GUANTANAMO BEGINS AT HOME

SYSTEMATIC DISCRIMINATION FACED BY MUSLIM "WAR ON TERROR" SUSPECTS IN THE US

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"I strongly believe that the American system of justice is a key part of our arsenal in the war against al-Qaeda and its affiliates, and we will continue to draw on all aspects of our justice system -- including Article III courts (U.S. federal courts) -- to ensure that our security and our values are strengthened."

President Barack Obama, March 2011

"So if anybody is coming to the federal system, this is what they will face. And this is a calculated ploy of the government to make you think closing Guantánamo and putting people into the federal system is something better, which it's inherently not.

Faisal Hashmi (brother of Syed Fahad Hashmi), April 2010

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INTRODUCTION

In January 2009, just two days after he was sworn into office, President Barack Obama signed an executive order. The order declared that the detention camps at Guantanamo Bay *"shall be closed as soon as practicable, and no later than one year from the date of this order."*

Lawyers and activists sighed in relief; this was the light at the end of the tunnel they had all been hoping for in Obama's presidency, for the closure of the ultimate symbol of human rights violations justified under the War on Terror.

Years passed, and Guantanamo remains open. Shutting it proved to be more difficult than Obama initially anticipated. After the mid-term elections, a full-scale transfer of inmates to U.S. soil seemed impossible.

More recently, on 7 March 2011, President Obama lifted the ban on trials by the Military Commission at Guantanamo. Civil rights group immediately vocalized their opposition.
Anthony D. Romero, the Executive Director of the American Civil Liberties Union, commented:

"The only way to restore the rule of law is to put an end to indefinite detention at Guantánamo and the broken commissions system, and to prosecute terrorism suspects in federal criminal courts. Today's announcement takes us back a step when we should be moving forward toward closing Guantánamo and ending its shameful policies."

The Center for Constitutional Rights (CCR), another prominent civil rights group, released the following statement:

"Barack Obama campaigned and began his presidency with a pledge to shut down Guantánamo, support federal trials for terrorism suspects, respect human rights and restore the rule of law. Guantánamo and the military tribunal system are no longer an inheritance from the Bush administration – they will be President Obama's legacy."[2]

In early 2012, the Senate Armed Services Committee pushed through Congress the controversial 2012 National Defense Authorization Act. The provisions establish mandatory military custody and adjudication for noncitizens who are determined to be members of Al Qaeda or associated forces, even if they were arrested on U.S. soil. Another provision authorises the indefinite detention without trial of terrorism suspects who supported Al Qaeda, the Taliban, or associated forces, even if they are American citizens. The Obama administration threatened to veto the bill, stating it would be "inconsistent with the fundamental American principle that our military does not patrol our streets", however, they not only failed to secure the veto, but have backed its existence.[4]

Now is a moment of great strategic importance. Where should we direct our energies, in order to ensure that all individuals suspected of terrorism - from those held at Guantanamo Bay, to the people suffering in secret "black sites", to the accused that are arrested abroad and face extradition to the U.S. - access the fairest form of legal judgment possible? Is simply struggling to get War on Terror suspects into the federal court system *enough?*

This report endeavours to provide a comprehensive account of the treatment of terrorism suspects in U.S. federal courts. It documents the systemic human rights abuses and
Islamaphobia that pervade the criminal justice system at every step: prior to indictment; from indictment through conviction; in sentencing; and inside U.S. prisons. The report was not written with the purpose of advocating for the use of Military Tribunals. Rather, the author of this report intended to document the many barriers that Muslims accused of terrorism face in receiving fair and legal treatment within the federal criminal justice system.

http://www.aclu.org/national-security/president-obama-issues-executive-order-institutionalizing-indefinite-detention
http://ccrjustice.org/newsroom/press-releases/ccr-condemns-president-obama%E2%80%99s-lifting-of-stay-military-tribunals
http://sfappeal.com/news/2011/11/occupysf-marching-against-federal-defense-bill.php
http://swampland.time.com/2011/11/18/why-obama-is-threatening-to-veto-a-defense-bill-over-detention-policy/#ixzz1eiWmjAa3

PRIOR TO INDICTMENT: HUMAN AND CIVIL RIGHTS ABUSES OUTSIDE OF CIVILIAN COURTS

PRIOR TO INDICTMENT: HUMAN AND CIVIL RIGHTS ABUSES OUTSIDE OF CIVILIAN COURTS

It isn't just foreigners held abroad in secret "black sites", Abu Gharib, or in Guantanamo Bay who have been subject to secret imprisonment, abuse, and torture. Being an American citizen, or a long-term legal resident of the country, has not protected Muslims from unconstitutional and illegal violations of their civil and human rights.

The abuses that have happened before defendants even entered into the judicial system, have inevitably affected their trials - whether it is secret arrest and imprisonment in Iraq and Afghanistan, or abuse at the hands of the U.S. military on American soil. The following section explores how injustices executed outside of the civilian judicial system, have had a tangible and concrete impact on the legitimacy of trials themselves.

1) SECRET ARREST AND IMPRISONMENT

'Extraordinary rendition'; 'black sites'; 'enforced disappearances'. It is common knowledge that many of the prisoners in Guantanamo Bay have had first-hand experience with these illegal practices. However, some legal residents and American citizens with similar narratives about their capture have already been convicted and sentenced in U.S. courts. It is crucial to consider whether the U.S. judicial system has been able to appropriately respond to defendants that claim to have experiences of secret arrest or torture.

CASE STUDY: AAFIA SIDDIQUI

On 17 July 2008, Siddiqui was allegedly arrested immediately outside of the provincial governor's compound in Ghazni, Afghanistan. The police authorities claimed they found incriminating items in her purse, including handwritten notes that referred to mass casualty attacks and two pounds of sodium cyanide. The following day, two US army officials and two FBI agents arrived in Ghazni. Siddiqui was standing in the same room, behind a curtain. According to the American officials, she jumped out from behind the curtain, picked up a rifle, and fired two shots. Siddiqui maintains that she never touched the rifle. When the chaos ended, she was the only one with bullet wounds - two in her torso.

There is no concrete or verifiable information about Siddqui's whereabouts between March 2003 and July 2008. According to her family members, Siddiqui went missing on 30 March 2003 after getting into a taxi with her three children, en route to catch an early morning flight. Many people believe that Siddiqui was abducted by Pakistani intelligence agents, then passed to the U.S. military and held at Bagram Air Base. Her oldest son was seven years old when he disappeared; it was not until September 2008 that he was returned to his family. In an unverified statement made to an intelligence officer after his release from custody, he recounted his memories of abduction:

"I remember we were going to Islamabad in a car when we were stopped by different cars and high roof ones. My mother was screaming and I was screaming as they took me away. I looked around and saw my baby brother on the ground and there was blood. My mother was crying and screaming. Then they put something on my face. And I don't remember anything. When I woke up I was in a room. There were American soldiers in uniform and plain clothes people. They kept me in different places. If I cried or didn't listen, they beat me and tied me and chained me. There were English speaking, Pashto and Urdu speaking. I had no courage to ask who they were..."[2]

Former detainees of Bagram Air Base say that a woman was held there during the time of Siddiqui's disappearance; many of them are still haunted by the woman's screams they heard while imprisoned. Binyam Mohamad, one of these former inmates, was shown a photograph of Siddiqui after his release, and claimed it was the same woman he saw on the inside. Six human rights groups, including Amnesty International and Human Rights Watch, listed Siddiqui as a potential 'ghost prisoner' being held by the U.S. Her lawyers claim that the bag of incriminating evidence was planted on her, and that she was coerced into appearing in front of the governor's mansion after years of mistreatment at Bagram.

Siddiqui's sister and others report that she was tortured and raped while imprisoned at Bagram, and her lawyers have maintained that she suffers from severe mental illness, including posttraumatic stress disorder. Aafia was initially declared unfit to stand trial, although the trial eventually went forward. During her trial, Siddiqui failed to cooperate with her own defence, and was removed from the court several times for outbursts. She insisted that she could make a peace deal with the Taliban. Her lawyers requested that the judge bar her from testifying, on the basis that she was "driven by her severe mental illness and would turn the trial into a spectacle". During the trial, the International Justice Network issued the following press release on behalf of the Siddiqui family:

"Given what we have observed during the trial, we are very concerned about our sister Aafia's emotional and physical health. It is clear to us that she is extremely depressed, and her outbursts in the courtroom reveal that she has been traumatized by her past ordeal and current treatment... The Aafia whom we see in this courtroom now, is not the same rational and focused Aafia who we know and love."[7]

In the winter of 2010, Siddiqui was tried and convicted of five charges. The judge repeatedly prohibited the defence from entering in evidence about her disappearance, on the basis that her potential imprisonment at Bagram was irrelevant to the charges at hand. Several months later, she was sentenced to 86 years in prison, essentially a life term.

Was Siddiqui kidnapped and detained by U.S. and Pakistani forces, as her supporters claim? It is irrefutable that Aafia's trial would have been fairer if either the prosecution or the defence had submitted tangible proof of her whereabouts between 2003 and 2008. Her lawyer's claims of her incompetence to stand trial rested on whether or not she had been tortured. Yet by the very nature of secret detention and torture, it was very difficult for them to bring these claims to light.

Throughout the War on Terror, potentially hundreds of individuals have been anonymously captured and tortured at black sites around the world before arriving at prisons run by the U.S. military. Yet how does anyone establish that they have experienced extraordinary rendition, black sites, or an enforced disappearance? Aafia Siddiqui's trial exemplifies a chilling danger of secret detention and torture – that it is very difficult to determine if someone was held in secret captivity, and how they were treated, unless the military or intelligence services are willing or forced to release their records. Her trial further underscores the way that torture or abuse during secret detention, may impact trials in federal courts later on.

Aafia Siffiqui

2) ABUSE BY U.S. ARMED FORCES

Aafia's case is very unique; not many legal residents have claimed they experienced secret detention or torture abroad. For a few Americans eventually tried in federal courts, mistreatment did not occur at the hands of foreign militaries, at black sites, or even in Iraq or Afghanistan. Instead, it occurred on the U.S. mainland, often with the full knowledge of the public, the media, and the criminal justice system.

CASE STUDY:

Padilla is of Puerto Rican descent; he was born in New York and spent most of his childhood and adolescence in Chicago, where he was involved with street gangs. After completing a brief prison sentence, Padilla converted to Islam, and moved to Egypt to continue his religious studies. He was arrested at Chicago O'Hare Airport in 2002, for allegedly planning to detonate a radioactive dirty bomb. Despite the fact that he was arrested in the U.S., he was classified an 'enemy combatant' and held in a navy brig in South Carolina for nearly three years.

According to Padilla's attorneys, he was held under such extreme conditions of isolation and sensory deprivation for the first twenty-one months of his detention "that he is now insane" – with no contact from lawyers, family, or even other detainees. According to testimony made in court by Sanford Seymour, the brig's technical director, the windows in Padilla's room that faced the outside were blacked out; brig employees covered up their nametags when they were around him; he was even fed through a slot in the door. At times he slept on a steel bunk without a mattress, or had his clock and Koran taken away from him. Padilla claims he was given LSD; forced into painful stress positions; and subjected to loud noises, sleep deprivation, extreme heat and cold, and harsh lighting. His mother was only allowed to visit him after she agreed not to tell the media about her visit.[9]

Stills from an undated videotape of Padilla's time inside the brig demonstrate how inhumanely he was treated, even for a simple trip to the dentist. One photograph depicts Padilla's feet hanging outside the rectangular panel on his door, ready to be shackled; another shows him with his head bowed, surrounded by guards in camouflage riot gear, about to be fitted with blacked-out goggles and noise blocking headphones (See Appendix, Figure 1).

Strangely, Padilla was never considered a disobedient prisoner. In an affidavit, his lawyer even said that *"[he] was told by members of the brig staff that Mr. Padilla's temperament was so docile and inactive that his behaviour was like that of 'a piece of furniture."*[10]

After a long and protracted battle in U.S. Courts, the Supreme Court eventually agreed to hear arguments about Padilla's habeas corpus rights in November 2005. Bush retracted his designation as an enemy combatant rather than allow the hearing to move forward. According to Padilla's lawyer, by the time he was finally transferred into civilian custody to face federal charges of terrorism, Padilla was unfit to stand trial. A New York psychiatrist who spent over 22 hours with Padilla testified that, *"When approached by his attorneys, he begs them 'please, please, please' not to have to discuss his case... He refuses to watch the videos of his interrogation and he refuses to answer questions pertaining to aspects of the evidence in his case."*[11] In an affidavit, his lawyer commented:

"It is my opinion that as the result of his experiences during his detention and interrogation, Mr. Padilla does not appreciate the nature and consequences of the proceedings against him, is unable to render assistance to counsel, and has impairments in reasoning as the result of a mental illness, i.e., post-traumatic stress disorder, complicated by the neuropsychiatric effects of prolonged isolation."[12]

He added, *"Mr. Padilla remains unsure if I and the other attorneys working on his case are actually his attorney or another component of the government's interrogation scheme."*

Padilla was never charged with attempting to detonate a dirty bomb, and he was eventually ruled fit to stand trial. In August 2007, he was convicted of various conspiracy charges and sentenced to seventeen years in prison.[13]

Interestingly, documents obtained in 2008 through a FOIA request revealed that conditions inside the Navy brig were designed to mimic those at Guantanamo Bay. Over ninety pages of e-mails and documents, gave a clear indication that officials at the Charleston brig were deeply uncomfortable with what they were doing. In an email to another official, one person noted, *"You have every right to question the 'lash-up' between GTMO and Charleston — it was the first thing I ask (sic) about a year ago when I checked on board... In a nutshell, they gave the Charleston detainee mission to (Joint Forces Command) who promptly gave it to (Fleet Forces Command) with a 'lots of luck' and nothing else."*[14]

Civil rights organizations in the United States have endeavoured to hold members of the Bush administration responsible for Padilla's treatment in military custody, with very little success. In February 2011, the U.S. District Court for the District of South Carolina ruled that former Defense Secretary Rumsfeld and other government officials were entitled to *"qualified immunity"* for their participation in Padilla's mistreatment. According to the District Court, no *"clearly established"* law prohibits the torture of American citizens who are designated "enemy combatants" by the executive branch. The ACLU challenged the District Court's ruling. In October 2011, the U.S. Court of Appeals for the Fourth Circuit heard arguments to have the case reinstated.[15]

Jose Padilla's case provides compelling evidence that the mistreatment of detainees in the War on Terror has actually prevented fair trials from going forward. American citizens who have been held as *"enemy combatants"* in conditions of extreme isolation have experienced such severe psychological trauma that they were unable to assist in their own defence and arguably unfit to stand trial.

3) CONCLUSION

As the cases of Aafia Siddiqui and Jose Padilla demonstrate, the United States' practices towards War on Terror detainees, including imprisonment in Iraq and Afghanistan and classification as enemy combatants, have already affected the legitimacy of federal trials. Soon after coming into office, Obama signed an executive order closing down the CIA's network of secret prisons ("black sites"), and he promised not to send any more individuals to Guantanamo Bay.[1] Yet even if more recently apprehended War on Terror detainees receive federal trials – rather than face the widely discredited Guantanamo Military Commission system – their verdicts may still be fundamentally affected by the unjust practices that precede indictment. The arrest of Ahmed Abdulkadir Warsame is telling. Believed to be a leader of the al Qaeda linked al Shabaab group, Warsame was captured by American forces in April 2011, and secretly held and interrogated on a U.S. Navy vessel for over two months by the High Value Detainee Interrogation Group (HIG), which includes experts from the CIA, FBI and Defense Department. After a four-day break from interrogations, Warsame was read his Miranda rights, and again interviewed by FBI agents, this time for law enforcement purposes, rather than national intelligence. He was flown to the United States and indicted in civilian court in July 2011.[16]

[i] There is substantial evidence that Bush's "black sites" have not closed, despite Obama's promises. In July 2011, The Nation published an article exposing CIA participation in counter-terror interrogations in a secret prison in Mogadishu, Somalia. Article available here: http://www.thenation.com/article/161936/cias-secret-sites-somalia?page=0,0

As one ACLU blogger points out:

"The Obama administration held Warsame, a criminal suspect, in military custody on a Navy ship for more than two months for interrogation. Apparently, the administration continues to assert worldwide war detention authority wherever terrorism suspects are found."

At his Senate confirmation in late June 2011, Joint Special Operations Command's Vice Admiral William McRaven described Warsame's treatment as the new norm for War on Terror detainees captured abroad:

"In many cases, we will put [detainees] on a naval vessel and we will hold them until we can either get a case to prosecute them in U.S. court ... or we can return him to a third party country. ... If we can't do either one of those, then we'll release that individual and that becomes the unenviable option, but it is an option." McRaven's statement suggests that he continues to support the practice of extra-ordinary rendition, which has facilitated prisoner transfer to third party countries in the past. This is despite the preponderance of evidence - for example, in the case of Ibn al-Shaykh al-Libi - that

people who undergo rendition face conditions of torture or even death, and often provide grossly misleading information in the hopes of escaping this brutality.[ii]

By holding him in international waters, the U.S. military endeavoured to circumvent international law, leaving Warsame in a no-man's-land between criminal prosecution and status as a prisoner of war. Given these circumstances, can Warsame's case truly be held up as the archetype for the humane treatment of War on Terror suspects in a post-Guantanamo world? As in Padilla's case, the President's administration is being commended for trying criminal suspects in federal courts, even though these suspects were held and interrogated by the military for months or years prior to indictment. What conditions was Warsame held in during those two months, and how might they have affected his willingness to waive his rights or continue his interrogations with the FBI? Padilla's case demonstrates the grave danger of presuming that simply moving terror suspects from military to federal custody is sufficient for a just outcome.

[ii] Ibn al-Shaykh al-Libi was captured by Pakistani forces in 2001. He was detained by the FBI at Bagram Air Force Base, then flown to the USS Bataan and held in international waters alongside several other high-level suspects, including John Walker Lindh. In early 2002 he was extradited to Egypt and interrogated; it was here that he told officials that Saddam Hussein had agreed to provide al-Qaeda with training in chemical and biological weapons. This information was repeatedly cited by the Bush administration in the months leading up the invasion of Iraq as evidence of Hussein's links to terrorism, even though both the CIA and the Defense Intelligence Agency questioned its credibility. After he was taken back into CIA custody in 2004, al-Libi recanted his statements, maintaining that he had made them under conditions of torture. In late 2005 or early 2006, al-Libi was returned to Libyan custody. He was sentenced to life in prison by a state security court, and found dead in his cell in May 2009. Upon hearing about his death, Reprieve founder Clive Stafford Smith commented, "We are told that al-Libi committed suicide in his Libyan prison. If this is true it would be because of his torture and abuse. If false, it may reflect a desire to silence one of the greatest embarrassments to the Bush administration."

