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Special Administrative Measures and the War on Terror: When do Extreme Pretrial Detention Measures Offend the Constitution?

Andrew Dalack
University of Michigan Law School

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SPECIAL ADMINISTRATIVE MEASURES AND THE WAR
ON TERROR: WHEN DO EXTREME PRETRIAL
DETENTION MEASURES OFFEND
THE CONSTITUTION?

*Andrew Dalack**

Our criminal justice system is founded upon a belief that one is innocent until proven guilty. This belief is what foists the burden of proving a person’s guilt upon the government and belies a statutory presumption in favor of allowing a defendant to remain free pending trial at the federal level. Though there are certainly circumstances in which a federal magistrate judge may—and sometimes must—remand a defendant to jail pending trial, it is well-settled that pretrial detention itself inherently prejudices the quality of a person’s defense. In some cases, a defendant’s pretrial conditions become so onerous that they become punitive and even burden his or her constitutional rights, including the Fifth and Sixth Amendment rights to due process and the effective assistance of counsel, respectively. Special Administrative Measures (SAMs) consist of a variety of confinement conditions that the attorney general may impose on an individual defendant at his or her discretion. Their purpose is to severely restrict communication by defendants with the demonstrated capacity to endanger the public through their third-party contacts. Although Congress did not create SAMs with terrorists in mind, their use in terrorism cases is almost routine. This Note explores the constitutional implications of SAMs when they are imposed on terrorism defendants who are detained pending trial. Specifically, my interview with criminal defense attorney Joshua Dratel sheds critical light on the deleterious impact SAMs have on a defendant’s Fifth Amendment right to due process and Sixth Amendment right to the effective assistance of counsel.

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* University of Michigan Law School, J.D. Candidate, May 2014. Andrew Dalack was the Executive Articles Editor for the *Michigan Journal of Race & Law*, Volume 19 and a Fellow for the Program in Race, Law & History. This Note would not have been possible without Professor Margo Schlanger’s guidance, expertise, and supervision. Special thanks is owed to Joshua Dratel for his willingness to candidly discuss his experiences and share his insight. Thank you to the Honorable James Carr, the Honorable Jeffrey Helmick, and Federal Defender Dennis Terez for sharing their thoughts on the significance of *United States v. Amawi*. Special thanks is also owed to Professor Jeanne Theoharis for sharing her knowledge about SAMs and for her mentorship. Thank you to Samia Ayyash and Mallak Anani for their help with the interviews. Finally, thank you to Professor Rebecca Scott, Professor Martha Jones, and to the Program in Race, Law & History for supporting this project.

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INTRODUCTION

On June 6, 2006, Syed Fahad Hashmi was arrested at London's Heathrow airport.¹ He was en route to Pakistan when British law enforcement officials detained him under the authority of a U.S. arrest warrant. An American citizen, Hashmi was charged with two counts of providing and conspiring to provide material support to Al Qaeda, as well as two counts of making and conspiring to make a contribution of goods or services to Al Qaeda. When he first appeared before Judge Loretta A. Preska, the chief judge of the United States District Court for the Southern District of New York, to ask for bail, Hashmi lacked a criminal history and enjoyed substantial ties to New York City; he grew up in Queens.

Nevertheless, Judge Preska denied Hashmi's request for bail. The friends and family who packed the courtroom on Hashmi's behalf sat in disbelief, but continued to support him. Initially, there was nothing particularly outstanding or unique about the circumstances of Hashmi's pretrial detention. Hashmi's lawyer was able to meet with him regularly and speak with others freely. Hashmi was allowed to visit with his friends and family, and his family members were allowed to discuss their visits. Hashmi had a radio in his cell, enjoyed regular access to the newspaper and other publications, and was even able to shower outside of a camera's view.

Then, five months after Judge Preska denied Hashmi bail, the Federal Bureau of Prisons (BOP)—at Attorney General Eric Holder's behest—

1. The following facts are taken from Jeanne Theoharis, *My Student, 'The Terrorist'*, CHRON. HIGHER EDUC. (Apr. 3, 2011), <https://chronicle.com/article/My-Student-the-Terrorist/126937/>.

imposed Special Administrative Measures (SAMs) on Hashmi, which placed him under twenty-three-hour lockdown and restricted his access to family, friends, and the media. The specifics of Hashmi's SAMs were nothing short of draconian. Hashmi was unable to communicate with anyone except his attorney and, in a severely limited fashion, his family. He received no more calls or letters; Hashmi could not even talk through his cell's walls because they were electronically monitored. Under the SAMs, Hashmi had to shower and relieve himself in the presence of cameras, and he was only allowed to write one letter per week, not more than three pages long, to a single member of his family.

Even though one of Hashmi's parents could technically visit their son once every other week, the visits were often not allowed to happen or were cut short for bureaucratic reasons. Hashmi was also unable to communicate with the news media at all. He could only access portions of newspapers approved by the BOP, and he had to wait thirty days after they were published before he could read them. Hashmi was forbidden from listening to a radio or from watching television. Denied access to fresh air or sunlight, Hashmi was allowed one hour of physical activity each day in a cage located within the Metropolitan Correctional Facility in Manhattan. This was only permitted after participating in a full strip search.

★ ★

U.S. law authorizes the attorney general to impose SAMs on defendants in cases where there exists "a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons."² According to the Department of Justice (DOJ), certain inmates are placed under SAMs and exposed to extreme restrictions on third-party communications in order to prevent acts of terrorism, violence, or the disclosure of classified information.³ Although the Federal government has not released up-to-date details and statistics on its application of SAMs, it appears that extreme detention measures are becoming more commonplace in terrorism prosecutions. According to the Center for Constitutional Rights (CCR), "Just as states such as California have used overly broad, exaggerated responses to the development of prison gangs or violence within prison to keep thousands of prisoners in inhumane prolonged solitary confinement, the Federal government routinely imposes extremely harsh forms of solitary confinement on persons suspected of or convicted of terrorist-related crimes."⁴

2. 28 C.F.R. § 501.3(a) (2012).

3. *Fact Sheet: Prosecuting and Detaining Terror Suspects in the U.S. Criminal Justice System*, DEP'T OF JUST. (June 9, 2009), <http://www.justice.gov/opa/pr/2009/June/09-ag-564.html> [hereinafter DOJ Factsheet].

4. WRITTEN TESTIMONY OF THE CENTER FOR CONSTITUTIONAL RIGHTS, HUMAN RIGHTS AND SOLITARY CONFINEMENT IN THE AMERICAS: THEMATIC HEARING BEFORE THE

Arabs and Muslims have a significant interest in questioning the Federal government's increased use of harsh pretrial detention measures in terrorism cases because they are the focus of a staggering proportion of all terrorism prosecutions in the United States.⁵ The DOJ has imposed SAMs on several Muslim terror defendants who have been detained pretrial, including Hashmi.⁶ Through SAMs, the Federal government is able to effectively keep accused terrorists walled off from society while they await trial. In Hashmi's case, by the time he pleaded guilty to one count of conspiracy to provide material support to al-Qaeda, he had spent almost three years in solitary confinement.⁷

The overall effect of Hashmi's pretrial confinement was devastating. The harm that solitary confinement inflicts on prisoners' mental and physical health is well documented. According to recent testimony given by the CCR before the Inter-American Commission on Human Rights (IACHR), the "symptoms [psychological experts] have commonly found in prisoners in prolonged solitary confinement may in fact be worse than they suspect."⁸ Prisoners subjected to solitary confinement often experience a "persistent and heightened state of anxiety, and paranoid and persecutory fears."⁹ Prolonged solitary confinement causes severe headaches, ruminations, irrational anger, violent fantasies, oversensitivity to stimuli, extreme lethargy, insomnia, confusion, and an impaired capacity to concentrate.¹⁰

While there is robust debate regarding the extent to which prolonged solitary confinement violates the Eighth Amendment's proscription of cruel and unusual punishment,¹¹ there is a dearth of analysis on whether extreme pretrial detention measures infringe on a defendant's Fifth Amendment right to due process, including the right to participate mean-

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 8 (Mar. 12, 2013), available at http://www.aclu.org/files/assets/ccr_testimony_to_iachr_for_thematic_hearing_3-12-13.pdf [hereinafter CCR Testimony].

5. DEP'T OF JUSTICE NAT'L SECURITY DIV., INTRODUCTION TO NATIONAL SECURITY DIVISION STATISTICS ON UNSEALED INTERNATIONAL TERRORISM AND TERRORISM-RELATED CONVICTIONS (2012), available at <https://www.fas.org/irp/agency/doj/doj060612-stats.pdf>; see also INVESTIGATIVE PROJECT ON TERRORISM, 2010 TERRORIST ACTIVITY IN FEDERAL COURTS (2010), available at <http://www.investigativeproject.org/documents/misc/626.pdf> (explaining that nearly every terrorism-related prosecution in 2010 involved an Arab or Muslim defendant, an Islamist organization, or a self-proclaimed Jihadist network).

