

# Sentencing Terrorist Crimes

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*The legal framework behind the sentencing of individuals convicted of committing terrorist crimes has received little scholarly attention, even with the proliferation of such prosecutions in the eleven years following the attacks of September 11, 2001. This lack of attention is particularly striking in light of the robust and multifaceted scholarship that deals with the challenges inherent in criminal sentencing more generally, driven in no small part by the comparatively large number of sentencing decisions issued by the United States Supreme Court over the past thirteen years. Reduced to its essence, the Supreme Court's sentencing jurisprudence requires district courts to make no factual findings that raise a criminal penalty over the statutory maximum, other than those found by a jury or admitted by the defendant in a guilty plea. Within those parameters, however, the Court has made clear that such sentences are entitled to a strong degree of deference by courts of review.*

*Historically, individuals convicted of committing crimes involving politically motivated violence/terrorism were sentenced under ordinary criminal statutes, as theirs were basically crimes of violence. Even when the law shifted to begin to recognize certain crimes as terrorist in nature—airplane hijacking being the prime example—sentencing remained relatively uncontroversial from a legal perspective, since the underlying conduct being punished was violent at its core.*

*In the mid-1990s, the development and passage of a special sentencing enhancement, U.S. Sentencing Guidelines Manual section 3A1.4, offered the opportunity for district courts to significantly increase the penalty for certain activity that fell into a defined category of what was termed “a federal crime of terrorism.” Coupled with the post-9/11 trend of the government using a relatively new offense, 18 U.S.C. § 2339B, the ban on providing material support to designated foreign terrorist organizations, as its main legal tool in the war on terrorism, sentences for such crimes increased significantly, even in situations where there was no link to an act of violence. The application of section 3A1.4 invites a district court to find certain facts, under the preponderance of the evidence standard, which bring the conduct into the category of a federal crime of terrorism, thereby triggering greatly enhanced punishment. A review of the reported decisions involving section 3A1.4 reveals, however, that only in rare cases do courts find the enhancement to be improperly applied. This Article argues that, as currently understood, the application of section 3A1.4 raises serious concerns about its fidelity to the Supreme Court's Sixth Amendment jurisprudence.*

*The existence of a terrorism sentencing enhancement also serves as a kind of statutory basis to embolden courts of appeals to overturn a sentence as too*

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lenient, as has been the case in certain high-profile prosecutions, such as those of Ahmad Abu Ali, Lynne Stewart, and Jose Padilla, among others. As the examples in this Article demonstrate, those courts of review that have engaged in this practice either fail to appreciate or disregard the Supreme Court's instructions to engage in a highly deferential type of review of a district court sentence. At the heart of these opinions lies a message that terrorism is especially heinous, and those convicted of terrorist crimes are particularly dangerous to the point of being irredeemably incapable of deterrence. While these sentiments may or may not be accurate, the courts of appeals adopting them cite no evidence or studies in support, creating the impression that a court of review may overturn a sentence in a terrorism case simply because it disagrees with the district court, something the Supreme Court has said is improper. In light of this recent development, this Article recommends that some combination of Congress, the United States Sentencing Commission, and the federal courts establish standards to better help a court decide when a heightened punishment might be warranted, free from unsupported assumptions about the nature of terrorism or a particular defendant.

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## I. INTRODUCTION

A defendant is convicted of both obstructing justice and criminal contempt and qualifies for a sentence of twenty-four to thirty months in prison, but the government asks the district court to apply a special terrorism-sentencing enhancement, resulting in a 135-month term. The basis for such a radical increase in the sentence is that the defendant was convicted of obstructing a federal investigation by refusing to testify before a grand jury looking into allegations of terrorist fundraising in the United States. That he was acquitted of being a part of the terrorist group and had no link to violent activity was of no import. The sentence of a man convicted of running a multi-million dollar interstate cigarette smuggling ring sees his sentence rise from fifty-seven months to 155 years (later reduced to thirty years), based on testimony that \$3500 the defendant gave to a cooperating witness was really destined for a terrorist group abroad. The cooperating witness, whose credibility was severely challenged at trial, could not establish conclusively that the terrorist group ever received the funds. Finally, a court of appeals throws out the seventeen-year sentence of alleged “dirty bomber” Jose Padilla for terrorism charges unrelated to the bomb plot as too lenient, based on his criminal history.<sup>1</sup> The district court’s relatively lesser sentence took into account Padilla’s treatment at the hands of the U.S. military while in detention as an enemy combatant, leading to his severe emotional and mental impairment.<sup>2</sup> The court of appeals was not moved.

The examples detailed above implicate the sentencing framework for individuals convicted of committing terrorist crimes, an area of law that has received little scholarly attention, even with the proliferation of such prosecutions in the nearly thirteen years following the attacks of September 11, 2001. This lack of attention is particularly striking in light of the robust and multifaceted scholarship examining the challenges inherent in criminal sentencing more generally, driven in no small part by the comparatively large number of sentencing decisions issued by the U.S. Supreme Court over the past thirteen years. Reduced to its essence, recent Supreme Court sentencing jurisprudence requires district courts to make no factual findings that raise a

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<sup>1</sup> See generally *United States v. Jayyousi*, 657 F.3d 1085 (11th Cir. 2011).

<sup>2</sup> *Id.*

criminal penalty over the statutory maximum, other than those found by a jury or admitted by the defendant in a guilty plea. Within those parameters, however, the Court has made clear that such sentences are entitled to a strong degree of deference by courts of review.

Historically, individuals convicted of committing crimes involving politically motivated violence/terrorism were sentenced under ordinary criminal statutes, as theirs were basically crimes of violence. Even when the law shifted to begin to recognize certain crimes as terrorist in nature—airplane hijacking being the prime example—sentencing remained relatively uncontroversial from a legal perspective, as the underlying conduct being punished was violent at its core.

In the mid-1990s, the development and passage of a special sentencing enhancement, *U.S. Sentencing Guidelines Manual* section 3A1.4, offered the opportunity for district courts to significantly increase the penalty for certain activity that fell into a defined category of what was termed a federal crime of terrorism.<sup>3</sup> Coupled with the post-9/11 trend of the government using a relatively new offense, 18 U.S.C. § 2339B, the ban on providing material support to designated foreign terrorist organizations (FTOs), as its main legal tool in the war on terrorism, sentences for such crimes increased significantly, even in situations where there was no direct link to an act of violence.<sup>4</sup> The application of section 3A1.4 invites a district court, under the preponderance of the evidence standard, to find certain facts that bring the conduct into the category of a federal crime of terrorism, thereby triggering greatly enhanced punishment. A review of the reported decisions involving section 3A1.4 reveals, however, that only in rare cases do appellate courts find the enhancement to be applied improperly.

This Article argues that, as currently understood, the application of section 3A1.4 has veered into unconstitutional territory, particularly in light of the Supreme Court's sentencing jurisprudence and the Sixth Amendment's strictures. Perhaps the trend behind the application of section 3A1.4 reflects a belief in terrorism's exceptional nature, rendering crimes with a terrorist bent as justifying a relaxation of generally applicable legal standards. This phenomenon has been observed in several other contexts involving terrorism prosecutions, such as the admission of confessions that would otherwise be inadmissible as coerced,<sup>5</sup> and the prosecution of individuals under statutes banning material support to terrorist groups where there is no link to violence of any kind.<sup>6</sup> The availability of a special enhancement also affords prosecutors and courts a vehicle of an expressive nature, to comment on their deep disapproval and condemnation of terrorism in a general sense. More debatable, however, is

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<sup>3</sup> U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (1995).

<sup>4</sup> 18 U.S.C. § 2339B (2012).

<sup>5</sup> See Wadie E. Said, *Coercing Voluntariness*, 85 IND. L.J. 1, 1 (2010).

<sup>6</sup> See Wadie E. Said, *The Material Support Prosecution and Foreign Policy*, 86 IND. L.J. 543, 544 (2011).

whether judges enhance sentences based on a need to be seen as condemning terrorism, and whether it serves the utilitarian or retributive functions of sentencing, as it is not clear how such sentences improve deterrence of future crimes or respond adequately to the harm done in each instance.

The existence of a terrorism-sentencing enhancement also serves as a kind of statutory basis to embolden courts of appeals to overturn a sentence as too lenient, as has been the case in certain high-profile prosecutions, such as those of Ahmed Abu Ali, Lynne Stewart, and Jose Padilla.<sup>7</sup> As the examples in this Article demonstrate, those courts of review that have engaged in this practice either disregard or fail to appreciate the Supreme Court's instructions to engage in a highly deferential type of review of a district court sentence.<sup>8</sup> At the heart of these opinions lies a message that terrorism is especially heinous, and those convicted of terrorist crimes are particularly dangerous to the point of being irredeemably incapable of deterrence. From this expressive exercise in condemning terrorists qua terrorists as being worthy of the most serious sentences allowed by law, appellate judges can demonstrate their participation in the project of protecting national security.

Even accepting the accuracy of these sentiments, the courts of appeals adopting them cite no evidence or studies to justify sentencing enhancements, creating the impression that a court of review may overturn a sentence in a terrorism case simply because it disagrees with the district court, something the Supreme Court has said is inconsistent with the Constitution.<sup>9</sup> Appellate judges engaging in this practice thereby rely on their own views of what they imagine terrorism to be, regardless of whether those views jibe with current reality or, at the very least, the particular circumstances of the individual being sentenced. In light of this recent development, this Article recommends that some combination of Congress, the U.S. Sentencing Commission, and the federal courts establish standards to help courts better decide when a heightened punishment might be warranted, free from unsupported assumptions about the

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<sup>7</sup> See *Virginia Man Sentenced to Life in Prison for Bush Assassination Plot*, GUARDIAN (July 27, 2009, 12:01 PM), <http://www.theguardian.com/world/2009/jul/27/al-qaida-american-bush-plot>; Lizette Alvarez, *Sentence for Terrorist Is Too Short, Court Rules*, N.Y. TIMES, Sept. 19, 2011, at A12, available at [http://www.nytimes.com/2011/09/20/us/jose-padillas-prison-sentence-too-short-appeals-court-says.html?\\_r=0](http://www.nytimes.com/2011/09/20/us/jose-padillas-prison-sentence-too-short-appeals-court-says.html?_r=0); Larry Neumeister, *Lynne Stewart, Ex-lawyer Convicted in Terror Case, Seeks Release from Prison Due to Cancer*, HUFFINGTON POST (May 1, 2013, 5:06 PM), [http://www.huffingtonpost.com/2013/05/01/lynne-stewart-ex-lawyer-terror-case-prison-cancer\\_n\\_3196127.html](http://www.huffingtonpost.com/2013/05/01/lynne-stewart-ex-lawyer-terror-case-prison-cancer_n_3196127.html). For a background on the individuals, see Jerry Markon & Dana Priest, *Terrorist Plot To Kill Bush Alleged*, WASH. POST, Feb. 23, 2005, at A01, available at <http://washingtonpost.com/wp-dyn/articles/A43940-2005Feb22.html>; Greg Sargent, *Jose Padilla: Overdue Process*, MOTHER JONES, May–June 2006, <http://www.motherjones.com/politics/2006/05/jose-padilla-overdue-process>; Michael Steven Smith, *The Sentencing of Lynne Stewart*, CENTER FOR CONST. RTS., <http://ccrjustice.org/sentencing-of-lynne-stewart-michael-steven-smith> (last visited Apr. 18, 2014).

<sup>8</sup> See *infra* Part V.

<sup>9</sup> See *infra* Part II.C.

nature of terrorism or a particular defendant. Otherwise, courts will continue to rely on their own assumptions about terrorism and the nature of political violence, irrespective of whether those beliefs are borne out by reality. As a result, a court's unsupported belief about a complex phenomenon like terrorism threatens to undermine the efficacy of its sentencing function entirely.

This Article proceeds as follows. Part II provides an overview of the current status of sentencing law and examines the Supreme Court's recent jurisprudence governing the sentencing process. Part III offers examples of how political/terrorist crimes fit historically within sentencing jurisprudence, at a time when those crimes fell under the rubric of general criminal statutes. Part IV introduces and critically examines the application of section 3A1.4, which has raised serious questions of the enhancement's compatibility with the animating principles of relevant Supreme Court rulings. Part V then reviews a more recent trend of cases in which the various panels of the U.S. Courts of Appeals overturned a terrorist defendant's sentence as too lenient, probing whether those panels have faithfully carried out the Supreme Court's mandate to give proper deference to a district court's sentencing decision.

## II. CURRENT SENTENCING LAW AND THE STANDARD OF REVIEW

A discussion of sentencing defendants convicted of terrorism-related crimes obviously lies within the contours of the debate over the imposition of criminal sentences more generally. Therefore, the brief overview that follows tracks what has been the critical question: how much discretion does a district judge enjoy in handing down a sentence?<sup>10</sup> Understanding both the district court's discretion and the court of appeals' review of that discretion is critical when we consider the sentencing of someone for a terrorist crime, with its attendant implications for and assumptions about U.S. foreign policy and the nature of a non-state political movement that uses violence.

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<sup>10</sup> At the outset it is important to note that there are two methods for a court to change a sentence under the *U.S. Sentencing Guidelines*, by "departure" or "variance." See *United States v. Brown*, 578 F.3d 221, 225–26 (3d Cir. 2009) ("Departures are enhancements of, or subtractions from, a guidelines calculation 'based on a specific Guidelines departure provision.' These require a motion by the requesting party and an express ruling by the court. Variances, in contrast, are discretionary changes to a guidelines sentencing range based on a judge's review of all the § 3553(a) factors and do not require advance notice." (citations omitted) (quoting *United States v. Vampire Nation*, 451 F.3d 189, 195 n.2 (3d Cir. 2006))). This Article makes use of these distinctive terms only to the extent that such a distinction impacts the trajectory of any analysis involved here. Otherwise, the Article does not point out whether a change in a *Guidelines* sentence calculation was a departure or variance.

### A. *The Creation of the U.S. Sentencing Guidelines*

In 1984, Congress passed the Sentencing Reform Act (the Act),<sup>11</sup> which had a three-fold purpose.<sup>12</sup> First, the Act strove for “honesty in sentencing” as a method of eliminating the system of indeterminate sentences that had arisen, with the result that convicted defendants often served only one-third of their actual sentence.<sup>13</sup> The Act’s second goal was “reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders,” as a judge in one district might impose a far more severe or lenient sentence than a judge in another for essentially the same conduct.<sup>14</sup> Finally, the third goal was to ensure proportionate sentences, so as to punish more serious crimes with harsher sanctions and prison terms.<sup>15</sup> The Act also did away with parole in the federal system and significantly hindered the ability to reduce one’s sentence through good time credits and the like.<sup>16</sup>

To further these goals, Congress authorized the creation of a Sentencing Commission (the Commission) to develop a set of Sentencing Guidelines (the *Guidelines*) that would provide the required uniformity and predictability in the imposition of sentences across the geographic spectrum.<sup>17</sup> The first set of the *Guidelines* was enacted in 1987, and the Commission retained the authority to issue amendments during an express period in which Congress is in session, with those amendments taking effect 180 days after their approval.<sup>18</sup> Critically, while the *Guidelines* system allowed a court to depart from the prescribed sentencing range—on condition it provide the reasons for its departure—the departure was subject to review by an appellate court for “reasonableness.”<sup>19</sup> Departures from a *Guidelines* sentence were only warranted when the case fell outside the traditional “heartland” of a criminal offense, although the *Guidelines* did not attempt to provide an authoritative list of when that occurred, preferring to leave that determination to the district court.<sup>20</sup>

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<sup>11</sup> Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. II, 98 Stat. 1837, 1987 (codified as amended at 18 U.S.C. §§ 3551–3559, 3561–3566, 3571–3574, 3581–3586; 28 U.S.C. §§ 991–998 (1988)).

<sup>12</sup> U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(3), at 2 (2000).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at ch. 1, pt. A(2), at 1.

<sup>17</sup> *Id.* at ch. 1, pt. A(1), at 1; 28 U.S.C. § 994(a) (1988).

<sup>18</sup> U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(2), at 2 (2000); *see also* 28 U.S.C. § 994(o)–(p) (2006).

<sup>19</sup> 18 U.S.C. § 3553(b) (1988); 18 U.S.C. § 3742 (1988).

<sup>20</sup> *Koon v. United States*, 518 U.S. 81, 81 (1996); U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(4)(b), at 6.

## B. The Sixth Amendment Shift

### 1. Apprendi v. New Jersey

In 1989, the Supreme Court held the *Guidelines* system constitutional, thereby clearing the way for an eleven-year reign of the mandatory sentencing scheme it enacted.<sup>21</sup> It was not until 2000 that the Supreme Court, in *Apprendi v. New Jersey*, formally began to chip away at the mandatory element of the *Guidelines* scheme.<sup>22</sup> In *Apprendi*, the defendant was arrested after firing several shots at the home of an African-American family that had recently moved into his “previously all-white neighborhood in Vineland, New Jersey.”<sup>23</sup> He pled guilty to three of the original twenty-three charges against him. None of the original charges referenced a hate crime or stated that he acted with a biased purpose.<sup>24</sup> The most severe charge exposed him to a maximum penalty of five to ten years in prison, but the prosecution reserved the right to ask the court for a hate crime enhancement, which carried a potential sentence of ten to twenty years in prison.<sup>25</sup> The trial court granted the prosecution’s motion and sentenced Apprendi to twelve years in prison.<sup>26</sup> In overturning the sentence, the Supreme Court clarified that the trial court’s sentence violated the Constitution: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>27</sup> Because nothing in Apprendi’s plea indicated he acted out of racial animus, which is the factual trigger for the trial court to impose a hate crime enhancement beyond the statutory maximum, his sentence was unconstitutional.<sup>28</sup>

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<sup>21</sup> *Mistretta v. United States*, 488 U.S. 361, 412 (1989).