With the passage of the 2011 and 2012 National Defence Authorization Acts, the U.S. Congress has effectively blocked any effort by the Obama administration to try current Guantanamo detainees on U.S. soil. This has notably prevented the trial of Khalid Sheikh Mohammed and other individuals accused of organising the 9/11 attacks. Yet it is important to consider what the trials of Guantanamo detainees might look like if they could proceed. Would claims of insanity be taken seriously, given that many of the detainees have experienced torture and years of solitary confinement? If the detainees had been tortured in CIA "black sites" or experienced extraordinary rendition, would they be able to submit evidence about what they experienced?[iii]

Most of this report focuses on the civil rights injustices and procedural improprieties that Muslims face in the federal court system. Yet for some War on Terror detainees, their treatment after capture but prior to indictment has directly affected the outcome of their trial. Extraordinary rendition, secret imprisonment, and torture directly influence defendants' mental health and ability to contribute to their own defence. As we campaign for Guantanamo to close and for all terror suspects to be tried in U.S. federal courts, it is crucial that we also push for a more appropriate response from federal courts to the injustices that occur prior to indictment.

[iii] This is one of the primary reasons why it would be so difficult to prosecute individuals like Khalid Sheikh Mohammed in the United States, if prosecutions in U.S. civilian courts were even possible. Furthermore, in the sole instance where a Guantanamo prisoner was prosecuted on U.S. soil - the case of Ahmed Khalfan Ghailani –it was clear he would be imprisoned whether he was found guilty or not. As with many American citizens indicted for terrorism-related charges, Ghailani would have simply been classified as an 'enemy combatant' and held indefinitely if he was found not guilty (see the case study on Iyman Faris for a more detailed exploration of the use of enemy combatant in order to induce guilty pleas). In other cases, such as Aafia Siddiqui's, claims to torture were simply disregarded or ruled irrelevant.

[1]http://www.bostonmagazine.com/articles/whos_afraid_of_aafia_siddiqui/page7
[2]http://www.justiceforaafia.org/articles/press-releases/604-first-public-statement-from-aafias-son-on-his-disappearance-and-detention
[3]http://www.andyworthington.co.uk/2009/03/28/guantanamo-bagram-and-the-dark-prison-binyam-mohamed-talks-to-moazzam-begg/
[4]http://www.time.com/time/nation/article/0,8599,1954598,00.html
[5]http://www.time.com/time/nation/article/0,8599,1954598,00.html
[6]http://www.nydailynews.com/news/ny_crime/2010/01/26/2010-01-26_defense_team_wants_lady_al_qaeda_aafia_siddiqui_barred_from_taking_stand.html#ixzz1HuYPCgcz
[7]http://www.freeaafia.org/archives/trial-updates/ijn-daily-reportfamily-endorsed.html
[8] Peter Honigsberg, Our nation unhinged: the human consequences of the War on Terror. University of California Press, 2009. Pg 49.
[9]Ibid.
[10]http://www.nytimes.com/2006/12/04/us/04detain.html?pagewanted=2
[11]http://www.time.com/time/nation/article/0,8599,1565798,00.html
[12]http://www.nytimes.com/2006/12/04/us/04detain.html?pagewanted=2
[13](Honigsberg, 2009).
[14]http://www.usatoday.com/news/washington/2008-10-07-1658333002_x.htm
[15]http://www.aclu.org/national-security/aclu-appeals-court-hold-officials-accountable-torture-jose-padilla
[16]http://abcnews.go.com/Blotter/ahmed-abdulkadir-warsame-secretly-held-months-navy-ship/story?id=14004812
[17]http://www.aclu.org/blog/tag/Ahmed%20Abdulkadir%20Warsame
[18]http://abcnews.go.com/Blotter/ahmed-abdulkadir-warsame-secretly-held-months-navy-ship/story?id=14004812&page=2

FROM INDICTMENT THROUGH CONVICTION: THE SYSTEMIC NATURE OF PROCEDURAL IMPROPRIETIES

FROM INDICTMENT THROUGH CONVICTION: THE SYSTEMIC NATURE OF PROCEDURAL IMPROPRIETIES

There has been a considerable effort to document the illegality and unconstitutionality of the military tribunals and detainee review boards at Guantanamo Bay. The most prominent global human rights organisations, including Amnesty International and the American Civil Liberties Union (ACLU), still campaign for Guantanamo detainees to either be released, or receive federal trials on U.S. soil. While it is clearly paramount to continue campaigning for the closure of Guantanamo Bay, it is important to do so without perpetuating the myth that U.S. civilian courts provide fair and just outcomes. As demonstrated by the 2010 European Court of Human Rights temporary stay on the extradition of several War on Terror suspects – discussed later in this report – the United States is increasingly becoming a retrograde outlier in the civil and human rights protections given to those convicted and imprisoned on American soil. War on Terror suspects tried in U.S. federal courts have faced procedural improprieties and due process violations in each and every stage of the criminal justice system. This section outlines six different facets of the federal trial system, in which Muslims have faced unconstitutional and unjust irregularities.

1) IMPRISONED WITHOUT TRIAL

Just as in Guantanamo Bay, American Muslims accused of terrorism have been held in prison for months and years at a time, even before being convicted of a crime. Some of these suspected individuals have endured severe isolation in American prisons while they were awaiting trial. In other cases, non-criminal statues were wilfully manipulated in order to preventively detain a suspected terrorist without sufficient evidence to indict. As the following case studies suggest, not even the U.S. judicial system protects Muslims from unjust and unconstitutional imprisonment without trial.

A) PRE-TRIAL DETENTION

The following case study explores the inhumane conditions under which some Americans are held, even before conviction for terror-related offences.

CASE STUDY: SYED FAHAD HASHMI

Hashmi was born in Karachi and immigrated to the U.S. when he was three. He grew up in Flushing, New York and attended high school and university in the tri-state area. He was known as a devout Muslim and as an activist/advocate.[1]

Hashmi was arrested in Heathrow airport in 2006 held in Belmarsh Prison on an American indictment for 11 months.[2] According to the indictment, from January 2004 - May 2006, Hashmi provided "material support of resources" to al Qaeda associates in South Waziristan, Pakistan. He is specifically accused of allowing an acquaintance, Junaid Barbar, to stay at his London apartment in 2004 for two weeks; Barbar purportedly kept luggage in Hashmi's apartment that contained raincoats, ponchos and waterproof socks, all of which were eventually brought to Pakistan and delivered to the third-ranking member of al Qaeda.

In 2007, Hashmi was extradited from Britain to the U.S. Despite the fact that Hashmi had made no effort to contact any suspected terrorists while at Belmarsh, and was not even facing charges of criminal violence, he was subject to severe isolation under Special Administrative

Measures (SAMs) once transferred to U.S. soil. These measures included 23 hour lockdown and 24 hour electronic monitoring, so he was forced to shower and relieve himself in front of a camera. He had no access to fresh air - only one hour of daily recreation inside a cage. Hashmi was permitted one visit from an immediate family member every other week for 1.5 hours, but no physical contact was allowed. He could not communicate with any other prisoners, or even participate in group prayer. Furthermore, Hashmi was barred from having any communication with the media; he could only read designated portions of newspapers 30 days after publication. This was all before he had been convicted of a single criminal offence.[4]

Legal precedent guarantees the basic constitutional rights of all individuals held in pre-trial detention. According to Bell v. Wolfish (441 U.S. 520, 536-537 [1975]):

"[We] have held that convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison. There is no iron curtain drawn between the Constitution and the prisons of this country.... A fortiori, pre-trial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners...."[5]

After three years of isolation, Hashmi pleaded guilty day on 27 April 2010 – the day before his trial was to begin. He could have faced a maximum of 70 years of continued isolation if he had been found guilty. Although imagining a lifetime of isolation certainly influenced Hashmi's decision to plead guilty, he also greatly feared the outcome of his trial. Just before the trial was scheduled to begin, the judge approved requests from the prosecution both for an anonymous jury and the inclusion of secret evidence. Given these circumstances it was doubtful the outcome of his trial would be favourable. On 9 June 2010, Hashmi was sentenced to 15 years.[6]

After Hashmi pleaded guilty, his lawyer David Ruhnke commented, *"I'd rather be in Guantanamo Bay than [the federal lockup in Manhattan]"* where Hashmi was being held.[7] According to expert testimony submitted by Hashmi's attorneys in December 2008, the conditions of his detention were so damaging that they may have *"had severe physical and mental consequences and impair[ed] his mental state and ability to testify on his own behalf".*[8]

Before he was even convicted, Hashmi was held in deleterious conditions that put his mental health and competency to stand trial at risk; his pre-trial conditions of confinement were one of the primary factors that shaped his decision to plead guilty. While other individuals accused of terrorism have also been held on pre-trial SAMs and in conditions of extreme confinement, the exact number is unknown. It is therefore hardly only in Guantanamo Bay that suspected terrorists are held in isolation without trial.

B) MISUSE OF MATERIAL ARREST WARRANTS

As the following case study shows, there are even some American Muslims who have been arrested, shackled onto a plane, and held in prison without sufficient evidence for an indictment.

CASE STUDY: ABDULLAH AL-KIDD

Abdullah al-Kidd (given name Lavoni T. Kidd) was born in Wichita, Kansas, and raised near Seattle. While in university, al-Kidd converted to Islam. From August 2001 to April 2002, he lived in Yemen to study Islamic law and learn Arabic. His trip, and loose connections to some Muslim charities in the United States, flagged him as a person of interest to the FBI.

On 16 March 2003, al-Kidd was arrested at Dulles International Airport. Several days earlier, a judge had issued a material witness arrest warrant, and required his testimony in an upcoming trial. Material witness warrants exist to force important witnesses into custody. The FBI had claimed incorrectly that al-Kidd had a one-way ticket to Saudi Arabia, insisting that since no extradition treaty existed between the US and Saudi Arabia, once he left he might not return. According to the government's account of al-Kidd's arrest, his testimony was required for the trial of Sami Omar al-Hussayen, and the investigation of two organizations al-Hussayen supported, the Islamic Assembly of North America and Help the Needy. The organizations were suspected of providing material support to terrorism.

The police and FBI made no effort to contact al-Kidd to tell him about the arrest warrant, or to ask him to turn himself in. Instead, al-Kidd was arrested in the airport:

"If they would've just given me a call, I would've taken a flight to Boise," he said. "But they didn't.... Everybody was looking at me like they just captured a terrorist right there in Dulles airport," he said. "I mean, here I am, dressed in Muslim garb and I have my beard..."[9]

Al-Kidd was first held for three days at a detention centre in Alexandria, Virginia. After a hearing, he was flown to Idaho. As one reporter commented: *"[While in the plane] he was surrounded by people accused and convicted of serious felonies, his hands shackled to his waist and his feet shackled together. 'Con Air,' [al-Kidd] said, "just like the movie.'"*[10]

Sixteen days later, on 31 March, al-Kidd was released, but only with extreme conditions in place: he had to live with his wife and his in-laws in Las Vegas; his passport was seized; and he was restricted to travelling within four states. It wasn't until over a year later, on 22 June , 2004, that a judge finally lifted restrictions on al-Kidd's travel and returned his passport to him. This followed al-Hussayen's unanimous acquittal on 10 June. Al-Kidd never testified in al-Hussayen's trial.

The impact of the arrest and travel restrictions on al-Kidd's life cannot be underestimated. First, being forced to live with his in-laws in Las Vegas put severe strains on his marriage. In one interview, al-Kidd lamented, *"...this ordeal has dissolved our relationship... I lost a good wife. I'm not with my daughter anymore. How painful is that?"*[11] Second, his professional aspirations were also destroyed. He lost his scholarship to study in Saudi Arabia, and his name is now irrevocably tied to criminality, even though he was never indicted or charged for a crime. As he said: *"Here I am now, 31, and that dream is shrinking and shrinking... My reputation is destroyed... I keep getting 'no's' from jobs as if I'm an ex-felon."*[12]

With his life permanently impacted by his arrest – despite the fact that he was never formally accused of a crime – al-Kidd decided to bring a lawsuit in March 2005 against John Ashcroft, individual FBI agents, and the wardens in the prisons in which al-Kidd was held. He successfully settled with the wardens from the prisons in Virginia and Oklahoma. In September 2009, the 9th Circuit Court of Appeals issued a ruling in al-Kidd's favour, in relation to the other suits. It held that *"that the federal material witness law cannot be used to 'preventively' detain or investigate suspects."*[13] The Court also ruled that Ashcroft could be held individually responsible for the way that material witness warrants were twisted and utilized for a different purpose.

In October 2009, Ashcroft asked the 9th Circuit Court of Appeals to reconsider its ruling; in March 2010, however, the Court refused to do so. In October 2010, the Supreme Court agreed to hear Ashcroft's appeal on whether to throw out the lawsuit. The case was heard on 2 March 2011. In May 2011, the Supreme Court ruled unanimously that al-Kidd could not sue Ashcroft for his purported misuse of the federal material witness law.

The justices all concurred that the policy Mr. Kidd described – namely, the misuse of the material witness law for preventive detention – *"did not violate clearly established law".*[14]

At its core, this case addresses the way the Fourth Amendment has been ignored and dismissed in the Islamaphobic climate of post-9/11 America. As the ACLU outlines in its summary of the case:

"The Fourth Amendment prohibits the arrest of criminal suspects without probable cause. In this case we allege that our client, a former football player at the University of Idaho, was arrested on a material witness warrant pursuant to a policy implemented by John Ashcroft after 9/11 to use the material witness statute as a means of detaining individuals for investigative purposes without probable cause to believe that they'd committed a crime."

In al-Kidd's case – as in others – material arrest warrants were abused to preventatively detain and investigate individuals suspected of terrorism. Both al-Kidd's and Hashmi's cases, provide in-depth and personal insight into the systemic way in which imprisonment without trial affects American citizens on U.S. soil. Indeed, al-Kidd and Hashmi may have been spared Guantanamo Bay, but their First and Fourth Amendment rights as American citizens were grievously violated when they were imprisoned and held under isolating conditions prior to – or even without – trial.

C) UNCONSTITUTIONAL DETENTION OF SOUTH ASIAN AND ARAB NON-CITIZENS

Non-citizens living in the United States have also been subject to unjust and inhumane detention. A Department of Justice Office of the Inspector General (OIG) report, published in April 2003, documented the arrest of the more than 700 Muslim and Arab non-citizens after 9/11, under the pretext of minor immigration violations. The report describes a blanket policy of denying the men release on bond, and continuing to hold them for investigation even after they could have been deported. Many of the detainees were improperly placed in the Administrative Maximum Special Housing Unit (ADMAX SHU), the maximum-security unit at the Metropolitan Detention Centre (MDC) in Brooklyn, New York. While in prison, many of the plaintiffs were kept in solitary

confinement; placed under a communications blackout and prevented from seeking the assistance of their attorneys, families, and friends; and abused physically and verbally by guards. A second OIG report, published in December 2003, documented the abusive conditions under which INS detainees suffered while imprisoned in the MDC. The following section describes a lawsuit being brought against the Immigration and Naturalization Service (INS), the FBI, and several high-profile officials for the illegal and abusive treatment faced by the 9/11 detainees.

LAWSUIT: TURKMEN V. ASHCROFT

[iv] "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks, Special Report" is available at http://www.justice.gov/oig/special/0306/full.pdf.

In April 2002, the Center for Constitutional Rights (CCR) filed a class action lawsuit, *Turkmen v. Ashcroft*, in the U.S. District Council for the Eastern District of New York. The suit holds that the Immigration and Naturalization Service (INS) unlawfully held the plaintiffs for months under the pretext of minor immigration violations, despite the fact that few of them had any connections to any criminal act at all. It was brought against the high level-officials that created these policies, including former Attorney General John Ashcroft, FBI Director Robert Mueller, and former INS Commissioner James Ziglar. The suit also lists other employees of the Metropolitan Detention Center (MDC), who implemented these unconstitutional orders.

All of the eight men originally named on the suit are from Arab or South Asian countries, and were kept in detention while the FBI investigated them. Under this *"hold until clear"* policy, put in place by Attorney General Ashcroft, these men were detained as suspected terrorists until the investigation proved otherwise, which meant that they were held in super-maximum security conditions of confinement. Detainees imprisoned in the ADMAX SHU faced lockdown 23-24 hours a day and were only moved with handcuffs and shackles. According to the lawsuit, these detentions facilitated the systematic discrimination of non-citizens perceived to be of South Asian or Arab descent. Nearly all of the 9/11 detainees were arrested due to "tip-offs" phoned into an FBI hotline; most were completely unknown to the police and immigration authorities beforehand and only raised the suspicion of neighbours because of their perceived ethnic origin. As Rachel Meeropol, the lead attorney on the case at the CCR, points out:

"Mr. Turkmen himself was arrested because his landlady called the FBI hotline shortly after 9/11 and told the FBI that she rented her apartment to several Middle Eastern men. She reported that they were good tenants and paid their rent on time, and that's it. But they were Middle Eastern, and if they were involved in terrorism and she didn't say anything, she couldn't live with herself… and on that information alone, Mr. Turkmen and his roommates were put into detention and held as suspected terrorists… What ties every single tip together is a reference to an Arab or a Middle Eastern person. You see that in absolutely every single tip. Frequently, it's not even accurate! It's not even an accurate assessment of where the individual is from… but this is what brought people into this dragnet."

The CCR suit also alleges that the detainees faced abuse from prison officers. Over and over again, detainees have reported that the officers harassed and physically harmed them, called them "terrorists" and prevented them from practicing their religion while on the inside. One of the core questions of the *Turkmen* suit is whether or not high-level officials should be held responsible for this widespread abuse. In an interview with Cageprisoners, Ms. Meeropol explained why she believed it was not only the guards who should be held responsible:

"Is it just that the 9/11 detainees were abused because there was poor oversight at the facility, and because the guards all thought that they were suspected terrorists, and acted on their own to treat them in these outrageous manners? Or were the detentions themselves set up to facilitate this abuse? And we argue that it's the latter."

