CAGEPRISONERS

TOO BLUNT FOR JUST OUTCOMES

Why the US terrorism enhancement sentencing guidelines are unfair, unconstitutional and ineffective in the fight against terrorism

About Cageprisoners

Cageprisoners is a not-for-profit company limited by guarantee which operates as a human rights NGO. The organisation seeks to work for political Muslim detainees, specifically those interned as a result of the 'War on Terror' and its peripheral campaigns, by raising awareness of the illegality and the global consequences of their detention. By promoting due process, the vision of the organisation is to see a return to the respect of those fundamental norms which transcend religion, societies and political theories.

Cageprisoners comprises of an advisory group which includes patrons, seasoned activists, lawyers, doctors and former detainees. From the group, a board has been elected which oversees the strategy and management of the organisation and its employees. By working in such a way the working environment of the organisation can constantly be reviewed in light of its aims and objectives.

CAGEPRISONERS®

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Introduction

Part of the history of the United States of America is the way that its judicial system has attempted to consistently provide justice to those that come before its purview. This history, however, is not devoid of its exceptions. Isolated communities over the years have fallen victim to gross miscarriages of justice, whether it was the Japanese-Americans during World War II or communists in a post-war world. There have been a number of occasions where the US justice system has allowed itself to fall victim to the politics of fear.

The most well known example of how a community has been systematically alienated from the judicial process is that of African-Americans. Through the work of individuals such as Sister Helen Prejean, there has been a great deal of documentation of the ways in which the community has been subjected to biased trials, procedural impropriety and disproportionate sentencing. Even today, discrimination against African-Americans continues as record numbers of black men are incarcerated and sentenced disproportionally.

With much focus on the illegality of the prison camps at Guantanamo Bay and the military commission process that is being used in order to try the detainees, there is very little scrutiny of the way in which Muslims are being treated within the US justice system. From a number of perspectives, Muslims have become the new 'black' and are being treated as a singular threat.

Although there are real areas of concern in relation to due process and procedural impropriety, the focus of this report is on the sentencing guidelines that are used in cases involving Muslims. Even where the convictions against a Muslim suspect bear only a very peripheral relation to terrorism, a terrorism enhancement is being applied which dramatically increases the number of years to be served by the defendant.

The report shows a number of examples of the widespread way in which the sentencing guidelines are being used in order to criminalise Muslims and indeed increase the fear and stigma surrounding terrorism within the Muslim community. Guantanamo may well be the symbol of arbitrary detention and removal of due process, however, the US mainland requires much work before it can lay claim to a fair, open and justice system for all.

[Asim Qureshi – Executive Director]

Federal sentencing guidelines

From the 2010 Federal Sentencing Guidelines Manual, **§3A1.4**:

(a) If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32.

(b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.

Application Notes:

1. *"Federal Crime of Terrorism"* Defined.—For purposes of this guideline, **"Federal crime of terrorism" has the meaning given that term in 18 U.S.C. § 2332b(g)(5)**.

2. *Harboring, Concealing, and Obstruction Offenses*—For purposes of this guideline, an offense that involved (A) **harboring or concealing a terrorist who committed a federal crime of terrorism** (such as an offense under 18 U.S.C. § 2339 or § 2339A); or (B) **obstructing an investigation of a federal crime of terrorism, shall be considered to have involved, or to have been intended to promote, that federal crime of terrorism**

3. *Computation of Criminal History Category*—Under subsection (b), if the defendant's criminal history category as determined under Chapter Four (Criminal History and Criminal Livelihood) is less than Category VI, it shall be increased to Category VI.

4. *Upward Departure Provisio*n—By the terms of the directive to the Commission in section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, the adjustment provided by this guideline applies only to federal crimes of terrorism. However, there may be cases in which (A) **the offense was calculated to influence or affect the conduct of government by intimidation or coercion**, or to retaliate against government conduct but the offense involved, or was intended to promote, an offense other than one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B); or (B) the offense involved, or was intended to promote, one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B), but the terrorist motive was to intimidate or coerce a civilian population, rather than to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. **In such cases an upward departure would be warranted.**[i]

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.[1] Within the Guidelines, sentences are determined on the basis of two factors: the act for which the person was convicted (offense 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]

The Guidelines thereby serve two functions:

First, by taking into the defendant's criminal history, in addition to the convicted offense, the Guidelines are designed to fulfil the purposes of imprisonment as provided by Congress.

