

THIS IS STILL A PROFESSION: SPECIAL ADMINISTRATIVE MEASURES, THE SIXTH AMENDMENT, AND THE PRACTICE OF LAW

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ABSTRACT:

Special Administrative Measures (“SAMs”) are rules meant to let the government restrict the contact that dangerous prisoners may have with the outside world in order to prevent further harm to society. SAMs can result in extremely harsh conditions on top of lengthy solitary confinement—practices that many groups, including the United Nations, believe may constitute torture.¹ SAMs were initially imposed mainly against high-risk detainees, such as prisoners who had ordered multiple murders from behind bars, and high-ranking terrorists convicted of mass murder. However, since 9/11, the application of SAMs to pre-trial detainees, especially Muslim terrorism suspects, has become alarmingly general, often seeming more punitive than preventative in nature, to the detriment of their Sixth Amendment rights. In light of the very serious threat that SAMs pose to fair trial guarantees, future courts should weigh the defendant’s fundamental

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1. U.N. Special Rapporteur Juan Méndez has suggested that solitary confinement for periods lasting over 15 days may constitute torture. U.N. News Centre, *Solitary Confinement Should Be Banned in Most Cases, UN Expert Says*, (Oct. 18, 2011), <http://www.un.org/apps/news/story.asp?NewsID=40097#.WObFEVXyuUk> [<https://perma.cc/56VQ-ZMZV>]; see also HUMAN RIGHTS WATCH ET AL., *ILLUSION OF JUSTICE: HUMAN RIGHTS ABUSES IN US TERRORISM PROSECUTIONS 134* (2014) [hereinafter HRW Report], https://www.hrw.org/sites/default/files/reports/usterrorism0714_ForUpload_1_0.pdf [<https://perma.cc/S287-YLE2>] (recognizing lengthy solitary confinement as cruel, inhuman or degrading treatment, which constitutes a violation of U.S. treaty obligations).

right to an adequate defense against the seriousness of the risk of future injury or loss of life ordered by the prisoner from behind bars, ensuring that the SAMs imposed on a given prisoner are narrowly tailored to further the state's admittedly compelling interest in public safety. Applying heightened scrutiny to pre-trial SAMs will allow judges to uphold restrictions against high-ranking prisoners who are truly likely to cause death or injury, as well as protect the integrity of the legal profession and the Sixth Amendment.

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“Although these restrictions are imposed invoking the need to prevent acts of terrorism by others, no particular showing is made of specific reasons for such measures.”

—Juan Mendez, U.N. Special Rapporteur on Torture, opposing extradition of a prisoner to the United States in 2011²

INTRODUCTION

Special Administrative Measures (“SAMs”) are, in theory, rules that let the government restrict the contact that dangerous prisoners may have with the outside world in order to prevent further harm to society.³ The restrictions, which limit media consumption and personal correspondence, can severely isolate a prisoner from the outside world.⁴ A 2015 case, for example, explicitly upheld SAMs that prevented a

2. Letter from Juan Mendez, U.N. Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, to T.L. Early, Section Registrar European Court of Human Rights (Nov. 25, 2011), <http://www.ohchr.org/Documents/Issues/SRTorture/SRTECHRNov2011.pdf> [<https://perma.cc/YS83-F8F4>].

3. 28 C.F.R. § 501.3 (2018). SAMs, which place severe restrictions on communication, were ruled constitutional prior to 9/11 when, for example, an inmate ordered a murder from behind bars or there was proof of gang leadership. *See United States v. Felipe*, 148 F.3d 101, 107 (2d Cir. 1998). However, at least one court has specifically held that the government cannot monitor meetings or review written materials exchanged between counsel and detainees without substantial support. *See Al Odah v. United States*, 346 F. Supp. 2d 1, 13 (D.D.C. 2004) (discussing the “delicate balance . . . [between] national security . . . [and] the rights of the individual” and ultimately concluding that the government did not produce sufficient evidence to abrogate the attorney-client privilege).

4. *See, e.g., United States v. Stewart*, 590 F.3d 93, 115 (2d Cir. 2009) (upholding Lynne Stewart’s conviction for violating SAMs against her client Abdel Rahman by covertly communicating to members of al-Gama’a, considered a terrorist organization by the U.S. government, and others, his withdrawal of support for the cease-fire in Egypt, a communication that may have resulted in deaths). Ms. Stewart, prior to her conviction, had a long career as a civil rights attorney, which she dedicated to defending the most vulnerable and unpopular defendants. Ms. Stewart was granted compassionate release from prison in 2013 due to her terminal breast cancer. Joseph Fried, *Lynne Stewart, Lawyer Imprisoned in Terrorism Case, Dies at 77*, N.Y. TIMES, (Mar. 7, 2017), https://www.nytimes.com/2017/03/07/nyregion/lynne-stewart-dead-radical-leftist-lawyer.html?_r=0 (on file with the Columbia Human Rights Law Review).

prisoner from saying “I love you” to any family member, or even from sending his love by way of his attorney.⁵

SAMs can result in extremely harsh conditions on top of lengthy solitary confinement, a practice that many groups, including the United Nations, believe may constitute torture.⁶ SAMs can be imposed before, during, or after trial.⁷ SAMs were initially imposed mainly against high-risk detainees, such as prisoners who had ordered multiple murders from behind bars, and high-ranking terrorists convicted of mass murder.⁸ However, since 9/11, application of SAMs to pre-trial detainees, especially Muslim terrorism suspects, has become alarmingly general.⁹ This application of SAMs to Muslim

5. See *United States v. Mohamed*, 103 F. Supp. 3d 281, 291 (E.D.N.Y. 2015) (finding that, despite its severity, the restriction was a reasonable means of preventing further violence).

6. See UN News Centre, *supra* note 1.

7. 28 C.F.R. § 501.3 (2018).

8. See, e.g., *United States v. Felipe*, 148 F.3d 101, 105 (2d Cir. 1998) (upholding SAMs against Luis Felipe, a prisoner convicted for murder, whose ascent as a crime lord was largely based on his correspondence, including hits he ordered from behind bars in spite of a mail watch); *Yousef v. Reno*, 254 F.3d 1214, 1216 (10th Cir. 2001) (upholding SAMs against a prisoner convicted for participation in the 1993 World Trade Center bombing and conspiracy to blow up aircraft); *United States v. El-Hage*, 213 F.3d 74, 77 (2d Cir. 2000) (upholding SAMs against prisoner indicted for the 1998 bombing of the U.S. embassy in Kenya and related conspiracy); *Al-Owhali v. Holder*, 687 F.3d 1236, 1239 (10th Cir. 2012) (upholding SAMs against a prisoner convicted of several terrorism-related offenses stemming from the 1998 bombing of the U.S. embassy in Kenya); *Ayyad v. Gonzales*, No. 05-CV-02342-WYD-MJW, 2008 WL 2955964, at *3 (D. Colo. July 31, 2008) (upholding SAMs which were imposed against another World Trade Center bomber).

9. See, e.g., *United States v. Kassir*, No. S2 04 CR. 356 (JFK), 2008 WL 2695307, at *3, *8 (S.D.N.Y. July 8, 2008) (denying request to lift SAMs imposed pre-trial), in which the district court, rather than providing a risk-based justification for the restrictive facilities, turned instead to Kassir’s statements regarding his unsympathetic political views and personal background: “[T]hat he received jihad training in Afghanistan; that he supports Usama Bin Laden; and that he would kill a person and bury that person’s body for not having a sufficiently large enough jihad training operation in place at Bly, Oregon,” *id.* at *3. The district court thus seems to have relied almost entirely on the constitutionally protected anti-American political views of this Muslim defendant to justify upholding extremely harsh restrictions on his communications, including his communications with counsel. See also *United States v. Warsame*, 651 F. Supp. 2d 978, 981 (D. Minn. 2009), in which the court found “nothing that adequately demonstrate[d] that Warsame was a part of a specific plot against the United States, and very little that suggest[ed] he was especially useful to al-Qaeda. . . .” Treating every prisoner with terrorist aspirations, even those too incompetent to pose an actual threat, results

prisoners has often seemed more punitive than preventative in nature, to the detriment of their Sixth Amendment rights.¹⁰ Fahad Hashmi, for example, was placed under SAMs soon after he rejected a government offer to cooperate.¹¹ Uzair Paracha, similarly, was placed under SAMs shortly after he refused to accept a plea deal.¹² These cases raise the question of whether SAMs were merely imposed to punish the defendants.

The pre-trial application of SAMs to Boston bomber suspect Dzhokhar Tsarnaev is an instructive case. Tsarnaev was in custody for over four months before the government imposed SAMs.¹³ This delay seriously undermined the government's argument that his communications presented an urgent threat.¹⁴ In this case—among others—the government did not even claim the prisoner had engaged in behavior constituting a security threat, instead saying only that he had inspired others to commit acts of terrorism.¹⁵ Their claim relied entirely on the message that Tsarnaev left inside the boat where he hid

in the unnecessary torture of human beings at the hands of the U.S. government. SAMs disproportionately afflict the Muslim prisoner population. *See* ALLARD K. LOWENSTEIN INT'L HUMAN RIGHTS CLINIC AT YALE LAW SCH. & THE CTR. FOR CONSTITUTIONAL RIGHTS, *THE DARKEST CORNER: SPECIAL ADMINISTRATIVE MEASURES AND EXTREME ISOLATION IN THE FEDERAL BUREAU OF PRISONS 2* (2017), https://law.yale.edu/system/files/area/center/schell/document/sams_report_final.pdf [<https://perma.cc/XMM2-KXUF>] [hereinafter "Yale Report"]; Carrie Johnson & Margot Williams, 'Guantanamo North': Inside Secretive U.S. Prisons, NPR (Mar. 3, 2011, 1:09 PM), <http://www.npr.org/2011/03/03/134168714/guantanamo-north-inside-u-s-secretive-prisons> [<https://perma.cc/Y8SN-UXW5>].

10. *See* United States v. Kassir, No. S2 04 CR. 356 (JFK), 2008 WL 2695307, at *3 (S.D.N.Y. July 8, 2008) (upholding SAMs even though Kassir had not caused any particular deaths, physical injury, or any specific violence, either before or during detention); United States v. Warsame, 651 F. Supp. 2d 978, 981 (D. Minn. 2009) (upholding SAMs against defendant accused of material support in the form of teaching English in al-Qaeda-affiliated medical clinic); Yale Report, *supra* note 9; Johnson & Williams, *supra* note 9.

11. Yale Report, *supra* note 9, at 14; Laura Rovner & Jeanne Theoharis, *Preferring Order to Justice*, 61 AM U. L. REV. 1331, 1359 (2012).

12. *See* Yale Report, *supra* note 9, at 15 (detailing the especially coercive nature of Uzair Paracha's experience with SAMs).

13. John Gerstein, *Tsarnaev Defense Fights Jail Limits*, POLITICO (Oct. 2, 2013, 6:00 PM), <http://www.politico.com/blogs/under-the-radar/2013/10/tsarnaev-defense-fights-jail-limits-174152.html> [<https://perma.cc/U4KN-539M>].

14. *Id.*

15. Andrew Cohen, *Dzhokhar Tsarnaev, Defender of the Constitution*, THE ATLANTIC (Nov. 12, 2013), <http://www.theatlantic.com/national/archive/2013/11/dzhokhar-tsarnaev-defender-of-the-constitution/281363/> [<https://perma.cc/5LDV-LCX2>].

from law enforcement, an act of expression he performed prior to incarceration.¹⁶ The government brief cited only Tsarnaev's words as justification for the use of SAMs:

The U.S. government is killing our innocent civilians but most of you already know that . . . I can't stand to see such evil go unpunished. We Muslims are one body, you hurt one you hurt us all . . . The ummah [the Muslim people] is beginning to rise . . . Know you are fighting men who look into the barrel of your gun and see heaven, now how can you compete with that. We are promised victory and we will surely get it.¹⁷

This act likely fails to rise to the level of incitement to violence¹⁸—let alone the type of dangerous communication that SAMs were created to prevent. However unpalatable the words may be to many, Tsarnaev's message on the boat did not include any particularized unlawful incitement to violence; instead, it represented constitutionally protected political speech.¹⁹ As Andrew Cohen said in a 2013 editorial, "Are the feds here . . . using the SAMs against Tsarnaev because they think he's plotting to wage a terror war from detention? Or are the feds restricting his communications because they

16. *Id.*

17. Combined Opposition to Defendant's Motion to Strike Aggravating Factors at 4, *United States v. Tsarnaev*, (No. 13-10200-GAO), 2014 WL 5427193 (D. Mass. 2014).

18. In *Brandenburg v. Ohio*, the Court ruled that the Constitution bars the government from forbidding mere "advocacy of the use of force or of law violation" except where said speech is both "directed to inciting or producing imminent lawless action" and is "likely to incite or produce such action." 395 U.S. 444, 447–48 (1969) (emphasis added) (striking down Ohio's Criminal Syndicalism Act, which punished persons who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform"); see also *Noto v. United States*, 367 U.S. 290, 297–98 (1961) (noting that "mere abstract teaching . . . is not the same as preparing a group for violent action and steeling it to such action.").

19. See *Texas v. Johnson*, 491 U.S. 397, 399, 414 (1989) (overturning the conviction of a defendant who had burned the American flag at a public demonstration while protestors chanted: "America, the red, white, and blue, we spit on you," because "offensive or disagreeable" speech is protected under the First Amendment); see also *Brandenburg*, 395 U.S. at 447 (overturning the conviction of a white nationalist who advocated that African Americans "should be returned to Africa, the Jew returned to Israel," while surrounded by armed marchers, under the Ohio Criminal Syndicalism Statute).

don't want the notorious prisoner to become ever more of a political symbol than he already is?"²⁰ This restriction on a prisoner's political symbolism and political speech activity from behind bars is, of course, a violation of the First Amendment.²¹

But the restriction of a prisoner's communications *before trial* has Sixth Amendment implications as well. Indeed, the restrictions frivolously imposed on Tsarnaev were not without consequences for his defense. His defense attorneys reported that the SAMs unnecessarily restricted the defense team's work in the twenty-one-year-old's capital case, giving the government an unfair advantage and making a mockery of due process protections.²² The Tsarnaev case represented an inappropriate application of SAMs that abridged the defendant's Sixth Amendment rights, but it is far from the worst overreach.²³ Tsarnaev was accused of mass violence, but the government has imposed SAMs on a variety of prisoners since 9/11, including those without any history of violence.²⁴

Over and over again, prisoners' defenses have been hampered by their attorneys' inability to discuss criminal trials with third parties,²⁵ including SAMs' restrictions on attorney communications

20. Cohen, *supra* note 15.

21. See *Turner v. Safley*, 482 U.S. 78, 95 (1987) (holding that a prison inmate "retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." (construing *Pell v. Procunier*, 417 U.S. 817, 822 (1974))).

22. *Lawyers Ask Officials to Lift Dzhokhar Tsarnaev's 'Overly Harsh' Conditions*, THE GUARDIAN (Oct. 2, 2013), <http://www.theguardian.com/world/2013/oct/02/boston-suspect-dzhokhar-tsarnaev-lawyers-conditions> [https://perma.cc/4SY9-9EMV]; Cohen, *supra* note 15.

23. See, e.g., *United States v. Hashmi*, 621 F. Supp. 2d 76, 79 (S.D.N.Y. 2008) (finding that keeping a defendant under 23-hour solitary confinement for three years prior to trial did not burden the defendant's fundamental rights); HRW Report, *supra* note 1, at 112.

24. See, e.g., *United States v. Kassir*, No. S2 04 CR. 356 (JFK), 2008 WL 2695307, at *17 (S.D.N.Y. July 8, 2008) (trying a defendant who was accused of material support of al-Qaeda, including crimes of a communicative nature—specifically, of developing and operating extremist websites promoting terrorism, including "The Mujahideen Explosives Handbook" and "The Mujahideen Poisons Handbook"); *United States v. Hashmi*, 621 F. Supp. 2d 76, 86 (S.D.N.Y. 2008) (upholding SAMs against a prisoner who was charged with material support).

25. See, e.g., *United States v. Reid*, 214 F. Supp. 2d 84, 90 (D. Mass. 2002) (objecting to paragraph four of the Emergency Order, "which restricted dissemination by Reid's attorneys of communications from Reid to anyone."); *United States v. Mikhel*, 552 F.3d 961, 964 (9th Cir. 2009) (modifying SAMs to allow investigators working on behalf of defendant's counsel to disseminate the contents

with the media, as discussed *infra* in Section II.iv.²⁶ In light of the very serious threat that SAMs pose to fair trial guarantees, future courts should explicitly read the Sixth Amendment to include the right to have contact visits and for attorneys to consult with third parties, including the media, in highly political cases involving notorious prisoners. I argue that viewing this third-party contact as an affirmative constitutional right is the only way to ensure that our nation's fair trial guarantees will be able to withstand highly political situations such as terrorism cases.

Andrew Dalack, in his time as a student at the University of Michigan Law School, previously discussed some of these issues in his Note, *Special Administrative Measures and the War on Terror: When Do Extreme Pretrial Detention Matters Offend the Constitution?*²⁷ In that Note, Dalack explored the El-Hage, Abu-Ali and Hashmi cases, and examined pre-trial detention generally. This article seeks to expand upon his logic with regards to SAMs related Sixth Amendment concerns, examine the existing legal framework for evaluating pre-trial conditions of confinement, and propose solutions. It also examines how SAMs hamper the practice of law itself.

In Section I, I will discuss the legal background of SAMs and their harsh human consequences. In Section II, I will discuss the over-application of SAMs and how it has prevented defendants and their attorneys from adequately preparing their defenses. I will also discuss the threat that SAMs pose to the integrity of the legal profession. I will show that courts should overtly protect contact visits, and that third-party consultation is essential for the preservation of Sixth

of defendant's communication to third parties for the purpose of preparing his post-sentencing proceedings); *United States v. Mohamed*, 103 F. Supp. 3d 281, 290 (E.D.N.Y. 2015) (arguing "the prohibition on 'third party messages' is overly broad and could prevent them from informing Defendant's family members about 'the basics about his well-being,' such as his health and spirits, sending them his love, or letting them know he wants them to deposit money in his commissary account.").

26. Juries can perceive silence on the part of a defendant as a lack of remorse. Nancy Gertner, *Will We Ever Know Why Dzhokhar Tsarnaev Spoke After It Was Too Late?*, BOSTON GLOBE (June 20, 2015), <https://www.bostonglobe.com/opinion/2015/06/30/will-ever-know-why-dzhokhar-tsarnaev-spoke-end/TLF4CL3QdIQImqcGSKiNaL/story.html> (on file with the Columbia Human Rights Law Review) (alleging that SAMs prevented important evidence of remorse from being introduced in the young man's death penalty proceeding); Yale Report, *supra* note 9, at 16–17 (noting that complete media silence on the part of the defendant in highly political cases also allows the government to control the narrative).

27. Andrew Dalack, Note, *Special Administrative Measures and the War on Terror: When Do Extreme Pretrial Detention Measures Offend the Constitution?*, 19 MICH. J. RACE & L. 415 (2014).

Amendment and due process rights, especially in highly political cases involving notorious prisoners. In Section III, I will examine why the current checks for SAMs are inadequate, and propose a more rigorous balancing test which includes heightened scrutiny. Courts should weigh the defendant's fundamental right to an adequate defense against the seriousness of the risk of future injury or loss of life ordered by the prisoner from behind bars, making sure the SAMs imposed on a given prisoner are narrowly tailored to further the state's admittedly compelling interest in public safety. Applying heightened scrutiny to pre-trial SAMs will allow judges to uphold restrictions against high-ranking prisoners who are truly likely to cause death or injury, as well as protecting the integrity of the legal profession and the Sixth Amendment.

I. SAMs: HARSH MEASURES FOR DANGEROUS PRISONERS

A. General Background

Congress first imposed SAMs regulations in the 1990s,²⁸ in the wake of the Oklahoma City bombing. The original legislative intent was for SAMs to prevent injury and death—not to punish.²⁹ Though technically the Attorney General imposes SAMs, it is the Federal Bureau of Prisons (BOP) that implements the measures.³⁰ The BOP

28. Scope of Rules: Prevention of Acts of Violence and Terrorism, 28 C.F.R. pt. 501 (1996), 1996 WL 257068. Suspects of gang-related violence or organized crime tend to portray the restrictions as being intended for terrorists. Brief for Petitioner at 2–3, *Basciano v. Martinez*, No. 08-1227-pr., 2008 WL 8054313, at *2 (2008) (“They are usually reserved for terrorists believed to pose a threat to national security,” citing Reid, Yousef, El-Hage, Hashmi, Ayyad, Abu Ali, Al-Owhali, Sattar and Bin Laden).