In sum, the complaint maintained that the detention violated the detainees' First, Fourth, and Fifth Amendments, as well as international human rights law. Indeed, *"instead of being presumed innocent until proven guilty, they and hundreds of other post-9/11 detainees were presumed guilty of terrorism until proven innocent to the satisfaction of law enforcement authorities"*.[16] It further charged that the detainees were subject to abuse in the ADMAX SHU, and sought compensatory and punitive damages for the plaintiffs.

In 2006, a judge dismissed the CCR's claims challenging the plaintiff's prolonged detention, but permitted the claims challenging confinement and racial and religious discrimination at the MDC to move forward. On 14 February 2008, a CCR attorney argued an appeal of this ruling before the Second Circuit, but in December 2009 the Court affirmed the initial ruling and dismissed the claims about prolonged detention. In November 2009, five of the seven Turkmen plaintiffs settled their claims for $1.26 million from the United States. In September 2010, the CCR filed an amended complaint to add six new plaintiffs to the case. The defendants moved to dismiss this Amendment Complaint, and oral arguments on this motion were heard by the Second Circuit in March 2011.[17]

It is not only in Guantanamo Bay that individuals can be held in conditions of extreme isolation and confinement for months or years without trial. Indeed, both citizens and non-citizens have been subject to illegal and unconstitutional detention without trial on U.S. soil.

2) DISCRIMINATORY POLICING AND PROSECUTION

American Muslims are not merely experiencing detention and imprisonment without trial. They are also facing a criminal justice system that discriminates against them on the basis of their faith. Muslims are forced to endure heightened suspicion and surveillance from the FBI, the police, and members of their own communities. They are also more likely to be indicted and convicted of particular crimes – purely on the basis of their faith.

A. CITIZEN VIGILANTES AND "PREVENTATIVE POLICING"

Beginning in World War II and continuing through the 1970s, the FBI engaged in several operations aimed at undermining domestic groups considered antagonistic to the U.S. government and American national security. This included the infamous COINTEL program, in which the FBI systematically surveilled and sabotaged members of the "New Left" and civil rights activists. During the 1960s, Dr. Martin Luther King Jr, the Southern Christian Leadership Conference, the National Association for the Advancement of Colored People (NAACP), and the Congress of Racial Equality (CORE) were all targets of COINTELPRO projects, along with other progressive organizations– including member of the Communist Party, women's liberation groups, and others.

After the Watergate affair, the Church Committee (formally known as the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities) was established to investigate tactics used by the FBI and the CIA to gather intelligence. The committee found that the FBI utilized *"secret informants... wiretaps, microphone 'bugs,' surreptitious mail opening and break-ins, [sweeping] in vast amounts of information about the personal lives, views and associations of American citizens". In other words, this was "a sophisticated vigilante operation aimed squarely at preventing the exercise of First Amendment rights of speech and association, on the theory that preventing the growth of dangerous groups and the propagation of dangerous ideas would protect the national security and deter violence".*[18]

As a result of the Committee findings, in 1976 Attorney General Edward Levi established the first Attorney General Guidelines. These Guidelines were premised on the fundamental assumption

that *"government monitoring of individuals or groups because they hold unpopular or controversial political views is intolerable in our society"*[19]

MUSKASEY GUIDELINES AND FBI DOMESTIC INVESTIGATIVE OPERATIONAL GUIDELINES (DIOGS)

Since 11 September 2001, several Attorney Generals have eliminated many of the protections afforded under previous Guidelines. The 2008 Guidelines put in place by Attorney General Michael Mukasey, nearly return the United States to pre-1976 conditions.

Consider the following analysis from *Targeted and Entrapped*, a recent report published by the Center for Human Rights and Global Justice (CHRGJ) at the NYU School of Law:

"The Muskasey Guidelines are profoundly troubling in that they allow the FBI to authorize informants and other surveillance techniques without any factual predicate or nexus to suspected criminal conduct...

More specifically, (1) the Guidelines authorize the FBI to undertake "assessments" prior to preliminary investigations, in stations where there is no 'information, or ... allegation indicating' wrongdoing or a threat to national security; (2) in this assessment stage, the Guidelines permit the FBI to use intrusive investigative techniques such as 'recruiting and tasking informants to attend meetings or events surreptitiously'; 'questioning people or engaging them in conversation while misrepresenting the agent's true identity'; and, 'engaging in physical surveillance of homes, offices and individuals'; and (3) the Guidelines 'eliminate[e] or reduc[e] many of the requirements for supervisory approval of particular investigative techniques and temporal limits on investigative activity.'[20]

The Guidelines are put in place via the FBI's Domestic Investigative Operational Guidelines (DIOGs). According to a report published by the Brennan Centre for Justice, the DIOGs allow the FBI to collect "information regarding ethnic and racial behaviours 'reasonably believed to be associated with a particular criminal or terrorist element of an ethnic community" and "to collect 'the locations of ethnic-oriented businesses and other facilities' (likely including religious facilities such as mosques) because 'members of certain terrorist organizations live and operate primarily within a certain concentrated community of the same ethnicity'".[21]

Taken together, the Guidelines and the DIOGs enable the surveillance and criminalization of entire Muslim communities – even when there is no evidence of wrongdoing. This is pre-emptive policing at its heart: assuming that the risk of criminal activity exists purely on the basis of religious beliefs protected by the First Amendment. As the case of the Fort Dix Five demonstrates, widespread policies of preventive policing work in tandem with citizen vigilantes, who monitor Muslim members of their own communities. Non-Muslim and Muslim Americans alike become an extension of the Islamaphobic criminal justice system, in which simply being 'too Muslim' raises a flag of suspicion and is deemed sufficient to notify the police or federal authorities.

CASE STUDY: THE FORT DIX FIVE[22]

Zurata and Ferik Duka are ethnic Albanians, who immigrated to the United States in order to escape discrimination in the former Yugoslavia and build a better future for their family. When they immigrated to the U.S. they brought their three sons – Eljvir, Dritan, and Shain - who at the time were six, four, and one and a half years old. The family settled in Cherry Hill, New Jersey. When the brothers reached adulthood, they began working for their father's roofing business seven days a week, and encouraged him to retire. Most of their free time was spent as a family, especially with Dritan's five children.

In January 2006, Eljvir, Dritan, and Shain decided to take a vacation in the Pocono Mountains, along with eight other friends. They decided to make a DVD of the video footage of their trip, and went to Circuit City to make copies for everyone who

attended. The clerk copying the video heard the men chanting "*Allahu Akbar*" [God is Great], and participating in a host of recreational activities, including riding horses, skiing, playing paintball, and shooting at a firing range. The tape garnered his suspicion, and he immediately turned the DVD over to the police.

After reviewing the tape, the FBI decided to investigate both the brothers and two of their friends – Mohammad Shnewer and Serdar Tatar – by sending into the community two undercover paid informants, Mahmoud Omar and Besnik Bakalli. The two informants secretly recorded hundreds of hours of conversation with the brothers, and encouraged them to download jihadist videos and engage in violence. In August 2006, Omar and Shnewer drove to Fort Dix - a nearby army base - and other sites, in a trip that the government later described as 'reconnaissance'.[23] One video of these 'missions', however, simply shows Shnewer sitting in the passenger seat drinking coffee, while Omar drove up to the gates of the Fort and then turned around. Furthermore, Serdar Tatar even went to the Philadelphia police to report that someone (likely either Omar of Shnewer) was pressuring him to acquire a map of Fort Dix, since he thought it might be related to terrorism.[24]

Several months later, Omar offered to help the brothers purchase more guns. According to their younger brother, Burim, "*My brothers wanted the guns because they were going to the Poconos again with their friends and didn't want to wait in line for target shooting with such a big group.*"[25] The men maintain that they expected legal semi-automatic rifles, and never intended to purchase illegal or automatic weapons. Omar did not record the conversations where the gun deal was arranged, however. He maintains that the recording equipment failed to work.[26]

The three brothers were arrested on 7 May 2007, as they went to go pick up the guns they had asked Omar to buy. The trial was held in Camden, New Jersey. As in several other terrorism cases, the government requested and was granted an anonymous jury. All three brothers were charged with conspiracy to attack Fort Dix and weapons possession. This is despite the fact that the brothers vocally objected to violent jihad on tape; Eljvi can be heard saying that a violent attack against Fort Dix would be both "*haram*" [forbidden] and unwarranted.[27] Furthermore, even the informant himself admitted that the Duka brothers had no awareness of the plot on Fort Dix. Omar testified in court that Dritan and Shain knew nothing about the planned attack, and *"had nothing to do with this matter"*.[28]

Despite this, the jury convicted all three Duka brothers and their co-defendants.[29] As payment for working as informants, Bakalli earned $150,000 and Omar made $240,000.[30]

As both the Turkmen suit and the case of the Fort Dix Five show, community vigilantism, and discriminatory policing, have played a key role in the arrest of many Muslim 'War on Terror' defendants. Yet in considering the following case study, it becomes clear that Islamaphobia penetrates even further into the criminal justice system. Some individuals have even been selectively prosecuted, simply because of their religious beliefs.

B. SELECTIVE PROSECUTION

Aside from facing discriminatory policing, Muslims have also been aggressively targeted by the judicial system: arrested and charged for committing crimes with a fervour rarely experienced by non-Muslims. Rafil Dhafir's case exemplifies howselective prosecution affects Muslims in America.

CASE STUDY: RAFIL DHAFIR

Rafil Dhar was born and raised in Baghdad. He attended medical school in Iraq, then immigrated to the U.S. in 1972. Once in the U.S., he married his wife, Priscilla, and lived in various parts of the country – from Michigan, to Detroit, to Amarillo. In 1980, Rafil relocated to Syracuse and began to build a life there. He eventually opened up a private medical practice, assisted in the creation of a new mosque, the Islamic Society of Central New York, and became engaged in building the Muslim community in the Syracuse area.

After the invasion of Kuwait in 1990, strict sanctions were imposed in Iraq. These sanctions proved to have a deadly impact on everyday Iraqis; as a result, eventually *"half a million Iraqi children died along with one million adults"*.[31] Rafil was concerned

about the impact the sanctions were having on Iraqi children, and in 1993 he established Help the Needy, which aimed to provide humanitarian aid (primarily food and medicine) to children in Iraq. The organization was relatively successful in providing assistance to Iraqi civilians; indeed, *"since 1994 almost $5 million in donations were used to buy food, clothes, and medicine in Jordan. These essential materials were transported by trucks across the border to be distributed by local family and relief networks in Iraq."*[32]

Nearly ten years later, in February 2003, Dhafir was arrested. At 6 AM, several cars full of federal agents arrived at his home in order to search it. Law enforcement agents simultaneously interrogated 150 mostly Muslim families who had donated to Help the Needy. The day after his arrest, then-Attorney General John Ashcroft reported that *"funders of terrorism"* had been arrested.[33] Similarly, just before Dhafir's trial began in October 2004, then-Governor Pataki commented Dhafir's was a *"money laundering case to help terrorist organizations... conduct horrible acts".*[34]

Dhafir was refused bail over and over again. He rejected all offers to take a plea bargain. At his the trial, the prosecution continuously hinted at more serious involvement in terrorism. In February 2005, Dhafir was convicted of 59 out of 60 charges. Essentially all of the crimes were white-collar; they included charges for money laundering, tax evasion, tax-related conspiracy, a visa fraud charge, and 24 courts of health care fraud. Most notably, he was convicted of conspiring to violate the International Emergency Economic Powers Act (IEEP), specifically the Iraqi Sanctions Regulations Act. He is the only U.S. citizen ever to be held in prison for violating the sanctions against Iraq. His case is depicted as a success in the fight against terror, even though none of his convictions are related to terrorism.[35] In October 2005, Dhafir was sentenced to 22 years in prison.[36]

Prominent politicians and aid workers expressed shock after Dhafir's conviction. The former United Nations Humanitarian Coordinator in Iraq (1997 1998), Dennis Halliday, commented:

"I'm absolutely stunned by this information. I mean, it is an outrageous situation, particularly as we have just discussed the State Department breaching its own or the United Nations' sanctions to the tune of $10 billion, allowing Saddam Hussein to export oil and import at the same time, and now we're prosecuting an American Iraqi? It's unbelievable".[37]

Indeed, non-Muslims who violated the sanctions were not subject to criminal charges:

"We have some people from the Syracuse area that went with Voices in the Wilderness to Iraq. Those individuals and the organization Voices in the Wilderness never got criminal charges filed against them. Instead, the government imposed only fines. Our perception is that the only people that get criminal charges filed against them tend to be Muslims and Arabs. That raises questions about selective enforcement".

Given this context, it is unsurprising that Dhafir's case is perceived as one of discriminatory prosecution. Individuals campaigning on behalf of Dhafir commented: "criminal prosecutions have only been made against Muslims and people of Middle Eastern origin accused of violating these economic sanctions. Dr. Dhafir is the only individual prosecuted where the aid sent to a sanctioned country was predominately food and/or humanitarian aid."[38]

Muslims in America live under heightened suspicion and surveillance from members of their community, the FBI, even the government officials that determine prosecution. A widespread culture of Islamaphobia makes it easier for Americans across the political spectrum to condone citizen vigilantism, preventative policing, and discriminatory prosecution. The result is a criminal justice system that systematically discriminates against Muslims, landing Muslims in prison for crimes for which few others would face incarceration.

3) ILLEGITIMATE CHARGES

As proven by the recent publication of the Guantanamo files by Wikileaks, many of the individuals held at Guantanamo Bay were either completely innocent or relatively low-level operatives. Given this context, it is important to consider whether all the convictions of War on Terror defendants on U.S. soil have been legitimate. Many people have been convicted of nebulous and broad-reaching offences such as 'material support',

faced entrapment from undercover agents, or been threatened with 'enemy combatant' status in order to induce guilty pleas.

A. MATERIAL SUPPORT

The material support statue, 18 U.S.C. § 2339B, criminalizes providing 'material support' to any organisation that has been identified by the Secretary of State as a DFTO (Designated Foreign Terrorist Organization). 'Material support' is broadly defined to encompass any kind of support given to designated groups, including humanitarian aid, expert advice, training, and political advocacy. There is no requirement to demonstrate intent to support a terrorist or other illegal activity; if the accused is aware that the organisation is a DFTO, they are culpable, even if they only intended to further its legal or humanitarian aims.

Jeanne Theoharis is professor of political science at Brooklyn College, and researches the civil rights and Black Power movements. She taught Syed Fahad Hashmi several years before his arrest. After learning about his case, she began campaigning on his behalf. In an article published in Slate in April 2010, she commented:

"Material-support laws are the black box of domestic terrorism prosecutions, into which all sorts of constitutionally protected activities can be thrown and classified as suspect. The law defines material support as the knowing provision of 'any service, training, [or] expert advice or assistance' to a group designated by the federal government as a foreign terrorist organization. The prosecution need not show an actual criminal act, just the knowing 'support' to a group designated a terrorist organization. It's a prosecutor's dream: You don't need to show evidence of a plot or even a desire to help terrorists to win a conviction—a low bar the standards of traditional criminal prosecution would not allow."[39]

Mohamad Hammoud was the first person to be convicted of material support charges. His case is explored below.

CASE STUDY: MOHAMAD HAMMOUD

Mohamad Hammoud and his brother ran a multimillion-dollar cigarette-smuggling operation with the intention of engaging in tax arbitrage, transporting at least $7.9 million worth of cigarettes from North Carolina (where the state tax was fifty cents per carton) to Michigan (where the state tax was $7.50 per carton). He was arrested in July 2000. Almost all of the charges brought against Hammoud were for white-collar crimes, namely cigarette smuggling, racketeering, and money laundering; however at trial, prosecutors sought to prove that Hammoud sent at least $3,500 of his profits from the smuggling venture to high-ranking Hezbollah leaders. In 2002, Hammoud was convicted of fourteen charges, including 18 U.S.C. §2339 (B).[40] Many DFTOs – including Hezbollah – provide social services to local populations, but the prosecution was not required to demonstrate that Hammoud donated the money with the intent of furthering its illegal activities.

At sentencing, the trial court judge determined that Hammoud was attempting to influence the conduct of government by funding Hezbollah, thereby bringing the terrorism enhancement statute (3A1.4) into play. Hammoud was initially sentenced to 1860 months – over 155 years of imprisonment.[41]

Hammoud challenged both his conviction and his sentencing under 3A1.4. He claimed that the application of 3A1.4 violated his Sixth Amendment rights to a jury trial, as given by Blakely v. Washington.5 He lost his appeal on all counts but brought a writ of certiorari request to the Supreme Court. In January 2005, the Supreme Court ruled in Hammoud's favour. The case was remanded to the 4th Circuit Court of Appeals, who vacated his sentence. In January 2011, Hammoud was resentenced, and his term was reduced by over a century – to 30 years.[42]

[v] In this 2004 ruling, the U.S. Supreme Court found that in the context of mandatory sentencing guidelines specified under state laws, judges cannot enhance criminal sentences, except on the basis of facts decided by thejury or entered by the defendant himself.

His lawyer, Stanley Cohen, lamented that 9/11 was still being used to justify an unreasonably long sentence in Hammoud's case. As cited in ones new report, *"This was a trial about a young kid and $3,500,"* Cohen said. *"It doesn't make anyone in this country safer."*

As suggested by the sentence initially given to

Hammoud, the material support charge can bring about extremely long prison terms for convicted defendants. Furthermore, the way the crime is currently constituted arguably violates our constitutionally protected rights. The following section explores a lawsuit brought by the Centre for Constitutional Rights to challenge the legality of the material support charge.

LAWSUIT: HOLDER VS. HUMANITARIAN LAW PROJECT

The Center for Constitutional Rights (CCR) has spent over a decade challenging the material support statute. The lead plaintiff in the case, the Humanitarian Law Project (HLP), is a non-profit that provides training in conflict resolution and human rights monitoring, in order to encourage the peaceful and legal resolution of armed conflicts. Some of the groups that the HLP want to assist are categorized by the United States government as Designated Foreign Terrorist Organisations (DFTOs), including the Kurdistan Worker's Party (PKK).