6. See, e.g., *United States v. Abu-Ali*, 528 F.3d 210 (4th Cir. 2008); *United States v. Hashmi*, 621 F. Supp. 2d 76 (S.D.N.Y. 2008); *United States v. El-Hage*, 213 F.3d 74 (2d Cir. 2000).

7. Theoharis, *supra* note 1.

8. CCR Testimony, *supra* note 4, at 4.

9. *Id.*

10. *Id.*

11. See generally Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115 (2009).

ingfully in his or her own defense, and his or her Sixth Amendment right to receive effective assistance of counsel. It is widely recognized that pretrial detention itself negatively impacts a criminal defendant's ability to "prepare for trial," and complicates "consulting with counsel, searching for witnesses, investigating details of the [government's] case against him, and earning money for legal fees and expenses."¹² However, where pretrial detention is more oppressive, its collateral consequences on a defendant become less harmless and more offensive to the Constitution.

The first part of this Note thus addresses preventive pretrial detention generally and provides background information on SAMs. Specifically, Part I.A discusses the constitutional framework for preventive pretrial detention. Part I.B then breaks down the mechanics of SAMs, their historical evolution, and how they function today. Part II next addresses the constitutional implications of imposing SAMs pretrial, and begins with a discussion of the unique obstacles that are inherent to a terrorism prosecution against Arab and Muslim defendants. The rest of Part II is devoted to an in-depth analysis of how SAMs work to punish a defendant before conviction, deprive a defendant of his Fifth Amendment Due Process rights, and make it very difficult for a defendant to enjoy his Sixth Amendment right to the effective assistance of counsel. Essentially, this Note concludes that SAMs imposed before trial burden a defendant's ability to contribute to his own defense and amount to punishment before conviction in violation of his Fifth Amendment right to a fair trial. Furthermore, because SAMs substantially impair an attorney's ability to investigate a case and have a chilling effect on his or her advocacy, they also violate a defendant's Sixth Amendment right to the effective assistance of counsel.

I. BACKGROUND ON PREVENTIVE PRETRIAL DETENTION AND SPECIAL ADMINISTRATIVE MEASURES

A. *Preventive Pretrial Detention Generally*

The Constitution does not guarantee criminal defendants an absolute right to bail; rather, it simply proscribes setting excessive bail.¹³ In the federal system, there is a general presumption in favor of allowing a criminal defendant to remain free pending conviction.¹⁴ The Bail Reform Act of 1984 (BRA), however, formally authorizes a judge to detain a defendant pending trial if the judge determines that the defendant poses a dan-

12. Eric D. Blumenson & John J. Barter, *Pretrial Release, Bail, and Pretrial Detention*, in MASSACHUSETTS CRIMINAL PRACTICE, ch. 9, § 9.1 (Eric D. Blumenson & Arthur B. Leavens eds., 4th ed. 2012), available at <http://www.suffolk.edu/documents/LawMCP/Ch9PretrialReleaseBailandPretrialDetention.pdf>.

13. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); see also *United States v. Salerno*, 481 U.S. 739, 755 (1987) ("[T]he Eighth Amendment does not require release on bail.").

14. DAVID N. ADAIR, JR., *FED. JUDICIAL CTR., THE BAIL REFORM ACT OF 1984*, at 1 (3d ed. 2006).

ger to the community or is a flight risk.¹⁵ A court may not detain a federal criminal defendant until after holding a hearing to determine whether there is a condition or a combination of conditions that will “reasonably assure the appearance of the person as required and the safety of any other person and the community.”¹⁶

Although the prosecution typically has the burden to proffer clear and convincing evidence that an individual is dangerous before he or she may be detained accordingly,¹⁷ the BRA identifies certain crimes that trigger a rebuttable presumption in favor of detention.¹⁸ These crimes include drug offenses carrying a maximum sentence of ten years or more, offenses involving a “minor victim,” and acts of terrorism.¹⁹ An individual accused of terrorism, for example, must present evidence to the judge that is material to the issue of dangerousness in order to rebut the presumption favoring his or her detention.²⁰ If the evidence fails to persuade the judge that the defendant is not dangerous, then the individual is remanded pending trial.²¹

Pretrial detention is considered preventive rather than punitive because it is designed to protect the community and guarantee the defendant’s presence in court, not to punish him for a crime he allegedly committed.²² According to the BRA, nothing about pretrial detention “shall be construed as modifying or limiting the presumption of innocence.”²³ As a result, a criminal defendant is still technically presumed innocent until proven guilty even if he or she is detained pending trial. However, pretrial detention prioritizes protecting society over safeguarding the accused’s liberty interests. Therefore, it is no surprise that, while pretrial detention is designed to be preventive rather than punitive, it still punishes the criminal defendant.

For example, even though a pretrial detainee has not been convicted, he or she is subjected to the same conditions as other criminal convicts and thus suffers from the social stigma associated with incarceration. Further,

15. 18 U.S.C. § 3142 (2008).

16. *Id.* § 3142(f).

17. *Id.* § 3142(f)(2)(B). Although the Act does not articulate a standard of proof for a finding on likelihood to appear, there appears to be a consensus that the standard as to flight risk is beyond a preponderance of the evidence. *See, e.g.,* United States v. Himler, 797 F.2d 156 (3d Cir. 1986); United States v. Portes, 786 F.2d 758 (7th Cir. 1986); United States v. Chimurenga, 760 F.2d 400 (2d Cir. 1985); United States v. Fortna, 769 F.2d 243 (5th Cir. 1985).

18. 18 U.S.C. § 3142(e)(3).

19. *Id.* § 3142(e).

20. *Id.*

21. *Id.*

22. David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693 (2009) available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1134&context=californialawreview>.

23. ADAIR, *supra* note 14, at 61; 18 U.S.C. § 3142(j).

according to the American Bar Association's Pretrial Release Standards, not only is pretrial remand "harsh and oppressive," but it also interferes with a defendant's ability to defend himself.²⁴ In fact, one of the "most glaring concern[s] of the pretrial detainee is the large percentage of detainees who are eventually found guilty."²⁵ Studies conducted after Congress enacted the BRA demonstrated that, in 1987 and 1988, nearly 85 percent of pretrial detainees were eventually convicted.²⁶ A more recent study conducted in New York City reiterated that a positive correlation exists between pretrial detention and conviction. In 2008, "59% of cases with a released defendant ended in conviction, compared to 74% of cases with a detained defendant" citywide.²⁷

At the federal level, any likelihood that pretrial detainees face an increased risk of criminal conviction might indicate that judges are effectuating the BRA's goals by accurately predicting a defendant's dangerousness.²⁸ Conversely, the "tendency of pretrial detainees ultimately to be found guilty may [also] reflect juror bias," as jurors may infer that the defendant's pretrial confinement is indicative of his guilt.²⁹ Either way, it is clear that pretrial detention has a deleterious impact on a defendant's liberty, reputational interests, and the quality of his defense.

In *United States v. Salerno*,³⁰ the Supreme Court found pretrial detention constitutional and further explained that, "in appropriate circumstances," the government's interest in community safety outweighs an individual's liberty interests.³¹ Under the BRA, those "appropriate circumstances" are presumptively satisfied when an individual is charged with committing an act of terror. Although solitary confinement existed at the time the Supreme Court decided *Salerno*, SAMs were not yet a part of the attorney general's repertoire. After *Salerno*, however, the question remains: *when* does the government's interest in community safety justify imposing extremely harsh pretrial detention measures on a defendant? Is there something special about terrorism defendants that necessitates the use of SAMs

24. AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE 1 (3d ed. 2007), available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_toc.html.

25. Douglas J. Klein, *The Pretrial Detention "Crisis": The Causes and the Cure*, 52 WASH. U. J. URB. & CONTEMP. L. 281, 293 (1997), available at <http://law.wustl.edu/journal/52/306.pdf>.

26. *Id.*; see also Thomas E. Scott, *Pretrial Detention Under the Bail Reform Act of 1984: An Empirical Analysis*, 27 AM. CRIM. L. REV. 1, 15 (1989).

27. MARY T. PHILLIPS, PRETRIAL DETENTION AND CASE OUTCOMES, PART 2: FELONY CASES 25 N.Y.C. CRIMINAL JUSTICE AGENCY, INC. (2008), available at <http://www.cjareports.org/reports/felonydetention.pdf>.

28. Klein, *supra* note 25, at 293.

29. *Id.*

30. *United States v. Salerno*, 481 U.S. 739 (1987).