According to 18 U.S.C. §3553(a)(2), sentences should be:

Sufficient, but not greater than necessary...
(a) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
(b) to afford adequate deterrence to criminal conduct;
(c) to protect the public from further crimes of the defendant;
(d) to provide the defendant with needed educational or vocational training, medical care, or other corrective treatment...

By taking into account both a defendant's offense, and his criminal history, the Guidelines endeavour to approximate a defendant's likelihood of recidivism and provide appropriate space and time for him to be rehabilitated. In establishing a state-sanctioned sentencing range, the authors of the Guidelines also functionally defined what constitutes a 'just punishment' for federal crimes.

Second, the Sentencing Guidelines were created with the intention of establishing greater uniformity and fairness in sentencing. According to the opening pages of the Guidelines Manual:

The Act's basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. To achieve this end, Congress first sought honesty in sentencing...

Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity...

By creating the Guidelines and thereby narrowing judges' discretion, the United States Sentencing Commission aimed to eliminate the disparities in sentencing that seemed to plague federal courts. The federal parole system was also effectively abolished under the Guidelines. Prior to the guidelines reform, defendants were generally given a minimum and a maximum sentence, and the actual sentence served was determined by the parole commission or another administrative body; after the Guidelines were established, however, judges determined the specific amount of months to be served.

[1] 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.
[2] See the Appendix for the Sentencing Guidelines chart.

It is important to note that the Federal Sentencing Guidelines also specify circumstances under which judges ought to deviate from the suggested sentencing range. Particular mitigating circumstances can justify a reduction in time to be served. Specific conditions might also call for the appropriate application of longer sentences. As enumerated within the Sentencing Guidelines, these "victim-related" adjustments include hate-motivated crimes, crimes that include official victims, and terrorist-related offenses.

Section 3A1.4

History of 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 offenses as well. The USA PATRIOT Act, passed in the wake of 11 September 2001, further shifted sentencing for terrorist-related crimes. The Act established base offense 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 now sentenced according to the suggested Guidelines range, but may also be deemed eligible for the application of the "terrorism enhancement" statute.[ii]

How does 3A1.4 work?

Section 3A1.4 is applied over and above the base sentence given for a convicted offence, and quite significantly impacts sentencing. First, qualifying defendants are immediately given a "Category VI" criminal score, regardless of their criminal history. Second, 3A1.4 shifts defendants' offence level upwards by at least 12 classes, and all qualifying 3A1.4 defendants are sentenced at a minimum of offense level 32. In other words, if a convicted terrorist is initially classified at an offense level below 20, his offense level is immediately increased to 32; if he is classified at an offense level at or above 20, 12 levels are added to his offense 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.[iii] Some legal scholars have therefore described section 3A1.4 as 'draconian'.[iv]

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

1) Commit an offense 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 fulfill two criteria:
a. It must be "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct"
b. It must under a list of specified terror-related violations as given in §2332b(g)(5)(B).

2) Harbor or conceal a terrorist who committed a federal crime of terrorism, or obstructed an investigation of a federal crime of terrorism.

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

In sum, the statute 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.[3]

[3] As I will explore later, there is a great deal of confusion within state and federal courts in how to determine intent. It is unclear what level of evidential certainly is necessary in order to establish intent, or whether judges or juries should be responsible for making this determination.

The statute therefore gives agents within the judicial system wide-ranging power and greatly expands their discretion in sentencing. Even if defendants cannot be linked to the funding, planning or enactment of specific acts of terrorism, they can still qualify for statute 3A1.4 and receive a heightened sentence.

3A1.4 and Muslim defendants: case studies

Mohamad Hammoud

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 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, and became the first person to be convicted of 18 U.S.C. §2339 (B), namely providing material support to a designated foreign terrorist organisation (DFTO), and conspiracy to provide material support to a DFTO.[v] At sentencing, the trial court judge determined that Hammoud was attempting to influence the conduct of government by funding Hezbollah, thereby bringing 3A1.4 into play. His suggested sentencing range increased dramatically to between 360 months and life; without 3A1.4, Hammoud's recommended sentence would have fallen between 108 and 135 months. Hammoud was initially sentenced to 1860 months – over 155 years of imprisonment.[vi]

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.[4]