According to the CCR:[44] *"...the challenged provisions [of the material support statute] violate the First Amendment insofar as they criminalize the provision of forms of support such as the distribution of literature, engaging in political advocacy, participating in peaceconferences, training in human rights advocacy, and donating cash and humanitarian assistance, even when such support is intended solely to promote the lawful and nonviolent activities of a designated organization. Plaintiffs' principal complaint is that the statute imposes guilt by association by punishing moral innocents not for their own culpable acts, but for the culpable acts of the groups they have supported. The statute does not require any showing of intent to further terrorist or other illegal activity. [The CCR] also claimed that the statute was unconstitutionally vague, and that the Secretary of State's power to designate groups was too broad, giving the executive too much discretionary power to label groups as "terrorist" and turn their supporters into outlaws."*[45]

The first suit was filed by the CCR in 1998. Holder v. Humanitarian Law Project (HLP) was heard several times by the lower courts, which consistently ruled in favour of the plaintiffs. On 23 February 2010, the suit was argued in front of the Supreme Court. In a June 2010 ruling, the Court held that the statute's prohibitions on 'expert advice,' 'training,' 'service' and 'personnel' did not violate First Amendment rights to freedom of speech or freedom of association. Furthermore, in the 6-3 ruling, the Court also maintained that the statute was not excessively vague. Writing for the majority, Chief Justice Roberts reversed a previous ruling by the Court of Appeals, establishing that even providing intangible support like human rights training could be included under the material support charge.

After the ruling, CCR Cooperating Attorney David Cole commented: *"We are deeply disappointed. The Supreme Court has ruled that human rights advocates, providing training and assistance in the nonviolent resolution of disputes, can be prosecuted as terrorists. In the name of fighting terrorism, the Court has said that the First Amendment permits Congress to make human rights advocacy and peacemaking a crime. That is wrong."*[46]

Indeed, the *"CCR's clients sought to engage in speech advocating only nonviolent, lawful ends, but the government took the position that any such speech, including even filing an amicus brief in the U.S. Supreme Court, would be a crime if done in support of a designated 'terrorist group.'... this is one of a very few times time that the Supreme Court has upheld a criminal prohibition of speech under strict scrutiny, and the first time it has permitted the government to make it a crime to advocate lawful, nonviolent activity."*[47]

The Supreme Court's ruling on the material support charge puts Americans' First Amendment rights under threat. It allows for prosecution based on speech and even criminalizes the work of peaceful nonprofits such as the Humanitarian Law Project. Moreover, the material support charge does not require the prosecution to show that the defendant intended to support the illegal aims of a DTFO. The nebulous and farreaching nature of the legislation means that defendants can be convicted much more easily under material support than under more substantive charges.[48] Syed Fahad Hashmi, for example, provided "material support" by allowing a friend to stay in his London apartment;

even John Walker Lindh was indicted for "material support" when the federal government did not have sufficient evidence to charge him with treason. As the case of Mohammad Hammoud demonstrates, the material support charge helps the federal government to send suspected terrorists to prison for an extremely long time, even if the "support" they have provided is relatively minor or only tangentially related to thecriminal work of a DTFO.

It isn't only that some specific charges – such as material support – are overly vague and infringe on constitutional liberties. As the next section explores, many War on Terror defendants have been convicted based on actions committed as a result of their interactions with paid FBI informants, rather than crimes they would have committed on their own had the informants never entered their lives.

B. USE OF INFORMANTS AND AGENT PROVOCATEURS

In the past few years, civil rights advocates have identified the role that informants and agent provocateurs play in terror convictions. In several cases – for example, that of the Newburgh Four - convicted individuals were encouraged to discuss and plan terror attacks by undercover agents. Under the direction and coercion of these paid informants, defendants agreed to participate in acts of terrorism they might never have considered otherwise.

The Mukasey Guidelines and DIOGs (referred to earlier in this report) do not only permit the FBI to recruit informants and place them in communities even if there is no suspicion of criminal activity; they also allow the informants to engage in criminal activity, and do not clearly prohibit entrapment. In fact, the Guidelines established by Alberto Gonzales actually removed prohibitions on entrapment listed in both the Reno and Ashcroft Guidelines, which specified that FBI informants are prohibited from *"participat[ing] in an act that constitutes an obstruction of justice… or initiat[ing] a plan or strategy to commit a federal state, or local offence"*.[49]

The Guidelines provide few checks on the FBI on the aggressive use of informants in 'suspect' Muslim communities. However, individuals indicted after an informant was placed in their vicinity, can endeavour to mount an entrapment defence. To successfully argue that their case is one of entrapment, the defendant must first demonstrate by a preponderance of the evidence, that the informant induced him to commit the crime. Secondly – if the defendant can successfully prove inducement – it is the government's responsibility to establish, beyond a reasonable doubt, that the defendant was predisposed to commit the crime at hand. Despite the fact that the entrapment defence has been raised in several federal terrorism cases involving a paid informant, it has never been utilized successfully. As the authors of *Targeted and Entrapped* note, *"substantial defences like entrapment or outrageous government conduct exist, but in particular in the terrorism context, the virtual equation of political and religious viewpoints with predisposition renders the entrapment defence ineffectual"*.[50] As the case of the Newburgh Four case demonstrates, agent provocateurs often endeavour to entrap the most vulnerable members of Muslim communities. These individuals are sometimes given life sentences in prison, for purported attacks they never would have discussed or envisaged if they had not been contacted by the undercover agent.

CASE STUDY: NEWBURGH FOUR[51]

In 2007, FBI informant Shahed Hussain was sent to infiltrate the Masjid al-Ikhlas mosque in Newburgh, New York. Hussain initially became involved with the FBI after a 2002 arrest for identity theft; Hussain was sentenced to five years probation and agreed to become a confidential informant. He was first placed in Albany, where his actions led to the arrest and conviction of Yassin Aref (his case is explored in full later on in this report). Newburgh is approximately sixty miles north of New York City, and has about 30,000 residents. The long decline of industry from the city, combined with failed urban renewal, has plagued Newburgh with endemic poverty and underemployment. In 2008, Newburgh led New York State in violent crimes per capita.[52]

Hussain introduced himself to James Cromitie in

2008, in the parking lot of the al-Ikhlas mosque. According to the mosque's imam, Salahuddin Muhammad, most of the congregants suspected that Hussain was an informant, and stayed away. They believe he lured Cromitie by offering him meals out and rides in expensive cars. At a sermon just after the conviction of the Newburgh Four, the imam wondered aloud what else the congregation could have done. *"Maybe the mistake we made was that we didn't report him… But how are we going to report the government agent to the government?"*[53]

After reporting to the FBI that Cromitie was making anti-Semitic and anti-American remarks, Hussain was attached to a wire. He eventually recorded hundreds of minutes of conversation with the four convicted men. Hussain and Cromitie began discussing a potential terrorist attack, but Cromitie expressed ambivalence. The FBI then ordered Hussain to offer Cromitie a new incentive: a BMW and almost $250,000 in cash. Over the next few months, Cromitie was also offered a two-week vacation to Puerto Rico, a car, and a barbershop business if he agreed to the plot. He eventually did. At the behest of Hussain, Cromitie recruited three other men as lookouts: David Williams, Laguerre Payen, and Onto Williams, offering them all substantial sums of money to participate. The FBI even pulled strings to postpone David William's sentencing for grand larceny charges, scheduled for 13 May. If the charges had gone forward as planned, he would have been in jail when the attack was scheduled to take place.

On 20 May 2009, the day of the planned attack, Cromitie and Hussain placed three inert explosive devices in a Mazda and parked outside of the Riverdale Jewish Center. The bombs had been built by the FBI and provided to the Newburgh Four through Hussain. (Hussain even testified that he was ordered by the FBI to take complete control of the operation once they arrived in Riverdale).

David Williams now maintains that he and the other defendants had planned to swindle Hussain out of the money, and never intended to go through with the attack. As proof, he says that none of the defendants switched on their cell triggers for the bombs – Hussain is the one who connected the bombs to the phones. Hussain made over $100,000 in wages and expenses as an informant, including $23,000 for his testimony against the Newburgh Four. In October 2010, the men Hussain convinced to participate in the plot were given a far different 'reward'; they were found guilty of several charges, including conspiracy to use weapons of mass destruction and conspiracy to acquire and use anti-aircraft missiles to kill U.S. officers and employees. Several months later, in June 2011, three of the four men were given the mandatory minimum sentence of 25 years.[54] Laguerre Payen, the fourth man to be sentenced, was also given 25 years in September 2011.[55]

All four men involved were in extremely precarious situations when they were recruited. David Williams, one of the accused lookouts, had been living in Brooklyn, and only returned to Newburgh when his brother fell ill with liver disease. His family's insurance wasn't good enough to pay for the full cost of the transplant, and Williams was desperate to raise the money. Hussain purportedly promised Williams that if he participated in the plot, he would pay him enough money to cover the full cost of the transplant.

Laguerre Payen has a ten-year history of mental illness, and has taken medication for schizophrenia. A few years ago his deportation order to Haiti was suspended due to his mental instability. When asked how he would have responded if he knew Hussain was spending time with Payen, the mosque's assistant imam answered, *"I would have told him, in no uncertain terms, 'Stay the hell away from him… My heart hurts. For the most part [Payen] was a baby. Chronologically he may have been 27. Psychologically, emotionally, he was a kid."*[56]

Even Hussain's FBI handler, Special Agent Robert Fuller testified that the government was *"pretty much in control of what the defendants were doing."* As one author commented:

"Hussain made up the plan, identified the targets, and supplied the transportation and equipment, including the fake bombs, a non-functioning Stinger missile, a safe house, two storage facilities, rental cars, cameras, and cell phones. He suggested the code words, trained the four men on the weapons, assembled the fake bombs, and paid for everything, including meals, rent, groceries, and personal expenses." [57]

Imam Salahuddin Muhammad was the first

to publicly define the Newburgh Four case as entrapment. He said that had Hussain never infiltrated their community, *"these men would still be smoking weed and drinking beer somewhere"*.[58] The FBI has been using undercover agents for decades, though not primarily amongst Muslims. Imam Muhammad pointed out that entrapment has long been used by the FBI to demonize and weaken African-American communities:

"I believe that what we are seeing today with the FBI surveillance and the FBI allowing for agent provocateurs to enter into Muslim communities is the same thing that happened in the '60s with a lot of the Black Nationalist organizations. That's what I see happening today in the Islamic community. The FBI, they are sending these agent provocateurs into the community, and they are cultivating and nurturing and actually creating situations that would never have occurred if they didn't have their man in there to do that…"[59]

In an interview with Cageprisoners, Alicia McWilliams, David Williams' aunt, expressed her outrage at the case:

"Where the [heck] do you go when something like this happens? Who do you go to, as an American, who do you go to?... This is a human issue that affects us all as Americans, and as people."

The case of the Newburgh Four is not an unusual or isolated example of entrapment. As indicated by the following lawsuit, FBI agents are systematically and routinely infiltrating American mosques.

LAWSUIT: FAZAQA V. FBI

On 23 February 2011, the Council on American-Islamic Relations of the Greater Los Angeles Area (CAIR-LA), the ACLU of Southern California (ACLU/SC), and the law firm Hadsell Stormer Keeny Richardson & Renick LLP (HSKRR), filed a federal class action lawsuit against the FBI, for its infiltration of mosques throughout Southern California.[60]

The lawsuit seeks the destruction of all the information gathered by the informant, Craig Monteilh, during the 14 months he was planted in Orange County. During that time, he collected information on hundreds of California Muslims, including their names, telephone numbers and e-mails. The suit also seeks damages for the emotional distress caused to the three plaintiffs listed on the suit. Monteilh, a convicted felon, posed as a convert, and according to the suit was instructed to *"focus on people who were more devout in their religious practice, irrespective of whether any particular individual was believed to be involved in criminal activity"*.[61]

As Peter Bibring, Staff Attorney for the ACLU/SC, commented:

"The FBI gathered information on hundreds of innocent Americans simply because they worship at a mosque. It's hard to imagine a more blatant violation of the First Amendment's guarantees against religious discrimination." [62]

By sending an informant into the mosques in order to gain information about the Muslim community, the FBI did not only violate the constitutional rights of the plaintiffs. As the Deputy Director for the Council on American-Islamic Relations of the greater Los Angeles Area (CAIR-LA) commented, using an informant also served to weaken ties between mosque-goers and law enforcement:

"Targeting American Muslims for surveillance not only destroys community cohesion, it erodes the trust between law enforcement and Muslim communities, which, in turn, undermines our national security interests. This broad investigation by the FBI that failed to produce even a single terrorism-related conviction was not based on suspicion of criminal activity, but rather on the targets being Muslim."[63]

In response to the lawsuit, the U.S. Department of Justice (DOJ) requested a dismissal, claiming that the suit would require the government to divulge state secrets. In August 2011, CAIR-LA, the ACLU/SC and HSKRR filed a motion to prevent the court from reviewing the secret evidence filed in support of the DOJ, until the court can rule whether the state secret doctrine can even be properly invoked in this case. Ameena Qazi, the deputy executive director of CAIR-LA, commented:

"It is shocking that the Obama Administration would invoke the state secrets privilege to dispose of this lawsuit... State secrets should be an evidentiary rule to keep specific information

or documents from being presented in court. It should not be used to prevent those wronged by the government from having their day in court."[64]

As shown both by the lawsuit filed by CAIR-LA & ACLU/SC and the case of the Newburgh Four, placing paid informants in Muslim communities does not serve to promote national security. Using paid informants wastes an immense amount of government funds, can lead to the conviction of individuals who would pose no danger on their own, and further strains the already tense relationship between the Muslim community and law enforcement.

The next section explores another facet of how illegitimate charges affect War on Terror defendants. Several individuals have decided to plead guilty to federal crimes, after they were threatened by prosecutors or the FBI with classification under 'enemy combatant' status.

C. THE THREAT OF 'ENEMY COMBATANT' STATUS AND THE INDUCEMENT OF GUILTY PLEAS

It is important to recognize not only that the federal criminal justice system is systematically discriminatory towards Muslims – but also that it is intimately connected to Guantanamo Bay. The ever-present threat of 'enemy combatant' status has been invoked by the FBI and prosecutors in order to induce defendants to plead guilty. In at least two cases – the Lackawanna Six, and Iyman Faris, explored below – defendants chose to plead guilty rather than face potentially indefinite detention without trial as an enemy combatant.

As given by *Boykin v. Alabama*, the Supreme Court only considers a guilty plea to be valid if it is made voluntarily and intelligently. Yet as legal scholar Carl Takei deliberates in an article published in the *Boston College Law Review*, *"What kinds of coercion or unequal bargaining power can render a plea involuntary?"*[65]

According to Takei, *"enemy combatant threat bargains do not arise from the normal give and –take of plea bargaining because the choice between a plea bargain and extrajudicial enemy combatant detention – with its limited due process guarantees, usual severity, and unrelated to criminal justice objectives – creates extraordinary pressure to plead guilty to a degree unlike that presented by normal plea bargaining threats".*[66] It is the grotesque brutality of rights violations at Guantanamo Bay that has convinced some Americans that it is worthwhile to plead guilty, rather than face possible classification under enemy combatant status. In Iyman Faris' case, the fear of living in Guantanamo Bay played a central role in his decision to plead guilty.

CASE STUDY: IYMAN FARIS

Iyman Faris was born in Kashmir. He arrived in the United States in 1994, and became a naturalized citizen in December 1999. He lived under the alias of Mohammad Rauf. From 1995 to 2000 he lived with his wife, Geneva Bowling, in Columbus, Ohio, and worked as trucker.

In 2003, the FBI sought Faris for questioning. He agreed to cooperate, and in late March Faris was interrogated in a hotel room in Ohio for several days. After gaining his consent, the FBI transported Faris to Quantico, Virginia, for further questioning. Faris claims that although he continually requested an attorney after transfer, he was interrogated without legal counsel until 6 April.

Several days after first meeting his attorney – on 16 April – Faris' counsel informed him that if he chose not to accept the prosecutor's plea offer, he risked being sent to Guantanamo Bay. The next day, on the 17th, an FBI agent visited Faris without his counsel present, and warned him that his window for accepting a plea offer was closing quickly; the agent further commented that if Faris did not plead guilty, he might be classified an enemy combatant and shipped to Guantanamo Bay. According to Faris, on the same day his lawyer phoned him several times, asking him to reconsider the plea bargain. Bowing to pressure from all sides, Faris signed the plea agreement later that day, and entered it into court on 1 May 2003. In addition to the plea bargain, Faris also signed a written statement of facts.

In the statement of facts, Faris admitted to meeting Osama Bin Laden, as well as obtaining sleeping

bags, cell phone and extensions on airplane tickets for individuals in al Qaeda. The FBI also claims he received instructions from Khalid Shaikh Mohammad for a second wave of attacks on New York and Washington. Faris was purportedly instructed to obtain equipment that could be used to cut the cables on a bridge in New York City. Several days later, Attorney General John Ashcroft held a press conference, stating that Faris had been involved in a conspiracy to sever the cables of the Brooklyn Bridge.

Later, in May, Faris told his interrogators that he had falsely confessed. He hired a different attorney and filed an appeal challenging the voluntariness of his guilty plea. Before the appeal was heard - in October 2003 – Faris sentenced to 20 years in prison. In 2004, the U.S. Court of Appeals for the Fourth Circuit denied his appeal.

In the War on Terror, many guilty pleas and convictions have a dubious legitimacy. The material support statue facilitates the convictions of individuals engaging in human rights or humanitarian work with DFTOs; it also eases convictions of people who could not be successfully charged with more substantive crimes. The widespread use of entrapment by FBI agents brings into further doubt the legitimacy of charges levied against 'homegrown' terror suspects. Finally, several individuals have pled guilty only because they were threatened with 'enemy combatant' status and feared imprisonment in Guantanamo Bay. Taking terrorism seriously means evaluating cases as they occur, to ensure that people are not imprisoned for engaging in constitutionally protected behaviour, or because they faced entrapment or threats by FBI agents or police officers. Convicting people of illegitimate charges only serves to distort the threat of terrorism and obfuscates the genuine suffering of families affected by 9/11 and other terrorist attacks.

The next section explores issues faced by War on Terror defendants with regards to the evidence levied against them in court; this includes prejudicial and false testimony, and evidence gained in ways that violated the defendants' civil liberties or human rights.