<sup>22</sup> 530 U.S. 466 (2000).

<sup>23</sup> *Id.* at 469.

<sup>24</sup> *Id.* at 469–70.

<sup>25</sup> *Id.* at 470.

<sup>26</sup> *Id.* at 471.

<sup>27</sup> *Id.* at 490. The *Apprendi* Court referenced a previous decision, *Jones v. United States*, which examined the sentencing structure of the federal carjacking statute. *Id.* at 476 (citing 526 U.S. 227, 243 n.6 (1999)). In observing that the carjacking statute’s penalties increased according to the level of harm to the victim, the *Jones* Court noted:

[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

*Jones*, 526 U.S. at 243 n.6 (establishing the principle where previous cases had merely suggested it).

<sup>28</sup> *Apprendi*, 530 U.S. at 469, 497.



## 2. Blakely v. Washington

Four years later, the Court clarified the contours of *Apprendi*'s holding in *Blakely v. Washington*.<sup>29</sup> Ralph Blakely, who had a history of mental illness, pled guilty to charges related to the kidnapping of his estranged wife and son, and faced a sentence of forty-nine to fifty-three months.<sup>30</sup> After hearing testimony from Blakely's wife and then conducting a three-day sentencing hearing, the court made a finding that he had acted with "deliberate cruelty," a statutory precursor for an upward departure in a domestic violence case, and sentenced him to ninety months in prison.<sup>31</sup> The Supreme Court found that the sentence violated the Sixth Amendment even though the statutory maximum for the kidnapping Blakely pled guilty to is ten years in prison.<sup>32</sup> Specifically, the Court made clear that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."<sup>33</sup> Since a jury had not heard Blakely's case, and he had not admitted to kidnapping his family with "deliberate cruelty," a sentence beyond the prescribed range, even if within the actual statutory maximum, was unconstitutional.<sup>34</sup>

## 3. United States v. Booker

In the following term, following the rationale laid out in *Blakely*, the Court held the Sixth Amendment applicable to the *Guidelines* themselves.<sup>35</sup> In *United States v. Booker*, the Court confronted the issue of courts enhancing a sentence based on facts not found by a jury or admitted by a defendant via a plea bargain.<sup>36</sup> Booker himself had been found guilty by a jury of possession of 92.5 grams of crack cocaine with the intent to distribute, rendering him eligible for a *Guidelines* sentence of between 210 and 262 months in prison, after the court factored in his criminal history.<sup>37</sup> However, during the sentencing hearing, the district court found by a preponderance of the evidence that Booker in fact possessed an additional 566 grams of crack, and also obstructed justice.<sup>38</sup> Both of those findings, coupled with the jury's verdict, exposed him to a potential sentence under the *Guidelines* of between 360 months and life in prison, and the

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<sup>29</sup> 542 U.S. 296, 299 (2004).

<sup>30</sup> *Id.* at 298–300.

<sup>31</sup> *Id.* at 300–01.

<sup>32</sup> *Id.* at 302–05.

<sup>33</sup> *Id.* at 303.

<sup>34</sup> *Id.* at 303, 305.

<sup>35</sup> *United States v. Booker*, 543 U.S. 220, 227 (2005) (Stevens, J., majority opinion in part).

<sup>36</sup> *Id.* at 227–29.

<sup>37</sup> *Id.* at 227.

<sup>38</sup> *Id.*

district court duly sentenced him to 360 months.<sup>39</sup> The other respondent, Fanfan, was found guilty by a jury of possessing more than 500 grams of powder cocaine with the intent to distribute, which merited a seventy-eight-month sentence under the *Guidelines*.<sup>40</sup> At the sentencing hearing, the district court found, again by a preponderance of the evidence, that Fanfan had actually possessed 2.5 kilograms of powder cocaine and 261.6 grams of crack, as well as serving as a leader in the drug-dealing operation, making him eligible for a *Guidelines* sentence of fifteen to sixteen years.<sup>41</sup> However, as *Blakely* had been handed down just a few days before the sentencing hearing, the district court opted to impose a seventy-eight-month sentence.<sup>42</sup>

In holding *Blakely* applicable to the *Guidelines*, a majority of the Supreme Court, in an opinion written by Justice Stevens, reaffirmed its holding from *Apprendi*: “Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”<sup>43</sup> A different majority, with the opinion authored by Justice Breyer, announced the remedy for Sixth Amendment violations in sentencing. First, the Court invalidated 18 U.S.C. § 3553(b)(1), which had previously made the *Guidelines* mandatory, thereby rendering them advisory.<sup>44</sup> Second, Justice Breyer’s opinion excised the provision requiring de novo review of *Guidelines* sentences, as it contained “critical cross-references” to the invalid § 3553(b)(1).<sup>45</sup> Although the Court recognized that it had done away with the “explicit” standard of review, it noted that the statute “implicitly” retained a standard of review; sentences were now to be reviewed to determine whether they are “unreasonable.”<sup>46</sup>

### C. Booker and Its Progeny

As the *Booker* opinion left undefined the issue of what constitutes a “reasonable” sentence, three subsequent decisions attempted to provide more clarity. In the first such case, *Rita v. United States*, the Supreme Court ruled that a sentence is entitled to a presumption of reasonableness by a reviewing court, as long as it is within the properly formulated *Guidelines* range.<sup>47</sup> However, in a subsequent decision, *Gall v. United States*, the Court noted that a sentence outside the *Guidelines* range is not subject to a presumption of

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 228.

<sup>41</sup> *Booker*, 543 U.S. at 228 (Stevens, J., majority opinion in part).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 244.

<sup>44</sup> *Id.* at 245 (Breyer, J., majority opinion in part).

<sup>45</sup> *Id.* at 259–60.

<sup>46</sup> *Id.* at 260–61.

<sup>47</sup> 551 U.S. 338, 341 (2007).

unreasonableness.<sup>48</sup> *Gall* specified that the correct standard of review for a sentence is abuse of discretion, which it described as “deferential” to the district court, as opposed to the *de novo* review previously required by the *Guidelines* prior to the *Booker* decision.<sup>49</sup> The Court remarked that its ruling was based in the “practical considerations” of a district court’s institutional advantage in regularly conducting sentencing, a process that calls for a detailed and individual inquiry into the facts and circumstances of both the crime and the defendant.<sup>50</sup>

*Gall* also elaborated what a reasonableness review of a district court’s sentence entails. This process has two components, one procedural and the other substantive. Procedural review of a sentence envisions no errors related to “failing to calculate (or improperly calculating) the *Guidelines* range, treating the *Guidelines* as mandatory, failing to consider the § 3553(a) factors,”<sup>51</sup>

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<sup>48</sup> 552 U.S. 38, 51 (2007).

<sup>49</sup> *Id.* at 52.

<sup>50</sup> *Id.* at 51–52.

<sup>51</sup> Those § 3553(a) factors are:

(a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to Section 994 (a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under Section 994 (p) of title 28); and

(ii) that, except as provided in Section 3742 (g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to Section 994 (a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under Section 994 (p) of title 28);

selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the *Guidelines* range.”<sup>52</sup> Assuming no procedural error, the review then considers the substantive reasonableness of the sentence, while bearing in mind “the totality of the circumstances, including the extent of any variance from the *Guidelines* range.”<sup>53</sup> Critical to the substantive review of a sentence is “due deference” to a district court’s sentence, as “[t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.”<sup>54</sup> Based on these opinions, it seems clear that a court of appeals may not overrule a sentence determined by the district court that meets the requirements of a reasonableness review based on a disagreement over what the proper sentence should be.

Further, the Court has made clear that a district court possesses the authority to impose a sentence lower than the *Guidelines* on the basis of a disagreement with Congress over policy. In *Kimbrough v. United States*, the defendant faced a *Guidelines*-driven sentence of 228 to 270 months for a series of drug and firearms convictions.<sup>55</sup> Since the charges against him included both crack and powder cocaine offenses, his *Guidelines* sentence calculation was significantly higher than the 97 to 106-month range he would have qualified for had he faced only charges of possession of a similar weight of powder cocaine.<sup>56</sup> As a matter of policy, the district court took exception with the then-prevailing 100-to-1 sentencing ratio of crack versus powder cocaine, and sentenced Kimbrough to 180 months in prison and six months of supervised release, i.e., a total of 4.5 years fewer than the minimum *Guidelines* sentence.<sup>57</sup> In support of its position, the district court noted the consistent recommendations of the Commission to Congress over a period spanning more

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(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to Section 994 (a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under Section 994 (p) of title 28); and

(B) that, except as provided in Section 3742 (g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (2012).

<sup>52</sup> *Gall*, 552 U.S. at 51.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> 552 U.S. 85, 92–93 (2007).

<sup>56</sup> *Id.* at 93. Both *Guidelines* figures accounted for the firearms charge in their calculations. *Id.*

<sup>57</sup> *Id.* at 92–93, 111.

than a decade to change the 100-to-1 ratio.<sup>58</sup> Having failed to spur Congress into action, the Sentencing Commission changed the *Guidelines* to allow for a sentencing disparity of twenty-five-to-one through eighty-to-one, depending on the nature of the offense.<sup>59</sup> Marshalling this evidence permitted the Supreme Court to uphold the sentence as a reasonable exercise of the district court's discretion.<sup>60</sup>

Understanding the likely radical impact of allowing sentencing judges to disagree with the *Guidelines* as a matter of policy, the Court explained the logical framework for its holding. Initially, it stated that “[t]he Government acknowledges that the *Guidelines* ‘are now advisory’ and that, as a general matter, ‘courts may vary [from *Guidelines* ranges] based solely on policy considerations, including disagreements with the *Guidelines*.’”<sup>61</sup> As previously noted in *Rita* and *Gall*, district court judges should treat the *Guidelines* as the “‘starting point and the initial benchmark’” of the sentencing process, because the Commission is charged with determining national sentencing standards based on statistical data and trends.<sup>62</sup> However, the district court judge is in the best position to determine an individualized sentence based on “familiarity” with the defendant and the crime according to the 18 U.S.C. § 3553(a) factors.<sup>63</sup> A sentencing court’s decision to depart from a sentence recommended by the *Guidelines* is entitled to the greatest deference when it determines that the case before it falls outside the “heartland” offense under that particular statute.<sup>64</sup> However, the Court made sure to note that “while the *Guidelines* are no longer binding, closer review may be in order when the sentencing judge varies from the *Guidelines* based solely on the judge’s view that the *Guidelines* range ‘fails properly to reflect § 3553(a) considerations’ even in a mine-run case.”<sup>65</sup> Given the persistent controversy and back-and-forth between Congress and the Commission over the crack versus powder cocaine sentencing disparity, the Court concluded that this was not a case to question the district court’s exercise of discretion on policy grounds.<sup>66</sup> Two years later, the Court, without elaborating much further, essentially reiterated its position from *Kimbrough* in another case involving a policy-based deviation from the crack/powder cocaine sentencing scheme.<sup>67</sup>

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<sup>58</sup> *Id.* at 110–11.

<sup>59</sup> *Id.* at 106.

<sup>60</sup> *Id.* at 111–12.

<sup>61</sup> *Kimbrough*, 552 U.S. at 101 (quoting Brief for Respondent at 16, *Kimbrough*, 552 U.S. 85 (No. 06-3360)).

<sup>62</sup> *Id.* at 108 (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)).

<sup>63</sup> *Id.* at 109 (quoting *Gall*, 552 U.S. at 51).

<sup>64</sup> *Id.* (quoting *Rita v. United States*, 551 U.S. 338, 351 (2007)).

<sup>65</sup> *Id.* (quoting *Rita*, 551 U.S. at 351).

<sup>66</sup> *Id.*

<sup>67</sup> *Spears v. United States*, 129 S.Ct. 840, 843–45 (2009) (per curiam). In 2010, Congress finally changed the crack/powder sentencing disparity from 100–1 to 18–1. Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372 (codified at 21 U.S.C. § 841(b)(1)(A)(iii) (2012)).

*Booker* and its progeny represent the latest and most important developments in the familiar struggle over control of the criminal sentencing process. The two decades that preceded *Booker* saw major actors—the Commission, Congress, the Department of Justice, and the Supreme Court—attempt to assert definitive roles for themselves in the sentencing process.<sup>68</sup> Within the Department of Justice existed a contest between the central authority in Washington and the local prosecutors over which body set the policies and practice of sentencing by the various U.S. Attorneys’ offices.<sup>69</sup> In 2003, Congress passed legislation that effectively ordered the courts to sentence according to the *Guidelines*, in reliance on data that, in its view, suggested district judges were ignoring the mandatory nature of the *Guidelines* at purportedly troubling rates.<sup>70</sup> The Court reacted strongly to these efforts in the *Booker* decision by declaring the *Guidelines* advisory, reducing prosecutorial control over sentencing.<sup>71</sup> Therefore, the decisions can be read as the Supreme Court returning a modicum of power to the local district judge to decide on an appropriate sentence.<sup>72</sup>

The effect of *Booker* and its progeny is hard to establish. In the most concentrated study, covering the sentencing patterns of the District of Massachusetts, which stands alone among federal courts in making public critical information about each criminal sentence,<sup>73</sup> Ryan Scott concluded that

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<sup>68</sup> See generally Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds—The Center Doesn’t*, 117 YALE L.J. 1374 (2008); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420 (2008).

<sup>69</sup> Richman, *supra* note 68, at 1376–95.

<sup>70</sup> *Id.* at 1388–90 (noting the Department of Justice’s role in actually drafting the legislation, which was followed six months later by a memorandum from then-Attorney General John Ashcroft to Department personnel further proscribing and streamlining the discretion of line prosecutors in the sentencing process); Stith, *supra* note 68, at 1461–71 (discussing the Feeney Amendment to the Protect Act of 2003, which “directly confronted and sought to reduce the discretion of every institution involved in federal criminal sentencing—the Supreme Court, the courts of appeals, sentencing judges, the Sentencing Commission, and even the Department of Justice” by dramatically decreasing the incidence of downward departures and prescribing more stringent review of district court sentences); see also Ricardo J. Bascuas, *The American Inquisition: Sentencing After the Federal Guidelines*, 45 WAKE FOREST L. REV. 1, 28–35 (2010).

<sup>71</sup> Stith, *supra* note 68, at 1476–84.

<sup>72</sup> *Id.*; see also David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1695 (2009) (“By and large, *Apprendi*, *Blakely*, and *Booker* have shifted power not from judges to juries, or from legislatures to juries, but from legislatures to judges.”).

<sup>73</sup> Ryan W. Scott, *Inter-judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1, 23 (2010) (“By special vote of the court in 2001, the District of Massachusetts now makes public a case document called the ‘Statement of Reasons.’ This document is available online for every criminal sentence, unless the presiding judge orders it sealed. The Statement of Reasons, which must be completed and submitted to the Commission for every sentence, reports a host of details about the sentence, including the offender’s offense level, criminal history category, and guideline range, as well as any statutory minimum sentence, and the basis for any departure.” (footnote omitted)).

“[i]n cases not governed by a mandatory minimum, drawing one of the court’s more severe judges, rather than its more lenient judges, means an average difference of more than two years in prison.”<sup>74</sup> While comprehensive conclusions about post-*Booker* sentencing patterns are premature at this stage, the available data seem to support Scott’s conclusions, “which indicate[] that district judges have been imposing increasingly disparate sentences.”<sup>75</sup>

Regardless of what trends *Booker*, *Rita*, *Gall*, and *Kimbrough* embody, the tension surrounding judicial discretion and the role of the *Guidelines* remains. The principal point of contention is *Booker*’s rendering the *Guidelines* advisory. To fix what he considers to be *Booker*’s fundamental flaw, Judge William K. Sessions, the former chair of the U.S. Sentencing Commission, has proposed a new type of sentencing guidelines that group more offenses within larger cells of general criminal activity.<sup>76</sup> Departures from one cell to another would still require conduct either admitted by the defendant or proven to a jury, in keeping with the line of decisions beginning with *Apprendi*.<sup>77</sup> However, within each offense level in a cell would be three sub-ranges, with the typical sentence beginning in the middle sub-range; a judge would then have the discretion to issue a sentence within any of the three sub-ranges and rely on uncharged conduct to do so.<sup>78</sup> Judge Sessions’s proposal would allow the use of uncharged conduct, if proven by a preponderance of the evidence, to enhance an offense level with the expanded cell, while acquitted conduct could not be used to raise an offense level, but would be permitted within the sub-ranges.<sup>79</sup>

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<sup>74</sup> *Id.* at 52.

<sup>75</sup> D. Michael Fisher, *Still in Balance? Federal District Court Discretion and Appellate Review Six Years After Booker*, 49 DUQ. L. REV. 641, 664 (2011) (footnote omitted).

<sup>76</sup> William K. Sessions III, *Federal Sentencing Policy: Changes Since the Sentencing Reform Act of 1984 and the Evolving Role of the United States Sentencing Commission*, 2012 WIS. L. REV. 85, 105–13.

<sup>77</sup> *Id.* at 107–10. Judge Sessions’s proposals track his work on the Constitution Project Sentencing Initiative, a bipartisan panel of experts who attempted to formulate a framework for sentencing reform in the wake of *Booker*. See Frank O. Bowman, III, *Nothing Is Not Enough: Fix the Absurd Post-Booker Federal Sentencing System*, 24 FED. SENT’G REP. 356, 363–65 (2012), available at <http://ssrn.com/abstract=2055440>.