29. See *Hale v. Ashcroft*, No. CIV. 06-CV-00541-REB-KLM, 2008 WL 4426095, at *2 (D. Colo. Sept. 24, 2008) (“SAMs are reserved for those prisoners found to have a ‘proclivity for violence’ or those found to create a ‘substantial risk [of] communication or contacts with persons [which] could result in death or serious bodily injury.’”). In order to implement SAMs, the Federal Bureau of Prisons must receive written notification from the Attorney General or an appropriate agent that there is “a substantial risk that a prisoner’s *communications or contacts* with persons could *result in death or serious bodily injury* to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons.” 28 C.F.R. § 501.3 (2018) (emphasis added). All SAMs should be “reasonably *necessary to protect* persons against the risk of *death or serious bodily injury*.” *Id.* (emphasis added).

30. The authority for imposing SAMs lies in two statutory provisions. The United States Code grants the directors of executive departments the power to

was supposed to reserve these harsh measures for prisoners with a “proclivity for violence,” or those whose communication could result in public harm.³¹ The statute authorizes the Attorney General, and the BOP by proxy, to impose SAMs based either on (1) the prisoner’s behavior while incarcerated³² or (2) the risk that the inmate’s communication with outsiders will incite serious violence.³³ No advance hearing is required before imposing SAMs,³⁴ which are

create regulations “for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.” 5 U.S.C.A. § 301 (2018). The authority to promulgate rules for the penal system is vested in the Attorney General: “The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof.” 18 U.S.C.A. § 4001 (2012). The Tenth Circuit has held that the BOP retains discretion as to whether or not to implement the SAMs once so directed by the Attorney General, and discretion as to how to execute them. *See* *Yousef v. Reno*, 254 F.3d 1214, 1221 (10th Cir. 2001) (“We see no reason to diverge from the clear language of the regulation, and hold that the BOP has the discretion to implement SAMs.”); *see also* *Rovner & Theoharis*, *supra* note 11, at 1360 (“The U.S. Attorney General has sole discretion to impose SAMs, and a prisoner lacks the most basic procedural protections to allow him to contest the SAMs designation.”).

31. *Hale*, 2008 WL 4426095, *2 (citing Prisoner Complaint against All Defendants at 37).

32. *See, e.g.*, *United States v. Felipe*, 148 F.3d 101, 110 (2d Cir. 1998) (finding that the conditions imposed on codefendant were reasonably formulated to prevent the defendant from continuing his illegal activities from prison); *United States v. Troya*, No. 06-80171 CR, 2008 WL 2537145, at *2 (S.D. Fla. June 24, 2008) (upholding SAMs because of defendant’s “risk to the safety and well-being of third parties, including potential witnesses.”). Basing the risk assessment on the nature of the allegations or conviction is also permissible. *Yousef v. United States*, No. 12-CV-2585-RPM, 2014 WL 2892251, at *1–2 (D. Colo. June 26, 2014) (justifying SAMs based on the nature of the crime and defendant’s status as a terrorist icon).

33. *See, e.g.*, *Felipe*, 148 F.3d at 107 (imposing “special conditions of confinement” because Court concerned that defendant in prison had used his privileges to correspond with people outside of prison, allowing him to maintain control over certain criminal activities and cause individuals to be murdered); *United States v. El-Hage*, 213 F.3d 74, 81 (2d Cir. 2000) (holding that there was sufficient evidence to support that “the challenged restrictions serve the regulatory purpose of preventing El-Hage from communicating with his unconfined co-conspirators, and thereby facilitating additional terrorist acts by those co-conspirators.”).

34. 28 C.F.R. § 501.3(b) (2018) (providing for written notice “as soon as practicable” but not for a hearing); *see also* *Hale v. Ashcroft*, No. CIV. 06-CV-00541-REB-KLM, 2008 WL 4426095, at *6 (D. Colo. Sept. 24, 2008) (referencing 28 C.F.R. § 501.3 and the lack of a hearing requirement). Even an expansive

typically imposed as an additional restriction on prisoners who are already subject to solitary confinement.³⁵ The law grants the BOP discretion to modify SAMs in response to good behavior, changed circumstances, or a prisoner's constitutional challenge.³⁶

SAMs may be extended if "there continues to be a *substantial risk* that the inmate's communications or contacts with other 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*."³⁷ According to the Tenth Circuit in *Yousef v. Reno*, the warden is the one charged with conducting the fresh risk assessment, suggesting that a SAMs extension determination should be based upon behavior while in prison.³⁸

While a prisoner normally needs to exhaust available BOP administrative remedies before bringing a separate civil action,³⁹ courts in several circuits have held that a pre-trial criminal defendant's motion to challenge SAMs is not an "action" within the meaning of the Prison Litigation Reform Act (PLRA),⁴⁰ and thus does not require exhaustion of administrative remedies.⁴¹ These decisions have opened

reading of the Sixth Amendment would only extend protections to prisoners with ongoing criminal trials.

35. Yale Report, *supra* note 9, at 4.

36. *Yousef v. Reno*, 254 F.3d 1214, 1219, 1221–22 (10th Cir. 2001) (construing 28 C.F.R. § 501.3(a)) (2018).

37. 28 C.F.R. § 501.3(c) (2018) (emphasis added).

38. *Yousef*, 254 F.3d at 1219 (construing *United States v. Johnson*, 223 F.3d 665, 672 (7th Cir. 2000)).

39. 28 C.F.R. § 542.13 (2018) ("[A]n inmate shall first present an issue of concern informally to staff, and staff shall attempt to informally resolve the issue before an inmate submits a Request for Administrative Remedy."); 28 C.F.R. § 542.10 (2018) ("The purpose of the Administrative Remedy Program is to allow an inmate to seek formal review of an issue relating to any aspect of his/her own confinement."); *United States v. Ali*, 396 F. Supp. 2d 703, 706 (E.D. Va. 2005) (citing 28 C.F.R. § 542.10 and 28 C.F.R. § 542.13 for the proposition that defendant must exhaust administrative appeals with regards to SAMs before bringing an action); *see also* *Sallee v. Joyner*, 40 F. Supp. 2d 766, 768 (E.D. Va. 1999) (holding that plaintiff's *Bivens* claim was subject to the exhaustion requirements of the Prison Litigation Reform Act's (PLRA)).

40. 42 U.S.C. § 1997e (2010).

41. These include the First, Second, Third and Tenth Circuits. *See, e.g.*, *United States v. Lopez*, 327 F. Supp. 2d 138, 140 (D.P.R. 2004) (holding that the PLRA's exhaustion requirements do not apply to pre-trial detainee's motion in criminal case, but merely to civil actions challenging prison conditions); *United States v. Hashmi*, 621 F. Supp. 2d 76, 84 (S.D.N.Y. 2008) (finding that the defendant's motion challenging SAMs was not an "action" within the meaning of

the door to pre-trial federal challenges to SAMs, but there remain few legal victories against SAMs.⁴²

B. SAMs After 9/11: A Sweeping Expansion at Great Human Cost

Shortly after 9/11, the DOJ amended the SAMs regulations to allow for harsher restrictions and less oversight.⁴³ The new regulations tripled the length of time for which SAMs can be imposed without internal review, extending the duration from 120 days to a year.⁴⁴ The DOJ has also relaxed the standards for renewal of SAMs; before 2001, the DOJ had to affirmatively demonstrate that the original justification still existed,⁴⁵ but under current regulations, the DOJ

the PLRA which required exhaustion of administrative remedies prior to bringing an action with respect to prison conditions, as Congress's purpose in enacting the exhaustion requirement was to "reduce the quantity and improve the quality of prisoner suits." (citing *Porter v. Nussle*, 534 U.S. 516, 524 (2002)); *Ayyad v. Gonzales*, No. 05-CV-02342-WYD-MJW, 2008 WL 2955964, at *2 (D. Colo. July 31, 2008) (citing *Hashmi* and finding that the prisoner's motion for a preliminary injunction in a civil case is not an "action" within the meaning of the PLRA, distinguishing it from *Harris v. Garner*, 190 F.3d 1279, 1286 (11th Cir. 1999), by explaining that *Harris* did not concern a motion filed by a plaintiff once a case was already filed, but involved a failure to exhaust administrative remedies before bringing suit); *Sattar v. Gonzales*, No. CIV. A. 07CV02698WDMKL, 2010 WL 685787, at *2 (D. Colo. Feb. 23, 2010) (citing *Ayyad* and *Hashmi*, finding that the purpose of the exhaustion requirement is to reduce the quantity and improve the quality of prisoners suits, that said purpose would not be served here as a new lawsuit had already been initiated before filing of the motion at issue, and therefore finding that plaintiff was not required to exhaust administrative remedies before filing the motion in his civil case); *United States v. Savage*, CRIM. A. No. 07-550-03, 2010 WL 4236867, at *3-6 (E.D. Pa. Oct. 21, 2010) (reviewing case law on whether a SAMs challenge requires exhaustion and finding it does not). *Contra* *United States v. Ali*, 396 F. Supp. 2d 703, 704 (E.D. Va. 2005) (applying the PLRA exhaustion requirement to a pre-trial detainee's motion for relief from SAMs); *United States v. Troya*, No. 06-80171 CR, 2008 WL 2537145, at *5 (S.D. Fla. June 24, 2008) (applying the PLRA exhaustion requirement to a pre-trial detainee's motion for relief from SAMs). For civil claims, as opposed to mere motions in already-filed civil cases, neither futility nor the inadequacy of the type of administrative relief available excuses a plaintiff from the requirements of administrative exhaustion. *Yousef v. Reno*, 254 F.3d 1214, 1221 (10th Cir. 2001) (construing *Booth v. Churner*, 532 U.S. 731, 739 (2001)).

42. Yale Report, *supra* note 9, at 26.

43. *Id.* at 4.

44. *Id.*; 28 C.F.R. § 501.3 (2018).

45. See *supra* note 29 and accompanying text. All SAMs should be "reasonably necessary to protect persons against the risk of death or serious bodily injury." 28 C.F.R. § 501.3 (2018) (emphasis added).

must demonstrate only that *some reason* exists.⁴⁶ The post-9/11 regulations also clarified that SAMs could be imposed on detainees pre-trial, which has serious implications for the ability of defendants to aid in their own defense.⁴⁷ Governmental imposition of SAMs has also increased dramatically since 2001.⁴⁸ Shortly after 9/11, the Bureau of Prisons noted that “some or all” of the prisoners with “links to international terrorist organizations possibly involved in recent events” would likely be subjected to SAMs.⁴⁹ This was a departure from prior policy, which required individualized suspicion that a particular prisoner was a risk for communicating dangerous information.⁵⁰

Under the Mandela Rules, which define standards for the treatment of prisoners set out by the United Nations, solitary confinement that continues for more than fifteen consecutive days constitutes torture or cruel, inhuman, or degrading treatment.⁵¹ According to the recent Yale report on SAMs, around eighty percent of prisoners placed under SAMs were so-restricted for over a year.⁵² Of SAMs prisoners counted in 2013, thirteen had survived under SAMs for over a decade.⁵³ A recent report by Yale Law School and the Center for Constitutional Rights situates the imposition of SAMs within a larger administrative practice of using “the torture of isolation and sensory deprivation as a tool to elicit what it termed ‘learned

46. Yale Report, *supra* note 9, at 4; 28 C.F.R. §§ 501.2(c) (2018), 501.3(c) (2018); National Security; Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. at 55,062-63 (modifying the “standard for approving extensions of the special administrative measures” so that “subsequent certifications by the head of an intelligence agency may be based on any information available to the intelligence agency.”).

47. Yale Report, *supra* note 9, at 4; 28 C.F.R. § 500.1(c) (2018) (defining “inmates” covered by the rule to include pre-trial detainees and material witnesses); *see also* Section II.

48. Yale Report, *supra* note 9, at 2 (“In November 2001, there were only sixteen individuals under SAMs; by 2009 there were thirty, and, as of June 8, 2017, there were fifty-one.”).

49. *Id.* at 4 (citing Memorandum issued by Michael B. Cooksey, Assistant Director, Correctional Programs Division, Federal Bureau of Prisons, on Guidance for Handling of Terrorist Inmates and Recent Detainees (Oct. 1, 2001) (on file with authors of the Yale Report)). SAMS disproportionately afflict the Muslim prisoner population. Yale Report, *supra* note 9, at 2; LOWENSTEIN, *supra* note 9, at 2.

50. Yale Report, *supra* note 9, at 4.

51. Economic and Social Council Res. 2015/20, (annex, U.N. Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules)), 18, r. 44, U.N. Doc. A/C.3/70/L.3, r. 44 (Sept. 29, 2015) [hereinafter Mandela Rules].

52. Yale Report, *supra* note 9, at 11.

53. *Id.*

helplessness' in detainees suspected of terrorism."⁵⁴ The majority of prisoners subjected to SAMs are Muslim.⁵⁵

Since SAMs often include restrictions on discussing the SAMs themselves, there is little information publicly or easily available on the physical and psychological effects of SAMs on prisoners.⁵⁶ However, thanks to the work of Yale Law School and the Center for Constitutional Rights, a 2017 report sheds some light on the conditions brought about by SAMs.⁵⁷ For example, in one of the facilities with a large number of SAMs-subjected prisoners, when a prisoner's family member gets a new phone number, the prisoner may not be able to communicate with them for months while officials conduct a "clearance process."⁵⁸ SAMs-subjected prisoners' conversations are heavily censored, sometimes to the point of absurdity and cruelty, as "when one SAMs prisoner attempted to ask his mother and son about whether his cousin and children survived the war in Gaza in 2009," and "the monitoring staff ordered him and his family to stop talking 'politics about Gaza.'"⁵⁹ SAMs delayed one prisoner's goodbye letter from his terminally ill father for two months.⁶⁰ One prisoner has lost three uncles, his grandfather, his aunt, and his cousin since his incarceration;⁶¹ his SAMs have prevented him from sending either written condolence letters to extended family, or verbal condolences through his immediate family members.⁶² Likewise, another prisoner

54. *Id.* at 1; see also S. Rep. No. 113-288, at xxviii, n.32 (1955); Terrence McCoy, 'Learned helplessness': The chilling psychological concept behind the CIA's interrogation methods, WASH. POST (Dec. 11, 2014), https://www.washingtonpost.com/news/morning-mix/wp/2014/12/11/the-chilling-psychological-principle-behind-the-cias-interrogation-methods/?utm_term=.f6d79d35663e (on file with the Columbia Human Rights Law Review) [hereinafter Learned Helplessness].

55. Yale Report, *supra* note 9, at 2.

56. HRW Report, *supra* note 1, at 116 (restricting prisoners under SAMs to communicating only with their lawyers and family members, who are not allowed to talk to the media). These restrictions limit the ability of outsiders to research or document the conditions of an individual under SAMs.

57. See Yale Report, *supra* note 9.

58. *Id.* at 7 (citing the Declaration of Mahmud Abouhalima at 44–48, Ayyad v. Holder, No. 05-cv-02342, (D. Colo. Aug. 12, 2013)).

59. *Id.* at 8 (citing the Declaration of Nidal Ayyad at 35, Ayyad, No. 05-cv-02342).

60. *Id.* at 7 (citing the Declaration of Nidal Ayyad at 32, Ayyad, No. 05-cv-02342).

61. *Id.* at 8 (citing the Declaration of Mahmud Abouhalima at 42, Ayyad, No. 05-cv-02342).

62. *Id.*

has not been able to speak to his dying grandfather, or hug his sister even once in the fourteen years he has been detained.⁶³

Pre-trial defendants charged with terrorism-related offenses are often held in the draconian 10 South unit of the Metropolitan Correctional Center (MCC) in Manhattan.⁶⁴ Detainees in 10 South of the MCC are forbidden from spending time outdoors or even opening a window, meaning they are completely cut off from fresh air.⁶⁵ If a government interpreter is not available at the precise moment a prisoner under SAMs makes a phone call, that prisoner is required to make the phone call in English, even if the person the prisoner is calling does not speak English.⁶⁶ Because of this language restriction, defendant Fahad Hashmi was not able to speak to his mother during the three years he spent in the MCC before trial.⁶⁷

As of May 2013, there were a total of fifty-five prisoners under SAMs in the United States, thirty-one of whom were accused of terrorism crimes, eight of whom were accused of non-terrorism national security-related charges (i.e., espionage), and only sixteen of whom were “violent-crime related inmates.”⁶⁸ Especially unsettling are

63. *Id.* at 9 (citing Letter from Mariam Abu Ali to President Barack Obama (Dec. 7, 2016) (on file with the authors of the Yale Report)).

64. *Id.* at 6 (citing AMNESTY INT’L, *Entombed: Isolation in the Federal Prison System*, AI Index AMR 51/040/2014 (2014), <https://www.amnestyusa.org/files/amr510402014en.pdf> [<https://perma.cc/CE98-GYTP>] [hereinafter *Entombed*]; Arun Kundnani, *The Guantanamo in New York You’re Not Allowed to Know About*, INTERCEPT (Feb. 5, 2016, 8:55 AM), <https://theintercept.com/2016/02/05/mahd-hashhi-metropolitan-correctional-center-manhattan-guantanamo-pretrial-solitary-confinement/>; (on file with the Columbia Human Rights Law Review); HRW Report, *supra* note 1, at 119.

65. Yale Report, *supra* note 9, at 6; *Entombed*, *supra* note 64, at 7.

66. Yale Report, *supra* note 9, at 7; Memorandum from Lanny A. Breuer, Assistant Att’y Gen., to Charles E. Samuels, Jr., Dir., Bureau of Prisons, 9 (Nov. 14, 2012); U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., THE FED. BUREAU OF PRISONS’ MONITORING OF MAIL FOR HIGH-RISK INMATES 13, 75 (2006), <https://www.oig.justice.gov/reports/BOP/e0609/final.pdf> [<http://perma.cc/YVG5-8WAE>] [hereinafter 2006 OIG Report].

67. Yale Report, *supra* note 9, at 7 (citing Interview with Pardiss Kebriaei, Attorney, in New York, N.Y. (Apr. 14, 2017)).

68. HRW Report, *supra* note 1, at 141 n.631. Other notable prisoners subjected to SAMs have included the “shoe-bomber” suspect Richard Reid and “American Taliban” John Walker Lindh. See *United States v. Reid*, 369 F.3d 619, 620 (1st Cir. 2004); Carrie Johnson, *Prison Officials Are Loosening Restrictions on Taliban Supporter*, WASH. POST (March 18, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/17/AR2009031702356.html> (on file with the Columbia Human Rights Law Review).

the cases of prisoners under SAMs who were only accused of non-violent material support charges. “Material support of terrorism” is a post-9/11 crime so broad as to encompass almost anything, even reaching certain humanitarian assistance after the 2004 tsunami.⁶⁹ In the *Hashmi* case, for example, U.S. citizen Fahad Hashmi was subjected to severe SAMs as a result of material support charges that consisted almost entirely of the allegation that he allowed an acquaintance to use his cell phone and stay at his apartment.⁷⁰ Even though the acquaintance was never accused of any particular violent offense; he was prosecuted only for bringing wet weather supplies in his luggage that he later delivered to al-Qaeda.⁷¹ While providing wet weather gear to a terrorist organization may cause harm to U.S. interests, such an act hardly indicates that the perpetrator poses a serious danger of committing murder while incarcerated, which is the type of harm that SAMs were initially implemented to prevent.⁷²

II. THE TREND OF OVER-APPLICATION OF SAMs REPRESENTS A THREAT TO FAIR TRIAL RIGHTS, INCLUDING ACCESS TO THE COURTS UNDER DUE PROCESS AND THE SIXTH AMENDMENT

A. Since 9/11, the BOP Has Inappropriately Expanded Application of SAMs to Less Dangerous Prisoners

Before 9/11, SAMs were used only against highly dangerous prisoners.⁷³ Based on available information, it appears that even

69. Implementation of the USA Patriot Act: Prohibition of Material Support Under Sections 805 of the USA Patriot Act and 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 109th Cong. 23-25-27 (2005) (Statement of Ahilan T. Arulanantham, Staff Attorney, American Civil Liberties Union of Southern California); see also Amna Akbar, How Tarek Mehanna Went to Prison for a Thought Crime, *THE NATION* (Dec. 31, 2013), <https://www.thenation.com/article/how-tarek-mehanna-went-prison-thought-crime/> (on file with the Columbia Human Rights Law Review) (explaining that the use of the material support statute has been increasingly used in prosecuting speech); HRW Report, *supra* note 1, at 60-75.