4) EVIDENCE

We know that individuals have been held indefinitely at Guantanamo Bay without charge or trial, and often without sufficient evidence to convict them in a federal court or military tribunal. But in the federal criminal justice system, defendants have also faced a host of systemic procedural improprieties with respect to the evidence used against them, including: prejudicial or false testimony by witnesses; and the inclusion of evidence that was gained in ways that violate the defendant's civil liberties or human rights.

A. PREJUDICIAL OR FALSE TESTIMONY

In compiling evidence against accused War on Terror defendants, many prosecutors have drawn on circumstantial evidence or unreliable witnesses in order to build a case. In the two cases explored below, the prosecution used weak and unreliable evidence to depict the defendants as dangerous characters worthy of imprisonment. In Sabri Benkahla's case, the so-called expert testimony of Evan Kohlmann played on the fears of jury members and served to prejudice them against the defendant. In Pete Seda's case, the key witness – who was paid to testify against him - lied under oath.

CASE STUDY 1: SABRI BENKHALA & THE 'EXPERT' TESTIMONY OF EVAN KOLHMANN

Sabri Benkahla is an American citizen, born and raised in Virginia. He attended a Catholic elementary school in Falls Church and was always interested in civic activities and local politics. In the summer of 1999, Benkhala travelled to England, and then purchased a ticket to travel onwards to Pakistan. He would later be accused of crossing from Pakistan into Afghanistan in order to attend a training camp for Lashkar-e-Taiba (LET), and firing both an AK-47 and a rocket propelled grenade launcher.

After finishing his undergraduate degree at George Mason University, Benkahla decided to move abroad to expand his knowledge of Islam and Arabic. It was in June 2003 - while Benkahla

was studying in Madinah – that his struggles with the law began. Just before his graduation, and on the night before his wedding, the Saudi police arrested Benkahla. According to the American Civil Liberties Union (ACLU), Benkahla was held *"incommunicado in 8 x 8 foot concrete cell while his dumbfounded family wondered why he failed to appear at his own wedding".*[68] After spending over a month in the custody of Saudi Arabian security forces, Benkahla *"was taken by the F.B.I. on the tarmac of an airport, forced to strip, and photographed in the nude".*[69] During his flight, he was *"forced to wear opaque goggles with duct tape, shackled in a painful position, and left in a sealed pod for approximately seventeen hours".*[70]

In 2003, Benkahla was indicted with ten others as part of the Virginia Paintball trials; he was specifically charged with supplying services to the Taliban, and using a firearm in furtherance of that offence. In March 2004 Benkhala had a one-day bench trial. He was immediately acquitted by Judge Leonie M. Brinkema, who railed against the U.S. government for Benkahla's treatment in custody. In fact, *"Brinkema called his arrest and transfer to American authorities 'a Kafkaesque situation'".*[71] Despite being acquitted of all charges levied against him by the U.S. government, Benkahla's troubles were just beginning. Beginning in August 2004, he was compelled by the U.S. government to testify before several grand juries and meet with the FBI during ancillary proceedings. He was promised immunity from criminal prosecution in exchange for truthful testimony.

About a year and a half later, in February 2006, Benkahla was indicted with two counts of perjury, one count of obstruction of justice, for purportedly untruthful testimony in 2004, and one count of making false statements to the FBI. Even though he had already been acquitted of charges surrounding his participation in jihad training camps in 1999, he was accused of *"unlawfully and knowingly made a false declaration"* in court, particularly in relation to what he had seen in the camps, and whether he had planned to attend a training camp even before leaving for London.[72] He purportedly lied about his contacts with several *"Specially Designated Global Terrorists"* and prevented the Grand Jury from further investigating who had participated in jihad training camps and under what circumstances.

The perjury case went to trial in January 2007, and in February of that year, Benkahla was convicted of all charges. As in many other domestic terrorism cases, Evan Kohlmann appeared at his trial, providing some historical background on 'radical Islam' and the Taliban. At the trial, Kohlmann commented that for Bin Laden and members of al-Qaeda, *"Americans, no matter where they are on earth, whether they're civilian or military, are considered to be a target. There are no innocent civilians."*[73] These kinds of statements, provided alongside video confessions of the other members of the Paintball Network, hardly left the jury in a state of mind to impartially evaluate the evidence before them.

In recent years Kohlmann has testified against several Americans, including Uzair Paracha and Ali Asad Chandia. In U.S. courts, the Daubert test is used to rule on the admissibility of both scientific testimony and expert testimony from non-scientific fields, including historians. Daubert assesses *"the relevance and reliability of the expert's theory"* using several factors, including:[74]

(1) Whether [it] has been subject to peer review and publication;
(2) Whether it has attracted widespread acceptance within the scientific community;
(3) Whether the theory or technique has been tested
(4) Its known potential error rate...[75]

As Goodman points out in an article published in the Baylor Law Review, "a historian's methodology does not involve testing a hypothesis and then replicating the test to check the hypothesis... rather, it may involve choosing whether to rely on a certain source to arrive at a universe of facts supporting a particular historical interpretation" Kohlmann's testimony has come under fire from a wide range of academics. The judge in Uzair Paracha's case even admitted that *"Kohlmann's methodology is not readily subject to testing and permits of no ready calculation error rate"*; in fact, he only allowed Kohlmann's testimony on the basis that *"it is more reliable than a simple cherry-picking of information from websites and other sources".*[76]

Furthermore, Kohlmann has *"never conducted any post-graduate research"* and has only published a handful of papers that have been formally peer reviewed.[77] This is especially important given that

"being subject to peer review is an important aspect of whether a witness can be considered an expert and Kohlmann was challenged again on this point in several subsequent cases with no success".[78]

Rather than drawing on established facts or proven methodologies, Kohlmann often speaks more generally on the threat posed by Osama Bin Laden, the Taliban, and violent jihad. He is rarely asked to testify about the actions or beliefs of the particular individual on trial. It is therefore arguable that Kohlmann plays on the deeply entrenched fears and Islamaphobic beliefs of the jury in order to encourage conviction. In an article entitled *"The Doogie Howser of Terrorism?"* Tom Mills comments:

"What in particular Kohlmann tends to 'bring to life' is connections linking defendants to Al-Qaeda or Osama Bin Laden. This, in the political climate of the United States greatly increases the prosecution's chances of a conviction. As one US defence attorney explains: 'If a jury in the US finds any connection between your client and Osama bin Laden, you're going to get convicted.'"[79]

At sentencing, it was determined by the judge that Benkahla qualified for the terrorism enhancement statute, even though none of his convictions were terrorism-related offenses. He was given a 121-month sentence – over ten years. Under normal sentencing guidelines, Benkahla would have received at most a mere three years for his convictions. In June 2008, Benkahla lost his appeal on all counts. He is currently serving his sentence in the Communication Management Unit (CMU) in Terre Haute, Indiana.

CASE STUDY 2: PETE SEDA & PAID WITNESSES

Pete Seda was born Pirouz Sedaghaty and grew up in Iran. He moved to the United States in the 1970s and eventually settled in Ashland, Oregon. After he became a United States citizen in 1994, Sedaghaty Americanized his name, started a business as a tree surgeon, married, and had two sons. As the years passed, Seda became a fixture in the Ashland community.

In 1999, Seda co-founded the Ashland branch of al Haramain, a Saudi-Arabian based Muslim relief charity with offices worldwide. His co-founder, Soliman Al-Buthe, currently resides in Saudi Arabia. The now-defunct al Haramain was historically funded by Saudi Arabia and exercised some degree of control over it. Al Haramain has a complex and fraught history. After the 1998 bombings of the U.S. embassy in Kenya, the organization was banned. In 1999, the Russian Federal Security Service accused al Haramain of sending more than $1 million to rebels in Chechnya.[80] In 2004, CBS reported that al Haramain raised between $40 and $50 million dollars each year and sent most of it to al Qaeda.[81] Later that year, the U.S. Treasury listed al Haramain as a Specially Designated Global Terrorist (SDGT) group. While al Haramin certainly has a controversial organisational history, its past tells us very little about how Seda intended to use the funds that he solicited as donations.

In 2003, after he discovered that al Haramain and its founders were under investigation, Seda fled to Dubai. Seda and al-Buthe were indicted in 2005, specifically for smuggling $130,000 and for filing false tax returns that showed that the money was used to buy a prayer house in Springfield, Missouri. In 2007, Seda voluntarily returned to the U.S. to face the charges.

Seda's trial began in August 2010. The defence maintained that the money was intended solely for humanitarian purposes, and that the government had failed to produce evidence that the funds ever reached Chechnya. The prosecution's primary witness linking Seda to terrorism was Barbara Cabral, who testified that Seda advocated giving financial support to mujahedeen fighters. Her husband was initially prepared to testify, but died before the case went to trial.

On 9 September 2010, Seda was convicted of two charges: one count of conspiracy to defraud the U.S. government, and one count of filing a false return with the IRS. Seda's sentencing hearing was postponed since there was no concrete evidence demonstrating terrorist links between the Oregon chapter of al Haramain and fighters in Chechnya.

In December 2010, U.S. Attorney for Oregon Dwight Holton received a surprising request from the FBI: to approve a $7,500 cash payment for Barbara Cabral. He refused to process the

payment and immediately notified Seda's lawyers. After a new FBI agent was assigned to the case, he discovered that the FBI had previously made payments totalling $14,500 to Cabral's late husband, Richard, for his help in the investigation. The FBI never disclosed the payments, information which the defence argued could have been used to question the credibility of Cabral's testimony.[82]

About a month later, U.S. Attorney Kelly Zusman notified Seda's lawyers of a *"regrettable late disclosure of information"* based on her office's review of Richard Cabral's file. After reading the newly provided notes summarizing the FBI's initial interview with Cabral, his lawyers noted a dramatic difference. Absent from the initial case notes given to Seda's attorneys in the pre-trial stage was this information: *"Cabral did not recall (Seda) discussing the topic of Kosovo or supporting mujahideen there".*[83] This statement obviously stands in stark contrast both to the prosecution's narrative of the case, and Barbara Cabral's testimony at Seda's trial. Given that she was the government's primary witness, these new revelations generated significant doubt about the legitimacy of his conviction.

On Wednesday, 19 January 2011, Seda was released from prison. Not even the U.S. Attorney's Office opposed his release to home electronic monitoring. However, several months later, in August 2011, the federal judge in Seda's case denied him a new trial. In his ruling, U.S. District Judge Michael Hogan commented:

"The evidence supported the government's theory in this case that defendant and others conspired to conceal a transaction destined for the Chechen mujahedeen and the jury rationally concluded as much."[84]

Judge Hogan further wrote that Cabral's testimony was irrelevant to Seda's conviction for signing a false tax return and conspiring with Al-Buthe.[85]In September 2011, Seda was sentenced to 33 months prison for money laundering and evading taxes. However, Judge Hogan declined to apply the terrorism enhancement statute, which would have added five years to his sentence. At the hearing the judge commented, *"There's no doubt the Chechen mujahedeen were involved with terrorism, but there hasn't been a link to this defendant".*[86]

The testimony in the trials of War on Terror defendants has at times been prejudicial and even false. The so-called expert testimony of individuals like Evan Kohlmann has been used to convict defendants, by relying on oblique references to al Qaeda and 9/11 to stoke the fears of jury members. In other cases, paid witnesses were called to the stand. As is evident from the cases of the Newburgh Four, Pete Seda and others, promising payments for testimony or participation in a plot can significantly alter the outcome of a case. In the most serious of cases – such as Pete Seda's – providing payments to witnesses can encourage false testimony. The next section explores another trend in the evidentiary procedural improprieties faced by War on Terror defendants.

B. GAINED IN WAYS THAT VIOLATE CIVIL LIBERTIES AND HUMAN RIGHTS

It is not only prejudicial and false testimony that has contributed to the convictions of War on Terror defendants. Evidence used in trial has also been gained in ways that violate constitutionally protected civil liberties and internationally recognized human rights. Two case studies are explored below.

CASE STUDY 1: AHMED OMAR ABU ALI & EVIDENCE GAINED UNDER TORTURE

Abu Ali was born in Houston, Texas and raised in Falls Church, Virginia. He graduated as the valedictorian of his class at the Islamic Saudi Academy High School in Alexandria, and enrolled in the University of Maryland in the fall of 1999. In September 2002, Abu Ali withdrew from the University with the intention of travelling to Medina to study Islamic theology.

On 8 June 2003, Abu Ali was arrested by the Saudi authorities while he was taking exams. The Saudi Arabian government informed the United States of

Abu Ali's arrest, and agreed to ask him questions provided by the FBI. Just a few days later, Abu Ali was transferred from Medina to al-Ha'ir prison, near Riyadh. He was interrogated for 47 days, *"during which time he was held incommunicado and in solitary confinement, with no judicial review."*[87]Despite repeated requests, Abu Ali did not receive a visit from the US embassy until 8 July, and was not allowed to phone his family until 31 July. His confession was videotaped on 24 July, as he was being interrogated by the mabahith, the secret police agency in Saudi Arabia. According to Human Rights Watch:

"The violations of defendants' rights are so fundamental and systemic that it is hard to reconcile Saudi Arabia's criminal justice system, such as it is, with a system based on the basic principles of the rule of law and international human rights standards.... Many of the most systematic abuses occur at the hands of the Ministry of Interior's domestic intelligence service (mabahith), which runs its own detention facilities. These range from holding cells of local intelligence offices to sprawling prison complexes such as al-Ha'ir mabahith prison near Riyadh, which is close to al-Ha'ir Correctional Facility for ordinary criminal defendants."[88]

In a report published in 2008, Human Rights Watch specifically addressed the human rights abuses committed at al-Hair prison in order to extract confessions:

"Human Rights Watch learned of repeated and consistent accounts of how detainees were ill-treated and forced to sign confessions that were later used at trial... At al-Hair prison, Human Rights Watch interviewed a group of eight prisoners who all said that interrogators had routinely beaten them at the police station-with ashtrays, shoes, fists, sticks, and electrical cables-in order to encourage quick confessions. They said that they were hung from their arms or legs and/or doused with cold water. One prisoner claimed that officers beat him so badly he was hospitalized, then beat him again when he was returned from the hospital. They also said that they had initially refused to confess to the crime they were accused of and had then been transferred to the criminal evidence (forensics) section, for further interrogation. Other prisoners at al-Ha'ir prison told Human Rights Watch that the criminal evidence (forensics) department, where their interrogations took place, was a separate 'confession extraction center', where the authorities send suspects who do not confess at the police station."[89]

In June 2003, members of the FBI observed interrogations of Abu Ali behind two-way mirrors. Several months later, in September, he was interviewed directly by the FBI. According to Amnesty International, *"Ahmed Abu Ali testified that he told an FBI agent that he wanted a lawyer and had been mistreated. The agent, according to Ahmed Abu Ali, responded 'I'll go ask the General' and left the room."* [90] According to Amnesty, the FBI was aware that Abu Ali was being tortured.[91]

In August 2004, over a year after his initial arrest in Saudi Arabia, Abu Ali's attorneys filed suit in the U.S. District Court of the District of Columbia to obtain his release; they asked the Court to issue a writ of habeas corpus to compel the U.S. government to secure Abu Ali's return to American soil.[92] The government claimed that Abu Ali was too dangerous to be returned to U.S., but refused to release any details of the threat he posed to his attorneys, citing national security concerns. In December 2004, *"Judge John Bates ruled that because Ahmed Abu Ali was effectively being held in Saudi Arabia at the behest of the USA, the US authorities had to provide the court with evidence of their activities around his arrest, detention and interrogation."*[93] He commented:

"The position advanced by the United States is sweeping. The authority sought would permit the executive, at his discretion, to deliver a United States citizen to a foreign country to avoid constitutional scrutiny, or, as is alleged and to some degree substantiated here, work through the intermediary of a foreign country to detain a United States citizen abroad... The Court concludes that a citizen cannot be so easily separated from his constitutional rights."[94]

Despite this ruling, Abu Ali continued to be held without charge or trial in Saudi Arabia. In February 2005, the government changed course, and transported Abu Ali to the U.S. At his bail hearing, FBI agents testified that Abu Ali had confessed to Saudi officials that he had associated with al-Qaeda, received things of value from them and discussed how to assassinate President Bush.[95] According to Abu Ali, his videotaped confession had been

taken under conditions of extreme confinement during a period when he was denied access to an attorney. The question before the judge was how to balance the potentially prejudicial effect of coerced confessions with their probative value.[96]

In October 2005, the District Court rejected Abu Ali's attempt to prohibit the testimony, including the statements and the videotape. He went to trial a few days later. Abu Ali continued to challenge the admissibility of the confession, claiming that it was coerced under torture, and that he should have been given Miranda warnings and other constitutional protections since the interrogations were held in partnership with the FBI.[97]

On November 22, the jury in Abu Ali's case returned a guilty verdict. In March 2006, he was sentenced to 30 years in prison. His case was then challenged in the U.S. Court of Appeals. The Court upheld his conviction, but overturned his sentence on the grounds that the Court had deviated from federal sentencing guidelines. In July 2009, Abu Ali was resentenced to life in prison. Judge Gerland Bruce Lee commented, *"the more severe penalty was given as Abu Ali had not renounced al-Qaeda nor terrorist activities."*[98]

CASE STUDY 2: UZAIR PARACHA & THE "SWIFT" PROGRAM

Uzair Paracha grew up in both the United States and Pakistan. He was never perceived as having anti-American sentiments. According to his brother, Mustafa, Uzair *"...was a typical teenage guy. I mean, he wore his pants incredibly low. He hung out with girls. He loved to drive, he loved driving. He was into western music, he had over one hundred and fifty to two hundred CDs. He had like branded clothes. He used to go to the States like every six months, almost every six months. He loved the place, he went for like four months at time sometimes."*

After spending much of his childhood in the United States, Paracha resettled in Pakistan with his family in the mid 1980s. In February 2003, Paracha travelled to the U.S. on behalf of his families' business; he intended to help market apartments in Karachi to American-Pakistani families. According to the government's narrative, while in the U.S., Paracha provided substantial help to Majid Khan, the only U.S. resident currently held in Guantanamo Bay. Majid Khan, who held asylum status in the U.S., returned to Pakistan in 2002 to visit his wife without giving the required notice to American immigration authorities. Khan was purportedly trained by Khalid Sheikh Mohammad to organise and support terrorist tacks against the United States and Israel, including a specific plan to simultaneously blow up underground storage tanks at several gas stations.

