

THE CONVICTION OF LYNNE STEWART AND THE UNCERTAIN FUTURE OF THE RIGHT TO DEFEND

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ABSTRACT

At the heart of the attorney-client relationship lies the ability to communicate freely and without fear that someone is listening. Since 9/11, the government has passed regulations, such as the Special Administrative Measures (“SAMs”), that by virtue of their broad scope and lack of procedural safeguards have endangered this privilege, particularly for incarcerated criminal defendants. The recent conviction of attorney Lynne Stewart for providing material support to a foreign terrorist organization has brought this issue to the forefront, as the prosecution relied upon government-monitored conversations between Stewart and her client, convicted terrorist Sheik Abdel Rahman, to prove its case against her. This Article argues that post-9/11 administrative mechanisms such as the SAMs represent a classic case of governmental overreaching, one that is in line with a long history of compromising civil liberties and limiting access to the courts during periods of war and national anxiety. It analyzes the effects of such mechanisms upon criminal defendants and those who represent them, and uses Lynne Stewart’s conviction as a lens through which to examine the history that brought us to this point as well as serving as a concrete example of what can, and does, happen when rules regulating the bounds of proper legal advocacy are violated. It concludes by demonstrating that although effective defense strategies may temper the impact of certain aspects of the SAMs, the regulations’ very existence has the potential to “chill” the attorney-client relationship and thereby threaten the Sixth Amendment – a reality the courts have yet to acknowledge.

Introduction

At the heart of the attorney-client relationship lies the ability to communicate freely and candidly, without fear that someone is listening. In criminal defense, this critical tenet – expressed in evidentiary rules as the attorney-client privilege – is the *sine qua non* for achieving effective, meaningful representation. Clients, who may differ from their lawyers in terms of culture, experience, and background, are reluctant to share information under the best of circumstances. Yet, without protected communication, the likelihood that trust will develop, and

that such trust will lead to a genuine meeting of the minds between lawyer and client, is low – if not nonexistent.¹

Since 9/11, the government has adopted administrative regulations that have endangered the attorney-client privilege, particularly for incarcerated criminal defendants. The principal regulation of consequence here is a Bureau of Prisons (“BOP”) rule referred to as the “Special Administrative Measures” (“SAMs”), which allows for restrictions to be placed upon an inmate’s ability to communicate with the outside world, restrictions to which the inmate’s attorney can also be required to adhere.² Among the provisions is one that allows the BOP to monitor attorney-client communications when there is “reasonable suspicion” to believe that the inmate may use such communications to “further or facilitate acts of terrorism.”³ The terms used in the drafting of the SAMs are broad and not well-defined, and the provision itself – which allows for the monitoring of all written, oral and telephonic communications between lawyers and their incarcerated clients – fails to provide for meaningful judicial oversight.⁴

Against this backdrop, in February 2005, a federal jury in New York City convicted attorney Lynne Stewart in a case that highlights the stark intersection between the defendant’s right to unfettered communication with his lawyer and the ever-increasing reach of the federal

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¹ There is much legal scholarship that focuses on the history of the attorney-client privilege, chronicling its development and the ways in which the prevailing rationales for the privilege have evolved. *See, e.g., C. MCCORMICK, EVIDENCE* § 121 (2d ed. 1972) (discussing rationales for the privilege); 8 J. WIGMORE, *EVIDENCE* § 2290 (McNaughton rev. 1961); Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1087-91 (1978) (discussing the origins of the privilege).

² 28 C.F.R. § 501.3 (2005). *See infra* notes 236-75 and accompanying text for a discussion of recent cases in which attorneys have challenged provisions of the SAMs requiring them to “affirm” that they would comply with the conditions imposed upon their clients.

³ 28 C.F.R. § 501.3(d) (2005).

⁴ *Id.* *See infra* notes 60-66 and accompanying text for a discussion of alternatives to the monitoring provisions of the SAMs that do, in fact, provide sufficient judicial oversight. *See also infra* note 208.

government post-9/11.⁵ The charges against Stewart emanated from her decade-long representation of Sheikh Omar Abdel Rahman, an Egyptian Muslim cleric serving a life plus 65-year sentence for conspiracy to bomb the World Trade Center and other New York landmarks as well as soliciting crimes of violence against Egyptian President Hosni Mubarak and the U.S. military.⁶ After a seven-month trial, Stewart – along with two co-defendants⁷ – was convicted of all charges, from conspiring to provide and actually providing “material support” to Rahman’s terrorist organization, the Islamic Group (“IG”), to conspiring to defraud the United States and making false statements.⁸

⁵ See, e.g., Michael Powell & Michelle Garcia, *Sheik’s U.S. Lawyer Convicted of Aiding Terrorist Activity*, WASH. POST, Feb. 11, 2005, at A01 (“Stewart’s case became a litmus test for how far a defense attorney could go in aggressively representing a terrorist client without crossing the line into criminal behavior.”); Victoria Ward, *U.S. Civil Rights Lawyer Guilty of Aiding Terrorism*, PRESS ASSOC., Feb. 11, 2005 (reporting Stewart’s conviction); *Civil Rights Lawyer Lynne Stewart Convicted of Aiding Terrorists* (National Public Radio broadcast Feb. 11, 2005) (discussing Stewart’s conviction).

⁶ Indictment, *United States v. Ahmed Abdel Sattar, Yassir Al-Sirri, Lynne Stewart & Mohammed Yousry*, No. 02 Cr. 395 (S.D.N.Y. filed Apr. 9, 2002), available at <http://news.findlaw.com/hdocs/docs/terrorism/ussattar040902ind.pdf> [hereinafter Indictment]. See also Joseph P. Fried, *In Muslim Cleric’s Trial, a Radical Defender; Left-Leaning Lawyer and Revolutionary Sympathizer Comes Back in the Limelight*, N.Y. TIMES, June 28, 1995, at B1, col. 5; *The Woman Behind the Sheikh*, THE NEW YORKER, Jan. 23, 1995, at 28. Rahman was convicted of the following: seditious conspiracy, soliciting the murder of Egyptian President Hosni Mubarak and soliciting an attack on American military installations, conspiracy to murder Mubarak, and bombing conspiracy. *United States v. Rahman*, 189 F.3d 88, 103-4 (2d Cir. 1999).

⁷ Also indicted with Stewart were Ahmed Abdel Sattar, a U.S. postal worker alleged to be an active member of the Rahman’s organization, the Islamic Group, and a “surrogate” for Rahman; Yassir Al-Sirri, the former head of the London-based Islamic Observation Center and a “facilitator of communications for IG members world-wide”; and Mohammed Yousry, the Arabic interpreter for Rahman. See Indictment, *supra* note 6. See also Powell & Garcia, *supra* note 5. Al-Sirri has been detained in London since October 2001 and did not take part in the federal trial. *United States v. Sattar, Al-Sirri, Stewart and Yousry*, 272 F. Supp. 2d 348, n.1 (S.D.N.Y. 2003); See also Patricia Hurtado, *Wanted, But Kept Out of Reach; Nine Men Suspected of Terror Crimes and Links to al-Qaida are Being Held in Britain, Where Extradition Laws Keep Them From U.S.*, NEWSDAY (New York), Apr. 24, 2005, at A4 (reporting Al-Sirri’s status).

⁸ See Ward, *supra* note 5. Stewart was originally charged in a five-count indictment on Apr. 8, 2002. Count One of the Indictment charged her with conspiring to provide material support and resources to a foreign terrorist organization (“FTO”) under 18 U.S.C. § 2339B (2005). Count Two charged her with providing and attempting to provide material support and resources to an FTO, in violation of 18 U.S.C. §§ 2339B and 2 (2005). Count Three charged her co-defendants, but not Stewart, with soliciting persons to engage in crimes of violence, in violation of 18 U.S.C. § 373 (2005). Count Four charged Stewart with conspiring to defraud the U.S., based on her alleged violations of the SAMs, in violation of 18 U.S.C. § 371 (2005), and Count Five charged her with making false statements, also premised on her alleged violations of the terms of the SAMs, in violation of 18 U.S.C. §§ 1001 and 2 (2005). See Indictment, *supra* note 6.

After the defendants’ motion to dismiss was allowed as to Counts One and Two, on the ground that the charges were unconstitutionally vague as applied to the defendants’ conduct, a superseding indictment was returned on Nov. 19, 2003, in which Stewart was charged with conspiring to provide and conceal material support to an FTO under 18

The evidence at the core of the government's case came from Stewart's own words, words spoken in confidence to her client. Her conversations during a series of prison visits with Rahman had been recorded by the government, and the tapes of those visits formed the basis for the arguments advanced against her at trial.⁹ As a result, while the central facts at trial were not in dispute, the meaning and significance of them was, with the principal inquiry focused upon the following: By her actions and her words, did Lynne Stewart intend to provide material support to Rahman and the IG? Did she, in fact, provide material support? And, did she knowingly intend to violate the SAMs?

While Lynne Stewart's conviction raises many questions that are specific to the woman and to the circumstances surrounding her prosecution, it also implicates much broader developments and trends. Among those is the matter of how did we get here or, rather, how did our laws develop to the point at which we now can, through measures such as the SAMs, monitor attorney-client conversations without clear legal standards or sufficient judicial oversight? An attempt to answer this question requires an examination of the national legacy of placing unprecedented limits on civil liberties during times of war. It requires a look at recent legislation that effectuated "court-stripping," whereby Congress passed laws that diminish the rights of groups on society's margins without a mechanism for judicial review. It also requires an analysis of the history and implementation of the SAMs, an examination of the grounds for

U.S.C. § 2339A (2005) and the actual provision and concealment of that support under 18 U.S.C. §§ 2339A and 2 (2005). *See* Indictment, United States v. Ahmed Abdel Sattar, Yassir Al-Sirri, Lynne Stewart & Mohammed Yousry, No. 02 Cr. 395 (S.D.N.Y. filed Nov. 19, 2003), <http://www.lynnestewart.org/IndictmentSuperseding.pdf> [hereinafter Superseding Indictment]. *See also* Press Release, Department of Justice, Superseding Indictment Adds New Charges Against Ahmed Abdel Sattar, Lynne Stewart, and Mohammed Yousry (Nov. 19, 2003), http://www.usdoj.gov/opa/pr/2003/November/03_crm_631.htm.

A discussion of the impact of the court's dismissal of Counts One and Two and the government's resultant shift in strategy, as reflected in the superseding indictment, may be found *infra* at notes 148-52 and accompanying text.

⁹ *See infra* notes 29-31 and accompanying text.

contesting them, and an exploration of how the federal courts have handled cases in which the SAMs have been challenged.

In looking ahead, it is useful to try to divine what the future holds, both for the criminal defense attorney and for the criminal defendant. Must Stewart's conviction lead to the "chilling" of the defense bar? Must it result in widespread reluctance to represent the most unpopular defendants, those on the fringes of society? Must it mean that the attorney-client privilege is a thing of the past and that the chastening and ultimate silencing of defenders is inevitable? Or, might it serve as an object lesson for defense lawyers – a blueprint of what *not* to do, and by its very nature, a guide on how to advocate rigorously and aggressively for one's client without running afoul of the law? These questions provide an opportunity to analyze specific cases in which defense attorneys have, indeed, rendered effective assistance of counsel against the backdrop of the government's unwavering assault on those who promulgate terror.

This article argues that post-9/11 administrative mechanisms such as the SAMs represent a classic case of U.S. governmental overreaching, one that is in line with a long history of compromising civil liberties and limiting access to the courts during periods of war and national turmoil. It analyzes the impact of such mechanisms upon criminal defendants and those who represent them, and uses Lynne Stewart's criminal conviction as a lens through which to examine the historical development to date as well as serving as a concrete example of what can – and does – happen when rules regulating the bounds of proper legal advocacy are violated. It concludes by demonstrating that although effective defense strategies may temper the impact of certain procedural aspects of the SAMs, the regulations' very existence has the potential to "chill" the attorney-client relationship and thereby threaten the Sixth Amendment – a reality the courts have yet to acknowledge.

Part I describes the specifics of the case against Lynne Stewart and the national reaction to her conviction, and then establishes why the prosecution of Stewart stands for more than just the sum of its parts. Part II analyzes the U.S. government's long record of infringement upon civil liberties in order to effectuate the dramatic regulation of individual conduct during periods of war and unrest, of which the SAMs is only the most recent example. Part III portrays the history of the SAMs from the regulation's drafting and implementation by the executive branch, coinciding with the passage of broad counterterrorism legislation, to its almost uniform support by the courts despite clear legal and constitutional vulnerabilities. Part IV recognizes the likely negative impact that Lynne Stewart's conviction may have, in the short term at least, on the vitality of the Sixth Amendment and questions whether meaningful representation is possible in the age of the SAMs. It then posits several recent examples of tenacious advocacy by lawyers representing terrorists – illustrating that *Stewart* can serve as a guide for where to draw the line between rigorous defense and illegality – and offers some final thoughts regarding the future of the right to defend.

I. *United States v. Stewart*

A. The Case against Lynne Stewart: Radical Lawyering or Supporting Terror?

Lynne Stewart's personal story is one that is, of course, unique to her while also resonating with the stories of many who came of age in the 50s. Born Lynne Feltham and raised in Queens, New York, the child of school teachers, she had a traditional upbringing.¹⁰ She married early, became a mother, and when her husband had a psychological breakdown and was unable to work, she became a librarian – all by age twenty-one.¹¹ Her experiences over the next decade with children at a public elementary school in Harlem politicized her as she became

¹⁰ George Packer, *Left Behind*, N.Y. TIMES (MAGAZINE) Sept. 22, 2002, at § 6, 42 (discussing Lynne Stewart's background, career, and political philosophy).