<sup>78</sup> Sessions, *supra* note 76, at 110 (“My proposal includes an important ‘advisory’ aspect to the otherwise presumptive nature of the guidelines. Within each cell on the grid, a judge would have discretion to impose a sentence within any of the three sub-ranges. In this sense, the within-cell ranges would be advisory, in the same manner as the entire guideline table is now advisory under *Booker*. Because the sub-ranges would be advisory, a sentencing judge could impose, consistent with the Constitution, a sentence anywhere within the larger cell; aggravating factors that would not alter the calculation of which larger cell a defendant falls in would not be subject to *Blakely* requirements. I envision judges considering aggravating and mitigating circumstances in deciding where within the larger cell the sentence will fall. In our current parlance, my system would be ‘*Blakely*-ized’ with respect to the larger cells but ‘*Booker*-ized’ with respect to the three sub-ranges within each cell.” (citations omitted)).

<sup>79</sup> *Id.* at 111–12. The Supreme Court has ruled that acquitted conduct may be used to enhance a sentence, as long as it has been proven by a preponderance of the evidence. See

Judge Sessions's proposals are the most recent and perhaps most prominent example of an attempt at sentencing reform following *Booker*. The Sentencing Commission itself has made several proposals, geared at Congress changing the law so as to effectively overturn *Booker*, but at this stage has not put forth draft legislation in support of those proposals.<sup>80</sup> In any event, *Booker* remains good law. Amy Baron-Evans and Kate Stith have put forth an extensive examination and defense of *Booker*, one that includes a thorough criticism of Judge Sessions's proposals.<sup>81</sup> Relying on statistics and doctrine, they argue that granting discretion to district judges to craft particularized sentences has made for a less arbitrary process in which sentencing disparities across the board have declined.<sup>82</sup> Additionally, the discretion given to district courts by *Booker* has allowed, for the first time, sentencing judges and the Commission to engage in a dialogue about what truly is the best sentence in an individual case.<sup>83</sup> In their words: "[T]here is no need for a *Booker* fix. *Booker* was the fix."<sup>84</sup>

When studying the issue of sentencing in terrorism cases, it is important to remember what *Booker* has empowered district judges to do—namely, disagree with the *Guidelines* as a matter of policy. In Baron-Evans and Stith's view: "The lesson is clear: the Supreme Court has recognized the authority of sentencing judges to vary from guideline ranges based on a 'policy disagreement' not as a challenge to Congress but as a legal principle necessary to avoid a Sixth Amendment violation."<sup>85</sup> But outside of cases involving the crack/powder cocaine ratio, the contours of crafting a policy disagreement are not clear.<sup>86</sup> As Frank Bowman has noted,

[W]e really do not know what authority district courts have to disagree with Guidelines the Commission has not merely enacted, but continues to believe

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United States v. Watts, 519 U.S. 148, 157 (1997); Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599, 1628–29 (2012) (criticizing the Court's position on allowing the use of acquitted conduct at sentencing).

<sup>80</sup> See Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1730 (2012).

<sup>81</sup> *Id.* at 1713–29.

<sup>82</sup> *Id.* at 1667–1712.

<sup>83</sup> *Id.* at 1671 ("Booker has thus created a dialogue between the courts and the Commission that has, for the first time in the Commission's history, made possible the 'continuous evolution helped by the sentencing courts and courts of appeals' that the SRA's framers envisioned. The Commission can persuade the courts to follow the guidelines through 'the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' And the courts can persuade the Commission to revise guidelines that they find to be unsound by varying from them and explaining why." (footnotes omitted)).

<sup>84</sup> *Id.* at 1681.

<sup>85</sup> *Id.* at 1741 (footnote omitted).

<sup>86</sup> In combination with a faulty analysis and an incompletely developed record, a policy disagreement has served as the basis for reversing a sentence for distribution of child pornography. See, e.g., United States v. Dorvee, 616 F.3d 174, 188 (2d Cir. 2010).



in. And the Court gives no guidance on the critical question of the sort of record a district court must create when grounding a sentence on disagreement with the government's expert sentencing agency.<sup>87</sup>

The Court has continued to uphold this position and recently expanded to some extent the issue of when a policy disagreement might comport with *Booker*, even as it has yet to articulate a comprehensive rationale or framework for its position.<sup>88</sup> While this has yet to become relevant in the context of terrorism prosecutions, one can imagine that it might become relevant in cases where politics necessarily play a large role.

### III. SENTENCING TERRORISTS AS CRIMINALS: THE TRADITIONAL PRACTICE

Terrorism normally connotes violence, or the threat of violence, in order to bring about some sort of political change, and the criminal laws of the United States generally track this rough definition.<sup>89</sup> In the era before the passage of the criminal ban on providing material support to foreign terrorist organizations in 1996,<sup>90</sup> sentencing for crimes involving terrorism was relatively straightforward, since defendants usually faced charges of carrying out violent

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<sup>87</sup> Frank O. Bowman, III, *Debate: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 455 (2010); see also Stephanos Bibas et al., *Policing Politics at Sentencing*, 103 NW. U. L. REV. 1371, 1388–90 (2009) (criticizing the potential of the phenomenon of a district court disagreeing with the *Guidelines* on policy grounds to undermine the fairness of sentencing in general).

<sup>88</sup> *Pepper v. United States*, 131 S. Ct. 1229, 1247 (2011) (noting the validity of a policy disagreement with the *Guidelines*, especially where the Sentencing Commission's opinion relies on "wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted").

<sup>89</sup> See, e.g., 18 U.S.C. § 2332b(g)(5)(A) (2012) (stating that a federal crime of terrorism is a violation of several enumerated criminal statutes and is a crime "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct"); United and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism Act of 2001 (Patriot Act), Pub. L. No. 107-56, § 802, 115 Stat. 272 (2001) ("[T]he term 'domestic terrorism' means activities that . . . involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State [that] appear to be intended to intimidate or influence the policy of a government by intimidation or coercion; or . . . to affect the conduct of a government by mass destruction, assassination, or kidnapping; and . . . occur primarily within the territorial jurisdiction of the United States."); Exec. Order No. 13,224, 31 C.F.R. § 594.311 (2011) ("[Terrorism of foreign groups is] an activity that . . . [i]nvolves a violent act or an act dangerous to human life, property, or infrastructure; and . . . [a]ppears to be intended . . . [t]o intimidate or coerce a civilian population; . . . [t]o influence the policy of a government by intimidation or coercion; or . . . [t]o affect the conduct of government by mass destruction, assassination, kidnapping, or hostage-taking."). For a thoughtful discussion of the problems inherent in defining "terrorism" in general, both in the United States and internationally, see generally Sudha Setty, *What's in a Name? How Nations Define Terrorism Ten Years After 9/11*, 33 U. PA. J. INT'L L. 1 (2011).

<sup>90</sup> 18 U.S.C. § 2339B (2012).

criminal activity, rendering their political motivations irrelevant. It followed logically that given the criminal law's capacity for dealing easily with a violent attack—regardless of what motivated it—the type of sentence courts handed down was relatively unremarkable. Even where a court pointed out the political context of a given incident, such details did not affect the nature of the sentence on their own, but the more sensational or violent the conduct the more severe the resulting sentence. The following examples illustrate this trend.

### A. Historical Examples

#### 1. Puerto Rican Nationalists

In the wake of their 1954 gun attack on the House of Representatives during a debate over an immigration bill, four Puerto Rican nationalists were tried and convicted of various charges related to the incident, including seditious conspiracy.<sup>91</sup> The female defendant, Lolita Lébron, received an indeterminate sentence of sixteen years and eight months to fifty years in prison; the other three, all men, received the same term of twenty-five to seventy-five years.<sup>92</sup> While the political motivations of the four were obvious—Lébron tried to unfurl a Puerto Rican flag on the House floor while proclaiming “Viva Puerto Rico!”—the litany of charges producing the most severe sentences stemmed from the actual violent activity, which mirrored the type of assault charges levied in many a run-of-the-mill case.<sup>93</sup>

Puerto Rican nationalist ideology continued to motivate violent activity in the United States. Marie Haydee Beltran Torres was convicted for her role in the 1977 attack on the Mobil Oil Building in New York City, which left one dead and several injured.<sup>94</sup> Acting on behalf of the Fuerzas Armadas de Liberación Nacional (FALN)—characterized by the court as “a terrorist group that used violence to promote its agenda in support of Puerto Rican independence from the United States”—she refused the assistance of counsel, asked to be treated as a prisoner of war, and was tried in an international court.<sup>95</sup> Upon being convicted of a charge of using an explosive device to

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<sup>91</sup> *Lebron v. United States*, 229 F.2d 16, 17 (D.C. Cir. 1955).

<sup>92</sup> Douglas Martin, *Lolita Lébron, Puerto Rican Nationalist, Dies at 90*, N.Y. TIMES, Aug. 3, 2010, at A17. The four also received an additional six-year prison sentence for the seditious conspiracy charge. *Id.*; see also *United States v. Lebron*, 222 F.2d 531, 532–33 (2d Cir. 1955).

<sup>93</sup> *Lebron*, 229 F.2d at 17 (noting that Lebron was acquitted of the charge of assault with the intent to kill and found guilty of assault with a deadly weapon while the other three defendants were found guilty of all charges).

<sup>94</sup> *Torres v. United States*, 140 F.3d 392, 395 (2d Cir. 1998).

<sup>95</sup> *Id.* at 395 n.2, 396. The struggle over how individuals engaged in non-state political violence should be treated is a familiar one, with the state authorities considering them mere criminals, while they try to assert their political status and be considered akin to prisoners of war. See, e.g., DENIS O’HEARN, NOTHING BUT AN UNFINISHED SONG: BOBBY SANDS, THE IRISH HUNGER STRIKER WHO IGNITED A GENERATION 49–50 (2006) (detailing the long

destroy property used in interstate commerce, resulting in the death of a Mobil employee, she was sentenced to life in prison.<sup>96</sup> Again, because of the violent activity, Torres was convicted of an offense that is on its face clearly criminal, regardless of political motivation.

## 2. *Croatian Nationalists*

Courts also heightened the sentences they gave out for crimes with a political dimension by opting to apply consecutive, as opposed to concurrent, sentences when a defendant faced multiple counts. For example, over several prosecutions in the early 1980s, Croatian nationalists were found guilty of plotting to kill Yugoslav officials in the New York area, as well as opponents within the Croatian community in New York City.<sup>97</sup> The police surveillance revealed multiple instances of scouting targets, plotting bombings, and actual possession of explosives, all ostensibly committed in aid of a political cause.<sup>98</sup> The sentencing courts no doubt felt that the nature of the terrorist activity was so antisocial and disconcerting that it required consecutive sentences as to the various counts of conviction.

## 3. *United States v. El-Jassem*

Another example of the trend of heightened punishment in the form of consecutive sentences for terrorist activity is *United States v. El-Jassem*, a prosecution involving allegations of attempts to detonate a series of car bombs in New York City in 1973 on behalf of the group Black September.<sup>99</sup> The court sentenced the defendant to three consecutive ten-year terms, for a total of thirty years in prison, reasoning that he was unlikely to be rehabilitated, needed to be incapacitated, and that such a sentence was needed to promote general deterrence of similar acts.<sup>100</sup> Specifically, the court noted why it was imposing consecutive sentences on the three counts, elaborating most notably on the point regarding general deterrence:

A heavy sentence is an appropriate means of bringing to the attention of prospective terrorists that they are not welcome to bomb and kill in this country. They are on notice that our police forces will do all they can to obtain the requisite evidence of their crimes and to hunt them down anyplace in the world. Should they be found guilty after a fair trial, they should realize that

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campaign by Irish detainees to be treated as political prisoners during the conflict in Northern Ireland, in response to the British authorities' insistence on classifying them as criminals).

<sup>96</sup> *Torres*, 140 F.3d at 399.

<sup>97</sup> *United States v. Bagaric*, 706 F.2d 42, 52–53 (2d Cir. 1983); *United States v. Ivic*, 700 F.2d 51, 55–56 (2d Cir. 1983).

<sup>98</sup> *Bagaric*, 706 F.2d at 46–52; *Ivic*, 700 F.2d at 53–55.

<sup>99</sup> *United States v. El-Jassem*, 819 F. Supp. 166, 170 (E.D.N.Y. 1993).

<sup>100</sup> *Id.* at 180–82.

they will be punished to the full extent of the law. Terrorist activities such as those revealed in this case, even when bombs do not explode, wreak great havoc. They disturb the peace and tranquility of all our citizens, requiring future security measures that are both costly and hobbling to the free spirit of our open democratic society. The court must also consider the strong national and international policies against terrorists.<sup>101</sup>

The *El-Jassem* court expressed an opinion that there is something especially reprehensible in the type of violence it confronted, something greater than an ordinary crime. Accordingly, once it distinguished the crime and characterized it as terrorism, the court could then take the next step of meting out an unusual and severe penalty.<sup>102</sup>

#### 4. Airplane Hijacking Cases

Harsh sentences are the norm in situations where the crime itself is identified expressly as political and terroristic. A paradigmatic example of such a crime is airplane hijacking. Starting in the late 1980s, the government went to great lengths to try to imprison individuals who had hijacked planes abroad carrying American citizens, even if few in number. In 1987, the FBI, with assistance from the CIA, launched an extensive operation to capture Fawaz Yunis, the lead hijacker of a 1985 Jordanian flight out of Beirut airport; two American citizens were among the passengers.<sup>103</sup> Federal agents eventually captured him in international waters off the coast of Cyprus, luring him out of Lebanon under the pretense of a lucrative drug deal.<sup>104</sup> After being brought to the United States, Yunis was tried and convicted of charges including conspiracy, hostage taking, and air piracy, and was given concurrent sentences of five, thirty, and twenty years in prison, respectively.<sup>105</sup> While the crime itself was a reprehensible and terrifying event, the government acted in a remarkably persistent manner to track Yunis and then lure him out of Lebanon.<sup>106</sup> Its efforts were rewarded with a very long sentence intended to demonstrate a willingness

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<sup>101</sup> *Id.* at 180 (citations omitted).

<sup>102</sup> El-Jassem was deported to Sudan in 2009 after spending around eighteen total years in custody. See Associated Press, *Mystery Terrorist in NYC Plot Deported to Sudan*, TOLEDO BLADE (Mar. 4, 2009), [www.toledoblade.com/Nation/2009/03/04/Mystery-terrorist-in-NYC-plot-deported-to-Sudan.html](http://www.toledoblade.com/Nation/2009/03/04/Mystery-terrorist-in-NYC-plot-deported-to-Sudan.html).

<sup>103</sup> *United States v. Yunis*, 924 F.2d 1086, 1089 (D.C. Cir. 1991). For more background on the *Yunis* case and the numerous novel rulings it inspired, see Said, *supra* note 6, at 546–50.

<sup>104</sup> *United States v. Yunis*, 867 F.2d 617, 618–19 (D.C. Cir. 1989); Elaine Sciolino, *Friend Led Terror Suspect to F.B.I., Lawyer Says*, N.Y. TIMES (Sept. 19, 1987), [www.nytimes.com/1987/09/19/world/friend-led-terror-suspect-to-fbi-lawyer-says.html](http://www.nytimes.com/1987/09/19/world/friend-led-terror-suspect-to-fbi-lawyer-says.html).

<sup>105</sup> *Yunis*, 924 F.2d at 1089–90.

<sup>106</sup> See Said, *supra* note 6, at 546–47 n.23.

to pursue this type of fugitive, even if the primary jurisdictional hook was the presence of only two American passengers on the plane.<sup>107</sup>

The more horrible the crime, the more extraordinary the government's efforts to track down, prosecute, and convict politically motivated airplane hijackers and bombers, particularly where their crimes resulted in multiple deaths. Omar Rezaq took part in a 1985 hijacking of an Egypt Air flight out of Athens, during which he shot and killed several passengers.<sup>108</sup> He was captured in Malta, where the plane had stopped, after Egyptian commandos stormed the plane; in the ensuing chaos, fifty-seven passengers were killed.<sup>109</sup> He pled guilty to multiple counts of murder and attempted murder in Malta, and was sentenced to twenty-five years in prison.<sup>110</sup> The Maltese authorities released him for unknown reasons after serving only seven years of his sentence, and after some roundabout travels in Africa, the FBI picked him up in Nigeria.<sup>111</sup> After being extradited to the United States, Rezaq was convicted of one count of air piracy, and sentenced to life in prison, which was upheld on appeal.<sup>112</sup>

Mohammed Rashed was implicated in several airplane-bombing attacks, including placing a bomb that exploded on board a Pan Am flight in 1982, killing a Japanese citizen.<sup>113</sup> When the Greek authorities apprehended him in Athens, the subsequent American request to have him extradited was approved by the Greek Supreme Court on some of the charges against him.<sup>114</sup> However, the Greek government later denied the extradition request because of political instability following legislative elections and opted to try Rashed in Greece.<sup>115</sup> He was convicted on two counts—homicide and placement of explosives on an aircraft—and sentenced to eighteen years in prison but released after only eight.<sup>116</sup> Upon being apprehended by U.S. authorities after leaving Greece, he faced charges related to the airline bombings, to which he later pled guilty.<sup>117</sup> Rashed apparently chose to cooperate with the government and, after spending eight years in custody, was officially sentenced to seven more years in prison,

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<sup>107</sup> While the symbolic nature of the sentence was clear, in the end Yunis was deported to Lebanon after serving sixteen years of his total prison term. See Associated Press, *Convicted Terrorist Deported to Lebanon After Prison Term*, WASH. POST, Mar. 30, 2005, at A10.

<sup>108</sup> *United States v. Rezaq*, 134 F.3d 1121, 1126 (D.C. Cir. 1998). For more on the *Rezaq* case and the novel rulings it inspired, see Said, *supra* note 6, at 550–52.

<sup>109</sup> *Rezaq*, 134 F.3d at 1126.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 1125–27.