On 28 March 2003, Paracha was arrested with Khan's driver's license, social security card, and bank cards in his suitcase. The key to the post office where Khan's immigration documents were sent was also on his key chain[99]. Paracha was taken to the Metropolitan Detention Center, and made extensive confessions during three days of questioning by New York counterterrorism agents. During Paracha's trial, the prosecution argued that he agreed to pose as Mr. Khan while on his business trip in New York, in order to give immigration authorities the impression that Khan had not left the U.S. The question of whether Paracha provided help to Khan with or without the knowledge of his terrorist ties, was central to his case. During his trial, Paracha denied that he ever intended to facilitate the movement of someone involved in terrorism. He recanted the confession made just after his arrest, insisting that *"he thought he was doing a harmless favour for one of his father's business associates... and that the confession was the result of sleeplessness, exhaustion and fear in three days of interrogation."*[100]

Paracha's trial lasted two weeks, and the jury deliberated for less than six hours. He was convicted on 23 November 2005 of five counts: conspiracy to provide and providing material support to the al Qaeda foreign terrorist organization; conspiracy to provide and providing funds, goods, or services to al Qaeda; and identification document fraud committed to facilitate an act of international terrorism. In July 2006, Paracha was sentenced to thirty years in prison.

The $200,000 transferred to Paracha from Khan was identified using the Swift program, which was initiated under President Bush. Swift has been described by government officials *"as the biggest and most far-reaching of several secret efforts*

to trace terrorist financing"[101]. It allows treasury officials to utilize broad administrative subpoenas to access records, rather than requiring individual court-approved warrants or subpoenas. Under the program, the federal government can more easily access the data records from the Society for Worldwide Interbank Financial Communication (SWIFT), the Belgian cooperative that routes over $6 trillion daily around the global market. In sum, the Swift program provides an immense amount of confidential data about the flow of money across borders by tracing wires and transfers. As the New York Times explains:

"The cooperative's message traffic allows investigators, for example, to track money from the Saudi bank account of a suspected terrorist to a mosque in New York. Starting with tips from intelligence reports about specific targets, agents search the database in what one official described as a "24-7" operation. Customers' names, bank account numbers and other identifying information can be retrieved, the officials said."[102]

Like the NSA Warrantless Wiretapping program, discussed later, the Swift program *"grew out of the Bush administration's desire to exploit technological tools to prevent another terrorist strike, and [reflects an attempt] to break down longstanding legal or institutional barriers to the government's access to private information about Americans and others inside the United States"*.[103] In speaking about Swift, one former senior counter terrorism official notes,*"The capability here is awesome or, depending on where you're sitting, troubling…the potential for abuse is enormous."*[104]

In 2006, the *New York Times* interviewed nearly 20 current and former government officials and industry executives. Many of these individuals expressed their own doubts about the program, commenting, that "what they viewed as an urgent, temporary measure had become permanent nearly five years later without specific Congressional approval or formal authorization."[105] Some officials worried that the program exploited a "grey area" in United States legal protections on the privacy of financial data, such as the 1978 Right to Financial Privacy Act, or possibly violated Fourth Amendment rights. Even Swift executives grew uneasy about the extent of the program; they considered pulling out of the arrangement in 2003 but agreed to continue sharing data after several top officials personally requested it.[106]

It is unclear how many individuals have faced terrorism-related charges as a result of information gathered under Swift. However, even the so-called successful prosecution of a single case – such as Paracha's – ought to be considered warily, if it requires sacrificing some of the defendant's basic civil liberties.

As the following lawsuit demonstrates, the Swift program is just one example of how our civil liberties have come under attack since the start of the War on Terror. The federal government has also engaged in unlawful surveillance against suspected organizations and individuals, popularly referred to as "warrantless wiretapping".

LAWSUIT: AL-HARAMAIN V. BUSH (AL-HARAMAIN FOUNDATION V. OBAMA) AND WARARNTLESS WIRETAPPING

After 9/11, Congress passed the Patriot Act, and President George W. Bush gained new wide-ranging powers. He issued an executive order authorising the National Security Agency (NSA) to engage in surveillance of particular telephone calls, internet activity, text messaging, and any other communication, even without obtaining a warrant as normally required by the Foreign Intelligence Surveillance Act (FISA). His administration thereby in effect established a new NSA electronic surveillance program, referred to by the Bush administration as the "terrorist surveillance program" but later dubbed the "warrantless wiretapping" program when disclosed by the *New York Times* in 2005. Former Attorney General Alberto Gonzales explained that the program authorised warrantless wiretaps under two conditions: first, when the government "has a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda." and second, when "one party to the conversation is 'outside of the United States'".[107]

After the *New York Times* revealed the existence of the warrantless wiretapping program, several lawsuits were filed against the Bush administration, most notably *ACLU v. NSA*. However, all of the suits were dismissed on the basis that the plaintiffs did not have the legal standing to file, since they could not prove that they had been targets of the program. The ACLU endeavoured to appeal, but the Supreme Court elected not to hear the case.

In fact, the plaintiffs who were finally able to file a suit against wireless wiretapping gained their evidence entirely accidentally. In 2004, the United States government was intercepting the phone calls of Al-Haramain Islamic Foundation (AHIF) lawyers Wendell Belew and Asim Ghafoor. The two men were completely unaware that they were being monitored until the Department of the Treasury accidentally sent them classified transcripts of conversations that had been recorded. By the time the government sent FBI agents to retrieve the documents, AHIF officials had retained their own copies.

A copy of the original transcripted conversations was filed with the initial complaint made the AHIF. However, both the Bush and Obama administrations declared these records to be state secrets, so they were excluded as evidence. However, the lawyer for the Al-Haramain plaintiffs, John Eisenberg, pieced together pieces of public statements from the government's investigations into Al-Haramain, in order to provide circumstantial evidence of wiretapping. The judge allowed the case to proceed.

In December 2010, federal judge Vaughn R. Walker ordered the government to pay more than $2.5 million in legal expenses accrued by Ghafoor and Belew. He also awarded the men $20,400 in damages each.[108] While these sums of money are relatively insignificant for the federal government, the ruling set a new precedent since it recognised that the NSA's warrantless wiretapping violated federal surveillance law.[109] However, while the Judge referred to the wiretapping as "unlawful surveillance", he did not declare the Terrorism Surveillance Program unconstitutional or issue punitive damages to the plaintiffs.

The Electronic Frontier Foundation (EFF) has taken a lead role in challenging the legality and constitutionality of the warrantless wiretapping program, with very limited success. In September 2011, the EFF delivered arguments in front of the U.S. Court of Appeals for the Ninth Circuit, urging the Court to reinstate two lawsuits that had previously been dismissed by the courts, Hepting v. AT&T[vi] and Jewel v. NSA7[vii].

It is clear that even in the federal criminal justice system, defendants accused of terrorism related crimes have faced a host of systemic procedural improprieties with respect to the evidence used against them. At times, witnesses testifying against these defendants have provided prejudicial or false testimony. War on Terror cases have also battled evidence that was gained in ways that violate the defendant's civil liberties and human rights, including evidence gained under torture or in violation of federal law.

5) "BY ANY MEANS NECESSARY": GOVERNMENT TACTICS WHEN GUILTY VERDICTS FAIL

It is clear that Muslims accused of terrorism face a systemically discriminatory criminal justice system from start to finish. Yet even some individuals that have been acquitted of the charges levied against them, or have had juries reach a deadlock again and again, have been pursued aggressively by the government until it was satisfied with the outcome. In the two cases studies explored below, immigration authorities and federal prosecutors pushed for deportation and/or conviction, even when juries consistently refused to convict.

[vi] Jewel v. NSA was filed by the EFF in September 2008. In the suit, the EFF alleged that the wireless wiretapping conducted by the NSA and others, in cooperation with telecommunications companies such as AT&T, was both illegal and unconstitutional. It was brought by five customers of AT&T, and sought to hold both the United States government and a number of current and former agency officials responsible for ordering the surveillance, including President George Bush, NSA Director Keith B. Alexander, CIA Director Michael V. Hayden, among others. In his January 2010 dismissal of the case, U.S. District Court Chief Judge Vaughn Walker held that privacy harm from warrantless wiretapping was not a "particularized injury" but instead a "generalized grievance", since nearly everyone in the United States has a phone and internet service. In response to the dismissal, EFF Senior Staff Attorney Kevin Bankston commented, "With new revelations of illegal spying being reported practically every other week -- just this week, we learned that the

FBI has been unlawfully obtaining Americans' phone records using Post-It notes rather than proper legal process -- the need for judicial oversight when it comes to government surveillance has never been clearer."

[vii] Hepting vs. AT&T was filed by the EFF in 2006. In this class-action lawsuit, the EFF maintained that by collaborating with the NSA in its illegal domestic spying program, AT&T violated the law and the privacy of its customers. However, in July 2008, in response this lawsuit as well as several others, Congress passed the FISA Amendments Act (FISAAA). The law allowed the Attorney General to grant retroactive immunity to the telecoms for their participation in warrantless wiretapping, which would also prevent the courts from declaring the program was illegal. In June 2009, a federal judge dismissed Hepting and all the other lawsuits against the telecoms, due to their immunity under FISAAA.

CASE STUDY 1: YOUSSEF MEGAHED

Youssef Megahed and a friend, Ahmed Mohammad, were arrested in South Carolina in August 2007 after being stopped for a routine traffic infraction. In the trunk of the car, the officers found 4-inch plastic pipes filled with a mixture of potassium nitrate and sugar. Megahed and his defence maintained that he was unaware that the pipes – later identified as FBI agents as "low explosives" – were in the car. Megahed was indicted for illegally transporting explosives and for possession of an explosives device, and went on trial in Tampa, Florida. After debating for four days, the jury acquitted Megahed of all charges. Mohammad pled guilty to providing material support to terrorists, specifically for posting a YouTube video that demonstrated how to convert a remote-controlled toy into a bomb. He is now serving a 15-year sentence in prison.[110]

Youssef and his family thought their ordeal was over. But only three days after his trial ended, Megahed was arrested by immigration authorities outside a Wal-Mart in Tampa, Florida. Despite the fact that Megahed was a legal resident and had lived in the United States with his family for over 20 years, the government initiated deportation proceedings against him.

The judge for the immigration proceedings allowed only two government witnesses, most of whose testimony focused on Mohammad's activities. Although the government's attorneys insisted that Megahed was an "enabler" for Mohammad, the judge remained sceptical, even commenting, *"Besides knowing the guy, what did he do to enable?"*[111] Megahed's attorney argued that the government's case for deportation was based merely on guilt by association. In August 2009, the judge ruled that the government had not proved its case and stopped the deportation proceedings.[112]

CASE STUDY 2: THE LIBERTY SIX

The members of the group later known as the "Liberty Six" were arrested in June 2006. They were depicted as a blossoming terrorist cell, with plans to bomb the Sears Tower and put in place an Islamic state. Even at the time of their arrest, authorities commented that the plot was more "aspirational rather than operational," and that the men did not pose a genuine threat, since they had neither contacts to al Qaeda nor the equipment necessary to commit the attack.[113]

In the first trial, in December 2007, the seventh defendant was acquitted, while the jury deadlocked on the other six. The second trial, in 2008, was also declared a mistrial after the jury failed to reach a verdict. After the third attempt at trial, in May 2009, the jury returned with a mixed verdict. Jurors convicted five defendants, and acquitted the sixth. The purported "ringleader" of the group, Narseal Batiste, was convicted of all four conspiracy charges, including conspiring to incite a rebellion against the United States, supplying materials to a terror organization, and conspiring to destroy buildings with explosives. Another defendant, Patrick Abraham, was convicted of two counts of material support and one charge of conspiracy. The last three defendants were convicted of conspiracy to supply materials to terrorists but were acquitted of all the other charges.[114]

During each trial, defence lawyers maintained that the men had never posed threat to American national security. As they pointed out, no weapons or plans had been found in the warehouse that the government claimed functioned as their headquarters. The case largely relied on recorded conversations with an undercover informant. One of the videos featured the seven men taking an oath

to al-Qaeda. Attorneys for the defendants argued that the men only went along with the undercover agent in order to extract money from him; the agent, who was posing as an al-Qaeda operative, promised them $50,000 for participating.[115]

After the convictions, several legal scholars expressed profound concern about just how aggressively the case had been pursued, even after two mistrials. In an interview in the *New York Times*, one professor commented, "The past cases ending in hung juries showed that the Justice Department had trouble matching the evidence with their rhetoric... It goes to show that if you try it enough times, you'll eventually find a jury that will convict on very little evidence".[116]

Just days after their conviction, on 17 May, lawyers for the Liberty Six announced that they would be appealing the verdict. According to defence attorneys and jurors' notes from the trial, a holdout juror from the trial was removed after she decided that she could no longer handle the pressure from the other jury members to change her vote from not guilty to guilty. As one of the attorneys commented, *"Her note clearly shows that the other jurors tried to convince her to change her beliefs about the case...Absolutely it was going to be a hung jury if she had been allowed to stay on"*.[117] The jury only convicted the defendants after an alternate replaced the hesitant juror.

The appeal failed. In November 2009, Narseal Batiste received a thirteen and half year sentence. Abraham was sentenced to more than nine years, while the other three members of the "Liberty Six" were given sentences of six, seven, and eight years.[118]

6) CONCLUSION

Individuals tried for terrorism-related crimes on U.S. soil do not face the terrifying, neverending detention experienced by those still imprisoned at Guantanamo Bay; indeed, terror suspects tried in American civilian courts cannot be held indefinitely without charge or trial. It is important not to conflate the circumstances of suspects held for years on end without charge in Guantanamo, with those who are tried and convicted in U.S. courts.[viii]

[vii]Yet this important distinction between due process rights at Guantanamo Bay versus U.S. soil is becoming less clear with time. As discussed earlier, the 2012 National Defense Authorization Act will make it significantly harder for some War on Terror suspects to access the civilian court system, even if they are arrested within the United States or hold American passports. The provisions would permit military trials for terror suspects that are presumed to be members of al Qaeda or associated organizations, and even legalize their indefinite detention in military custody.

Yet making this distinction does not require us to minimize the systemic procedural improprieties faced by War on Terror defendants as they are charged, tried and convicted in American civilian courts. These systemic rights violations shape the defendants' lives in every stage of the criminal justice system. Even without an indictment or before conviction, defendants can be held for months or years in prison. The charges brought against defendants are also shaped by Islamaphobic practices, as demonstrated by discriminatory "preventive" policing and the selective prosecution of Muslims. In some cases, the actual charges brought against defendants may be dubious – for example, the "material support" charge arguably encompasses constitutionally protected behaviours. Similarly, given that entrapment has played a significant role in many convictions, and that "enemy combatant" status has been threatened in order to induce guilty pleas, it is difficult to know to what extent convicted defendants are truly guilty of the charges brought against them.

Furthermore, the evidence used against defendants during trial has also impeded their right to due process; some defendants have encountered testimony against them that was false or prejudicial, or faced evidence in their trial that was gained in ways that violated their civil liberties or internationally protected human rights.

Finally, as the cases studies of Youssef Megahed and the Liberty Six demonstrate, when juries refuse to convict War on Terror defendants, the government may adopt ever-more aggressive tactics in an effort to ensure their imprisonment or deportation. Pressing for fair trials for suspects held at Guantanamo Bay is imperative. No human being ever deserves to be held indefinitely without charge. Yet it is also crucial for human rights organisations and civil rights activists to think deeply about what kinds of trials War on Terror suspects are facing in the United States at the current moment, and whether we think these trials are just or fair. If we truly believe in the values

enshrined in our Constitution and Bill of Rights, lobbying for the closure of Guantanamo Bay is not enough. We must also demand an end to the profound and systemic discrimination in our criminal justice system, which leaves Muslim War on Terror defendants with little chance for a fair conviction.

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AFTER CONVICTIONS COMES SENTENCING: DISPROPORTIONATE AND UNJUST

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1) TERRORISM ENHANCEMENT STATUE (3A1.4)

Section 3A1.4 was initially created in 1994, after Congress urged the United States Sentencing Commission to establish a sentencing "enhancement" for individuals convicted of felonies involving international terrorism. After the 1995 Oklahoma City bombing, Congress extended 3A1.4's enhancement power to include domestic terrorism offences as well. The USA PATRIOT Act, passed in the wake of 11 September, further shifted sentencing for terrorist-related crimes. The Act established base offence guidelines for federal crimes of terrorism, for example for providing material support or resources to a designated foreign terrorist organisation (DFTO). Any individual convicted of federal crimes of terrorism is thereby now sentenced according to the suggested Guidelines range, but may also be deemed eligible for the application of the "terrorism enhancement" statute.[1]

In the United States, people convicted of federal crimes are sentenced according to uniform, established guidelines. While these guidelines are no longer binding, judges are required to calculate the guideline sentence in each case and consider it before issuing a prison term. Within the guidelines, sentences are determined on the basis of two factors: the act for which the person was convicted (offence act) and the defendant's criminal history (criminal points score). These two factors are combined within a matrix to create a sentencing table, with suggested sentences ranging from 0-6 months in prison to a life term.[2] Section 3A1.4 is applied over and above the base sentence given for a convicted offence, and quite significantly impacts sentencing. Firstly, qualifying defendants are immediately given a "Category VI" criminal score, regardless of their criminal history. Secondly, 3A1.4 shifts defendants' offence level upwards by at least 12 classes, and all qualifying 3A1.4 defendants are sentenced at a minimum of offence level 32. In other words, if a convicted terrorist is initially classified at an offence level below 20, his offence level is immediately increased to 32; if he is classified at an offence level at or above 20, 12 levels are added to his offence level. As given by the sentencing matrix included in the appendix, under 3A1.4 all defendants are sentenced to a very minimum of 210-262 months, or between 17.5 and 21 years.[3] Some legal scholars have therefore described section 3A1.4 as "draconian".[4]

In order to qualify for terrorism-related adjustments under statute 3A1.4, the defendant must fall under one of three categories:

i. Commit an offence that qualifies as a federal crime of terrorism, as defined in 18 U.S.C. §2332b(g)(5). According to this statute, in order to be considered a federal crime of terrorism, the given act must fulfil two criteria:[x]
   - It must be *"calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct"*
   - It must under a list of specified terror-related violations as given in §2332b(g)(5)(B).

