewer</li> <li>• Matin Siraj</li> <li>• Serdar Tartar</li> <li>• Ziyad Yaghi</li> <li>• Mohammed Warsame</li> <li>• David Williams</li> </ul>	<ul style="list-style-type: none"> <li>• Sami Al-Arian</li> <li>• Ahmed Bilal</li> <li>• Barry Bujol</li> <li>• Dritan Duka</li> <li>• Eljvir Duka</li> <li>• Shain Duka</li> <li>• Fahad Hashmi</li> <li>• Oussama Kassir</li> <li>• Raja Khan</li> <li>• Uzair Paracha</li> <li>• Shifa Sadequee</li> <li>• Tarik Shah</li> <li>• Matin Siraj</li> </ul>	<ul style="list-style-type: none"> <li>• Ahmed Abu Ali</li> <li>• Dritan Duka</li> <li>• Eljvir Duka</li> <li>• Shain Duka</li> <li>• Fahad Hashmi</li> <li>• Oussama Kassir</li> <li>• Tarek Mehanna</li> <li>• Uzair Paracha</li> <li>• Ziyad Yaghi</li> </ul>	<ul style="list-style-type: none"> <li>• Ahmed Abu Ali</li> <li>• Dritan Duka</li> <li>• Eljvir Duka</li> <li>• Shain Duka</li> <li>• Fahad Hashmi</li> <li>• Ossama Hilder</li> <li>• Tarek Mehanna</li> <li>• Uzair Paracha</li> </ul>
24	13	9	8

<sup>779</sup> Six of the prisoners are not quoted or referred to by name in the report, but review and documentation of their experiences informed our analysis of detention conditions.

<sup>780</sup> Detained pursuant to a material witness warrant.

Pretrial SAMs	Post-conviction SAMs	CMU
<ul style="list-style-type: none"> <li>• Ahmed Abu Ali</li> <li>• Fahad Hashmi</li> <li>• Oussama Kassir</li> <li>• Tarek Mehanna</li> <li>• Uzair Paracha</li> <li>• Mohammed Warsame</li> </ul>	<ul style="list-style-type: none"> <li>• Ahmed Abu Ali</li> <li>• Fahad Hashmi</li> <li>• Ossama Hilder</li> <li>• Tarek Mehanna</li> <li>• Uzair Paracha</li> <li>• Mohammed Warsame</li> </ul>	<ul style="list-style-type: none"> <li>• Mufid Abdulqader</li> <li>• Yassin Aref</li> <li>• Shukri Abu Baker</li> <li>• Sabri Benkahla</li> <li>• Ahmed Ibrahim Bilal</li> <li>• Zachary Chesser</li> <li>• Eljvir Duka</li> <li>• Tarek Mehanna</li> <li>• Uzair Paracha</li> <li>• Shifa Sadequee</li> <li>• Mohammad Shnewer</li> <li>• Matin Siraj</li> <li>• Hossam Smadi</li> <li>• Avon Twitty</li> </ul>
6	6	14

## C. Length of Time in Pretrial Solitary Confinement

At least twenty-two individuals whose cases are documented in this report were held in some form of pretrial solitary confinement for varying lengths of time.<sup>781</sup> Seven of those individuals were held in Special Housing Units (SHUs) where they occasionally shared a cell with one other detainee for short periods of time between arrest and sentencing.<sup>782</sup>