31. *Id.* at 740.

before they have even been convicted? In terrorism cases, pretrial detainees are regularly “held under highly restrictive conditions pursuant to ‘special administrative measures’ that significantly limit human contact and mobility.”³² This is especially true for Arab and Muslim terrorism defendants who are disproportionately subjected to SAMs pretrial.³³

B. *Special Administrative Measures (SAMs)*

The attorney general may authorize the Director of the BOP to impose SAMs after notifying the BOP in writing that he or she has reason to believe that a prisoner’s third-party communications or contacts pose a threat of death or serious bodily injury to others.³⁴ Pursuant to 28 C.F.R. § 501.3, the attorney general need not notify the BOP that a particular prisoner’s communications pose a risk in order to satisfy the statute’s notification requirement. At the attorney general’s direction, either the head of a federal law enforcement agency, or the head of a U.S. intelligence agency, may notify the BOP himself that a specific prisoner’s communications create a substantial risk of death or injury to others.³⁵ Ultimately, however, the authorization to implement SAMs must come from the attorney general.³⁶

SAMs usually “include housing [an] inmate in administrative detention and/or limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and use of the telephone” to the extent necessary to protect the public from violence or terrorism.³⁷ Under SAMs, a prisoner may be forced to endure administrative detention and restrictions on his “privileges” for “up to 120 days or, with the approval of the attorney general, a longer period of time not to exceed one year.”³⁸ The Director of the BOP may renew a prisoner’s SAMs at the conclusion of the one-year mark after the attorney general provides additional written notification that the prisoner’s third-party communications still present a risk of death or serious bodily injury to others.³⁹

32. Aziz Z. Huq, *Forum Choice for Terrorism Suspects*, 61 DUKE L.J. 1415, 1475 (2012).

33. Laura Rovner & Jeanne Theoharis, *Preferring Order to Justice*, 61 AM. U. L. REV. 1331, 1370 (2012).

34. DEP’T OF JUSTICE, OFFICE OF THE UNITED STATES ATT’YS, CRIMINAL RESOURCE MANUAL, at 9-24.100 [hereinafter CRIMINAL RESOURCE MANUAL] (quoting 28 C.F.R. § 501.3), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/24mcrm.htm. Title 28 of the Code of Federal Regulations governs matters of judicial administration and Chapter 5 deals with the Bureau of Prisons and the Department of Justice.

35. CRIMINAL RESOURCE MANUAL, *supra* note 34, at 9-24.100.

36. *Id.*

37. 28 C.F.R. § 501.3(a) (2001).

38. *Id.* § 501.3(c).

39. *Id.*

Typically, either an assistant U.S. attorney or a member of the U.S. intelligence community will submit a letter to the attorney general requesting authorization for the BOP to impose SAMs on a specific prisoner.⁴⁰ The requesting agency's letter must include a full statement of the prisoner's background and "proclivity for violence," a "discussion of why special measures should be implemented," and an explanation of "what special measures should be imposed" with a "justification for each."⁴¹ Although the prisoner receives a written notification of the SAMs when they are imposed, 28 C.F.R. § 501.3(b) provides that the "notice's statement as to the basis [for the SAMs] may be limited in the interest of prison security or safety or to protect against acts of violence or terrorism."⁴² Thus, the very rationale behind subjecting a particular prisoner to SAMs—to protect against acts of violence or terrorism—also functions as the government's justification for keeping the factual basis for the SAMs a secret.

Pursuant to the Administrative Remedy Program,⁴³ while it is certainly possible for a defendant to challenge the specifics of his SAMs in court, he must exhaust all available administrative remedies through the BOP before "the Bureau will refer the inmate to the appropriate statutorily-mandated procedures."⁴⁴ The most accurate statistics regarding the government's use of SAMs are contained in a factsheet published by the DOJ in June 2009. The statistics reflect the government's stated commitment to use SAMs only to "prevent acts of terrorism, acts of violence, or the disclosure of classified information."⁴⁵ As of May 22, 2009, "there were 44 inmates subjected to SAMs within a total federal inmate population of more than 205,000."⁴⁶ The government imposes SAMs on only a tiny fraction of the Federal prison population. "Of the 44 inmates subject to SAMs, 29 were incarcerated on terrorism-related charges, while 11 were incarcerated on violent-crime related charges (gangs, organized crime, etc.), and four were incarcerated on espionage charges."⁴⁷

1. A Defendant's Demonstrated Reach is a Necessary Condition for Imposing SAMs

The federal government established SAMs in May 1996 for gang leaders, organized crime bosses, and other individuals with the demon-

40. CRIMINAL RESOURCE MANUAL, *supra* note 34, at 9-24.100.

41. *Id.*

42. 28 C.F.R. § 501.3(b) (2001).

43. *Id.* § 542.10 ("The purpose of the Administrative Remedy Program is to allow an inmate to seek formal review of an issue relating to any aspect of his/her own confinement").

44. *Id.*; *see also* Booth v. Churner, 532 U.S. 731, 741 (2001) (holding that Congress has clearly mandated that a Federal inmate exhaust all available administrative remedies, "regardless of the relief offered through administrative procedures").

45. DOJ Factsheet, *supra* note 3.

46. *Id.*

47. *Id.*

strated capacity to pose a threat to the public, especially potential witnesses, from behind bars.⁴⁸ Despite the fact that 28 C.F.R. § 501.3(a) makes clear that SAMs exist in order to protect the public from acts of terrorism, SAMs “were not necessarily developed in connection with terrorism cases or defendants.”⁴⁹ SAMs first appeared in a 1998 prosecution against Luis Felipe, a notorious gang leader also known as “King Blood.”⁵⁰ There, the court rejected Felipe’s challenges to the government’s “special” conditions of confinement at sentencing because Felipe had demonstrated his willingness and capacity to continue illegal activities while incarcerated.⁵¹ While in prison, Felipe ordered his underlings to commit at least six murders that resulted in several deaths and injured numerous bystanders.⁵² The court found that the government’s interest in protecting the community from a career gangster outweighed any concerns Felipe’s burdensome confinement conditions generated.⁵³

Even a cursory reading of the Second Circuit’s decision in *United States v. Felipe* clearly indicates that the government placed King Blood under SAMs because he communicated with third parties from within prison in order to kill, intimidate, and extort.⁵⁴ According to the Second Circuit, “[f]rom his jail cell, Felipe committed the very crimes for which he is now serving a life sentence. And, until shown differently, we agree with the district court’s observation that, given the opportunity, [Felipe] would likely continue such illegal activity.”⁵⁵

It is important to note that in deciding whether Felipe’s SAMs were justified, the scope of the court’s inquiry was limited to an examination of Felipe’s behavior *in prison*. The court did not justify keeping Felipe under SAMs simply because he demonstrated a general penchant for violence as a gang leader. Rather, Felipe’s SAMs were a direct consequence of the established and verifiable danger Felipe’s third-party communications created for the public. The fact that the government’s reasons for maintaining the SAMs were concrete and not speculative was critical to the Second Circuit’s decision to affirm the district court.

48. Rovner & Theoharis, *supra* note 33, at 1366–67.

49. Joshua Dratel, *Ethical Issues in Defending a Terrorism Case: How Secrecy and Security Impair the Defense of a Terrorism Case*, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 81, 84 (2003).

50. *Id.* at 84–85; *United States v. Felipe*, 148 F.3d 101 (2d Cir. 1998).

51. *Felipe*, 148 F.3d at 110.

52. *Id.* at 111.

53. *Id.*

54. Heena Musabji & Christina Abraham, *The Threat to Civil Liberties and Its Effect on Muslims in America*, 1 DEPAUL J. FOR SOC. JUST. 83, 104 (2007).

55. *Felipe*, 148 F.3d at 111.

2. The Government's Interest in Imposing SAMs on Terrorism Defendants is Specific to the Individual Defendant's Circumstances

The Second Circuit upheld Felipe's SAMs because he actually tried to intimidate witnesses and coordinate murders while incarcerated; the government could not justify the SAMs based simply on the premise that Felipe was a notorious gangster. If the attorney general decides that SAMs are appropriate, they must be "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."⁵⁶

Where a terrorism defendant has the requisite "demonstrated reach" to abuse third-party communications but lacks a history of doing so, the government certainly has an interest in restricting his or her communications. The DOJ and the BOP are well aware of the risks created by allowing terrorism defendants with alleged ties to terror organizations the same third-party communication privileges as other inmates.⁵⁷ Thus, courts recognize that the government's interest in preventing defendants with sophisticated international networks and known links to notorious terrorists is sufficient to justify SAMs even where there is a dearth of evidence that the suspected terrorist has attempted to use third-party communications—with unconfined co-conspirators or others—to perpetrate or promote terrorism.⁵⁸

For example, in a recent memorandum defending his decision to impose SAMs on Dzhokhar Tsarnaev, one of the Boston Marathon bombing suspects, Attorney General Eric Holder clarified how severe restrictions on a pretrial terrorism defendant's third-party communications, particularly with the media, work to keep the public safe from future acts of terror and violence. Operating under the premise that Tsarnaev has the ability to "aid, knowingly or inadvertently, in plans that create a substantial risk that [his] communications or contacts with persons could result in death or serious bodily injury to persons," Holder explained that measures limiting Tsarnaev's access to the telephone and mail were necessary to prevent

56. *United States v. Reid*, 214 F. Supp. 2d 84, 92 (D. Mass. 2002).