¹¹ *Id.*

awakened to the vast disparities of wealth and opportunity in the United States and grew determined to affect change.¹² A relationship with, and eventual marriage to, Ralph Poynter, a charismatic black teacher at the school, radicalized Stewart even further.¹³ She left public education at age thirty-one to attend Rutgers School of Law in Newark, and upon graduating in the mid-70s fell quite naturally into criminal defense, representing indigent clients in a variety of cases, from the routine to the notorious.¹⁴ While she was known and respected among the New York defense bar as someone who advocated well for her clients, often achieving hard-fought success, she had no national profile until 1995 when she agreed to take on the representation of Sheik Abdel Rahman, a blind Muslim cleric, at the urging of Ramsey Clark, United States Attorney General under President Lyndon Johnson and, in recent years, an emissary for Arab causes.¹⁵

Stewart's representation of Rahman followed the pattern she seemed to assume with the majority of her clients – she viewed them as “revolutionaries against unjust systems” and closely identified with them.¹⁶ During the period of Rahman's trial for his involvement with the 1993 World Trade Center bombing, Stewart made statements to reporters about her politics and world view that were used against her during her own trial over a decade later.¹⁷ Committed to ending what she perceived as the economic and racial injustices of America's capitalist system, she endorsed “directed violence;” she believed that the United States, engaged in armed conflicts around the globe, should not expect its own violent acts to go unanswered; and she supported

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* Among Stewart's clients were members of the Weather Underground who had been accused in the 1981 Brinks robbery; mob informant Salvatore Gravano (Sammy the Bull); Larry Davis, acquitted in the 1986 shooting of six N.Y.C. police officers; and Richard C. Williams of the Ohio 7, convicted of killing a state trooper and bombing military sites and corporate offices. *Id.* See also *The Woman Behind the Sheik*, *supra* note 6.

¹⁵ Packer, *supra* note 10. See also Fried, *supra* note 6; *The Woman Behind the Sheik*, *supra* note 6.

¹⁶ Fried, *supra* note 6.

¹⁷ See *infra* note 36 and accompanying text.

clients whom she believed had legitimately resisted imperialism.¹⁸ While these views were considered radical when she expressed them in the 90s, as seen through the lens of 9/11, they were judged by many as bordering on the seditious.¹⁹ It is against this backdrop that the federal government's indictment of Lynne Stewart, mere months after 9/11, came as no surprise to those familiar with her history.²⁰

The charges against Stewart emanated from prison visits she had made to Rahman in May 2000 and July 2001, and they centered upon her alleged violation of the SAMs, Bureau of Prison regulations first established in 1996 pursuant to the Attorney General's authority over the management of federal prisons.²¹ The 1996 SAMs allowed for prison authorities to place limits on inmates' communications with the outside world – including correspondence, visits, phone calls, and contact with the media – when found to be “reasonably necessary” to protect against “substantial risk” of death or serious bodily injury.²² After 9/11, a new, more rigorous version of the SAMs was passed without public comment that allowed for monitoring of communications between prisoners and their lawyers with few procedural safeguards or meaningful judicial oversight.²³ Under both versions of the regulation, SAMs have been imposed that have required

¹⁸ Fried, *supra* note 6.

¹⁹ See John Podhoretz, *Lockin' Up Lynne: Justice for an Evil-Doer*, N.Y. POST, Feb. 11, 2005, at 35 (“Having said for years that she believed violence was an appropriate way to express political and cultural anger against an unjust system, Stewart stopped merely advocating evil and became an active participant in causing evil.”); Ben Johnson, *Lynne Stewart's Just Deserts*, Feb. 11, 2005, <http://www.frontpagemag.com/Articles/Printable.asp?ID=17004> (“Her role as a go-between for Rahman gave Stewart a chance to practice the violence she had so long advocated....”).

²⁰ Packer, *supra* note 10.

²¹ See 18 U.S.C. §§ 4001(b), 4042 (2000); 5 U.S.C. § 301 (2000) (granting the heads of executive departments the power to create regulations to assist them in fulfilling their official functions and those of their departments); 28 C.F.R. § 501.3 (2005).

²² See 28 C.F.R. § 501.3 (a) (1996); see also *infra* notes 153-70 and accompanying text (discussing the regulatory history and implementation of the 1996 version of the SAMs).

²³ See 28 C.F.R. §§ 500, 501 (2002); see also *infra* notes 193-210 (discussing the changes made to the SAMs post-9/11 and describing the constitutional and procedural objections to the SAMs monitoring rule).

defense counsel to provide written “affirmation” of their adherence to the measures’ terms before gaining access to their clients.²⁴

Rahman, incarcerated at the Federal Medical Center in Rochester, Minnesota, had SAMs imposed upon him in April 1997 that severely limited his ability to communicate with persons outside the prison.²⁵ He was only allowed contact with his wife and with his attorneys through their translator.²⁶ His mail was screened by federal authorities, and he could have no contact with the news media.²⁷ Prior to the prison visits that are at the center of the case, Stewart was obligated to sign one such “attorney affirmation” in which she agreed to abide by the terms of the SAMs as they applied to Rahman. Stewart also agreed that translators would be used only for the communication of “legal matters” and that her access to Rahman could not be used to “pass messages” between him and third parties.²⁸

The central evidence presented against Stewart during the course of the trial was not in dispute. The testimony demonstrated that Stewart violated the SAMs when she distracted guards and acted as a decoy so that Rahman and his interpreter, Mohammed Yousry, could covertly discuss issues related to IG-governance, strategy, and policy during prison visits.²⁹ The evidence showed that Stewart also provided “cover” for Yousry to read letters and other messages from third parties to Rahman and for Rahman to dictate outgoing letters to Yousry.³⁰ And the testimony confirmed that Stewart conveyed a statement of Rahman’s to a Reuters reporter based

²⁴ See *infra* notes 236-75 (discussing recent cases that have successfully challenged the “attorney affirmation”).

²⁵ See Superseding Indictment, *supra* note 8.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ See Transcript of Stewart and Yousry, Prison Visit with Rahman, at 17 (May 20, 2000), <http://www.lynnestewart.org/5201.pdf> (Stewart stating, “I am making allowances for them looking in at us and seeing me never speaking and writing away here while you talk Arabic.”).

³⁰ See Transcript of Stewart and Yousry, Prison Visit with Rahman, at 49-51 (May 19, 2000), <http://www.lynnestewart.org/5191.pdf> (Stewart stating that she can “get an Academy Award” for her performance while covering for Yousry’s private conversations with Rahman). See also Trial Testimony of Lynne Stewart, at 7764-66 (Oct. 27, 2004), <http://www.lynnestewart.org/transcripts/102704.txt> (testifying to comments made to Yousry during May 19, 2000, prison visit).

in Egypt that included the potentially explosive message (although no violence ultimately ensued) that Rahman was “withdrawing his support” for the cease-fire in Egypt that had been upheld by factions of the IG since 1997.³¹

While there was, of course, disagreement during the trial, it was the dispute over the meaning and significance of the *uncontroverted* material facts that drove the competing narratives of the two sides. While the government insisted that Stewart knowingly violated the SAMs with criminal intent³² – by distracting prison guards from Rahman’s conversations with Yousry and by relaying Rahman’s lack of support for the cease-fire to the Egyptian press – the defense characterized her conduct as falling within the ethical guidelines and boundaries of proper legal advocacy.³³ While the government argued that Stewart intended for her “material support” of Rahman to incite the IG to violence,³⁴ the defense asserted that her intent was only to draw media attention to Rahman’s plight and, thus, to catalyze renewed interest in his case.³⁵ And while the government advanced that Stewart’s avowed support for the use of “directed

³¹ See Trial Testimony of Esmat Salaheddin, at 5573-75 (Sept. 13, 2004), <http://www.lynnestewart.org/transcripts/091304.txt> (testifying that Stewart conveyed Rahman’s statement regarding the cease-fire to a reporter); Testimony of Lynne Stewart at 7810, 1816 (Oct. 27, 2004), <http://www.lynnestewart.org/transcripts/102704.txt> (stating that Salaheddin’s testimony was accurate) and at 8307-09 (Nov. 8, 2004), <http://www.lynnestewart.org/transcripts/110804.txt> (same); Superseding Indictment, *supra* note 8.

³² See Opening Statement of Christopher Morvillo, at 2125-27 (June 22, 2004), <http://cryptome.org/usa-v-ssy-10.htm> (“The evidence will show that by engaging in that calculated conduct Stewart supported a terrorist conspiracy and along the way deliberately lied to and defrauded the United States government.”); Closing Statement of Andrew Dember at 11,112-13, 11,230 (Dec. 29, 2004), <http://www.lynnestewart.org/transcripts/122904.txt> (arguing that Stewart intentionally violated the SAMs); Closing Statement of Andrew Dember at 11,286-300 (Dec. 30, 2004); <http://www.lynnestewart.org/transcripts/12,3004.txt> (same).

³³ See Opening Statement of Michael Tigar at 2170-77 (June 22, 2004), <http://cryptome.org/usa-v-ssy-10.htm> (discussing Lynne Stewart as an advocate); Closing Argument of Michael Tigar at 11,973-78 (Jan. 10, 2005), <http://www.lynnestewart.org/transcripts/011005.txt> (same).

³⁴ See Opening Statement of Christopher Morvillo at 2124-25, 2141-42, 2146 (June 22, 2004), <http://cryptome.org/usa-v-ssy-10.htm> (arguing that Stewart knowingly aided terrorists); Rebuttal of Anthony Barkow at 11,993-94 (Jan. 10, 2005), <http://www.lynnestewart.org/transcripts/011005.txt> (same) and 12,138-257 (Jan. 11, 2005), <http://www.lynnestewart.org/transcripts/011105.txt> (same).

³⁵ See Opening Statement of Michael Tigar at 2170, 2194-95 (June 22, 2004), <http://cryptome.org/usa-v-ssy-10.htm> (stating that Stewart acted ethically as an attorney); Closing Argument of Michael Tigar at 11,821-22 (Jan. 5, 2005), <http://www.lynnestewart.org/transcripts/010505.txt> (same) and 11,902-04 (Jan. 6, 2005), <http://www.lynnestewart.org/transcripts/010605.txt> (same).

violence” by revolutionary groups evinced her personal willingness to help bring about such violence,³⁶ the defense insisted that her comments regarding the justified use of violence were theoretical, made long-ago, and had no relevance to her intentions vis-à-vis the Sheikh.³⁷

This tension and struggle over the meaning and interpretation of agreed-upon statements and descriptions of conduct continued through the seven-month trial to the parties’ closing arguments. Stewart’s counsel, Michael Tigar, gave an eloquent and learned summation on her behalf – one that touched upon everything from the meaning and elasticity of the word “terrorism,” to the historical underpinnings of the defense lawyer’s duty to her client, to an apocryphal conversation between Napoleon and Talleyrand used to illustrate the attribution of motives to those who are, in all likelihood, acting without them.³⁸ Meanwhile, the prosecutors, Andrew Dember who spoke in summation and Anthony Barkow who argued in rebuttal, focused on a rigorous recitation of the evidence and testimony presented at trial, with an unyielding emphasis on the contention that Lynne Stewart patently lied when she agreed to abide by the SAMs, that she believed herself to be above the law, and that her trial testimony was merely another lie made to save her own skin.³⁹ In a case which seemed to pit the post-modern language and abstract theories of the intellectual elite against the hard-nosed, black and white reality of the

³⁶ See Opening Statement of Christopher Morvillo at 2140-44 (June 22, 2004), <http://cryptome.org/usa-v-ssy-10.htm> (“[T]he evidence will show that Lynne Stewart’s message to Abdel Rahman was terrorism carried out in your name is good for your case.”); Rebuttal of Anthony Barkow at 12,140-48 (Jan. 11, 2005), <http://www.lynnestewart.org/transcripts/011105.txt> (“...Lynne Stewart understood that the withdrawal of support for the ceasefire meant pro violence and pro armed resistance.”).

³⁷ See Closing Argument of Michael Tigar at 11,889-91 (Jan. 6, 2005), <http://www.lynnestewart.org/transcripts/010605.txt> (arguing that Stewart’s comments justifying the use of violence were theoretical).

³⁸ See Closing Statement of Michael Tigar at 11,932-34, 11,950 (Jan. 6, 2005), <http://www.lynnestewart.org/transcripts/010605.txt>.

³⁹ See Closing Statement of Andrew Dember at 11,292-94, 11,329 (Dec. 30, 2004), <http://www.lynnestewart.org/transcripts/123004.txt>; Rebuttal of Anthony Barkow at 12,120 (Jan. 10, 2005), <http://www.lynnestewart.org/transcripts/011005.txt>.

foreign terrorist threat, it is not surprising – particularly given the weight of the evidence against her – that amidst the shadows of 9/11, the jury voted to convict Lynne Stewart.⁴⁰

B. The Politicized Reaction to the Conviction

United States v. Stewart was, in fact, the first time that the federal government had prosecuted an attorney in a terrorism case,⁴¹ and the win was a significant one. As Attorney General Alberto Gonzales stated on the day of the verdicts:

Today's verdict is an important step in the Justice Department's war on terrorism. The convictions handed down by a federal jury in New York today send a clear, unmistakable message that this Department will pursue both those who carry out acts of terrorism and those who assist them with their murderous goals.⁴²

The conviction of Stewart also served as a response, of sorts, to the still-vocal critics of the second, amended version of the SAMs – the one passed in 2001, just weeks after 9/11, which allowed for conversations between attorneys and their detained clients to be monitored at the direction of the Attorney General.⁴³ The critics asserted that this “new” version gave too much discretion to the executive branch and lacked an effective mechanism for judicial oversight,⁴⁴ while its supporters contended that the conviction of a defense attorney whose client had used her “to further acts of terrorism” served as proof that the post-9/11 SAMs were both appropriate

⁴⁰ The culture clash was illustrated by one of the prosecutors, Anthony Barkow, in his rebuttal when he stated: I'm not going to stand up here and talk about, with you, Talleyrand, DeValera, Thomas Merton or Derrida, because I'm not able to talk about those people that Mr. Tigar mentioned because I don't even know who some of them are, but I'm okay with that. But what I do know, because I have been here with you every day for the past seven months, is the evidence. The evidence that I can talk about is the evidence.