[ix]When the Guidelines were initially adopted in 1987, judges were required to impose a sentence within the Federal Guidelines range. In 2005, the Supreme Court ruled in *United States v.* Booker that this provision of the Guidelines violated the Sixth Amendment of right to trial by jury, and also mandated that only the facts admitted by the defendant or proved beyond a reasonable doubt by a jury can be used in calculating a sentence.[x] I have included statute 18 U.S.C. §2332b(g)(5) in the Appendix, including the specific crimes that constitute qualifying violations.

ii. Harbour or conceal a terrorist who committed a federal crime of terrorism, or obstructed an investigation of a federal crime of terrorism.

iii. Commit any other criminal act, if:
   - This act is committed with the intention of influencing the conduct of government via intimidation or coercion.
   - This act is committed with the intention of intimating or coercing a civilian population.

In sum, 3A1.4 is not applied exclusively to defendants who commit federal crimes of terrorism, or even to defendants who obstruct the conviction and apprehension of terrorists. Statute 3A1.4 can be applied to any criminal act. If it can

be established that the defendant committed a criminal act with the intention of intimidating or coercing a government or civilian population, he is eligible for 3A1.4.

CASE STUDY: ALI ASAD CHANDIA

In June 2006, Ali Asad Chandia was convicted on three counts, namely providing material support to a DFTO, Lashkar-e-Taiba (LET), and conspiracy to provide material support to a DFTO. Chandia purportedly participated in the "Virginia Jihad Network". He was accused of visiting LET headquarters in Lahore while travelling in Pakistan; picking up Mohammed Ajmal Khan, an LET official, at Reagan National Airport; and helping Khan deliver 21 boxes of paintballs and other goods to a shipping company in Virginia, where Chandia paid to have them mailed to Pakistan.

Chandia was initially sentenced to 15 years (180 months) in prison in August 2006. The trial judge determined at sentencing that he qualified for 3A1.4, on the basis that he provided material support to a DTFO *"with the intent to influence or coerce government conduct"*. Without 3A1.4, Chandia's advisory Guideline range would only have been 63—78 months. In October 2007, Chandia went before the 4th Circuit Court of Appeals to challenge both his conviction and the use of the terrorism enhancement statute in his case. Later that year, in January 2008, the Court of Appeals upheld his conviction but determined that the application of the terrorism enhancement statute in his case was inappropriate. The Court of Appeals sent the case back to District Court Judge Claude Hilton, to either justify his use of the enhancement statute or to resentence Chandia without its use. In its ruling the Court stated:

Chandia's convictions under the material support statues clearly satisfied the first element of the enhancement. However, the PSR (presentencing report) did not contain any factual assertions… related to the intent element. Instead… [the report and the district court] both appeared to assume (erroneously) that the enhancement automatically applies to material support conviction…. [the government] appears to suggest that we should infer the required intent from the basic facts that gave rise to the conviction… Unlike in some case where the enhancement has been applied, the acts underlying the conviction in this case were not violent terrorist acts…. Therefore, these facts cannot, standing alone, support application of the terrorism enhancement. Because there has been no factual finding on the intent element, and because the basic facts supporting the conviction do not give rise to an automatic inference of all the required intent, we must vacate Chandia's sentence and remand for resentencing.[5]

The Court sidestepped the issue of whether intent must be found by *"clear and convincing evidence"*, or merely by a *"preponderance of evidence"*, choosing instead to *"reserve consideration of this issue" until it was given a "case where [it is] presented with relevant findings".*

In April 2008, the District Court resentenced Chandia to fifteen years in prison, which Chandia appealed. In October 2010, the Court of Appeals again vacated Chandia's sentence and ordered the trial judge to hold another sentencing. At a re-sentencing hearing in March 2011, Chandia was sentenced to 15 years once again.

3A1.4: TOO BLUNT TO PROMOTE JUST OUTCOMES

Statute 3A1.4 tangibly exemplifies that facing trial on U.S. soil, does not guarantee a just outcome for War on Terror suspects. First, 3A1.4 generates sentences that violate one of the fundamental aims of imprisonment – namely, protecting the public. Every individual to whom 3A1.4 is applied is immediately classified as a Category VI criminal, regardless of his criminal history or the specific components of the criminal act for which he was convicted. *"It is difficult to isolate any one factor in U.S.S.G. section 3A1.4's sentencing calculus that is most flawed, but if one were forced to do so, the factor that most drives the dramatic increases in sentences is fixing defendants' Criminal History Categories at VI"*.[6] Indeed, *"U.S.S.G. section 3A1.4's fixing a defendant's Criminal History Category at VI creates an irrefutable legal presumption that the defendant is a recidivist career offender who cannot be deterred by fear of prison and who is certain to commit serious offence in the future"*, even though there is no established evidence to validate this claim.

Secondly, statue 3A1.4 may be unconstitutional. According to some legal scholars, statute 3A1.4 violates the Double Jeopardy clause of the Fifth Amendment of the Constitution. According to *Blockburger v. United States*, *"if the two statues of convictions require proof of the same elements, the defendant's constitutional right to be free from multiplicitous punishment and he or she may be punished under only one of the two offences."*[7] This does not seem to hold true for all crimes that are eligible for 3A1.4. For example, for people convicted of 18 U.S.C. §2339C(a)(1)(B), namely, providing funds knowing they are to be used to promote a federal crime of terrorism, the very requirements of conviction already meet or surpass the eligibility requirements for 3A1.4.[8] Thereby, *"as soon as the defendant has been convicted all elements are present to enhance his or her sentence under U.S.S.G. section 3A1.4"*, violating the Double Jeopardy clause.[9]

The statue may also violate the 5th and 6th Amendments: the right to due process and the right to trial by jury. In the United States, defendants on trial for serious crimes are constitutionally guaranteed the right to a trial by jury[xi]. In the case of *"prohibitions against the financing of terrorism"* (§2339C(a)(1)(B)), a jury must find beyond reasonable doubt that the defendant provided funds with the knowledge that they would be used to intimidate or coerce a civilian population or government. In order to be convicted of a simple material support charge (§2339B), however, the jury must only find beyond reasonable doubt that the defendant knowingly provided funds to a DTFO; the prosecution does not need to show that the defendant knew these funds would be used for terrorism. This is an extremely important distinction, since many DTFOs have a social arm dedicated to the provision of healthcare, education, and other basic needs[xii]. In order for any act to be eligible for 3A1.4 enhancement, the intent to coerce a government or population must be established. Yet in the case of §2339B and innumerable other charges – where intent isn't a requirement for conviction – it remains unclear how eligibility ought to be determined and by whom.

Thus far, judges have determined whether sufficient intent is established on the basis of the preponderance of the evidence, rather than the standard of proof beyond a reasonable doubt. As given by many prior District and Supreme Court rulings, namely *Apprendi v. New Jersey, Blakely v. Washington*, and *United States v. Booker*, "[a]ny fact (other than prior conviction) which is necessary to support a sentence exceeding the maximum authorised by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt"[xiii10]. There is therefore a *"serious argument that unless a jury finds beyond a reasonable doubt that defendant had the intent required to apply U.S.S.G section 3A1.4, there is a violation of the Due Process Clause of the Fifth Amendment and the Trial by Jury Clause of the Sixth Amendment as interpreted Apprendi"*.[11]

In addition to a question of what burden of proof is applied, the question of who ought to have the power to apply 3A1.4 is also important. As given in *Ring v. Arizona*, and also implied in Booker, it is a jury that must establish the standard of evidence to be beyond a reasonable doubt in order to increase a given sentence. [xiv] As one legal scholar points out:

No one should doubt that the framers would be troubled by a judge ruling that a sentence that would be no more than fifty-seven months under the Sentencing Guidelines based upon the findings of the jury rises to 1860 months based upon a district court judge's findings, under a preponderance of the evidence standard…[12]

Thirdly, 3A1.4 leaves a wide open door for Islamaphobic attitudes to influence sentencing. Under the statue, judges have a great deal of discretion in determining who qualifies for enhanced sentencing. There is a widespread acknowledgement of the rising tide of Islamaphobia in the United States. If policemen and airport security guards unduly and automatically perceive Muslims as terrorists and criminals, it is ludicrous to believe that judges do not hold the same bigoted beliefs. It is therefore both nad've and dangerous to maintain statute 3A1.4, since its largely unspecified application encourages judges to rely on intolerant perspectives in determining sentencing. Why did the judge in Chandia's case believe he had intent to coerce, when the Court of Appeals found no

[xi]Serious crimes are defined as crimes that are punishable by incarceration for more than six months.

[xii]Examples of DFTOs that have a social arm include Hezbollah and Hamas.

evidence to support this claim? How many judges will similarly presume that Muslim defendants qualify for 3A1.4, regardless of the details of the case? What will happen to Muslims that are deemed to qualify for 3A1.4 despite a lack of evidence, but are not lucky enough to have their appeal heard by a higher court?

In sum, statute 3A1.4 is a dangerously blunt instrument. It undermines the goals of the criminal justice system; it is arguably unconstitutional; and it allows Islamaphobic beliefs to play a role in sentencing. It is clear that 3A1.4 facilitates the draconian and illegitimate imprisonment of Muslim detainees.[xv]

2) IN CONTRAST TO GUANTANAMO: THE DANGER OF LONGER SENTENCES

Civil rights activists have rightly campaigned against the rights violations faced by "enemy combatants", both in their potentially indefinite detention at Guantanamo Bay

[xiii]In *Apprendi v. New Jersey*, the Supreme Court ruled that the Sixth Amendment prohibited judges from augmenting criminal sentences beyond the statutory maximum provided by the facts in the case, which must be found by a jury to be beyond a reasonable doubt.
[xiv]*Ring v. Arizona* found that under the Sixth Amendment, a jury is required to establish the factors necessary for imposing the death penalty.
[xv]It is worth nothing that 3A1.4 has also been applied to animal rights and environmental activists.

and in the military commissions designed to evaluate their guilt. Certainly, defendants standing trial in military commissions are denied their fundamental right to due process– including the inclusion of evidence gained under torture, and severe restrictions on access to defence lawyers and evidence.

It is important to note, however, that Guantanamo detainees who undergo military commissions are not generally subject to the extremely lengthy prison sentences faced by terrorism suspects put on trial in U.S. federal courts. As Paul Rushkind, one of the lawyers who represented Jose Padilla, points out:

"Criminal defendants in federal court seemingly have more rights, but there are certainly limits in terrorism cases that make them different from the run of the mill criminal case. And if they lose at trial (which they all have), the prison sentences are astronomical. Military commission defendants have fewer rights, but when convicted their sentences have been more moderate. So it is hard to say which forum provides a more just result."

The case of David Hicks provides an important counter-narrative to the claim that Guantanamo detainees will face a more just and tempered outcome if their trial occurs on U.S. soil.

CASE STUDY: DAVID HICKS

David Hicks was born in 1975 in Adelaide, Australia. After his expulsion from high school at age 14, Hicks travelled to the Northern Territory cattle country. He worked as an agricultural trainee, and also as a rodeo rider and barman. It was during this time that Hicks started to read the Koran. While living in the township, Hicks met Jodie Sparrow, and the two had two children together – a daughter and a son – but they eventually separated.

After their separation, Hicks left Australia for Japan with the intention of becoming a horse trainer. After serving briefly with the Kosovo Liberation Army, Hicks returned to Adelaide in mid-1999. He studied in a mosque near his home and decided to fully convert to Islam. Later in 1999, Hicks travelled to Pakistan to further to Islamic studies. There he trained with Lashkar-e-Taiba and al-Qaeda, and purportedly continued to fight alongside al-Qaeda against the Northern Alliance after 9/11.[13]

Hicks, however, denies ever intending to engage in conflict with U.S. troops or coalition forces. In an August 2011 interview, he maintained that he tried to flee from the battle lines once the invasion of Afghanistan began:

"At the end of the day in Afghanistan, when the bombs started falling and I was trapped in the country, I actually went and hid in a house, and then I was eventually apprehended at a taxi stand by a...soldier who then sold me to US troops for around $5000." [14]

Hicks was transferred to Guantanamo Bay in January 2002. A year and a half later – in July 2003

– he was selected as one of the six Guantanamo detainees to be tried by military commission. In June 2004, after another full year in detention, he was charged with conspiracy and various other crimes; he pled guilty, only to have his plea struck down when the U.S. Supreme Court ruled in June 2006 that the commissions were unlawful and breached the Geneva Conventions. In October 2006, President Bush brought in legislation to reinstate the revamped military commissions, and in February 2007 Hicks became the first Guantanamo detainee charged under the new commission regulations. He pled guilty to one count of material support for terrorism at a U.S. military commission hearing in March 2007.[15] As a result of his plea, Hicks was sentenced to just under seven years, and was permitted to serve out his sentence in Australia. His time already served in Guantanamo was subtracted from his sentence, so after his transfer from Guantanamo to Australia, Hicks served only nine months. Hicks was released from prison in December 2007, and now has remained in Australia.

Both prominent politicians, as well as Hicks' family, contested the moral and legal legitimacy of his guilty plea. Conservative National Party MP Barnaby Joyce noted: *"One of the many reasons why the law disapproves of prolonged incarceration without charge or trial is because of the intolerable pressure it places on the accused to plead guilty just to escape detention... The only thing that is guilty here is the judicial process under which he was being tried."* [16]

David's father, Terry Hicks, similarly commented: *"He's had five years of absolute hell, and I think anyone in that position, if they were offered anything, they would possibly take it."* [17]

While the threat of indefinite detention at Guantanamo Bay may have pushed Hicks to plead guilty, in doing so he received a far lighter sentence than nearly every individual convicted of terrorism in U.S. federal courts.

3) CONCLUSION

Individuals in Guantanamo endure the psychological trauma of indefinite detention without charge or trial. Yet when detainees have had the opportunity to face a military tribunal – and pleaded guilty - they have not received lifelong sentences. Conversely, U.S. federal courts provide Muslims accused of terrorism with many of the civil rights explicitly denied to Guantanamo detainees – most importantly, the right to habeas corpus. However, nearly everyone who has gone to trial has been convicted, and faced extremely long sentences as a result. Under statute 3A1.4, even individuals who are not convicted of any terrorism-related crimes can have their sentences heightened by decades at the discretion of a single judge. It is indefensible that Guantanamo detainees live with the day-to-day unknown of a potential lifetime on the inside. Yet in campaigning for the closure of Guantanamo Bay, it is important to remember that many individuals convicted on U.S. soil face the complete *certainly* of a lifelong sentence, often for crimes that had no direct connection to any act of terrorism or violence.

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[1]James McLoughlin, Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations. 28 Law & Inequal. 51, 2010. Pg 51-53.
[2]See the Appendix for the Sentencing Guidelines chart.
[3]McLoughlin, 51-54.
[4]Ibid, 54.
[5]http://nefafoundation.org//index.cfm?pageID=51#LetterC, "Fourth Circuit Court of Appeals Opinion"
[6]McLoughlin 111
[7]Ibid, 76-77
[8]§2339C(a)(1)(B) is defined as "providing or collecting funds with the intention or knowledge that the funds are to be used to carry out… any other serious act… when the purpose of such an act, by its nature or context, is to intimidate a population or to compel a government…."
[9]McLoughlin, 79
[10]Booker, 543 U.S. at 244
[11]McLoughlin 83.
[12]Ibid, 86
[13]http://www.adelaidenow.com.au/news/the-extraordinary-life-of-david-hicks/story-e6freo8c-1111115206302
[14]http://www.dailytelegraph.com.au/news/david-hicks-denies-on-channel-tens-7pm-project-being-a-terrorist-despite-being-detained-in-afghanistan/story-e6freuy9-1226124822634
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LIFE ON THE INSIDE: GUAN-TANAMO LIGHT?

LIFE ON THE INSIDE: GUANTANAMO LIGHT?

We know that Guantanamo Bay is not a pleasant place to be detained. Indeed, Gitmo has almost become shorthand for a locale devoid of human rights, where torture is condoned, detainees spend years in isolation, and guards regularly degrade the Muslim faith. Yet what about the conditions faced by inmates inside U.S. federal prisons? Guantanamo is not an aberration in the treatment of prisoners held by the United States. As the following section demonstrates, there are very significant parallels between the conditions inside Guantanamo and inside federal prisons – particularly at the present moment, for Muslim prisoners and prisoners held on terror-related charges.

The parallels discussed here are useful because they disrupt the assumption that the straightforward solution to ending the rights abuses at Guantanamo Bay, is to transfer detainees into U.S. federal prisons. This is not to suggest, however, that the conditions at Guantanamo are *just like* those in federal prisons. There are very important distinctions to be made between these two locales. In general, individuals charged with terror-related crimes in the United States maintain several basic rights: the right to challenge detention, unhindered legal visits with full attorney-client privileges, meaningful communication with family, visitation rights, recreation and educational opportunities and investigations into torture and abuse. It is thereby important to keep in mind both the continuities between the treatment of detainees in Guantanamo and in U.S. federal prisons, and the *discontinuities*, as given by the most basic legal rights denied to individuals at Guantanamo Bay.

1) COMMUNICATION MANAGEMENT UNITS (CMUS)

According to the Center for Constitutional Rights (CCR):

"In 2006 and 2008, the Federal Bureau of Prisons (BOP or "Bureau") secretly created the Communications Management Units (CMUs), prison units designed to isolate and segregate certain prisoners in the federal prison system from the rest of the BOP population. Currently, there are two CMUs, one located in Terre Haute, Indiana and the other in Marion, Illinois." [1]

The CMUs were created without an opportunity for public notice and comment, in direct violation of the Administrative Procedures Act (APA). Shockingly, *"over two-thirds of the CMU population is Muslim, even though Muslims represent only 6 percent of the general federal prison population."*[2] This is despite the fact that many Muslim prisoners held in the CMU were never convicted of terrorism-related offences and are not considered even minimal threats to U.S. national security, according to the judges that presided over their cases. Many individuals in the CMUs are imprisoned for crimes entirely unrelated to terrorism, including armed robbery and manslaughter.