He lost his appeal on all counts but brought a writ of certiorari request to the Supreme Court, essentially asking that the Supreme Court require the Appeals Court to re-review his case. He also argued that the judge should have justified his sentencing based on the clear and convincing standard of evidence, rather than the preponderance of the evidence standard usually used for sentencing, since applying 3A1.4 would substantially increase his sentence.[5]

In January 2005, the Supreme Court ruled in Hammoud's favor, granting his writ of certiorari. The case was remanded to the 4th Circuit Court of Appeals for consideration in light of United States v. Booker. Several months later, in April, the Court of Appeals submitted:

The sentence imposed on Hammoud exceeded the maximum sentence authorized by the jury verdict alone.... And the Government cannot prove that this error... did not affect Hammoud's substantial rights. We therefore vacate Hammoud's sentence and remand for resentencing under the advisory guidelines regime...

In January 2011, Hammoud was resentenced to 30 years in prison, which means he will spend another two decades inside. Judge Graham Mullen, who initially sentenced Hammoud in 2003, commented that the prison term now seems "grossly disproportionate".

[4] 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 the jury or entered by the defendant himself.

[5] Preponderance of the evidence is usually reserved for civil cases, and means that based on the given evidence, the proposition at hand is more likely to be true than not. Clear and convincing evidence means that based on the facts, the proposition at hand is substantially more likely to be true than not. The standard of evidence of beyond a reasonable doubt is used for conviction in all criminal cases, and means that there is no reasonable doubt in the mind of a reasonable person that the defendant is guilty.

Sabri Benkahla

Sabri Benkahla was acquitted in March 2004 of the government's initial charge, supplying services to the Taliban and using a firearm in furtherance of that offence. Beginning in August 2004, Benkahla was compelled by the US government to testify for several grand juries and meet with the FBI; he was promised immunity from criminal prosecution in exchange for truthful testimony. During one grand jury testimony, Benkahla testified about individuals he knew that had participated in jihad training in Afghanistan and Pakistan in 1999, and the circumstances surrounding his own participation in training camps during the same time period.

In February of 2006, Benkahla was indicted on four counts: 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.

The perjury case went to trial in January 2007, and in February, Benkahla was convicted of all charges. At sentencing, the judge also determined that he qualified for 3A1.4 enhancement under the perjury charge, since he purportedly obstructed an investigation of a federal crime of terrorism. His legal team challenged his conviction and his sentence in 2008, but Benkahla lost his appeal on all counts. Despite denying his appeal, however, even the District Court judge openly acknowledged in his statement that Bekahla presented no real threat to Americans:

Sabri Benkahla is not a terrorist. He does not have the same characteristics of a terrorist, and share the same characteristics or the conduct of a terrorist and in turn does not share the same likelihood of recidivism, the difficulty of rehabilitation, or the need of incapacitation... Defendant has not committed any other criminal acts and there is no reason to believe he would ever commit another crime after his release from his imprisonment. Defendant has engaged in model citizenry, receiving a Master's Degree from Johns Hopkins University, volunteering as a national elections officer in local, state, and national elections. It is clear that, in the case of the instant defendant, his likelihood of ever committing another crime is infinitesimal...In fact the court received more letters on Sabri's behalf than any other defendant in twenty five years, all attesting to his honor, integrity, moral character, opposition to extremism, and devotion to civic duty...[vii]

Sabri was ultimately given a 121-month sentence – over ten years. Without the application of the terrorism enhancement statute, Sabri would have received at most three years for his convicted offences.[viii]

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 somes 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 o 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.[ix]

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 Chandia's second resentencing - in March 2011 - Judge Hilton imposed the same 15-year prison term. Chandia's defence team will challenge the sentence. If the Court of Appeals rules that Judge Hilton was again unable to justify the use of the terrorism enhancement statute, the Appellate Court can remove him from the case and transfer it to a different judge.

Aafia Siddiqui

In July 2008, Siddiqui was arrested in Afghanistan; the authorities claimed they found suspicious items in her purse, including handwritten notes that referred to mass casualty attacks, two pounds of sodium cyanide, and various other chemicals and documents. The following day U.S. army officials went to interrogate her. According to the US government, before any interrogation Siddiqui purportedly picked up the rifle of one of the officials and attempted to fire at them, but missed, shouting *"Death to America!"* in the process. A warrant officer fired upon her in return. Siddiqui claims she never touched the rifle and simply stood up.