Name	Length of Time in Pretrial Solitary	Prison
Ahmed Abu Ali	14 months	Alexandria Detention Center
Yassin Aref	17 months	Rennselaer County Jail
Sami Al-Arian	19 months	USP Coleman (SHU)
Ahmed Ibrahim Bilal	Information not available	
Barry Bujol	19 months	FDC Houston (SHU)
Dritan Duka	23 months	FDC Philadelphia (SHU)
Eljvir Duka	23 months	FDC Philadelphia (SHU)
Shain Duka	23 months	FDC Philadelphia (SHU)
Rezwan Ferdaus	13 months	Wyatt Detention Center
Fahad Hashmi	39 months	MCC Manhattan (10 South)
Oussama Kassir	18 months	MCC Manhattan (10 South)
Raja Khan	11 months	MCC Chicago (SHU)
Tarek Mehanna	30 months	Plymouth County Jail
Adnan Mirza	22 months	FDC Houston
Uzair Paracha	23 months	MCC Manhattan (10 South)
Shifa Sadequee	41 months	USP Atlanta (SHU)
Matin Siraj	12 months	MDC Brooklyn (SHU)
Tarik Shah	At least 14 months (maybe up to 29)	MCC Manhattan (10 South)
Mohammed Shnewer	23 months	FDC Philadelphia (SHU)
Serdar Tatar	23 months	FDC Philadelphia (SHU)
Mohammed Warsame	68 months	Oak Park Heights
David Williams	1 month	Westchester County Jail

<sup>781</sup> All of the solitary pretrial detention was administrative in nature except for 4 of the 11 months served by Raja Khan, which were punitive, and possibly the time in solitary served by Bilal, for which we were unable to obtain specific details. The case of Shifa Sadequee is not referred to by name in this report, but review and documentation of the case informed our analysis.

<sup>782</sup> Those individuals are Sami Al-Arian, Dritan Duka, Eljvir Duka, Shain Duka, Uzair Paracha, Mohammed Shnewer, Serdar Tatar.

## D. Quantitative Analysis of the Department of Justice Terrorism Conviction Dataset

There were 494 individuals on the Justice Department list of convictions for terrorism-related offenses between September 1, 2001 and December 31, 2011, which is the most current Justice Department data publicly available on terrorism-related cases.

The original Justice Department PDF lists the cases by Justice Department category. Category I cases involve charged violations of federal statutes that are directly related to international terrorism (regardless of the offense of conviction). Category II cases involve charged violations of a variety of other statutes where the investigation involved an identified link to international terrorism.

DOJ Category	Number of Offenders	Percentage of Offenders
I	225	46%
II	269	54%
Total	494	100%

### *Number of Convictions and Offenses Involved*

Among the 494 offenders, there were 917 separate convictions.<sup>783</sup> The majority of offenders on the DOJ list were only convicted of a single offense. However, 22 percent of those on the list were convicted of three or more offenses. The 917 convictions included 140 unique offenses. The two most frequent offenses, “Providing Material Support” and “Conspiracy,” account for more than 1 in 4 of the DOJ convictions.

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<sup>783</sup> This analysis does not consider the number of counts of each offense for each conviction. For example, if an individual was convicted of 2 counts of Conspiracy, the Conspiracy conviction is only counted once as there was only a single conviction.

## *Sentences for Material Support and Conspiracy*

**Table: Most Frequent Convictions by Offense**

Offense (US Code)	Number of Convictions	Percent of All Convictions
Providing Material Support to Designated Terrorist Organizations (18 U.S.C. § 2339B)	111	12%
Conspiracy (18 U.S.C. § 371)	92	10%
False Statements (18 U.S.C. 1001)	58	6%
Providing Material Support to Terrorists (18 U.S.C. § 2339A)	57	6%
136 Other Offenses	599	65%
<b>Total</b>	<b>917</b>	<b>100%</b>