Both the manner in which individuals are transferred into the CMUs, and the conditions inmates experience inside the unit, so fundamentally violate prisoners' rights that the CMUs have been termed "little Guantanamos". First, inmates are given little explanation for their transfer into the CMU. Many of the prisoners transferred into the CMU received the same exact wording on their one-page notice of transfer from the BoP: *"reliable evidence indicates your involvement in recruitment and radicalization of other prisoners"*. As Rachel Meeropol, the lead attorney on Aref v. Holder at the CCR, points out, this one-page notice is far from sufficient to justify transfer. *"Who are they supposed to have recruited? When? Toward what end? In what prison? Why didn't they get an incident report?"* For Meeropol, *"there's no evidentiary support"* to demonstrate that transfers into the CMU were justified on the basis of radicalization. Similarly, there is little proof that individuals are placed in the CMU as a result of disciplinary problems or communications-related infractions. Worryingly, inmates in the CMU have no meaningful appeals process to challenge their placement. Whereas in supermax prisons, individuals can earn their right to be transferred into the general population on the basis of good behaviour, no similar procedure exists inside the CMU.

Second, people imprisoned within CMUs face extreme restrictions on their communication with

the outside world, which is why they have also been *called "an experiment in social isolation"*. Prisoners inside the CMUs get only one to two 15-minute phone calls each week (compared to 75 minutes a week for other prisoners), and one to two four-hour visits each month. Visits and phone calls must be conducted in English. People detained within the units are not permitted contact visits under any circumstances, and are therefore denied a right that even supermax prisoners retain under some circumstances. It is difficult to substantiate that this is a security-related regulation, since CMU prisoners are still strip-searched before and after each visit. As one author noted, *"[CMU inmates] are not even allowed a brief embrace [with family members and friends] upon greeting or saying goodbye."* [3]

According to the CCR, *"the ban on physical contact during visits contradicts the Bureau's own policy recognizing the critical importance of visitation in rehabilitation and prisoner re-entry. The CMUs' visitation policy is even more restrictive than that of the BOP's notorious 'supermax' prisons, where prisoners have over four times more time allotted for visits than prisoners in the CMU."*[4] In an interview with Cageprisoners, Rachel Meeropol reflected on how these restrictions on communication affected her plaintiffs inside the CMUs:

"Our clients describe it as just incredibly painful, to sit across from their young children, their wives, to know that they are so close to them, and yet so far away, in every way that counts… [Ever since the suit against the CMUs has been brought] some of our clients have been moved out of the unit and have had the actual opportunity to have the 300 minutes of phone calls a month that most prisoners get in the federal system, to have contact visitation with their children and wives and friends, and the difference in their lives and mental and emotional well-being is just amazing, cannot be over-stated…"

As Sabri Benkahla's case demonstrates, many Muslims are incarcerated inside the CMUs despite the fact that they pose little or no threat to national security. As in Guantanamo Bay, prisoners are subject to potentially tortuous conditions of extreme isolation, with no established procedure to challenge their detention.

CASE STUDY: YASSIN M. AREF

Yassin Aref grew up in Northern Iraq. As a Kurd, he was targeted under Saddam Hussain's regime, and came to the United States as a United Nations refugee in 2001. After working as a janitor and an ambulance driver, Aref was eventually hired as the imam at Masjid Al-Salaaam mosque in Albany, New York.[5] Mohammad Hossain, the mosque's founder, had moved from Bangladesh years earlier.

In July 2003, an undercover informant was sent into Mr. Hossain's pizzeria, also in Albany. The informant, Shahed Hussain, is the same individual who would be planted in Newburgh, New York several years later. Hussain offered to lend the restaurant owner $50,000 for improvements to the pizzeria. According to Hussain's testimony at trial, he informed Hossain that the money came from the sale of a missile launcher, which had been purchased for a planned attack on the Pakistani ambassador. After accepting the loan offer from Hussain, Hossain asked Aref to attend a meeting with the informant in order to act as a witness to the loan, which is customary for religious figures to do in Islam.[6]According to the government, Aref was made aware of the origins of the funds when he met with Hossain and the informant. Yet given Aref's poor English at the time, it is unclear whether he understood that the transaction was anything but legitimate.

Hossain and Aref were arrested on August, 5, 2004. Later that month, both men were released on bail after it was discovered that the government had mistranslated a key piece of evidence, which linked Aref to the terrorist group Ansar al-Islam. Whereas the government had initially claimed that an address book found in an Iraqi training camp referred to Aref as "the commander" in Arabic, it later admitted that the translation was incorrect, and that he was actually described as "brother" in Kurdish.[7]

Despite the government mistranslation and substantial evidence that the FBI informant had entrapped the two men, the trial moved forward. In October 2006, both men were convicted of conspiring to aid a terrorist group, conspiring to provide support for a weapon of mass destruction, money laundering, and supporting a Designated

Foreign Terrorist Organization, Jaish-E-Mohammad (JEM), among other charges.[8] Several months later, in March 2007, Aref was sentenced to 15 years.

In May 2007, Aref was placed in the CMU in Terre Haute, Indiana. He was incarcerated there until 2009, when he was moved into the CMU in Marion, Illinois. In April 2011, nearly four years after his initial transfer into the CMU, Aref was shifted back into the general population at Marion. It is possible that he was moved in an attempt to defuse the suit brought against the Bureau of Prisons by the CCR, *Aref, et. al. v. Holder* (discussed below). In an e-mail sent to his friends and family on April 13, 2011, Aref discussed what it was like to be imprisoned inside the CMU:

"After spending about 20 Months in total solitary confinement at a county jail, I arrived at CMU Terra Haute, Indiana to find a small Middle Eastern community where inmates from Iraq, Syria, Lebanon, Palestine, Jordan, Egypt and Yemen among others were already there. In CMU, most inmates are Arab or Arabic speakers.

We are separated because of our nationality and religion. Of course they deny that, but the reality in the CMU proves this segregation is the whole point of a CMU. Otherwise what did I do? Why am I classified as a high risk inmate? How can it be dangerous if they allow me to hug my children? Why do they need to limit my communication? Who I am going to call besides my family?

All my life in Iraq I was treated as a second degree citizen and half human because I was Kurdish. I left my country to regain my humanity and live free, not to be targeted, imprisoned and placed in a CMU.

When I learned CMU prisoners don't have the same rights like other prisoners in the BOP, and I found that 65 to 75 percent of the inmates in CMU are Muslim and another 8 to 15 percent are Spanish speakers, I became sad and it seemed like this country is going backward to the dark days of its history when Black people were slaves or treated like slaves. Many inmates in CMU are not criminals. They are political prisoners and victims who were in the wrong place at the wrong time.

Some like me never committed any crime. Yet they treat us as the highest risk inmates!

My youngest daughter is still a child and she was born while I was in jail. I never carried her or kissed her and I could never buy a candy for her. She doesn't have any memory with me. Until she was four years old she used to think `daddy' means the phone! That's because whenever I used to call home, her brothers and sister would run to the phone saying "Daddy, daddy!" So, she thought daddy means phone! Whenever anyone asks her, `Where is your daddy?' she would point or run to the phone and say, `That is my daddy!' It's heart breaking but I am laughing. In Arabic they say the worst trial is the one which makes you laugh!

Thank God with all of these injustices still my heart is full of peace and love. My faith saved me from hate. I believe God allowed this to happen and that is why it happened. I look for His reward for all my pain and all of what my family going through." [9]

Aref's letter provides just a brief glimpse into the kind of isolation experienced by prisoners inside the CMU. Since being shifted back into the general population, Aref has regained the basic privileges denied to him while inside the unit, including the right to hug his children during visits. However, a host of other individuals named in this report – including John Walker Lindh, Ali Asad Chandia, and Rafil Dhafir, among others – remain within the confines of the CMU. The next section describes a legal challenge currently being brought against the Communication Management Units.

LAWSUIT: AREF, ET AL. V. HOLDER

In April 2010, the Center for Constitutional Rights (CCR) filed a lawsuit in the District of Columbia against Attorney General Eric Holder, federal Bureau of Prisons (BOP) officials, and the BOP itself. Five CMU prisoners and two of their spouses were named on the lawsuit as plaintiffs. The suit listed several complaints. First, it stated that the CMUs violate prisoners' right to procedural due process. The men were not given any rationale for their transfer to the CMUs, nor were they given any opportunity to challenge their designation in the unit. The suit also alleged that the conditions inside the unit – especially the blanket ban on contact visits – amounted to cruel and unusual punishment. It included an equal protection claim,

on the basis that Muslims are overrepresented in the unit by over 1000% as compared to the general prison population.

According to the CCR, the lack of procedural protections at the CMU has facilitated a pattern of discriminatory and retaliatory designations in the unit. Individuals are transferred into the CMU – not on the basis of communication infractions or the potential threat they pose to national security – but on their perceived religious and/or political beliefs. Finally, the suit brought an Administrative Procedures Act (APA) claim since the CMUs were opened without the period of notice and comment required by APA legislation.

In July and November 2010, the defendants filed motions to dismiss the lawsuit; the plaintiffs filed motions opposing dismissal in the fall of 2010. About a year after the suit was first filed – in March 2011 – the court returned with a mixed ruling. It both denied the motion to dismiss in part, and granted it in part. The suit has proceeded on the procedural due process and retaliation grounds described above, and is now in discovery.[10]

The CMUs do not minimize threats to American national security. As Rachel Meeropol points out, these "experiments in social isolation" are about something else entirely: religious discrimination and treating Muslims as second-class citizens:

"I think it's about controlling a perceived threat about radicalization. There is a predominant philosophy right now in the government and within the Bureau of Prisons (BoP) that individuals… who hold leadership positions in the Muslim community in prison – who talk about Islam, who teach about Islam – that these people are a threat. That simply based on those religious ideals, that they pose a greater threat to the BoP than other prisoners, and that that is enough in itself in eyes of the BoP to justify harsher restrictions…"

According to the website Green is the New Red, it is impossible to fully understand CMUs without contextualizing them alongside Guantanamo: *"CMUs mark a continuation of the Guantanamo mindset by the Obama administration. Guantanamo reflected a fundamental contempt for the rule of law and basic human rights. The Obama administration has advocated closing Guantanamo, and it must also close secretive facilities on U.S. soil that single out prisoners because of their religious beliefs and political ideology and deprive them of their due process rights to challenge their incarceration."*[11]

It is not only individuals in the CMUs who face extreme conditions of social isolation. As the next section explores, many defendants convicted of terror related offences have been placed under Special Administrative Measures (SAMs), which prevent them from having even minimum communication with the outside world.

2) SPECIAL ADMINISTRATIVE MEASURES (SAMS)

In 1996, the Prevention of Acts of Violence and Terrorism section of the criminal code became effective, listed as 28 C.F.R. § 501.3. Under 9-24.100 of the Act, the Attorney General may authorize the Director of the Bureau of Prisons to place specific prisoners under *"special administrative measures"* (SAMs). According to the text of 28 C.F.R. § 501.3, an inmate is only eligible for SAMs if *"there is a substantial risk that [the] 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"*.[12]The SAMs imposed *"may include housing the inmate in administrative detention and/or limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to protect persons against the risk of acts of violence or terrorism"*[13]. These measures can be imposed for a maximum of 120 days, but can be renewed for 120-day increments indefinitely.

Many of the individuals discussed in this report have lived under SAMs. For individuals such as Syed Fahad Hashmi, SAMs were imposed even before conviction. For others – including John Walker Lindh and Richard Reid – whose case is explored below – extremely restrictive SAMs were imposed for years after conviction, without a clear and justifiable rationale.

CASE STUDY: RICHARD REID

Richard Reid was born in 1973 in the London suburb of Bromley. In the mid-1990s, he was convicted of a string of muggings and served sentences in several different prisons. While at Feltham young offenders' institution, he decided to convert to Islam.

After his release, Reid began praying at Brixton mosque, in south London. According to the chairman of the mosque, Abdul Haqq Baker, Reid slowly became acquainted with individuals in the mosque known to hold more extreme views. In 1998, Reid left London for Pakistan. In the next few years he travelled extensively through Europe, Israel, and Pakistan.

On 22 December, 2001, Reid boarded American Airlines flight 63 from Paris to Miami. He tried to light a fuse connected to explosives on his shoe, but was overpowered by passengers and crewmembers before he could. In 2002, Reid pled guilty to eight criminal counts including attempted murder and attempted use of a weapon of mass destruction, among other charges. He is serving a life sentence without chance of parole at the supermax prison in Florence, Colorado.

In 2003, Reid was placed under SAMs and as a result, was a moved into a special isolation unit at the supermax prison For the first 6.5 years of his sentence, he was confined to a 75.5 square-foot cell for 23 hours a day, and had almost no contact with anyone except for his lawyers and his immediate family. The one hour he was allowed outside of his cell each day, was spent in an indoor recreation hall alone, or at best, sectioned off from other inmates in a "dog-kennel" fashion. One former guard in the supermax described life on the inside:

"It's a very negative atmosphere. They can't see grass or trees, they will never feel the touch of a loved one, they will never see bright colours, they're deprived of the sensory stimulation that you and I know… Everyone in there is in a dark abyss. The isolation breeds paranoia, it's contagious." [15]

For another guard, the conditions in the supermax were second only to Guantanamo: "It's sensory deprivation — not Guantanamo, not hoods over your head and mental torture, but the next worst thing." [16]

The SAMs placed on Reid only compounded the conditions of isolation faced by all inmates at the supermax. In 2007, Reid filed a civil lawsuit in a Denver federal court challenging the legality of the SAMs. According to Reid, the SAMs violated his right to freedom of religion, since he was unable to pray in groups as required by Sunni Islam. His suit also questioned the legitimacy of other elements of his SAMs: he was barred from learning Arabic, ordering book or magazines, watching television, speaking with the media, or having even minimum interaction with other inmates.[17]

In March 2009, Reid went on a hunger strike, demanding that the SAMs be lifted. He had refused 58 meals by April 9th, and on the 7th of April prison officials decided that *"medical intervention was necessary"*, including force feeding.[18] A few months later, in June 2009, the SAMs against Reid were lifted. In August, an annual Justice Department review found that Reid had not been seeking to commit violence, and he was moved into the general population. Reid is now able to talk to other inmates without monitoring, order books and magazines, receive non-family visits and communicate with the media. After being moved into the general population, however he was again subject to SAM restrictions on some other forms of communication. He is not permitted to write to anyone aside from his lawyers and immediate family. [19]

As demonstrated by the cases of Syed Fahad Hashmi, John Walker Lindh, and Richard Reid, SAMs place extreme conditions of isolation and confinement on individuals charged or convicted of terror-related offences. These restrictions sometimes seem to have no logic other than making life even more difficult and painful for the individuals living under them; for example, for years John Walker Lindh was prohibited under SAMs from speaking Arabic at any time, even while praying. Indeed, as the following section explores, the conditions faced by War on Terror convicts in the United States are so extreme, that the European Court of Human Rights has temporarily stayed the extradition of several men facing charges on American soil.

3) INHUMANE CONDITIONS?

In July 2010, the European Court of Human Rights stayed the extradition to the United States of four men facing terrorism charges – Abu Hamza, Babar Ahmed, Harun Rashid Aswat and Syed Talha Ahsam. The court, based in Strasbourg, France, ruled that the men could not be taken from the UK until it was satisfied that their extradition would not violate the Human Rights Convention, which stipulates the *"prohibition of torture and inhuman or degrading treatment"*. All of the signatories of the European Convention on Human Rights are legally barred from removing anyone to a place where they could be subject to such treatment.

Hamza's lawyers claimed that the men would face unreasonably long sentences if put on trial in the United States; they could potentially receive life sentences without parole, which would arguably breach their human rights. Secondly, all the legal teams maintained that that the conditions in the 'supermax' prison in Florence, Colorado – where almost all high-profile terrorism convicts are kept – also violated the men's human rights.[20] Many psychologists and human rights advocates stress the long-term psychological consequences of extended solitary confinement, and consider it a form of torture. As described earlier in this report, in the Florence supermax most inmates spend about 23 hours a day in solitary confinement and have minimal or no contact with other inmates. In stopping the extradition of Hamza and the others, the Court requested more detailed arguments from both sides about the conditions inside the supermax, and the psychological impact of lifetime sentences on prisoners.[21]

As this report goes to print, the extraditions have still not gone ahead, since the Court has not returned with its final ruling. As exemplified by the temporary stay on extradition by the Court, many of the practices considered quotidian in the American criminal justice system – particularly long-term solitary confinement and life-sentences without parole – are controversial on the international stage. In many respects, the ruling demonstrates that it is not only Guantanamo Bay that separates the United States from Canada and Europe in terms of its human rights practices. America's treatment of individuals charged and convicted on U.S. soil, arguably also violates our basic human rights norms.

4) CONCLUSION

Conditions on the inside are bleak for individuals charged and convicted in U.S. federal courts – especially if they are Muslim or presumed to have links to terrorism. Inside the Communication Management Units (CMUs), inmates have extremely limited contact with friends and family, and could potentially serve their entire sentences without being able to hug their wives or children. Individuals placed under Special Administrative Orders (SAMs) also endure extreme restrictions on their basic freedoms – including limits on their access to media and print materials, extensive constraints on their communication with other inmates and the outside world, prohibitions on what they are allowed to learn, and even which languages they are allowed to speak. As the recent ruling by the European Court of Human Rights demonstrates, it is not only at Guantanamo Bay that the United States is accused of exposing inmates to cruel and unusual punishment.

Indeed, American prisoners have endured these inhumane conditions for decades. For African Americans and other people of colour in the United States, it is old news that years of incarceration and extreme isolation can cause long-term psychological damage, and therefore arguably amounts to torture. When asked about whether conditions in Guantanamo Bay had influenced the treatment of War on Terror suspects in the United States, Rachel Meeropol commented:

"I think it's more likely that generic abuse in prison has contributed to the abuse at Guantanamo and the abuse at Abu Gharib than it came from the other way around. I think prisoners in this country have been living with that abuse for hundreds of years."

Perhaps there are not simply parallels between the treatment of detainees in Guantanamo Bay and inmates in U.S. federal prisons. Instead, it is possible that the brutality that has long informed U.S. prison practices has shifted to Guantanamo, Abu Gharib, and elsewhere? Regardless, it is crucial to remember that even if we could close Guantanamo Bay, it would not be sufficient. Individuals convicted of terrorism offences – along with all other prisoners in the United States – deserve to have their human rights respected, no matter what crime they committed.

[1] http://ccrjustice.org/cmu-factsheet
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