See Rebuttal of Anthony Barkow at 11,981 (Jan. 10, 2005), <http://www.lynnestewart.org/transcripts/011005.txt>.

⁴¹ *See* Powell & Garcia, *supra* note 5; Rivka Gewirtz Little, *Free Speech and Funding Fears*, THE VILLAGE VOICE, Apr. 30-May 6, 2003, at 28 (naming Stewart as “the first attorney targeted by the U.S. War on terror”).

⁴² Press Release, Department of Justice, Statement of Attorney General Alberto R. Gonzales on the Verdict in the Case of U.S. v. Abdel Sattar, Lynne Stewart and Mohammed Yousry (Feb. 10, 2005), http://www.usdoj.gov/opa/pr/2005/February/05_ag_059.htm.

⁴³ *See* 28 C.F.R. § 501.3 (2005).

⁴⁴ *See, e.g.*, Barry Tarlow, *Warning: Attorney-Client Jailhouse Conversations No Longer Privileged?*, 26 CHAMPION 57 (2002) (arguing that the new SAMs lack sufficient procedural safeguards).

and necessary.⁴⁵ Few on either side acknowledged, however, that the government had been effectively monitoring Rahman’s communications with his lawyers for several years prior to 9/11, albeit under long-existing methods of monitoring, such as Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (“Title III”),⁴⁶ and the Foreign Surveillance Intelligence Act (“FISA”).⁴⁷

In fact, all of the government-monitored conversations between Rahman and Stewart that were used as evidence against her at trial were recorded (legally) through means separate and discrete from the SAMs.⁴⁸

Not surprisingly, given this polarized climate, the immediate public reaction to Stewart’s conviction was as divided and politically-driven as the country itself had become post-9/11. Those on the right asserted that the conviction represented a moment of true justice and a long-

⁴⁵ See, e.g., Andrew C. McCarthy, *Judge Not*, THE NATIONAL REVIEW ONLINE, Feb. 23, 2005, <http://www.nationalreview.com/mccarthy/mccarthy200502230740.asp>. A full discussion of the history of the government’s development and implementation of the SAMs may be found *infra* notes 153-70 and 193-207 and accompanying text.

⁴⁶ 18 U.S.C. §§ 2510-21 (2000). Title III allows for monitoring of attorney-client communications without notice to the targets once the government obtains an ex parte court order from a federal district or circuit court judge allowing for the “interception of wire, oral, or electronic communications.” To secure such order, the government must establish in its application that there is probable cause that the individual is committing, has committed, or is about to commit one of the enumerated offenses; that communications concerning the offense will be obtained through the interception; and that normal investigative procedures have either failed or are not feasible. The judge issuing the order may require reports “showing what progress has been made toward achievement of the authorized objective and the need for continued interception.” *Id.* at § 2518(1), (3), and (6). Title III prohibits the introduction of privileged intercepted communications into evidence. *Id.* at § 2517(4) (“No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter, shall lose its privileged character.”).

⁴⁷ 50 U.S.C. § 1801 (2004). FISA, enacted in 1978, established a Foreign Intelligence Surveillance Court (“FISC”) composed of Article III judges who review applications for interception of communications in which at least one of the targets is a foreign power or an agent of a foreign power. *Id.* A designated national security official must certify in the application that a significant purpose of the surveillance is to obtain foreign intelligence information; and the application must be approved by the Attorney General. *Id.* at §§ 1803-05. Prior to issuing the order, the FISC must find probable cause that these elements have been established. *Id.* at § 1805(a) and (b). As with Title III, FISA protects privileged intercepted communications. *Id.* at § 1806(a).

⁴⁸ Rachel Zabarkes Friedman, *Lawyer of Jihad*, NAT’L REV., Aug. 23, 2004, at 29 (stating that Stewart’s conversations with Rahman were recorded pursuant to FISA, not the SAMs). An additional irony was the government’s announcement, on the day of Lynne Stewart’s indictment in April 2002, that the Department of Justice would – for the first time – use the “new” SAMs to monitor the communications between a prisoner and his lawyers. Who had been chosen? Rahman and the attorneys appointed to replace Stewart. Prepared Remarks, John Ashcroft, Attorney General, Islamic Group Indictment/SAMs, Apr. 9, 2002, <http://www.usdoj.gov/archive/ag/speeches/2002/040902agpreparedremarksislamicgroupindictments.htm>.

awaited rejection of both the radical element and the liberal academy that champions it.⁴⁹ While the left outwardly called the conviction a death knell for the attorney-client privilege and for the future of an independent defense bar,⁵⁰ the private reaction was more nuanced, focused instead on the injustice of what had happened to Stewart. Many expressed, for instance, that the federal prosecution of a woman – and grandmother – who had given her career and livelihood to the defense of the indigent and the despised was a stark abuse of governmental discretion.⁵¹ While Stewart was known for her radical political views as well as her empathic representation of and understanding for her clients – many of whom had been charged with or convicted of crimes of extreme violence – she was also known for her adherence to legal procedure, her collegiality, and her overall respect for the law.⁵² During the course of the trial, many observers felt that the evidence amassed by the prosecution would have been more appropriately handled in another forum – a hearing before the Bar, for instance, that could have resulted in the loss of her license to practice, rather than a felony conviction and potentially lengthy prison sentence.⁵³ Occurring mere months after 9/11, the prosecution of Lynne Stewart was seen as overblown and politically-motivated.⁵⁴ To her supporters, given her well-established leftist political philosophy, her personal and professional loyalty to Sheik Rahman, and the cavalier nature with which she

⁴⁹ Johnson, *supra* note 19; Podhoretz, *supra* note 19.

⁵⁰ Elaine Cassel, *The Lynne Stewart Verdict: Stretching the Definition of “Terrorism” to New Limits*, COUNTERPUNCH, Feb. 14, 2005, <http://www.counterpunch.org/cassel02142005.html>; David Feige, *Radical Sheik: An Elegy for Radical Lawyering*, SLATE, Feb. 14, 2005, <http://slate.msn.com/id/2113446>; Andrew P. Napolitano, *No Defense*, N.Y. TIMES, Feb. 17, 2005, at A29.

⁵¹ See, e.g., Stephen J. Singer, *Defense Attorneys Walk a Thin Line*, NEWSDAY, Apr. 18, 2002, at A43 (expressing surprise and concern of the criminal defense bar over the arrest and indictment of Lynne Stewart).

⁵² Andrew C. McCarthy, *Lynne Stewart and Me*, NATIONAL REVIEW ONLINE, Feb. 15, 2005, <http://www.nationalreview.com/script/printpage.p?ref=/mccarthy/mccarthy200502150746.asp> (discussing Stewart’s radical politics while acknowledging that she was “eminently reasonable and practical” as a litigator).

⁵³ E.g., David Cole, *The Lynne Stewart Trial*, THE NATION, Mar. 7, 2005, at 6 (noting that Stewart faces up to thirty years in prison as a result of the convictions). Her sentencing hearing is currently scheduled for March 10, 2006. The Lynne Stewart Defense Committee, *Justice for Lynne Stewart*, <http://www.lynnestewart.org> (last visited Jan. 31, 2006).

⁵⁴ See, e.g., Deborah L. Rhode, Editorial, *Terrorists and Their Lawyers*, N.Y. TIMES, Apr. 16, 2002, at A27.

thumbed her nose at the SAMs, she was an easy target for the federal government – almost too easy.

When Stewart’s indictment was viewed in conjunction with the perceived increase in the rate of government monitoring pursuant to the SAMs, many among the defense bar did express genuine concern that the Sixth Amendment right to effective assistance of counsel had been placed in peril.⁵⁵ Clients held in custody, aware of the possibility of monitoring, expressed reluctance to communicate candidly with their lawyers. Lawyers, chastened by the *Stewart* case, felt themselves engaging in self-censorship, declining to raise certain topics of conversation with their incarcerated clients – ranging from issues with clear potential for controversy, such as politics and religion, to case-related questions regarding criminal intent and association – for fear that they might lead to uncharted, and potentially dangerous, waters.⁵⁶ Some expressed that this resultant “chill” would inalterably jeopardize the attorney-client relationship, while others predicted that the defense bar would become increasingly less willing to represent alleged terrorists due to the very real potential of being subjected to criminal prosecution.⁵⁷ The prevailing thought had become, “If Lynne Stewart, why not me?”

C. Reverberations beyond United States v. Stewart

Despite the tendency of the media and some in the legal community to view the case in simple black-and-white terms or to consider it an anomaly that has little relevance beyond its time and place, the issues raised by *United States v. Stewart* are neither easy nor straightforward, and the prosecution strategy utilized by the government could have reverberations that are felt for decades to come. It is not a stretch, first of all, to say that Stewart’s actions on behalf of Rahman crossed the line; she clearly violated ethical rules, if not criminal laws, when she

⁵⁵ *See id.*

⁵⁶ Tarlow, *supra* note 44, at 62.

⁵⁷ *See* Napolitano, *supra* note 50.

knowingly signed an agreement to abide by the SAMs, promising not to convey messages from Rahman to the outside world or to allow messages from others to reach him, yet then engaged in acts that shamelessly ran afoul of these regulations. In the post-9/11 world, given the reality of Rahman's criminal history and established ties to terrorism – and given Stewart's stated acceptance of the use of directed violence – it is not surprising that her actions were perceived as threatening to U.S. national security.

What complicates the discussion of the *Stewart* case, however, and what does not portend well for the rights of defendants, is the alacrity with which the government – post-9/11 – amended the SAMs to allow for attorney-inmate monitoring and then aggressively launched a criminal prosecution against a defense lawyer who represented a convicted terrorist.⁵⁸ The use of the material support statute by federal prosecutors in *Stewart* is yet another example of the government casting too wide a net in its preventive efforts post-9/11; this piece of legislation, regularly used in terrorism-related prosecutions since 9/11, is designed to capture an extremely broad ambit of potentially criminal conduct, including that which is only tangentially related to terrorist activity.⁵⁹

The troubling nature of the *Stewart* case – which brought into public consciousness the propriety, if not the necessity, of monitoring attorney-inmate conversations – is brought into starker relief when one considers the full panoply of tools already at the government's disposal *prior to* the implementation of the post-9/11 SAMs. As stated *supra*, the government effectively monitored the conversations between Stewart and Rahman in 2000 and mid-2001 not under the aegis of the SAMs, but pursuant to FISA, which requires that the order to intercept

⁵⁸ See 28 C.F.R. §§ 500, 501 (2002) (indicating that the amended version of the SAMs became effective on October 30, 2001); see Indictment, *supra* note 6 (noting a filing date of Apr. 9, 2002). For a detailed discussion of the contours of the SAMs, see *infra* notes 153-70, 193-207 and accompanying text.

⁵⁹ For a discussion of the material support statute and its use in the prosecution of Lynne Stewart, see *infra* notes 140-52 and accompanying text.

communications be made by an Article III judge after a finding of probable cause.⁶⁰ Similarly, such communications can be readily monitored pursuant to Title III, which also requires that the decision to intercept be made by a judge after a finding of probable cause.⁶¹ In other words, as a practical matter, the SAMs are not a necessary or justifiable tool in the government’s war on terror; they do, however – and without question – make the unfettered monitoring of attorney-inmate communications by the government that much easier to accomplish.⁶²

An additional means by which the government can readily address the conduct of defense lawyers suspected of providing improper “support” to their clients is found in the application of the attorney-client privilege itself. Considered the oldest of privileges for confidential communications, dating back to the reign of Elizabeth I,⁶³ it has also long been recognized to have an exception: the privilege will not hold when communications between lawyer and client are made for the purpose of committing a crime or fraud.⁶⁴ This exception, however, may be invoked only after it has been demonstrated to a court that the client consulted the attorney for the purpose of eliciting advice and/or assistance in perpetrating a crime or fraud; or that, regardless of the client’s initial intent, the client used the lawyer’s counsel or services to commit or assist in the commission of a crime or fraud.⁶⁵ This common law exception to the privilege is

⁶⁰ See *supra* note 47 for a description of the parameters of FISA.

⁶¹ See *supra* note 46 for a general description of Title III.

⁶² See, e.g., Marjorie Cohn, *The Evisceration of the Attorney-Client Privilege In the Wake of September 11, 2001*, 71 *FORDHAM L. REV.* 1233, 1246-48 (2003) (discussing FISA and Title III as viable, and more equitable, alternatives to the monitoring provision in the SAMs).

⁶³ 8 J. WIGMORE, *supra* note 1, at § 2290.

⁶⁴ 8 J. WIGMORE, *supra* note 1, at § 2298; David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 *N.C. L. REV.* 443, 445 (1986) (stating the crime-fraud exception dates back to at least 1743).