Siddiqui and her supporters maintain that she was kidnapped and detained by U.S. and Pakistani forces in March 2003, then held in Afghanistan until 2008, under conditions of torture and solitary confinement. Some evidence supports this claim. Former Guantanamo detainee Binyam Mohamed confirmed to Cageprisoners that Aafia Siddiqui was detained at Bagram Airbase. Six human rights groups, including Amnesty International, listed her as a potential "ghost prisoner" being held by the U.S.

On February 3, 2010, Siddiqui was convicted of five charges: one count of attempting to kill US nationals outside of the US; one count of attempting to kill US officers and employees; one count of armed assault of US officers and employees; one count of using and carrying a firearm during and in relation to a crime of violence; and three counts of assault of US officers and employees.

Later that year, in September 2010, Siddiqui was sentenced to 86 years in prison, essentially a life term. At the sentencing ruling, the judge stated that he believed Siddiqui was beyond rehabilitation, and proceeded to add a host of enhancements to her sentence – official victim enhancement; hate crime enhancement; criminal history enhancement; obstruction of justice enhancement; enhancement on the basis that her actions were premeditated; and terrorism enhancement. Given her convicted offenses (namely under United States Code, Sections 1114 (relating to killing or attempted killing of officers and employees of the United States), 2332 (relating to certain homicides and other violence against United States nationals occurring outside of the United States)), Siddiqui automatically met the first criteria for the commission of a federal crime of terrorism. In its sentencing memo, the prosecution staunchly maintained that she also acted with intent, thereby fulfilling the second condition of eligibility; they argued that her actions, the materials in her possession at the time of her arrest, and the statements she allegedly made as she attempted to shoot U.S. personnel, all demonstrated that her actions were indeed *"calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct".* This is despite the prosecution setting out at the start of her trial that she was not tied to Al Qaeda or terrorism.

As the defence pointed out in its sentencing memo, however, Siddiqui was suffering from mental illness when she was apprehended, which is why her bizarre behaviour aroused suspicion in the first place.[6]

[6] In the pretrial hearings, Siddiqui's defence team maintained that she suffered from mental illness and was unfit to stand for trial. She underwent three sets of psychological assessments, with psychologists ultimately disputing whether she was ill or merely faking sickness in order to avoid prosecution. The judge eventually ruled that Siddiqui was healthy enough to stand trial, although he did not dispute that she did suffer from some mental health issues. During her trial, however, Siddiqui failed to cooperate with her own defence, and was removed from court several times for outbursts. It is therefore disputable that her trial should have ever gone forward.

Once in the Afghan police compound, and mindful of the United States' history of extraordinary rendition and torture, Siddiqui seized an opportunity to escape when it presented itself. Even if she did try to fire on US personnel, there is no evidence to show that this was part of a "calculated" effort to influence the conduct of government, instead of a misguided and spur of the moment attempt to flee. Moreover, the United States, *"government could not come up with anything persuasive to ground Dr. Siddiqui's activities on July 18, 2008 with terrorist activity, and consequently, never suspended the indictment with a terrorist charge".*[x] In summary:

What we are left with is a defendant who is clearly her own worst enemy. Mentally ill and caught in the crossfire of a war that is no longer fought on conventional battleground, Dr. Siddiqui's self destructive behaviour got her shot in the abdomen, charged with murder, and – undermining any form of defense – convicted of the same. Notably, while the government cannot point to a single person who was harmed by Dr. Siddiqui's behavior, they seek enhancements in her advisory Sentencing Guidelines range...[xi]

Without the multiple sentencing enhancements applied to Siddiqui, she would have served about 12 years in prison.

Too blunt to promote just outcomes: the dangers of 3A1.4

3A1.4 undermines the goals of the criminal justice system

a. 3A1.4 does not uphold the ultimate purposes of imprisonment as enumerated in 18 U.S.C. §3553(a)(2).