70. Press Release, Amnesty Int'l et al., USA: Rights Groups Issue Open Letter on Hashmi Trial and SAMs (Apr. 27, 2010), <http://www.amnestyusa.org/news/press-releases/usa-rights-groups-issue-open-letter-on-hashmi-trial-and-sams> [<https://perma.cc/5ZAB-YPY5>] [hereinafter Amnesty International Letter].

71. *Id.*

72. See *supra* Section I.A.

73. See, e.g., *United States v. Felipe*, 148 F.3d 101, 105, 109-12 (2d Cir. 1998) (upholding SAMs restricting other inmates' contact with Luis Felipe, a prisoner

among Muslim prisoners subjected to SAMs, all the prisoners so-restricted prior to 9/11 were accused of crimes of grave violence—often, communicative in nature, such as conspiracy.⁷⁴ SAMs continue to be

whose ascent as a crime lord was largely based on his correspondence, including hits he ordered from behind bars in spite of a “mail watch”). Felipe also founded a prison gang. John Richardson, *Torture on American Soil? Three Glimpses at Our Fractured Prison System*, *ESQUIRE* (Mar. 31, 2009), <http://www.esquire.com/news-politics/a5810/federal-prison-reform-033109> [<https://perma.cc/V8V3-LC85>]. The consequences of Felipe’s correspondence with the outside world were dire: “One victim was choked and beheaded. A second was killed accidentally during an attempt on another man. A third was gunned down.” Jan Hoffman, *Testing the Limits of Punishment; Unusually Severe Life Sentence vs. Society’s Need for Safety*, *N.Y. TIMES* (Oct. 26, 1997), <http://www.nytimes.com/1997/10/26/nyregion/testing-limits-punishment-unusually-severe-life-sentence-vs-society-s-need-for.html> (on file with the Columbia Human Rights Law Review). Even so, when the judge ordered his placement in solitary confinement, including a ban on visits from anyone except his attorney and close relatives, contemporary legal experts noted that these conditions were “virtually unprecedented” at the time—in their severity, they were said to have stood as an “extreme example of [the] penological trend to make prison more punitive.” *Id.*

The judge in this case, extraordinarily, maintained direct control of Felipe’s conditions of confinement, by application of a little-known racketeering statute. *Id.* The judge refused to grant Felipe permission to submit poems and sketches to magazine contests, contact religious organizations, or write to prisoners’ rights groups. *Id.* In imposing these conditions, however, the judge was almost apologetic, saying that the case presented “unusual circumstances and raised unique concerns because defendant, while in prison, had used his privileges to correspond with people outside the prison in order to maintain control over the criminal activities of the Latin Kings and cause the murders of a number of people,” and because “there was every reason to believe Felipe would abuse those privileges again and attempt to orchestrate additional murders.” *Felipe*, 148 F.3d at 107. This explanation implies that in a situation with less risk of danger, applying similar restrictions would have been inappropriate. In March of 1997, Felipe moved to be re-sentenced without the “special conditions of confinement.” *Id.* The judge finally relented and ruled that the prisoner could communicate with “a sister-in-law, niece, and an attorney who had served as a paralegal on Felipe’s case and developed a close relationship with him.” *Id.*

74. See, e.g., *Yousef v. Reno*, 254 F.3d 1214, 1216 (10th Cir. 2001) (upholding SAMs against a prisoner convicted for participation in the 1993 World Trade Center complex bombing and conspiracy to blow up aircraft); *United States v. El-Hage*, 213 F.3d 74, 77, 81 (2d Cir. 2000) (upholding SAMs against prisoner indicted for the 1998 bombing of the U.S. embassy in Kenya and extensive related conspiracy); *Al-Owhali v. Holder*, 687 F.3d 1236, 12398 (10th Cir. 2012) (upholding SAMs against a prisoner convicted of several terrorism-related offenses stemming from the 1998 bombing of the U.S. embassy in Kenya); *Ayyad v. Gonzales*, No. 05-CV-02342-WYD-MJW, 2008 WL 2955964, at *4 (D. Colo. July 31, 2008) (expanding SAMs imposed against another World Trade Center bomber). Ayyad’s SAMs expired in 2012 and were not renewed, presumably because any dangerous information he once

used against high-risk prisoners,⁷⁵ but in the post-9/11 United States their application has broadened drastically, including against lower-risk prisoners.⁷⁶ Some of these cases are borderline abusive,⁷⁷ while

possessed was at that point stale. *Ayyad v. Holder*, No. 05-cv-02342-WYD-MJW (D. Colo. Sept. 24, 2014).

In 1998, Judge Duffy, who presided over Yousef's case, stated that SAMs were then imposed against only seven prisoners out of the 114,000 prisoners then being held in the federal system. Benjamin Weiser, *Mastermind Gets Life for Bombing of Trade Center*, N.Y. TIMES (Jan. 9, 1998), <http://www.nytimes.com/1998/01/09/nyregion/mastermind-gets-life-for-bombing-of-trade-center.html> (on file with the Columbia Human Rights Law Review).

75. See, e.g., *Basciano v. Martinez*, No. 07 CV 421 (NGG) (RML), 2007 WL 2119908, at *1 (E.D.N.Y. May 25, 2007) *report and recommendation adopted sub nom.* *Basciano v. Lindsay*, 530 F. Supp. 2d 435, 442 (E.D.N.Y. 2008) (upholding SAMs against a prisoner charged with various violent offenses, several of which occurred while Basciano was incarcerated); *Al-Owhali*, 687 F.3d at 1239 (upholding SAMs against a prisoner convicted of several terrorism-related offenses stemming from the 1998 bombing of the U.S. embassy in Kenya); *United States v. Mohamed*, 103 F. Supp. 3d 281, 282–283 (E.D.N.Y. 2015) (upholding SAMs against a defendant who had previously broken out of prison multiple times, allegedly in coordination with a terrorist organization, and who had killed three prison guards in one escape).

76. See, e.g., *United States v. Ali*, 396 F. Supp. 2d 703, 704 (E.D. Va. 2005) (upholding SAMs on procedural grounds against a prisoner affiliated with an al-Qaeda cell); *Hale v. Ashcroft*, No. CIV.06CV00541REBKLM, 2008 WL 4426095, at *5 (D. Colo. Sept. 24, 2008) (upholding SAMs against defendant convicted of unsuccessfully soliciting the murder of a federal judge, where SAMs were imposed based on the nature of the prisoner's conviction); *United States v. Troya*, No. 06-80171 CR, 2008 WL 2537145, at *1 (S.D. Fla. June 24, 2008) (upholding SAMs on procedural grounds against a drug runner indicted for several murders as part of their involvement in a criminal organization, and the Court went out of its way to note that it found that the SAMs were not imposed just because the Defendant was charged with an offense eligible for capital punishment); *United States v. Reid*, 214 F. Supp. 2d 84, 90 (D. Mass. 2002) (upholding modified SAMs against the “shoe bomber” prisoner, who was indicted for the attempted bombing of an airplane as an agent of an international terrorist organization); *United States v. Kassir*, No. S2 04 CR. 356 (JFK), 2008 WL 2695307, at *1 (S.D.N.Y. July 8, 2008) (upholding SAMs against an alleged member of Al-Qaeda indicted for providing information and training to help others commit violent acts); *United States v. Hashmi*, 621 F. Supp. 2d 76, 79 (S.D.N.Y. 2008) (upholding SAMs against a prisoner who was charged with material support of Al-Qaeda, whose SAMs were apparently based on his pre-incarceration behavior).

77. See, e.g., *Ali*, 396 F. Supp. 2d at 704–05 (upholding SAMs on procedural grounds against a prisoner affiliated with an al-Qaeda cell who had personally trained in explosives and discussed terrorist attacks, and whose organization committed terrorist attacks while he was a member, but who was never conclusively linked to any particular murders and for whom there was no particular evidence of true ongoing risk of future violence from behind bars); *Hale*, 2008 WL

others represent an obvious and dangerous overreach.⁷⁸ Take, for example, the case of Fahad Hashmi.

1. U.S. v. Hashmi: A Worst Case Scenario Violation of Sixth Amendment Protections

During Fahad Hashmi's pre-trial detention, he had no prior criminal record, "had never been charged with committing or assisting any act of violence, and had no direct links to terrorist groups."⁷⁹ He was detained for 170 days in MCC prior to the imposition of SAMs⁸⁰ and exhibited good behavior in prison during this time.⁸¹ At the time he was first subjected to SAMs, Hashmi had been charged with conspiracy to provide material support to al-Qaeda, substantive material support to al-Qaeda, and conspiracy to make or receive a contribution of funds, goods or services to, and for the benefit of, al-Qaeda.⁸² The material support that Hashmi was accused of providing was scant; he allegedly allowed an acquaintance to stay in his apartment, allowed the acquaintance the use of his cellphone, and

4426095, at *5 (upholding SAMs against a white supremacist convicted of unsuccessfully soliciting the murder of a federal judge); *Troya*, 2008 WL 2537145, at *5 (upholding SAMs on procedural grounds); Missy Diaz, *Turnpike Murders: Two Sentenced to Death*, SOUTH FLORIDA SUN SENTINEL (May 13, 2009), <http://www.sun-sentinel.com/local/palm-beach/sfl-turnpike-killings-death-p051209-story.html> (on file with the Columbia Human Rights Law Review) (describing the prisoner in *Troya*, a drug runner indicted for several especially gruesome murders as part of their involvement in a criminal organization); *Reid*, 214 F. Supp. at 87, 100 (upholding modified SAMs against the "shoe bomber" prisoner, who was indicted for the attempted bombing of an airplane as an agent of an international terrorist organization).

78. See, e.g., *Kassir*, 2008 WL 2695307, at *5 (upholding SAMs against a prisoner who was never even accused of any particular acts of violence but had flown to Oregon with the intent of setting up a Jihad training camp, subsequently threatened his American co-conspirator with death because there were too few recruits at the camp, and also built websites that "promoted terrorism and disseminated terrorist manuals"); *Hashmi*, 621 F. Supp. 2d at 78, 86 (upholding SAMs against a prisoner who was charged with material support).

79. Yale Report, *supra* note 9, at 14.

80. Dalack, *supra* note 27, at 433. (citing Memorandum of Law in Support of Defendant's Motion for Emergency Hearing to Prohibit the Attorney General from Restricting Defense Counsel's Access to Defendant and Impairing Defendant's Constitutional Rights at 1, *Hashmi*, 621 F. Supp. 2d 76 (No. 06 Cr. 00442)).

81. *Id.*

82. *Hashmi*, 621 F. Supp. 2d at 78.

lent him a small amount of money.⁸³ Hashmi was accused of doing these things despite allegedly knowing that his guest was on the way to supply socks and rainproof ponchos to al-Qaeda.⁸⁴

In spite of the obviously low-level nature of this alleged terrorism offense, Hashmi was kept under severe SAMs for three years *prior to* his trial, during which he was not allowed to speak, worship, or otherwise communicate with any other prisoners.⁸⁵ He was not allowed to receive any visitors except immediate family and attorneys, and even then, he was not permitted any physical contact,⁸⁶ or allowed to speak with his mother unless a translator was available, as she did not speak English.⁸⁷ He was not permitted access to any fresh air or sunlight, and before his daily hour of solitary physical exercise, he was subjected to a strip search, which he found so humiliating that he eventually refused to take advantage of this supposed outlet.⁸⁸ He was forbidden from accessing television, radio, or timely newspapers.⁸⁹ His attorneys have attested that his mental health rapidly deteriorated under these extreme conditions, to the detriment of his defense.⁹⁰ Under these extreme conditions, he eventually confessed.⁹¹

According to the government, Hashmi was subjected to SAMs based on the following:

- (1) the Defendant's former membership in an Islamic fundamentalist organization whose members promote the overthrow of Western Society;
- (2) the Defendant's willingness to allow co-conspirators to store gear in his

83. Benjamin Weiser, *Ex-Brooklyn College Student Admits Conspiring to Help Al-Qaeda* N.Y. TIMES (Apr. 27, 2010), <http://www.nytimes.com/2010/04/28/nyregion/28hashmi.html> (on file with the Columbia Human Rights Law Review).

84. *Id.*

85. See Amnesty International Letter, *supra* note 70.

86. *Id.*

87. Yale Report, *supra* note 9, at 7–8.

88. Amnesty International Letter, *supra* note 70.

89. *Id.*

90. *Id.* See also, Sentencing Memorandum for Defendant at 6, United States v. Hashmi, 621 F. Supp. 2d 76 (S.D.N.Y. 2010) (No. 1:06CR00442) (“Mr. Hashmi’s psychological, emotional, and physical well-being have been negatively affected by prolonged subjugation to solitary confinement and special administrative measures.”).

91. Weiser, *supra* note 83 (where defendant “acknowledged . . . [that] he knew that a man staying with him was planning to deliver outdoor gear like ponchos, sleeping bags and waterproof socks to Al Qaeda He also acknowledged lending the man \$300 to buy a plane ticket to carry the gear”).

apartment that he knew was destined for al-Qaeda's insurgency forces in Afghanistan; (3) the Defendant's willingness to allow a co-conspirator to use his cellular phone to contact other al-Qaeda supporters, including Omar Khyam who was recently convicted of conspiring to bomb targets in the United Kingdom; and (4) the Defendant's post-arrest statements indicating an intention to kill U.S. soldiers. (Gov't SAM Mem. at 3.)⁹²

The government's interest here, of preventing terrorist acts which result in mass death, is certainly compelling. The prisoner's alleged conduct of providing material support to al-Qaeda arguably threatens this interest by furthering the organizational health of a violent terrorist organization, however slightly. However, the restrictions imposed by SAMs are hardly narrowly tailored to achieve the government's interest. Note, for example, that none of the four points listed above involve the *likelihood* or *ability* of the prisoner to *commit any actual harm at all*, from behind bars or otherwise, let alone serious bodily harm.⁹³ Indeed, the specific alleged acts—lending a cell phone and letting an acquaintance sleep on his couch—are not the type of activities that indicate the ability to cause harm from behind bars. Hashmi certainly held strong anti-America opinions,⁹⁴ but no matter the substance, these opinions are protected by the First Amendment⁹⁵ and at best, only indicate his desire to commit harm but say nothing about his ability to actually do so. Even his communication with his attorneys was so restricted that he was not allowed to leave voicemails.⁹⁶ Nevertheless, the government's argument in *Hashmi*

92. United States v. Hashmi, 621 F. Supp. 2d 76, 79 (S.D.N.Y. 2008).

93. Compare the cult-like status of Scott Roeder, a Christian militant who murdered an abortion doctor. Rovner & Theoharis, *supra* note 11, at 1371 (describing Roeder's privileges in prison, including mail, telephone calls, visits with the public, and communication with the press).

94. See, e.g., Jeanne Theoharis, *The Legal Black Hole in Lower Manhattan*, SLATE (Apr. 27, 2010), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/04/the_legal_black_hole_in_lower_manhattan.html [<https://perma.cc/ED3Q-LVDG>] (quoting Hashmi as calling America "the biggest terrorist in the world").

95. See *Texas v. Johnson*, 491 U.S. 397, 399, 414 (1989) (overturning the conviction of a defendant who had burned the American flag at a public demonstration while protestors chanted: "America, the red, white, and blue, we spit on you").

96. Dalack, *supra* note 27, at 432.

relied heavily on the defendant's anti-American political speech.⁹⁷ The court in *Hashmi* still found his SAMs constitutional under the *Turner* test,⁹⁸ discussed in Section III, which requires, among other things, that there be a valid, rational connection between any prison regulation and a legitimate governmental interest.

Hashmi eventually pled guilty to one count of material support and was sentenced to fifteen years in prison.⁹⁹ His SAMs have since been dropped,¹⁰⁰ but this should give Sixth Amendment rights advocates no comfort; the restrictions were dropped post-conviction, long after this defendant would have had any chance to prepare an adequate defense. Just as importantly, SAMs should never have been applied to Hashmi in the first place. The U.N. Special Rapporteur on Torture, Juan Mendez, described Hashmi's SAMs as "no more than a punitive measure that is unworthy of the United States as a civilized democracy."¹⁰¹

97. *United States v. Hashmi*, 621 F. Supp. 2d 76, 86 (S.D.N.Y. 2008) (citing Letter of David Raskin, et al. to Honorable Loretta A. Preska (Dec. 3, 2007), as saying "[t]he Government proffers that the Defendant stated: '[W]e must not recognize any government authority, or any authority at all, besides Allah. We are not Americans. We are Muslims . . . The Colonizers and masters against the oppressed, and we will burn down the master's house . . . We reject the U.N., reject America, reject all law and order. Don't lobby Congress or protest because we don't recognize Congress. The only relationship you should have with America is to topple it.'").

98. *See Hashmi*, 621 F. Supp. 2d at 86 (citing the non-analogous *Felipe* and *El-Hage* cases in support of the assertion that the restrictions imposed were a "rational means" towards a legitimate penological objective of limiting the risk that "Hashmi's communications could result in death or seriously [sic] bodily injury to other persons," though El-Hage, at the time, had been indicted for a major international bombing and Felipe committed numerous murders from behind bars); *see also Turner v. Safley*, 482 U.S. 78, 89 (1987) (establishing a test to justify the constitutionality of prison regulations).

99. Colin Moynihan, *U.S. Man Draws 15 Years for Plot to Supply Al-Qaeda*, N.Y. TIMES (June 9, 2010), <http://www.nytimes.com/2010/06/10/nyregion/10hashmi.html> (on file with the Columbia Human Rights Law Review).

100. *See, e.g., Interview with Pardiss Kebriaei on Guantanamo Bay Prisoners*, THE MODERATE VOICE (July 31, 2016), [http://themoderatevoice.com/218422/\[https://perma.cc/2QXW-AFAP\]](http://themoderatevoice.com/218422/[https://perma.cc/2QXW-AFAP) (recounting an interview with Hashmi's attorney, Pardiss Kebriaei of the Center for Constitutional Rights). Hashmi has since been moved to a Communication Management Unit with slightly better, but still very restrictive, conditions. *Id.*

101. Sally Eberhardt & Jeanne Theoharis, *Five Years Ago, Obama Pledged to End Torture. He Still Hasn't*, THE NATION (Jan. 22, 2014), <http://archive.is/SyKeQ> (on file with the Columbia Human Rights Law Review). Mendez has since opposed the extradition of individuals accused of terrorism-related offenses to the United

While extreme, the case of Fahad Hashmi's torturous pre-trial detention was far from a one-time event. Human Rights Watch reported in 2014 that five other defendants accused of terrorism-related offenses had also been subjected to pre-trial SAMs.¹⁰² For example, Uzair Paracha, another detainee who was accused of material support, was held in isolation for two and a half years before trial.¹⁰³ He described his pre-trial conditions with damning simplicity: "I faced the harshest part of the SAMs while I was innocent in the eyes of

States on the ground that it might constitute a violation of the State responsibility, under international law, to prevent the extradition of detainees to States where torture or other cruel, inhuman, or degrading treatment is practiced. *See* Letter from Juan Mendez to T.L. Early, *supra* note 2.