57. *See, e.g.*, Letter from Assistant U.S. Attorney Patrick Fitzgerald to Attorney Michael Young (Nov. 13, 1998) ("It needs to be candidly recognized up front that these defendants are not like 'most persons detained at [Metropolitan Correctional Center]' to which [Michael Young's] letter makes frequent comparison. Unlike 'most persons detained at MCC . . . each of the defendants has been closely tied to the activities of the al Qaeda terrorist organization, whose openly avowed goal is the slaughter of American civilians anywhere in the world they can be found").

58. *See United States v. El-Hage*, 213 F.3d 74, 81 (2d. Cir. 2000) ("The government contends the restrictions imposed on El-Hage are reasonably related to the nonpunitive objective of protecting national security interests. It maintains that the challenged conditions serve the regulatory purpose of preventing El-Hage from communicating with his unconfined co-conspirators, and thereby from facilitating additional terrorist acts by those co-conspirators . . . [and the] government has supported these assertions with ample evidence of [El-Hage's] extensive terrorist connections").

Tsarnaev from arranging “terrorist or criminal activities” and “receiving or passing along critically timed messages,” respectively.⁵⁹ Restricting communication, particularly with the media, thus ensures that Tsarnaev, or any other similarly situated defendant, cannot make statements designed to incite “terrorist, criminal, and/or violent offenses,” and interrupts “communication patterns [that] the inmate may develop with the outside world.”⁶⁰

In defending his decision to subject Tsarnaev to SAMs, Attorney General Holder conceded that virtually eliminating Tsarnaev’s access to the media, telephone, and mail “may be an excessive measure except in the most egregious of circumstances[.]” He nevertheless asserted that such measures are necessary because of Tsarnaev’s personal circumstances, namely his past behavior and the “high probability of calls to co-conspirators to arrange terrorist or criminal activities.”⁶¹ Assuming that the attorney general considers reliable and competent evidence to determine whether there is a high probability that a specific terrorism defendant may abuse third-party communications, the more evidence showing that an accused terrorist actually enjoys connections to identified terrorists, networks, or cells, the more reasonable it becomes to restrict his third-party communications.

II. PRETRIAL SAMs VIOLATE A DEFENDANT’S FIFTH AND SIXTH AMENDMENT RIGHTS

A. *Terrorism Cases Not Involving SAMs*

Introducing SAMs to the preventive pretrial detention of terror suspects exacerbates certain obstacles endemic to terrorism cases. Even in the “ordinary” terrorism case, the criminal defense attorney “assumes a unique role,” as “he is the only person in the justice system whose sole obligation and loyalty is to the defendant.”⁶² Although objectivity is necessary while preparing or analyzing a particular case, a criminal defense attorney’s constitutional “duty is purely subjective: advancing the best interests of the client.”⁶³ This duty may create tension “in any case in which the crime charged is nefarious and the defendant is unsympathetic.”⁶⁴ Accordingly, “those conflicts that the criminal defense lawyer’s role engenders are mul-

59. Memorandum from Attorney General Eric Holder to Bureau of Prisons Director Charles E. Samuels, Jr., Origination of Special Administrative Measures Pursuant to 28 C.F.R. § 501.3 for Federal Bureau of Prisons Pretrial Inmate Dzhokhar Tsarnaev 16 (Aug. 27, 2013) [hereinafter Memorandum from Eric Holder].

60. *Id.* at 17.

61. *Id.* at 16.

62. Dratel, *supra* note 49, at 81.

63. *Id.*

64. *Id.*

tiplied exponentially and become substantially more difficult to navigate” when the defendant is an accused terrorist.⁶⁵

While it is difficult to identify a specific terrorism prosecution as prototypical or representative of all terrorism cases involving Arab and Muslim defendants, the infamous “Toledo Terror” plot highlights some of the more glaring difficulties inherent to terrorism litigation. In *United States v. Amawi*, Mohammad Amawi, Marwan El-Hindi, and Wasim Mazloun were convicted of conspiracy to commit several acts of terrorism.⁶⁶ Darren Griffin, a paid informant for the Federal Bureau of Investigation (FBI), made contact with El-Hindi in September 2002 after embedding himself in Toledo, Ohio’s local Muslim community.⁶⁷ Griffin recorded each of the three defendants discussing his desire to be trained in guns, explosives, and sniper tactics. Additionally, on the only occasion in which the group of four met face-to-face, he recorded all of the defendants expressing their desire to be trained in order to kill American soldiers overseas.⁶⁸ Griffin was present during all recorded conversations, and the government offered no evidence of phone calls or e-mails “dealing with the alleged plot among only the defendants.”⁶⁹

Despite the fact that none of the defendants in *Amawi* formally encountered SAMs, defending the case was complicated and frustrating. None of the three defendants had significant previous criminal histories; however, they all failed to rebut the BRA’s presumption in favor of their pretrial detention. Normally, remanded criminal defendants in the Northern District of Ohio are detained inside of Lucas County Jail because it is located near the Federal courthouse, and this location helps defendants and their attorneys access one another with relative ease.⁷⁰ Amawi, El-Hindi, and Mazloun, however, were all detained in a Federal prison in Milan, Michigan, located about forty minutes from Toledo.⁷¹ Judge Helmick represented Wassim Mazloun before his appointment to the Federal bench. He indicated that simply communicating with Mazloun was arduous. Scheduling a physical visit with Mazloun required Judge Helmick to

65. *Id.*

66. *United States v. Amawi*, 695 F.3d 457, 465 (6th Cir. 2012). Amawi, El-Hindi, and Mazloun were accused of conspiracy to kill and maim people living outside the United States, conspiracy to provide material support to terrorists whose goal was to kill U.S. citizens, and sharing information regarding how to manufacture explosives, destructive devices, and weapons of mass destruction. *Id.* at 490–91.

67. *Id.* at 466–67.

68. *Id.* at 467.

69. *3 Men in Toledo Terrorism Case Are Sentenced*, ASSOCIATED PRESS (Oct. 21, 2009), <http://www.toledonewsnow.com/story/11356307/3-men-in-toledo-terrorism-case-are-sentenced>.

70. Interview with James Carr and Jeffrey Helmick, Fed. Dist. Judges for the N. Dist. of Ohio, in Toledo, Ohio (Nov. 20, 2012) [hereinafter Interview with Judge Carr and Judge Helmick].

71. *Id.*

spend a minimum of eighty minutes in transit to and from Milan.⁷² Correspondence between Judge Helmick and Mazloum was subject to frequent delays; with some letters being re-routed and reviewed before they even made it to Judge Helmick or Mazloum.⁷³

Dennis Terez, the federal public defender for the Northern District of Ohio, represented Mohammad Amawi. Terez's contact visits with Amawi were irregular and occurred inside a special room that was made partially out of plexi glass, resulting in totally exposed visitation.⁷⁴ A thick plexi glass window separated Terez and Amawi during their meetings, and the room's construction caused the temperature to be consistently "sweltering hot."⁷⁵ The conditions made Terez suspicious enough to request an affidavit from the government to confirm that he was not being followed or surveilled, and that his phone lines were not tapped.⁷⁶ The government never provided Terez with a clear answer to his inquiry.⁷⁷ Even worse, the defendants' onerous confinement conditions made it virtually impossible for them to examine the evidence against them, because the vast majority of it was electronic.⁷⁸ In Amawi's case, he had so much difficulty reviewing the government's electronic discovery that, at one point, the judge forced the government's hand and gave each defendant an iPod to listen to the recordings.⁷⁹

The government's treatment of Amawi and his codefendants portrayed a presumption of guilt rather than innocence, and it further reflected "deep institutional prejudices against Arab and Muslim Americans."⁸⁰ While Terez conceded that his client had behavioral issues that likely caused the BOP to revoke some of Amawi's telephone privileges, Terez was adamant that Amawi's pretrial confinement was based largely on prejudice, fear, and stereotypes, rather than on a realistic assessment of Amawi's dangerousness.⁸¹

According to Terez, all of the BOP officials who came into contact with Amawi appreciated that he was not a threat and saw him as a "run-of-the-mill defendant who happened to be getting a lot of press because of his

72. *Id.*

73. *Id.*

74. Interview with Dennis Terez, Fed. Defender for the N. Dist. of Ohio, in Ann Arbor, Mich. (Jan. 7, 2013) [hereinafter Interview with Dennis Terez].

