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SPECIAL ADMINISTRATIVE MEASURES:

AN EXAMPLE OF COUNTERTERROR EXCESSES AND THEIR ROOTS IN U.S. CRIMINAL JUSTICE

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Abstract

*This article examines the creation and implementation of pretrial Special Administrative Measures [SAMs], a version of pretrial solitary confinement now used most often to confine terror suspects in the federal criminal justice system. Through an in-depth archival study, this article brings attention to the importance of 20<sup>th</sup> century criminal justice trends to the 21<sup>st</sup> century response to the threat of terrorism, including an increasingly preventive focus and decreasing judicial checks on executive action. The findings suggest that practices believed to be excessive responses to the threat of terrorism are in fact a natural outgrowth of late modern criminal justice.*

**Introduction**

In Spring of 2007, Syed Fahad Hashmi was extradited to the United States and immediately placed in solitary confinement.<sup>1</sup> Hashmi had been arrested in the United Kingdom nearly a year prior to his extradition, and accused of involvement in terrorism.<sup>2</sup> The conditions of his confinement in the United States were not limited simply to normal solitary confinement—three months after his extradition he was placed under Special Administrative Measures [SAMs]<sup>3</sup> whereby his visits from his family and attorneys (the only visits he was permitted) were

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<sup>1</sup> Letter to Attorney General Michael Mukasey from the Brennan Center for Justice, 10/20/2008, available at [http://brennan.3cdn.net/301ff4d661c066cf21\\_p7m6brynx.pdf](http://brennan.3cdn.net/301ff4d661c066cf21_p7m6brynx.pdf) hereafter “Brennan Letter.”

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

<sup>3</sup> Democracy Now transcript “‘Guantanamo At Home’: Muslim American Syed Fahad Hashmi Held in 23-Hour Pre.-Trial Solitary Confinement for Over Two Years in Case Resting on Plea-Bargaining Government Informant.” Originally aired 6/5/09. Available at <http://www.democracynow.org/2009/6/5/hashmi> hereafter “Guantanamo At Home.”

monitored, all communication with media outlets was forbidden, any news via television or radio was forbidden, and he was allowed newspapers only after a 30-day delay.<sup>4</sup> His family visits were limited to one visit, from one family member, every other week, and subjected to the bureaucratic difficulties of the Bureau of Prison's monitoring practices, such that these visits might be forgone if the Bureau of Prisons translator failed to appear at the appointed time.<sup>5</sup> He was subjected to a strip search before his one hour per day of exercise, which eventually led him to choose to forego leaving his cell altogether.<sup>6</sup> According to Hashmi's brother, even his own speech (presumably to himself) within his cell was restricted.<sup>7</sup> Three years into Hashmi's confinement, his brother was quoted as saying that the limited family visits had been impossible for five months.<sup>8</sup>

The conditions of confinement allowed under SAMs are exceptionally harsh. After two and a half years in solitary, Hashmi's supporters believed his mental health was deteriorating, stating he looked "frail" and "jittery."<sup>9</sup> This conforms well to the criticisms that have been lodged at the use of solitary confinement in the terrorism context and elsewhere—critics argue that the use of solitary confinement should be deemed a violation of the Eighth Amendment due

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<sup>4</sup> Brennan Letter, *supra* note 1.

<sup>5</sup> Democracy Now transcript "Guantanamo At Home," *supra* note 3.

<sup>6</sup> Open Letter from Amnesty International USA, the Center for Constitutional Rights, and the Council on American Islamic Relations-NY on the upcoming trial of Syed Fahad Hashmi and the severe Special Administrative Measures to which he is subjected, 4/23/10, *available at* <http://www.commondreams.org/newswire/2010/04/23-2> .

<sup>7</sup> Democracy Now, "Guantanamo At Home," *supra* note 3.

<sup>8</sup> Democracy Now "After 3 Years in Pretrial Solitary Confinement, Fahad Hashmi Pleads Guilty on Eve of Terror Trial." 4/28/10. *Available at* [http://www.democracynow.org/2010/4/28/after\\_3\\_years\\_in\\_pretrial\\_solitary](http://www.democracynow.org/2010/4/28/after_3_years_in_pretrial_solitary).

<sup>9</sup> Democracy Now "Hashmi Remains in Solitary Confinement as Trial Delayed." 12/8/09. *Available at* <http://www.democracynow.org/2009/12/8/headlines#15> .

to the extreme mental and emotional harm it inflicts on inmates.<sup>10</sup> SAMs are a form of Administrative Supermaximum Security confinement (ADMAX), in which the conditions of confinement are based on the danger that inmates pose (according to the BOP, and often based on the inmate's status as a gang member). Because ADMAX is status-based it is indefinite in duration, so that prisoners who are believed to be dangerous may be housed in ADMAX for their entire prison sentence.<sup>11</sup> Because it is administrative, it is subject to little, if any, judicial oversight.<sup>12</sup> In the case of SAMs, this status is meant to be based on a determination that SAMs are reasonably necessary, either to "protect persons against the risk of death or serious bodily injury," or to "prevent disclosure of classified information."<sup>13</sup>

But Hashmi was held under SAMs without any claim that he posed this type of immediate danger. He had provided aid to terrorists, in the form of socks, blankets, money and the use of a phone, but there was no claim that he himself would or could engage in terrorist acts, or direct others to do so.<sup>14</sup> This made him a focal point for criticism of the "reflexive" use of

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<sup>10</sup> See, e.g. Craig Haney, *Mental Health Issues in Long Term Solitary and "Supermax" Confinement*, 29 CRIME AND DELINQUENCY 124 (2003); Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115 (2009); Holly Boyer, *Home Sweet Hell: An Analysis of the Eighth Amendment's Cruel and Unusual Punishment Clause as Applied to Supermax Prisons*, 32 SW. U. L. REV. 317 (2003); Christine Rebman, *Eighth Amendment and Solitary Confinement: The Gap in Protection from Psychological Consequences*, 49 DEPAUL L. REV. 567 (1999-2000); Bryan Walton, *Eighth Amendment and Psychological Implications of Solitary Confinement*, 21 LAW & PSYCHOL. REV. 271 (1997); Atul Gawande, "Hellhole." *The New Yorker* March 30, 2009. Available at [http://www.newyorker.com/reporting/2009/03/30/090330fa\\_fact\\_gawande](http://www.newyorker.com/reporting/2009/03/30/090330fa_fact_gawande) ; Jeffrey Kluger "Are Prisons Driving Prisoners Mad?" *Time Magazine* Jan. 26, 2007 Available At <http://www.time.com/time/magazine/article/0,9171,1582304,00.html> .

<sup>11</sup> Haney, *Id.*

<sup>12</sup> Keramet Ann Reiter, *The Most Restrictive Alternative: A Litigation History of Solitary Confinement in U.S. Prisons 1960-2006*. 57 STUDIES IN LAW, POLITICS, AND SOCIETY 71 (2012); Van Swearingen, *Imprisoning Rights: The Failure of Negotiated Governance in the Prison Inmate Grievance Process*. 96 CAL. L. REV. 1353 (2008).

<sup>13</sup> (28 CFR 501- 501.3(a)).

<sup>14</sup> *U.S. v. Warsame* transcript of sentencing, 7/9/2009, on file with author.

pretrial solitary confinement in terrorism cases.<sup>15</sup> Other SAMs cases offer further clues that SAMs are being applied unthinkingly and without oversight, such as the imposition of SAMs on one defendant whose judge determined outright that he posed no immediate danger,<sup>16</sup> or the statement by a prosecutor, when SAMs were questioned, that SAMs were, to his understanding “the way all material support defendants were held,” regardless of the specific allegations against those defendants.<sup>17</sup> Because of this reflexive use, as well as the harsh nature of the confinement, SAMs are repeatedly cited as an example of the striking deviation from normal criminal procedure that, critics assert, characterizes the criminal justice system’s response to the threat of terrorism and the terrorist attacks of 2001.<sup>18</sup>

SAMs may indeed serve as an example of post-2001 responses to terrorism, but their explanatory power lies in their consistency with prior practices rather than their exceptionalism. While the claim that “9/11 changed everything” has seemed ubiquitous and axiomatic in recent years, this article joins those of a minority of scholars who have associated post-2001 tactics with

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<sup>15</sup> Kareem Fahim Restrictive Terms of Prisoner's Confinement Add Fuel to Debate” *The New York Times* February 5, 2009 pg. A27.

<sup>16</sup> *U.S. v. Warsame* transcript of sentencing, 7/9/2009, on file with author.

<sup>17</sup> *U.S. v. Sadequee*, transcript of proceedings, 3/3/2009 at 43, on file with author.

<sup>18</sup> Heena Musabji and Christina Abraham, *The Threat to Civil Liberties and Its Effect on Muslims in America*, 1 DEPAUL H. SOC. JUST. 83 (2007-2008); Susan Akram & Maritza Karmel, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction without a Difference?* 38 U.C. DAVIS L. REV. 609 (2004-2005); Sadiq Reza, *Unpatriotic Acts: An Introduction*, 48 N. Y. L. SCH. L. REV. 3 (2003-2004); Sam A. Schmidt and Joshua Dratel, *Turning the Tables: Using the Government’s Secrecy and Security Arsenal for the Benefit of the Client in Terrorism Prosecutions*, 48 N. Y. L. SCH. L. REV. 69 (2003-2004); Joshua Dratel, *Ethical Issues in Defending a Terrorism Case: How Secrecy and Security Impair the Defense of a Terrorism Case*, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 81 (2003-2004); J. Soffiyah Elijah, *The Reality of Political Prisoners in the United States: What September 11 Taught Us About Defending Them*, 18 HARV. BLACKLETTER L. J. 129 (2002).

pre-2001 trends and efforts on the part of law enforcement agents.<sup>19</sup> While these works examine counter-terror and criminal justice trends more broadly, this article is among the first to provide an in-depth study of the development of what has been identified as an example of post-2001 counter-terror excess. As this article will show, the use of SAMs did change as the judiciary abandoned oversight of government claims of dangerousness in order to allow the reflexive use of pretrial solitary confinement in the case of “dangerous” defendants, but this change was established prior to September 11, 2001. Moreover, this sea change is better understood as another aspect of the increasing informalism and decreasing judicial oversight of the criminal justice system as a whole, rather than a response to a war-like threat.