102. HRW Report, *supra* note 1, at 199. The men were Ahmed Abu Ali, Oussama Kassir, Mehanna, Uzair Paracha, and Mohammed Warsame. *Id.* Ahmed Abu Ali, after being detained as part of a mass arrest in Saudi Arabia, was charged with material support, membership in al-Qaeda, and conspiracy to assassinate the president—but not with any particular attacks. *See* *United States v. Abu Ali*, 395 F. Supp. 2d 338, 341 (E.D. Va. 2005). He claimed his confession in Saudi Arabia was extracted via torture by local officials. *Id.* at 374. Oussama Kassir was accused of material support of al-Qaeda, including crimes of a communicative nature—specifically, developing and operating extremist websites promoting terrorism, including "The Mujahiden Explosives Handbook" and "The Mujahiden Poisons Handbook." *United States v. Kassir*, No. 04 CR. 356 (JFK), 2009 WL 2913651, at *1–3 (S.D.N.Y. Sept. 11, 2009) (upholding SAMs even though Kassir had not caused any particular deaths, physical injury, or any specific violence, either before or during detention). Tarek Mehanna was accused of material support, providing false statements to government officials, and conspiracy to commit murder—but no actual killings. HRW Report, *supra* note 1, at 69; Press Release, US Attorney's Office, Tarek Mehanna Sentenced in Boston to 17 Years in Prison on Terrorism-Related Charges (Apr. 12, 2012), <https://archives.fbi.gov/archives/boston/press-releases/2012/tarek-mehanna-sentenced-in-boston-to-17-years-in-prison-on-terrorism-related-charges> [<https://perma.cc/28ND-JGV4>]. Uzair Paracha was similarly accused of conspiracy and material support and no particular killings. *United States v. Paracha*, No. 03 CR. 1197 (SHS), 2006 WL 12768, at *1 (S.D.N.Y. Jan. 3, 2006), *aff'd*, 313 F. App'x 347 (2d Cir. 2008). Warsame was actually a pacifist, well-known among Islamic militants for his military ineptitude—another example of the "incompetent terrorist." *See* *infra* Section III.D.1. Position of Defendant with Respect to Sentencing at 4, *United States v. Warsame*, 651 F. Supp. 2d 978 (D. Minn. 2009) (No. 04-29), 2009 WL 2173047. He was accused of material support, which mainly took the form of teaching English in an al-Qaeda-affiliated medical clinic. *United States v. Warsame*, 651 F. Supp. 2d 978, 981 (D. Minn. 2009).

103. Yale Report, *supra* note 9, at 11; Uzair Paracha, *Innocent in the Eyes of the Law, in* HELL IS A VERY SMALL PLACE: VOICES FROM SOLITARY CONFINEMENT 48–49 (2016).

American law.”¹⁰⁴ The over-application of SAMs to pre-trial detainees represents a clear threat to fair trial rights.

B. Pre-Trial SAMs Violate the Sixth Amendment Right to Counsel by
Disabling the Defendant’s Communication with His or Her
Attorney

It is difficult—perhaps impossible—to adequately represent a prisoner who is subject to SAMs.¹⁰⁵ Defense attorney Sean Maher, for example, has asserted that SAMs “are meant to bludgeon people into cooperating with the government, accepting a plea, or breaking their spirit.”¹⁰⁶ Defense attorney Joshua Dratel, likewise, has stated that solitary confinement is “calculated” to disorient and dehumanize prisoners.¹⁰⁷ According to Dratel, SAMs “dehumanize defendants and create a situation where they cannot exist in a defiant posture [to] fight the case.”¹⁰⁸ The effect of SAMs is to “eliminate [prisoners] as participants in their defense.”¹⁰⁹ SAMs also inhibit the right to counsel by creating a “climate of fear and suspicion,”¹¹⁰ as they “suggest to the client that [defense attorneys] are under the government’s control and are therefore untrustworthy.”¹¹¹

The harmful effects of SAMs on preparing the defense are stark. According to Dratel, in cases against prisoners subject to SAMs, “[p]otential witnesses will not be identified, documents will not be

104. HRW Report, *supra* note 1, at 6.

105. See generally Yale Report, *supra* note 9 (describing at various times the way in which SAMs restrict access to counsel). The Yale report based its findings on interviews with eleven attorneys who have represented clients under SAMs, as well as two mitigation investigators. Mitigation investigators are members of defense teams responsible for “telling a defendant’s full life history to advocate for a lesser sentence.” *Id.* at 3. Researchers also interviewed family members of prisoners subject to SAMs. *Id.*

106. *Id.* at 14.

107. *Id.* (quoting telephone interview with Joshua Dratel, Attorney (Apr. 22, 2016)).

108. *Id.* at 16 (quoting telephone interview with Joshua Dratel, Attorney (Apr. 22, 2016)) (alteration in original).

109. *Id.* (quoting telephone interview with Joshua Dratel, Attorney (Apr. 22, 2016)).

110. *Id.*

111. *Id.* (quoting interview with Denny LeBeouf and Scharlette Holdman, in New Haven, Conn. (Feb. 5, 2016)) (alteration in original). The chilling effect of SAMs seems ever-present for researchers. Even for purposes of the Yale Report, three attorneys that the researchers contacted declined to answer any questions, citing fears of violating the SAMs to which they were subjected. *Id.* at 3.

located, and the entire defense investigation of the case will be limited to those discovery materials produced by the government.”¹¹²

The Supreme Court in *Strickland v. Washington*,¹¹³ as well as the ABA standards, both state that counsel has a duty to make reasonable investigations in support of their case.¹¹⁴ Imposing SAMs during pre-trial detention inhibits these investigations and thus disables the defense during the most critical time of its case preparation. Pre-trial SAMs also prevent attorneys from consulting with the defendant or sending updates during the investigation of the case.¹¹⁵ In *Maine v. Moulton*, the Supreme Court recognized that depriving a defendant of counsel prior to trial may be more detrimental than denial of counsel during trial.¹¹⁶ The Supreme Court has thus recognized that pre-trial counsel is core, not peripheral, to the Sixth Amendment right to counsel.¹¹⁷ Indeed, the most important work of a defense attorney is completed prior to ever setting foot in a courthouse to argue a given case—whether that means negotiating a plea, gathering evidence, or forming a strategy.¹¹⁸

112. Joshua L. Dratel, *Ethical Issues in Defending a Terrorism Case: How Secrecy and Security Impair the Defense of a Terrorism Case*, 2 CARDOZO PUB. L., POL'Y AND ETHICS J. 81, 90 (2003).

113. *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

114. STANDARDS FOR CRIMINAL JUSTICE § PROSECUTION FUNCTION AND DEF. FUNCTION § 4-4.1 (AM. BAR ASS'N 1991). *See also* *Blackburn v. Foltz*, 828 F.2d 1177, 1183–84 (6th Cir. 1987) (finding denial of effective assistance of counsel based on a combination of several defects, including failure to obtain transcript of earlier trial and failure to investigate a lead concerning a potential alibi).

115. *See, e.g., Dalack, supra* note 27, at 431 (noting that under SAMs, El-Hage was forbidden from communicating with his attorneys' staff, experts, and other potential witnesses and from attending meetings with his co-defendants to discuss joint legal issues).

116. *See Maine v. Moulton*, 474 U.S. 159, 170 (1985) (denying a person's right to pre-trial counsel may be more damaging than denying a person's right to not having counsel during trial).

117. *See Miranda v. Arizona*, 384 U.S. 436, 455 (1966).

118. *See, e.g., Moulton*, 474 U.S. at 170; *United States v. Wade*, 388 U.S. 218, 224–25 (1967) (discussing the importance of pretrial proceedings); *Wolfish v. Levi*, 573 F.2d 118, 133 (2d Cir. 1978), *rev'd on other grounds*, *Bell v. Wolfish*, 441 U.S. 520 (1979); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051 (8th Cir. 1989) (finding that when pre-trial detainees' interests in effective communication with attorneys is “inadequately respected during pre-trial confinement, the ultimate fairness of their eventual trial can be compromised”) (citing *Campbell v. McGruder*, 580 F.2d 521, 531–32 (D.C. Cir. 1978)); *Benjamin v. Fraser*, 264 F.3d 175, 185 (2d Cir. 2001) (citing *Moulton's* holding that deprivation of counsel prior to trial may be more damaging than denial of counsel during trial).

By restricting prisoners' access to their attorneys, SAMs necessarily impact the Sixth Amendment right to counsel.¹¹⁹ Accordingly, the most successful challenges to SAMs seem to have been those which raise claims based on the Sixth Amendment right to counsel.¹²⁰ SAMs detainees have pointed out the extensive discovery required in many terrorism cases¹²¹ and the increased importance of contact visits with attorneys.¹²² Closely related to this argument is the idea that dehumanizing conditions, in and of themselves, may violate the Sixth Amendment right to counsel by rendering the defendant unfit to stand trial.¹²³ Others have highlighted the importance of

119. Yale Report, *supra* note 9, at 24. This is especially true in light of the fact that SAMs entirely prohibit prisoners' access to counsel until their chosen attorney consents to be subject to SAMs. *Id.*

120. *See, e.g.*, United States v. Reid, 214 F. Supp. 2d 84, 91 (D. Mass. 2002) (modifying SAMs in the "shoe bomber case" at request of defense attorney to avoid violating defendant's Sixth Amendment right to counsel); United States v. Hale, No. 03 CR 11, 2003 WL 1989620, at *1 (N.D. Ill. Apr. 28, 2003) (observing *sua sponte* that due to SAMs, defendant was unable to have private consultation with his defense attorneys for approximately six weeks and granting a continuance partly as a result of this circumstance). Note that deprivation of counsel due to SAMs implicates the Sixth Amendment only if the deprivation of counsel took place in the course of some criminal prosecution. *See* Sattar v. Gonzales, No. 07-cv-02698 8-WDM-KLM-CV-02698WD, 2008 WL 5712727, at *25 (D. Colo. Nov. 3, 2008) *R. & R. adopted as modified*, Sattar v. Gonzales, No. 07-cv-02698-WDM-KLM 07-CV-02698WD, 2009 WL 606115 at *3 (D. Colo. Mar. 6, 2009) (recommending that, because the plaintiff failed to allege existence of a criminal prosecution, he failed to state a plausible claim for Sixth Amendment relief).

121. *See, e.g.*, Brief for Defendant at 61, United States, v. El-Hage, No. 00-1025, 2000 WL 33978823 (C.A.2) (noting that the alleged conduct spanned years and continents, and included many hard-to-find alleged co-conspirators: "The seeds of the events that put Mr. El-Hage in association with bin Laden in the early 1990's were planted twenty years ago during the Soviet Union's invasion of Afghanistan."); Memorandum of Law in Support of Defendant Kassir's Motion to Lift the Special Administrative Measures that Have Been Imposed on Him at *4, United States v. Kassir, No. S2 04 Cr. 356 (JFK), 2008 WL 8888942 (S.D.N.Y. 2008) (in which the defense claimed that the severe restrictions on the defendant in combination with the massive discovery process resulted in a Sixth Amendment violation).

122. *See, e.g.*, Memorandum of Law in Support of Defendant Kassir's Motion to Lift the Special Administrative Measures that Have Been Imposed on Him at *4, Kassir, No. S2 04 Cr. 356 (JFK), 2008 WL 8888942 (in which the defense claimed that the severe restrictions on the defendant, which prohibited contact meetings with his attorney, in combination with the massive discovery process, resulted in a Sixth Amendment violation).

123. *See, e.g.*, Yale Report, *supra* note 9, at 11 (detailing how Uzair Paracha, who was held in isolation for two and a half years before trial, reported severe

contact visits to establish a positive attorney-client relationship.¹²⁴ Still others have laid out the importance of third-party consultation for competent counsel.¹²⁵

Kaboni Savage, for example, an alleged drug dealer and organized crime leader accused of killing six people and firebombing the home of a federal witness, made a motion to strike his pre-trial SAMs.¹²⁶ The defense argued that while the immediate dehumanizing conditions of the defendant's SAMs were constantly at issue, counsel and the defendant had a diminished opportunity to focus on the long-

physical symptoms as a result of SAMs, including eyesight and breathing problems).

124. See, e.g., *Ching v. Lewis*, 895 F.2d 608, 610 (9th Cir. 1990) (holding that a prisoner's right of access to the courts includes contact visitation with his counsel); Trial Motion for Defendant at 9, *United States v. Savage*, CRIM. A. No. 07-550, 2010 WL 4659681 (E.D. Pa. Aug. 16, 2010) (arguing that the Sixth Amendment entitles the defendant to contact visits with his attorneys, saying "contact visits enable the development of a meaningful attorney-client relationship. Such a relationship is at the heart of a competent defense in any capital prosecution.").

125. Yale Report, *supra* note 9, at 17 (describing how SAMs made it nearly impossible for attorneys to interview and retain witnesses); Memorandum of Law in Support of Defendant Kassir's Motion to Lift the Special Administrative Measures that Have Been Imposed on Him at *4, *United States v. Kassir*, No. S2 04 Cr. 356 (JFK), 2008 WL 8888942 (S.D.N.Y. 2008) (asserting that SAMs limit attorney practice to the extent of implicating the ability to advocate zealously, by hampering communication with even in-house paralegals, investigators and other staff). *But see* *United States v. Kassir*, No. S2 04 CR. 356 (JFK), 2008 WL 2695307, at *9–10 (S.D.N.Y. July 8, 2008) (holding that the claims that non-attorney in-firm staff would have access because defense counsel is permitted to "share information freely" provided that their purpose is "preparing the inmate's defense" and that an investigator may meet with the defendant when counsel is present).

126. See Trial Motion for Defendant at 2, *United States v. Savage*, No. 07-550, 2010 WL 4659681 (E.D. Pa. Aug. 16 2010) ("The conditions Mr. Savage faces at Unit 10-South in MCC-New York are so offensive and demoralizing to him and counsel that his Sixth Amendment safeguards, among numerous other constitutional rights, are being violated. The defendant's right to be 'afforded reasonable opportunity for private consultation with counsel' under 18 U.S.C. § 3142(i) (3) is a fiction. His right to a 'full defense by counsel' and the ability of his attorneys to have 'free access to the accused at all reasonable hours' is a fiction."). Savage had also attempted to order at least one hit from prison. Ralph Cipriano, *The Imam's Clout*, BIG TRIAL (Feb. 28, 2013), <http://www.bigtrial.net/2013/02/the-imams-clout.html> [<https://perma.cc/67BV-W6YK>] ("In his letters to Oliver, Savage asked him to 'get my man for me; you know who.' The guy Savage was referring to was 'my little fat homey,' another drug dealer known as Twin who might be talking to the feds.").

term aspects of the case and the upcoming trial.¹²⁷ Conditions in *Savage* appear to have been so brutal that it raises the question of whether the defendant was being punished for exercising his Sixth Amendment right to counsel.¹²⁸ This would, of course, violate the *Bell v. Wolfish* test, discussed *infra* in Section III, which allows any restriction on a pre-trial detainee as long as it is reasonably related to a legitimate non-punitive governmental objective, absent a showing of express intent to punish.¹²⁹ *Savage*, where the prisoner was neither Muslim nor accused of affiliation with foreign terrorism,¹³⁰ represents one of the few victories against SAMs. In *Savage*, the Court did eventually decide to modify the prisoner's SAMs to "permit the free transfer of the contents of Defendant's communications among only members of the defense team."¹³¹ *Savage* was convicted on all counts, including thirteen death penalty-eligible counts, and he is currently appealing from death row.¹³² He is still contesting his remaining SAMs.¹³³

1. SAMs Burden a Defendant's Ability to Even Retain Counsel

It can be almost impossible for prisoners subject to SAMs to find lawyers due to limits on their correspondence.¹³⁴ Al-Owhali's SAMs, for example, included a prohibition on communicating with

127. Trial Motion for Defendant at 2, *Savage*, No. 07-550, 2010 WL 4659681. El-Hage's counsel also made this argument, claiming that pre-trial SAMs disabled El-Hage to such an extent as to render his defense constitutionally impaired. Brief in Support of Defendant Wadih El-Hage's Motion for Bail and/or Other Relief at 61, *United States v. El-Hage*, 214 F.3d 74 (2d Cir. 2000) (No. 00-1025), 2000 WL 33978823 ("If the S.A.M. are not eliminated and/or substantially modified with respect to Mr. El-Hage, it is inevitable that by the time trial commences, if not well before, he will be completely unable to assist in his own defense, thereby rendering it constitutionally impaired and, ultimately, ineffective.").

128. Eighth Amendment challenges to SAMs are beyond the scope of this article, but may merit further research and consideration.

129. See *Bell v. Wolfish*, 441 U.S. 520, 539 (1979) ("[I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'").

130. See Defendant Kaboni Savages's Motion for Relief from Special Administrative Measures at 3, *Savage*, No. 07-550, 2010 WL 4659681.

131. Memorandum at *9, *United States v. Savage*, No. 07-550-03, 2012 WL 424993 (E.D. Pa. 2017).

132. *Id.*

133. *Id.*

134. Yale Report, *supra* note 9, at 18.

attorneys “not of record,” which has clear Sixth Amendment implications—after all, it is impossible to secure counsel, in the absence of a prior arrangement, without speaking to an attorney.¹³⁵ Though Al-Owhali brought civil suit challenging his SAMs while already serving a sentence for several terrorism-related offenses involving the 1998 U.S. embassy bombing in Kenya,¹³⁶ his situation is extremely relevant to concerns of pre-trial detainees. Al-Owhali brought suit not under the Sixth Amendment, which would require evidence of actual injury,¹³⁷ but instead claimed that he had the right to speak with an attorney not of record under the First Amendment.¹³⁸ In the *Al-Owhali* challenge, the Tenth Circuit affirmed the dismissal of the prisoner’s claims without weighing in on the constitutionality of the SAMs themselves.¹³⁹ The plaintiff’s brief, drafted by Daniel Manville of the Michigan State University College of Law Civil Rights Clinic, pointed out the impossibility of securing adequate counsel under existing restrictions:

[N]o attorney, prior to either corresponding or talking to a potential client, can agree to be the “attorney of record” or file an appearance. It would be unethical for an attorney to agree to represent a client without knowing whether there is merit to what the “potential” client wishes to undertake, whether the attorney is capable of handling such issue or issues that the client wants to undertake, and whether the client has the resources to retain that counsel.¹⁴⁰

135. Appellant’s Opening Brief on Appeal at 4, *Al-Owhali v. Holder*, 687 F.3d 1236 (10th Cir. 2012).

136. See *Al-Owhali*, 687 F.3d at 1238.

137. See Appellant’s Opening Brief on Appeal, *supra* note 135, at 8, 39–41.

138. See *id.* at 39–41. This strategy may be especially useful in SAMs cases due to the difficulty of showing actual injury during secretive court proceedings where the outcome depends on complex discovery. Note that this requirement does not apply to the right to counsel of choice, which could arguably have been at stake here. See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006) (“In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation ‘complete.’”); see Appellant’s Opening Brief on Appeal, *supra* note 135, at *8 (citing *Benjamin v. Fraser*, 264 F.3d 175, 186 (2nd Cir. 2001); *Gonzales-Lopez*, 548 U.S. at 150).

139. See *Al-Owhali*, 687 F.3d at 1236.

140. Appellant’s Opening Brief on Appeal, *Al-Owhali v. Holder*, *supra* note 135, at 24.

The plaintiff's brief here lays out one convincing way in which the application of SAMs threatens the integrity of the legal profession, as well as the right to counsel—no lawyer could take the case without committing an ethical violation. Indeed, SAMs also seem to prohibit all attorney ethics consultations themselves, which necessarily involve consulting outside counsel.¹⁴¹

Mahmud Abouhalima, one of the perpetrators of the 1993 World Trade Center bombing, actually filed an administrative remedy request protesting his lack of access to lawyers.¹⁴² While at first the BOP refused to modify his SAMs to allow him to reach out to advocates, Abouhalima was eventually allowed to contact potential attorneys regarding his case, but the number he could contact was limited to ten.¹⁴³

2. SAMs Threaten the Due Process Right to Contact Visits with Attorneys

Even if a prisoner subject to SAMs is able to retain counsel, SAMs hamper their attorney communications. Several detainees have specifically contested SAMs which prevented contact meetings with counsel. For example, the *Savage* defense claimed that non-contact visits detract from Sixth Amendment rights. The defense explained that the longer attorney-client visits are restricted to non-contact visits, the less time there is leading up to trial to focus on preparing for the defense of the case.¹⁴⁴ Instead, the defendant spent precious time with his attorneys discussing the frustrations associated with the burdensome administrative restrictions imposed upon himself and counsel.¹⁴⁵

141. See, e.g., *Ethics Hotline*, NEW YORK CITY BAR, <http://www.nycbar.org/member-and-career-services/ethics/hotline> [https://perma.cc/4FS9-HCX5] (detailing resources for attorneys to consult outside counsel for guidance with regard to New York Rules of Professional Conduct).