<sup>113</sup> *United States v. Rashed*, 234 F.3d 1280, 1281 (D.C. Cir. 2000).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*; *United States v. Rashed*, 83 F. Supp. 2d 96, 98–100 (D.D.C. 1999).

<sup>116</sup> *Rashed*, 83 F. Supp. 2d at 99–100.

<sup>117</sup> See *Jordanian Man Sentenced in 1982 Bombing of Pan Am Flight from Tokyo to Honolulu*, U.S. DEPARTMENT JUSTICE (Mar. 24, 2006), [www.justice.gov/opa/pr/2006/March/06\\_crm\\_172.html](http://www.justice.gov/opa/pr/2006/March/06_crm_172.html); see also *Rashed*, 234 F.3d at 1281; *Rashed*, 83 F. Supp. 2d at 100.

bringing his total time in prison—American and Greek—to about twenty-five years.<sup>118</sup>

Zayd Safarini was the leader of a team of attackers who hijacked Pan Am flight 73 at Karachi airport in 1986.<sup>119</sup> During the course of the standoff, he shot and killed an American citizen, and at least one other American citizen was killed when he and his fellow hijackers launched an assault on the passengers, leaving twenty dead and over 100 injured.<sup>120</sup> Safarini was tried, convicted, and sentenced to death in Pakistan for his role in the hijacking, which was later commuted to life in prison.<sup>121</sup> After about fourteen years in Pakistani custody, he was released, left Pakistan, and was captured by the FBI en route to Jordan.<sup>122</sup> After charging him with numerous counts of air piracy and homicide, the government sought the death penalty against him.<sup>123</sup> After the district court ruled that the federal death penalty statute could not be applied retroactively—it was passed in 1994—Safarini pled guilty and was sentenced to multiple and consecutive life sentences.<sup>124</sup>

In all the examples discussed above, the government went to great lengths to monitor the status of the men while abroad and then apprehend them once they had been released. Whenever arguments regarding double jeopardy were made, courts unequivocally denied them.<sup>125</sup> Extremely violent conduct warranted life sentences, with the exception of Rashed, who cooperated and still ended up in prison for twenty-five years between the United States and Greece.<sup>126</sup> But the critical common factor was politically motivated violence, which the government made sure was punished most severely. However, beginning in the mid-1990s, the law would shift to allow individuals to be sanctioned criminally for providing material support to a proscribed foreign terrorist organization where the support was not directly linked to violence of any kind.<sup>127</sup> Roughly concomitantly, a sentencing enhancement for terrorist crimes was approved in the *Guidelines*, radically increasing the potential penalty for conviction under a number of criminal statutes.

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<sup>118</sup> Henri E. Cauvin, *Bomber of 1982 Flight Gets 7 Years*, WASH. POST (Mar. 25, 2006), [www.washingtonpost.com/wp-dyn/content/article/2006/03/24/AR2006032401795.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/03/24/AR2006032401795.html).

<sup>119</sup> *United States v. Safarini*, 257 F. Supp. 2d 191, 193 (D.D.C. 2003).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 194.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 202–03; Plea Agreement at 1–3, *Safarini*, 257 F. Supp. 2d 191 (Cr. No. 91-504(EGS)), available at [www.justice.gov/usao/dc/programs/vw/pdf/pan\\_am\\_73\\_docs/pan\\_am\\_73\\_plea0903.pdf](http://www.justice.gov/usao/dc/programs/vw/pdf/pan_am_73_docs/pan_am_73_plea0903.pdf).

<sup>125</sup> *United States v. Rashed*, 234 F.3d 1280, 1285 (D.C. Cir. 2000); *United States v. Rezaq*, 134 F.3d 1121, 1128–30 (D.C. Cir. 1998).

<sup>126</sup> Cauvin, *supra* note 118.

<sup>127</sup> See 18 U.S.C. § 2339B (2012).

#### IV. SENTENCING TERRORISTS AS TERRORISTS: THE TERRORISM ENHANCEMENT

##### A. U.S. Sentencing Guidelines Manual § 3A1.4

In 1994, Congress instructed the Sentencing Commission to “amend its sentencing guidelines to provide an appropriate enhancement for any felony, whether committed within or outside the United States, that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime.”<sup>128</sup> The Sentencing Commission responded with *U.S. Sentencing Guidelines Manual* section 3A1.4, which dramatically increases sentences for individuals convicted of terrorist crimes.<sup>129</sup> The enhancement applies “[i]f the offense is a felony that involved, or was intended to promote, a federal crime of terrorism,” the convicted defendant is subject to a 12-level enhancement of his Guidelines calculation; if his Guidelines score after the enhancement does not compute to level 32 by itself, the Guidelines should be automatically adjusted upward to level 32.<sup>130</sup> The federal crime of terrorism is defined according to a two-prong test in 18 U.S.C. § 2332b(g)(5) as (1) “an offense that is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct,” and (2) any one of a whole host of specifically enumerated statutes.<sup>131</sup>

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<sup>128</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120004, 108 Stat. 1796, 2022. This directive was later extended to domestic terrorism, in the wake of the 1995 Oklahoma City bombing. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 730, 110 Stat. 1214, 1303; *see also* Michael J. Whidden, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 *FORDHAM L. REV.* 2825, 2825–26 (2001) (stating that the Antiterrorism and Effective Death Penalty Act of 1996 was enacted to prevent another bombing similar to the one that occurred in Oklahoma City).

<sup>129</sup> U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (1995).

<sup>130</sup> *Id.*

<sup>131</sup> The full definition is as follows:

- (5) The term “Federal crime of terrorism” means an offense that—
  - (A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and
  - (B) is a violation of—
    - (i) section 32 (relating to destruction of aircraft or aircraft facilities), 37 (relating to violence at international airports), 81 (relating to arson within special maritime and territorial jurisdiction), 175 or 175b (relating to biological weapons), 175c (relating to variola virus), 229 (relating to chemical weapons), subsection (a), (b), (c), or (d) of section 351 (relating to congressional, cabinet, and Supreme Court assassination and kidnapping), 831 (relating to nuclear materials), 832 (relating to participation in nuclear and weapons of mass destruction threats to the United States) 842(m) or (n) (relating to plastic explosives), 844(f)(2) or (3) (relating to arson and bombing of Government property risking or causing death), 844(i) (relating to arson and bombing of property used in interstate commerce), 930(c) (relating to

Upon the passage of the Patriot Act in 2001, Congress authorized a significant amendment to section 3A1.4, whereby the enhancement was made to apply to: a) harboring or concealing a terrorist who committed a terrorist crime; b) obstructing an investigation into federal crimes of terrorism; c) crimes that involved terrorism, but do not fall within the federal crime of terrorism definition; and d) crimes that were intended to influence a government's

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killing or attempted killing during an attack on a Federal facility with a dangerous weapon), 956(a)(1) (relating to conspiracy to murder, kidnap, or maim persons abroad), 1030(a)(1) (relating to protection of computers), 1030(a)(5)(A) resulting in damage as defined in 1030(c)(4)(A)(i)(II) through (VI) (relating to protection of computers), 1114 (relating to killing or attempted killing of officers and employees of the United States), 1116 (relating to murder or manslaughter of foreign officials, official guests, or internationally protected persons), 1203 (relating to hostage taking), 1361 (relating to government property or contracts), 1362 (relating to destruction of communication lines, stations, or systems), 1363 (relating to injury to buildings or property within special maritime and territorial jurisdiction of the United States), 1366(a) (relating to destruction of an energy facility), 1751(a), (b), (c), or (d) (relating to Presidential and Presidential staff assassination and kidnaping), 1992 (relating to terrorist attacks and other acts of violence against railroad carriers and against mass transportation systems on land, on water, or through the air), 2155 (relating to destruction of national defense materials, premises, or utilities), 2156 (relating to national defense material, premises, or utilities), 2280 (relating to violence against maritime navigation), 2281 (relating to violence against maritime fixed platforms), 2332 (relating to certain homicides and other violence against United States nationals occurring outside of the United States), 2332a (relating to use of weapons of mass destruction), 2332b (relating to acts of terrorism transcending national boundaries), 2332f (relating to bombing of public places and facilities), 2332g (relating to missile systems designed to destroy aircraft), 2332h (relating to radiological dispersal devices), 2339 (relating to harboring terrorists), 2339A (relating to providing material support to terrorists), 2339B (relating to providing material support to terrorist organizations), 2339C (relating to financing of terrorism), 2339D (relating to military-type training from a foreign terrorist organization), or 2340A (relating to torture) of this title; (ii) sections 92 (relating to prohibitions governing atomic weapons) or 236 (relating to sabotage of nuclear facilities or fuel) of the Atomic Energy Act of 1954 (42 U.S.C. 2122 or 2284); (iii) section 46502 (relating to aircraft piracy), the second sentence of section 46504 (relating to assault on a flight crew with a dangerous weapon), section 46505(b)(3) or (c) (relating to explosive or incendiary devices, or endangerment of human life by means of weapons, on aircraft), section 46506 if homicide or attempted homicide is involved (relating to application of certain criminal laws to acts on aircraft), or section 60123(b) (relating to destruction of interstate gas or hazardous liquid pipeline facility) of title 49; or (iv) section 1010A of the Controlled Substances Import and Export Act (relating to narco-terrorism).

18 U.S.C. § 2332b(g)(5) (2012) (citation omitted).



conduct by intimidation or coercion, retaliate against government conduct, or influence a civilian population by intimidation or coercion.<sup>132</sup> Additionally, under section 3A1.4 a convicted defendant's criminal history category is Category VI, the most extreme classification usually reserved for career criminals, regardless of whether the individual being sentenced has ever committed a crime.<sup>133</sup> Thus, if a court finds that section 3A1.4 applies, the minimum sentencing range a convicted defendant faces is 210 to 262 months, which is the *Guidelines* calculation for a level 32, criminal history Category VI sentence.<sup>134</sup>

It is clear that the application of the enhancement is quite severe, which corresponds to the shared purpose of Congress and the Sentencing Commission that terrorist crimes are so odious as to warrant such heightened punishment. At first blush, however, one questions why Congress did not simply increase the penalties for the various federal crimes of terrorism listed in section 3A1.4 instead of directing the Sentencing Commission to come up with a *Guidelines* provision doing just that. After all, when the enhancement was passed in 1995—and subsequently amended in 1996, 1997, and 2002—the *Guidelines* were mandatory, rendering its application quite similar to a base sentencing range, provided there existed the intent to intimidate or influence a government by force or coercion. One study reviewing the various sentencing ranges under the *Guidelines* for federal crimes of terrorism reveals a clear difference between the lengthy penalties for crimes of violence and the lesser sanctions for crimes involving supporting or financing terrorism.<sup>135</sup> When section 3A1.4 is applied, though, the distinction between the sentences for violent and non-violent crimes can narrow, exposing a fundamental inconsistency between the penalties Congress has promulgated and the actual sentencing levels terrorism defendants are exposed to, regardless of violent conduct. The fact that the *Guidelines* are now advisory has the potential to blunt the force of section 3A1.4 in that sentencing judges can opt to not sentence at the full level of the *Guidelines* range even if they find the enhancement applicable. But such a decision is subject to the individual discretion of a district court judge and has only been

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<sup>132</sup> See U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 cmt. nn.2 & 4 (2011); see also James P. McLoughlin, Jr., *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, LAW & INEQ., Winter 2010, at 61–62 (remarking that section 3A1.4 now has a broader reach than originally intended and giving the example of *United States v. Jordi*, 418 F.3d 1212, 1213–17 (11th Cir. 2005)). In *Jordi*, the court of appeals allowed an upward departure based on section 3A1.4 in a case involving plans to bomb abortion clinics in Florida. See *id.* The Eleventh Circuit noted that a crime did not have to transcend national boundaries to fall within the enhancement's parameters—all that was needed in this case was the defendant was trying to intimidate or influence a civilian population through his planned violent acts. *Id.*

<sup>133</sup> See U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 cmt. n.2 (1995).

<sup>134</sup> See U.S. SENTENCING GUIDELINES MANUAL ch. 5 pt. A (2011) (Sentencing Table), available at [www.ussc.gov/Guidelines/2011\\_Guidelines/Manual\\_HTML/5a\\_SenTab.htm](http://www.ussc.gov/Guidelines/2011_Guidelines/Manual_HTML/5a_SenTab.htm).

<sup>135</sup> See McLoughlin, *supra* note 132, at 62–76.

made possible by the Supreme Court's *Booker* decision; previously, were the enhancement found applicable, its strict sentencing strictures would have been mandatory.

### B. *The Application of § 3A1.4*

Available statistics from the Commission show that the enhancement has been applied in 197 cases between 1996 and 2012.<sup>136</sup> However, its application was initially quite rare, being applied only nine times in the first six years after its passage, with no instances of its application in four of those years.<sup>137</sup> Between 2002 and 2005, the enhancement was applied only sporadically, pending the outcome of *Blakely* and *Booker*.<sup>138</sup> After *Booker* was decided, the application of the enhancement has become more frequent, reaching a high of

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<sup>136</sup> See U.S. SENTENCING COMM'N, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 31 (1997) [hereinafter 1996 SOURCEBOOK]; U.S. SENTENCING COMM'N, 1997 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 41 (1998) [hereinafter 1997 SOURCEBOOK]; U.S. SENTENCING COMM'N, 1998 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 41 (1999) [hereinafter 1998 SOURCEBOOK]; U.S. SENTENCING COMM'N, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 41 (2000) [hereinafter 1999 SOURCEBOOK]; U.S. SENTENCING COMM'N, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 41 (2001) [hereinafter 2000 SOURCEBOOK]; U.S. SENTENCING COMM'N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 41 (2002) [hereinafter 2001 SOURCEBOOK]; U.S. SENTENCING COMM'N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 41 (2003) [hereinafter 2002 SOURCEBOOK]; U.S. SENTENCING COMM'N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (2004) [hereinafter 2003 SOURCEBOOK]; U.S. SENTENCING COMM'N, 2004 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (Pre-*Blakely*) & tbl.18 (Post-*Blakely*) (2005) [hereinafter 2004 SOURCEBOOK]; U.S. SENTENCING COMM'N, 2005 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (Pre-*Booker*) & tbl.18 (Post-*Booker*) (2006) [hereinafter 2005 SOURCEBOOK]; U.S. SENTENCING COMM'N, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (2007) [hereinafter 2006 SOURCEBOOK]; U.S. SENTENCING COMM'N, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (2008) [hereinafter 2007 SOURCEBOOK]; U.S. SENTENCING COMM'N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (2009) [hereinafter 2008 SOURCEBOOK]; U.S. SENTENCING COMM'N, 2009 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (2010) [hereinafter 2009 SOURCEBOOK]; U.S. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (2011) [hereinafter 2010 SOURCEBOOK]; U.S. SENTENCING COMM'N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (2012) [hereinafter 2011 SOURCEBOOK]; U.S. SENTENCING COMM'N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.18 (2013) [hereinafter 2012 SOURCEBOOK].

<sup>137</sup> 1996 SOURCEBOOK, *supra* note 136; 1997 SOURCEBOOK, *supra* note 136; 1998 SOURCEBOOK, *supra* note 136; 1999 SOURCEBOOK, *supra* note 136; 2000 SOURCEBOOK, *supra* note 136; 2001 SOURCEBOOK, *supra* note 136.

<sup>138</sup> 2002 SOURCEBOOK, *supra* note 136; 2003 SOURCEBOOK, *supra* note 136; 2004 SOURCEBOOK, *supra* note 136; 2005 SOURCEBOOK, *supra* note 136.

thirty-nine times in 2012, the latest year for which reported statistics are available.<sup>139</sup>

Once the enhancement is applied, it is very likely to be upheld on appeal. A review of the reported decisions available electronically indicates that in approximately thirty-one instances the application of the enhancement was affirmed on appeal.<sup>140</sup> There are only three reported decisions where the court's application of the enhancement was reversed on appeal.<sup>141</sup> Of those three, two were *Chandia*, which saw the Fourth Circuit reverse the district court's application of section 3A1.4 on two occasions and remand for resentencing both times,<sup>142</sup> only to uphold the application of the enhancement on the third appeal.<sup>143</sup> In *Parr*, the Seventh Circuit overturned the application of the enhancement on the grounds that the offense did not "involve" a federal crime of terrorism but remanded for the district court to consider if there were facts to sustain its application as to whether the offense "promoted" a federal crime of

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<sup>139</sup> 2006 SOURCEBOOK, *supra* note 136; 2007 SOURCEBOOK, *supra* note 136; 2008 SOURCEBOOK, *supra* note 136; 2009 SOURCEBOOK, *supra* note 136; 2010 SOURCEBOOK, *supra* note 136; 2011 SOURCEBOOK, *supra* note 136; 2012 SOURCEBOOK, *supra* note 136.