This article analyzes the increasingly reflexive use of SAMs in the late 20<sup>th</sup> century. I begin with the origins of SAMs as a response to high level organized crime defendants more than a decade prior to the terror attacks of 2001, and follow the development of SAMs to its increasing use in terrorism-related cases at the turn of the 21<sup>st</sup> century, in order to demonstrate the conventional criminal justice roots of this 21<sup>st</sup> century counter-terror tactic.

Rather than a response to terrorism, this article locates the creation and development of SAMs in conventional criminal justice developments that were ongoing, and well known, at the

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<sup>19</sup> Mary L. Dudziak. *SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT?* (2003); John Hagan “Twin Towers, Iron Cages and the Culture of Control” in M. Matravers (ed.) *MANAGING MODERNITY: POLITICS AND THE CULTURE OF CONTROL* (2005); John Parry, *Terrorism and the New Criminal Process*. 15 *WM. & MARY BILL RTS. J.* 765 (2007); Robert Chesney and Jack Goldsmith *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 *STANF. L. REV.* 1079 (2007); David Cole and James Dempsey, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY*. (2006); James Forman Jr. *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible* 33 *N.Y.U. REV. L. & SOC. CHANGE* 331 (2009); Colin Dayan, *THE STORY OF THE CRUEL AND UNUSUAL* (2007); Chesney, Robert. *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*. *HARVARD JOURNAL ON LEGISLATION* (2005).

turn of the 21<sup>st</sup> century. Below I briefly outline the methodology I used to study SAMs, which are often hidden and may be difficult to uncover. I then turn to key critiques of the criminal justice system made by scholars in the late 20<sup>th</sup> century. I also discuss the place of supermax facilities and solitary confinement in this history of U.S. criminal justice in late modernity. I then turn to SAMs. In particular, I focus on two post- 2001 cases which exemplify the critiques of SAMs and the ways in which SAMs are believed to avoid traditional criminal justice protections. I then look to the history and development of SAMs practice, and find that these traditional protections were long gone in SAMs practice prior to 2001. Moreover, their gradual diminishment is linked to the broader criminal justice developments that have been noted by scholars for several decades. I conclude that SAMs are more closely linked to late 20<sup>th</sup> century criminal justice practices than to early 21<sup>st</sup> century responses to terrorism, and I suggest that this may be true for many other supposed “changes” in response to the terror attacks of 2001.

### **Researching SAMs**

As with many aspects of the response to terrorism in the 21<sup>st</sup> century, analysis of SAMs policy is fraught with difficulty because of its hidden nature. The practice of SAMs has been shrouded in secrecy, making it very difficult to know precisely how the practice works or has worked over time. The Department of Justice has acknowledged that 46 federal prisoners are being held under SAMs, of which 26 are charged in association with terrorism and 28 are held in the Supermax facility in Florence, Colorado,<sup>20</sup> but it has refused to disclose the names of the prisoners who are or have been so held. Moreover, this number changes seemingly constantly,

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<sup>20</sup> See Basil Katz, “After 18 years, terrorist seeks reason for special detention.” *Thompson Reuters*, July 1, 2011. Available at [http://newsandinsight.thomsonreuters.com/Legal/News/2011/06\\_-\\_June/After\\_16\\_years,\\_terrorist\\_seeks\\_reason\\_for\\_special\\_detention/](http://newsandinsight.thomsonreuters.com/Legal/News/2011/06_-_June/After_16_years,_terrorist_seeks_reason_for_special_detention/).



both as new defendants are arrested and as defendants are moved out of SAMs and into other forms of confinement (generally into other forms of confinement where communication is still limited but some time spent outside of isolation is allowed).<sup>21</sup> The lack of names creates severe difficulties in researching SAMs, as does the fact that SAMs normally include restrictions on communications of lawyers and visitors to SAMs prisoners. This means that even family members of prisoners may not be allowed to discuss the conditions under which SAMs prisoners are being held. Motions and rulings concerning SAMs are often sealed, as are transcripts.

This article relies on the legal challenges, judicial opinions, and media reports that have escaped this secrecy. By searching through legal filings and news stories for telltale words such as SHU (special housing unit), solitary, lockdown, and various specific conditions of confinement associated with SAMs as my research revealed those conditions, I was able to identify several dozen SAMs convicts and defendants. The arguments and rulings in these cases tell the story of the development of SAMs. They identify SAMs not as an overreaction to terrorism, but as part of the broader overreaction to crime in general that characterized the late 20<sup>th</sup> century.

I rely on the motions of attorneys and opinions of judges to gauge the accepted practices of the federal criminal courts. In so doing, I do not assume that judges, prosecutors, or defense

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<sup>21</sup> In 2009, the Department of Justice acknowledged that (at that time) 44 prisoners federal were being held under SAMs, of which 29 were charged in association with terrorism (Department of Justice Fact Sheet, June 9, 2009, available at <http://www.justice.gov/opa/pr/2009/June/09-ag-564.html> .) In February of 2009, a Department of Justice spokesperson stated that there were 46 such inmates, 30 of which were associated with terrorism. Six of those prisoners, four of whom were terrorism-associated, had not yet been convicted of the crimes with which they were charged. Kareem Fahim, *Restrictive Terms of Prisoners' Confinement Add Fuel to Debate*, supra note 15. Attorney General Eric Holder has described the movement between more and less harsh versions of communication management isolation in his motion for summary judgement in the case of *Ayyad v. Holder* (filed March 25, 2011).

attorneys are either honest or straightforward regarding the reasons for their actions. Rather, I assume that their actions give some insight to what they believe will work in the criminal justice system. In other words, prosecutors put forward that information that they believe will be deemed sufficient to achieve the result they want, i.e. the imposition of SAMs, while defense attorneys put forward those arguments which they believe will give their clients the best chance of removal from SAMs, and judges' formal opinions give the amount of information they believe necessary in order to make their decision legitimate in the eyes of observers, most importantly higher level (appellate) judges. These arguments and opinions, then, give insight into the way in which participants in the criminal justice system perceive the requirements, norms, and values of that system. Perhaps more importantly, in the case of the criminal justice system, these arguments constitute the system itself, as the acceptance of norms and priorities, represented in judicial opinions, becomes precedent and therefore law in future cases.

In this way, I analyzed the development of SAMs practice, from a new and mistrusted technique of preventive detention, to an accepted and even assumed practice. I looked for the key moments and characteristics of this development in order to determine whether this practice belongs in the category of late modern criminal justice, or post-2001 counter-terror exceptionalism. My findings suggest that SAMs fit quite well in the former grouping.

But SAMs are not merely a form of confinement in the federal criminal justice system, entirely removed from more extreme tactics that characterize the U.S. government's response to terrorism since 2001. SAMs are a microcosm of the values and priorities that characterize the post 2001 response to terrorism. They allow harsh treatment of persons who have not been convicted of any crime, and they are applied, seemingly, with no check on executive claims or authority. They represent the valuing of public safety over any other rights or interests, even

where the alleged threat to public safety consists of a claimed (but unproven) association rather than any proven activity or intent. In short, the criticisms of SAMs are the criticisms of post-2001 counter-terror practices.

For this reason, SAMs present an excellent case study in the evolution of counter-terror policies, and as a case study they suggest that the supposed exceptionalism of post-2001 U.S. policies has been vastly overrated. Instead, this article suggests, the harsh and unchecked counter-terror tactics of the U.S. government post-2001 originated in the harsh and unchecked crime control tactics of the U.S. government in the late 20<sup>th</sup> century.

## **Background**

Since the terrorist attacks of 2001, scholars, activists, and government defenders have chronicled the entrance of the U.S. government into a state of exception. Authors have debated the necessity of the countless changes that followed 2001, arguing over should, or could, have been avoided. Whether or not civil liberties can withstand warlike attacks, how the rule of law should respond to an extreme threat, and whether or not the U.S. government's exceptional response can be justified, have become favorite topics for scholars of all disciplines. Changes believed to have been brought about by this one horrendous attack have run the gamut, from

torture<sup>22</sup> to torts,<sup>23</sup> from securities regulation<sup>24</sup> to surveillance and civil liberties,<sup>25</sup> from the nature of war<sup>26</sup> to the nature of racism.<sup>27</sup>

The breadth of changes linked to the 2001 attacks makes it difficult to generalize, yet some overarching trends are clearly present. Most apparent is the critique of “ever-expanding justifications for the assertion of executive and unilateral power.”<sup>28</sup> According to this critique, the U.S. government has acquired the power to infringe on the lives and liberties of persons who would have been safe from government intrusion prior to the 2001 attacks, either through strategic use of those attacks or through genuine efforts to protect the public. Whether by relying on “guilt by association,”<sup>29</sup> or justifying actions as efforts to prevent and preempt terrorist attacks,<sup>30</sup> the fundamental change in everything since 2001 is, these authors claim, the ability of the government to unilaterally act without checks or oversight.

But to what extent did these checks exist prior to 2001? As Kim Lane Scheppele notes, many of the post-2001 changes in policy, even those she herself highlights, were simply

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<sup>22</sup> See, e.g., Hajjar, Lisa. *Does Torture Work? A Sociolegal Assessment of the Practice in Historical and Global Perspective*, ANNUAL REV. OF L. AND SOC. SCIENCE (2009).

<sup>23</sup> George W. Conk, *Will the Post 9/11 World Be a Post-Tort World?*, 112 PENN. ST. L. REV. 175, 188 (2007)

<sup>24</sup> Mary L. Schapiro, *The Regulation of the Securities Industry in the Wake of the 9/11 Tragedy*, 7 FORDHAM J. CORP. & FIN. L. 5 (2001).

<sup>25</sup> Matthew J. Morgan, ed., *THE LEGAL IMPACT OF 9/11 AND THE NEW LEGAL LANDSCAPE: THE DAY THAT CHANGED EVERYTHING?* (2009).

<sup>26</sup> James Wirtz and James A. Russell, *U.S. Policy on Preventive War and Preemption*. THE NONPROLIFERATION REV. 113-123 (Spring 2003).

<sup>27</sup> Thomas Ross, *Whiteness After 9/11*, 18 WASH. U. J.L. & POL'Y 223, 225 (2005)

<sup>28</sup> Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*. 6 U. PENN. J. OF CON. L. 1001 (2004).

<sup>29</sup> David Cole *The New McCarthyism: Repeating History in the War in Terrorism*. 38 HARV. CIVIL RIGHTS-CIVIL LIBERTIES L. REV. 1 (2003); Robert Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 101 MICH. L. REV. 1409 (2003).