⁶⁵ Cohn, *supra* note 62, at 1239 (citing *RESTATEMENT OF THE LAW GOVERNING LAWYERS* 132 (1996)). Not surprisingly, there have been conflicts in the courts in recent years over the specific application and implications of the crime-fraud exception. With a steep increase in reported allegations of crime and fraud, courts have been grappling with such questions as the proper threshold of evidence required before a trial court may undertake review of the evidence; whether privileged communications may be reviewed in camera; and, if a threshold is required, what type of evidence may be used to meet it. See, e.g., Rachel A. Hutzler, Note, *Evidence: The Crime Fraud*

yet another means by which improper – and/or illegal – attorney-inmate communications can be brought to light, further obviating the need for the monitoring provision of the post-9/11 SAMs.⁶⁶

Thus, while it is unlikely that the specific enumerated acts of Lynne Stewart will be repeated by defense attorneys anytime soon, there *is* valid cause for concern raised by the manner and means of the prosecution itself, for the broad acceptance of prosecutions of this nature – by the legal community as well as the general public – could indeed place the attorney-client privilege as well as the Sixth Amendment right to effective assistance of counsel in jeopardy. Likewise, by acknowledging that the SAMs represent an instance of governmental overreaching that threatens to compromise the right to defend, one need not reject the argument that reasonable limits can – and should – be imposed upon communications between defendants and their lawyers, albeit in appropriate circumstances and with meaningful judicial review.

II. Overreaching in the Name of Prevention: 1798 to 9/11

In order to attempt to evaluate the significance of both the SAMs and *Stewart*, it is useful to place these developments in historical context. The strategies employed by the government in the post-9/11 prosecution of Stewart – predicating its case on her violation of a poorly drafted administrative regulation and an overbroad criminal statute – mirror methods utilized by the U.S. government during earlier periods of national anxiety. This section describes a number of such instances in which the government has punished speech and association, detained and deported foreign nationals, and directed anti-terror legislation at immigrants and indigent prisoners – all during times of U.S. turmoil and always in the name of prevention.

Exception to Attorney-Client Privilege – United States v. Zolin, 109 S.Ct. 2619, 15 U. DAYTON L. REV. 365, 373-77 (1989-1990).

⁶⁶ See also *infra* note 208 (noting alternatives to the monitoring provisions of the SAMs).

A. Punishing Speech and Association

Since its inception, the U.S. government has taken preventive steps to control its citizenry during periods of war as well as when profound fear of attack has gripped the country, such as during the Cold War and, of course, in the wake of 9/11.⁶⁷ It has, during these periods, criminalized speech, membership, and association in order to silence dissent and prevent subversive activity. Rather than rely on laws already on the books, it has pushed for new ones, expanding the scope of the types of language, ideas, and alliances that are impermissible. Instead of waiting for individuals and groups to take action, it has focused instead upon predictors and indicators of future dangerousness and has directed its prosecutorial energies on targeting those who make certain kinds of statements and associate with specific types of people.⁶⁸

An illustration of this trend towards the preventive may be seen in the passage of the Sedition Act of 1918,⁶⁹ just after World War I, which made it a crime, punishable by a fine, imprisonment or both, to “utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States.”⁷⁰

⁶⁷ The Cold War of the 1950s permeated the American populace with profound fear of nuclear attack by the Russians. Unlike today’s terrorists who operate without official governmental support or sponsorship and whose nuclear capabilities are uncertain at best, the Soviet bloc of the Cold War era was known to be armed and willing to strike. When one combines the reality of this potentially catastrophic threat with the government’s anxiety over the impact of growing American interest in Socialist and Communist ideology, it is not hard to see the parallels between that age and today. See David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 2-4 (2003).

⁶⁸ *Id.* at 3.

⁶⁹ Sedition Act of 1918, ch. 75, 40 Stat. 553-54, *repealed by* Act of Mar. 3, 1921, ch. 136, 41 Stat. 1359-60 (1921). The Sedition Act was technically an amendment to the Espionage Act of 1917, and a violation of the Act was punishable by a fine not to exceed ten thousand dollars and imprisonment for not more than twenty years, or both.

⁷⁰ *Id.* In line with the language of the Sedition Act of 1918, there was a renewed push for a constitutional amendment to ban flag burning as recently as June 2005. Such an effort is made cyclically, usually when the country is seized by a strong wave of patriotism, and inevitably, the proposal passes in the U.S. House of

The Act also made it a crime to “advocate, teach, defend, or suggest the doing of any of the acts or things” forbidden by the legislation.⁷¹ Thousands of people were prosecuted under the Act, most for crimes related to protesting the war.⁷² In a number of cases decided at the end of the war, including *United States v. Abrams*,⁷³ which was prosecuted under the related Espionage Act of 1917, the Supreme Court held that the legislation was constitutional.⁷⁴

While laws that explicitly criminalize anti-war speech have not been in use since World War I, there have been repeated occasions – during the Cold War of the 1950s, the Vietnam War, and post-9/11 – in which scholars, commentators, and private citizens have seen their employment and livelihood placed in jeopardy after expressing opinions or ideas considered hostile or inflammatory to the security of the United States.⁷⁵ Although most academics recognize that faculty members should not be fired merely for expressing controversial opinions, more than one investigation into the integrity and originality of a professor’s research and academic writing has been launched only after the scholar’s ideas have first become the subject

Representatives but not in the Senate. See, e.g., Editorial, *Flag-Burning Ban Weakens Freedom; U.S. Principles Strong Enough to Withstand Offensive Opinions*, ATLANTA J.-CONST., July 4, 2005, at A10. See also Editorial, *Flag (Burning) Day*, WASH. POST, June 14, 2004, at A16.

⁷¹ Sedition Act of 1918.

⁷² ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 51-60 (1941).

⁷³ *Abrams v. United States*, 250 U.S. 616 (1919).

⁷⁴ See, e.g., *Debs v. United States*, 249 U.S. 211, 215 (1919); *Schenck v. United States*, 249 U.S. 47, 51-52 (1919). When Zechariah Chafee, Jr., a professor at Harvard Law School, challenged these developments in an article in 1920 that focused on the *Abrams* case, he was confronted by a movement of conservative alumni and colleagues to unseat him on the ground that he was unfit to teach, seemingly based on allegations of factual errors in his article, with the recommendation that he be stripped of the privileges and title of law professor. After a rather unorthodox trial by his peers, in which they were assisted by members of the Department of Justice whose conduct in the *Abrams* trial had been faulted in Chafee’s article, the professor was narrowly acquitted. Zechariah Chafee, Jr., *A Contemporary State Trial – The United States Versus Jacob Abrams Et Al.*, 33 HARV. L. REV. 747 (1920); see also Cole, *supra* note 67, at 4 (citing Peter H. Irons, “Fighting Fair”: Zechariah Chafee, Jr., *the Department of Justice, and the “Trial at the Harvard Club,”* 94 HARV. L. REV. 1205 (1981)).

⁷⁵ For a modern-day example, see Kirk Johnson, *Incendiary in Academia May Now Find Himself Burned*, N.Y. TIMES, Feb. 11, 2005, at A13 (discussing Professor Ward L. Churchill of the University of Colorado, roundly criticized by conservative academics and pundits alike, with even Colorado Governor Bill Owens calling for his dismissal, after he wrote an essay on the 9/11 attacks that characterized the “technocrats” working at the World Trade Center as “little [Adolf] Eichmanns”).

of controversy.⁷⁶ While the types of economic harms faced by academics and others for unpopular speech – loss of employment and social status – are of an altogether different nature than the criminal prosecution and imprisonment faced by the criminal defense bar today, the two groups have responded similarly to the increase in scrutiny: by censoring their own words and chilling their own actions.⁷⁷

The pattern in which the public outcry over an individual's words has led to a potential loss of employment – or to the individual's work being examined more rigorously – has continued to the present day.⁷⁸ In fact, the targeting of academics for unpatriotic speech has been an express priority for the Republican faithful,⁷⁹ and while universities and civil rights advocates

⁷⁶ See, e.g., Kirk Johnson, *University Changes Its Focus In Investigation of Professor*, N.Y. TIMES, Mar. 26, 2005, at A9 (discussing the case of Ward L. Churchill).

⁷⁷ See, e.g., *supra* notes 55-57 and accompanying text (describing how defense attorneys began to censor themselves following the indictment of Lynne Stewart); Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 FORDHAM L. REV. 1971, 1989-90 (discussing the refusal of law school clinics to represent controversial cases or clients for fear that it would jeopardize their continued operation). See also James Fishman, *Tenure: Endangered or Evolutionary Species*, 38 AKRON L. REV. 771, 786 (2005) (“[T]he absence of tenure [for clinical law professors] influenced many in their choices of clinical cases and led to the self-censorship of potentially controversial cases.”).

⁷⁸ See, e.g., Tim Padgett & Rochelle Renfor, *Fighting Words: Can a Tenured Professor Be Fired for His Pro-Muslim Views? In a Post-Sept. 11 America, All Bets Are Off*, TIME, Feb. 4, 2002, at 56 (profiling Palestinian activist Sami al-Arian, a professor at the University of South Florida who was terminated after making public statements that he supported the intifadeh after 9/11); David Shaw, *A Skeptical Journalist Isn't an Unpatriotic One*, L.A. TIMES, Apr. 20, 2003, at 16 (discussing increase in numbers of journalists whose patriotism is questioned when they “ask tough questions or challenge official pronouncements or try to show the impact of the war on enemies and noncombatants”). See also Eric Lichtblau, *Setback for U.S. in Terror Trial*, N.Y. TIMES, Dec. 7, 2005, at A1 (discussing the failure of federal prosecutors to secure guilty verdicts against Sami al-Arian and his co-defendants, charged with multiple criminal counts related to support for terrorism, perjury, and immigration violations).

⁷⁹ See, e.g., AM. COUNCIL OF TRUSTEES AND ALUMNI, DEFENDING CIVILIZATION: HOW OUR UNIVERSITIES ARE FAILING AMERICA AND WHAT CAN BE DONE ABOUT IT (rev. 2002), <http://www.goacta.org/publications/Reports/defciv.pdf>. This report, issued by the American Council of Trustees and Alumni [“ACTA”] organization founded by Lynne V. Cheney, names and quotes faculty, staff and students in reaction to the 9/11 attacks and equates campus criticism of the U.S. attacks on Iraq and Afghanistan, as well as feelings of sympathy for the victims, with a failure to “defend civilization” and proof that “our universities are failing America.” See also, e.g., CAMPUS SUPPORT FOR TERRORISM 11 (David Horowitz & Ben Johnson eds., 2004), <http://www.frontpagemag.com/media/pdf/CampusTerrorism.pdf> (arguing that the academic left is a “juggernaut” that has championed Islamist terror).

have generally stood firm in their support of the freedom of expression,⁸⁰ unpopular speech continues to be denounced.⁸¹

The Smith Act of 1948 serves as another significant moment in U.S. history in which the government utilized preventive techniques, expanding criminal liability to prevent politically-unpopular views from being expressed and alliances from being formed. Because few Communist Party members during the 1950s and 60s ever took action in ways that could be prosecuted under traditional criminal statutes – such as storming federal buildings or assaulting elected officials – the government resorted to drafting a law that would throw a net over those who merely avowed such ideas. By criminalizing speech that advocated the overthrow of the government by force or violence, the Smith Act was an effective mechanism for prosecuting members of the Communist Party for conspiring to advocate.⁸²

The Act was also used in conjunction with a number of government-initiated measures to promote the concept of guilt by association. Prosecutions under the Smith Act were

⁸⁰ See, e.g., Joel Beinin, *The New American McCarthyism: Policing Thought about the Middle East*, 49 RACE & CLASS 101, 103-04 (2004) (criticizing the ACTA report for “resuscitating the tactics so infamously deployed during the McCarthy era”); Letter from Robert M. O’Neil, Chair, Special Committee, American Association of University Professors (“AAUP”), to Secretary of State Colin Powell & Secretary of Homeland Security Tom Ridge (Aug. 27, 2004), <http://www.aaup.org/newsroom/press/2004/Ramadanletter.htm> (expressing “deep concern” over the decision by the U.S. State Department, made at the request of the Department of Homeland Security, to revoke the work visa of Professor Tariq Ramadan, a citizen of Switzerland and a Muslim scholar, because he allegedly “endorsed or espoused terrorist activity”); Mary Burgan, Editorial, *Academic Freedom in a World of Moral Crises*, CHRON. HIGHER EDUC., Sept. 6, 2002, at B20 (expressing concern over attempts by state legislatures to dictate curricular decisions, focusing on the North Carolina House of Representatives’ attempt to deny state funds to a reading program at the University of North Carolina at Chapel Hill after a book on the Koran was assigned to freshman and transfer students); Letters of Support for Dr. Al-Arian from Marc J. Defant, Professor, University of South Florida, et al., to Judy Genshaft, President, University of South Florida, <http://www.academicfreespeech.com/id13.html> (last visited Jan. 16, 2006) (expressing support for Sami al-Arian, a former professor at the University of South Florida terminated for his controversial public statements made after 9/11).

⁸¹ See, e.g., Scott Smallwood, *Speaking for the Animals, or the Terrorists?*, CHRON. HIGHER EDUC., Aug. 5, 2005, at A8 (profiling University of Texas philosophy professor Steven Best, a vocal proponent of the animal rights movement alleged to be an instigator of animal- and eco-terrorism, who was stripped of the chairmanship of his department).

⁸² See generally *Dennis v. United States*, 341 U.S. 494 (1951); see also Cole, *supra* note 67, at 6-8 (describing the censorship of subversive speech and the punishment of political association during the Cold War).

complemented by the establishment of loyalty-security programs,⁸³ and, of course, by the investigations and hearings conducted by the House Un-American Activities Committee (“HUAC”),⁸⁴ all of which targeted, labeled, and punished individuals based on their associations alone. The Smith Act’s reach was narrowed in 1957 by *Yates v. United States*,⁸⁵ and the Supreme Court went on to hold in *Brandenburg v. Ohio* that speech was protected so long as it was not intended or likely to result in imminent illegal conduct.⁸⁶ One present-day example of the targeting of speech and association may be found in the government’s aggressive use of the material support statute – also utilized in the *Stewart* case – to prosecute individuals with suspected ties to terrorist organizations, a development arguably derived from the Smith Act’s legal and historical antecedents.⁸⁷

B. Detaining and Deporting Foreign Nationals

In conjunction with expanding criminal liability to prosecute an ever-widening range of speech and associational activity, as discussed *supra*, the U.S. government has also used mass detention and deportation of immigrants to discourage expressions of dissent. An even cursory

⁸³ See Michael E. Parrish, *A Lawyer in Crisis Times: Joseph L. Rauh, Jr., The Loyalty-Security Program, and the Defense of Civil Liberties in the Early Cold War*, 82 N.C. L. REV. 1799, 1801 (2004) (describing the legal challenge – based on the denial of the right to confront one’s accusers – to the federal government’s Cold War loyalty-security program, initiated by Truman via Executive Order and expanded under Eisenhower, in which government employees and contractors were terminated upon a finding of “reasonable grounds” to question their fidelity to the United States).