142. Yale Report, *supra* note 9, at 18 (citing Declaration of Mahmud Abouhalima at 39, *Ayyad v. Holder*, No. 05-cv-02342 (D. Colo. Aug. 12, 2013)).

143. *Id.* at 18.

144. See Defendant Kaboni Savages's Motion for Relief from Special Administrative Measures at 9, *United States v. Savage*, No. 07-550, 2010 WL 4659681 (E.D. Pa. 2010). The brief also called attention to heightened protections available during capital trials. *Id.* at 7 (construing *United States v. Ayala-Lopez*, 327 F. Supp. 2d 138 (D.P.R. 2004)).

145. *Id.* at *2–5, 9.

The EDNY magistrate judge in *Basciano v. Martinez*,¹⁴⁶ another case involving alleged murders during incarceration, expressed support for contact visits in his recommendation to the district court.¹⁴⁷ Magistrate Judge Levy found that the burden placed on the defense was the “most troubling single circumstance” of the defendant’s incarceration:¹⁴⁸

In the two hearings I held on this matter, Basciano’s counsel vividly described the volume of documents they must review with their client during a typical meeting and the lengthy and burdensome process entailed by the requirement that this review be conducted through a screen with two sets of documents, rather than side by side. Defense counsel repeatedly emphasized that the time lost through this cumbersome procedure was impairing their ability to prepare for trial in both the 2003 and 2005 indictments.¹⁴⁹

The sympathetic magistrate judge in *Basciano v. Martinez* believed that the petitioner had passed the *Bell v. Wolfish* test for challenging his non-contact visits with attorneys,¹⁵⁰ which mimics rational basis scrutiny for prison restrictions on pre-trial detainees.¹⁵¹ He thus

146. In *Basciano*, similarly to *United States v. Felipe*, 148 F.3d 101 (2d Cir. 1998), the prisoner was charged with various violent offenses, including several counts of murder in aid of racketeering, conspiracy to commit murder in aid of racketeering, and soliciting the murder of a federal law enforcement officer; several of these alleged crimes occurred while Basciano was incarcerated. *Basciano v. Martinez*, No. 07CV421 (NGG) (RML), 2007 WL 2119908, at *1 (E.D.N.Y. May 25, 2007). As in *Savage*, because of the clear risk of death and violence due to the prisoner’s actions from behind bars, *Basciano* is arguably an emblematic case of the proper use of SAMs. Nonetheless, Basciano’s case was reviewed relatively sympathetically. Basciano was neither politically opposed to America nor a Muslim. *Id.* at *1.

147. *Id.* at *1.

148. *Id.* at *7 (describing restrictions placed by the BOP on all inmates housed in Unit 10 South of the MCC, not by the defendant’s SAMs). This concern about non-contact attorney visits was mooted before the District Court could rule on it. *Basciano v. Lindsay*, 530 F. Supp. 2d 435, 437 (E.D.N.Y. 2008).

149. *Basciano*, 2007 WL 2119908, at *7 (describing restrictions placed by the BOP on all inmates housed in Unit 10 South of the MCC, not by the defendant’s SAMs). This concern was mooted before the District Court could rule on it. *Basciano*, 530 F. Supp. 2d at 437.

150. *Basciano*, 2007 WL 2119908, at *8 (E.D.N.Y. May 25, 2007).

151. In *Bell v. Wolfish*, 441 U.S. 520 (1979), the Supreme Court held that absent a showing of express intent to punish, a restriction imposed on a pre-trial

suggested in a non-binding magistrate recommendation that contact visits be allowed between Basciano and his attorneys.¹⁵² Again, this case involved a prisoner accused of organized crime, but he was not Muslim, and there was no alleged affiliation with foreign terrorism.¹⁵³ Unfortunately for the prisoner, the District Court and Second Circuit declined to follow the magistrate's recommendation.¹⁵⁴

The *Basciano* magistrate recommendation cited *Ching*, a Ninth Circuit case specifically holding that "a prisoner's right of access to the courts includes contact visitation with his counsel."¹⁵⁵ Unlike in *Basciano*, in which the BOP cited a prior violent incident at the MCC in which another prisoner supposedly threatened counsel,¹⁵⁶ the defendants in *Ching* "failed to give *any* justification to support their

detainee shall be permissible, as long as it is reasonably related to a legitimate non-punitive governmental objective.

152. *Basciano*, 2007 WL 2119908, at *1.

153. *Id.*

154. The *Basciano* case was reviewed *de novo* by the district court judge who denied the habeas petition, praising the government in its flexible implementation of SAMs. *Basciano*, 530 F. Supp. 2d at 449 (noting the government's ongoing efforts to provide reasonable increases in phone calls, visitation, and correspondence with family members, as well as improving the efficiency of Basciano's meetings with his attorneys and receipt of legal mail and concluding that "the flexible implementation of the SAMs weighs in favor of the conclusion that the SAMs are not punitive in nature and do not violate Basciano's due process rights."). The district court judge, while acknowledging with concern the ongoing difficulties counsel was having, merely invited defense counsel to keep the court apprised of any ongoing difficulties while upholding all SAMs. *Id.* at 450 (noting that defense counsel should advise the court if client continues to have difficulty accessing counsel). The court also pointed out that taxpayer dollars were being wasted on the hours the publicly-appointed attorneys spend waiting for their clients, saying this "misuse of valuable resources cannot be sanctioned." *Id.*

155. *Ching v. Lewis*, 895 F.2d 608, 610 (9th Cir. 1990). The *Savage* defense also argued that the Sixth Amendment entitles the defendant to contact visits with his attorneys due to needs of the attorney-client relationship, reasoning that "a meaningful attorney-client relationship . . . is at the heart of a competent defense in any capital prosecution. Non-contact visits both frustrate the development of this relationship and destroy the ability of counsel and defendant to effectively communicate with each other." Defendant Kaboni Savages' Motion for Relief from Special Administrative Measures at 9, *United States v. Savage*, No. 07-CR-550, 2017 WL 4659681 (E.D. Pa. Aug. 16, 2010).

156. *Basciano*, 2007 WL 2119908, at *8 (citations omitted) (noting that all Unit 10 South inmates were denied contact visits with counsel after a single inmate gravely injured a guard at the MCC and had planned to assault and take hostage his own attorneys).

decision to deny contact visits” with counsel.¹⁵⁷ Future anti-SAMs advocates may thus find it fruitful to emphasize the arbitrariness of any deprivation of contact visits,¹⁵⁸ and to make hybrid due process/Sixth Amendment arguments, as the right of access to the courts falls under due process.

The Third Circuit has also ruled favorably towards contact visits. In *Young v. Larkin*, the court held outright that “[a]n inmate’s right of access to the courts encompasses the right to contact visits with his or her attorney,” adding that contact visits are “a necessary means for the establishment of a relationship between the inmate and his or her lawyer.”¹⁵⁹ By abridging this right, SAMs thereby abridge due process under *Larkin*. The right to contact visits has also been upheld in at least one international court.¹⁶⁰

157. *Ching*, 895 F.2d at 610.

158. Defense attorneys may also consider arguing that contact visits do not place a serious burden on the government. Echoing the language of the *Turner* test, discussed *infra*, and *Bell v. Wolfish*, the defense brief in *Savage* called SAMs arbitrary and exaggerated, and pointed to evidence that a less restrictive alternative means exists and works (noting that defendant’s time while housed at USP Atlanta was without incident, and that the government failed to establish that allowing counsel “to meet with his client face-to-face at the MCC would prove any more difficult than” meeting with his client behind a steel cage). Defendant Kaboni Savages’ Motion for Relief from Special Administrative Measures at 10, *Savage*, No. 07-CR-550, 2010 WL 4659681. Overall, anti-SAMs advocates should emphasize the importance of contact meetings with counsel and the unacceptability of limitations on contact meetings for nonviolent offenders. The *Savage* brief also pointed out that the defendant had never demonstrated any dangerousness to counsel. *Id.* Attorneys should continue to argue for lack of dangerousness whenever possible, especially where prisoners are accused of non-violent crimes such as material support.

159. *Young v. Larkin*, 871 F. Supp. 772, 783 (M.D. Pa. 1994) (citations omitted) (holding that the prisoner’s Fifth Amendment right to access to the courts included the right to contact visits with his attorneys, but that he did not have a constitutional right to contact visits with family under *Block v. Rutherford*, 468 U.S. 576, 588 (1984), in which the Court held that a county jail’s blanket prohibition against contact visits between pre-trial detainees and their family was a reasonable, nonpunitive response to legitimate security concerns, and was thus consistent with the Fourteenth Amendment).

160. *Modarca v. Moldova*, App. No. 14437/05, ¶ 18-19 Eur. Ct. H.R. (2007), (holding that a defendant’s rights were violated in a case where the prisoner was separated from his lawyer by two panes of glass with holes covered with mesh, because they did not permit documents to be passed back and forth and also because they prevented effective confidential communication about the case by forcing prisoner and his attorney to communicate by yelling). In MCC’s 10 South, attorneys

3. Terrorism Cases Tend to Have Complex Discovery, Requiring Close Communication with an Attorney to Prepare an Adequate Defense

Terrorism cases tend to require complex discovery, as a result of the networked nature of the crimes alleged.¹⁶¹ Defendants and their counsel thus require more time to review the extensive disclosure.¹⁶² In *United States v. El-Hage*, for example, the defendant was held incommunicado for fifteen months prior to trial, before being subject to more moderate continuing restrictions on his communication.¹⁶³ El-Hage was charged with being a key participant in six al-Qaeda conspiracies to kill United States citizens, including having knowledge of the Kenya bombing, which resulted in hundreds of deaths and thousands of injuries.¹⁶⁴ Not only did El-Hage's SAMs physically prevent him from consulting with his attorney for fifteen months, the restrictions seriously degraded his mental state, negatively affecting his ability to consult with his attorney or participate in his own defense,¹⁶⁵ even once the government allowed for some communication privileges.¹⁶⁶ In *El-Hage*, the alleged conduct spanned years and

and clients are also divided by a "mesh grate" that does not allow even eye contact. Yale Report, *supra* note 9, at 17.

161. See, e.g., Brief in Support of Defendant Wadih El-Hage's Motion for Bail and/or Other Relief at 61, *United States v. El-Hage*, 213 F.3d 74 (2d Cir. 2000) (No. 00-1025), 2000 WL 33978823 (noting how the alleged conduct spanned years and continents, and included many hard-to-find alleged co-conspirators: "[t]he seeds of the events that put Mr. El-Hage in association with bin Laden in the early 1990s [sic] were planted twenty years ago during the Soviet Union's invasion of Afghanistan.").

162. *Id.* (emphasizing how this case was "not the type of case that counsel can prepare independent of the defendant.").

163. *Id.* at 6-7 (noting that the defendant was held "incommunicado" for fifteen months prior to trial).

164. *Id.* at 77 (noting that the defendant was charged with six al Qaeda conspiracies to kill United States citizens, including having knowledge of a Kenya bombing resulting in deaths and injuries).

165. *Id.* at 53-54 (outlining doctor reports showing that even though this was a case in which SAMs were, arguably, applied appropriately, there was still a serious human and constitutional cost).

166. See *El-Hage*, 213 F.3d at 78 (noting that while the defendant was being held pre-trial, the government revised El-Hage's SAMs to provide "seven extra minutes of time in each phone call to his family," permitted him "three calls per month to his family," rather than the usual one for inmates in administrative detention, and provided him with "a plastic chair so that he . . . [could] review documents more comfortably.").

continents, and included many hard-to-find alleged co-conspirators.¹⁶⁷ As noted by the defendant-appellant brief, it was not “the type of case that counsel can prepare independent of the defendant,”¹⁶⁸ rendering his SAMs all the more harmful.

SAMs can hinder essential discovery communications between counsel and the defendant, which is a vital need even in less serious material support cases. In *Kassir*, another material support case, there was complex discovery even though the prisoner was not accused of any particular violent acts.¹⁶⁹ He was nonetheless detained at the restrictive MCC facility, where he was prohibited from having contact visits with his attorney.¹⁷⁰

167. See Brief in Support of Defendant Wadhi El-Hage’s Motion for Bail and/or Other Relief at 61, *El-Hage*, 213 F.3d 74 (No. 00-1025), 2000 WL 33979923.

168. *Id.*

169. Oussama Kassir was accused of material support of al-Qaeda, including crimes of a communicative nature—specifically, developing and operating extremist websites promoting terrorism, including “The Mujahiden Explosives Handbook” and “The Mujahiden Poisons Handbook.” *United States v. Kassir*, No. S2 04 CR. 356 (JFK), 2008 WL 2695307, at *1 (S.D.N.Y. July 8, 2008). The government, however, did not allege that Kassir caused any particularized deaths, physical injury or any specific violence, either before or during detention. *Id.* at *2.

170. He was, however, provided with his own computer on which to review the “vast amount of computerized materials” produced by the government during discovery. *Kassir*, 2008 WL 2695307, at *2. Emphasizing massive discovery process in combination with deprivation of counsel may also be something worth highlighting for future anti-SAMs advocates. In *Kassir*, for example, the defense alleged that the severe restrictions on the defendant in combination with the massive discovery process resulted in a Sixth Amendment violation. Memorandum of Law in Support of Defendant Kassir’s Motion to Lift the Special Administrative Measures that Have Been Imposed on Him at *2, *United States v. Kassir*, 2008 WL 8888942, No. S2 04 Cr. 356 (JFK) (S.D.N.Y. 2008) (describing the extent to which the restrictions placed on the defendant hindered the defendant’s ability to review discovery materials with his attorney). The constitutional issue here allegedly arose from the combination of “the government’s production, coupled with limitations on counsel’s visits . . .” *Id.* at 7. The defense claimed that the government limited Kassir’s access to discovery material provided, and prevented him from reviewing documents together with his counsel with any specificity. *Id.* at 2. In the future, attorneys may consider continuing to make this hybrid argument in complex cases.

C. Pre-Trial SAMs Burden Due Process By Rendering Prisoners Unfit to Stand Trial

Criminal defendants have a right under due process to “participate meaningfully” in their own defense.¹⁷¹ SAMs threaten this right, because of their effect on the physical and mental health of prisoners. Colin Dayan, a humanities professor at Vanderbilt University who has studied solitary confinement, describes the effect of solitary confinement as follows:

You no longer know what’s real. . . . You can’t speak to anyone; you can’t touch anyone; your senses no longer have any outlet. You have delusions and become psychotic. Your mind deteriorates.¹⁷²

SAMs create isolation that is even more extreme than solitary confinement.¹⁷³ This isolation can cause serious mental illness in prisoners subjected to SAMs.¹⁷⁴ Uzair Paracha, who was held in isolation for two and a half years before trial, reported severe physical

171. *Medina v. California*, 505 U.S. 437, 445 (1992) (citing *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985) as an “expansion of earlier due process cases holding that an indigent criminal defendant is entitled to the minimum assistance necessary to assure him ‘a fair opportunity to present his defense’ and ‘to participate meaningfully in [the] judicial proceeding.’”).

172. Richard Serrano, *After 15 Years in Solitary, Convicted Terrorist Pleads for Contact with Others*, L.A. TIMES (Feb. 16, 2013), <http://articles.latimes.com/2013/feb/16/nation/la-na-yousef-solitary-20130217> (on file with the Columbia Human Rights Law Review).

173. Yale Report, *supra* note 9, at 6.

174. Take, for example, Ramzi Yousef, who was serving life without parole for his role in two terrorist attacks, including the 1993 World Trade Center bombing which killed six people. Ray Sanchez & Alexandra Field, *What's Life Like in Supermax Prison?*, CNN (June 25, 2015), <http://www.cnn.com/2015/06/25/us/dzhokhar-tsarnaev-supermax-prison/> [<https://perma.cc/LB3N-63ME>]. Yousef spent more than fifteen years in solitary confinement, starting in 1998. *Id.* During this entire time, SAMs set limits on his contact with relatives, lawyers, and other inmates. *Id.* In 2011, he challenged his SAMs in court. His lawyer had observed a disturbing degree of paranoia and of fear in Yousef due to his isolation. Serrano, *supra* note 172. In Yousef’s suit challenging his SAMs, he alleged that long-term solitary leaves him “no hope” and that it has led to “severe psychological trauma.” *Id.* While this prisoner’s SAMs challenge was post-conviction, it illustrates the mental and emotional damage that can be done by imposing SAMs, even against highly dangerous prisoners without an ongoing need to prepare their defense.

symptoms as a result of SAMs.¹⁷⁵ He reported that he and other prisoners suffered eyesight problems, and his physical coordination deteriorated to the point where he developed breathing problems.¹⁷⁶ The United Nations and other groups have similarly recognized that the practice of prolonged solitary confinement may constitute torture.¹⁷⁷ Given the severe psychological effects and the conclusions of international human rights groups, the practice of pre-trial solitary confinement may violate due process under the Fourteenth Amendment.

D. Pre-Trial SAMs in Highly Political Cases May Violate the Sixth Amendment Right to Counsel by Preventing the Defendant and the Defendant's Attorneys from Communicating with the Media

Pre-trial SAMs which prevent consultation with third parties may also threaten the defendant's right to representation by inhibiting the ability to show remorse.¹⁷⁸ Especially in highly political cases, silence can be perceived by jury members as a form of speech (e.g., "I'm not sorry!").¹⁷⁹ For example, in the Tsarnaev case, the defense alleged

175. Yale Report, *supra* note 9, at 11; Uzair Paracha, *Innocent in the Eyes of the Law, in HELL IS A VERY SMALL PLACE: VOICES FROM SOLITARY CONFINEMENT* 43, 48–49 (Jean Casella et al. eds., 2016).

176. *Id.* at 43, 48–49.

177. *Solitary Confinement Should Be Banned in Most Cases, UN Expert Says*, U.N. NEWS CENTRE (Oct. 18, 2011), <http://www.un.org/apps/news/story.asp?NewsID=40097#.WObFEVXyuUk> [<https://perma.cc/2RGF-WD38>]; *see also* HRW Report, *supra* note 1, at 133–34 (recognizing lengthy solitary confinement as cruel, inhuman, or degrading treatment, which constitutes a violation of U.S. treaty obligations).

178. One way of compensating for prejudice is, of course, striking affected jurors. Prejudice of the jurors may be presumed when there is evidence of "inflammatory, prejudicial pretrial publicity that has so pervaded or saturated the community" that the jury may be presumed to have been affected. *Buttrum v. Black*, 721 F. Supp. 1268, 1276 (N.D. Ga. 1989). The Eleventh Circuit, applying *Irvin v. Dowd*, 366 U.S. 717, 727–28 (1961) (holding that that jurors who were exposed to massive pre-trial publicity had been prejudiced thereby and overturning the conviction), has held that the Sixth Amendment requires adequate, individualized voir dire where pre-trial publicity creates a significant possibility of prejudice. *Jordan v. Lippman*, 763 F.2d 1265, 1274 (11th Cir. 1985) (construing *United States v. Davis*, 583 F.2d 190 (5th Cir. 1978)). When the entire community is affected, of course, it may be impossible to avoid jury prejudice. In highly political cases like this, it is especially important to allow prisoners to express remorse.

179. *See* Nancy Gertner, *Will We Ever Know Why Dzhokhar Tsarnaev Spoke After It Was Too Late?*, BOSTON GLOBE, (Jun. 20, 2015), <https://www.bostonglobe>

that SAMs prevented important evidence of remorse from being introduced in the death penalty proceeding.¹⁸⁰ Indrani Balaratnam, a mitigation specialist reported that in one case, a client had expressed remorse in two different written statements.¹⁸¹ Because of SAMs, however, the defense in that case was not able to use either of those statements for mitigation purposes, which had a huge impact on the ultimate death sentence.¹⁸²

SAMs effectively: 1) prevent prisoners from speaking publicly and 2) prevent media access to prisoners, creating “a system where the government effectively controls the narrative” in a criminal case.¹⁸³ The dangers inherent in a supposedly adversarial system wherein one side has control of the public narrative should be self-evident in a jury trial.¹⁸⁴ Consider the problematic public assumption produced by SAMs in the case of Tsarnaev:

.com/opinion/2015/06/30/will-ever-know-why-dzhokhar-tsarnaev-spoke-end/TLF4CL3QdIQImqcGSKiNaL/story.html (on file with the Columbia Human Rights Law Review) (expounding on defense allegations that SAMs prevented important evidence of remorse from being introduced in the Tsarnaev’s death penalty proceeding); Yale Report, *supra* note 9, at 17.