<sup>30</sup> Chesney, *Id.*; Wirtz and Russell, *supra* note 26.

codifications of pre-2001 practices that had already gained judicial approval, while others were changes to internal checks and policies, rather than avoidance of external oversight. Similarly, the “guilt by association” critique is one that preceded the 2001 attacks.<sup>31</sup> Even the use of rendition, the process by which terrorist detainees were transferred to black sites in order to be tortured into providing information, began in 1996 when suspects were rendered to countries with questionable human rights records in order to be questioned.<sup>32</sup>

Reaching beyond specific policies, the overarching trend of decreasing checks on the executive branch and increasing avenues for unilateral executive action is one that has been well established by punishment scholars over the past several decades. Just as in the terrorism context, these decreasing checks are justified by the prioritization of prevention and public safety. In perhaps the most cited work on modern criminal justice, David Garland describes a cultural crisis based on a perpetual sense of disorder and confusion. He describes a perpetual fear that leads to a desperate desire for the state to protect the public. At the same time, modern criminological theories viewing crime as rational and opportunistic, and viewing rehabilitation as impossible or undesirable,<sup>33</sup> lead to a focus on prevention. Concerns for the rights of offenders steadily decrease in the face of an overly emotional public that refuses to identify with criminals.<sup>34</sup>

The abandonment of the criminal other and prioritization of prevention is evident in the public’s uncaring response to the government’s practice of punishing without proving guilt.

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<sup>31</sup> Cole, *supra* note 29.

<sup>32</sup> Jane Mayer, *Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program*. THE NEW YORKER, February 8, 2005, p. 106.

<sup>33</sup> Andrew Von Hirsch. *DOING JUSTICE*. (1976).

<sup>34</sup> David Garland, *THE CULTURE OF CONTROL* (2001)

Community based policing, workplace drug testing, increased police presence, as well as increased stops, frisks and arrests, all clearly prior to any determination of guilt, create a new form of punishment, avoiding oversight by functioning as administrative “management of dangerous populations” rather than a new form of criminal justice.<sup>35</sup>

Much like the terrorism context, the increasing desire for preventive interventions results in the use of “end runs”<sup>36</sup> or “short cuts”<sup>37</sup> around the criminal justice system and its required procedural protections. These alternate paths to detention, such as the use of immigration detention and civil commitment for sex offenders, allow the government to bypass judicial checks by turning to an administrative forum where oversight is less rigorous. These practices are unremarked upon as a necessary aspect of the preventive regime, supported by public and government backlash against stringent due process protections enacted in the 1960s and 70s which lessened the preventive and efficient processing of criminal justice.<sup>38</sup>

However, the desire for efficient processing of criminals reaches even into the criminal courts, the supposed bastion of procedural checks, as loitering statutes and other responses to gang violence allow for incarceration based on guilt by association, increased preventive

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<sup>35</sup> Malcolm Feeley and Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOL. 449 (1992); Jonathan Simon GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); Bernard Harcourt, *AGAINST PREDICTION: PROFILING, POLICING AND PUNISHING IN AN ACTUARIAL AGE* (2007).

<sup>36</sup> Katherine Beckett and Naomi Murakawa, *Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment*. THEORETICAL CRIMINOL. 1 (2012).

<sup>37</sup> Nicola Lacey *The Resurgence of Character: Criminal Responsibility in the Context of Criminalisation*. PHILOSOPHICAL FOUNDATIONS OF CRIM.L. 151 (2011).

<sup>38</sup> Andrew Ashworth and Lucia Zedner, *Defending the criminal law: Reflections on the changing character of crime, procedure, and sanctions*. CRIM. L. AND PHILOSOPHY 21 (2007).

intervention, and detention with decreased checks.<sup>39</sup> In more traditional criminal prosecutions, criminal courts turn towards efficient processing of defendants who are presumed to be guilty, which requires increasing informalism and decreasing checks on the executive (once provided by traditional due process protections).<sup>40</sup>

In other words, late modern criminal justice was well on its way to finding opportunities for unilateral executive action in the interests of public safety, long before the terror attacks of 2001. This has been noted by some few scholars who have discussed the predecessors of post-2001 counter-terror.<sup>41</sup> Parry<sup>42</sup> Foreman,<sup>43</sup> and Dayan<sup>44</sup> all relate the use of torture to the harsh nature of pre-2001 criminal justice practices. Dayan specifically examines the jurisprudence of the Eighth Amendment ban on cruel and unusual punishment as a predecessor for acceptance of the use of torture, while Parry and Foreman more broadly look to Garland's "Culture of Control" and the general punitiveness of crime control in late modernity without specifically following any one doctrine. Cole and Dempsey, and Chesney and Goldsmith generally acknowledge the beginnings of the use of deportation to avoid criminal justice and increased resemblance between

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<sup>39</sup> Carole Steiker, *The Limits of the Preventive State*, 88 J. OF CRIM. L. & CRIMINOL. 771 (1998); Paul Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001).

<sup>40</sup> Wolfgang Heydebrand and Carroll Seron. RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF FEDERAL DISTRICT COURTS (1990); William Stuntz, *Law and Grace*, 98 VA. L. REV. 367 (2012).

<sup>41</sup> See note 18, *supra*.

<sup>42</sup> John Parry, *Terrorism and the New Criminal Process*. 15 WM. & MARY BILL RTS. J. 765 (2007).

<sup>43</sup> James Forman Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible* 33 N.Y.U. REV. L. & SOC. CHANGE 331 (2009).

<sup>44</sup> Colin Dayan, *THE STORY OF THE CRUEL AND UNUSUAL* (2007).

military and civilian justice systems prior to 2001, respectively, but focus instead on the increase in those trends since 2001.<sup>45</sup>

Yet the brief literature review above suggests that late modern criminal justice may bear far more responsibility for our 21<sup>st</sup> century counter-terror policies than has been acknowledged thus far. While an exhaustive examination of post-2001 policies is beyond the scope of any single article, this article begins the process of examining the origins of 21<sup>st</sup> Century counter-terror practices without assuming that these practices began in the 21<sup>st</sup> Century. This article looks to the use of SAMs as a starting point for this discussion.

As noted above, SAMs have been continually recognized as a central aspect of the supposed changes to the U.S. criminal justice system since 2001. They are an exceptionally harsh form of punishment, arguably the harshest form of confinement used in the U.S. today. Moreover, the ADMAX facilities they employ were a model for “one of the worst solitary confinement facilities at Guantanamo.”<sup>46</sup> They have been used as precedent by government actors seeking to justify the continuing impositions on attorney client privilege and pretrial research experienced by detainees and their counsel at Guantanamo.<sup>47</sup>

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<sup>45</sup>Cole, David, and James Dempsey, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* (2006); Chesney, Robert, and Jack Goldsmith. *Terrorism and the convergence of criminal and military detention models*. 60 *STAN. L. REV.* 1079 (2007).

<sup>46</sup> Vincent Warren, "Shut Down the Whole Thing." *NEW YORK TIMES.COM, ROOM FOR DEBATE*, May 1: Available at <http://www.nytimes.com/roomfordebate/2012/11/18/should-obama-close-guantanamo-and-end-military-tribunals/close-guantanamo-and-shut-down-the-commissions>; Jeffrey Ian Ross and Dawn L. Rothe, "Guantanamo: America's Foreign Supermax in the Fight Against Terror." In *THE GLOBALIZATION OF SUPERMAX PRISONS*, Jeffrey Ian Ross (ed.), 145-159.

<sup>47</sup>D.B. Woods, "Memorandum from Rear Admiral D.B. Woods re: Order Governing Written Communications Management for Detainees Involved in Military Commissions." December, 2011.



Additionally, SAMs represent an apex in criminal justice end-runs around the burdensome requirements of criminal procedure. SAMs consistently interfere with defendants' trial preparation. Non-contact visits combine with limitations on reading materials to inhibit defendants from looking at trial materials with their attorneys, as the barrier between defendant and attorney results in only one person having the material at a time. Restrictions on media that defendants can see may lead to relevant information being missed. Moreover, attorneys complain that the psychological deterioration that accompanies solitary confinement leads to an inability of defendants to focus on the material issues in their cases. All of this undermines the ability of defendants to engage in defending themselves, thereby lessening the adversarial character of the (supposed) looming trial.<sup>48</sup> Worse, defendants suffering from desperation in the face of continued solitary confinement are likely to plead guilty, simply to shorten their stay in solitary confinement. In this way, SAMs may well coerce defendants into pleading guilty.<sup>49</sup> Altogether, SAMs severely undermine the ultimate adversarial check on executive action – the adversarial criminal trial.

But most importantly, the imposition of this exceedingly harsh detention on defendants such as Hashmi, with no apparent demonstration of necessity for their imposition, shows the lack of oversight and the extent of unilateral executive reach that is the hallmark of post-2001 counter-terror tactics. The harsh nature of SAMs, the difficulties they create for trial preparation, and the pressure they apply to defendants to plead guilty all clearly accompany any use of pretrial supermaximum security solitary confinement, which preceded 2001 and was used in high level

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<sup>48</sup>Sam A. Schmidt and Joshua Dratel, *Turning the Tables: Using the Government's Secrecy and Security Arsenal for the Benefit of the Client in Terrorism Prosecutions*, 48 N. Y. L. SCH. L. REV. 69 (2003-2004).

<sup>49</sup> Schmidt and Dratel, *Id.*, see also Brennan Center, 2008, *supra* note 1.

organized crime cases. The question is, is the reflexive application of SAMs truly a change in response to the terror attacks of 2001?

The answer is, no. As the following sections will show, SAMs must be examined in light of the transition to a punitive and yet administrative, preventive, risk-averse, and therefore deferential criminal justice system. SAMs belong in this late modern criminal justice system, both historically and ideologically. This suggests that we may find criminal justice roots for other aspects of the response to terrorism in the 21<sup>st</sup> Century.

The following sections describe the development of SAMs.