<sup>140</sup> *United States v. Dye*, No. 11-3934, 2013 WL 4712733, at \*9–10 (6th Cir. Sept. 3, 2013); *United States v. Ibrahim*, 529 F. App'x 59, 63–64 (2d Cir. 2013); *United States v. Thomas*, 521 F. App'x 741, 743–44 (11th Cir. 2013); *United States v. Kadir*, 718 F.3d 115, 125–26 (2d Cir. 2013); *United States v. Ortiz*, 525 F. App'x 41, 43–44 (2d Cir. 2013); *United States v. Banol-Ramos*, 516 F. App'x 43, 47–50 (2d Cir. 2013); *United States v. Siddiqui*, 699 F.3d 690, 708–10 (2d Cir. 2012); *United States v. Mohammed*, 693 F.3d 192, 201–02 (D.C. Cir. 2012); *United States v. Salim*, 690 F.3d 115, 126–27 (2d Cir. 2012); *United States v. Amawi*, 695 F.3d 457, 485–90 (6th Cir. 2012); *United States v. Chandia (Chandia I)*, 675 F.3d 329, 338–42 (4th Cir. 2012); *United States v. El-Mezain*, 664 F.3d 467, 571 (5th Cir. 2011); *United States v. Assi*, 428 F. App'x 570, 570–71 (6th Cir. 2011); *United States v. Mason*, 410 F. App'x 881, 887 (6th Cir. 2010); *United States v. McDavid*, 396 F. App'x 365, 372 (9th Cir. 2010); *United States v. Ashqar*, 582 F.3d 819, 821 (7th Cir. 2009); *United States v. Christianson*, 586 F.3d 532, 540 (7th Cir. 2009); *United States v. Cottrell*, 312 F. App'x 979, 981–82 (9th Cir. 2009), *amended and superseded by* 333 F. App'x 213, 215 (9th Cir. 2009); *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 154–55 (2d Cir. 2008); *United States v. Garey*, 546 F.3d 1359, 1363 (11th Cir. 2008); *United States v. Schipke*, 291 F. App'x 107, 108 (9th Cir. 2008); *United States v. Tubbs*, 290 F. App'x 66, 68 (9th Cir. 2008); *United States v. Benkahla*, 530 F.3d 300, 311 (4th Cir. 2008); *United States v. Puerta*, 249 F. App'x 359, 360 (5th Cir. 2007) (per curiam); *United States v. Hale*, 448 F.3d 971, 988 (7th Cir. 2006); *United States v. Harris*, 434 F.3d 767, 774 (5th Cir. 2005); *United States v. Cleaver*, 163 F. App'x 622, 630 (10th Cir. 2005); *United States v. Hammoud*, 381 F.3d 316, 355 (4th Cir. 2004), *vacated*, 543 U.S. 1097 (2005); *United States v. Mandhai*, 375 F.3d 1243, 1247–48 (11th Cir. 2004); *United States v. Meskini*, 319 F.3d 88, 91–92 (2d Cir. 2003); *Haouari v. United States*, 429 F. Supp. 2d 671, 681 (S.D.N.Y. 2006).

<sup>141</sup> *United States v. Chandia (Chandia II)*, 395 F. App'x 53, 60 (4th Cir. 2010) (per curiam); *United States v. Chandia (Chandia III)*, 514 F.3d 365, 376 (4th Cir. 2008); *United States v. Parr*, 545 F.3d 491, 503–04 (7th Cir. 2008).

<sup>142</sup> *Chandia II*, 395 F. App'x at 60; *Chandia III*, 514 F.3d at 376.

<sup>143</sup> *Chandia I*, 675 F.3d at 338–42.

terrorism.<sup>144</sup> While there is one reported case in which the Seventh Circuit upheld the district court's refusal to apply the enhancement,<sup>145</sup> there are two separate decisions in which the Second Circuit overruled the district court's determination that section 3A1.4 did not apply to the prosecutions at hand.<sup>146</sup> Finally, in *United States v. Stewart*, the Second Circuit upheld the application of the enhancement for one defendant, upheld its non-application for a second defendant, and reversed its non-application for a third defendant.<sup>147</sup> In summary, out of thirty-eight reported decisions governing the applicability of the enhancement, there were only two clear and final instances of a court of appeals upholding a district court's refusal to apply it; in all other cases, the court ruled in favor of applying it.<sup>148</sup>

The existence of the terrorist enhancement in its current guise offers an advantage to sentencing courts in that the difference between a *Guidelines* sentence without the enhancement and a sentence with the enhancement can be stark. In such cases, if the sentencing court finds section 3A1.4 applicable, it can then decide on a sentence in between the *Guidelines* range with and without the enhancement, after applying the individualized analysis under § 3553(a).

*United States v. Ashqar* functions as an example of this phenomenon.<sup>149</sup> The defendant was convicted of obstruction of justice and criminal contempt for refusing to answer questions at a grand jury empaneled to investigate the activity of Hamas, a banned FTO, in the United States.<sup>150</sup> The *Guidelines* sentence without the enhancement was twenty-four to thirty months on the contempt count but reached 210 to 262 months when section 3A1.4 was found applicable.<sup>151</sup> Faced with this discrepancy, the district court chose a middle-of-the-road 135-month sentence, which was upheld by the Seventh Circuit as

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<sup>144</sup> *Parr*, 545 F.3d at 494.

<sup>145</sup> *United States v. Arnaout*, 431 F.3d 994, 1002 (7th Cir. 2005).

<sup>146</sup> *United States v. Awan*, 607 F.3d 306, 312–13 (2d Cir. 2010); *United States v. Salim*, 549 F.3d 67, 77–79 (2d Cir. 2008).

<sup>147</sup> *United States v. Stewart (Stewart I)*, 590 F.3d 93, 136–52 (2d Cir. 2009). The Second Circuit later upheld the heightened sentence for the third defendant after resentencing by the district court, while leaving undisturbed the district court's decision to let its original sentences stand for the first two defendants. *See United States v. Stewart (Stewart II)*, 686 F.3d 156, 163 & n.4 (2d Cir. 2012).

<sup>148</sup> Compare this ratio with the most recent data on sentencing appeals: "The circuit courts affirmed 73.5 percent of the sentencing appeals brought by the defendant in fiscal year 2012, compared to 74.5 percent in fiscal year 2011." U.S. SENTENCING COMM'N, 2012 ANN. REP. 49 (2012), available at [www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2012/2012\\_Annual\\_Report\\_Chap5.pdf](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/2012_Annual_Report_Chap5.pdf).

<sup>149</sup> 582 F.3d 819, 821 (7th Cir. 2009); *see also* *United States v. Amawi*, 695 F.3d 457, 485–90 (6th Cir. 2012) (finding enhancement applicable but upholding a downward variance from life to 240, 144, and 100 months for each defendant, respectively).

<sup>150</sup> *Ashqar*, 582 F.3d at 821.

<sup>151</sup> *Id.* at 824–25.

reasonable under *Rita*.<sup>152</sup> Taking this dynamic at face value, it appears as if the courts are acting reasonably and moderately by staking out a compromise position in between two extremes. But it is necessary to take a closer look at the type of conduct being punished to determine the “reasonableness” of any of these sentences.

### 1. 18 U.S.C. § 2339B

In 1996, Congress enacted a law banning the provision of material support to designated FTOs.<sup>153</sup> The original legislative impetus for the statute was the purported problem of terrorist groups raising money in the United States under the guise of legitimate humanitarian activity.<sup>154</sup> Congress was persuaded by the logic that “money is fungible,” and that money for charity, even if legitimate, frees up money for violence.<sup>155</sup> In 2010, the Supreme Court extended this logic even further in *Holder v. Humanitarian Law Project*, holding that material support in the form of pure speech may be banned, such as teaching an FTO how to use international law to peacefully resolve a conflict.<sup>156</sup> The Court reasoned that even material support in the form of speech allows FTOs to garner “legitimacy,” which “makes it easier for those groups to persist, to recruit members, and to raise funds, all of which facilitate more terrorist attacks.”<sup>157</sup> A conviction under the statute does not require there be a link between the material support and violent activity, just that the defendant knew what was given was material support and that the support was intended for a designated FTO or a group that had committed acts of political violence tantamount to terrorism.<sup>158</sup> The penalty for conviction is a sentence of up to fifteen years in prison, rising to life in prison if the material support results in death.<sup>159</sup> While the statute was challenged in the courts on multiple fronts, the Supreme Court

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<sup>152</sup> *Id.* at 821 (observing that the application of the enhancement changed the defendant’s Guidelines range from 24 to 30 months to 210 to 262 months, leaving “[t]he district court [to choose] a point roughly in the middle of those extremes, 135 months’ imprisonment”); *see also* United States v. Chandia (*Chandia I*), 675 F.3d 329, 333–34, 341–42 (4th Cir. 2012) (choosing a sentence of 180 months from a pre-enhancement *Guidelines* range of 63 to 78 months or an enhanced *Guidelines* range of 360 months to life).

<sup>153</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 2339B(a)(1), 110 Stat. 1214, 1250.

<sup>154</sup> Said, *supra* note 6, at 556.

<sup>155</sup> *Id.* at 582–84 (citing examples of courts crediting the “money is fungible” theory).

<sup>156</sup> 130 S. Ct. 2705, 2725 (2010).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 2724; *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 925 (9th Cir. 2009).

<sup>159</sup> 18 U.S.C. § 2339B(a)(1) (2012) (“Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.”).

rejected those challenges before it in 2010, ultimately finding the statute constitutional.<sup>160</sup>

One critical distinction within the material support ban is that it applies only to the provision of such support to *foreign* terrorist organizations. There is no corresponding list of domestic terrorist organizations to which material support is criminalized. When combined with the fact that a) nonviolent activity is criminalized and b) the statute is specifically mentioned as a precursor felony for “federal crime of terrorism” purposes under section 3A1.4,<sup>161</sup> materially supporting FTOs can result in very high sentences for what would otherwise be innocuous and constitutionally protected activity. In contrast, in cases involving purely domestic terrorist crimes with no international bent, the available decisions of the federal circuit courts involve some form of violent activity or conspiracy to commit violence, without exception.<sup>162</sup>

#### a. United States v. Hammoud

As an example of this dynamic, in 2004 the Fourth Circuit upheld the conviction and 155-year sentence of Mohamad Hammoud, a Lebanese national prosecuted for running a cigarette smuggling ring between North Carolina, where taxes were low, to Michigan, where they were much higher.<sup>163</sup> Although

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<sup>160</sup> *Humanitarian Law Project*, 130 S. Ct. at 2718–31.

<sup>161</sup> See 18 U.S.C. § 2332b(g)(5)(B) (2012).

<sup>162</sup> *United States v. Mason*, 410 F. App’x 881, 884, 887 (6th Cir. 2010) (upholding application of section 3A1.4 to Earth Liberation Front defendant for arson convictions that targeted university agriculture department building and commercial logging equipment); *United States v. McDavid*, 396 F. App’x 365, 367, 372 (9th Cir. 2010) (upholding application of section 3A1.4 to defendant convicted of conspiring to bomb “a federal facility for tree genetics, a federal dam and fish hatchery, and cell phone towers”); *United States v. Christianson*, 586 F.3d 532, 534, 537–40 (7th Cir. 2009) (upholding application of section 3A1.4 to Earth Liberation Front—“identified by the FBI as a domestic eco-terrorist group”—defendants who pled guilty to destroying government property); *United States v. Garey*, 546 F.3d 1359, 1363 (11th Cir. 2008) (upholding application of section 3A1.4 for conviction on counts of threatening to use a weapon of mass destruction against federal building); *United States v. Schipke*, 291 F. App’x 107, 107–08 (9th Cir. 2008) (upholding application of section 3A1.4 and sentence for threatening to use a weapon of mass destruction); *United States v. Tubbs*, 290 F. App’x 66, 67–68 (9th Cir. 2008) (upholding application of section 3A1.4 after guilty plea to multiple arsons); *United States v. Puerta*, 249 F. App’x 359, 359–60 (5th Cir. 2007) (per curiam) (upholding application of section 3A1.4 to material support count and conspiracy to sell cocaine); *United States v. Hale*, 448 F.3d 971, 974, 988 (7th Cir. 2006) (upholding application of section 3A1.4 for convictions related to plot to kill federal judge); *United States v. Harris*, 434 F.3d 767, 774 (5th Cir. 2005) (upholding application of section 3A1.4 for convictions stemming from planting a bomb to damage a municipal building); *United States v. Cleaver*, 163 F. App’x 622, 624, 630 (10th Cir. 2005) (upholding application of section 3A1.4 for convictions arising from attack on IRS office).

<sup>163</sup> *United States v. Hammoud*, 381 F.3d 316, 325–27 (4th Cir. 2004), *vacated*, 543 U.S. 1097 (2005).

the government alleged that the scheme encompassed over \$3 million in fraud, the jury convicted Hammoud of conspiracy to provide material support to the FTO Hizballah, as well as one count of substantive material support in the amount of \$3500.<sup>164</sup> From that single transaction came the basis for the application of section 3A1.4.<sup>165</sup> The Fourth Circuit also ruled that the then-recently decided *Blakely* opinion did not affect the application of all the various enhancements to Hammoud's sentence, even when made by a judge under the preponderance of the evidence standard, as "*Blakely*, like *Apprendi* before it, does not affect the operation of the federal sentencing guidelines."<sup>166</sup>

As 18 U.S.C. § 2339B—the material support ban—is a predicate felony for “federal crime of terrorism” purposes per section 3A1.4, once the Fourth Circuit upheld the district court's finding that Hammoud attempted to coerce or intimidate a government through his support to Hizballah, the requirements of the application of the enhancement were met.<sup>167</sup> In rejecting all challenges to the convictions and sentence, the Fourth Circuit let stand a 155-year prison sentence when the original *Guidelines* sentence, based on facts found by the jury, would have been fifty-seven months.<sup>168</sup> This sentence was overturned by the Supreme Court following its 2005 *Booker* ruling, and the Fourth Circuit remanded the matter to the district court for resentencing, after re-affirming Hammoud's convictions and *Guidelines* level calculation.<sup>169</sup> Upon being re-sentenced by the district court to thirty years in prison, Hammoud's next appeal of the new sentence was rejected again by the Fourth Circuit.<sup>170</sup> The court of appeals specifically noted that applying the enhancement, with its criminal history category of VI—even when dealing with a first-time offender—was not unreasonable since Congress had made findings justifying such a harsh classification on the basis that terrorists were unlikely to be deterred.<sup>171</sup> Given what the government depicted as Hammoud's longstanding links with Hizballah, the court reasoned that the application of section 3A1.4 properly reflected its belief that recidivism in terrorists is more likely than in cases of ordinary criminals.<sup>172</sup>

But it is important to remember that the terrorist conduct Hammoud was accused of was entirely nonviolent in nature. There were no links to any act of violence, let alone plots to blow up government buildings, hostage situations, or

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<sup>164</sup> *Id.* at 326.

<sup>165</sup> *Id.* at 354–56.

<sup>166</sup> *Id.* at 348–53.

<sup>167</sup> *Id.* at 356.

<sup>168</sup> *Id.* at 361–62 (Motz, J., dissenting) (“The maximum sentence that the district judge could have imposed in this case, had he not made any additional factual findings, was 57 months.”).

<sup>169</sup> *Hammoud v. United States*, 543 U.S. 1097 (2005); *United States v. Hammoud*, 405 F.3d 1034, 1034 (4th Cir. 2005).

<sup>170</sup> *United States v. Hammoud*, 483 F. App'x 865, 867, 873 (4th Cir. 2012).

<sup>171</sup> *Id.* at 873 n.10.

<sup>172</sup> *Id.*

murders aboard hijacked airplanes. The jury convicted him on one count of substantive material support and one count of conspiracy to provide material support to an FTO based on the testimony of a co-defendant who reached a deal with the government. In his dissent to the original Fourth Circuit opinion upholding the convictions and 155-year sentencing, Circuit Judge Roger Gregory provided his take on the substantive material support conviction:

It is further worth noting that not only did the government fail to connect Hammoud's purported \$3,500 donation to [alleged Hizballah figure] Sheik Abbas Harake to any illegal purpose, or concededly criminal act, but the government could barely connect the funds to Harake *to any degree whatsoever*. The government admits that the only source of information indicating that Hammoud was sending money to Hizballah was Said Harb. Harb was described throughout the trial as untrustworthy, manipulative, a liar and an exaggerator. With reference to the alleged \$3,500 in "material support" provided to Hizballah, Harb testified that he had once carried money to Harake for Hammoud. He testified that the money he carried was in an envelope which Hammoud said had two checks totaling \$3,500. Harb testified that he spoke with Harake by telephone while in Lebanon, but never met with him and did not deliver money to him. Instead, Harb stated he "g[a]ve [the envelope] to my mom and, you know, told her to make sure it gets to [Hammoud's] mom." Ostensibly, under the government's theory, Hammoud's mother gave the money to Harake, although I have found no testimony in the record completing this chain that allegedly stretched from Hammoud to Harake. Indeed, Harb never explained how the money got to Harake, nor did he state that he even spoke with Hammoud's mother to make sure she received the envelope, let alone spoke to Harake to assure that he received the envelope from Hammoud's mother. Despite these facts, the \$3,500 transfer was the sole transaction offered by the government in support of Count 78 against Hammoud.<sup>173</sup>

Hammoud's case was noteworthy in that it was the first post-9/11 terrorism conviction under the material support ban, which may explain the harshness of the sentence, even though it has been mitigated somewhat with time and Supreme Court precedent.<sup>174</sup> From this shaky factual basis, the highly contested matter of a \$3500 donation transformed a trial on routine—even if high in volume—fraud charges to a symbolic strike against terrorism in the name of national security less than a year after the traumatic attacks of September 11, 2001. The material support ban, coupled with section 3A1.4, produced a shockingly high sentence for a financial donation that was not criminalized before 1996. While the 155-year sentence was later reduced to thirty, its length is still noteworthy as a statement that the government seeks to punish terrorist offenders harshly.

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<sup>173</sup> *Hammoud*, 381 F.3d at 384 n.16 (Gregory, J., dissenting) (citations omitted).

<sup>174</sup> Adam Liptak, *The Year in Ideas; Material Support*, N.Y. TIMES (Dec. 15, 2002), <http://www.nytimes.com/2002/12/15/magazine/the-year-in-ideas-material-support.html>.