Statute 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".*[xii]

It is useful to compare 3A1.4's manipulation of criminal history to the "Career Offender" Guidelines (U.S.S.G. section 4B1.1) in order to consider how this clause has been applied elsewhere. Section 4B1.1 outlines specific conditions under which criminals who perpetually commit violent or drug offenses, may be eligible for immediate classification as a Category VI criminal. According to its supporters, 4B1.1 fulfils the purposes of imprisonment, since it provides harsher sentences to career criminals and protects the public from dangerous individuals who are likely to re-offend. This statute is thereby arguably justifiable on the fact that it is both predictive and preventative, since it requires evidence that the felon is likely to recommit particular types of violent or drug-related offenses in the future.

However, *"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 offenses in the future"*, even though there is no established evidence to validate this claim.

Indeed, as we can see from cases like Benkahla's, in some cases 3A1.4 is applied to offenders even when all evidence suggests that classifying them as VI Criminals is misleading and inaccurate.

Furthermore, there are legitimate concerns that the very long sentences given under 3A1.4, do not accurately reflect the seriousness of the convicted crime, thereby also contravening the ultimate aims of imprisonment. How does Hammoud's initial 155 year sentence – given despite the fact that he did not commit a single violent act – provide *"just punishment"* for his offense? Does Benkahla's ten year prison term for perjury, really *"promote respect for the law"?*

b. 3A1.4 brings about greater unfairness and inequality in sentencing, thereby undermining one of the fundamental purposes of the establishment of the Guidelines.

The Guidelines where created with the intention of bringing fairness and equality to federal sentencing. Under the Guidelines, more serious offenses and more hardened criminals should be given longer prison terms. Let's consider an example of how this is supposed to function, by examining the maximum sentences suggested in the Guidelines for two different terrorism-related charges: providing general material support to a DFTO; versus providing material support for a specific act of terror:

18 §2339B(a)(1): Providing Material Support to DFTOs – Maximum fifteen years imprisonment
18 §2339C(a)(1): Prohibitions against Financing Terrorism (ie, "Providing or collecting funds with the intention or knowledge the funds are to be used to carry out.... an act...") – Maximum twenty years imprisonment.

Under 3A1.4, all defendants have their sentences augmented in the same exact manner. Compare a defendant – such as Sabri Benkahla – who potentially lied under oath, and another defendant who aided a DFTO in purchasing a biological toxin. Despite the fact that the two crimes are incomparable in terms of the amount of potential social harm incurred, both defendants would be sanctioned similarly under 3A1.4, with 12 levels added to their offense level, and immediate categorization as a level VI criminal. If the Guidelines exist so that serious offenses are given heavier sanctions, 3A1.4 undermines its purpose.

Statute 3A.4 also ignores changes in judges' constitutional obligations, designed to ensure fairer sentencing. As discussed earlier, post-*Booker* judges must sentence defendants within the range given by the facts of the case, found by the jury to be beyond reasonable doubt. Other cases – specifically *Blakely*[7], *Rita* and *Gall* – have further altered the judicial landscape; judges are now constitutionally required to deconstruct a specific offence and defendant in order to justify the given sentence, by *"placing both [the defendant and the offense] on the spectrum of similar defendants convicted of criminal crimes".*[xiii] Statute 3A1.4 *"is an impediment to that constitutionally required analysis".*[xiv] Since it does not allow for any departures based on the characteristics or history, 3A1.4 erases the distinctions in sentencing practices devised to promote greater fairness under the Guidelines.

Statute 3A1.4 is a blunt tool that fails to promote the ethos of just and fair punishment embodied in the post-Booker application of the Guidelines.

[7] In Blakely v. Washington, the Supreme Court determined that in cases involving state mandatory minimum sentences, the judge could only take into account facts submitted by the defendant or proven to a jury to be beyond reasonable doubt. Under Rita v. United States, the Court determined that any sentence given by a judge within the Guidelines range could be presumed to be reasonable, regardless of the defendants' history or background. Gall v. United States, conversely, held that federal appeals courts could not simply presume that sentences falling outside the Guidelines range were unreasonable.

3A1.4 is unconstitutional

a. 3A1.4 may violate the 5th Amendment: Protection against double jeopardy.

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 offenses"*.[xv] 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. 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.[xvi]

b. 3A1.4 may violate the 5th and 6th Amendments: Right to due process and the right to a trial by jury

In the United States, defendants on trial for serious crimes are constitutionally guaranteed the right to a trial by jury.[8] As already mentioned, 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.[9] 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 authorized 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"*.[xvii] 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"*.[xviii]

Aside from the question of whether juries should establish intent beyond a reasonable doubt in order for 3A1.4 to apply, it is also disputed what standard of evidence judges ought to adhere to when determining 3A1.4 eligibility, if they indeed have the power to do so. As given by Hammoud's case, it is unclear whether judges should rely on the preponderance of the evidence standard, as usually occurs in sentencing, or the standard of clear and convincing evidence, which is usually required when the evidence in question would dramatically increase the sentence at hand.