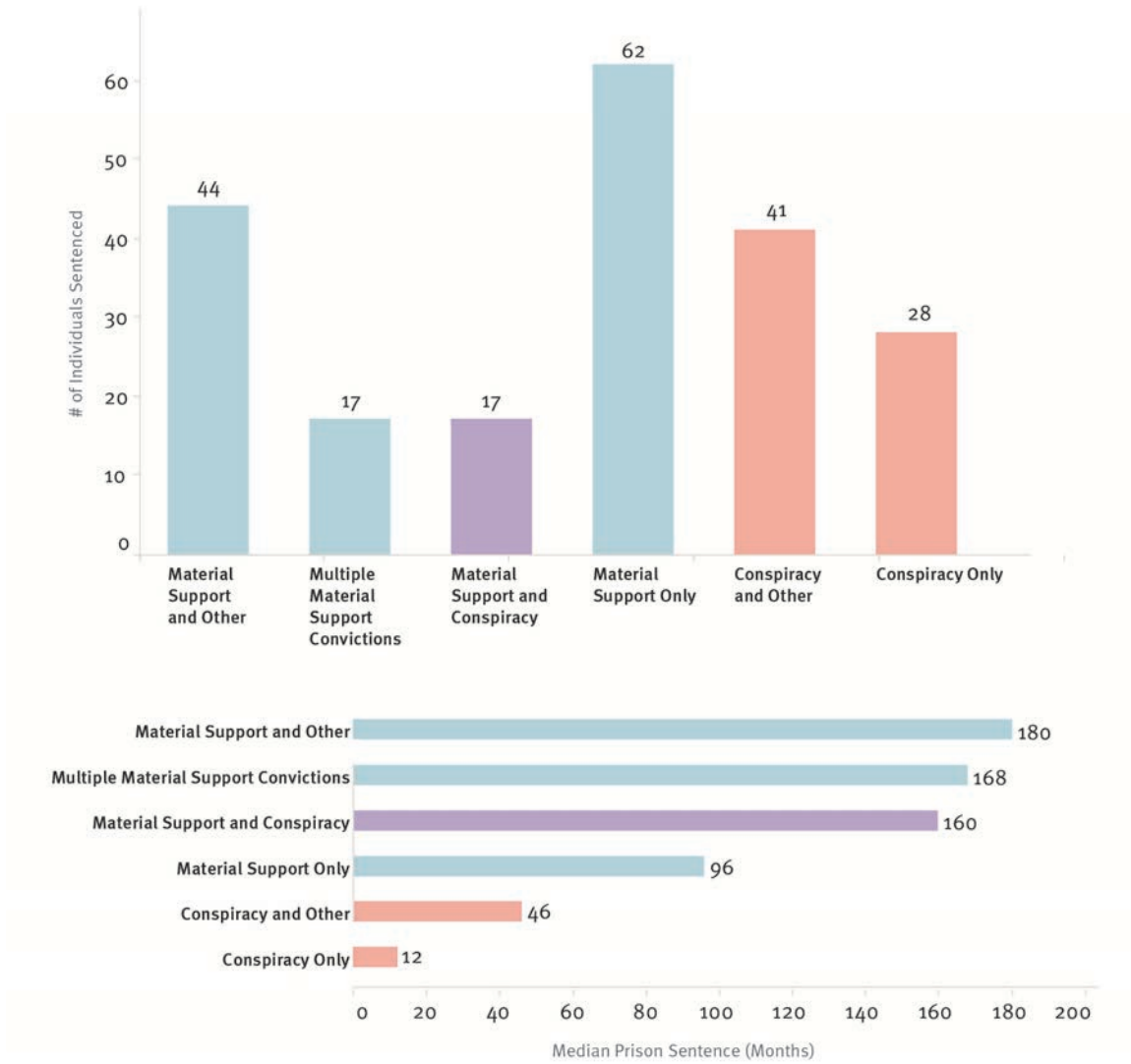
We examined sentences for those convicted of the offenses of Providing Material Support to Terrorists (18 U.S.C. § 2339A), Providing Material Support to Designated Terrorist Organizations (18 U.S.C. § 2339B), and Conspiracy (18 U.S.C. § 371). Sentencing data within the dataset was complicated by the fact that individuals could be convicted of multiple offenses, and multiple counts per offense, yet have a single sentence. Additionally, the circumstances regarding the crime of two people convicted of the same offense can greatly differ. Therefore, it is difficult to connect a sentence to an offense code for comparative analysis. However, exploratory analysis does provide some worthwhile information.

First, we analyzed those individuals convicted of a single offense, negating any influence of additional offenses on sentencing. We found that:

- All 12 people with a single conviction of Providing Material Support to Terrorists (18 U.S.C. § 2339A) were given prison sentences with the average sentence of 132 months. A quarter of this group was given the maximum 15 year sentence.
- Nearly all (96 percent) of the 48 people convicted only of Providing Material Support to Designated Terrorist Organizations (18 U.S.C. § 2339B) were given prison sentences—averaging 87 months. Of those, 15 percent were given the maximum 15-year sentence.