⁸⁴ See Alan I. Bigel, *The First Amendment and National Security: The Court Responds to Governmental Harassment of Alleged Communist Sympathizers*, 19 OHIO N.U. L. REV. 885, 888-95 (1993) (describing the HUAC hearings and related Supreme Court rulings on whether the First Amendment was violated); see also Erica Bose, Comment, *Three Brave Men: An Examination of Three Attorneys Who Represented the Hollywood Nineteen in the House Un-American Activities Committee Hearings in 1947 and the Consequences They Faced*, 6 UCLA ENT. L. REV. 321, 321-26 (1999) (detailing the HUAC investigation into the Hollywood motion picture industry during the late 1940s).

⁸⁵ 354 U.S. 298, 318 (1957) (overruling convictions for advocacy of the forcible overthrow of the government under the Smith Act, because the trial judge’s instructions had allowed convictions for mere advocacy, unrelated to its likelihood to produce forcible action).

⁸⁶ 395 U.S. 444, 447-49 (1969) (forbidding punishment of speech without proof of specific intent to further a group’s unlawful activities). See also *Scales v. United States*, 367 U.S. 203, 209 (1961) (holding that the Smith Act required proof that an individual’s membership be knowing, active, and purposive as to the organization’s criminal ends).

⁸⁷ Cole, *supra* note 67, at 8-14; see also *infra* notes 140-52 and accompanying text (discussing the material support statute and terrorist prosecutions).

examination of the contours of the post-9/11 SAMs regulations, particularly those provisions that severely restrict the communication rights of federal detainees,⁸⁸ suggests parallels between the invocation of “prevention” to justify these particularly harsh conditions of confinement and the arguments asserted in eras past to justify the mass detention of foreign nationals. Rather than rely on the criminal justice system to handle the prosecution and punishment of illegal activity *after* it occurs, the government has used immigration law to circumvent the protections offered by the courts – including the procedural safeguards of the presumption of innocence and the rights to counsel, to remain silent, and to trial – and has detained and deported entire categories of people who have been determined to present a *potential* danger to national security.⁸⁹

This arguably preventive strategy may be seen as early as 1798 with the passage of the Alien Act,⁹⁰ which called for the mass deportation of non-citizens, and the Alien Enemy Act,⁹¹ which allowed for the summary arrest, detention, or exclusion of citizens of the foreign nation or government with which the United States was at war. The Alien Act, which was adopted as a temporary provision to remain in force for two years, gave the President the discretion to deport persons whom he concluded were “dangerous to the peace and safety” of the United States as well as those whom he had “reasonable grounds to suspect” of treason. Although the Act failed to culminate in any court-ordered deportations, it served to strengthen anti-alien sentiment and resulted in the “voluntary departure” of many non-citizens.⁹² The Alien Enemy Act, which more

⁸⁸ See *infra* notes 198-200 and accompanying text (discussing the expanded reach of the post-9/11 SAMs to include pretrial criminal defendants, immigration detainees, and material witnesses).

⁸⁹ See *infra* notes 90-110 and accompanying text (discussing the ways in which immigration law has been used to preventively detain and deport specific categories of immigrants).

⁹⁰ Alien Act of 1798, ch. 58, 1 Stat. 570 (1798) (repealed 1800).

⁹¹ 50 U.S.C. § 21 (2000). In the absence of a declared war, this Act is also triggered if the foreign country perpetrates, attempts, or threatens an invasion or predatory incursion against the territory of the United States. *Id.*

⁹² Jim Rosenfeld, *Deportation Proceedings and Due Process of Law*, 26 COLUM. HUM. RTS. L. REV. 713, 726 (1995) (chronicling the debate over the meaning of due process with a thorough discussion of the politics of the Adams administration vis-à-vis the Alien Acts).

narrowly applied to citizens of countries with which the United States was at war,⁹³ nonetheless also allowed for detention and deportation without any individualized finding of dangerousness or standard of review.⁹⁴ In fact, this Act is still in force today, having last been invoked during World War II.⁹⁵

The Alien Acts, catalyzed by nationalism and xenophobia during the period of undeclared war with France in the late 1700s,⁹⁶ found their natural descendant in the Palmer Raids of 1920, which were themselves triggered by the “Red Scare” that followed a series of mail-bombings said to be the work of Bolshevik sympathizers of Russian and East European descent.⁹⁷ Thirty-six bombs, which were mailed on May 1, 1919, the international labor holiday known as “May Day,” set off at least nine explosions at the homes of various prominent citizens and government officials, including Attorney General A. Mitchell Palmer, and at a Philadelphia church.⁹⁸ Under pressure to react, government officials mounted a nationwide assault on foreign “radicals” with law enforcement specifically instructed to target non-citizens as well as citizens of Japanese ancestry.⁹⁹ Palmer invoked Justice Department rules to accomplish these ends, allowing for deportation to be triggered by mere membership in certain groups, including the Communist Party, Communist Labor Party, and the Union of Russian Workers, and denying

⁹³ *Id.* at 721.

⁹⁴ 50 U.S.C. § 21. The Alien Enemy Act has consistently been found to be constitutional. *See* United States *ex rel.* Schlueter v. Watkins, 158 F.2d 853, 853 (2d Cir. 1946) (holding Act is constitutional); De Lacey v. United States, 249 F. 625, 626-27 (9th Cir. 1918) (holding Act is constitutional); *Ex parte* Zenzo Arakawa, 79 F. Supp. 468, 470 (E.D. Pa. 1947) (“The Alien Enemy Act is constitutional, both as an exercise of power conferred upon the Federal Government and as a grant of power by the Congress to the President.”).

⁹⁵ *See* J. Gregory Sidak, *War, Liberty and Enemy Aliens*, 67 N.Y.U. L. REV. 1402, 1416-19 (1992) (discussing the administration of the Alien Enemy Act during World War II); *see also infra* notes 105-10 and accompanying text (discussing the application of the Alien Enemy Act during World War II).

⁹⁶ *See* Rosenfeld, *supra* note 92, at 720 (discussing how wartime xenophobia triggered public debate and eventual legislation regarding the treatment of non-citizens).

⁹⁷ Harlan Grant Cohen, Note, *The (Un)Favorable Judgment of History: Deportation Hearings, The Palmer Raids, and the Meaning of History*, 78 N.Y.U. L. REV. 1431, 1436 (2003) (recounting the origins of the “Red Scare” and the subsequent Palmer Raids).

⁹⁸ *Id.* at 1453-54 (providing historical background on the May Day 1919 bombings).

⁹⁹ *Id.* at 1457. *See also* Thomas Alexander Aleinikoff, David A. Martin & Hiroshi Motomura, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 1184-92 (5th ed. 2003).

non-citizens the right to counsel and to inspect the evidence against them.¹⁰⁰ It was with the utilization of these rules that thousands of immigrants were searched, arrested, and detained during this period.¹⁰¹ Despite these aggressive measures, no one connected to the bombings was ever found or prosecuted.

The Palmer Raids seem almost quaint when compared with the treatment of non-citizens – particularly those of Japanese descent – just twenty years later. Within days of the attack on Pearl Harbor on December 7, 1941, federal and state law enforcement – acting under the authority of the Alien Enemy Act of 1798 – had placed nearly 1200 Japanese aliens in custody, as well as smaller numbers of Germans and Italians.¹⁰² Arrested and detained because they had been deemed “dangerous,” most of these individuals had been active members of their communities, known for their leadership skills and talents, not for violating laws or presenting a threat.¹⁰³ They were then held for months, refused the right to challenge their detention, and denied requests for counsel.¹⁰⁴

During this same period, the government conducted massive sweeps of the homes of Japanese immigrants, seizing items of both monetary and sentimental value, again under the authority of the Alien Enemy Act which allowed local federal prosecutors – without judicial review – to summarily issue search warrants for the premises of any enemy alien.¹⁰⁵ By the fall of 1942, the entire Japanese population on the West Coast – totaling almost 120,000, two-thirds of whom were American citizens – had been forcibly removed, first to “assembly” centers and

¹⁰⁰ *Id.* at 1458-61 (describing mass arrests of immigrants based on their political associations). *See also* Cole, *supra* note 67, at 16-18 (detailing the law enforcement tactics used during the Palmer Raids).

¹⁰¹ *See* Cohen, *supra* note 97, at 1460-65.

¹⁰² Eric Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA L. REV. 571, 573-74 (2002).

¹⁰³ *Id.* (pointing out that the “dangerous” aliens arrested were “prominent businessmen, leaders of Japanese cultural and civic organizations, Japanese language teachers, judo instructors, and Buddhist priests”).

¹⁰⁴ *Id.* at 574.

¹⁰⁵ *Id.* at 577 (describing the “house-to-house searches” of Japanese homes that occurred in 1941 and 1942).

then to more permanent “relocation” centers.¹⁰⁶ No distinctions had been drawn between citizens and non-citizens; all persons of Japanese ethnicity were equally suspect in terms of “loyalty” to the United States, and all were questioned in this regard.¹⁰⁷ Although a form of parole was available to Japanese Americans who could pass loyalty tests, the majority remained at these relocation centers until 1945 when the war ended and the camps were closed.¹⁰⁸

With the benefit of time and distance from these events, it is easy to conclude that such acts will never be repeated, and – in all probability – no act of the U.S. government should ever approximate the horror and injustice of the Japanese internment during World War II. Likewise, while the Supreme Court upheld – on the basis of military necessity – the constitutionality of the military’s exclusion order in the infamous *Korematsu v. United States*,¹⁰⁹ it is safe to say that no sitting U.S. court would reaffirm its reasoning. However, despite the implicit acknowledgement of the “mistake” of *Korematsu*, and despite the eventual governmental apology and reparations offered to Japanese Americans held in the camps, it would be ill-advised to presume that history *cannot* repeat itself.¹¹⁰ This is particularly so, given past U.S. history as well as recent politically-driven initiatives – including the post-9/11 SAMs – ostensibly designed to stave off

¹⁰⁶ *Id.* at 575, 578 (recounting the forced removal of the West Coast’s Japanese population during the summer and autumn of 1942).

¹⁰⁷ *Id.* at 575 (describing the blanket targeting of all citizens of Japanese ancestry).

¹⁰⁸ *Id.* at 578 (explaining that most U.S. citizens in relocation camps opted to stay with their alien parents rather than “strike out on their own”).

¹⁰⁹ 323 U.S. 214 (1944) (holding that the Civilian Exclusion Order, mandating the exclusion of all persons of Japanese ancestry from the West Coast of the United States, withstood strict scrutiny and was constitutional because of the perceived threat to national security and the necessities of war).

¹¹⁰ *See, e.g.*, British Prime Minister Tony Blair, Remarks at Prime Minister’s Press Conference (Aug. 5, 2005), <http://www.number-10.gov.uk/output/Page8041.asp> (outlining plans after the July, 2005, London bombings to extend governmental powers to deport or exclude foreigners who advocate terror); Editorial, *Tony Blair’s Antiterrorism Package*, N.Y. TIMES, Aug. 19, 2005, at A18 (expressing concern regarding Blair’s proposed criminalization of acts determined to “condone,” “glorify,” or “justify” terrorism and his expansion of the list of deportable offenses to include the expression of “what the government considers to be extreme views”). *See also* Chief Justice William H. Rehnquist, Remarks at the 100th Anniversary Celebration of the Norfolk and Portsmouth Bar Association (May 3, 2000), http://www.supremecourtus.gov/publicinfo/speeches/sp_05-03-00.html (defending the basis for the *Korematsu* decision).

acts of terrorism but which have had a particularly adverse impact on those at the margins, from immigrants and criminal defendants to those suspected merely of having terrorist “ties.”

C. Directing Anti-Terror Legislation at Immigrants and Indigent Prisoners

The precursors to the regulatory and statutory tools utilized by the government in the prosecution of Lynne Stewart may be found in a series of federal laws passed in 1996. Beginning in 1993 after the bombing of the World Trade Center and with renewed energy following the bombing of the Alfred P. Murrah Federal Building in Oklahoma City two years later, there was a call for broad counterterrorism legislation. President Bill Clinton worked with Congress to enact a bill that would give law enforcement expanded surveillance powers, make it easier to deport non-citizens, and limit most death row prisoners to a single appeal in federal court.¹¹¹ While the various components of the legislation were vigorously debated by politicians on both sides of the aisle, and while everyone from the National Rifle Association to the American Civil Liberties Union weighed in, ultimately a package was passed in April 1996 that would serve as an ominous harbinger of things to come, such as the USA PATRIOT ACT of 2001 and the post-9/11 SAMs.¹¹²

The Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”)¹¹³ restricted death row inmates and other prisoners from obtaining federal review of their convictions by precluding the federal district and appeals courts from considering their habeas corpus

¹¹¹ See Jerry Gray, *Senate Approves Anti-Terror Bill by a 91-to-8 Vote*, N.Y. TIMES, June 8, 1995, at A1 (noting Senate’s passage of the Comprehensive Terrorism Prevention Act of 1995).