### **The Birth of SAMs**

Although it appears to have been generally forgotten,<sup>50</sup> the use of pretrial solitary confinement to control a dangerous defendant predates both the codification of SAMs and the modern concern with terror defendants. In 1988, Bureau of Prisons regulations already allowed for the use of solitary in the form of administrative detention, including “when the inmate's continued presence in the general population poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution and when the inmate... [i]s

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<sup>50</sup> Those few scholars who have examined SAMs have discussed them either as an overreaction to the terrorist attacks of 2001, or have not looked past the regulation passed in 1996. Heena Musabji and Christina Abraham, *The Threat to Civil Liberties and Its Effect on Muslims in America*, 1 DEPAUL H. SOC. JUST. 83 (2007-2008); Susan Akram & Maritza Karmel, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction without a Difference?* 38 U.C. DAVIS L. REV. 609 (2004-2005); Sadiq Reza, *Unpatriotic Acts: An Introduction*, 48 N. Y. L. SCH. L. REV. 3 (2003-2004); Sam A. Schmidt and Joshua Dratel, *supra* note 28; Joshua Dratel, *Ethical Issues in Defending a Terrorism Case*, *supra* note 18; J. Soffiyah Elijah, *The Reality of Political Prisoners in the United States: What September 11 Taught Us About Defending Them*, 18 HARV. BLACKLETTER L. J. 129 (2002).

pending investigation or trial for a criminal act.”<sup>51</sup> The regulation was unquestionably in use by 1991, when John Gotti and his codefendants, successfully challenged their 23 hour per day solitary confinement as they awaited trial on charges that included witness tampering, multiple murders, solicitation and conspiracy to commit murder.<sup>52</sup> El-Sayyid Nosair, a primary defendant in the 1993 World Trade Center bombing prosecution, was held in administrative detention after his indictment in that case; his challenge to the conditions of his confinement was unsuccessful.<sup>53</sup>

Defendants in the above cases had been given, and made use of, the due process procedures required by 28 C.F.R. 541 (governing administrative solitary confinement); namely notice of reasons for detention within 24 hours, a hearing if detention lasts greater than seven days, and periodic reviews thereafter.<sup>54</sup> Use of the regulation, however, was not strictly necessary in order to house a defendant in solitary confinement pending trial. Augusto Falcone was transferred to USP Marion, a maximum security facility, while awaiting trial for his activities “as a drug ‘Kingpin’” for importing 75 kilos of cocaine into the United States and operating a criminal enterprise.<sup>55</sup> His 1994 challenge to his solitary confinement was unsuccessful in part due of the judge’s determination that Falcone was not being held in administrative solitary; Falcone had merely been transferred to a facility where “[a]ll inmates... are housed in single-man cells, and most are restricted to their cells for 23 hours per day.”<sup>56</sup>

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<sup>51</sup> 18 C.F.R. 541.22; 53 Fed. Reg. 196 January 5, 1988.

<sup>52</sup> *United States v. Gotti*, 755 F. Supp. 1159, 1164-5 (E.D.N.Y. 1991).

<sup>53</sup> *United States v. Nosair*, 1994 U.S. Dist. LEXIS 12159 (S.D.N.Y. 1994). Although Nosair was awaiting trial, his detention might not appropriately be thought of as pretrial detention; he had already been convicted of murder. *Id.* at 1.

<sup>54</sup> 28 C.F.R. 541.22(b), (c); 53 Fed. Reg 196, January 5, 1988. In the *Gotti* case, it was in part the failure to adequately give notice of the reasons for administrative detention that apparently led to the judge’s decision. 755 F. Supp. 1159, 1161.

<sup>55</sup> *Falcone v. U.S. Bureau of Prisons*, 852 F. Supp. 1413, 1415 (S.D.Ill. 1994).

<sup>56</sup> *Id.* at 1416.

SAMs as such were officially introduced to the BOP in October of 1995, in the form of an interim rule allowing for “special administrative measures that are reasonably necessary to prevent disclosure of classified information... include placing the inmate in administrative detention and/or limiting certain privileges, including, but not limited to, correspondence, visiting, and use of telephone.”<sup>57</sup> This somewhat vague rule, specifically limited to national security cases and the threat of divulging classified information, went into effect immediately,<sup>58</sup> received no public comment and was eventually codified in 1997.<sup>59</sup>

It was the second half of the SAMs rule that received the most publicity and response, leading most authors to date SAMs as originating in 1996.<sup>60</sup> In May of 1996 a regulation allowing for the implementation of “special administrative procedures that are reasonably necessary to protect persons against the risk of death or serious bodily injury” were first codified as an interim rule with request for comments.<sup>61</sup> The rule was effective immediately.<sup>62</sup> Allowable restrictions to be placed on inmates were almost identical to those suggested in 1995 regarding classified information, with the addition of an explicit reference to limitations on “interviews with representatives of the news media.”<sup>63</sup>

As an administrative regulation, and (as will be discussed in the following section) as was the case with all administrative solitary confinement, the practice had little judicial oversight to

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<sup>57</sup> 60 FR 53490, October 13, 1995. 28 CFR 501.

<sup>58</sup> *Id.*

<sup>59</sup> 62 FR 33730, June 20, 1997. 28 CFR 501.

<sup>60</sup> *See, e.g.*, Joshua Dratel, *Ethical Issues in Defending a Terrorism Case*, *supra* note 18; Heena Musabji and Christina Abraham, *Threat to Civil Liberties and Muslims in America*, *supra* note 18; Kareem Fahim, *Restrictive Terms of Prisoners’ Confinement Add Fuel to Debate*, *supra* note 15.

<sup>61</sup> 61 FR 25120, May 17, 1996. 28 CFR 501.3(a).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

begin with. Administrative actions are generally subjected to more deferential judicial review, and this is even more the case where prison regulations are concerned.<sup>64</sup> The decision to place an inmate under SAMs was (and still is) to be made initially by the Attorney General with no non-executive oversight whatsoever. SAMs were to be

implemented upon written notification to the Director, Bureau of Prisons, by the Attorney General or, at the Attorney General's direction, by the head of a federal law enforcement agency, or the head of a member agency of the United States intelligence community, that there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons.<sup>65</sup>

The limitations implemented in accordance with SAMs were to be allowed in 120 day increments, renewable upon “additional written notification” from the same designated persons “that the circumstances identified in the original notification continue to exist.”<sup>66</sup> All of this left the imposition of SAMs completely in the hands of the executive branch, with a hypothetical<sup>67</sup> path of review via the Administrative Remedy Program<sup>68</sup> and further review by the judiciary

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<sup>64</sup> See Haney, *supra* note 10; Reiter, *supra* note 12; Swearingen, *supra* note 12.

<sup>65</sup> 61 FR 25120, May 17, 1996. 28 CFR 501.3(a).

<sup>66</sup> 61 FR 25120, May 17, 1996. 28 CFR 501.3(c).

<sup>67</sup> The actual existence of an administrative remedy was first questioned in *Yousef v. Reno*, 254 F.3d 1214 (10<sup>th</sup> Cir. 2001), decided in July of 2001 (prior to the terrorist attacks on September 11<sup>th</sup>). See notes 115-117, *infra*, and accompanying text.

<sup>68</sup> 28 CFR part 542

after all administrative options had been exhausted.<sup>69</sup> The hearing provided in earlier administrative detention regulations was noticeably absent.<sup>70</sup>

Judges overseeing SAMs cases immediately acknowledged that these limitations amounted to solitary confinement, and that they applied to all persons in the custody of the Bureau of Prisons, including defendants awaiting trial.<sup>71</sup> Early cases mentioning SAMs described the conditions under which the prisoner was being held as “confined in special housing, i.e., solitary confinement;”<sup>72</sup> a second described the unit in which the prisoner was held by stating “prisoners are kept essentially in solitary confinement;”<sup>73</sup> a third noted that the defendant (who was not yet convicted) “was subject to solitary confinement for the first 15 months of his detention,”<sup>74</sup> a fourth described the prisoner’s placement “into administrative segregation in an isolated soundproof cell.”<sup>75</sup> Each of these cases predated the attacks of 2001.

Following the September 11<sup>th</sup> attacks, the regulation was almost immediately modified in the form of an interim rule, however the modifications were, in practice, fairly limited, with one exception. The new interim rule allowed for the monitoring of attorney-client conversations.<sup>76</sup>

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<sup>69</sup> 61 FR 25120, May 17, 1996. 28 CFR 501.3(d).

<sup>70</sup> See comments to 1996 interim rule, 62 Fed. Reg. 33730 (commenter refers to ‘placing a prisoner in segregation without a due process hearing.’) (June 20, 1997).

<sup>71</sup> In spite of the fact that the list of subjects for the regulation reads, in its entirety, “prisoners.” 61 FR 25120, May 17, 1996.

<sup>72</sup> *U.S. v. Felipe*, 148 F.3d 101, 107 (2<sup>nd</sup> Cir. 1998).

<sup>73</sup> *U.S. v. Johnson*, 223 F.3d 665, 671 (7<sup>th</sup> Cir. 2000).

<sup>74</sup> *U.S. v. El-Hage*, 213 F.3d 74, 78 (2<sup>nd</sup> Cir. 2000)

<sup>75</sup> *Yousef v. Reno*, 254 F.3d at 1214.

<sup>76</sup> 66 FR 55066, October 31, 2001; 28 CFR 501.3(d).

While this led to substantial criticism, the option to monitor attorney-client conversations does not appear to have ever been used.<sup>77</sup>

Several additional, but perhaps less notable modifications were included as well. The regulation was amended to allow for an initial detention of up to one year before the dangerousness of a prisoner had to be reevaluated.<sup>78</sup> Certainly, it is possible that this had a substantive effect on inmates held under SAMs, however in practice it appears unlikely. Wadih El-Hage, for instance, who was held prior to the modification, received a modification to his SAMs whereby he was no longer held in pure solitary confinement after 15 months—which would not appear to be in conjunction with a 120 day review period.<sup>79</sup> Later defendants awaiting trial remained under SAMs for years at a time, through numerous review periods, at times having their SAMs removed and then reinstated arguably unnecessarily.<sup>80</sup>

Additionally, while the listed subject of the regulation remained “prisoners,”<sup>81</sup> a definition of “inmate” was added in order to make clear that the regulation reached both persons charged and persons convicted.<sup>82</sup> Finally, a section was added making clear that the Bureau of Prisons need not have custody of the individual, other agencies holding prisoners of the Department of Justice (for instance, U.S. Marshalls) might implement similar conditions of

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<sup>77</sup> Letter from Samuel Seymour, President, New York City Bar Association (Feb. 16, 2012) (on file with author).