180. See Gertner, *supra* note 179 (according to the defense, Tsarnaev wrote a letter just months after the bombing expressing remorse for his actions, and agreeing to cooperate with the government. However, the letter was sealed under the government’s SAMs, and his communications were blocked from the outside world).

181. Yale Report, *supra* note 9, at 17.

182. *Id.*; Katharine Seelye, *Dzhokhar Tsarnaev Given Death Penalty in Boston Marathon Bombing*, N.Y. TIMES (May 15, 2015), <https://www.nytimes.com/2015/05/16/us/dzhokhar-tsarnaev-death-sentence.html> (on file with Columbia Human Rights Law Review); see also James Henry, *Dzhokhar Tsarnaev Still Gagged as Death Penalty Appeal Grinds On*, WHO WHAT WHY (Apr. 17, 2018), <https://whowhatwhy.org/2018/04/17/dzhokhar-tsarnaev-still-gagged-as-death-penalty-appeal-grinds-on/> [<https://perma.cc/CVU6-K8JH>].

183. Yale Report, *supra* note 9, at 16.

184. See, e.g., John C. Meringolo, *The Media, the Jury, and the High-Profile Defendant: A Defense Perspective on the Media Circus*, 55 N.Y.L. SCH. L. REV. 981, 994 (2011) (“When the public is exposed to information that is incomplete, factually incorrect, or, even worse, purposefully manipulated, the knowledge gained is injurious to the judicial system.”); Joel Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL’Y & L. 677, 679 (2000) (“Once jurors have been exposed to pretrial publicity, it becomes quite difficult to eliminate its biasing effects. . . . [I]ndividuals exposed to actual media reports of crime also develop a prosecution orientation.”); see also Gerald Wetherington et. al., *Preparing for the High Profile Case: An Omnibus Treatment for Judges and Lawyers*, 51 FLA. L. REV.

The defense reported that there was a 2013 letter from Tsarnaev, written just months after the bombing, about which the government knew. It suggested that letter did demonstrate remorse, and further, that Tsarnaev went so far as to offer to cooperate with the government. The letter was sealed under the government's Special Administrative Measures. SAMs, as these measures are called, were put in place to block a defendant's communications with the outside world, even if those communications contained an apology, had evidentiary value, and — in this case — may have served to dissuade others from following Tsarnaev's lead.¹⁸⁵

In publicized, sensational cases such as the *Tsarnaev* case, where no jury member can truly avoid hearing about the case on the news or from community members, the bare absence of defense communication with the media is suspicious enough to threaten the defendant's case.¹⁸⁶ Silence, in high-profile cases, is thus akin to compelled speech against oneself.¹⁸⁷

425, 474 (1999) (detailing methods to control prejudicial pre-trial publicity, select jurors untainted by prejudicial publicity, and minimize prejudicial publicity during trial, for high-profile cases).

185. Gertner, *supra* note 179. Professor Gertner is a former federal judge, so her thoughts may be of special interest to litigators.

186. *See id.*; *see also, e.g., supra* note 179. The issue of notoriety tainting a jury also implicates the Fourteenth Amendment right to due process. *See, e.g., Estes v. State of Tex.*, 381 U.S. 532, 535 (1965) (holding that the televising and broadcasting of the petitioner's trial deprived him of his fourteenth amendment right to due process).

187. It is well-settled that compelled speech is prohibited by the First Amendment. *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, No. 16-1466, 585 U.S. ___ (2018), 138 S. Ct. 2448, 2463 (2018) (noting how the Court has "held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)); *Riley v. National Federation of Blind of N. C., Inc.*, 487 U.S. 781, 796–97 (1988); *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256–257 (1974); *accord, Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 9 (1986) (plurality opinion).

E. Pre-Trial SAMs Violate the Sixth Amendment Right to Counsel Because Consulting Others is Integral to the Practice of Law

Another line of argument made by defense attorneys focuses on the importance of consultation with third parties in order to provide competent counsel. Like many aspects of the right to counsel, consultation with third parties is so integral a part of the foundation that it normally goes unspoken.¹⁸⁸ Ethical regulations, for example, contemplate attorneys regularly consulting with other attorneys in their firms, even those who are not necessarily working on the same case.¹⁸⁹ Third-party communication is, in practice, necessary for an adequate defense:

When they do investigate, attorneys face high barriers in building trust with witnesses . . . One mitigation specialist described speaking with witnesses close to

188. See, e.g., *United States v. Reid*, 214 F. Supp. 2d 84, 90 (D. Mass. 2002); *United States v. Savage*, No. CRIM. A. 07-550-03, 2012 WL 424993, at *9 (E.D. Pa. Feb. 10, 2012) (holding that the SAMs provision will be modified to allow the defendant to communicate to other members of his defense team for preparing for trial and sentencing).

189. MODEL CODE OF PROF'L RESPONSIBILITY, DR 5-105(D) (AM. BAR ASS'N 1969) (implying that if one lawyer in a firm knows something, every individual at the firm knows it: "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.").

"Chinese Walls" are a method used by firms to avoid the disqualification from representation of an entire firm where an attorney, often a new hire, has a conflict with a particular client. In *Schiessle v. Stephens*, for example, the Seventh Circuit discussed Chinese Walls as a manner to rebut the "presumption of shared confidences" within a firm. It assumed, otherwise, there would be a "flow of confidential information from the 'infected' attorney to any other member of his present firm." *Schiessle v. Stephens*, 717 F.2d 417, 421 (7th Cir. 1983). It is clear from such discussion within one firm, there is a "presumption of shared confidence" that extends to considering legal information as a *contagion*. Chinese Walls, meanwhile, are so onerous that even with a profit motive, firms may fail to comply with the requirements for avoiding disqualification. See, e.g., *Schiessle v. Stephens*, 717 F.2d 417, 421 (7th Cir. 1983) (in which the attorney in question failed to rebut the presumption of shared confidences because there were no institutional mechanisms in place to prevent impermissible information-sharing with members of the attorney's new firm at the time when the attorney changed firms). Attorneys even consult with attorneys outside of their firms, when in doubt, in order to verify that an action they plan to take is ethical. See, e.g., *Ethics Hotline*, ASSOC. OF THE BAR OF NEW YORK, <http://www.nybar.org/member-and-career-services/ethics/hotline> [<https://perma.cc/SM7Z-RHCM>] (last visited Nov. 6, 2017).

the defendant: The “first thing they ask is ‘How’s he doing? What did he say?’” But SAMs prohibit her from answering that basic question. This inability to speak freely “kills the relationship.”¹⁹⁰

In this way, SAMs enable government prosecutors to do more than take advantage of the notoriety of a prisoner—they can create it.¹⁹¹

In the 2008 *Kassir* case, the defense’s brief extolled consultation as essential for zealous advocacy:

Beyond mere inconvenience, certain of the [SAMs] limitations implicate the ability of counsel to advocate zealously on behalf of his client. For example, the limitation on counsel’s ability to rely on paralegals, investigators, and other staff to meet with the defendant, or to share information freely with them prevents counsel from having their staff or the investigator employed by the defense communicate as they see fit with experts or witnesses.¹⁹²

At least one judge finds this convincing; the court in *Reid* stated matter-of-factly that third-party consultation is a type of trial preparation “generally deemed necessary for a proper defense.”¹⁹³

190. Yale Report, *supra* note 9, at 17.

191. *Id.*

192. Def.’s Mem. Supp. Motion to Lift the Special Administrative Measures that Have Been Imposed on Him, at *7–8, *United States v. Kassir*, No. S2 04 CR. 356 (JFK), 2008 WL 2695307 (S.D.N.Y. July, 8 2008).

193. *United States v. Reid*, 214 F. Supp. 2d 84, 90 (D. Mass. 2002). In *Reid*, the court also excused defense counsel from the government’s requirement to sign an affirmation acknowledging the receipt of SAMs, explicitly upholding the right to counsel in the process. *Reid*, 214 F. Supp. 2d at 94 (holding that the affirmation imposed by the Marshals Service as a condition for exercise of prisoner’s Sixth Amendment rights “fundamentally and impermissibly intrude[d] on the proper role of defense counsel,” and that the defense counsel could consult with “third parties who are engaged in the preparation of Mr. Reid’s defense or providing information which is necessary and helpful to that defense” in a modified order) (citing also the case of Lynne Stewart, who at the time had been indicted for knowingly making a false statement when she violated SAMs and signed the affirmation anyway). The judge thus explicitly stated that to require counsel to affirm the receipt of SAMs in writing, and their understanding that SAMs applied to them as well as their client would violate the Sixth Amendment. *Id.* Unfortunately, because the government carefully modified the SAMs to require the affirmation “unless ‘barred by judicial determination’” before the judge ruled, the court’s decision not to require the affirmation in *Reid* is merely an exercise of its discretion and not a case of Sixth

The *Reid* judge also quoted at length from various non-legal sources regarding the importance of being able to discuss the defense strategy with third parties in order to provide competent counsel, saying that he always tells trial lawyers to shop their ideas and consult other attorneys, such that they and their clients may benefit from the experience of the entire profession.¹⁹⁴ In commenting on its own modifications of its Emergency Order, the court noted that the modification—which included removing limits on counsel’s disclosure of information received from Reid—had vindicated Reid’s Sixth Amendment rights.¹⁹⁵ However, because the government had already made this modification, the judge’s comments on this matter are arguably mere *dicta* rather than precedent.¹⁹⁶ Beyond this *dicta*, one of the only victories against SAMs was in *Savage*, where the judge ruled to permit intra-firm communication regarding the case for the sole purposes of trial and sentencing.¹⁹⁷

III. PRE-TRIAL SAMs SHOULD BE SUBJECTED TO HEIGHTENED SCRUTINY

In the hands of an administration which is hostile to democratic values, SAMs may theoretically be wielded against any persons considered undesirable, including whomever is deemed an enemy of the current regime.¹⁹⁸ This lack of limiting principle is extremely perilous. President Trump, for example, has deemed even political protestors demonstrating against white supremacy to be

Amendment constitutional interpretation and so holds no precedential value. *Id.* at 92 (citing Letter from Gerard T. Leone, Jr., Associate United States Att’y, to The Hon. William G. Young regarding Richard C. Reid, app. ¶ 2(a), 214 F.Supp.2d 84 (D. Mass. 2002)); *see also* United States v. Mikhel, 552 F.3d 961, 963–65 (9th Cir. 2009) (modifying SAMs to permit convicted prisoner to use a translator to communicate with his attorney, to allow attorney’s investigators to meet with the inmate, and to allow attorney’s investigators to disseminate inmate’s communications for the purpose of preparing his post-sentencing proceedings).

194. United States v. Reid, 214 F. Supp. 2d at 90 (quoting WILLIAM G. YOUNG, REFLECTIONS OF A TRIAL JUDGE 102 (1st ed. 1998)).

195. *Reid*, 214 F. Supp. 2d at 100.

196. *Id.*

197. United States v. Savage, Crim. A. No. 07-550-03, 2012 WL 424993, at *9 (E.D. Pa. Feb. 10, 2012) (modifying the SAMs provision to allow dissemination of the defendant’s communications to other members of the defense team, but only for the purpose of preparing for trial and sentencing).

198. Yale Report, *supra* note 9, at 21–22.

“dangerous.”¹⁹⁹ SAMs should thus be subject to much more rigorous judicial oversight than is currently in place.

A. Courts are Already Troubled by SAMs’ Impact on Sixth Amendment Rights

Detainees have brought a variety of arguments alleging Sixth Amendment violations, involving discovery issues, contact visits, third-party consultation, and the effect of the conditions themselves on the defendant, with little success.²⁰⁰ What sympathy judges have for prisoners subjected to SAMs, however, seems to be drawn out by Sixth Amendment claims.²⁰¹ The magistrate judge in *Basciano* called the burden placed by SAMs on the defense the “most troubling single

199. Josh Sanburn & TIME, *President Trump Just Signaled Some Dramatic Changes for Police and Criminal Justice*, FORTUNE (Jan. 21 2017), <http://fortune.com/2017/01/21/president-trump-criminal-justice> (on file with the Columbia Human Rights Law Review). As one illustration of how changing administrations can change justice when the relationship of individual rights to the government is one of trust, take Lynne Stewart. She violated SAMs in 2000, and was “reprimanded—but not prosecuted—by the Clinton Administration” but in the spring of 2002, John Ashcroft, U.S. Attorney General under the George W. Bush Administration, announced her indictment. Rovner & Theoharis, *supra* note 11, at 1374.

200. See, e.g., *Yousef v. Reno*, 254 F.3d 1214, 1221 (10th Cir. 2001) (denying *Bivens* action to lift SAMs which allegedly constituted First and Sixth Amendment violations because defendant failed to exhaust administrative remedies); *United States v. Kassir*, No. S2 04 CR. 356 (JFK), 2008 WL 2695307, at *5–6 (S.D.N.Y. July 8, 2008) (denying defendant’s motion to lift SAMs); *Basciano v. Lindsay*, 530 F. Supp. 2d 435, 449 (E.D.N.Y. 2008) (denying habeas petition of prisoner serving life in prison and praising the government in its flexible implementation of SAMs); see also *supra* Section II.

201. See, e.g., *Kassir*, 2008 WL 2695307, at *4, 6 (denying the defendant’s application but discussing Sixth Amendment implications in its analysis); *United States v. Reid*, 214 F. Supp. 2d 84, 91 (D. Mass. 2002) (modifying SAMs in the “shoe bomber case” at request of defense attorney to avoid violating defendant’s Sixth Amendment right to counsel); *United States v. Hale*, No. 03 CR 11, 2003 WL 1989620, at *1 (N.D. Ill. Apr. 28, 2003) (observing *sua sponte* that, due to SAMs, defendant was unable to have private consultation with his defense attorneys for around six weeks, and granting a continuance partly as a result of this circumstance). Note that deprivation of counsel due to SAMs implicates the Sixth Amendment only if the deprivation of counsel took place in the course of some criminal prosecution. *Sattar v. Gonzales*, No. 07–cv–02698–WDM–KLM, 2008 WL 5712727, at *3 (D. Colo. Mar. 6, 2009) (recommending that, because plaintiff failed to allege existence of a criminal prosecution, he failed to state a plausible claim for Sixth Amendment relief).

circumstance” of the defendant’s incarceration.²⁰² Even opinions upholding SAMs may include lengthy explanations of why the SAMs do not infringe upon the defendant’s due process rights to participate in the preparation of his defense,²⁰³ suggesting that judges were most troubled by the issue of access to counsel in the course of preparing for litigation.²⁰⁴

B. Currently, Inadequate Internal Checks Make SAMs Self-sustaining

Courts have consistently deferred to vague governmental arguments that SAMs are necessary on the basis of broad allegations of “national security interests.”²⁰⁵ This has limited meaningful judicial review of the justifications for SAMs.²⁰⁶ SAMs also have great potential to be self-sustaining, by silencing prisoners who suffer SAMs-related abuses. SAMs “prohibit defendants, attorneys and their families from communicating *about* the SAMs to each other—or anyone else.”²⁰⁷ As a result, lawyers, as well as family members of prisoners subject to SAMs also often reject interviews with journalists, due to anxieties about possible prosecution.²⁰⁸ This makes it difficult to even obtain updated information about the extent of the implementation of SAMs.²⁰⁹

202. *Basciano v. Martinez*, No. 07CV421(NGG)(RML), 2007 WL 2119908, at *7 (E.D.N.Y. May 25, 2007) (describing restrictions placed by the BOP on all inmates housed in Unit 10 South of the MCC, not by the defendant’s SAMs). This concern was mooted before the district court could rule on it. *Basciano v. Lindsay*, 530 F. Supp. 2d 435, 437 (E.D.N.Y. 2008).

203. *See, e.g., Kassir*, 2008 WL 2695307, at *4, 6 (S.D.N.Y. July 8, 2008) (denying the defendant’s application but discussing Sixth Amendment implications in its analysis); *Hale*, 2003 WL 1989620, at *1 (N.D. Ill. Apr. 28, 2003) (defendant could not speak privately with his defense attorneys for around six weeks but only a continuance was granted).

204. *See, e.g., United States v. Ali*, 396 F. Supp. 2d 703, 707–10 (E.D. Va. 2005) (discussing why the SAMs do not infringe upon the defendant’s due process rights to participate in the preparation of his defense); *Basciano v. Lindsay*, 530 F. Supp. 2d at 449–50 (discussing petitioner’s access to counsel in the course of preparing for litigation under SAMs and the reason that the SAMs did not violate petitioner’s right to substantive due process).

205. Yale Report, *supra* note 9, at 26.

206. *Id.*

207. HRW Report, *supra* note 1, at 141 (emphasis added).

208. Yale Report, *supra* note 9, at 20.

209. The most recently updated official information available is from a 2009 Department of Justice factsheet, which states that 44 persons were then under SAMs. Press Release, U.S. Dep’t of Justice, Fact Sheet: Prosecuting and Detaining

In theory, the BOP could choose to modify SAMs in response to changed circumstances,²¹⁰ but in reality, prisoners subject to SAMs have been forced to bring civil suit challenging the restrictions on their communications. Take the example of *Yousef v. Reno*. In *Yousef*, the judge sentenced the defendant to life in prison without parole, recommending that he spend the entire sentence in solitary confinement.²¹¹ He was subjected to SAMs due to his “association with terrorist activities.”²¹² The judge recommended that Yousef be visited “only by his lawyers,”²¹³ and specifically suggested that prison officials should bar Yousef from calling his family on the phone.²¹⁴ In recommending these especially restrictive conditions, Judge Duffy said he was trying to “tailor the punishment to fit the criminal, not the crime.”²¹⁵ At that time these conditions were extremely rare, and he would have been one of seven held under such conditions, out of the 114,000 prisoners held in the federal system in 1998.²¹⁶

During Yousef’s original defense case, he filed both a formal and informal application for review of these measures, and then filed a *Bivens* action alleging, among others, First and Sixth Amendment violations.²¹⁷ All of these were denied.²¹⁸ Unlike some circuits,²¹⁹ the court held that neither futility nor the inadequacy of the type of administrative relief available excuses a plaintiff from the requirements of administrative exhaustion.²²⁰

Terror Suspects in the U.S. Criminal Justice System (June 9, 2009), <http://www.justice.gov/opa/pr/2009/June/09-ag-564.html> [<https://perma.cc/9JZS-LN5L>].

210. See *Yousef v. Reno*, 254 F.3d 1214, 1222 (10th Cir. 2001) (“the BOP can and does evaluate the merits of individual constitutional challenges and may modify particular conditions of an inmate’s confinement.”).

211. Peg Tyre, ‘Proud terrorist’ Gets Life for Trade Center Bombing, CNN (Jan. 8, 1998), <http://www.cnn.com/US/9801/08/yousef.update/> [<https://perma.cc/Z53U-EWGA>] [hereinafter Proud Terrorist].

212. *Yousef*, 254 F.3d at 1216.

213. Proud Terrorist, *supra* note 211.

214. Benjamin Weiser, *Mastermind Gets Life for Bombing of Trade Center*, N.Y. TIMES (Jan. 9, 1998), <https://www.nytimes.com/1998/01/09/nyregion/mastermind-gets-life-for-bombing-of-trade-center.html> (on file with the Columbia Human Rights Law Review).

215. *Id.*

216. *Id.*

217. *Yousef*, 254 F.3d at 1216–17.

218. *Id.* at 1222.

219. See Proud Terrorist, *supra* note 211.

220. *Yousef v. Reno*, 254 F.3d 1214, 1221 (10th Cir. 2001) (construing *Booth v. Churner*, 532 U.S. 731, 739 (2001)). *But see* *United States v. Lopez*, 327 F.