¹¹² See *id.* (describing Senate debate surrounding the Comprehensive Terrorism Prevention Act of 1995); See also Martin Kasindorf, *Clinton Signs Weakened Terror Law*, NEWSDAY, Apr. 25, 1996, at A19 (explaining that passage of the new counterterrorism law was delayed because of objections by civil libertarians and conservatives); Linnet Myers, *Anti-Terror Bill Spurs Emotional Debate*, CHI. TRIB., Mar. 8, 1996, at 14 (noting that the anti-terrorism legislation “sparked hot opposition from civil libertarians, both Democrat and Republican...[and] spawned a peculiar coalition of diverse groups, including the National Rifle Association and the American Civil Liberties Union”); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (placing unprecedented limits on civil liberties, eliminating judicial review of many law enforcement activities, and targeting immigrants by greatly expanding the grounds for deportation and criminal prosecution in a manner similar to the 1996 counterterrorism legislation).

¹¹³ Pub. L. No. 104-132, Title IV, 110 Stat. 1214 (1996) (enacting habeas corpus reform).

petitions.¹¹⁴ Specifically, it gave prisoners only one year to file a habeas petition from the time of final judgment in the state courts;¹¹⁵ it narrowed the circumstances under which a habeas petition may be granted as well as the circumstances under which an evidentiary hearing may be held;¹¹⁶ and it limited the number of habeas applications that a prisoner could bring.¹¹⁷ Proponents of the bill contended that the habeas rules needed tightening to curb the proliferation of expensive, protracted appeals and that these delays only furthered the anguish of legitimate victims of heinous crimes.¹¹⁸ Supporters also asserted that the legislation would prevent domestic terrorists, such as Timothy McVeigh and others charged in relation to the Oklahoma City bombing, from using the habeas writ to derail their own executions.¹¹⁹ While these arguments do have credence, the legislation was ultimately devastating for defendants, particularly indigent ones who had received inadequate legal representation in the state courts, as the habeas corpus writ is, by design, the means of last resort whose successful application has led to the exoneration of many on death row.¹²⁰

¹¹⁴ *Id.* at §§ 101-108 (restricting circumstances when habeas relief can be granted, limiting successive habeas applications, and providing a one year limitation on all habeas applications).

¹¹⁵ *Id.* at § 101 (“A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.”).

¹¹⁶ *Id.* at § 104 (stating that habeas corpus relief is only appropriate when either “the applicant has exhausted the remedies available in the courts of the State; or there is an absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant”).

¹¹⁷ *Id.* at § 106 (limiting “second or successive applications”).

¹¹⁸ *See, e.g.*, 142 Cong. Rec. 49, 3471-73 (1996) (statement of Sen. Specter).

¹¹⁹ *See* Thomas Healy, *1996 Law Hindered McVeigh Appeals; Measure Made it Tougher to Prolong Death Penalty Fights*, BALT. SUN, June 9, 2001, at 1A (asserting that McVeigh was a catalyst for the limits on habeas petitions established by the AEDPA and illustrating how the law did, in fact, foreclose further pursuit of his appeals); *see also* Jordan Steiker, *Did the Oklahoma City Bombers Succeed?*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 185, 187 (2001) (arguing that federal habeas reforms “are likely to have a real impact on the effectiveness of the death penalty, if that is measured in terms of the ability of states to carry out executions and to do so in an expeditious fashion”).

¹²⁰ There is much legal scholarship on the negative impact of the AEDPA on criminal defendants, particularly indigent ones on death row. *See, e.g.*, Kara Thompson, *The ABA’s Resolution Calling for a Moratorium on Executions: What Jurisdictions Can Do to Ensure that the Death Penalty is Imposed Responsibly*, 40 ARIZ. L. REV. 1515, 1519 (1998) (chronicling the particularly adverse impact of the AEDPA on indigent criminal defendants, for whom filing deadlines impose a greater hardship).

The AEDPA was also particularly damaging to the rights of immigrants with its wide expansion of the list of enumerated criminal offenses for which a legal resident alien could be removed and the substantial curtailment of traditional judicial review of final removal orders.¹²¹ The law was said to threaten due process and to thwart the judiciary from performing its historic function of reviewing immigration law.¹²² Because parts of the Act applied retroactively, one of the most common practical results was the summary removal of legal residents for minor criminal offenses committed long ago.¹²³ The Act also allowed for the detention of non-citizens convicted of crimes who sought entry, re-entry or a waiver of deportation.¹²⁴ Many questioned the efficacy of the bill and contended that it had little, if any, legitimate impact on the government's preventive agenda: to identify and remove non-citizens involved in terrorist-related activity.¹²⁵

The second piece of legislation that resulted in the dramatic denial of judicial review for the politically-powerless was The Illegal Immigration Reform and Immigrant Responsibility Act

¹²¹ See Pub. L. No. 104-132 at §§ 423, 435, 440, 441 (codifying an expanded list of deportable offenses as well as limiting collateral attack upon and judicial review of resulting deportations and exclusions; these changes amended the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101-1525 (1994)); 8 U.S.C. § 1101(a) (43) (expanding the list of "aggravated felonies" that can trigger deportation to include minor offenses such as fraud, simple theft, and gambling, as per the AEDPA mandate); see also Jennifer A. Beall, Note, *Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996's Answer to Terrorism*, 73 IND. L.J. 693, 707 (1998) (arguing that the AEDPA's removal procedures violate the due process rights of aliens); Ella Dlin, *The Antiterrorism and Effective Death Penalty Act of 1996: An Attempt to Quench Anti-Immigration Sentiments?*, 38 CATH. LAW. 49, 62 (1998) (same); Lisa C. Solbakken, Note, *The Anti-Terrorism and Effective Death Penalty Act: Anti-Immigration Legislation Veiled in an Anti-Terrorism Pretext*, 63 BROOK. L. REV. 1381, 1384 (1997) (detailing how judicial review of final deportation orders, a necessary safeguard of due process, has been substantially curtailed by the AEDPA).

¹²² See Solbakken, *supra* note 121, at 1383.

¹²³ See *id.* at 1399; See also Laura S. Washington, *An Anti-Immigration Law that has Crossed the Line*, CHI. TRIB., Oct. 27, 1997, at 15 (profiling non-citizens facing deportation years after committing minor criminal offenses that had no immigration consequences at the time); Lena Williams, *A Law Aimed at Terrorists Hits Legal Immigrants*, N.Y. TIMES, July 17, 1996, at A1 (same).

¹²⁴ Pub. L. No. 104-132, at §§ 422, 439 (granting state and local authorities as well as immigration officers the power to detain any alien convicted of a felony).

¹²⁵ See, e.g., Kevin R. Johnson, *Challenging the Boundaries of Nationality: September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849, 853 (2003).

(“IIRIRA”).¹²⁶ This Act further restricted the role of the federal courts in reviewing immigration decisions on deportation, political asylum and other matters, while it simultaneously expanded the number of immigrants who could be vulnerable to deportation, resulting in large numbers of summary deportations without adequate judicial review.¹²⁷ For instance, a section of the Act provided for the expedited removal of non-citizens by immigration inspectors,¹²⁸ and another section allowed for the criminal prosecution of non-citizens who re-enter or attempt to re-enter after being removed.¹²⁹ This resulted in cases in which individual inspectors issued removal orders that were unreviewable and unappealable in any forum but could still become the basis for criminal prosecutions – creating a procedure that violated basic due process rights.¹³⁰ The list of crimes that could trigger deportation also continued to grow, while Congress expanded its definitions of “conviction” and “sentence” to encompass nearly every type of criminal offense as well as most categories of dispositions.¹³¹ The result, compounded by shifting agency priorities,

¹²⁶ The IIRIRA, which amended the INA, was passed into law as Division C of the Omnibus Consolidated Appropriations Act of 1997. See Pub. L. No. 104-208, Division C, 110 Stat. 3009-546 (1996) (codified as amended in sections of 8 U.S.C.).

¹²⁷ See generally, Pub. L. No. 104-208, Division C, at §§ 301-388 (containing the Illegal Immigration Reform and Immigration Responsibility Act of 1996). See also Patrick J. McDonnell, *New Law Could End Immigrants’ Amnesty Hopes*, L.A. TIMES, Oct. 9, 1996, at A1 (reporting that the IIRIRA stripped federal courts of jurisdiction over several class action lawsuits brought by immigrants seeking asylum); Melinda Smith, *Criminal Defense Attorneys and Noncitizen Clients: Understanding Immigrants, Basic Immigration Law & How Recent Changes in Those Laws May Affect your Criminal Cases*, 33 AKRON L. REV. 163, 194 (1999) (noting that the IIRIRA expanded the list of deportable criminal offenses while severely limiting judicial review of deportations for those offenses); Jennifer Welch, *Defending Against Deportation: Equipping Public Defenders to Represent Noncitizens Effectively*, 92 CAL. L. REV. 541, 549-51 (2004) (finding that the IIRIRA and the AEDPA significantly expanded the list of deportable crimes).

¹²⁸ Pub. L. No. 104-208, Division C, at § 302 (a).

¹²⁹ Pub. L. No. 104-208, Division C, at §§ 324, 334.

¹³⁰ David M. Grable, Note, *Personhood Under the Due Process Clause: A Constitutional Analysis of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 83 CORNELL L. REV. 820, 822 (1998)(describing the procedure as one that “flies in the face of Supreme Court precedent establishing aliens’ constitutional rights in criminal prosecutions”).

¹³¹ See Welch, *supra* note 127, at 551; see also Pub. L. No. 104-208, Division C, at §§ 321, 322, 350 (defining the terms, “aggravated felony,” “conviction,” and “term of imprisonment”).

was one of the most dramatic escalations in the numbers of non-citizens facing deportation in recent U.S. history.¹³²

The third act in this package was The Prison Litigation Reform Act (“PLRA”).¹³³ Passed in conjunction with the Republican-sponsored legislative package, “The Contract with America,” the PLRA was intended to relieve the ever-expanding federal docket by accomplishing something similar to the stark restrictions imposed on habeas petitions by the AEDPA: the decrease in litigation by prisoners.¹³⁴ Prisoner-initiated lawsuits had for years been viewed by conservatives as frivolous and unduly burdensome to the courts.¹³⁵ Yet, while the numbers confirmed that prisoners’ suits had more than doubled between 1980 and 1995, the reality was that the per capita rate of lawsuits filed had actually decreased during this time period, strongly suggesting that the steep rise in prison litigation resulted not from an explosion of litigious inmates, but from the “epidemic of incarceration” that had seized the nation.¹³⁶ The legislation was also intended to relieve what was perceived to be the “overly intrusive intervention of the federal judiciary in the management of prisons.”¹³⁷ To accomplish its ends, the PLRA limited judicial remedies in cases in which prisoners have prevailed, including placing narrow limits on

¹³² See, e.g., Terry Coonan, *Dolphins Caught in Congressional Fishnets – Immigration Law’s New Aggravated Felons*, 12 GEO. IMMIGR. L.J. 589, 604 (1998).

¹³³ The PLRA was passed into law as Title VIII of the Omnibus Consolidated Rescissions and Appropriations Act of 1996. See Pub. L. No. 104-134, 110 Stat. 1321-66 (1996) (codified as amended in sections of 11, 18, 28, and 42 U.S.C.).

¹³⁴ Adam Slutsky, Note, *Totally Exhausted: Why a Strict Interpretation of 42 U.S.C. 1997e(a) Unduly Burdens Courts and Prisoners*, 73 FORDHAM L. REV. 2289 (2005).

¹³⁵ *Id.* at 2300. In fact, Chief Justice Warren Burger, himself, stated in 1970: “What we need is to supplement [judicial actions] with flexible, sensible working mechanisms adapted to the modern conditions of overcrowded and understaffed prisons . . . a simple and workable procedure by which every person in confinement who has, or thinks he has, a grievance or complaint can be heard promptly, fairly and fully.” *Id.* at 2293 (quoting Chief Justice Warren E. Burger, Speech to the National Association of Attorneys General in Washington, D.C. (Feb. 8, 1970), in Fed. Judicial Ctr., RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN FEDERAL COURTS 29 (1980)).

¹³⁶ Slutsky, *supra* note 134, at 2294-95 (quoting Kermit Roosevelt III, *Exhaustion under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L. J. 1771, 1777 (2003)).

¹³⁷ Ira Bloom, *Prisons, Prisoners, and Pine Forests: Congress Breaches the Wall Separating Legislative from Judicial Power*, 40 ARIZ. L. REV. 389, 407 (1998).

the applicability of consent decrees, and it reduced prisoners' access to the courts through its rules regarding the availability of judicial review.¹³⁸

Despite separation of powers concerns – namely, the inability of courts to remedy violations of prisoners' constitutional rights due to the limits placed on judicial intervention by the PLRA – the Act has largely withstood judicial challenge.¹³⁹

A fourth tool added to the crime-fighting arsenal established by Congress during this period was the material support statute.¹⁴⁰ This new law made it a criminal violation to knowingly provide – or to attempt or conspire to provide – support or resources to a foreign terrorist organization (“FTO”).¹⁴¹ “Material support” was defined broadly as affording any of the following: “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel...and transportation....”¹⁴²

In the first few years after its passage, the statute was infrequently applied and was met by some hostility in the courts,¹⁴³ but after 9/11, federal prosecutors recognized that the statute could expand the reach of criminal liability and began to use it regularly in many of their

¹³⁸ Richard J. Costa, Note, *The Prison Litigation Reform Act of 1995: A Legitimate Attempt to Curtail Frivolous Inmate Lawsuits and End the Alleged Micromanagement of State Prisons or a Violation of Separation of Powers?* 63 BROOK. L. REV. 319, 348 (1997).