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. Interview with Dennis Terez, *supra* note 74.

80. *Id.* Mohammad Amawi is Palestinian, but he is a dual citizen of Jordan and the United States. Marwan El-Hindi was born in Jordan, but he is a naturalized U.S. citizen. Wassim Mazloum is a Lebanese citizen, and he was a permanent resident at the time he was indicted.

81. *Id.*

background.”⁸² Recall that the SAMs function together with the BRA, since “almost all defendants in terrorism cases are detained pending trial.”⁸³ Courts treat national security issues as “paramount” in the context of the dangerousness inquiry, “and this treatment acts as a natural precursor to and justification for implementation of the [SAMs] against a particular defendant.”⁸⁴

In many of the cases where the attorney general has imposed pretrial SAMs, the defendants not only failed to demonstrate an intention to abuse third-party communications, but they also arguably lacked the sufficient third-party contacts to abuse in the first place. Could the same prejudice that appeared to underlie Amawi’s pretrial confinement conditions also play a role in the attorney general’s decision to apply SAMs in specific cases? While it is impossible to know the attorney general’s subjective considerations in imposing SAMs, the fact remains: when applied pretrial, SAMs punish defendants before they have been convicted and deny them the opportunity to meaningfully assist in their own defense in contravention of the Fifth Amendment. Further, SAMs place serious burdens on the attorney-client relationship and interfere with a defendant’s Sixth Amendment right to the effective assistance of counsel.

B. *Pretrial SAMs Violate a Defendant’s Constitutional Rights*

1. SAMs Punish a Defendant in Pretrial Detention and Deny Him the Ability to Assist in His Own Defense, Violating His Fifth Amendment Right to Due Process and a Fair Trial

Though the Federal government does not publicize accurate and up-to-date information regarding its use of SAMs, there is no doubt that since their introduction in 1996, SAMs have been used pretrial in three separate terrorism cases: *United States v. El-Hage*;⁸⁵ *United States v. Abu-Ali*;⁸⁶ and *United States v. Hashmi*.⁸⁷ In *El-Hage*, Wadiah El-Hage, a Lebanese national, was charged with “six conspiracies to kill United States citizens and destroy United States property abroad, 20 counts of perjury based on his grand jury testimony, and three counts of false statements.”⁸⁸ Most of the charges arose out of El-Hage’s connection to al-Qaeda and its 1998 attacks on U.S. embassies in Nairobi, Kenya and Dar es Salaam, and Tanzania, respectively.

Ahmad Abu-Ali, a U.S. citizen, was arrested in Saudi Arabia for allegedly participating in a local terror cell while studying at the Islamic

82. *Id.*

83. Dratel, *supra* note 49, at 84.

84. *Id.*

85. 213 F.3d 74 (2d. Cir. 2000).

86. 528 F.3d 210 (4th Cir. 2008).

87. 621 F. Supp. 2d 76 (S.D.N.Y. 2008).

88. *El-Hage*, 213 F.3d at 77.

University in Medina.⁸⁹ Abu-Ali was charged with conspiracy to provide material support and providing material support to a designated foreign terrorist organization;⁹⁰ two counts of providing material support to terrorists;⁹¹ contribution of services to, and receiving funds from, al-Qaeda;⁹² conspiracy to assassinate the President of the United States;⁹³ and conspiracy to pirate and destroy aircrafts⁹⁴ in violation of U.S. law.⁹⁵

Fahad Hashmi, a native New Yorker, was extradited to the United States from Britain in May 2007 where he was pursuing a master's degree in international relations at London Metropolitan University.⁹⁶ 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."⁹⁷ The government's case against Hashmi revolved around his relationship with Mohammed Junaid Babar.⁹⁸ Babar and Hashmi knew each other from New York, and Babar asked to stay at Hashmi's London apartment for two weeks in early 2004.⁹⁹ The government claimed that Hashmi was aware of Babar's subsequent trip to Pakistan to deliver waterproof gear to al-Qaeda operatives and that Hashmi even let Babar use his phone to "call conspirators in terrorist plots."¹⁰⁰

Like its Fourteenth Amendment's equivalent, the Fifth Amendment's Due Process Clause "was intended to guarantee procedural standards adequate and appropriate . . . to protect at all times people charged with or suspected of crime by those holding positions of power and authority."¹⁰¹ Specifically, the Fifth Amendment's Due Process Clause prohibits punishing a defendant before trial, protects a defendant's right to contribute to his own defense, and preserves the privilege against self-incrimination.¹⁰²

The use of SAMs pretrial in each of the cases described above restricted the defendant's access to "important information and evidence," "the ability to communicate about important information and evidence," and deprived the defendant of the opportunity "to prepare and present a

89. *Abu-Ali*, 528 F.3d at 221.

90. *Id.* at 225 (under 18 U.S.C.A. § 2339B).

91. *Id.* (under U.S.C.A. § 2339B).

92. *Id.* (under 50 U.S.C. § 1705(a) & 31 C.F.R. § 595.204).

93. *Id.* (under 18 U.S.C. § 1751).

94. *Id.* (under 18 U.S.C. § 32(b)(4) & 49 U.S.C. § 46502(a)(2)).

95. *Id.* at 225.

96. Theoharis, *supra* note 1.

97. *Id.*; *see also* 18 U.S.C. § 2339B; 50 U.S.C. § 1705(b).

98. Theoharis, *supra* note 1.

99. *Id.*

100. *Id.*

101. *Chambers v. Florida*, 309 U.S. 227, 236 (1940).

102. *See, e.g., Dratel, supra* note 49, at 82; *United States v. Salerno*, 481 U.S. 739, 748 (1987).

defense consistent with the constitutional mandates” of the Fifth Amendment.¹⁰³ In a letter to former U.S. Attorney Patrick Fitzgerald, one of the lead prosecutors in *El-Hage*, attorneys representing El-Hage and his codefendants implored Fitzgerald to ease their client’s conditions of confinement.¹⁰⁴

At one point during the more than thirty months El-Hage spent in pretrial detention, his SAMs included solitary confinement in a windowless cell, occasional exercise in a completely barren room nicknamed the “rat cage,” severe restrictions on social contact, a ban on any communication with other inmates, undefined “others,” and the news media, and prohibitions on meeting with attorneys in a soundproof room (a courtesy afforded to all other pretrial detainees in the BOP’s Metropolitan Correctional Center (MCC) in New York City).¹⁰⁵

El-Hage’s pretrial confinement conditions may be better understood when compared to the circumstances of other pretrial detainees at MCC. For example, where paralegals, experts, and potential witnesses may have been allowed to communicate with other MCC pretrial detainees to help them prepare for trial, the SAMs forbade El-Hage from communicating with his attorneys’ staff, expert witnesses, and other possible witnesses.¹⁰⁶ Again, where most persons detained at MCC are permitted to attend codefendant meetings to discuss joint legal issues, or when appropriate, to prepare common defenses, El-Hage was not.¹⁰⁷ Lastly, although most persons detained pretrial at MCC are allowed visits without prior written notification, permitted to speak with more than one visitor at a time, and are able to enjoy the visits under “contact conditions,” El-Hage was denied most forms of communication with everyone but his spouse and his attorneys.¹⁰⁸

Abu-Ali’s SAMs also consisted of solitary confinement and serious restrictions on his social contacts, communications with the media, access to the mail, ability to interact with his attorneys’ paralegals, and his capacity to review the government’s evidence against him.¹⁰⁹ Abu-Ali failed to exhaust all of the available administrative remedies before he challenged his SAMs in district court, and his Motion for Relief from Conditions of Confinement failed accordingly.¹¹⁰ Nevertheless, Abu-Ali’s requested re-

103. Dratel, *supra* note 49, at 103.

104. Letter from Michael Young, Att’y, to Patrick Fitzgerald, former U.S. Att’y (Nov. 5, 1998), available at <http://www.pbs.org/wgbh/pages/frontline/shows/binladen/upclose/letters.html>.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *United States v. Abu Ali*, 395 F. Supp. 2d 338 (E.D. Va. 2005) (denying Abu-Ali’s motion for relief from SAMs).