In 2011, Yousef again challenged his SAMs in court.²²¹ Yousef argued that despite his good behavior in prison, he was subjected to isolation because of his status as a convicted terrorist.²²² Since this status is “something he can never change,”²²³ Yousef argued that his restrictions violated due process.²²⁴ In response to Yousef’s requests to be released from solitary, the warden wrote to him in November of 2012: “You are a violent jihadist, committed to waging war on the United States, with a strong following of supporters and admirers. There is substantial risk that your communications or contacts could result in death or serious bodily injury to others.”²²⁵ At that time, Yousef had been in prison for over fourteen years, with no allegations of violent acts or attempted violent acts from prison.²²⁶

In *Yousef v. United States*, the District of Colorado cited its earlier decision in *Sattar v. Holder*²²⁷ for the proposition that it was appropriate to base the risk assessment on the nature of the allegations or conviction.²²⁸ More questionably, the court in *Yousef* also held that basing SAMs on an incarcerated person’s status as a major

Supp. 2d 138, 140 (D.P.R. 2004); *United States v. Hashmi*, 621 F. Supp. 2d 76, 84 (S.D.N.Y. 2008); *Ayyad v. Gonzales*, No. 05-CV-02342-WYD-MJW, 2008 WL 2955964 (D. Colo. July 31, 2008); *Sattar v. Gonzales*, No. CIV.A 07CV026 98WDMKL, 2010 WL 685787, at *5 (D. Colo. Feb. 23, 2010).

221. *Yousef*, 2014 WL 2892251, at *1; Sanchez, *supra* note 174.

222. Serrano, *supra* note 172.

223. *Id.*

224. *Id.* By April of 2016, however, Yousef had finally been permitted to enter the next stage of the “step down” program, and now gets additional hours outside his cell. Robert Windrem, *Worse than Guantanamo? Terror Suspects Face Infamous Colorado Supermax*, NBC NEWS (Apr. 19, 2016), <http://www.nbcnews.com/news/us-news/new-prison-would-be-safer-harsher-much-colder-guantanamo-n542741> [http://perma.cc/F625-YWVX].

225. Serrano, *supra* note 172.

226. *Yousef v. United States*, No. 12-CV-2585-RPM, 2014 WL 2892251, at *2 (D. Colo. June 26, 2014) (“Yousef also argues that the passage of time and his relatively clean record in prison should diminish the weight of the nature of his crime in this analysis.”) (citation omitted); Sanchez, *supra* note 174 (“Yousef, who has had a clear conduct record for *at least* five years, has worked as an orderly, which allows him out of his cell a few hours a week to clean other cells.”) (emphasis added).

227. *Sattar v. Holder*, No. 07-CV-02698-PAB-KLM, 2012 WL 882401, at *8 (D. Colo. Mar. 15, 2012).

228. *Yousef*, 2014 WL 2892251, at *1. *Sattar*, 2012 WL 882401, at *8 (“[T]he penological interest [considered in the balancing test] need not be related only to post-incarceration conduct. Prison officials are permitted to consider the nature of the underlying crime for which a prisoner was convicted.”).

terrorist icon is acceptable.²²⁹ If this were the case, a person's notoriety with a dangerous group would be sufficient to restrict that individual's constitutional rights, regardless of his or her individual intent or ability to commit future violent crimes.²³⁰ The widespread use of SAMs is particularly troubling under the Trump administration, which has specifically advocated the use of torture.²³¹ The relationship between individuals and a vastly powerful government should not be one of trust, but instead one based on strong, institutional protections of individual rights. Without such protections, the door to abuse is left open. In the hands of an administration which is hostile to democratic values, SAMs may theoretically be wielded against any person deemed "undesirable," including whomever is deemed an enemy of the regime.²³²

C. Current Balancing Tests are Inadequate

1. *Bell v. Wolfish*

SAMs legislation originated after the creation of judge-made tests for assessing the constitutionality of conditions of confinement. I submit that these tests are insufficient to assess Sixth Amendment

229. *Yousef*, 2014 WL 2892251, at *2 (reasoning that "[w]hile Yousef may be frustrated that he remains a motivating force for extremists, that is not, as Mr. Kleinman contended, out of his control; no one forced Yousef to bomb the World Trade Center.").

230. Aside from violating various constitutional rights, this would be a serious perversion of the original intent of SAMs. See 28 C.F.R. § 501.3(a) (2001) ("Upon direction of the Attorney General, the Director, Bureau of Prisons, may authorize the Warden to implement special administrative measures that are reasonably necessary to protect persons against the risk of death or serious bodily injury.").

231. Yale Report, *supra* note 9, at 2; see Vincent Charles Keating, *Will Donald Trump Bring Back Torture? Foreign Leaders Might Need to Step up to Stop Him*, THE CONVERSATION (Jan. 21, 2017), <http://theconversation.com/will-donald-trump-bring-back-torture-foreign-leaders-might-need-to-step-up-to-stop-him-70932> [<https://perma.cc/VBV5-3D3G>]; Jenna Johnson, *Trump Says 'Torture Works,' Backs Waterboarding and 'Much Worse,'* WASH. POST (Feb. 17, 2016), https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425_story.html?utm_term=.87c93ac6edf5 (on file with the Columbia Human Rights Law Review).

232. Yale Report, *supra* note 9, at 22; see also Sanburn, *supra* note 199 (describing President Trump's "law and order" approach to criminal justice and criticism of protest movements).

challenges to SAMs. In *Bell v. Wolfish*, a pre-trial detainee challenged various conditions of his confinement including, among others, the double-bunking of prisoners, “shake-down” inspections by prison officials, body cavity searches, and various prohibitions on mail packages.²³³ The Supreme Court held that absent a showing of express intent to punish, a restriction imposed on a pre-trial detainee shall be permissible, as long as it is reasonably related to a legitimate non-punitive governmental objective.²³⁴

In *Wolfish* the Supreme Court said that in the absence of “substantial evidence” showing prison officials had “exaggerated their response to these considerations, courts should ordinarily defer to [prison officials’] expert judgment in such matters.”²³⁵ The Court in this case also held that the presumption of innocence has “no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun,”²³⁶ and clarified that there is no requirement that prison officials make a showing of “compelling necessity” to justify a pre-trial detainee’s conditions of confinement, even where the conditions may threaten constitutional rights.²³⁷ The focus, according to the Court, should be on whether pre-trial conditions amount to punishment.²³⁸

The Court in *Bell v. Wolfish*, however, did not have dangerous terrorism suspects in mind, but was instead sketching out the general relationship between prisoners—pre-trial and post-conviction—with the institutional needs and objectives of prisons.²³⁹ This case also concerned a facility in which pre-trial detainees were being held for no more than sixty days.²⁴⁰ The case has been misconstrued, however, and applied to uphold pre-trial SAMs, even when the restrictions have been applied for much longer periods of time and caused much more harmful effects than the conditions in *Wolfish*.²⁴¹ In *Wolfish*, the Court found it

233. *Bell v. Wolfish*, 441 U.S. 520, 520 (1979).

234. *Id.* at 538–39.

235. *Id.* at 548 (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

236. *Id.* at 533.

237. *Id.* at 532.

238. *Id.* at 535.

239. *Id.* at 546 (“There must be a ‘mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.’ This principle applies equally to pretrial detainees and convicted prisoners.” (citations omitted)).

240. *Id.* at 552.

241. *See, e.g.*, *United States v. El-Hage*, 213 F.3d 74, 81 (2d Cir. 2000) (finding that the length of El-Hage’s stay did not violate his rights to due process).

meaningful that the pre-trial detainees were only subjected to the overcrowded conditions²⁴² for sixty days or less:

Detainees are required to spend only seven or eight hours each day in their rooms, during most or all of which they presumably are sleeping. The rooms provide more than adequate space for sleeping. During the remainder of the time, the detainees are free to move between their rooms and the common area. . . . Our conclusion in this regard is further buttressed by the detainees' length of stay at the MCC. Nearly all of the detainees are released within 60 days. We simply do not believe that requiring a detainee to share toilet facilities and this admittedly rather small sleeping place with another person for generally a maximum period of 60 days violates the Constitution.²⁴³

The Court in *Wolfish* also cited to *Hutto v. Finney's* rationale for finding these conditions constitutional.²⁴⁴ In *Hutto*, the Court held that "the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards. A filthy, overcrowded cell and a diet of 'gruel' might be tolerable for a few days and intolerably cruel for weeks or months."²⁴⁵ SAMs, meanwhile, have been imposed for years at a time before trial, with little or no review.²⁴⁶ *Bell*

El-Hage was held incommunicado for fifteen months prior to trial, resulting in a seriously degraded mental state. Brief in Support of Defendant Wadih El-Hage's Motion for Bail and/or Other Relief, No. 00-1025, at 7, 53–54, *United States v. El-Hage*, 213 F.3d 74 (2d Cir. 2000).

242. The facility was in the practice of housing two detainees per room, where the rooms were designed for single individuals. *Wolfish*, 441 U.S. at 528.

243. *Id.* at 543 (citations omitted).

244. *Hutto v. Finney*, 437 U.S. 678, 682–84, 687 (1978) (holding, among other things, that the district court's finding that conditions in isolation cells violated the Eighth Amendment was sustained by evidence of prisoners' diets, overcrowding, rampant violence, vandalized cells, and lack of professionalism on the part of maximum security personnel, and that the district court did have the authority to place a limitation of thirty days on confinement of any given individual prisoner in these isolation cells).

245. *Id.* at 686–87.

246. For example, Fahad Hashmi was isolated and banned from speaking with his mother for the three years he spent in the MCC before trial, and Uzair Paracha was held in isolation for two and a half years before trial. Yale Report, *supra* note 9, at 7, 11.

v. Wolfish is therefore an improper test to review SAMs and other ongoing pre-trial prison conditions in the context of high-profile and slow-moving cases.²⁴⁷ The restrictions on contact meetings with attorneys would be upheld by the courts under the *Wolfish* analysis, unless there was substantial evidence that the SAMs were baseless. I suggest that the Court instead adopt the logic of the Ninth and Third Circuits in *Ching* and *Larkin*²⁴⁸ with regard to contact visits, and overturn *Wolfish* in light of the substantial threat the current test presents to the integrity of our judicial system.

2. *Turner v. Safley*

Courts apply the *Turner* test to determine the constitutionality of prison regulations generally.²⁴⁹ In *Turner v. Safley*, the Supreme Court examined the constitutionality of a prison's mail and marriage regulations. In order to do so, the Court weighed several factors: (1) whether there is "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it;" (2) whether the governmental interest put forward to justify it is indeed legitimate and neutral; (3) "whether there are alternative means of exercising the right that remain available to prison inmates;" (4) the impact that accommodation of the asserted constitutional right will have on guards, other inmates, and the allocation of prison

247. See, e.g., James E. Robertson, *The Rehnquist Court and the "Turnerization" of Prisoners' Rights*, 10 N.Y. CITY L. REV. 97, 101, 105 (2006) (arguing, among other things, that *Wolfish* represented the halt of the 20th century expansion of prisoners' rights, and describing *Wolfish* itself thusly: "The facts of the record mattered little, because a majority of the justices accepted at face value the defendant's security concerns and accorded them greater weight than the liberty interests of persons presumed innocent."); Fred Cohen, *The Limits of Judicial Reform of Prisons: What Works; What Does Not*, 40 CRIM. L. BULL. 421, 441 n.101 (2004) ("If the poet laureate of New York were named a prison warden on January 1, he would be a corrections expert in the *Bell v. Wolfish* mode the following morning.").

248. *Ching v. Lewis*, 895 F.2d 608, 610 (9th Cir. 1990) (holding that a prisoner's right to the courts includes the ability to communicate with counsel); *Young v. Larkin*, 871 F. Supp. 772, 783 (M.D. Pa. 1994) (holding the same).

249. See, e.g., *Ben-Levi v. Brown*, 136 S. Ct. 930, 932 (2016) (weighing restrictions on attending Jewish Bible study with other inmates against the correctional facility's public safety policy); *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 344–47 (2012) (weighing officials' ability to search newly admitted prisoners for contraband against inmate privacy); *Beard v. Banks*, 548 U.S. 521, 521 (2006) (weighing restricted access to newspapers, magazines, and photographs against inmates' First Amendment rights).

resources; and (5) whether there is an obvious, easy alternative to regulation that will accommodate the prisoners' rights "at *de minimis* cost to valid penological interest."²⁵⁰ The Court held that the inmate-to-inmate correspondence limits were constitutional, as the restrictions were reasonably related to legitimate security concerns of prison officials.²⁵¹ The Court struck down the inmate marriage regulation as not reasonably related to any legitimate penological objective.²⁵²

This test has been used to justify upholding inappropriate SAMs. For example, the court in *Hashmi* applied the *Turner* test, finding his SAMs constitutional.²⁵³ This subjected Hashmi to SAMs for years before trial.²⁵⁴ Current judicial tests for prison conditions were inadequate to prevent this serious Sixth Amendment violation.²⁵⁵ The court in *Hashmi*, for example, cited the totally non-analogous *Felipe* and *El-Hage* cases in support of the assertion that the restrictions imposed were a "rational means" towards the legitimate penological objective of limiting the risk that "Hashmi's communications could result in death or seriously [sic] bodily injury to other persons."²⁵⁶ However, the court did not consider the different levels of extremity in the accused crimes. Recall that Hashmi's accused crimes were non-violent.²⁵⁷ El-Hage, at the time, had been indicted for a major international bombing and Felipe had committed numerous murders from behind bars.²⁵⁸

250. *Turner v. Safley*, 482 U.S. 78, 89–91 (1987) (challenging regulations permitting correspondence between inmates only where both inmates are immediate family members, or between inmates where the correspondence is "concerning legal matters," and requiring both the prison superintendent's permission and "compelling reasons" to permit an inmate to marry).

251. *Id.* at 93.

252. *Id.* at 99.

253. *United States v. Hashmi*, 621 F. Supp. 2d 76, 86 (S.D.N.Y. 2008). Note that, arguably, *Bell v. Wolfish*, 441 U.S. 520 (1979) should have been applied, as *Hashmi* was still pre-trial.

254. Yale Report, *supra* note 9, at 14.

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

256. *Id.*

257. *Id.* at 78.

258. See *United States v. El-Hage*, 213 F.3d 74, 77 (2d. Cir. 2000); *United States v. Felipe*, 148 F.3d 101, 105 (2d Cir. 1998).

3. Current Tests Do Not Hedge Against Bias on the Part of Judges

It is perilous to leave our rights at the bare discretion of judges, who are subject to many of the same outside influences as juries.²⁵⁹ Judges have consistently upheld general BOP application of SAMs to prisoners accused of al-Qaeda membership, in spite of a high human cost.²⁶⁰ SDNY Judge John Keenan, for example, brushed aside worries about over-application of SAMs to those accused of associating with al-Qaeda, referring to the current BOP practice of treating prisoners accused of non-violent terrorism-related offenses the same as prisoners with a history of violence and al-Qaeda leadership as simply “treating like cases alike.”²⁶¹ The judge in *Kassir* made generalizations about the legitimacy of SAMs for all those accused of material support of al-Qaeda without any regard for individual circumstances.²⁶² This is not analogous to saying “people who have been indicted for murder tend to be violent,” but is instead analogous to saying, “people who are associated with the Italian mafia all pose an ongoing risk of violence from behind bars,” even if the association was “pool boy to the Godfather.” Aiding and abetting an illegal business by way of

259. See, e.g., *United States v. Lyons*, 739 F.2d 994, 999 (5th Cir. 1984) (Rubin, J., dissenting) (explaining that “[l]ike everyone else, judges watch television, read newspapers and magazines, listen to gossip, and are sometimes themselves victims.”); Linda Greenhouse, *In New York Visit, O’Connor Foresees Limits on Freedom*, N.Y. TIMES, (Sept. 29, 2001), <https://www.nytimes.com/2001/09/29/us/nation-challenged-supreme-court-new-york-visit-o-connor-foresees-limits-freedom.html> (on file with Columbia Human Rights Law Review) (statement of Justice Sandra Day O’Connor) (“[W]e’re likely to experience more restrictions on our personal freedom than has ever been the case in our country.”).

260. See, e.g., *United States v. Warsame*, 651 F. Supp. 2d 978, 980 (D. Minn. 2009) (upholding SAMs against defendant accused of material support in the form of teaching English in al-Qaeda-affiliated medical clinic); *United States v. Kassir*, No. S2 04 CR. 356 (JFK), 2008 WL 2695307, at *1 (S.D.N.Y. July 8, 2008) (upholding SAMs against an alleged member of Al-Qaeda indicted for providing information and training to help others commit violent acts); *United States v. Hashmi*, 621 F. Supp. 2d 76, 86 (S.D.N.Y. 2008) (upholding SAMs against a prisoner who was charged with material support of Al-Qaeda, whose SAMs were apparently based on his pre-incarceration behavior); *United States v. Ali*, 396 F. Supp. 2d 703, 710 (E.D. Va. 2005) (upholding SAMs on procedural grounds against a prisoner affiliated with an al-Qaeda cell).

261. Importantly, while surely facing serious allegations, *Kassir* was not even accused of being involved in any particularized incidents of violence. *United States v. Kassir*, No. S2 04 CR. 356 (JFK), 2008 WL 2695307, at *1 (S.D.N.Y. July 8, 2008).

262. *Id.* at *3.

chlorination does not exactly lend itself to a likelihood that said prisoner would commit murders from behind bars.

D. The Sixth Amendment, Rational Basis Scrutiny, Compelling Necessity and the Problem of Punishment: Courts Should Subject SAMs to Heightened Scrutiny

1. The Court Should Adopt Heightened Scrutiny for SAMs, Adopting the Logic of the Dissent in *Wolfish*

As noted by Andrew Dalack, “[t]he government’s interest in imposing SAMs on terrorism defendants is specific to the individual defendant’s circumstances.”²⁶³ An assessment of this interest should take into account not only the defendant’s *intent* to cause serious bodily harm, but their *ability* to do so:

In many of the cases where the attorney general has imposed pretrial SAMs, the defendants not only failed to demonstrate an intention to abuse third-party communications, but they also arguably lacked the sufficient third-party contacts to abuse in the first place.²⁶⁴

One may nickname it “the problem of the incompetent terrorist.” If malicious intent is high but capacity to cause harm is zero, the government should not be allowed to impose conditions of confinement which abridge constitutional rights. To do otherwise would be to fail to narrowly tailor the regulation to further the government’s interest of preventing grievous bodily injury and death as a result of terrorism.

One solution to this problem is requiring the government to have “probable cause that any suspected terrorist may attempt to use third-party communications to commit additional acts of terror or violence” in order to impose SAMs.²⁶⁵ The evidence upon which the Attorney General bases his decision to impose SAMs should be made explicit and available to defense counsel for review.²⁶⁶ Several

263. Dalack, *supra* note 27, at 425 (showing that in some terrorism cases involving Arab and Muslim defendants, SAMs were not formally imposed).

264. *Id.* at 429.

265. *Id.* at 442.

266. *Id.* at 442 (arguing that it is possible to prosecute suspected terrorists without depriving them of their constitutional rights).

circuit courts exempt SAMs challenges from the PLRA²⁶⁷ exhaustion requirement.²⁶⁸ I support these recommendations, and further propose heightened scrutiny in the context of judicial review of the BOP's implementation of these measures. The right to counsel and to assist in one's own defense are fundamental rights, and any regulation which threatens them, as all SAMs do, should be subject to strict scrutiny. While the governmental interest in these cases is almost always compelling, SAMs often fail to be narrowly tailored.

Currently, the low bar for the government's justification of SAMs does not require narrowly tailoring SAMs. As long as someone is accused of any affiliation with terrorists or terror organizations, the SAMs are presumptively valid, no matter how harsh their results or how nonviolent the prisoner.²⁶⁹ This is because both the rational basis test employed in *Turner* and the logic of *Bell v. Wolfish* tend to favor the government.²⁷⁰ Both *Wolfish* and *Turner*, however, had four-justice dissents.²⁷¹

Bell v. Wolfish overturned the lower court's holding in *Wolfish v. Levi*, in which the Second Circuit held that "pretrial detainees may be subjected to only those 'restrictions and privations' which 'inhere in their confinement itself or which are justified by compelling necessities

267. 42 U.S.C. § 1997e (2012).