<sup>78</sup> 66 FR 55065-6 October 31, 2001, 28 CFR 501.2(c); 28 CFR 501.3(c) (the modification carried through both for risk of disclosure of classified information and for risk of dangerousness to the prison or society in general).

<sup>79</sup> *U.S. v. El-Hage*, 213 F.3d 78.

<sup>80</sup> See, e.g., *U.S. v. Warsame*, notes 117-120 *infra*, and accompanying text.

<sup>81</sup> 66 FR 55065.

<sup>82</sup> 66 FR 55065, 28 CFR 500.1(c). This in spite of the fact that there did not seem to be argument regarding this issue. See notes 71-75, *supra*, and accompanying text.

detention.<sup>83</sup> These regulations remained in the form of an interim rule until their final codification in 2007.<sup>84</sup> At that point, commentary accompanying the final rule made clear that renewing SAMs “should not require a de novo review, but only a determination that there is a continuing need for the imposition of special administrative measures in light of the circumstances.”<sup>85</sup>

Comments on the interim rule specifically requested a description of the administrative procedures by which an inmate could challenge his or her SAMs.<sup>86</sup> This request was denied, and inmates were directed to the Administrative Remedy Program already in place.<sup>87</sup> The requirement to exhaust administrative remedies remained a bone of contention in almost every SAMs challenge that was brought to court.<sup>88</sup> Of course, while defendants worked their way through the administrative process, they remained in solitary confinement with SAMs in place.

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<sup>83</sup> 66 FR 55064, 55066, 28 CFR 501.3(f).

<sup>84</sup> 72 FR 16271, April 4, 2007.

<sup>85</sup> 72 FR 16271, 16272.

<sup>86</sup> 72 FR 16274.

<sup>87</sup> *Id.*

<sup>88</sup> *Yousef v. Reno*, 254 F.3d 1214 (10<sup>th</sup> Cir. 2001); *United States v. Yousef*, 327 F.3d 56 (2<sup>nd</sup> Cir. 2003); *United States v. Reid* 369, F.3d 619 (1<sup>st</sup> Cir. 2004); *United States v. Abu Ali*, 528 F.3d 210 (4<sup>th</sup> Cir. 2008); *Al-Owhali v. Ashcroft*, 279 F.Supp.2d 13 (D.D.C. 2003); *United States v. Elzahabi* No. 04-282 (D. Minn) ORDER of December 7, 2005, available at [http://scholar.google.com/scholar\\_case?case=11004938886914500817&q=el+zahabi+december+2005&hl=en&as\\_sdt=2,33](http://scholar.google.com/scholar_case?case=11004938886914500817&q=el+zahabi+december+2005&hl=en&as_sdt=2,33); *United States v. Sattar*, 2006 U.S. Dist. LEXIS 79328, October 27, 2006 (stating that the defendant had exhausted administrative remedies regarding SAMs in the abstract, but not as to any particular restriction).

In 2008, two separate district courts found that the exhaustion requirement did not apply to motions “brought to court in the context of an already-pending action” as opposed to new actions. *U.S. v. Hashmi*, 621 F.Supp.2d 76, 85-6 (S.D.N.Y. 2008); *Ayyad v. Gonzales*, D.D.C. No. 05-cv-02342, Order of July 31, 2008. This was based on an analysis of the legislative intent behind the Prison Litigation Reform Act, 42 U.S.C. §1997e(a) (from which the exhaustion requirement stems), which they found to be one of lessening the financial burden on courts. The relatively inexpensive nature of a new motion in an already existing action, as opposed to the creation of an entirely new case and claim, led these courts to the conclusion that the exhaustion requirement did not apply.



While the above has outlined the creation and amendment of SAMs regulations, the existence of pretrial solitary confinement of dangerous defendants prior to the implementation of SAMs regulations suggests that the use of administrative supermaximum security solitary confinement [ADMAX] should inform any analysis of SAMs. Indeed, the increasing use of ADMAX facilities aligns quite well, chronologically, with the creation and transformation of SAMs. Accordingly, the following section offers a brief overview of the history of ADMAX.

### **Setting the stage for SAMs—the ADMAX explosion**

It will come as no surprise to practitioners, or to students and scholars of contemporary technologies of punishment, that SAMs appeared during the 1980s and 90s, as the flourishing use of ADMAX facilities was well underway during this period. But the tendency to date practices used in connection with terrorism cases from either 2001 or 1996 suggests a need to recollect the history of ADMAX. In fact, it is generally the use of ADMAX facilities and practices that are authorized as SAMs—SAMs practice is ADMAX practice, SAMs challenges are ADMAX challenges, and SAMs law is ADMAX law.

While states began building ADMAX facilities in the 1980s, Keramet Reiter and Craig Haney have connected their origins to the criminal justice developments of the late 1960s and 70s.<sup>89</sup> According to Reiter, the creation and preservation of ADMAX facilities may be directly linked to federal prisoners' rights litigation in these decades. As courts specified necessary protections for prisoners, prison administrators responded by addressing the letter, rather than spirit of these requirements. Administrators responded to courts' admonishments regarding prison conditions by building new, pristine, technologically advanced cells that could not be

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<sup>89</sup> Reiter, *supra* note 12; Haney, *supra* note 10.

criticized in this manner. Advancing technologies allowed prison administrators to address the need for out of cell time, medical intervention, and similar tangible needs without increasing actual human contact, or in fact while decreasing that contact. By the time prisoners' litigation could respond to these developments, the rehabilitative ideal had disappeared from prisons, replaced by a steadily increasing willingness of judges to defer to the administrative determinations of prison officials, particularly regarding prison safety.<sup>90</sup> Moreover, prison administrators were able to respond to challenges that they were abiding by every letter of courts' prior rulings,<sup>91</sup> and that their own grievance procedures (a form of "cosmetic compliance" with former rights-protective court rulings) should be relied on in order to rectify any remaining problems<sup>92</sup>.

Haney turns directly to the abandonment of the rehabilitative ideal, and the advancing tendency to view crime and criminals as a problem to be managed rather than resolved. This general criminal justice trend was compounded due to the steadily increasing prison population, which caused massive overcrowding, in turn causing disciplinary complications. ADMAX facilities enabled the management of this increasing population, arguably unnecessarily, while providing some level of ammunition to politicians looking to court voters by appearing "tough on crime." (Haney, 2003)

In other words, ADMAX may be seen as an outgrowth of the deferential posture accorded to criminal justice officials by the judiciary, originating in a public-safety oriented criminal justice system and political body that had turned away from prisoners' rights in favor of

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<sup>90</sup>Reiter, *supra* note 12.; Van Swearingen, *supra* note 12.

<sup>91</sup> Reiter, *supra* note 12.

<sup>92</sup> Swearingen, *supra* note 12.

prevention and management of criminal activity. In the case of ADMAX, this originated with the public safety rhetoric of the 1980s, and “flourished” in the 1990s.<sup>93</sup> By 1991, when Gotti lodged his successful challenge to his ADMAX housing, the ADMAX boom was well underway. “Super maximum security” prison facilities existed or were being built in more than half the states in the country.<sup>94</sup> Courts were steadily accepting these facilities, due to the meticulousness of their creation and the generally increasing deference that judges were willing to accord prison administrators.

In this context, the creation and acceptance of SAMs hardly seems surprising. Yet SAMs still may be seen as a step further than ADMAX, at least when imposed prior to trial. The following section discusses the evolution of pretrial SAMs, from a rarely imposed and carefully overseen exception, to the reflexive practice which it is today.

### **SAMS: From rare to reflexive**

Scholars looking at SAMs typically date their origin at 1996,<sup>95</sup> when the phrase “special administrative measures” was first used in a BOP regulation. To better contextualize SAMs practice, however, we must remember that the first regulation allowing for administrative pretrial solitary confinement was passed in 1988,<sup>96</sup> only one year after pretrial detention based on a defendant’s dangerousness was determined to be constitutional by the Supreme Court. Under

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<sup>93</sup> Haney, *supra* note 10.

<sup>94</sup> Human Rights Watch, *Prison Conditions in the United States: A Human Rights Watch Report* (1991).

<sup>95</sup> See, e.g., Joshua Dratel, *Ethical Issues in Defending a Terrorism Case*, *supra* note 9; Heena Musabji and Christina Abraham, *supra* note 9.

<sup>96</sup> 18 C.F.R. 541.22; 53 Fed. Reg. 196 January 5, 1988.

this regulation, defendants were given due process in the form of administrative checks, including periodic reviews and a hearing if solitary confinement was to last longer than one week.<sup>97</sup> Perhaps more importantly, however, judges ruling on the acceptability of pretrial solitary confinement seemed to judge the regulation as a second form of preventive detention, and kept close watch on the justifications for the use of this extraordinary practice.

One example of this careful judicial oversight is that of John Gotti, who was held in pretrial solitary confinement based on his alleged activities as the boss of the Gambino crime family.<sup>98</sup> Although he was charged with several violent felonies including witness tampering, the judge in his case found that unless some showing could be made that he was going to continue offending *from his prison cell*, he could not be held in solitary confinement.<sup>99</sup> The determination that the charges against him were serious enough to warrant preventive detention did not necessarily lead to a conclusion that preventive detention in solitary was called for, in spite of the fact that the allegations against him suggested that he might continue to be a danger even while incarcerated.

A second example would be the case of Ahmad Suleiman. Suleiman was indicted in association with the 1993 World Trade Center bombing.<sup>100</sup> Although he was only indicted for perjury,<sup>101</sup> allegations brought by the U.S. Attorney's office painted a portrait of a violent terrorist with the capability to do extreme damage. Prosecutors on Suleiman's case claimed that his fingerprints had been found on bomb manuals, and that he had been present in two separate militant training areas; he had also travelled in the company of one of the men accused of the

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<sup>97</sup> 28 C.F.R. 541.22(b), (c); 53 Fed. Reg 196, January 5, 1988.

<sup>98</sup> *United States v. Gotti*, 755 F. Supp. 1159 (E.D.N.Y. 1991).

<sup>99</sup> *Id.* at 1165.