110. *Id.* at 342.

lief sheds light on the concrete ways in which the government's SAMs denied him the opportunity to exercise his Fifth Amendment right to a fair trial. In addition to being released from solitary confinement, Abu-Ali requested that the BOP furnish his cell with a chair and a desk, permit him to access a laptop computer and portable printer (both provided by the defense) in order to review the government's evidence, allow Abu-Ali to "receive and retain materials from counsel, including CD-ROMS, without having them inspected, searched, or taken from him," cease monitoring phone calls between Abu-Ali and his attorney, and provide him with "broader access to mass communications, mail, and visitors."¹¹¹

In addition to the earlier description of Hashmi's SAMs, Hashmi also could not meet with potential expert witnesses without the attorney general's express approval.¹¹² Hashmi was not allowed to leave voicemails for his attorney, and he was prevented from communicating with any of his attorney's representatives if his attorney was not physically present.¹¹³ Outside of the occasional correspondence he had with his immediate family, the only other mail Hashmi received was subject to BOP determination that the documents were "relevant to [Hashmi's] defense."¹¹⁴

The SAMs imposed on El-Hage, Abu-Ali, and Hashmi forced each defendant to reveal critical information about his defense strategies to the prosecution whenever he wanted to meet with a potential witness, speak with his attorney's representatives, or even receive mail. The irony of this situation cannot be overstated: because of the SAMs, the very people who were seeking a conviction of El-Hage, Abu-Ali, and Hashmi also served as the gatekeepers to the defense strategies each defendant attempted to construct. Categorical bans on any media contact also significantly impeded each defendant's ability to use the court of public opinion to test out defense theories and give meaningful effect to the presumption of innocence.

The fact that these defendants endured extremely similar SAMs conditions makes the SAMs look more like impermissible punishment before trial. The SAMs imposed on Hashmi, for example, were "in substance identical to those imposed against [notorious shoe bomber] Richard Reid."¹¹⁵ In fact, those SAMs were "in content the same SAMs place

111. *United States v. Ali*, 396 F. Supp. 703, 704–05 (E.D. Va. 2005) (quoting Abu-Ali's Motion for Relief from Conditions of Confinement).

112. Memorandum of Law in Support of Defendant's Motion for Emergency Hearing to Prohibit the Attorney General from Restricting Defense Counsel's Access to Defendant and Impairing Defendant's Constitutional Rights at 4, *United States v. Hashmi*, 621 F. Supp. 2d 76 (S.D.N.Y. 2008) (No. 06 Cr. 00442) [hereinafter Hashmi Memorandum on Emergency Hearing].

113. *Id.*

114. *Id.* at 5.

115. *Id.* at 2.

upon Zacarias Moussaoui (EDVA), Ahmed Ressam (MDCAL), Ahmed Omar Abu Ali (EDVA), and Ernest James Ujaama (WDWA).¹¹⁶

Additionally, the SAMs themselves distracted each defendant from the actual merits of his case and effectively stopped him from meaningfully contributing to his own defense. In *El-Hage* specifically, the SAMs forced the defendant to become obsessed with ameliorating his pretrial confinement conditions and prevented him from devoting his time and energy to building a defense. Attorney Joshua Dratel, who helped represent both El-Hage and Abu-Ali, described a typical encounter with a client under SAMs in the Southern District of New York:

You go to the MCC with the objective of discussing the case and making progress towards trial preparation or motion preparation or whatever you're doing. When you arrive, and finally get to your client, you end up spending the first half-hour, if not longer, discussing pretrial confinement conditions issues, like access to a new toothbrush or reading materials. While these concerns are real, they're distractions from the broader objective of preparing for the case.¹¹⁷

Not only do the SAMs distract a defendant from the merits of his or her case and consume precious face-time between client and attorney, they also put challenging the SAMs the center of an attorney's attention. It is very difficult to convince a defendant under SAMs to think about anything but the conditions of his or her pretrial detention, which forces the attorney to spend even more time challenging the SAMs.¹¹⁸ This includes "calling the BOP's legal counsel, the prosecutor, and writing letters to the judge—all of which are very time consuming and unlikely to yield any positive results."¹¹⁹ In Dratel's experience, it appears that "the government capitalizes on this situation in a somewhat deliberate way, even though such a manipulation is certainly not the purpose of the SAMs themselves."¹²⁰

To clarify this point, Dratel emphasized the difference between the application of SAMs in the prosecution of Luis Felipe and that in El-Hage, Abu-Ali, and Hashmi. For example, where the SAMs were justified in Felipe's case because of his demonstrated ability to pose a danger from behind bars, SAMs were imposed on Hashmi after he had already spent 170 days in the MCC without any incidents. In fact, the information upon which Attorney General Holder supposedly relied in determining that

116. *Id.*

117. Telephone Interview with Joshua Dratel, President, Joshua L. Dratel, P.C. (Jan. 24, 2013) [hereinafter Interview with Joshua Dratel].

118. *Id.*

119. *Id.*

120. *Id.*

Hashmi's communications could result in death or serious bodily injury to people was Hashmi's membership in a group called "Al-Muhajiroun," Junaid Babar's use of Hashmi's cellphone to call a man named Omar Khyam, and statements Hashmi made when he was detained in London by British authorities.¹²¹ All of this information was known to the U.S. Attorney's Office when Hashmi was indicted, and defense counsel received no information "suggesting a change of circumstances" in any threat Hashmi posed.¹²²

"Sometimes, the most effective way to communicate with witnesses is to have the defendant do it, either through a letter of introduction or a phone call, and the SAMs made that impossible" in *El-Hage* and *Abu-Ali*.¹²³ There is no real substitute for having the defendant himself reach out to potential witnesses and introduce them to his attorney.¹²⁴ The fact that neither El-Hage, Abu-Ali, nor Hashmi were allowed to independently communicate with third parties based on a thorough and unfettered review of the evidence against them undermined their capacity to make any real contributions to their defense.

The SAMs also distract a defendant from the case's substance and prevent the accused from concentrating on how to best challenge the indictment, which may include preparing the defendant to testify at trial, a task requiring "an extraordinary amount of time and attentiveness."¹²⁵ The defendant's isolation only makes matters worse: "[s]ince the attorney is the only person with whom the client has contact, the attorney is the only outlet for the client's frustration."¹²⁶ If this itself does not create tension between the defendant and his attorney, the attorney's failure to substantively improve the defendant's confinement conditions "can be met with animosity and resistance to discussing anything else," depriving the defendant the benefit of his own assistance.¹²⁷ In Abu-Ali's case, although he never expressed distrust towards Dratel, he simply withdrew from the entire case and "lost affect."¹²⁸

Therefore, as the defendant's paranoia increases, the likelihood that he will provide "an accurate, complete, or detailed factual account" of the case's circumstances diminishes. Given the "complexity of [*El-Hage* and *Abu-Ali*, specifically], the volume of the discovery, the travel involved in effective investigation, the need to consult and retain experts, and the length of the trials," severe restrictions on El-Hage's and Abu-Ali's ability

121. Hashmi Memorandum on Emergency Hearing, *supra* note 112, at 1.

122. *Id.* at 1–2.

123. Interview with Joshua Dratel, *supra* note 117.

124. *Id.*

125. Dratel, *supra* note 49, at 85.

126. *Id.*

127. *Id.*

128. Interview with Joshua Dratel, *supra* note 117.

to communicate with their attorneys, their attorneys' representatives, and potentially helpful third parties deprived them of their Fifth Amendment right to a fair trial.¹²⁹ Even where the case is less factually complicated and convoluted, as was the case in *Hashmi*, the SAMs broke Hashmi's spirit and had a strong coercive effect.¹³⁰ The particularly harsh conditions SAMs create for a defendant who is detained pretrial may, "whether intentionally or inadvertently," pressure him into a plea bargain to which he would not otherwise agree.¹³¹

2. SAMs Drastically Interfere with the Attorney-Client Relationship and Work to Deny a Defendant in Pretrial Detention the Effective Assistance of Counsel in Violation of the Sixth Amendment

There are two particularly onerous corollaries of SAMs that bear directly on the attorney-client relationship. First, 28 C.F.R. § 501.3(d) authorizes the attorney general to eavesdrop on all conversations between an attorney and his client after SAMs have been imposed.¹³² Under the statute, the attorney general may effectively abrogate the attorney-client privilege and create an independent "privilege team" to monitor and sift through "all communications between the inmate and [his] attorneys."¹³³ The attorney general must have reasonable suspicion¹³⁴ that the prisoner is using communications with his attorney to further acts of violence or terrorism before he begins monitoring their conversations.¹³⁵

Upon a finding of reasonable suspicion, the statute requires that the DOJ provide written notice to attorney and client that their conversations will be monitored.¹³⁶ Although the notice requirement was designed to

129. Dratel, *supra* note 49, at 86.

130. Rovner & Theoharis, *supra* note 33, at 1369–70.

131. *Id.* at 1370 (citing Letter from the Brennan Ctr. for Justice at N.Y. Univ. Law Sch. to Michael B. Mukasey, Att'y Gen. 2 (Oct. 20, 2008), available at http://brennan.3cdn.net/301ff4d661c066cf21_p7m6brynx.pdf).

132. 28 C.F.R. § 501.3(d) (2001) ("In any case where the Attorney General specifically so orders, based on information from the head of a federal law enforcement or intelligence agency that reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism, the Director, Bureau of Prisons, shall, in addition to the special administrative measures imposed . . . provide appropriate procedures for the monitoring or review of communications between that inmate and attorneys or attorneys' agents *who are traditionally covered by the attorney-client privilege*, for the purpose of deterring future acts that could result in death or serious to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons.") (emphasis added).