- There were 28 people convicted of Conspiracy (18 U.S.C. § 371). Nearly 3 out of 4 were given a prison sentence. Prison sentences averaged nearly 2 years for Conspiracy convictions.

## NUMBER AND MEDIAN SENTENCE OF MATERIAL SUPPORT AND CONSPIRACY CONVICTIONS





We gathered information from court documents on whether convictions were secured through guilty pleas or through trial for 489 of the 494 defendants. Of those, 74.2 percent were secured through plea. In comparison, in FY 2012, 97 percent of all federal convictions were secured by plea, indicating that terrorism defendants appear to be more likely (25.8 percent) to risk trial than other federal defendants (3 percent).<sup>784</sup>

If we examine the types of convictions for material support or conspiracy charges, the vast majority of those who were only convicted of a single crime pled guilty. Over 94 percent of those convicted only of conspiracy, and 87 percent of those convicted only of material support, pled guilty. Those that went to trial were more likely to have faced multiple charges of conspiracy and/or material support.

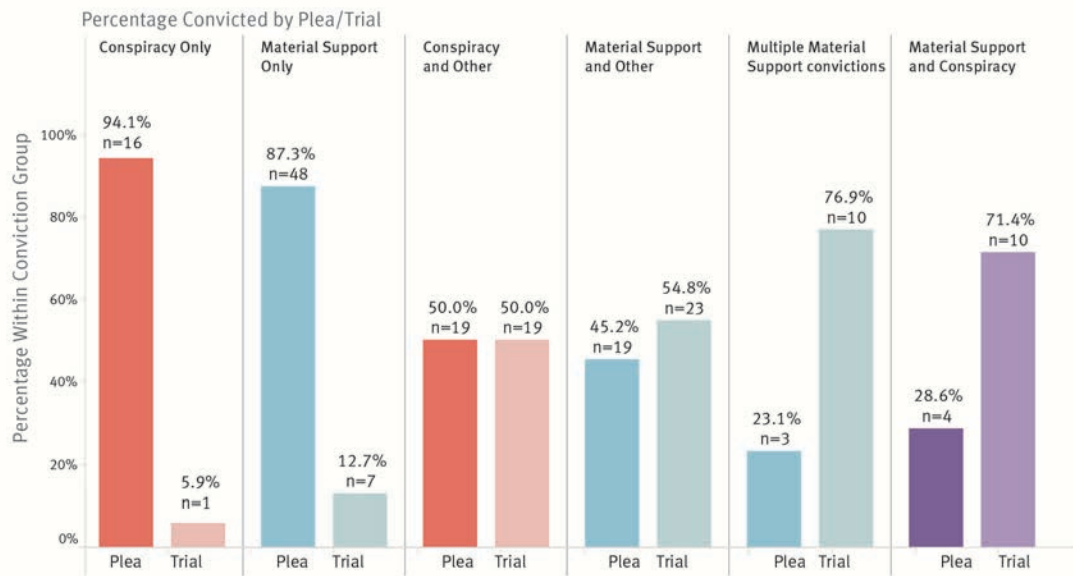
Those that went to trial consistently received longer prison sentences than those who pled. Of people only convicted of Material Support, those convicted by trial received 57 months more prison time, on average, than those who pled. Those who went to trial for both Material Support and Conspiracy charges received sentences nearly three times, or nearly 18 years, longer, on average, than people who pled to similar charges.<sup>785</sup>