<sup>100</sup> *United States v. Suleiman*, 1997 U.S. Dist. LEXIS 4647, 2 (S.D.N.Y. 1997)

<sup>101</sup> *Id.*

World Trade Center bombing.<sup>102</sup> While the judge acknowledged that Suleiman could be a danger if released into the general population, he maintained that this did not mean that it was likely that Suleiman would cause harm from jail.<sup>103</sup> Suleiman was therefore ordered released from administrative detention and returned to the general population.<sup>104</sup>

Cases where pretrial solitary confinement was allowed show the type of evidence that judges were looking for in these early days. El Sayyid Nosair was held in pretrial solitary confinement based on allegations that the 1993 World Trade Center bombing had been in part an effort to help Nosair escape prison, and that an escape plan had been in place, of which Nosair had been aware.<sup>105</sup> Luis Felipe, the defendant to whom most authors attribute the first SAMs case,<sup>106</sup> was held in pretrial solitary confinement upon evidence that while in prison he had founded the Latin Kings and directed three successful murders, three attempted murders, and a separate murder conspiracy.<sup>107</sup>

Comparing cases where solitary confinement was imposed to those where it was removed shows that while administrative solitary confinement was created to be preventive, in these early years it was a carefully monitored and limited practice, permitted only in cases where dangerousness was well established and violence seemed extremely likely. Over the years following, however, and after the creation of SAMs, pretrial solitary confinement became more broadly preventive. SAMs were allowed where defendants seemed capable of dangerous acts but no evidence was provided that they were likely to engage in them. The point at which this

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<sup>102</sup> *United States v. Suleiman*, 1997 U.S. Dist. LEXIS 5793, 3 (S.D.N.Y. 1997).

<sup>103</sup> *Id.* at 4.

<sup>104</sup> *Id.* at 6.

<sup>105</sup> *United States v. Nosair*, 1994 U.S. Dist. LEXIS 12159 at 1-2 (S.D.N.Y. 1994).

<sup>106</sup> *U.S. v. Felipe*, *supra* note 46.

<sup>107</sup> *United States v. Felipe*, 148 F.3d 101, 104 (2d Cir. 1998).

extreme intervention was allowable moved earlier and earlier, and further and further from actual violence. Judges steadily removed themselves from the process, leaving oversight of the use of SAMs to seemingly nonexistent BOP reviews.

### **Following the trend: Judges abandon oversight of SAMs**

Not only do SAMs predate the 2001 terror attacks, the decision by judges to abdicate any role they once had in overseeing SAMs application predates those attacks as well. The primary case showing this abandonment is that of Wadih El Hage.

Wadih El Hage was indicted for perjury, but later charged with being part of the conspiracy to bomb U.S. embassies in Africa in 1998; his involvement was primarily as financier for al Qaeda.<sup>108</sup> El Hage challenged his detention on the basis that there was no evidence that he had ever been directly involved in violence, let alone that he was capable of violence from jail, and that his detention in solitary confinement had been so long as to become punitive.<sup>109</sup> While the Circuit Court appeared convinced of El Hage's involvement in violent terrorist acts,<sup>110</sup> the district court had already found that there was no danger of El Hage returning to violent conspiracies if released into the general population because he had no capability to do so.<sup>111</sup>

The Second Circuit did not challenge the district court's analysis of El Hage's dangerousness. In fact, the Circuit court did not discuss El Hage's dangerousness at all. Instead, the Circuit court found that El Hage had access to significant information, and the ability to disclose that information. With no mention of any evidence that El Hage was likely disclose that

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<sup>108</sup> *United States v. El-Hage*, 213 F.3d 74, 78 (2<sup>nd</sup> Cir. 2000).

<sup>109</sup> *Id.* at 78-9.

<sup>110</sup> Referring to "reams of exhibits." *Id.*

<sup>111</sup> *Id.*, at 80.

information, no mention of the 1995 SAMs regulation regarding classified (rather than significant) information, and no suggestion that the information El Hage had was classified, the Second Circuit upheld El Hage's SAMs on the basis of his capabilities alone.<sup>112</sup> Acknowledging the contrast between this case and *Felipe*, namely that in this case there was no evidence of the inmate ever having engaged in dangerous communications, the Second Circuit maintained that El-Hage was dangerous because of what "information he *might* communicate to others."<sup>113</sup> One year prior to the 9/11 attacks, SAMs had already taken a wild leap forward in terms of earlier intervention and preventive action. Evidence that harm was likely was apparently no longer necessary, the *possibility* of harm would be sufficient to impose SAMs.

As El Hage moved SAMs practice forward in terms of increasingly early interventions, the case of *Yousef v. Reno*<sup>114</sup> significantly changed the level of judicial oversight of SAMs. It is surprising that the *Yousef* case so moved SAMs doctrine; *Yousef* was held under SAMs after his conviction, so there was no question as to whether he was a terrorist or had terrorist associates. As to the risk that *Yousef* posed from jail, a jailhouse informant had told prosecutors that *Yousef* was plotting criminal acts from jail, even turning over to prosecutors handwritten notes containing evidence of *Yousef's* schemes.<sup>115</sup> There is little doubt that *Yousef's* SAMs would have been upheld by any judge overseeing the case, had any judge truly overseen case.

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<sup>112</sup> *Id.* at 82.

<sup>113</sup> *Id.* at 82, emphasis added. The court also emphasized that El-Hage's confinement was less severe than *Felipe's* had been, as he was allowed a cellmate and visits from his family members.

<sup>114</sup> *Supra*, note 68.

<sup>115</sup> *U.S. v. Yousef*, 327 F.3d 56 (2d Cir. 2003) at 165-6.

Instead, the district court hearing Yousef's case immediately dismissed his claims<sup>116</sup> based on the fact that Yousef had failed to exhaust his administrative remedies via the Administrative Remedy Program prior to appealing to the court. Yousef's appeal to the Circuit Court was merely a challenge of the district court's holding. He argued both that the Bureau of Prisons was powerless to modify his SAMs, which were in practice dictated by the Attorney General, and that the Bureau of Prisons had acknowledged this fact by responding to Yousef's formal complaint with the statement that "this institution has no jurisdiction in this matter as the Special Administrative Measures were issued from the Attorney General's Office."<sup>117</sup> These arguments failed to convince the court. To the contrary, Yousef's case created precedent that was quickly followed by a slew of courts in response to SAMs challenges.<sup>118</sup>

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<sup>116</sup> Yousef had made First Amendment, Sixth Amendment, Eighth Amendment and due process arguments.

<sup>117</sup> quoted in *Yousef v. Reno*, 254 F.3d at 1222.

<sup>118</sup> See *United States v. Yousef*, 327 F.3d 56 at 166 (2d Cir. 2003); *Al-Owhali v. Ashcroft*, 279 F.Supp.2d 13 note 5 (D.D.C. 2003); *United States v. Elzahabi* ORDER of December 7, 2005, available at [http://scholar.google.com/scholar\\_case?case=11004938886914500817&q=el+zahabi+december+2005&hl=en&as\\_sdt=2,33](http://scholar.google.com/scholar_case?case=11004938886914500817&q=el+zahabi+december+2005&hl=en&as_sdt=2,33); *United States v. Ali*, 2005 WL 2757939 (E.D. Va. Oct. 24, 2005); *United States v. Sattar*, 2006 U.S. Dist. LEXIS 79328 (S.D.N.Y. 2006); *U.S. v. Abu Ali*, 528 F.3d 210 (4<sup>th</sup> Cir. 2008); *Ayyad v. Gonzales*, 2008 U.S. Dist. LEXIS 62863 (D. Colo. 2008).

Not every court has followed this lead. In 2005, Vincent Basciano was briefly released from the SAMs under which he was held after a judge in New York's Eastern District found exhaustion of administrative remedies was unnecessary. *United States v. Basciano*, 369 F. Supp. 2d 344, 348 (E.D.N.Y. 2005). It is worth noting that this case was not a terrorism-associated case. In 2008, two separate district courts found that the exhaustion requirement did not apply to motions "brought to court in the context of an already-pending action" as opposed to new actions. *United States v. Hashmi*, 621 F.Supp.2d 76, 85-6 (S.D.N.Y. 2008); *Ayyad v. Gonzales*, D.D.C. No. 05-cv-02342, Order of July 31, 2008. This was based on an analysis of the legislative intent behind the Prison Litigation Reform Act, 42 U.S.C. §1997e(a) (from which the exhaustion requirement stems), which they found to be one of lessening the financial burden on courts. The relatively inexpensive nature of a new motion in an already existing action, as opposed to the creation of an entirely new case and claim, led these courts to the conclusion that the exhaustion requirement did not apply.



In these ways, judges allowed SAMs practice to become increasingly preventive in the years preceding 2001; first by requiring less proximity to criminal activity prior to allowing detention, and second by ceding oversight of SAMs to the executive branch. Even as the SAMs regulations abandoned the requirement of hearings for extended confinement, and in the face of BOP admission that no due process could be obtained through administrative review, the judicial branch abandoned its oversight of the executive branch. This gave the executive branch unchecked authority to detain defendants, pretrial (let alone pre-conviction), in solitary confinement, in cases that would often go on for years before reaching trial.

The examples of Syed Hashmi and Mohamed Warsame are telling. Warsame's detention, which was spent entirely under SAMs, was claimed by his lawyers to have been the longest in U.S. history.<sup>119</sup> Warsame was known to have terrorist connections, to have trained at a terrorist training camp, and to have been communicating with terrorists prior to his arrest.<sup>120</sup> However, the judge on Warsame's case seemed unconvinced of his dangerousness, at one point making a specific finding that SAMs were unnecessary.<sup>121</sup> Even at sentencing, the judge remained unconvinced of Warsame's dangerousness.<sup>122</sup> Yet in spite of both this hesitancy and the judge's order, Warsame's SAMs were never removed.

As was mentioned above, the government's evidence of dangerousness in the case of Syed Hashmi seems similarly weak. Outside of the support he had provided to a high ranking

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<sup>119</sup> U.S. v. Warsame, Defendant's Renewed Motion for Conditional Release from the Longest Pretrial Imprisonment in United States History, July 13, 2008 (on file with author).

<sup>120</sup> U.S. v. Warsame sentencing transcript (on file with author). *See also* United States v. Warsame memorandum opinion on sentencing August 24, 2009 (on file with author).

<sup>121</sup> U.S. v. Warsame Order on Motion for Release Based on Changed Circumstances, August 31, 2007, at 10 (on file with author).