¹³⁹ See *id.* (providing a detailed analysis of the constitutionality of the Prison Litigation Reform Act of 1995).

¹⁴⁰ 18 U.S.C. § 2339B (2005) (entitled the “Providing material support or resources to designated foreign terrorist organizations” statute).

¹⁴¹ 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (2005) (defining “engage in a terrorist activity” to include providing “material support”); 18 U.S.C. § 2339B (2005) (stating that the provision of “material support or resources to a foreign terrorist organization . . . shall be fined under this title or imprisoned not more than 10 years, or both”).

¹⁴² See 18 U.S.C. § 2339A (b)(1) (2005).

¹⁴³ See, e.g., *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001) (finding that while the statute does not impermissibly impose guilt by association, two of the components included within the definition of material support – “training” and “personnel” – are impermissibly vague and, therefore, prosecution of activities covered by these terms may not proceed).

terrorism-related prosecutions.¹⁴⁴ Individuals were subsequently charged with material support of FTOs when there was evidence that they had advocated for, given money to, disseminated the message of, trained with, or instructed such groups. While some legal scholars have characterized the statute as impermissibly enabling the government to rely on guilt by association,¹⁴⁵ others have based its legitimacy on the government's preventative need to "disrupt the organizational basis for transnational violence."¹⁴⁶ When asked where the line fell between constitutionally protected activity and material support of terrorism, a prosecutor in the *Stewart* case responded archly, "You know it when you see it."¹⁴⁷

D. Prosecuting Lynne Stewart for Material Support

The material support statute was, as mentioned *supra*, used in the prosecution of Stewart. The initial indictment charged her with conspiring to provide material support and resources to an FTO and with providing and attempting to provide such support and resources.¹⁴⁸ When Stewart and her co-defendants moved to dismiss these counts on the grounds that they were unconstitutionally vague, specifically with regard to the prohibitions on "providing" material support in the form of "communications equipment" and "personnel," the court concurred, itself questioning whether the simple act of making a phone call or communicating one's thoughts would fall within the ambit of "providing communications equipment" or whether someone who merely advocates the cause of an FTO would be seen as supplying it with personnel.¹⁴⁹ Thus, the court allowed the motion on these grounds, rejecting the government's "evolving" definitions

¹⁴⁴ See, e.g., Adam Liptak, *Defending Those Who Defend Terrorists*, N.Y. TIMES, July 27, 2003, §4 at 4 (noting that the material support statute has been used in virtually every criminal case concerning terrorism filed since 9/11, including that of John Walker Lindh, the "American Taliban," and members of "sleeper cells" in Detroit, Seattle, Portland, Oregon and Lackawanna, N.Y.).

¹⁴⁵ See, e.g., David Cole, Op-Ed, *Fight Terrorism Fairly*, N.Y. TIMES, Oct. 19, 2002, at A17.

¹⁴⁶ Liptak, *supra* note 144 (quoting Peter Margulies, law professor at Roger Williams University).

¹⁴⁷ *Id.*

¹⁴⁸ See Indictment, *supra* note 6.

¹⁴⁹ *United States v. Sattar*, 272 F.Supp. 2d 348, 358-59 (S.D.N.Y. 2003) (relying, in part, on *Humanitarian Law Project v. Reno*).

of “communications” and “personnel,” and dismissed the material support charges against Stewart; it concluded that the statute failed to provide fair notice of the specific types of behavior that would constitute such violations.¹⁵⁰

While the dismissal of these charges was considered an unmitigated victory for the Stewart team, preventing the government from relying upon the broad language of the statute to capture arguably innocent activity, the defense was soon confronted with a resultant shift in prosecution strategy: re-indictment.¹⁵¹ By November 2003, Stewart was charged under a different but related statute, one that also targeted material support but required proof that Stewart had “specifically intended” to aid a terrorist organization in its preparation for or execution of criminal acts, thereby answering the court’s concerns regarding vagueness and fair notice claims.¹⁵² While the government now had willingly assumed the burden of a higher standard of proof, the development also opened the door for the introduction of evidence that Rahman was part of a militant terrorist group, that Stewart knew it, and that she acted knowingly and intentionally to “provide” Rahman as “personnel” to the IG, thereby helping the FTO attain its violent ends. In this way, the new indictment allowed for the introduction of potentially inflammatory evidence against Stewart, from Rahman’s past edicts calling for violence to Americans to his personal and political dealings with Osama bin Laden. This shift altered the tone and tenor of the case, which was tried just blocks from the site of the World Trade Center, as it enabled the prosecution to invoke the horrors of 9/11 even though the relevant evidence predated that traumatic event.

¹⁵⁰ *Id.* at 356-61.

¹⁵¹ See, e.g., Michael Powell & Christine Haughney, *Major Terror Charges Dropped for Lawyer*, WASH. POST, July 23, 2003, at A09; Mark Hamblett, *Judge Narrows Charges Against Lynne Stewart; Two Counts of Supporting Terror Group Dismissed*, N.Y. L.J., July 23, 2003, at 1.

¹⁵² See Superseding Indictment, *supra* note 8; 18 U.S.C. § 2339A (2005).

Thus, the prosecution of Lynne Stewart is but the latest example of the federal government's use of both criminal law, in the form of the material support statute, and its regulatory powers, in the form of the SAMs, to achieve arguably preventive ends. This two-pronged strategy has long proven effective for the government, whether the goal has been the punishment of dissent and guilt by association, the mass detention and deportation of immigrants and others deemed to be national security threats, or the aggressive prosecution and severe isolation of suspected terrorists.

III. The SAMs

A full understanding of the significance of the *Stewart* case requires a detailed analysis of the SAMs and the litigation that has challenged its provisions. While many of the court's rulings in *United States v. Stewart* were informed and influenced by prior legal challenges to the SAMs, it is also clear that beginning with the 2002 indictment, the *Stewart* case has helped shape the attitude of courts towards issues raised by the SAMs – from restricting prisoners' communications to monitoring attorney-client conversations to requiring that lawyers “affirm” their allegiance to its provisions.

A. *The First SAMs: Setting the Stage*

The SAMs regulation, entitled “Prevention of acts of violence and terrorism,” was first proposed by the Office of General Counsel for the Bureau of Prisons in 1996, amidst the same wave that produced the counterterrorism legislation discussed *supra*.¹⁵³ Just as it was applied against Rahman, the regulation allowed for limits to be placed on prisoners' communications with the outside world when the Attorney General deemed such measures to be “reasonably

¹⁵³ Prevention of Acts of Violence and Terrorism, 61 Fed. Reg. 25120 (May 17, 1996) (codified at 28 C.F.R. pt. 501).

necessary” to protect against a “substantial risk” of death or serious bodily injury.¹⁵⁴ Restrictions could be imposed upon the inmate’s correspondence, visits, phone calls and contact with the media.¹⁵⁵ The inmate must be given written notice “as soon as practicable” of the restrictions imposed and be told the “basis” for the restrictions, although this requirement could be limited to protect prison security or to prevent acts of violence.¹⁵⁶ Any of the limitations could be imposed for up to 120 days, with extensions of another 120 days, so long as the “circumstances identified in the original notification”¹⁵⁷ continued to exist. And, the inmate could seek review of the measures through the Administrative Remedy Program.¹⁵⁸

¹⁵⁴ See 28 C.F.R. § 501.3 (a) (1996)

[U]pon direction of the Attorney General, the Director, Bureau of Prisons, may authorize the Warden to implement special administrative procedures that are reasonably necessary to protect persons against the risk of death or serious bodily injury. These procedures may 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. These special administrative measures ordinarily may include housing the inmate in administrative detention and/or limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to protect persons against the risk of acts of violence or terrorism. The authority of the Director under this paragraph may not be delegated below the level of Acting Director.

¹⁵⁵ *Id.*

¹⁵⁶ See 28 C.F.R. § 501.3 (b) (1996)

[D]esignated staff shall provide to the affected inmate, as soon as practicable, written notification of the restrictions imposed and the basis for these restrictions. The notice’s statement as to the basis may be limited in the interest of prison security or safety or to protect against acts of violence or terrorism. The inmate shall sign for and receive a copy of the notification.

¹⁵⁷ See 28 C.F.R. § 501.3 (c) (1996)

[I]nitial placement of an inmate in administrative detention and/or any limitation of the inmate’s privileges in accordance with paragraph (a) of this section may be imposed for up to 120 days. Special restrictions imposed in accordance with paragraph (a) of this section may be extended thereafter by the Director, Bureau of Prisons, in 120-day increments upon receipt by the Director of additional written notification from the Attorney General, or, at the Attorney General’s direction, from the head of a federal law enforcement agency, or the head of a member agency of the United States intelligence community, that the circumstances identified in the original notification continue to exist. The authority of the Director under this paragraph may not be delegated below the level of Acting Director.

¹⁵⁸ See 28 C.F.R. § 501.3 (d) (1996) (stating that the “affected inmate may seek review of any special restrictions imposed in accordance with paragraph (a) of this section through the Administrative Remedy Program, 28 C.F.R. part 542.”).

The interim regulations were adopted with sixty days for submission of public comment.¹⁵⁹ The published comments, submitted between May and July 1996, raised many of the same questions about the constitutionality of the SAMs that have been heard from critics in the decade since their implementation.¹⁶⁰

Concerns focused on the First Amendment rights to freedom of speech and the press – specifically, that the regulation was “overbroad,” that it indiscriminately barred speech that did not pose a threat to Federal officials or to those outside of the prison setting, and that there were not sufficient “checks and balances” to insure that the executive branch was using its discretion appropriately.¹⁶¹ Others questioned whether the regulation would be misused and misapplied – to deny the media access to prisoners for illegitimate reasons, to prevent prisoners from making public complaints about prison conditions or treatment, and to suppress speech based on its content alone.¹⁶² There were also concerns expressed regarding prisoners’ due process rights, based on the lack of any judicial oversight or appeals procedure established by the regulation.¹⁶³

The Bureau of Prisons’ response to the public comment, as published in the Federal Register, was brief, summarily rejecting the concerns expressed and concluding that no substantive changes needed to be made to ensure that the measures passed constitutional muster.¹⁶⁴ Relying on the 1974 U.S. Supreme Court case of *Pell v. Procunier*,¹⁶⁵ the Bureau stated that the SAMs regulations served “the legitimate penological objectives of the corrections system,” namely the deterrence of crime and the maintenance of internal prison security, while

¹⁵⁹ 28 C.F.R. § 501 (1996).

¹⁶⁰ National Security: Prevention of Acts of Violence and Terrorism, 62 Fed. Reg. 33,730 (June 20, 1997) (codified at 28 C.F.R. pt. 501). Recent expressions of concern regarding the constitutionality of the SAMs may be found *infra* at notes 208-10 and accompanying text.

¹⁶¹ 62 Fed. Reg. 33,730 (June 20, 1997).

¹⁶² *Id.* at 33,731.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 33,730.

¹⁶⁵ 417 U.S. 817 (1974) (holding that denying inmates access to the media does not violate the First Amendment, as the Cal. Dept. of Corrections regulation at issue is “reasonably related to legitimate security concerns”).

not unduly limiting prisoners' freedom of expression nor the media's access to inmates.¹⁶⁶ The Bureau asserted, without citation, that the evidentiary standard that must be met before the SAMs are imposed – that of “substantial risk” – was consistent with the “clear and convincing” standard proposed in one comment.¹⁶⁷ It also claimed, in response to a comment that the rule should be revised to “prohibit the unilateral involvement of federal law enforcement and intelligence agencies in access decisions,” that there were appropriate “constraints” built into the rule – its implementation required the Attorney General's approval, re-approval was required every 120 days, and inmates had the right to administrative appeal¹⁶⁸ – and that the measures would affect only a “minute portion” of the prison population.¹⁶⁹

Thus, the SAMs regulation was introduced and implemented with little fanfare and without much notice in the press or in legal academic circles.¹⁷⁰ By all accounts, it was – as its commentary predicted – imposed infrequently, mainly upon felons convicted for crimes that involved the use of communications or correspondence to facilitate violent criminal activity. While civil libertarians expressed concern over the First Amendment implications of the regulation in regard to the relationship between prisoners and the media, there was little thought that the SAMs could be used or amended in such a way as to threaten the constitutional rights of a wide spectrum of people held in federal custody – which is precisely what was done as both court decisions and regulatory amendments extended the SAMs' reach from convicted inmates to

¹⁶⁶ 62 Fed. Reg. 33,730 (quoting 417 U.S. 822); *see also* *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (standing for the same proposition as *Pell v. Procunier*, namely that reporters have no constitutional right of access to prisons or their inmates beyond that afforded the general public).

¹⁶⁷ *Id.* at 33,730-31 (“At a minimum the standards for restrictive inmate privileges such as those described in the regulation should be that there is clear and convincing evidence of a substantial risk to death or serious bodily injury.”).

¹⁶⁸ *Id.* at 33,731.

¹⁶⁹ *Id.* at 33,730.

¹⁷⁰ A Lexis “news” search for “28 CFR Part 501” located only one newspaper or magazine article written about the 1996 version of the SAMs between 1996 and 2001: *Bureau Issues Rule on Preventing Terrorism, Violence*, CORRECTIONS PROF., June 24, 1996, Vol. 1, No. 19. No works were found in a search for law journal articles from the same period using “28 CFR Part 501” as the search term.

pre-trial and immigration detainees to material witnesses and then, with the monitoring provision and the “attorney affirmation” requirement, to the lawyers representing these prisoners. This method of “bootstrapping” enabled the government, with the judiciary’s acquiescence, to take what was a reasonable, well-drafted regulation, one that carefully balanced the objectives of the corrections system with the rights of prisoners, and to create an overbroad, aggressive regulation that threatens the integrity of the Sixth Amendment.