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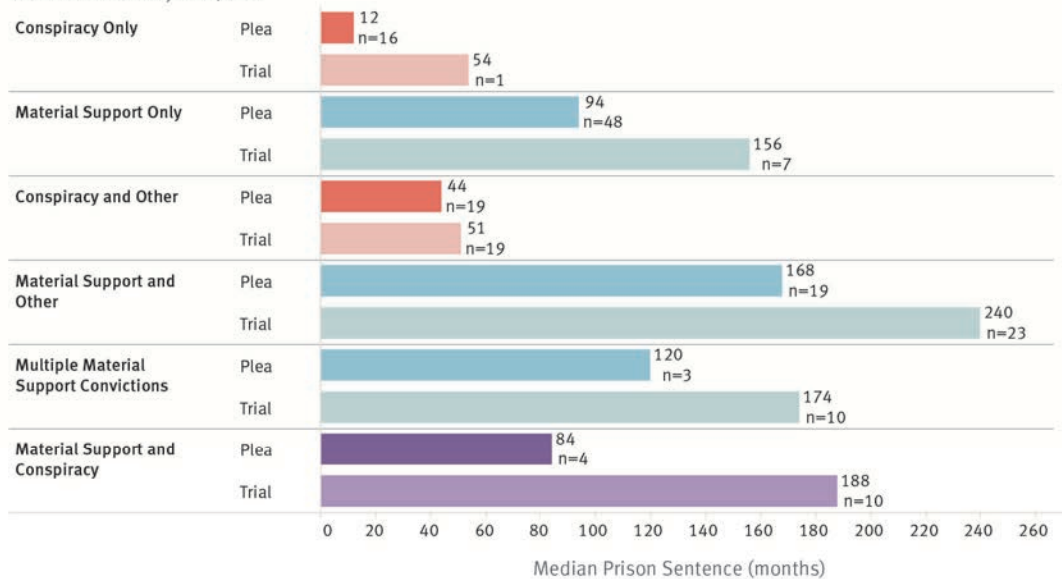
<sup>784</sup> United States Sentencing Commission, FY 2012 Sourcebook.

<sup>785</sup> Though all of these individuals were convicted of Material Support and Conspiracy, they may also have been convicted of other charges.

## MATERIAL SUPPORT AND CONSPIRACY CONVICTIONS AND SENTENCES BY WHETHER CONVICTED BY PLEA OR TRIAL



### Prison Sentence by Plea/Trial



\*Does not include life sentences.

## E. Government Correspondence

- Human Rights Watch and Columbia Law School's Human Rights Institute letter to the Federal Bureau of Investigation on November 21, 2012
- Human Rights Watch and Columbia Law School's Human Rights Institute letter to the Department of Justice National Security Division on February 25, 2013
- Department of Justice's response to Human Rights Watch and Columbia Law School's Human Rights Institute on May 23, 2013

# ILLUSION OF JUSTICE

## Human Rights Abuses in US Terrorism Prosecutions

Since September 11, 2001, the US government has prosecuted more than 500 people for alleged terrorism-related offenses in the United States. Many prosecutions have properly targeted individuals engaged in planning or financing terrorist acts under US law. However, in other cases, the individuals seem to have been targeted by US law enforcement because of their religious or ethnic background, and many appear to have engaged in unlawful activity only after the government started investigating them.

In *Illusion of Justice*, Human Rights Watch and Columbia Law School's Human Rights Institute examine 27 federal terrorism-related prosecutions against American Muslims since 2001 that raise serious human rights concerns. While the government maintains its actions are intended to prevent future attacks, in practice US law enforcement has effectively participated in developing and furthering terrorism plots. As a judge said in one case, the government "came up with the crime, provided the means, and removed all relevant obstacles," and in the process, made a terrorist out of a man "whose buffoonery is positively Shakespearean in scope."

Other concerns include the use of overly broad material support charges, prosecutorial tactics that may violate fair trial rights, and disproportionately harsh conditions of confinement.

US counterterrorism policies call for building strong relationships with American Muslim communities. Yet many of the practices employed are alienating those communities and diverting resources from other, more effective, ways of responding to the threat of terrorism. The US government should focus its resources on a rights-respecting approach to terrorism prosecutions, one that protects security while strengthening the government's relationship with communities most affected by abusive counterterrorism policies.



*Federal agents and police escort James Cromitie (center) from the FBI's New York headquarters on May 21, 2009. In 2011, Cromitie and three other men were sentenced to 25 years in prison for an alleged plot to bomb two synagogues in the Bronx and shoot down planes at an Air National Guard base in Newburgh, New York.*  
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