[8] Serious crimes are defined as crimes that are punishable by incarceration for more than six months.
[9] Examples of DFTOs that have a social arm include Hezbollah and Hamas.

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.[10] As one legal scholar points out:

No one should doubt that the framers would be troubled by 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...[xix]

Both Hammoud's case and Chandia's case demonstrate a fundamental ambivalence within the judicial system, around whether 3A1.4 should be applied by judges based on their own findings. Terrorism enhancement charges can augment a sentence from a matter of years to an entire lifetime. It therefore seems counter to the spirit of the Constitution and the relevant case history, to presume that judges ought to be able to apply 3A1.4 enhancements, merely based on the presumption that a preponderance of evidence exists.

3A1.4 leaves a wide open door for Islamaphobic attitudes to influence sentencing

As is evident from both Hammoud and Chandia's cases, judges have a great deal of discretion in determining who qualifies for enhanced sentencing. Given that any crime at all can qualify as terrorist-related if there is an "established" intent to coerce, it is important to consider that judges' prejudices and political beliefs might influence the determination of intent.

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 naïve 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 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?

3A1.4 does not further a sound or successful anti-terrorism policy

As McLoughlin points out, "*section 3A1.4 punishes the defendant who sends $5000 to the social services arm of a DFTO, such as Hezbollah or Hamas, the same as the defendant who attempts to bomb the United Nations, or who provides weapons of mass destruction to al Qaeda".*[xx] Everyone deemed subject to 3A1.4 enhancement are classified as level VI criminals, regardless of the risk they pose. If men like Sabri Benkahla are given egregiously lengthy sentences under 3A1.4, despite the fact that they do not pose a threat to national security, it gives us pause to wonder how this statue is enhancing the fight against terror. How does the imprisonment of Hammoud, Benkahla, Chandia and Siddiqui under 3A1.4 make Americans safer? Isn't it possible that their sentences instead rightly encourage Muslims to view the American criminal justice system as draconian and Islamaphobic?

[10] Ring v. Arizona found that under the Sixth Amendment, a jury is required to establish the factors necessary for imposing the death penalty.

Conclusion

Statute 3A1.4 is a dangerously blunt instrument. It undermines the goals of the criminal justice system; it is arguably unconstitutional; it allows Islamaphobic beliefs to play a role in sentencing; and it fails to further the so-called War on Terror. From the cases examined here – Mohamad Hammoud, Sabri Benkahla, Aafia Siddiqui and Ali Asad Chandia – it is clear that 3A1.4 facilitates the draconian and illegitimate imprisonment of Muslim detainees.[13] Supporting detainees of the War on Terror in the United States requires challenging 3A1.4 enhancement. Protecting America and Americans means demanding a judicial system where our Constitutional rights are upheld above all else, and where facts – not prejudice – shape sentencing. Statute 3A1.4 contravenes American values, and gives stunning legitimacy to the claim that Muslims are second class citizens whose rights can be breached at will.[11]

[11] It is also worth nothing that 3A1.4 has been applied to animal rights and environmental activists