<sup>122</sup> Warsame sentencing transcript, *supra* note 120, at 36-37.

member of a terrorist group, the concern regarding Hashmi appeared to center around the individuals he was associated with. The government alleged that Hashmi had served as a go-between for two terrorists who had been involved with a terror conspiracy in the United Kingdom, however it did not allege that Hashmi himself had any knowledge of how to build bombs or engage in any other violent acts, or that he could direct (or even ask) these other terrorists to engage in violence on his behalf. To the contrary, the government informant in the case had stated that topics of importance were avoided in front of Hashmi, because he was an outsider, not a member of al Qaeda, and rather a member of a public, political group that was not involved in violence.<sup>123</sup> A claim that Hashmi had made threats that terrorists would avenge his being held in prison was dropped prior to a 2008 motion to renew Hashmi's SAMs.<sup>124</sup> Yet Hashmi was held under SAMs for three years prior to his agreement to plead guilty, and has been so confined since that plea.

The judicial abandonment in evidence in the El Hage and Yousef cases paved the way for contemporary SAMs practice, overly preventive and insufficiently critical of government allegations, such as in the Hashmi and Warsame cases described above. Those two cases show the reaches of the preventive attitude in contemporary SAMs practice. It is difficult to see how, in either case, sufficient evidence of a likelihood of dangerousness could have been presented to justify the defendants' detentions. Yet by early 2001 SAMs practice had become so preventive that even the possibility of terrorist connections was sufficient for judges to abandon the SAMs determination to the executive branch. Moreover, this development was, by late 2001, clearly

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<sup>123</sup> United States v. Hashmi transcript of proceedings June 1, 2007 (on file with author).

<sup>124</sup> SAMs renewal memorandum attached to United States v. Hashmi defense memorandum of December 22, 2008 re def. mot. for Modification of Pretrial Conditions of Detention (on file with author).

established law. The case of Richard Reid shows how established SAMs practice was by this time.

### **SAMs As A Foregone Conclusion: What We Learn from Richard Reid**

Richard Reid was arrested after trying and failing to detonate a bomb in his shoe in December of 2001, mere months after the 2001 attacks.<sup>125</sup> Because Reid was arrested immediately after a failed attack, not to mention so shortly after the 2001 attacks, it is unsurprising that he was soon placed under SAMs. But the particular reaction of the judge overseeing his case shows just how established SAMs practice was at that time.

In Judge Young, Richard Reid had happened to find a judge particularly ideologically opposed to the extremities of the so-called “War on Terror.” In 2003 he was quoted saying “Mr. Reid is a very tall individual. But he’s not ten feet tall. And this constant reiteration of we’ve got to keep data away from him, we’ve got to keep his data out of the hands of the public lest disaster befall, respectfully, is wearing a bit thin.”<sup>126</sup> He further expressed his concern that the government was going to spirit Reid off to Guantanamo, a concern which had resulted in an order that Reid not be moved without the prior permission of the court,<sup>127</sup> and he maintained that Reid’s attorneys would not be forced to sign the affirmation generally required in SAMs cases, noting the ongoing prosecution of Lynne Stewart.<sup>128</sup> In fact, upon first seeing the SAMs this

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<sup>125</sup> *United States v. Reid* criminal complaint, on file with author. Although unknown to the FBI at the time of the filing of the complaint, Reid’s shoe was not only wired but laced with TATP and PETN, a combination later used by Umar Abdulmutallab (the “Underwear Bomber” or “Christmas Bomber”) (*U.S. v. Abdulmutallab* indictment on file with author).

<sup>126</sup> Quoted in *United States v. Reid*, 214 F.Supp.2d 84 (D. Mass. 2002).

<sup>127</sup> *Id.*

<sup>128</sup> Lynne Stewart was charged for, and ultimately convicted of providing material support to a terrorist by enabling that terrorist to evade the SAMs under which he had been placed. Tamar R.

judge had ordered the SAMs lifted,<sup>129</sup> reasoning that “the SAMs did not apply to Reid, as he was a pre-trial (sic) detainee presumed to be innocent.”<sup>130</sup>

Yet Judge Young not only ended up backtracking from his assertion of Reid’s presumed innocence, he was outright embarrassed that he had ever said it. In July of 2002 Judge Young set forth an opinion reinstating the SAMs and stating, in his words, he “botched it.”<sup>131</sup> His opinion drips with shame at the way in which he misread law. The extent of embarrassment of this ideologically opposed judge suggests that the extent to which SAMs practice was established at that time. Were SAMs not so clearly established to be within the prerogative of the executive branch, with or without proof of dangerousness, it is highly unlikely that a judge so concerned with the excesses of counterterrorism would respond with this embarrassment, rather than with a careful and limited admission of the reasons SAMs were justified in Reid’s particular case. Judge Young’s complete abdication of his objections shows that SAMs in 2002 were anything but new or reactionary. Instead, Judge Young had to acknowledge they were already customary, traditional, and generally accepted, hence his embarrassment at having foolishly seen them as exceptional when first confronted with the issue. The general acceptance of SAMs is further evident in the response from legal practitioners and academics, or more accurately, the lack thereof. This lack is discussed in the next section.

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Birckhead. *The Conviction of Lynne Stewart and the Uncertain Future of the Right to Defend*, 43 AM. CRIM. L. REV. 1 (2006).

<sup>129</sup> United States v. Reid, *supra* note 126.

<sup>130</sup> *Id.* at 89.

<sup>131</sup> *Id.*

### **A Lackluster Response: The deafening silence of the legal community**

If Judge Young's embarrassment shows the judiciary's acceptance of executive authority to impose SAMs unilaterally, the silence of the legal community, both in practice and in academia, shows its acceptance in the broader legal culture. Legal academia showed almost no interest in the psychological hardship that the solitary confinement of SAMs entails, or in the fact that defendants might be placed under SAMs with little or no articulated justification. Instead, civil liberties advocates, defense attorneys, and legal scholars focused on the impact on defendants' abilities to aid in their representation, or the effect of the attorney/client monitoring provision that was added to SAMs regulations in 2001. In fact, SAMs were almost entirely ignored by the legal academic community until this provision was passed. Winter of 2001-2002 saw the publication of two articles, an exponential increase from the zero articles that had published prior to 2001, both of which referenced SAMs solely in the context of the new attorney/client monitoring provision.<sup>132</sup>

In the spring of 2002 the floodgates opened, and by December 2010 80 law review articles and professional legal publications had made reference to SAMs. But of these articles, 55 mentioned SAMs solely in the context of either the Lynne Stewart case or the attorney/client monitoring provision. Only ten articles mentioned solitary confinement in the context of SAMs and outside of an introduction to the Stewart case, only six of these explore or even mention the effects these conditions may have on the inmate. Even those articles that did discuss the

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<sup>132</sup> Mark G. Young, NOTE: What Big Eyes and Ears You Have!: A New Regime for Covert Governmental Surveillance, 70 *FORDHAM L. REV.* 1017 (2001); Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent.* 81 *OR. L. REV.* 1051 (2002)

psychological effect of SAMs emphasized the practical hurdles that SAMs create regarding trial preparation, rather than the harsh nature of SAMs themselves.<sup>133</sup>

In reacting this way, legal academics appear to have been following the lead of the practitioners working on the cases who had, over the years, abandoned any claims of psychological hardship to their clients. In the early years of pretrial solitary confinement, the effect of solitary on inmates' well being comes up rarely, but it does appear. In *Gotti*, for example, the opinion closes with recognition of the defendants' "understandable desire to live as comfortably as possible and with as little restraint as possible during confinement."<sup>134</sup> In *Suleiman*, the judge opens his opinion by stating his sympathy for Suleiman's claim that his solitary confinement is affecting his mental health. In *El Hage*, the court acknowledged that El Hage had already been held for a long period of time, and was likely to remain in solitary for much longer, and seemed to be influenced at least in part by the fact that El Hage had already been allowed to have a cellmate.<sup>135</sup> Further, the very fact that El Hage's conditions of confinement had been modified in order to allow for a cellmate suggests some sensitivity on the part of the district court.<sup>136</sup>

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<sup>133</sup> See, e.g., Schmidt and Dratel, *supra* note 18 at 71

the defendant is focused on alleviating the onerous conditions rather than on the substance of the case. As a result, counsel is forced to develop a defense strategy without input from the client. In addition, counsel must spend an inordinate amount of time attempting to ameliorate the conditions by negotiating with prison officials, prosecutors, and, if necessary, the court. Furthermore, because the defendant is denied access to outside media, he or she cannot provide guidance and commentary with respect to potential occurrences that may have a bearing on the case, or warrant further investigation or exploration.

<sup>134</sup> 755 F. Supp. at 1165.

<sup>135</sup> 213 F.3d at 78-9.

<sup>136</sup> Sam Schmidt and Joshua Dratel further suggest that the district court's refusal to grant a severance in the case was in part based on sympathy for "the significant negative impact of the S.A.M.'s on the defendants and their ability to prepare and contribute to their defense." Schmidt

Once again, the *Yousef* case stands as a seeming death knell for SAMs argument. Yousef had clearly raised an argument regarding the effect solitary confinement had on his well-being—his Eighth Amendment claims could be based on little else.<sup>137</sup> But with the dismissal of Yousef’s claim not only judges but defense attorneys seem to have abandoned the argument that pretrial solitary confinement could be overseen on the basis of the effect it has on defendants. Following this case, the argument that the solitary confinement included as an aspect of SAMs was either punitive or simply cruel disappeared from the majority of cases.<sup>138</sup> Where it was brought – most often in pro se motions by convicted inmates at the Supermax facility in Florence, Colorado -- it was quickly dismissed or abandoned.<sup>139</sup>

In other words, claims of hardship were brought only by persons who were not legally educated, and who, one might say, could not see the writing on the wall. Defense attorneys, in contrast, saw not only from SAMs cases but from conventional solitary confinement suits that the Eighth Amendment was a losing argument. Aside from the generally accepted doctrine that solitary confinement does not violate the Eighth Amendment, dismissals might be based on a

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and Dratel, *supra* note 18 at 73, ftnt 9, citing *United States v. bin Laden*, 109 F. Supp. 2d 211, 213-15 (S.D.N.Y. 2000).

<sup>137</sup> 254 F.3d at 1216

<sup>138</sup> See *United States v. Esawi*, 2003 U.S. Dist. LEXIS 1695 (N.D. Ill. 2003); *Al-Owhali v. Ashcroft*, 279 F. Supp. 2d 13 (D.D.C. 2003); *United States v. Abu Ali*, 396 F. Supp. 2d 703 (E.D.Va. 2005); *Basciano v. Martinez*, 2007 U.S. Dist. LEXIS 56913 (E.D.N.Y. 2007); but see *Sattar v. Gonzales*, *supra* note 15.