With that said, the *Hammoud* prosecution, whatever one's position on the disputed facts and investigation, at least falls under the material support ban's "money is fungible" rhetoric, which Congress expressly adopted. Following the government's logic, one can make the argument that the \$3500 Hammoud was convicted of sending to a Hizballah figure, regardless of purpose, could free up money to use for violence. If that is the case, then the rationale for a sentencing enhancement to deter this type of surreptitious terrorism financing by dramatically increasing prison time flows naturally. The logic of section 3A1.4's application based on a material support conviction unravels when, at best, the link to violence exists only on a theoretical level.

*b. The Holy Land Foundation Prosecution*

The impetus behind Congress's passage of the material support ban was to put an end to the supposedly urgent problem of terrorist groups raising money in the United States under the guise of humanitarian activity.<sup>175</sup> But, as previously noted, the "money is fungible" rationale was the critical animating force behind the passage of the material support ban. The prosecution of the officers and directors of the Holy Land Foundation for Relief and Development (HLF), formerly the nation's largest Muslim charity, takes material support prosecutions far from this rationale into an area not contemplated by the statute.<sup>176</sup> The HLF defendants were convicted of materially supporting the FTO Hamas through monetary donations to religious charitable organizations called zakat committees operating in the West Bank and Gaza Strip.<sup>177</sup> While the government first intended to argue under the "money is fungible" theory, in accord with its initial belief that it felt the money for charity freed up money for violence, it shifted tack as the case progressed.<sup>178</sup> The government did not dispute the fact that the zakat committees were charitable in nature or allege that the defendants' support was in any way linked to violence; in fact it did not allege that HLF laundered money for or served as a fundraising arm of Hamas.<sup>179</sup> At trial, the government argued that the legitimate charitable activity served to enhance Hamas's reputation in the community, all the while conceding that there was no financial link between Hamas and the zakat committees.<sup>180</sup> To tie the zakat committees to Hamas, the district court allowed

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<sup>175</sup> See Said, *supra* note 6, at 556 n.86.

<sup>176</sup> United States v. El-Mezain, 664 F.3d 467, 485 (5th Cir. 2011).

<sup>177</sup> *Id.* ("Zakat committees are charitable organizations to which practicing Muslims may donate a portion of their income pursuant to their religious beliefs, but the Government charged that the committees to which the defendants gave money were part of Hamas's social network.").

<sup>178</sup> See Said, *supra* note 6, at 586.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

the government to present the testimony of several expert witnesses, including two Israeli security officers who testified anonymously.<sup>181</sup>

After the first trial ended in a mistrial, the second trial resulted in the conviction of all defendants on the material support charges, which generated enhanced sentences under section 3A1.4; fifteen years for two defendants, twenty years for one defendant, and sixty-five years for the remaining two.<sup>182</sup> The Fifth Circuit upheld the convictions and sentences in their entirety.<sup>183</sup> Regarding the specific issue of the terrorism enhancement, as noted above, the material support ban is a listed offense for “federal crime of terrorism” purposes, so the defendants could only challenge the application of section 3A1.4 on the second prong, namely that their conduct was not “calculated to influence or affect the conduct of government by intimidation or coercion.”<sup>184</sup> The Fifth Circuit upheld the district court’s ruling finding the enhancement applicable, crediting its conclusion “that the evidence established that HLF’s purpose was to support Hamas as a fundraising arm, and that videotapes, wiretaps, and seized documents interlinked the defendants, HLF, and Hamas, and demonstrated the defendants’ support of Hamas’s mission of terrorism.”<sup>185</sup>

To properly assess the sentences (to say nothing of the convictions) in the HLF prosecution, a brief recapitulation is in order. The defendants were convicted of materially supporting an FTO, not by sending money for charity

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<sup>181</sup> *El-Mezain*, 664 F.3d at 490–94 (upholding the district court’s ruling allowing the experts to testify anonymously). For a critique of this ruling, see Emily Ratner, *Anonymous Accusers in the Holy Land: Subverting the Right of Confrontation in the United States’ Largest Terrorism-Financing Trial*, 13 LOY. J. PUB. INT. L. 575 (2012); Wadie E. Said, *Constructing the Threat and the Role of the Expert Witness: A Response to Aziz Rana’s Who Decides on Security?*, 44 CONN. L. REV. 1545, 1556–61 (2012). On October 29, 2012, the Supreme Court denied certiorari on the defendants’ constitutional challenge to the anonymous expert testimony. See *Elashi v. United States*, SCOTUSBLOG, [www.scotusblog.com/case-files/cases/elashi-v-united-states/](http://www.scotusblog.com/case-files/cases/elashi-v-united-states/) (last visited Mar. 2, 2014).

<sup>182</sup> *El-Mezain*, 664 F.3d at 484, 490.

<sup>183</sup> *Id.* at 579.

<sup>184</sup> See *id.* at 570–71.

<sup>185</sup> *Id.* at 571. The Fifth Circuit explained its logic with the following paragraph:

As pointed out by the Government, the trial was replete with evidence to satisfy application of the terrorism enhancement because of the defendants’ intent to support Hamas. The Hamas charter clearly delineated the goal of meeting the Palestinian/Israeli conflict with violent jihad and the rejection of peace efforts and compromise solutions. The defendants knew that they were supporting Hamas, as there was voluminous evidence showing their close ties to the Hamas movement. The evidence of statements made by the defendants at the Philadelphia meeting and in wire intercepts throughout the course of the investigation demonstrated the defendants’ support for Hamas’s goal of disrupting the Oslo accords and the peace process, as well as their agreement with Hamas’s goals of fighting Israel. To the extent that the defendants knowingly assisted Hamas, their actions benefitted Hamas’s terrorist goals and were calculated to promote a terrorist crime that influenced government.

*Id.* (citations omitted).

that freed up money for weapons, but via their support of religious charities that the government alleged were affiliated with Hamas, although those charities did not share the same financing structure and might not have a financial relationship at all. The support, which was undisputedly legitimate charity in a conflict-rife region of the world, served to enhance Hamas's reputation in the West Bank and Gaza Strip, since the zakat committees were identified as providing charity on its behalf.<sup>186</sup> To make the link, the government relied in significant part on anonymous security agents testifying as experts. Incidentally, it never moved to designate the zakat committees as part of the FTO Hamas, even though those allegations were made official when the indictment was first handed down in 2004, several years before the final verdict.<sup>187</sup>

Although the jury convicted, it was a finding by the district court that, by a preponderance of the evidence, section 3A1.4 applied because, in its view, the HLF defendants were trying "to influence or affect the conduct of government by intimidation or coercion," based on their own personal political beliefs and statements in support of an FTO. This stands in marked contrast with the requirements for conviction under the material support ban: that the defendants know that what they are providing is material support and that they know that the support is for a banned FTO. In fact, many litigants over many prosecutions have attempted—largely without success—to argue that for liability to attach under the ban, the government must prove that a defendant had a specific intent to further the illegal goals of the FTO.<sup>188</sup> The application of section 3A1.4 in this case further turns this argument on its head; the government can obtain a conviction under the lesser knowledge standard, but for sentencing purposes can impute the specific intent to pressure a government by intimidation or coercion—i.e., the illegal goals of the FTO—under the more permissive preponderance of the evidence standard.

The sentences in HLF ranged from fifteen to sixty-five years in prison as a result of the enhancement's application, although the rationale seems particularly punitive; the defendants were given harsh sentences for engaging in legitimate charity and having unpopular political beliefs. For section 3A1.4 purposes, the issue of deterrence is essentially moot, since HLF had tried without success to coordinate with the government so as to avoid sending funds to terrorist groups in the wake of the passage of the material support ban in 1996.<sup>189</sup> As the Fifth Circuit itself recognized, the bulk of the allegations at trial

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<sup>186</sup>In the prosecution, the charging documents referred to zakat committees in the abstract, leaving the impression that all religious-based charity in the West Bank and Gaza Strip fell under the Hamas umbrella, a rather broad statement, to be sure. *See* Superseding Indictment at ¶ 4, *United States v. Holy Land Found. for Relief & Dev.*, No. 3:04-CR-240-G (N.D. Tex. Nov. 30, 2005); *Said*, *supra* note 6, at 588.

<sup>187</sup>*Said*, *supra* note 6, at 586 (noting the issue of non-designation of the zakat committees).

<sup>188</sup>*See id.* at 590–91.

<sup>189</sup>*See* Ratner, *supra* note 181, at 583–84 (collecting sources).

centered on activity that occurred before Hamas's designation.<sup>190</sup> Further, the government shut down the HLF in the wake of 9/11 and both the corporate entity and individual defendants ceased fundraising and sending money abroad for a period of at least two years before the initial indictment was handed down.<sup>191</sup>

So there is a real question regarding the terrorism enhancement's applicability on deterrence grounds, except if one subscribes to the retributive-inspired view that the type of support the HLF defendants provided mandates sentences in excess of those handed down for many ordinary violent crimes, simply because the terrorism label applies.<sup>192</sup> Stated differently, the harsh sentences in this case only make sense if we view the defendants' conduct, which was rooted in their religious obligation, as causing so much harm that it justified enhanced punishment. Given that the material support at issue sounded in the nebulous concept of enhancing an FTO's legitimacy, construing the level of harm as so great as to warrant a heavy sentence requires much more of an explanation than the record provides. Unless one takes the view that anyone convicted of a material support crime is an inveterate terrorist who must be punished severely, it is hard to understand the logic behind sentencing the HLF defendants to up to sixty-five years in prison, given the undisputed fact that their activities were in no way linked to violence.

## 2. Section 3A1.4 Post-Booker

Finally, the application of section 3A1.4 raises the critical issue of what to do with judge-found facts in the sentencing context, the original point of dispute that gave rise to the Court's holding in *Apprendi*: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."<sup>193</sup> In *Blakely*, the Court further narrowed those parameters: "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."<sup>194</sup> These two proclamations, taken together, would seem to render the application of the terrorism enhancement impossible without facts found by a jury beyond a reasonable doubt or those agreed upon in a sworn plea bargain.

In the wake of *Booker*, the Supreme Court has dealt with this quandary by resorting to a straightforward logic, albeit one that does not completely answer the question. In *Cunningham v. California*, a case invalidating California's

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<sup>190</sup> *El-Mezain*, 664 F.3d at 527.

<sup>191</sup> *Id.* at 488; see also Ratner, *supra* note 181, at 584–88 (collecting sources).

<sup>192</sup> See McLoughlin, *supra* note 132, at 109–11; cf. *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008) (expressly reserving the right to uphold heightened penalties for, inter alia, terrorism, which it described as an "offense[] against the State").

<sup>193</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

<sup>194</sup> *Blakely v. Washington*, 542 U.S. 296, 303 (2004).

determinate sentencing system on the basis that it allowed judges to find facts that would allow for sentencing increases, the Court noted, “[T]he Federal Constitution’s jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant.”<sup>195</sup> The Court went on to cite *Blakely*’s ruling that “‘the relevant ‘statutory maximum,’ this Court has clarified, ‘is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.’”<sup>196</sup> This passage gives the impression that even though the Court uses the phrase “statutory maximum,” it is sticking with *Blakely*’s interpretation of the rule, as the latter citation indicates.

In a terrorism case, however, it is not surprising to see a court of appeals disagree with the above reading of *Cunningham*, however unsatisfactory that may be, given that such cases offer up an opportunity to engage in the expressive function of condemning terrorism and reaffirming a court’s understanding of its participation in the project of protecting national security. In the previously discussed case of *United States v. Ashqar*,<sup>197</sup> the defendant was acquitted of the most serious terrorism charge of being part of a RICO conspiracy led by the FTO Hamas, but convicted of criminal contempt and obstruction of justice because of his refusal to testify before a grand jury investigating Hamas activities.<sup>198</sup> The FBI investigated Ashqar over a decade “for his role as a communication and financial conduit for the terrorist organization Hamas,” but the Seventh Circuit pointed out that he was only indicted after he refused to testify.<sup>199</sup> Although his *Guidelines* range was twenty-four to thirty months, the district court found section 3A1.4 applicable, based on its finding that he intended to promote a federal crime of terrorism, rendering his range from 210 to 262 months.<sup>200</sup> In the end, the court sentenced him to a “middle” range of 135 months, which reflected “a balance between the need for deterrence, the seriousness of the act, and Ashqar’s lack of a violent history.”<sup>201</sup>

The Seventh Circuit rejected Ashqar’s *Blakely* challenge to section 3A1.4’s application in part by citing to *Cunningham*’s endorsement of the phrase “statutory maximum” without making reference to that opinion’s *Blakely* citation.<sup>202</sup> By invoking the phrase “statutory maximum,” the court of appeals went on to reason:

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<sup>195</sup> 549 U.S. 270, 274–75 (2007) (citing *United States v. Booker*, 543 U.S. 220 (2005); *Blakely*; *Ring v. Arizona*, 536 U.S. 584 (2002); and *Apprendi*).

<sup>196</sup> *Id.* at 275 (quoting *Blakely*, 542 U.S. at 303–04).

<sup>197</sup> See *supra* Part IV.B.

<sup>198</sup> *United States v. Ashqar*, 582 F.3d 819, 821–22 (7th Cir. 2009).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 821.

<sup>201</sup> *Id.* at 822.

<sup>202</sup> *Id.* at 824.

There is also no question the sentences are below the statutory maximum. The statutory maximum for obstruction is ten years (120 months), and that is the sentence the district court chose for that count; the statutory maximum for criminal contempt is life, well above the 135 months Ashqar received on that count.<sup>203</sup>

Where Ashqar tried to argue “out of the blue”—in the Seventh Circuit’s phrase—that such a determination violated the Sixth Amendment, the court of appeals cited to *Rita*’s dictum that there is no constitutional problem because “the judge could disregard the Guidelines and apply the same sentence . . . in the absence of the special facts.”<sup>204</sup>

The Seventh Circuit’s decision is flawed in several respects. On a theoretical level, its rationale does not comport with the constitutional basis of the Supreme Court’s *Booker* jurisprudence, rooted as it is in a historical concept of liberty represented by the jury trial that goes back to the Magna Carta.<sup>205</sup> In the *Booker* majority opinion, Justice Stevens made sure to reaffirm the principles animating its holding, stemming from the Framers’ fear of “the threat of ‘judicial despotism’ that could arise from ‘arbitrary punishments upon arbitrary convictions’ without the benefit of a jury in criminal cases.”<sup>206</sup> The Court went on to cite this language from its *Apprendi* opinion:

[T]he historical foundation for our recognition of these principles extends down centuries into the common law. “[T]o guard against a spirit of oppression and tyranny on the part of rulers,” and “as the great bulwark of [our] civil and political liberties,” trial by jury has been understood to require that “*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant’s] equals and neighbours . . . .”<sup>207</sup>

The requirement of proving every accusation accordingly holds, whether that accusation comes from a statute or a sentencing guideline, a scenario that clearly encompasses section 3A1.4.<sup>208</sup> The above citations and the principles they reference call into question whether the terrorist enhancement could be applied properly absent a jury determination or guilty plea in support. But at

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<sup>203</sup> *Id.* at 825.

<sup>204</sup> *Ashqar*, 582 F.3d at 824–25 (quoting *Rita v. United States*, 551 U.S. 338, 354 (2007)).

<sup>205</sup> *United States v. Booker*, 543 U.S. 220, 239 (2005). For more on the historical role of the jury trial in this context, see generally Shima Baradaran, *The Presumption of Punishment*, CRIM. L. & PHIL., June 6, 2013, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2192346](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2192346).

<sup>206</sup> *Booker*, 543 U.S. at 238–39.

<sup>207</sup> *Id.* at 239 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000)) (internal citations omitted).

<sup>208</sup> *Id.* (“Regardless of whether the legal basis of the accusation is in a statute or in guidelines promulgated by an independent commission, the principles behind the jury trial right are equally applicable.”).

least with respect to Ashqar's sentencing, transforming a twenty-four to thirty month sentencing range to a 135-month sentence on the basis of a judge's determination regarding his intentions seems to represent the type of "judicial despotism" the Court was concerned with, starting with *Apprendi* and continuing on to *Booker* and its progeny.

Viewed in light of these principles, *Ashqar*'s other shortcomings come into view. The opinion fails to point out the *Cunningham* Court's reliance on *Blakely* in advancing its position about the "statutory maximum," thereby obfuscating the unresolved tension arising in the wake of *Blakely*'s holding.<sup>209</sup> Although it adopted a dismissive tone with respect to Ashqar's argument by noting that it has "rejected variants of this argument countless times, and do[es] so again here," it did not provide any citations to support this statement.<sup>210</sup> Its reliance on a statement in *Cunningham*, an opinion invalidating a state sentencing scheme that gave judges the power to find facts that enhance sentences, is far from persuasive, as there is little factual overlap between the scheme and the facts of Ashqar's case.

Additionally, its reliance on *Rita* is shaky. In that case, the defendant faced a *Guidelines* sentence of thirty-three to forty-one months for convictions on charges related to his lying under oath about the purchase of a machine gun from a company under federal investigation.<sup>211</sup> The Court rejected Rita's challenge to his thirty-three-month sentence, and specifically concluded that a court of appeals may apply a presumption of reasonableness—for purposes of *Booker* review—to a sentence within the *Guidelines* range.<sup>212</sup> There was no dispute as to the validity of the sentencing range, because Rita was arguing that his own personal circumstances and background warranted a lesser sentence than proscribed by the *Guidelines*. Ashqar's challenge to his sentence stemmed from the district court's specific finding that in obstructing a federal investigation, he had the intent to further the crimes of the FTO being investigated.<sup>213</sup>

In his concurring opinion in *Rita*, Justice Scalia posited that a scenario like the one articulated by Ashqar in his appeal violates the Sixth Amendment and

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<sup>209</sup> Indeed, the Supreme Court's most recent sentencing decision underscores this point. In *Alleyne v. United States*, the Court held that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury," thereby raising further doubt about the compatibility of section 3A1.4 with the Court's *Booker/Apprendi* jurisprudence. 133 S. Ct. 2151, 2155 (2013).