Appendix

Table 1
Sentencing Table (in Months of Imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0 - 6	0 - 6	0 - 6	0 - 6	0 - 6	0 - 6
	2	0 - 6	0 - 6	0 - 6	0 - 6	0 - 6	1 - 7
	3	0 - 6	0 - 6	0 - 6	0 - 6	2 - 8	3 - 9
Zone A	4	0 - 6	0 - 6	0 - 6	2 - 8	4 - 10	6 - 12
	5	0 - 6	0 - 6	1 - 7	4 - 10	6 - 12	9 - 15
	6	0 - 6	1 - 7	2 - 8	6 - 12	9 - 15	12 - 18
	7	0 - 6	2 - 8	4 -10	8 -14	12 - 18	15 - 21
	8	0 - 6	4 - 10	6 - 12	10 - 16	15 - 21	18 - 24
	9	4 - 10	6 - 12	8 - 14	12 - 18	18 - 24	21 - 27
Zone B	10	6 - 12	8 - 14	10 - 16	15 - 21	21 - 27	24 - 30
	11	8 - 14	10 -16	12 - 18	18 - 24	24 - 30	27 - 33
Zone C	12	10 - 16	12 - 18	15 - 21	21 - 27	27 - 33	30 - 37
	13	12 - 18	15 - 21	18 - 24	24 - 30	30 - 37	33 - 41
	14	15 - 21	18 - 24	21 - 27	27 - 33	33 - 41	37 - 46
	15	18 - 24	21 - 27	24 - 30	30 - 37	37 - 46	41 - 51
	16	21 - 27	24 - 30	27 - 33	33 - 41	41 - 51	46 - 57
	17	24 - 30	27 - 33	30 - 37	37 - 46	46 - 57	51 - 63
	18	27 - 33	30 - 37	33 - 41	41 - 51	51 - 63	57 - 71
	19	30 - 37	33 - 41	37 - 46	46 - 57	57 - 71	63 - 78
	20	33 - 41	37 - 46	41 - 51	51 - 63	63 - 78	70 - 87
	21	37 - 46	41 - 51	46 - 57	57 - 71	70 - 87	77 - 96
	22	41 - 51	46 - 57	51 - 63	63 - 78	77 - 96	84 - 105
	23	46 - 57	51 - 63	57 - 71	70 - 87	84 - 105	92 - 115
	24	51 - 63	57 - 71	63 - 78	77 - 96	92 - 115	100 - 125
Zone D	25	57 - 71	63 - 78	70 - 87	84 - 105	100 - 125	110 - 137
	26	63 - 78	70 - 87	78 - 97	92 - 115	110 - 137	120 - 150
	27	70 - 87	78 - 97	87 - 108	100 - 125	120 - 150	130 - 162
	28	78 - 97	87 - 108	97 - 121	110 - 137	130 - 162	140 - 175
	29	87 - 108	97 - 121	108 - 135	121 - 151	140 - 175	151 - 188
	30	97 - 121	108 - 135	121 - 151	135 - 168	151 - 188	168 - 210
	31	108 - 135	121 - 151	135 - 168	151 - 188	168 - 210	188 - 235
	32	121 - 151	135 - 168	151 - 188	168 - 210	188 - 235	210 - 262
	33	135 - 168	151 - 188	168 - 210	188 - 235	210 - 262	235 - 293
	34	151 - 188	168 - 210	188 - 235	210 - 262	235 - 293	262 - 327
	35	168 - 210	188 - 235	210 - 262	235 - 293	262 - 327	292 - 365
	36	188 - 235	210 - 262	235 - 293	262 - 327	292 - 365	324 - 405
	37	210 - 262	235 - 293	262 - 327	292 - 365	324 - 405	360 - life
	38	235 - 293	262 - 327	292 - 365	324 - 405	360 - life	360 - life
	39	262 - 327	292 - 365	324 - 405	360 - life	360 - life	360 - life
	40	292 - 365	324 - 405	360 - life	360 - life	360 - life	360 - life
	41	324 - 405	360 - life	360 - life	360 - life	360 - life	360 - life
	42	360 - life	360 - life	360 - life	360 - life	360 - life	360 - life
	43	life	life	life	life	life	life

Endnotes

[i] http://www.ussc.gov/Guidelines/2010_guidelines/Manual_HTML/3a1_4.htm
[ii] McLoughlin 51-53.
[iii] Id. 51-54.
[iv] Id. 54.
[v] http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A26122-2002Jun21&notFound=
[vi] McLoughlin 54-56
[vii] http://universal-justice.net/index.php?option=com_content&view=article&id=60&Itemid=59
[viii] http://www.cageprisoners.com/cases/americas/usa/item/796-sabri-benkahla
[ix] http://nefafoundation.org//index.cfm?pageID=51#LetterC, "Fourth Circuit Court of Appeals Opinion"
[x] from defense sentencing report, pg 4
[xi] from defense sentencing report, pg 5
[xii] McLoughlin 111
[xiii] 108
[xiv] 108
[xv] McLoughlin 76-77.
[xvi] Id. 79
[xvii] Booker, 543 U.S. at 244
[xviii] McLoughlin 83.
[xix] Id 86
[xx] Id 58