<sup>139</sup> *United States v. Troya*, 2008 U.S. Dist. LEXIS 118574 (S.D. Fla. 2008) without Eighth Amendment challenge *United States v. Troya*, 2008 U.S. Dist. LEXIS 71525 (S.D. Fla. 2008); 2008 U.S. Dist. LEXIS 73372 (D. Colo. 2008); *Sattar v. Gonzales*, 2008 U.S. Dist. LEXIS 112428 (D. Colo. 2008) adopted by *Sattar v. Gonzales*, 2009 U.S. Dist. LEXIS 21699 (D. Colo. 2008); *Shaaban Shaaban Hafed v. Fed. Bureau of Prisons*, 2009 U.S. Dist. LEXIS 69211 (D. Colo. 2009) adopted by *Shaaban Shaaban Hafed v. Fed. Bureau of Prisons*, 2009 U.S. Dist. LEXIS 69205 (D. Colo., Aug. 5, 2009); *Allmon v. Bureau of Prisons*, 2009 U.S. Dist. LEXIS 127183 (D. Colo. 2009) adopted by *Allmon v. Bureau of Prisons*, 2010 U.S. Dist. LEXIS 52390 (D. Colo., May 26, 2010); *Jabarah v. Garcia*, 2010 U.S. Dist. LEXIS 107838 (S.D.N.Y. 2010) (dismissing claim as moot).

failure to exhaust administrative remedies,<sup>140</sup> or on the basis of mootness as SAMs were adjusted and prisoners were transferred to new facilities.<sup>141</sup> These responses echoed those in conventional Supermax cases, where deference to prisons' administrative decisions was clearly overtaking any oversight role the judiciary had once played.<sup>142</sup> By pressing claims of interference with trial preparation instead, defense attorneys made a calculated effort to use an argument that maintained some chance of winning. Their abandonment of the hardship argument shows once again how fully established it was that imposition on defendants' well-being was within the prerogatives of the executive, even prior to any determination of guilt or dangerousness.

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<sup>140</sup> See note 88, *supra*, and accompanying text.

<sup>141</sup> *United States v. Elzahabi*, *supra* note 118; *Hale v. Ashcroft*, 683 F. Supp. 2d 1189 (D. Colo. 2009); *Reid v. Wiley*, 2010 U.S. Dist. LEXIS 98162 (D. Colo. 2010).

<sup>142</sup> Craig Haney and Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*. 23 N.Y.U. REV. OF L. AND SOCIAL CHANGE 477 (1997); Reiter, *supra* note 12; Swearingen, *supra* note 12.



## **Conclusion**

SAMs provide an excellent case study of the devolving checks on the executive branch in areas concerning public safety and suspected dangerous individuals. SAMs provide the harshest imposition on liberty allowed in the criminal justice system outside of death, but may be imposed on defendants who have not been convicted, have not been tried, and against whom the government has provided no evidence of dangerousness or necessity for SAMs. Instead, according to at least one prosecutor, an indictment on terrorism charges is sufficient to justify the imposition of ADMAX solitary confinement. In the interests of public safety, all questions of proof regarding the danger to the public disappear. In the interests of public safety, the executive is allowed to make this decision unilaterally, with only a show of judicial oversight and no actual questions asked.

The cases of Yousef and El Hage show that SAMs were established as an unchecked executive prerogative prior to the 2001 terror attacks. While it is true that SAMs began as an exceptional measure, applied only when judges were provided with adequate evidence of its necessity, judges had abdicated this role prior to the terrorist attacks in September of 2001. Moreover, examination of the rhetoric and doctrine used to justify that abdication locate the lack of oversight of SAMs as part of the more general acceptance of ADMAX facilities, and the more general abdication of oversight of those facilities.

The lack of surprise and attention paid to SAMs in the judiciary, the community of legal practitioners, and the community of legal academics shows just how established this practice was. The increasing number of suspected terrorists in our prisons seems to have more to do with

the increased attention and accusation of “reflexive” application of SAMs than does any post-2001 change in practice.

But can SAMs practice truly function as a case study in broader counter-terror excesses? It can and does. SAMs practice is directly relevant to, for instance, the use of solitary confinement at Guantanamo. SAMs not only represent a similar form of confinement, ADMAX facilities were the model for solitary confinement at Guantanamo. Now that details of the limitations on attorney/client conversations are emerging, it appears that these as well were based off of SAMs restrictions.

When Rear Admiral D.B. Woods, Commander of Joint Task Force-Guantanamo, issued an order providing for review of each and every piece of writing passed between detainees and their attorneys in December of 2011, a not-so-minor controversy erupted as defense attorneys expressed their outrage over the new regulations.<sup>143</sup> The ability to engage in privileged conversation with clients is, in the words of the American Bar Association (“ABA”), “critical to a true adversarial process.”<sup>144</sup> This right was irreversibly damaged by the oversight proposed. The Office of the Chief Defense Counsel at Guantanamo went so far as to issue a response

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<sup>143</sup> Memorandum From the Office of the Chief Defense Counsel Re: Professional Responsibility Guidance on the JTF-GTMO-CDR Orders Governing Written Communications Management for Detainees Involved in Military Commissions of 27 December 2011 and Governing Logistics of Defense Counsel Access to Detainees Involved in Military Commissions of 27 December 2011 (Jan. 13, 2012) [Hereinafter “January 13<sup>th</sup> Memo”]; National Association of Criminal Defense Lawyers News Release Dated January 13, 2012, available at <http://www.nacdl.org/NewsReleases.aspx?id=23429> ; Laura Pitter, *Guantanamo’s System of Injustice*. SALON.COM January 19, 2012, available at [http://www.salon.com/2012/01/19/guantanamos\\_system\\_of\\_injustice/](http://www.salon.com/2012/01/19/guantanamos_system_of_injustice/) ; Letter from Samuel Seymour, President, New York City Bar Association (Feb. 16, 2012) (on file with author); Letter from William Robinson III, President, American Bar Association (Dec. 21, 2011) *Available at* <http://www.lawfareblog.com/wp-content/uploads/2012/03/1-2011-Dec-21-ABA-Pres-Ltr-Re-GTMO.pdf>

<sup>144</sup> Robinson, *Id.*

directive recommending that detainees' defense counsel refuse to comply with the Order. The Ethics Advisory Committee of the National Association of Criminal Defense Lawyers soon issued an opinion supporting this response.<sup>145</sup>

Yet the Order itself claimed to be comparable to existing Bureau of Prisons ["BOP"] regulations. In particular, the Order and its supporters pointed to provisions allowing for the use of SAMs, including providing for monitoring of attorney-client communications, as comparable to the new procedures.<sup>146</sup>

Most telling is the response sent to the New York City Bar Association, after that Association wrote Jeh Johnson to complain about the procedures. The Association wrote to detail the differences between the procedures implemented at Guantanamo and the extremely limited manner in which SAMs are meant to be applied. General Mark Martins, having reviewed the letter, replied that while the Association might be correct about the requirements to implement SAMs de jure, in fact his observation of the ways in which SAMs were applied and overseen suggested that the Guantanamo procedures were not nearly so far off.<sup>147</sup>

Of course, General Martins was correct. The Association had focused on the broad sweep of the Guantanamo procedures, as far too vague and generalized to be comparable to SAMs. Yet, as seen above, SAMs in practice are applied, now, to any defendant charged under a terrorism statute, with almost no question or oversight as to the specific threat posed by the

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<sup>145</sup> Opinion of the Ethics Advisory Committee of the National Association of Criminal Defense Lawyers (Feb. 2012) Available at <http://www.lawfareblog.com/wp-content/uploads/2012/02/2012-02-22-Disclosure-of-attorney-client-privileged-communications-to-third-party-Guantanamo-Bay-Cuba.pdf>

<sup>146</sup> Woods, *supra* note 42.

<sup>147</sup> Letter from General Mark Martins, 2/17/2012, on file with author.

defendant.<sup>148</sup> In other words, the government was quite well aware of the lack of oversight of SAMs and preventive detention in Article III courts, and proceeded to demand that lack of oversight in Guantanamo.

Indeed, the entire phenomenon of Guantanamo may be explained as a government effort to claim the right to determine who needs to be punished, without the meddling interference of judges or juries. In creating Guantanamo, as many authors have noticed, the government endeavored to create the opportunity to act entirely without judicial oversight.<sup>149</sup> Guantanamo would allow the government to bypass frustrating limitations on the length of detention, historically created to ensure a jury or judge would check government allegations and force accusers to bring some proof of a reason to hold detainees.<sup>150</sup> In other words, with Guantanamo, with black sites, and with drone strikes, the government found a way to avoid being caught up in any argument over the guilt or innocence of detainees.

While black sites, drone strikes, and the use of indefinite detention at Guantanamo are extreme measures, the lack of oversight they display are not so far from the use of “short cuts” and “end-runs” around judicial oversight seen in late 20<sup>th</sup> century criminal justice alternatives. Yet SAMs may be an example of a “missing link” in comparisons between U.S. counterterror policies and U.S. criminal justice. Through SAMs, the connection between accepted criminal justice practices and the application of those practices to the pursuit of terror suspects can be seen. Rather than relying on vague accusations that the U.S. criminal justice system was already “harsh,” “preventive,” or “unilateral,” the development of SAMs shows just how the decrease in

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<sup>148</sup> See also statement of prosecutor in *U.S. v. Sadequee*, *supra* note 16, and accompanying text.

<sup>149</sup> Karen Greenberg *THE LEAST WORST PLACE: GUANTANAMO'S FIRST 100 DAYS* (2009); Phillippe Sands, *TORTURE TEAM: RUMSFELD'S MEMO AND HTE BETRAYAL OF AMERICAN VALUES* (2008).

<sup>150</sup> Natalia Nicolaidis *Sixth Amendment Right to a Speedy and Public Trial*. 26 *AMERICAN CRIM. L. REV.* 1489 (1988).

judicial oversight led to an exceptionally harsh and reflexive form of confinement, which, in fact, was used as a model for more infamous counterterror policies. In this way, SAMs bridge the gap between domestic and international practices of detention and confinement, showing how much of this effort the executive had already accomplished towards unilateral preventive detention in the criminal justice system, over the course of the 20<sup>th</sup> century.