133. 29 C.F.R. § 501.3(d) (2013).

134. Reasonable suspicion is a particularly low standard of proof most frequently invoked in the scope of temporary investigative "stop-and-frisks" by law enforcement. Reasonable suspicion must be based on specific and articulable facts that give rise to more than a hunch that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968).

135. 29 C.F.R. § 501.3(d).

136. § 501.3(d)(2).

assuage concerns about the monitoring regulation's constitutionality, it does not apply to Title III¹³⁷ or Foreign Intelligence Surveillance Act electronic surveillance of attorney-client conversations.¹³⁸ Thus, "the fact that a particular defendant or lawyer has not received notice under the regulation provides, at best, a false sense of security, since that does not preclude the possibility of clandestine eavesdropping under Title III or FISA."¹³⁹

Second, "given the nature and scope of the [SAMs], it is doubtful that any lawyer could maintain a perfect record of compliance" with all of the government's proscriptions.¹⁴⁰ However, failure to adhere to the SAMs may subject an attorney to criminal prosecution because the "government has maximum discretion regarding whom to prosecute, for what conduct, and when."¹⁴¹ The prosecution of attorney Lynne Stewart, who represented an accused terrorist, remains the quintessential example of how the government can use SAMs to expose someone to massive criminal liability "out of noncompliance in a matter that suits [its] policy."¹⁴²

In 2005, Stewart was convicted of five counts of conspiracy to provide material support for terrorists and making false statements.¹⁴³ The charges arose out of Stewart's violation of the SAMs imposed on Sheikh Omar Abdel Rahman (also known as the "Blind Sheikh"). In 2000, Stewart "made a statement to the press about [Abdel Rahman's] thoughts on the Egyptian ceasefire while serving as his counsel."¹⁴⁴ Stewart's statement constituted unauthorized contact between Abdel Rahman and the media in contravention of Abdel Rahman's SAMs, and the Clinton Administration reprimanded her for the violation without imposing any formal criminal charges.¹⁴⁵ However, in the spring of 2002—and under an arguably much different political climate—former Attorney General John Ashcroft indicted Stewart on several charges of conspiring to provide material support for terrorism, all of which flowed from Stewart's violation of Abdel Rahman's SAMs.¹⁴⁶

137. The Wire and Electronic Communications Interception and Interception of Oral Communications Act, 18 U.S.C. § 2511 (formerly known as the "Title III" Wiretap Act).

138. Dratel, *supra* note 49, at 89.

139. *Id.*

140. *Id.* at 88.

141. *Id.* (emphasis omitted).

142. *Id.*

143. Rovner & Theoharis, *supra* note 33, at 1373.

144. *Id.* at 1373–74.

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

146. *United States v. Stewart*, 590 F.3d 93, 98–100, 108 (2d Cir. 2009) (affirming Stewart's convictions of "conspiring to defraud the United States in violation of 18 U.S.C. § 371"; "providing and concealing material support to the conspiracy to murder persons in a foreign country in violation of 18 U.S.C. § 2339A and 18 U.S.C. § 2, and of conspiring to provide and conceal such support in violation of 18 U.S.C. § 371"; and of "knowingly and willfully making

For Stewart, actions that initially culminated in a stern reprimand from the DOJ under President Bill Clinton later substantiated serious criminal charges against her under President George W. Bush. Lynne Stewart's case is significant because it "provides a cautionary tale for contravening these rules."¹⁴⁷ Terrorism prosecutions already involve higher stakes than other "ordinary" criminal cases.¹⁴⁸ When applied pretrial, SAMs can make an attorney who zealously advocates for his or her client vulnerable to prosecution if the attorney general decides that the attorney's behavior jeopardizes national security.

The United States Supreme Court "has recognized that the right to counsel is the right to the effective assistance of counsel."¹⁴⁹ In *Strickland*, the Court delineated a two-part test to evaluate claims of ineffective assistance of counsel by assessing counsel's deficient performance, and the resulting prejudice to the defense.¹⁵⁰ The inquiry is retrospective, meaning that a reviewing court looks at the trial record to determine whether counsel's performance failed to meet an objective standard of reasonableness and whether any deficiencies in counsel's performance prejudiced the client.¹⁵¹ A reviewing court will show deference to a defense counsel's case strategy when it reflects an independent examination into the facts, which specifically includes "pursuing all leads relevant to the merits of the case."¹⁵² Counsel's deficient performance prejudices his client when it deprives him of a substantial defense or when the reviewing court determines that but for counsel's deficient performance, there was a reasonable probability of a different outcome to the case.¹⁵³

For the attorney who has litigated terrorism cases in which his client was subjected to SAMs pretrial, there is little doubt that the SAMs "significantly impair counsel's ability to investigate the case adequately," thus preventing them from pursuing all leads relevant to the case's merits. The SAMs in *El-Hage*, *Abu-Ali*, and *Hashmi* prevented each defendant from

false statements in violation of 18 U.S.C. § 1001 when she affirmed that she intended to, and would, abide by the SAMs").

147. Rovner & Theoharis, *supra* note 33, at 1373.

148. Dratel, *supra* note 49, at 82 ("In cases involving terrorism, the stakes are, of course, potentially far more significant than in the ordinary case. The allegations . . . do not suggest discrete harm, but rather a threat to entire populations and to civic security as a whole. The attorney himself may be within the defined class of victims—i.e., "all Americans around the world"—whom the defendant is alleged to have targeted. Moreover, while it is frequently easy enough to rationalize vindicating the statutory and constitutional rights of a defendant who . . . [allegedly] committed morally repugnant criminal offenses . . . even the criminal defense lawyer is presented with competing considerations when his client is not just a criminal defendant, but also an alien (or naturalized citizen) officially designated as the 'enemy' in an armed conflict.").

149. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (internal citations omitted).

150. *Id.* at 687.

151. *Id.* at 688–89.

152. *Blackburn v. Foltz*, 828 F.2d 1177, 1180 (6th Cir. 1987).

153. *Porter v. McCollum*, 558 U.S. 30, 38–39 (2009).

aiding his counsel's investigation "by contacting sources and encouraging them to cooperate with counsel," and as a result, the attorneys in those cases were unable to discover, or meaningfully utilize, potentially exculpatory evidence that may have existed.¹⁵⁴ Admittedly, the prejudice a defendant faces from his inability to communicate with third parties in preparing his defense is speculative; it is impossible to know if such third-party communications would have actually rendered useful or potentially exculpatory evidence.

However, effects of SAMs on an attorney's capacity to provide zealous and effective representation undoubtedly prejudice defendants. Specifically, even if an attorney commits a slight violation of the SAMs by communicating with third parties in the scope of his investigation, he subjects himself to an indictment because he failed to comply with the SAMs "attorney certification," which calls on an attorney to formally acknowledge the SAMs and pledge to abide by them.¹⁵⁵ Tying the threat of criminal prosecution to an attorney's advocacy on his or her client's behalf may have a strong chilling effect on counsel's advocacy, particularly after Lynne Stewart's prosecution and conviction. Because violating SAMs is a "specific-intent" offense, "the question is willfulness, and the government has the power to decide to whom it wishes to afford the benefit of the doubt" and to whom it will not.¹⁵⁶ Dratel's explanation is particularly telling:

I do think that [SAMs] have a chilling effect generally, and for those of us involved with terrorism cases on a day-to-day basis, we have incorporated some of these precautions into the way we operate, which is not a good thing because you end up self-censoring on the wrong side of the "line" that the SAMs draw. In other words, I'm always trying to be careful. This is a visual example, but if the SAMs draw a line between illegal conduct and what would otherwise be zealous criminal advocacy, I don't want to cross that line and subject myself to criminal prosecution. I am not going to go near that line, because I'm not sure what actions will cause my courtroom adversaries to file criminal charges against me. So, this 'buffer zone' is created between the line I draw for myself out of self-preservation and the arbitrary line drawn by the SAMs, and this is where the client suffers the most. Essentially, the government's enforcement of the SAMs is vague; there is no objective "bright-line." I once took a course in college on totalitarianism, and one thing I remember is that totalitarian regimes profit by vague enforcement of their laws, because then nobody knows when

154. Dratel, *supra* note 49, at 86–87.

155. *Id.* at 89.