<sup>210</sup> *United States v. Ashqar*, 582 F.3d 819, 824 (7th Cir. 2009).

<sup>211</sup> *Rita v. United States*, 551 U.S. 338, 341–42, 344 (2007).

<sup>212</sup> *Id.* at 358–60.

<sup>213</sup> Further complicating this analysis was that the district court explicitly relied on acquitted conduct—from the RICO charge—to find by a preponderance of the evidence that Ashqar had the requisite terroristic intent. See *Ashqar*, 582 F.3d at 824. The Seventh Circuit upheld the district court's reliance on the acquitted conduct by noting that under its jurisprudence, *United States v. Watts* survives *Booker*. *Id.* (citing *United States v. Price*, 418 F.3d 771 (7th Cir. 2005)).

argued the Court failed adequately to grasp this unresolved sentencing issue.<sup>214</sup> The majority opinion, authored by Justice Ginsburg, responded to Justice Scalia's constitutional concerns not by rejecting them, but through a declaration that since those concerns were not before the Court in this particular case, there was no need to rule on them.<sup>215</sup> It did not rule out invalidating a sentence where a judge had found a fact that increased sentencing exposure expressly, but noted that it would not decide the matter without having a set of facts like that properly before it.<sup>216</sup>

While not a completely implausible reading of the Supreme Court's statements in dicta, the Seventh Circuit's ruling in *Ashqar* speaks with a certainty that Supreme Court precedent does not seem to warrant. Further, the court of appeals' opinion takes a matter that should give rise to serious Sixth Amendment concerns and dismisses those concerns without recognizing the sweeping constitutional ramifications of its holding. It is not beyond the realm of possibility that Ashqar, rather than supporting violence or even Hamas per se, was simply refusing to cooperate with what he felt was an overzealous investigation.<sup>217</sup> Such a scenario is not so far-fetched. After all, it was the FBI's aggressive tactics in investigating Hamas that led the Foreign Intelligence Surveillance Court to issue the first public ruling in its history in 2002 denying the government's efforts to share information more freely between its criminal investigators and those national security agents running wiretaps pursuant to the Foreign Intelligence Surveillance Act.<sup>218</sup> Rather than necessarily supporting the aims of Hamas, Ashqar was most probably taking what he believed to be a patriotic position; during the pendency of his prosecution, he ran, as an unaffiliated independent, for the position of president of the Palestinian Authority while under house arrest in the United States.<sup>219</sup> Nothing in his

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<sup>214</sup> See *Rita*, 551 U.S. at 371–75 (Scalia, J., concurring).

<sup>215</sup> *Id.* at 353–54 (majority opinion) (“Justice Scalia concedes that the Sixth Amendment concerns he foresees are not presented by this case. And his need to rely on *hypotheticals* to make his point is consistent with our view that the approach adopted here will not ‘raise a multitude of constitutional problems.’” (citations omitted)).

<sup>216</sup> See *id.* at 354.

<sup>217</sup> Mary Beth Sheridan, *Palestinian Puzzle*, WASH. POST, Oct. 19, 2006, at B1, B5 (discussing Ashqar's background and the reasons behind his refusal to cooperate with the government's attempts to compel his testimony).

<sup>218</sup> *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 623–24 (FISA Ct. 2002), *overruled by In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002); Philip Shenon, *Secret Court Says F.B.I. Aides Misled Judges in 75 Cases*, N.Y. TIMES, Aug. 23, 2002, at A1 (“Officials have previously acknowledged that at the time of Mr. Moussaoui's arrest, the F.B.I. was wary of making any surveillance requests to the special court after its judges had complained bitterly the year before that they were being seriously misled by the bureau in F.B.I. affidavits requesting surveillance of Hamas, the militant Palestinian group.”).

<sup>219</sup> Sheridan, *supra* note 217 (noting that Ashqar ran for president of the Palestinian Authority while under house arrest in Virginia).



indictment suggested recent activity on behalf of Hamas, and all the Hamas-related allegations against him predated the group's designation as an FTO.<sup>220</sup>

*Ashqar* and the other decisions demonstrate the willingness of the federal courts to employ the terrorism enhancement against individuals charged with terrorist crimes. On the crucial question of intent to support a terrorist group's aims, courts are apt to make such a finding, interpreting the facts broadly to do so.<sup>221</sup> Based on a belief that defendants are dangerous terrorists, and informed by a belief about what constitutes terrorism, courts have in general displayed an unwillingness to carefully parse through the facts as they accept the government's characterization of a given defendant's threat level, even in complicated material support cases. But these decisions may be heading into constitutionally questionable territory, as they approve a sentencing scheme that authorizes the district court to drastically increase a sentence beyond what the jury's verdict authorizes on a judge's finding by a preponderance of the evidence.<sup>222</sup> Over and above the constitutional infirmities of such a scheme, the courts' rulings can leave the impression that the nature of the charges against the defendants fueled section 3A1.4's application, as opposed to a careful review of the facts. Short of eliminating section 3A1.4, which is unlikely, district courts should carefully carry out their roles in light of *Blakely*'s admonition, as highlighted by Justice Scalia in *Cunningham*.

#### V. THE COURTS OF APPEALS REBEL AGAINST THE POST-*BOOKER* SYSTEM OF REVIEW

By virtue of its existence, section 3A1.4 indicates that terrorism is different, and worthy of greater than normal punishment, reflecting society's heightened concern about terrorists operating in its midst. In that vein, the mechanism of sentencing terrorists includes an expressive component; it allows a court to make a statement against their depredations in a general sense. While this is a potentially dangerous function, in that it contains the possibility of courts engaging in the politically cost-free exercise of enhancing the sentence of those society considers dangerous with limited oversight, at least the district courts doing the sentencing have the benefit of a full hearing of all the relevant facts before making any decisions. With respect to the courts of appeals, however, there exists the temptation to pick and choose the most damning facts that comport with preconceived notions of how terrorists are especially blameworthy, regardless of how the jury or sentencing court ruled.<sup>223</sup> Most significantly here, there is a real question of whether review of a sentence in a

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<sup>220</sup> *Id.* ("The indictment lists no pro-Hamas actions by Ashqar after March 1994, other than his refusal to testify before grand juries. The U.S. Treasury Department designated Hamas a terrorist organization in January 1995.").

<sup>221</sup> *See, e.g.,* United States v. Ashqar, 582 F.3d 819, 821–22 (7th Cir. 2009).

<sup>222</sup> *See id.* at 821.

<sup>223</sup> *See, e.g., id.* at 821–22.

terrorism prosecution faithfully adheres to the deferential standards of *Booker* and its progeny—*Rita*, *Gall*, and *Kimbrough*.

#### A. United States v. Abu Ali

The first example of this phenomenon comes from the prosecution of Ahmed Omar Abu Ali, an American student at a university in Saudi Arabia who was arrested in the wake of a terrorist bombing in Riyadh on suspicion of belonging to a local al-Qaeda cell.<sup>224</sup> After the district court upheld the confession Abu Ali gave to the Saudi authorities as voluntarily given, he was convicted of multiple terrorist crimes, including providing material support to an FTO, conspiracy to commit air piracy, and conspiracy to assassinate the President of the United States.<sup>225</sup> Although his *Guidelines* calculation called for life in prison, the district court decided on a thirty-year prison sentence, to be followed by thirty years of supervised release.<sup>226</sup> The district court justified its downward variance on the basis of a careful consideration of the § 3553(a) factors: Abu Ali's own personal characteristics and history, the need for just punishment, adequate deterrence, protection of the public, and rehabilitative goals of sentence.<sup>227</sup> Additionally, the district court noted the need to avoid disparate sentences, reasoning that Abu Ali's case was closer to that of John Walker Lindh, who received a twenty-year sentence for fighting with the Taliban in Afghanistan, than those of Timothy McVeigh and Terry Nichols, who received the death penalty and life in prison, respectively, for killing 168 people in the bombing of the Oklahoma City federal building.<sup>228</sup>

Over Judge Diana Gribbon Motz's dissent, which asserted that the majority failed to respect *Rita*, *Gall*, and *Kimbrough*'s instructions regarding appellate review of a sentence, as well as improperly overriding the district court's specific findings,<sup>229</sup> the majority rejected the sentence as unreasonable, and remanded for resentencing, offering an implicit call for a life sentence.<sup>230</sup> The Fourth Circuit majority focused its criticism on the district court's likening of Abu Ali's sentence to that of Lindh in contrast to those of McVeigh and Nichols, which it deemed "the driving force behind [the district court's]

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<sup>224</sup> United States v. Abu Ali (*Abu Ali II*), 528 F.3d 210, 221–25 (4th Cir. 2008); United States v. Abu Ali (*Abu Ali I*), 395 F. Supp. 2d 338, 343 (E.D. Va. 2005). For a lengthy discussion and criticism of the federal courts' decision to admit the confession in the Abu Ali prosecution, see Said, *supra* note 5, at 17–34.

<sup>225</sup> *Abu Ali II*, 528 F.3d at 225.

<sup>226</sup> *Id.* at 221.

<sup>227</sup> *Id.* at 269–82 (Motz, J., dissenting) (criticizing, inter alia, "the majority's insistence on refusing to defer to the district court's considered judgment").

<sup>228</sup> *Id.* at 262–65 (majority opinion).

<sup>229</sup> See *id.* at 269–82 (Motz, J., dissenting).

<sup>230</sup> *Id.* at 269 (majority opinion) ("While we of course leave the sentencing function to the able offices of the trial court on remand, we trust that any sentence imposed will reflect the full gravity of the situation before us.").

ultimate [sentencing] determination.”<sup>231</sup> The district court took the hint and subsequently sentenced Abu Ali to life in prison, after expressing concern for public safety were he to be released after thirty years, based on his failure to express any remorse for his crimes; not surprisingly this sentence survived further appellate review and was deemed reasonable.<sup>232</sup>

The initial Fourth Circuit majority dismissed the importance of the fact that Abu Ali’s convictions were for crimes still in the highly inchoate planning stages and nowhere near fruition; the district court had originally relied on this factor to justify its variance from the *Guidelines* calculation.<sup>233</sup> Judge Motz asserted precisely the opposite point, namely that lack of actual harm was a valid factor to consider in evaluating a sentence, as part of her critique that “[t]he majority’s approach in this case reflects a fundamental misunderstanding of the shift in sentencing jurisprudence that has occurred since the Supreme Court issued its landmark decision in *Booker*.”<sup>234</sup> Rejecting all attempts to recognize Abu Ali’s humanity and consider the benefits to the public of the thirty-year sentence, the Fourth Circuit did not hide its outrage over the irredeemable threat all terrorist defendants—personified by Abu Ali—represented.<sup>235</sup> It noted:

We are similarly unmoved by the district court’s (and dissent’s) references to letters describing Abu Ali’s “general decent reputation as a young man” and his overall “good character.” What person of “decent reputation” seeks to assassinate leaders of countries? What person of “good character” aims to destroy thousands of fellow human beings who are innocent of any transgressions against him? This is not good character as we understand it, and to allow letters of this sort to provide the basis for such a substantial variance would be to deprive “good character” of all its content.<sup>236</sup>

In the face of such logic, it was not surprising that the majority dismissed arguments about a thirty-year sentence’s potential of rehabilitating a youthful Abu Ali, and foregoing the need to have the public pay for his medical care in advanced age.<sup>237</sup>

## B. *United States v. Lynne Stewart*

This type of sparring over the appropriate type of appellate review in a terrorism case is not limited to *Abu Ali*. In the *Stewart* prosecution, while all members of the Second Circuit panel agreed on remanding the issue of

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<sup>231</sup> *Abu Ali II*, 528 F.3d at 262.

<sup>232</sup> See *United States v. Abu Ali (Abu Ali III)*, 410 F. App’x 673, 676–82 (4th Cir. 2011).

<sup>233</sup> *Abu Ali II*, 528 F.3d at 264–65.

<sup>234</sup> *Id.* at 281 (Motz, J., dissenting).

<sup>235</sup> See *id.* at 267–68 (majority opinion).

<sup>236</sup> *Id.* at 268 (citation omitted).

<sup>237</sup> *Id.*

sentencing for the district court to consider more fully the matter of Lynne Stewart's perjury,<sup>238</sup> two judges wrote separate opinions to further clarify their positions.<sup>239</sup> Although he concurred as to the remand for resentencing, Judge Walker wrote to register his position that the district court should have imposed a sentence far closer to the section 3A1.4-influenced *Guidelines* recommendation of 360 months than the twenty-eight months initially levied.<sup>240</sup> While he also concurred, Judge Calabresi made it a point to specially commend the district court for its careful handling of the prosecution and urged a high level of deference for its role as a sentencing court.<sup>241</sup> Judge Walker invoked the terrorism enhancement as evidence of Congress's view that terrorist and material support crimes are different and deserving in the main of more severe sentencing.<sup>242</sup> Judge Calabresi disagreed with that position, and argued that precisely because those crimes encompass such a broad degree of activity, appellate courts need to respect the broad discretion that district courts have in sentencing defendants convicted of terrorist crimes.<sup>243</sup>

Judges Walker and Calabresi also differed with respect to the role that actual harm played in determining a sentence, echoing the dispute between the majority opinion and Judge Motz's dissent in *Abu Ali*. Judge Walker argued that a lack of harm should not serve as a basis for a downward deviation when a defendant has been convicted of material support conspiracy, which by its nature need not have a direct relation to any violence, and cited the *Abu Ali* majority's reasoning in support of his position.<sup>244</sup> Judge Calabresi remarked on the general nature actual harm has played in the sentencing process historically, cited recent caselaw reflecting courts' willingness to order a downward variance in terrorism cases, and noted that Congress had inherently recognized the role harm played in material support cases by authorizing a heightened penalty of life in prison when the support resulted directly in death.<sup>245</sup> The disagreement between the two judges seemed to center on the notion of the terrorist crime. Judge Calabresi suggested that he did not fully endorse Judge Walker's position that terrorism as an extraordinary type of crime fundamentally alters the sentencing process as the latter envisioned.<sup>246</sup> Judge Walker reiterated that a downward variance in Stewart's case—which he deemed as falling into the “heartland” of terrorist crimes—was not warranted.<sup>247</sup>

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<sup>238</sup> United States v. Stewart (*Stewart I*), 590 F.3d 93, 151 (2d Cir. 2009).

<sup>239</sup> See *id.* at 152–63 (Calabresi, J., concurring); *id.* at 163–86 (Walker, J., concurring in part and dissenting in part).

<sup>240</sup> See *id.* at 163–86 (Walker, J., concurring in part and dissenting in part).

<sup>241</sup> See *id.* at 152–63 (Calabresi, J., concurring).

<sup>242</sup> *Id.* at 172–74 (Walker, J., concurring in part and dissenting in part).

<sup>243</sup> *Id.* at 154 n.3 (Calabresi, J., concurring).

<sup>244</sup> *Stewart I*, 590 F.3d at 176–77 (Walker, J., concurring in part and dissenting in part) (citing United States v. Abu Ali (*Abu Ali II*), 528 F.3d 210, 264–65 (4th Cir. 2008)).

<sup>245</sup> *Id.* at 155–57 (Calabresi, J., concurring).

<sup>246</sup> *Id.* at 156.

<sup>247</sup> *Id.* at 177–78 (Walker, J., concurring in part and dissenting in part).

Judge Walker's opinion scarcely hid his outrage at Stewart's conduct. But his position seemed to take for granted that Stewart's crimes fell into the "heartland" of material support for terrorism, without elaborating how. For example, to the extent it is possible, we might construe "heartland" material support as providing money to carry out murder abroad, in accordance with her conviction under 18 U.S.C. § 2339A. Stewart, a longtime criminal defense lawyer, was convicted, however, of allowing her client, an imprisoned foreign terrorist leader, to make statements to the press regarding his opposition to his militant organization's ceasefire with the Egyptian government, in violation of federal prison authorities' restrictions on his speaking publicly.<sup>248</sup> The government acknowledged that no one was harmed as a result of Stewart's relaying her client's position on the ceasefire.<sup>249</sup> Without delving further into the merits of the case against Stewart,<sup>250</sup> we can recognize the potential danger in such activity. But to assume that it simply falls into a "heartland" of terrorist support crime, without further elaboration,<sup>251</sup> reveals a type of visceral outrage at all conduct linked to terrorists that can taint the individualized and careful process that is supposed to go into a criminal sentencing. Stated differently, we might ask how Stewart's crimes constitute "heartland" terrorist support when there has been no case like hers before or since. Given the lack of authority on what constitutes a "heartland" terrorist crime, Judge Walker's opinion goes too far in calling for harsher sentences for terrorist support crimes as a general rule.

### C. The Jose Padilla Prosecution

Generalizing about the nature of terrorist crimes brings us back to the supposedly irredeemable nature of a terrorist, a phenomenon well-represented by the Eleventh Circuit's decision overturning as substantively unreasonable alleged "dirty bomber" Jose Padilla's sentence on material support charges.<sup>252</sup> After being arrested in 2002 at Chicago O'Hare International Airport upon his return from abroad, Padilla was then moved to a military brig in Charleston, S.C., where he spent three years detained in isolation under the classification of enemy combatant.<sup>253</sup> The government suspected him of wanting to detonate a "dirty bomb" in the United States, which could have left scores of casualties in his wake.<sup>254</sup> Upon his release from military custody, Padilla was indicted—as

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<sup>248</sup> See Tamar R. Birckhead, *The Conviction of Lynne Stewart and the Uncertain Future of the Right To Defend*, 43 AM. CRIM. L. REV. 1, 7 (2006); Benjamin Weiser, *Judge Orders Release of Dying Lawyer Convicted of Aiding Terrorism*, N.Y. TIMES, Jan. 1, 2014, at A15.