268. See *supra* note 41.

269. See, e.g., *United States v. Ali*, 396 F. Supp. 2d 703, 708 (E.D. Va. 2005) (upholding SAMs on procedural grounds against a prisoner affiliated with an al-Qaeda cell who was never conclusively linked to any particular murders and for whom there was no particular evidence of true ongoing risk of future violence from behind bars); *United States v. Hashmi*, 621 F. Supp. 2d 76, 86 (S.D.N.Y. 2008) (upholding SAMs against defendant accused of allowing an al-Qaeda affiliated individual to stay with him for two weeks, store rain gear at his apartment, borrow his cell phone, and borrow a small sum of money); see also, Sentencing Memorandum for Defendant, *United States v. Hashmi*, 621 F. Supp. 2d 76 (S.D.N.Y. 2010) (No. 1:06CR00442) (providing case facts); *United States v. Warsame*, 651 F. Supp. 2d 978, 981 (D. Minn. 2009); *United States v. Kassir*, No. S2 04 CR. 356 (JFK), 2008 WL 2695307, at *1 (S.D.N.Y. July 8, 2008) (upholding SAMs against a al-Qaeda-affiliated prisoner who was never accused of causing any particular acts of violence).

270. *Turner v. Safley*, 482 U.S. 78, 100–01 (1987) (Stevens, J., dissenting) (citations omitted); *Bell v. Wolfish*, 441 U.S. 520, 565–66 (1979) (Marshall, J., dissenting).

271. *Bell v. Wolfish*, 441 U.S. 520, 563 (1979) (Brennan, J., Marshall, J., and Stevens, J., dissenting, Powell J., concurring in part and dissenting in part, expressing that reasonable suspicion should be required to justify the visual cavity searches described in the case); *Turner v. Safley*, 482 U.S. 78, 100 (1987) (Blackmun, J., Brennan, J., Marshall, J., and Stevens, J., dissenting).

of jail administration.”²⁷² In the *Bell v. Wolfish* Marshall dissent, the Justice explained his preference for applying strict scrutiny under due process:

At a minimum, I would require a showing that a restriction is substantially necessary to jail administration. Where the imposition is of particular gravity, that is, where it implicates interests of *fundamental importance* or inflicts significant harms, the Government should demonstrate that the restriction serves a *compelling necessity* of jail administration.²⁷³

Marshall went on to explain that because “individuals have a fundamental First Amendment right to receive information and ideas,” the government was thus required to show that its rule serves a compelling necessity, as its restriction vis-a-vis acceptable senders of printed materials should be subject to heightened scrutiny.²⁷⁴ He came to the same conclusion regarding visual cavity searches.²⁷⁵ The Stevens dissent, which was joined by Justice Brennan, considers *the right not to be punished* while innocent in the eyes of the law *itself* as fundamental under the due process clause.²⁷⁶

The four-person dissent in *Turner* echoed the problems addressed by the dissents of *Wolfish*:

[I]f the standard can be satisfied by nothing more than a “logical connection” between the regulation and any legitimate penological concern perceived by a cautious warden, it is virtually meaningless. Application of the standard would seem to permit disregard for inmates’ constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged

272. *Wolfish v. Levi*, 573 F.2d 118, 124 (2d Cir. 1978) (quoting *Rhem v. Malcolm*, 507 F.2d 333, 336 (2d Cir. 1974)), *rev'd sub nom.*, *Bell v. Wolfish*, 441 U.S. 520 (1979).

273. *Bell v. Wolfish*, 441 U.S. 520, 570 (1979) (Marshall, J., dissenting) (emphasis added).

274. *Id.* at 573.

275. *Id.* at 578.

276. *Bell v. Wolfish*, 441 U.S. 520, 580 (1979) (Stevens, J., dissenting, joined by Brennan, J.).

regulation. Indeed, there is a logical connection between prison discipline and the use of bullwhips on prisoners²⁷⁷

The Supreme Court in *Turner* did not examine conditions of confinement under the lens of heightened scrutiny.²⁷⁸ The district court, however, did.²⁷⁹ In particular, it deemed activities such as correspondence between inmates and inmate marriage to be fundamental rights, and thus barred limitations on their exercise unless they constituted the least-restrictive method to achieving penal goals.²⁸⁰ It described communication as “like marriage,” in that it was “one of the basic human rights.”²⁸¹ The court of appeals affirmed, using the same heightened scrutiny, and stating broadly that “[t]he right to exchange letters with another is clearly a fundamental free speech value.”²⁸²

Some states have evaded *Wolfish*, instead construing state law as more protective of individual rights.²⁸³ The Supreme Court should follow suit and recognize pre-trial access to counsel as a fundamental

277. *Turner v. Safley*, 482 U.S. 78, 100–01 (1987) (Stevens, J., concurring in part and dissenting in part) (citations omitted).

278. *Id.*

279. *Safley v. Turner*, 586 F. Supp. 589, 596 (W.D. Mo. 1984).

280. *Id.*

281. *Id.*

282. *Id.* *Safley v. Turner*, 777 F.2d 1307, 1311 (8th Cir. 1985), *aff'd in part, rev'd in part*, 482 U.S. 78 (1987).

283. New York, for example, has rejected *Bell v. Wolfish* to adopt a test that balances “the harm to the individual resulting from the condition imposed” against “the benefit sought by the government through enforcement,” a standard which seems to echo intermediate scrutiny. *People v. LaValle*, 3 N.Y.3d 88, 127 (2004) (citing *Cooper v. Morin*, 49 N.Y.2d 69 (1979)).

right,²⁸⁴ and examine pre-trial access to counsel under strict scrutiny, not rational basis as in *Turner*.²⁸⁵

The Yale report goes further, recommending the ban of all SAMs, regardless of the resulting risk to the public, citing the U.S. government's obligation under international law to refrain from torture under all circumstances.²⁸⁶ I would ban SAMs in all cases where the restrictions result in torture under international law; and certainly, abolishing SAMs in *all* cases would prevent them from unnecessarily abridging defendants' Sixth Amendment rights.

2. The Right to Contact with the Media in Highly Political Cases

The right to pre-trial access to counsel implicates the integrity of the entire justice system, including the legal profession.²⁸⁷ I argue that judges should thus read an expanded Sixth Amendment right to counsel as including consultation with third parties—especially

284. See, e.g., *Powell v. State of Ala.*, 287 U.S. 45, 57 (1932) (noting, in a pre-*Gideon* rape case, that between arraignment and trial, “consultation [with counsel], thorough-going investigation and preparation were vitally important” to the defense, and holding that the denial of counsel during that time before a capital trial was a denial of due process, where defendants were “young, ignorant, illiterate, and surrounded by hostile sentiment”); *Maine v. Moulton*, 474 U.S. 159, 170 (1985) (“[T]o deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.”); *United States v. Wade*, 388 U.S. 218, 224 (1967) (“Today’s law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused’s fate and reduce the trial itself to a mere formality.”); *Wolfish v. Levi*, 573 F.2d 118, 133 (2d Cir. 1978) (“[O]ne of the most serious deprivations suffered by a pretrial detainee is the curtailment of his ability to assist in his own defense.”), *rev’d on other grounds*; *Bell v. Wolfish*, 441 U.S. 520 (1979); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051 (8th Cir. 1989) (when pre-trial detainees’ interest in effective communication with attorneys is “inadequately respected during pre-trial confinement, the ultimate fairness of their eventual trial can be compromised”); *Benjamin v. Fraser*, 264 F.3d 175, 185 (2d Cir. 2001) (stating that unreasonable interference with the accused’s ability to consult counsel impairs the right to such counsel).

285. *Roe v. Wade*, 410 U.S. 113, 155 (1973), *holding modified by* *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992) (“Where certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest,’ and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.”) (citations omitted).

286. Yale Report, *supra* note 9, at 27.

287. See *supra* note 284.

in highly political cases. SAMs as currently practiced constitute “[r]egulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts,” and thus are constitutionally invalid.²⁸⁸

While the ABA Model Rules of Professional Conduct prohibit certain sensitive out-of-court statements, they do allow attorneys to “make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client.”²⁸⁹ But whereas defense attorneys currently must avoid educating the public about the defendant’s side of the case, for fear of facing criminal penalties including incarceration,²⁹⁰ the government is able to leak negative information about the prisoner’s supposed dangerousness, or lack of remorse, with impunity.²⁹¹ In publicized, sensational cases such as the *Tsarnaev* case, the mere absence of defense communication with the media may threaten the defendant’s case.²⁹²

The Supreme Court has already recognized that in some cases, attorney communication to the press is actually necessary to guarantee

288. *Procunier v. Martinez*, 416 U.S. 396, 419 (1974), *overruled on other grounds* by *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

289. MODEL RULES OF PROF’L CONDUCT r. 3.6(A), (C) (AM. BAR ASS’N 2011) (prohibiting statements that have a “substantial likelihood of materially prejudicing” the proceeding).

290. *See, e.g., United States v. Stewart*, 590 F.3d 93, 98–100 (2d Cir. 2009) (upholding the conviction of attorney Lynne Stewart for violating the SAMs imposed on her client Abdel Rahman by facilitating communication between Rahman and outside contacts regarding his opposition to a cease-fire in Egypt). Ms. Stewart wound up serving only four years of her ten-year sentence, as she was granted compassionate release in 2014 due to her diagnosis of terminal breast cancer, before passing away in her Brooklyn residence in 2017, at the age of 77. Joseph Fried, *Lynne Stewart, Lawyer Imprisoned in Terrorism Case, Dies at 77*, N. Y. TIMES (Mar. 7, 2017), <https://www.nytimes.com/2017/03/07/nyregion/lynne-stewart-dead-radical-leftist-lawyer.html> (on file with the Columbia Human Rights Law Review).

291. Yale Report, *supra* note 9, at 17.

292. *See, e.g., Gertner*, *supra* note 179 (in which the defense alleged that SAMs prevented important evidence of remorse from being introduced in the defendant’s death penalty proceeding). The issue of notoriety tainting a jury also implicates the Fourteenth Amendment right to due process. *See, e.g., Estes v. State of Tex.*, 381 U.S. 532 (1965) (holding that the televising and broadcasting of the petitioner’s trial deprived him of his Fourteenth Amendment right to due process).

the client access to the courts.²⁹³ I argue that, given the political situation in post-9/11 America, all cases wherein a Muslim prisoner is accused of foreign terrorism-related offenses qualify for this necessity.²⁹⁴ The Sixth Amendment should thus be read to imply an affirmative right for defense to communicate with the media in high-profile cases against notorious defendants.

One strategy for advocates, moving forward, could be to combine arguments in favor of a defendant's First Amendment right to communicate with the media through his or her attorney, and a defendant's right to counsel under the Sixth Amendment—which arguably also requires counsel to communicate with the media—into a hybrid First Amendment/Sixth Amendment claim.²⁹⁵ The idea of a

293. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1058 (1991) (“[I]n some circumstances press comment is necessary to protect the rights of the client and prevent abuse of the courts.”).

294. See, e.g., Antonia Blumberg, *Muslims Are More Unpopular than Atheists in the U.S.*, HUFFINGTON POST (Sept. 15, 2016), https://www.huffingtonpost.com/entry/muslims-are-more-unpopular-than-atheists-in-the-us_us_57daeede4b04a1497b31612 [<https://perma.cc/37BS-FQX3>] (citing a study by the University of Minnesota which revealed that negative attitudes toward Muslims are higher and rising at a faster rate than those towards other religious groups); Mona Chalabi, *How Anti-Muslim Are Americans? Data Points to Extent of Islamophobia*, GUARDIAN (Dec. 8, 2015), <https://www.theguardian.com/us-news/2015/dec/08/muslims-us-islam-islamophobia-data-polls> [<https://perma.cc/HYA2-8KQ3>] (noting that 55% of Americans admit to having an “unfavorable opinion of Islam”). *But see* Besheer Mohamed & Gregory A. Smith, *How the U.S. General Public Views Muslims and Islam*, PEW FORUM (July 26, 2017), <http://www.pewforum.org/2017/07/26/how-the-u-s-general-public-views-muslims-and-islam/> [<https://perma.cc/EW4J-NQLQ>] (noting a warmer view of Muslims and Islam in recent years).

295. Pure First Amendment claims, like Sixth Amendment access to counsel claims, do not require actual injury—unlike the more indirect “access to courts” claims that have been brought, e.g., alleging inadequate law libraries within prisons. See *Benjamin v. Fraser*, 264 F.3d 175, 185 (2d Cir. 2001) (“where the right at issue is provided directly by the Constitution or federal law, a prisoner has standing to assert that right even if the denial of that right has not produced an ‘actual injury.’”).

Of course, *Holder v. Humanitarian Law Project* restricts the ability of individuals to communicate in contexts relevant to terrorist prosecutions. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 39 (2010) (upholding the USA PATRIOT Act’s prohibition on providing material support to terrorist organizations, even if that support is in the form of facilitating peace negotiations). This case represents the only time in U.S. history that a restriction on political speech has passed the *Brandenburg v. Ohio* test. Eugene Volokh, *THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS*, 259 (4th ed. 2011); *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (barring the government from forbidding even “advocacy of the use of force or of law violation”

right to communicate with the media, by way of one's attorney, is not novel. The Supreme Court has previously recognized that pre-trial attorney speech may be less regulated than that of pre-trial media.²⁹⁶

This argument has been attempted, without success, in challenging SAMs. In Kassir's defense brief, for example, the defense invoked his unique status as a foreigner and a high-profile defendant and asserted that he had a First Amendment right to communicate with the media through his attorney:

As regards the press, Mr. Kassir's case is a matter of legitimate interest, particularly in the Country of Sweden, where he resides, and has been much covered by the media there. It is important that the public know about the nature of the charges against him, his well-being, and the conditions of his confinement.²⁹⁷

While Mr. Kassir was unsuccessful in challenging SAMs,²⁹⁸ his arguments may bear fruit for other defendants. Since many defendants subject to SAMs are high-profile suspects of terrorism, including many foreign citizens, it should be possible to advance these arguments in future cases. However, future defendants may have better luck focusing on the right to express remorse, or other issues that might bear more directly on trial and sentencing.

CONCLUSION

The trend of over-application of SAMs to all prisoners accused of terrorism implicates Sixth Amendment rights and threatens

except where said speech is both "directed to inciting or producing *imminent* lawless action" and is "*likely* to incite or produce such action" (emphasis added) in the context of striking down Ohio's Criminal Syndicalism Act, which punished persons who "advocate or teach the duty, necessity, or propriety of violence 'as a means of accomplishing industrial or political reform.'").

296. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1074 (1991) ("[T]he speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press . . .") (construing *In re Sawyer*, 360 U.S. 622 (1959) and *Sheppard v. Maxwell*, 384 U.S. 333 (1966)).

297. Memorandum of Law in Support of Defendant Kassir's Motion to Lift the Special Administrative Measures that Have Been Imposed on Him at *4, *United States v. Kassir*, No. S2 04 Cr. 356 (JFK), 2008 WL 8888942 (S.D.N.Y. 2008).

298. *United States v. Kassir*, No. S2 04 CR. 356 (JFK), 2008 WL 2695307, at *5-6 (S.D.N.Y. July 8, 2008).

the legal profession as an institution in a host of ways, including by preventing consultation between attorneys. Additionally, the requirement that defense counsel preclears work product with the U.S. Attorney and the FBI entails disclosing the defense's strategy to the government prior to trial.²⁹⁹ SAMs likely threaten various other constitutional rights, including the right to association, freedom of religion, and free speech, for both prisoners and the public.³⁰⁰ The argument that there is a heightened First Amendment right to speak with counsel, in particular, requires further research. One other compelling idea is that surveillance of privileged communications—in a suit against the government or in a criminal suit—is effectively surveillance by the opposing counsel, which presents a clear threat to the integrity of the adversarial process.³⁰¹ Another way to move

299. See Memorandum of Law in Support of Defendant Kassir's Motion to Lift the Special Administrative Measures that Have Been Imposed on Him, *supra* note 297, at 4.

300. Yale Report, *supra* note 9, at 26 (When a prisoner suffers from an "atypical and significant hardship," such as solitary confinement or SAMs, a liberty interest also arises that is protected by due process) (quoting *Wilkinson v. Austin*, 545 U.S. 209, 222–223 (2005)); see also *Williams v. Sec'y Pennsylvania Dep't of Corrections*, 848 F.3d 549, 562 (3d Cir. 2017) (holding that prisoners have a constitutionally protected liberty interest that prohibits the state from housing prisoners on death row after they have been granted resentencing hearings without meaningful review of their continuing placement); *Incumaa v. Stirling*, 791 F.3d 517, 534 (4th Cir. 2015) (failing to periodically review an inmate's segregated confinement violates the inmate's right to due process); *Wilkerson v. Goodwin*, 774 F.3d 845, 855 (5th Cir. 2014) (finding that thirty-nine years of solitary confinement constituted "atypical and significant hardship" such that it gave rise to a liberty interest). The vague and conclusory nature of the government's justification for SAMs in most cases thus clearly violates the Fifth Amendment as well. For example, the Yale Report documents how, when requesting the imposition of SAMs, the DOJ concedes that "eliminating the inmate's access to media may be an excessive measure except in the most egregious of circumstances," yet consistently uses the same generic language for justifying its request. Yale Report, *supra* note 9, at 10.

301. Even if not abused, government surveillance creates a chilling effect on the adversarial process. Many attorneys interviewed for the Yale report, for example, "operated under the assumption that all of their conversations were seen and heard" by opposing counsel. Yale Report, *supra* note 9, at 17. The Yale report also pointed out that while a firewall theoretically prevents government prosecutors from being privy to any information gained from government surveillance of privileged conversations with prisoners subject to SAMs, the restrictions nevertheless exert a chilling effect on client-attorney communication. *Id.*

forward would be to explore the First Amendment rights of *counsel itself* to communicate with third parties and the media.

When envisioning fully realized Sixth Amendment protections, it is important to envision the most corrupt and abusive opponent possible on the other side of the courtroom. A robust civil rights jurisprudence must protect against the worst-case scenario. That is, in a situation where the government is empowered to disable a prisoner's defense, the relationship between the judiciary and the prosecution should not be characterized by *trust*, but by rigorous oversight vis-à-vis pre-trial conditions. When all that protects an individual from measures that are effectively torture is the very government accusing them of terrorism, our Sixth Amendment protections are bankrupt. Advocates must not accept rationales such as that used in *Tsarnaev* and other SAMs cases.

Hashmi is but one step along what could become a slippery slope depending on the future administration. Under current law, it does not take much for an entirely new group of people to be subjected to pre-trial SAMs, to the detriment of the right to counsel and our democracy.³⁰² All that is needed is for an organization to be labeled “terrorist” and one overzealous prosecutor.³⁰³ In order to prevent this, the burden must be on the government to show the probability of likely harm.

The difference between having a lawyer and having a law dictionary is substantial. A lawyer, generally, does not work in a vacuum, any more than a doctor would be unable to ask for a second opinion when confronted with a particularly difficult or ambiguous case. In the 2002 case *United States v. Reid*, Judge Young argued that consultation with third parties is an integral part of providing competent counsel.³⁰⁴ Attorneys, like all professionals, draw strength and brilliance from an active collaboration with colleagues and mentors, even while taking care to preserve privilege for sensitive

302. Daniel McGowan, *Court Documents Prove I was Sent to Communication Management Units (CMU) for My Political Speech*, HUFFINGTON POST: THE BLOG (Apr. 1, 2013, 8:36 AM), https://www.huffingtonpost.com/daniel-mcgowan/communication-management-units_b_2944580.html [https://perma.cc/KKU7-CL7T] (describing the experiences of an environmental protestor who, despite having a “spotless” disciplinary record, was transferred to a segregation unit in which his communications were strictly limited, as a result of his continued written political advocacy).

303. *Id.*

304. *United States v. Reid*, 214 F. Supp. 2d 84, 90 (D. Mass. 2002).

information. If the right to counsel is to be preserved for prisoners accused of terrorism-related offenses, the right to have attorneys communicate with third parties must be similarly preserved. When advising trial lawyers, Judge Young always told them to talk the issues through with colleagues: “When you get a case, shop your ideas. Ask someone, ‘What about this? ...Have you ever had a case where...? What if I argued...? How do you think this would work?’ This is still a profession.”³⁰⁵

305. *Id.* (quoting WILLIAM G. YOUNG, REFLECTIONS OF A TRIAL JUDGE 102 (1998)).