156. *Id.* at 88.

they're protected and when they're not, so people will always be on guard and will self-censor and enforce.¹⁵⁷

To hear Dratel equate the government's use of SAMs pretrial with the tools totalitarian regimes employ to sustain their own power is disturbing. The fact that the attorney general may also monitor otherwise privileged attorney-client communications makes the chilling effect more acute. The monitoring regulation "makes the defense attorney presumptively suspect" and significantly decreases the chances that the defendant and his client will engage in the "candid exchange" of information that is otherwise customary.¹⁵⁸ Maintaining a free-flow of information between an attorney and his client is especially important in terrorism cases, where, "more often than not, [cases] involve evidence and information related to communities and countries to which counsel may lack access or sufficient knowledge without input and assistance from the defendant."¹⁵⁹

The prejudice flowing from the chilling effect that SAMs inflict on counsel's performance is undeniable. The "defendant [is] deprived of the ability to inform counsel of fertile investigative avenues to pursue without, at the same time, also notifying the government," potential witnesses will remain unidentified, documents will go ignored, and "the entire defense investigation of the case will be limited to those discovery materials produced by the government."¹⁶⁰

Finally, in today's ever-connected world, attorneys frequently employ alternative forms of advocacy in order to zealously protect their clients' interests and rights, and these tools are quickly becoming essential to any competent defense attorney's repertoire. For example, when activists across the United States decided to call attention to Bradley Manning's cruel confinement conditions at Quantico, Manning's lawyers helped them by providing thorough accounts of his detention.¹⁶¹ Some of these accounts were used to shed light on particularly inhumane aspects of Manning's confinement, like "being forced to sleep naked and stand naked for morning parade . . ."¹⁶² The lawyers' accounts were also critical to challenging the Pentagon's claims about Manning's treatment.¹⁶³

In contrast, "a particularly disturbing aspect of the [SAMs] is that detailed exposition of [their impact] itself becomes illegal."¹⁶⁴ This proscription is not limited to attorneys: "everyone in contact with a person under SAMs, including lawyers and immediate family members, becomes

157. Interview with Joshua Dratel, *supra* note 117.

158. Dratel, *supra* note 49, at 90.

159. *Id.*

160. *Id.*

161. Rovner & Theoharis, *supra* note 33, at 1372.

162. *Id.* at 1372.

163. *Id.* at 1372-73.

164. *Id.* (citing *United States v. Stewart*, 590 F.3d at 93, 93, 105, 110 (2d Cir. 2009)).

subject to the SAMs by virtue of the requirement that they not divulge any communication with that person to a third party.”¹⁶⁵ The SAMs themselves “make it illegal to speak out publicly against the damage the SAMs are having on the inmate.”¹⁶⁶ SAMs not only have a chilling effect on a defense attorney’s courtroom advocacy, but they also make it impossible for an attorney to make the most of his client’s family, friends, and acquaintances when preparing a defense.

In Hashmi’s case, for example, while it is true that the terms of his SAMs technically allowed his attorney to disclose information to third parties if it was for the “sole purpose of preparing [Hashmi’s] defense,” the government—specifically opposing counsel—defined the scope of “what might legitimately be included in this purpose.”¹⁶⁷ The fact that the government enjoys sole discretion in determining when the SAMs have been violated and whether the violation merits criminal prosecution keeps a defense attorney in a sort of criminal purgatory, forcing him to constantly question whether or not his actions will result in an indictment. Thus, there is no way to avoid the chilling effect that SAMs have on a defense attorney. The more intimidated and cautious a defense attorney becomes, the less likely it is that he will satisfy *Strickland*’s performance standards and fulfill the client’s right to the effective assistance of counsel.

CONCLUSION

When combined with pretrial detention, SAMs violate a defendant’s Fifth Amendment right to a fair trial by depriving him of the opportunity to meaningfully contribute to his own defense and to help his attorney thoroughly investigate the case. Furthermore, SAMs also deprive a defendant of his Sixth Amendment right to the effective assistance of counsel. The SAMs’ monitoring regulation and threat of criminal prosecution work together to have a substantial chilling effect on a defense counsel’s advocacy, preventing him from pursuing all leads relevant to the case’s merits. Although the government certainly has a strong interest in protecting the public from individuals capable of perpetrating acts of violence or terrorism from behind bars, the government’s increased use of SAMs in terrorism prosecutions involving Arab and Muslim defendants who lack any meaningful connection to terror organizations, history of crime, or patterns of abusing third-party communications in detention offends the Constitution.

Take Dzhokhar Tsarnaev’s SAMs, for example. Attorney General Holder’s recent decision to impose SAMs on Tsarnaev is difficult to square with the statutory requirements of 28 C.F.R. § 501.3 that the attorney general must have reason to believe that a prisoner’s third-party communi-

165. Rovner & Theoharis, *supra* note 33, at 1371.

166. *Id.* at 1371–72.

167. *Id.* at 1372–73.

cations or contacts pose a threat of death or serious bodily injury to others.¹⁶⁸ In Tsarnaev's case, the government has provided "scant factual support for its conclusory assertion that SAMs are required now, more than four months into [Tsarnaev's] already highly restrictive pretrial confinement, in order to protect others from 'death or serious bodily injury.'"¹⁶⁹ According to his attorneys, "[t]he government has not alleged that [Tsarnaev] has done or said anything since his arrest to commit violence, incite violence, or engage in communications that pose a security threat."¹⁷⁰ Here, the government cited Tsarnaev's alleged "participation in planning and executing the Boston Marathon bombings; his ensuing acts of violence and flight to avoid apprehension; his extensive obstruction of justice; and his explicit and continuing desire to incite others to engage in violent jihad" to justify his SAMs.¹⁷¹

However, similar to the government's speculative determinations about the substantial risks created by the third-party communications of the defendants in *El-Hage*, *Abu-Ali*, and *Hashmi*, "notably absent in the government's litany [justifying Tsarnaev's SAMs] is reference to any problematic behavior or efforts to incite others whatsoever in the months after his arrest before SAMs were imposed."¹⁷² Specifically, the fact that the government has not alleged that the events for which Tsarnaev was arrested "were directed by others still at large or that [Tsarnaev] ever had operational authority to direct the activities of others" casts serious doubt on the attorney general's evidentiary basis for the SAMs.¹⁷³

Additionally, no evidence appears to exist regarding the existence of co-conspirators "with whom [Tsarnaev] could arrange further terrorist or criminal activities, much less a 'high probability' that he would make calls to do so, as alleged by the government."¹⁷⁴ In fact, one of the few specific pieces of evidence cited by the government to justify its conclusions regarding the threat posed by Tsarnaev's third-party communications is his mother's decision to publish portions of a recorded phone call with Tsarnaev in a desperate attempt to create sympathy for him.¹⁷⁵ However, as Tsarnaev's attorneys accurately pointed out, "[w]hile the government

168. See Motion to Vacate Special Administrative Measures ("SAMs") Imposed on Defendant and Defense Counsel at 2, *United States v. Tsarnaev*, No. 13-CR-10200-GAO (D. Mass. Oct. 2, 2013).

169. *Id.* at 1–2.

170. *Id.* at 2.

171. Memorandum from Eric Holder, *supra* note 59, at 2.

172. Motion to Vacate Special Administrative Measures ("SAMs") Imposed on Defendant and Defense Counsel at 8, *United States v. Tsarnaev*, No. 13-CR-10200-GAO (D. Mass. Oct. 2, 2013).

173. *Id.* at 9.

174. *Id.* at 9.

175. *Id.* at 10.

may not want anyone to feel ‘sympathy’ for [Tsarnaev, such a concern] is not a proper basis to impose SAMs.”¹⁷⁶

If the government continues imposing SAMs pretrial, it should implement some critical procedural and substantive changes. First, the attorney general’s authority to impose SAMs should be triggered only by a finding of probable cause that any suspected terrorist may attempt to use third-party communications to commit additional acts of terror or violence. Reasonable suspicion is simply too low of an evidentiary standard. Additionally, the evidence upon which the attorney general makes his determination should be explicitly delineated and made available to defense counsel for review. If the evidence is of such a sensitive nature so as to trigger key national security concerns, then it should be subject to *in camera* review, and, where feasible, a closed evidentiary hearing.

Second, a terrorism defendant under SAMs should be able to challenge the measures’ evidentiary and legal basis before a federal judge without having to first exhaust the BOP’s procedural remedies. As in the context of FISA, district court judges are certainly equipped to evaluate the strength of the Executive Branch’s discretionary decisions, particularly those that implicate national security interests. A terrorism defendant and his attorney have enough to worry about in preparing for the actual trial. Obliging a defendant to exhaust all of the BOP’s administrative remedies before he can challenge his SAMs in court serves no real interest except to break the defendant’s spirit by forcing him to focus his time and energy on ameliorating his pretrial confinement conditions.

There is no doubt that terrorism poses unique threats to our country’s overall security and to citizens’ personal safety. Nevertheless, it is possible to prosecute suspected terrorists without depriving them of the ability to assemble a meaningful defense or subjecting their attorneys to criminal prosecution for what would otherwise constitute zealous representation. The Constitution demands that we strike a balance between national security and civil liberties, and we should always strive to heed its call.

176. *Id.* at 10–11.