<sup>249</sup> See *Stewart I*, 590 F.3d at 170 (Walker, J., concurring in part and dissenting in part).

<sup>250</sup> See generally Birckhead, *supra* note 248, at 1–52 (arguing that post-9/11 Special Administrative Measures (SAMs) represent classic government overreaching that compromises civil liberties and access to courts).

<sup>251</sup> See *Stewart I*, 590 F.3d at 177–78.

<sup>252</sup> See *United States v. Jayyousi*, 657 F.3d 1085, 1116–17 (11th Cir. 2011).

<sup>253</sup> Alvarez, *supra* note 7.

<sup>254</sup> *Id.*

part of a preexisting terrorism investigation involving two other defendants in Florida—and ultimately convicted on criminal charges entirely unrelated to the “dirty bomb” allegations.<sup>255</sup> After finding section 3A1.4 applicable, rendering Padilla’s *Guidelines* range from 360 months to life at a criminal history category of VI, the district court first reduced his sentencing exposure after considering the § 3553(a) factors, and then ordered another downward variance of forty-two months, in recognition of the harsh and lengthy nature of Padilla’s confinement in military detention.<sup>256</sup> Ultimately, he received a sentence of 208 months in prison.<sup>257</sup>

The Eleventh Circuit reversed, finding the sentence too lenient in light of Padilla’s extensive criminal history as a youth in Chicago prior to his involvement with religious extremists abroad.<sup>258</sup> Not only did the court of appeals highlight Padilla’s career offender status—seventeen prior arrests, including one for murder—as a reason for rejecting his sentence, but it also remarked that the risk of recidivism in his case was quite high.<sup>259</sup> The court stated:

“[T]errorists[,] [even those] with no prior criminal behavior[,] are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation.” Padilla poses a heightened risk of future dangerousness due to his al-Qaeda training. He is far more sophisticated than an individual convicted of an ordinary street crime.<sup>260</sup>

The Eleventh Circuit drew inspiration from the *Abu Ali* majority opinion in its next two observations justifying the reversal of Padilla’s sentence as too lenient.<sup>261</sup> First, the court of appeals rejected the district court’s comparison of Padilla’s sentence to those of other terrorist defendants who were not similarly situated, in its view, since they, unlike Padilla, “either [were] convicted of less serious offenses, lacked extensive criminal histories, or had pleaded guilty.”<sup>262</sup> The Eleventh Circuit viewed Padilla’s case as closer to those of 9/11 co-conspirator Zacarias Moussaoui and Oklahoma City bomb plotter Terry Nichols and, in slightly confusing language, seemed to recommend that the district court consider a life sentence upon remand.<sup>263</sup> Second, it rejected as immaterial—in

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<sup>255</sup> *Id.*

<sup>256</sup> *Jayyousi*, 657 F.3d at 1115–16.

<sup>257</sup> *Id.* at 1116.

<sup>258</sup> *Id.* at 1117.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* (citing *United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003)).

<sup>261</sup> *Id.* at 1118.

<sup>262</sup> *Jayyousi*, 657 F.3d at 1118.

<sup>263</sup> *Id.* (“The district court also improperly relied on the Terry Nichols and Zacarias Moussaoui prosecutions as examples of the types of behavior that warrant a life sentence because the government sought the death penalty in those cases. On remand, we admonish the district court to avoid imposition of a sentence inconsistent with those of similarly situated defendants. It should not draw comparisons to cases involving defendants who were

an essentially summary fashion—the district court’s reliance on both the lack of actual harm caused by Padilla and the fact that his criminal conduct did not target the United States.<sup>264</sup>

Finally, the majority opinion concluded its reversal of Padilla’s sentence by noting that the district court’s downward variance based on the length and nature of his pre-trial confinement was excessive.<sup>265</sup> In the district court’s knocking 152 months off of Padilla’s Guideline sentence calculation, the Eleventh Circuit majority found improper the crediting of Padilla’s time already served at a rate of three and one-half times his actual time detained.<sup>266</sup>

As with the other cases discussed above, the majority opinion provoked a strong dissent, this time by Judge Rosemary Barkett.<sup>267</sup> She characterized the majority’s position on the district court’s consideration of Padilla’s criminal history and pre-trial confinement in crafting a sentence as a violation of *Booker* and its progeny, particularly *Gall*’s admonition that “[t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.”<sup>268</sup> Similarly, she disagreed with the majority’s dismissal of the district court’s highlighting the lack of actual harm caused by Padilla and the fact that he did not target the United States.<sup>269</sup> Under current Supreme Court and Eleventh Circuit precedent a district court’s sentencing discretion deserves “due deference,” a point she believed eluded the majority.<sup>270</sup> Judge Barkett also pointed out that the majority simply disagreed with the district court regarding which terrorist defendants were similarly situated for sentencing purposes and that, in her view, the district court properly adhered to 18 U.S.C. § 3553(a) in this regard.<sup>271</sup>

In addition to her general criticism that the Eleventh Circuit majority failed to afford proper deference to the district court’s sentencing discretion, Judge Barkett articulated a more specific attack on the majority’s logic regarding Padilla’s future dangerousness.<sup>272</sup> She pointed out that the majority’s opinion

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convicted of less serious offenses, pleaded guilty, or who lacked extensive criminal histories, nor should it draw comparisons to cases where the government sought the imposition of the death penalty. See *United States v. Abu Ali*, 528 F.3d 210, 265 (4th Cir. 2008) (“[T]o require a similar infliction of harm before imposing a similar sentence would effectively raise the bar too high. We should not require that a defendant do what . . . Nichols did in order to receive a life sentence.”).

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 1118–19.

<sup>267</sup> See *id.* at 1119–35 (Barkett, J., concurring in part and dissenting in part) (dissenting from majority’s decisions to allow FBI agent to testify as expert, to permit the admission of Padilla’s non-*Mirandized* statements to law enforcement, and to overturn as substantively unreasonable Padilla’s sentence).

<sup>268</sup> *Jayyousi*, 657 F.3d at 1131 (quoting *Gall v. United States*, 552 U.S. 38, 51 (2007)).

<sup>269</sup> *Id.* at 1134.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 1133–34.

<sup>272</sup> *Id.* at 1132–33.

not only rejects the idea that Padilla's likelihood of recidivism might decrease with age, but also rejects that such a presumption must necessarily pertain in the case of every terrorist defendant.<sup>273</sup> She noted that the majority came to this conclusion without citing any evidence and despite the fact that the government did not challenge the district court's finding regarding Padilla's threat of recidivism.<sup>274</sup> The lack of evidence was particularly telling, in that the majority justified its position by likening terrorists to sex offenders in their potential to recidivate.<sup>275</sup> However, the case cited by the majority in support of this position referenced the multiplicity of judicial opinions and statistical studies that demonstrated the likelihood of recidivism for sex offenders.<sup>276</sup> In the terrorism case cited by the majority—*United States v. Meskini*, a Second Circuit opinion—there was no such evidence to support its conclusion regarding the increased likelihood of recidivism of terrorist defendants.<sup>277</sup> Further, Judge Barkett wrote that *Meskini*, despite its conclusory language, also recognized the district court's sentencing discretion when applying the § 3553(a) factors, thereby allowing for individualized determinations of a terrorist defendant's future dangerousness, something the Eleventh Circuit majority disregarded.<sup>278</sup> Not to put too fine a point on it, but Judge Barkett concluded her dissenting opinion by noting that the “old adage that ‘hard facts make bad law’ is clearly evident here.”<sup>279</sup>

#### D. *United States v. Ressam*

The disagreement among the judges of the United States Courts of Appeals regarding sentencing terrorist defendants continues apace, with the case of Ahmed Ressam, the so-called “Millennium Bomber” who was apprehended at the U.S.–Canada border trying to smuggle in explosives to blow up Los Angeles International Airport, being the latest example.<sup>280</sup> After pleading guilty, Ressam cooperated with the government in several terrorism investigations and prosecutions over a period of two years,<sup>281</sup> and then stopped, as his attorneys argued that his mental state had deteriorated while being held in solitary confinement.<sup>282</sup> The government repeatedly objected to the district

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<sup>273</sup> *Id.* at 1132.

<sup>274</sup> *Jayyousi*, 657 F.3d at 1132 (Barkett, J., concurring in part and dissenting in part).

<sup>275</sup> *Id.* at 1117 (majority opinion).

<sup>276</sup> *Id.* at 1132–33 (Barkett, J., concurring in part and dissenting in part) (citing *United States v. Irely*, 612 F.3d 1160, 1213–16 (11th Cir. 2010)).

<sup>277</sup> *Id.* at 1133 (citing *United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003)).

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 1134.

<sup>280</sup> *United States v. Ressam*, 679 F.3d 1069, 1071–73 (9th Cir. 2012).

<sup>281</sup> One of the cases in which Ressam testified for the government was the prosecution of Abdelghani Meskini, an Algerian national whose case elicited the broad statement about the incorrigibly dangerous nature of terrorists. *Id.* at 1074–75, 1080.

<sup>282</sup> *Id.* at 1077, 1083.



court's order of a twenty-two-year sentence, prompting the Ninth Circuit to overturn the sentence three separate times, before agreeing to hear the case en banc.<sup>283</sup> The court of appeals ruled, in a 7-to-4 decision, to overturn the district court's imposition of a twenty-two-year sentence as too lenient once again and recommended the district court consider a much more lengthy sentence.<sup>284</sup> Judge Mary Schroeder dissented, reprising the argument that the majority failed to heed *Gall*'s strictures on deferring to a district court's sentencing discretion.<sup>285</sup> Much like the dissenting opinions cited above, she pointed out that creating a terrorist exception for sentencing discretion is not recognized in the law.<sup>286</sup>

### E. Analysis

A review of the decisions involving reversing a district court's sentencing determination as too lenient reveals that there is a fair segment of appellate judges who believe that terrorism is different, maybe even exceptional. Proceeding logically from this assumption, proponents of this view assume that terrorist status justifies a departure from the normal standards, even if such a departure creates tension with the Supreme Court's sentencing jurisprudence. To the extent that there exists a congressionally mandated terrorism enhancement for sentencing purposes, perhaps such a conclusion is not too far-fetched. But there seems to be more behind this sentiment. *Meskini*'s language—"even terrorists with no prior criminal behavior are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation"—could possibly be true, but surely now, in the eleven years following the September 11, 2001, attacks, we might expect the government to produce some empirical evidence to support this position.<sup>287</sup> The *Meskini* language raises more questions than it answers. Is it true in all instances? Does this sentiment apply regardless of the cause of a terrorist, i.e., someone willing to use violence for political purposes? Are there no situations where defendants charged with terrorist crimes might be likely to change their ways without the imposition of a heavy sentence? How can we know that such defendants are not already deterred once arrested or detained? Perhaps most

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<sup>283</sup> See *id.* at 1078–82.

<sup>284</sup> *Id.* at 1088–97. In the most recent sentencing hearing, the district court imposed a thirty-seven-year sentence, rejecting the government's request of a life sentence, and leaving open the possibility of another appeal. See Kirk Johnson, *New Sentence Is Imposed in Bomb Plot from 1999*, N.Y. TIMES, Oct. 25, 2012, at A18.

<sup>285</sup> See *Ressam*, 679 F.3d at 1100–09 (Schroeder, J., dissenting).

<sup>286</sup> *Id.* at 1106 ("The majority's implicit assumption that terrorism is different, and must be treated differently, thus flies in the face of the congressionally sanctioned structure of sentencing that applies to terrorism as well as all other kinds of federal criminal offenses. Our courts are well equipped to treat each offense and offender individually, and we should not create special sentencing rules and procedures for terrorists.").

<sup>287</sup> *United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003).

problematic of all, in cases where the harm is inchoate or part of the broadly defined material support offense, does disapproval of the existence of terrorism as a phenomenon hinder or aid the sentencing function?

One might also explore the question of recidivism and retribution in the individual cases cited above. Ahmed Abu Ali was sentenced to thirty years in prison, with thirty years of supervised relief, before he was resentenced to life.<sup>288</sup> While he was convicted of being part of a violent plot, he vigorously challenged his confessions, arguing that they were the product of torture.<sup>289</sup> The Fourth Circuit's language justifying its decision to overturn the original sentence seems to reveal a type of outrage that overcame its desire to truly consider what type of threat he would pose to the public upon conditional release in his fifties. This is in marked opposition to the district court, which engaged in a lengthy hearing, weighing all the § 3553(a) factors before coming up with the thirty-year sentence.<sup>290</sup>

Lynne Stewart, a septuagenarian by the time of her sentencing, was essentially precluded from engaging in the same conduct—all of which occurred pre-9/11—that landed her criminal charges, as she was stripped of her law license.<sup>291</sup> Further, one might presume that for most, if not all, lawyers, the mere threat of prosecution on terrorism support charges would deter future conduct in a similar vein. The government also admitted that her conduct did not result in any violent activity.<sup>292</sup> In contrast, Jose Padilla may be so psychologically damaged from his time in military detention that he may never be able to function properly in society again.<sup>293</sup> There is a real question, therefore, of how a harsher sentence will deter future crimes if he is so mentally incapacitated, especially given the vague and highly inchoate nature of the charges against him.

Finally, Ahmed Ressam, caught in the most dangerous position of all, cooperated with the government for some two years before withdrawing under the stress of his confinement.<sup>294</sup> While someone armed and seemingly willing to carry out a violent attack obviously poses an immediate threat, the Supreme Court's *Booker* line of cases empowers the district court to craft an appropriate sentence. Mere statements on the nature of terrorists in the abstract should not be enough to overcome that fact.

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<sup>288</sup> See *United States v. Abu Ali (Abu Ali II)*, 528 F.3d 210, 221 (4th Cir. 2008); see also *United States v. Abu Ali (Abu Ali III)*, 410 F. App'x 673, 680–82 (4th Cir. 2011).

<sup>289</sup> See *Abu Ali II*, 528 F.3d at 232–34.

<sup>290</sup> See *id.* at 258–59; *United States v. Abu Ali (Abu Ali I)*, 395 F. Supp. 2d 338, 373 (E.D. Va. 2005).

<sup>291</sup> See *United States v. Stewart (Stewart I)*, 590 F.3d 93, 147 (2d Cir. 2009).

<sup>292</sup> Indeed, the district court ultimately ordered Stewart released on compassionate grounds, as she was diagnosed with terminal cancer. Weiser, *supra* note 248.

<sup>293</sup> See Deborah Sontag, *A Videotape Offers a Window into Terror Suspect's Isolation*, N.Y. TIMES, Dec. 4, 2006, at A22.

<sup>294</sup> *United States v. Ressam*, 679 F.3d 1069, 1074–75 (9th Cir. 2012).

What is needed, then, is the articulation of standards that define what a “heartland” offense in the terrorism context actually is, with a special focus on a definition in the case of banned material support, since it represents the government’s most utilized charge in terrorism prosecutions.<sup>295</sup> While the Sentencing Commission has traditionally let district courts discuss how a given set of facts constitutes a heartland offense, perhaps some guidance might be helpful, especially as terrorism offenses are of a more recent vintage. Otherwise, the sentencing process will continue to witness the phenomenon of federal appellate judges substituting their judgment for that of the district court in terrorism cases if they feel the penalty is too lenient, based on assumptions about the nature of a terrorist. Again, while those assumptions may be true, surely the government has the ability to put them to the test by way of academic and statistical studies, so as to eliminate speculation and prejudice from the sentencing process in the terrorism prosecution.

Of course, when dealing with the highly charged concept of terrorism, requiring the government to show evidence in support of its conclusions might be unrealistic. In *Humanitarian Law Project*, Justice Breyer’s dissent questioned the government’s assertion that material support to an FTO in the form of speech could be outlawed under the Constitution in the same way as the provision of money and bemoaned the lack of empirical evidence in support of such a proposition.<sup>296</sup> The majority opinion dismissed Justice Breyer’s concern, reasoning that requiring the government to make a stronger showing backing its position would be “dangerous.”<sup>297</sup> The question remains open as to whether the Supreme Court will take up the challenge of reconciling its deferential sentencing jurisprudence with the powerful assumptions of irredeemable violence that terrorism charges bring. Until that day, the phenomenon of appellate courts overturning sentences as too lenient looks to be in direct contradiction to what the Court has mandated, even in a terrorism case.

## VI. CONCLUSION

Where sentencing in cases involving politically motivated violence was once straightforward, since violence was at the root of a criminal conviction, the modern terrorism prosecution now relies largely on material support charges unconnected to any violence and inchoate criminal activity not likely to result in actual violence. The passage of a terrorism-sentencing enhancement reflects the government’s resolve to increase penalties for a certain class of offenses.

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<sup>295</sup> See Said, *supra* note 6, at 544 n.11 (citing DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERROR 75–76 (2003); DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR 49–50 (2007)).

<sup>296</sup> See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2735 (2010) (Breyer, J., dissenting); see also Wadie E. Said, *Humanitarian Law Project and the Supreme Court’s Construction of Terrorism*, 2011 BYU L. REV. 1455, 1503.

<sup>297</sup> *Humanitarian Law Project*, 130 S. Ct. at 2727–28.

However, as this Article has argued, terrorism sentencing jurisprudence has exposed problems of fidelity to Supreme Court precedent in the context of the limits on fact-finding and due deference to the standard of review. To cure these infirmities in the sentencing process, the courts, Congress, and the Sentencing Commission should work together on crafting clearer standards governing heightened penalties that hew to the Supreme Court's holdings. Otherwise, the phenomenon of courts ordering higher and higher penalties out of a sense of revulsion at the existence of terrorism in the abstract will continue.