B. *Cases that Tested the Waters – and Failed*

One of the first cases to challenge the legitimacy of the 1996 version of the SAMs was that of *United States v. Felipe*.¹⁷¹ When Luis Felipe was sentenced to life imprisonment for ordering a series of murders from his jail cell, the court also imposed “special conditions” upon him, which included placing him in solitary confinement and prohibiting contact with anyone except his attorney and close family members.¹⁷² Felipe’s visits and correspondence with everyone but his attorney were monitored, and he was allowed telephone calls only with his lawyer.¹⁷³ These conditions were imposed not at the behest of the Attorney General through the SAMs regulation, but by the judge through the authority of 18 U.S.C. 3582(d), “which allows district courts to limit the associational rights of defendants convicted of racketeering offenses.”¹⁷⁴

¹⁷¹ 148 F.3d 101 (2d Cir. 1998).

¹⁷² *Id.* at 107.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 109. 18 U.S.C. § 3582(d) (1994) states:

[T]he court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in chapter 95 (racketeering) or 96 (racketeer influenced and corrupt organizations) of this title . . . may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

Felipe, the leader of the New York chapter of the Latin Kings,¹⁷⁵ appealed the denial of his request to expand his right to communicate from prison on several grounds, and the Second Circuit rejected each one in turn. Felipe argued that the district court lacked the authority to impose such “stringent” conditions. He asserted that the district court’s order must identify specific persons with whom he could not communicate, rather than forbidding contact with “everyone but....” He also contended that the “special conditions” violated his First Amendment right to communicate.¹⁷⁶ The court responded by stating that, in general, the Attorney General through the Bureau of Prisons may determine a prisoner’s conditions of confinement, and that when there is statutory authority, a sentencing court may impose such conditions. It held that it would be “difficult, if not virtually impossible,” to identify each individual who might be a member of Felipe’s racketeering organization.¹⁷⁷ It also found that there was no constitutional violation, as the restrictions on Felipe’s ability to communicate were “reasonably related” to the legitimate penological interest of protecting prison security, and that the SAMs allow for limits on prisoners’ communications when they are “reasonably necessary” to protect against the risk of violence.¹⁷⁸

¹⁷⁵ See *id.* at 105 (providing two descriptions of the Latin Kings: the defendant describes them as an organization “designed to ‘promote a sense of Hispanic identity among prison inmates’ and to organize Caribbean Hispanics serving jail sentences,” while the government characterizes the group as a “racketeering enterprise whose members and associates engage in acts of violence, armed robbery, narcotics trafficking, and murder”).

¹⁷⁶ *Id.* at 109-10.

¹⁷⁷ *United States v. Felipe*, 148 F.3d 101, 110 (2d Cir. 1998).

¹⁷⁸ *Id.* (relying on *Turner v. Safley*, 482 U.S. 78 (1987), which establishes a widely-followed four-part analysis to determine whether restrictions upon prisoners are constitutional, to conclude that the restrictions placed upon Felipe do pass the test – namely, that the goal of preventing Felipe from ordering beatings and killings is a legitimate one; that Felipe still maintains his right to communicate, albeit in a limited fashion – with prison employees, his attorney, and several others; that expanding his ability to communicate could place others in danger of violence; and that there are no readily available alternatives to protect the public); see also *id.* at 104-05 (revealing some of the emotion underlying the dry legalese of the opinion when stating, “The principal issue is the severe restrictions on Felipe’s First Amendment rights to communicate. The restrictions imposed are extreme, but so are the circumstances that brought them about. The prisoner whose conviction we review is a cold-blooded murderer whose depraved and vicious predilections were not restrained by the fact of his imprisonment. In the present absence of a reason to impose restrictions less severe, there are only few choices available to the sentencing court, and they are poor ones at best. Yet, because we think that the district court took the best of these choices, we affirm.”).

Relying on *Felipe*'s holding that prisoners' communications may be restricted to prevent violence and serving as precedent for future litigation challenging the constitutionality of the SAMs was another Second Circuit case – that of *United States v. El-Hage*.¹⁷⁹ Wadih El-Hage, a U.S. citizen born in Lebanon and living in Texas with his wife and children, was indicted in 1998 for, among other things, conspiracy to kill American citizens in connection with the al Qaeda bombings of the U.S. embassies in Kenya and Tanzania.¹⁸⁰ The government alleged at his bail hearings that El-Hage had played a significant role in al Qaeda's operations from at least 1992 until his arrest in 1998; they also alleged that he had conveyed military orders from Bin Laden, played a role in providing documents and weapons to al Qaeda members, and been a frequent traveler who had lived in Afghanistan, Pakistan, Sudan and Kenya.¹⁸¹ While still a pretrial detainee, El-Hage appealed the conditions of his confinement – imposed through the SAMs – that limited his contacts to his cellmate, attorneys, and immediate family members.¹⁸² El-Hage asserted that such conditions restricted his ability to prepare his own defense and therefore violated his due process rights.¹⁸³ In response, the court held that the regulations imposed did not burden “fundamental rights” because they were “reasonably related” to the “nonpunitive object of protecting national security interests.”¹⁸⁴ The *El-Hage* court relied heavily on its holding in *Felipe* – both in its legal reasoning as well as in its analysis of the appropriateness of the restrictions themselves – and concluded that the conditions of El-Hage's confinement, which

¹⁷⁹ 213 F.3d 74 (2d Cir. 2000).

¹⁸⁰ *Id.* at 77.

¹⁸¹ *Id.* at 78.

¹⁸² *Id.*

¹⁸³ *Id.* at 81.

¹⁸⁴ *Id.* (relying on *Turner v. Safley* and *United States v. Felipe* to hold that the SAMs as applied to El-Hage passed the four-factor *Turner* test).

were considered by the court to be significantly “less onerous” than those imposed upon Felipe, were reasonably related to the government’s asserted security concerns.¹⁸⁵

Yet, the Second Circuit’s reliance on the *Felipe* decision in *El-Hage* was misplaced – and perhaps disingenuous – as there are significant differences between the two cases in terms of both posture and substance. Luis Felipe was a convicted felon when the restrictions upon his ability to communicate with the outside world were imposed. He had been found guilty of participating in racketeering activities while incarcerated, having ordered the murders of at least six individuals from his jail cell, and the evidence against him included his own letters and correspondence which explicitly revealed his skill at using secret codes and other strategies to circumvent prison regulations and thereby disseminate his “message.”¹⁸⁶

In addition, the conditions were imposed upon Felipe through court order, as part of his sentence, premised upon a showing of probable cause that the association or communication was *for the purpose of* enabling the defendant to participate in an illegal enterprise.¹⁸⁷ In Felipe’s case, this threshold showing was not hard to achieve – it had already been proven beyond a reasonable doubt at trial that he had used his communications from prison to bring about extreme violence – three of the six murders he had ordered from jail were carried out, with at least one bystander killed and others injured or maimed.¹⁸⁸

In contrast, the limits placed upon the associational rights of Wadiah El-Hage, a pretrial detainee, were done so by means of an executive branch regulation imposed at the discretion of the Attorney General, with no judicial oversight prior to its implementation and with only

¹⁸⁵ United States v. El-Hage, 213 F.3d 74, 81-82 (2d Cir. 2000).

¹⁸⁶ *Felipe*, 148 F.3d at 106, 109.

¹⁸⁷ *Id.* at 109.

¹⁸⁸ *Id.* at 106.

administrative review available.¹⁸⁹ In other words, not only had El-Hage not been convicted of anything at the time of the imposition of the SAMs, but the government’s evidence supporting its assertion that such strict associational limits were necessary was mere conjecture – evidence alleged but not evaluated by an independent fact-finder.¹⁹⁰ Furthermore, while the court could show that Felipe did it before and would (likely) do it again, there was no proof – by any standard – that El-Hage’s associational desires while in prison were *for the purpose of* facilitating terrorist acts. Yet, the Second Circuit skated over these procedural and substantive differences between the cases and relied, instead, on the arguable point that the restrictions placed upon El-Hage were acceptable because they were less severe than those imposed upon Felipe and also because of the asserted need to protect “national security interests,” given El-Hage’s “extensive terrorist connections.”¹⁹¹

Thus, the Second Circuit cases of *Felipe* and *El-Hage* clearly illustrated that when brought under judicial scrutiny, the SAMs were likely to be upheld by the courts. They confirmed that when defendants were convicted of – or even merely charged with – crimes of violence or terrorist activity, judges were reluctant to undermine government measures deemed to be necessary for the protection of the public and the stability of prison security. These cases did not augur well for future court challenges to the SAMs, and they set the stage for the further expansion of the regulation by the executive branch.

¹⁸⁹ *El-Hage*, 213 F.3d at 81. See also 28 C.F.R. § 501.3 (1996). As for the meaning and significance of the “administrative review” offered by the SAMs, one year after the decision in *El-Hage*, the Tenth Circuit decided *Yousef v. Reno*, 254 F.3d 1214 (2001). Ramzi Yousef, convicted for his participation in the 1993 World Trade Center bombing, brought a constitutional challenge to the SAMs that had been imposed upon him post-conviction. The court was able to avoid the constitutional question by holding that Yousef had failed to exhaust his administrative remedies, specifically those offered by the Administrative Remedy Program (“ARP”), as referenced in 28 C.F.R. § 501.3(d) (1996). To Yousef’s quite practical claim that such a “remedy” was meaningless, given the Bureau of Prisons’ inability to review a constitutional challenge to the “legality and fairness” of the SAMs, the court demurred, asserting that the ARP could address “fairness grievances” that did not implicate the “general invalidity” of the SAMs. Thus, Yousef’s legitimate challenge to the limitations placed on his rights under the Eighth, Sixth, and First Amendments was rejected on a point of procedure. See *Yousef*, 254 F.3d at 1220-22.

¹⁹⁰ *El-Hage*, 213 F.3d at 81.

¹⁹¹ *Id.* at 81-82.

C. *The Post-9/11 SAMs*

In the days immediately following 9/11, with the established holdings of such cases as those discussed *supra* informing the climate, Congress began drafting comprehensive antiterrorism legislation that would become the USA PATRIOT ACT.¹⁹² In conjunction with this package, on October 30, 2001, Attorney General Ashcroft implemented a new version of the SAMs, one that allowed for more rigorous monitoring of prisoners' communications, including conversations between prisoners and their lawyers.¹⁹³ These more aggressive, more pointed and muscular regulations seemed the logical result of a period that began eight years earlier with the bombing of the World Trade Center in 1993 and culminated with the most devastating terrorist act on domestic soil in U.S. history. The numbing effect of 9/11 and the shock felt by the populace in its aftermath created room for the passage of such legislation as the Patriot Act and the amended SAMs.

There were three central changes made to the SAMs regulation post-9/11. The first extended the period of time that SAMs could be imposed upon a prisoner before review and made the standard used for granting such an extension more elastic. Specifically, the length of time for which SAMs could be imposed was increased from 120 days to one year, with authority given to the Attorney General to impose additional one year periods.¹⁹⁴ In the 1996 SAMs, extensions were allowed upon a determination that “the circumstances identified in the original notification continue[d] to exist.”¹⁹⁵ This was perceived as a hindrance to law enforcement, as it limited extensions to a reevaluation of the original grounds for implementing the SAMs, even though it was commonly understood that prisoners could remain “an integral part of an ongoing

¹⁹² Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

¹⁹³ 28 C.F.R. §§ 500, 501 (2002).

¹⁹⁴ *Id.*

¹⁹⁵ 28 C.F.R. § 501.3(c) (1996).

conspiracy” with changed roles or during periods of dormancy. Thus, the new SAMs allowed for extensions whenever it was determined that they were “reasonably necessary” due to the “substantial risk” that the prisoner’s communications could result in death or serious injury.¹⁹⁶ It was also established that reviews would not be conducted *de novo* but would require a determination merely that there was a “continuing need” for the SAMs “in light of the circumstances.”¹⁹⁷

The second change expanded the reach of the regulation. A new section was added that extended the applicability of the regulation from convicted felons (“inmates in the custody of the Bureau of Prisons”) to anyone in custody under the aegis of the Department of Justice – from pretrial detainees held by the United States Marshals Service to immigration detainees held by the Department of Homeland Security (“DHS”).¹⁹⁸ Also, by broadening the definition of “inmate,” the regulation now covered persons held not just as felons or detainees but as material witnesses.¹⁹⁹ This aspect of the regulation, one which has received scant attention from the

¹⁹⁶ 28 C.F.R. § 501.3(c) (2002).

¹⁹⁷ *Id.* Section 501.3 (c) (2002)

[I]nitial placement of an inmate in administrative detention and/or any limitation of the inmate’s privileges in accordance with paragraph (a) of this section may be imposed for up to 120 days or, with the approval of the Attorney General, a longer period of time not to exceed one year. Special restrictions imposed in accordance with paragraph (a) of this section may be extended thereafter by the Director, Bureau of Prisons, in increments not to exceed one year, upon receipt by the Director of an additional written notification from the Attorney General, or, at the Attorney General’s direction, from the head of a federal law enforcement agency or the head of a member agency of the United States intelligence community, that there continues to be a substantial risk that the inmate’s communications or contacts with other persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons. The authority of the Director under this paragraph may not be delegated below the level of Acting Director.

Compare 28 C.F.R. § 500, 501 (2002) at “Supplementary Information: Changes to 501.3 With Respect to Prevention of Acts of Violence and Terrorism.” *with* 28 C.F.R. § 501.3(c) (1996) at *supra* note 157.

¹⁹⁸ 28 C.F.R. § 501.3 (f) (2002) (“(f) Other appropriate officials of the Department of Justice having custody of persons for whom special administrative measures are required may exercise the same authorities under this section as the Director of the Bureau of Prisons and the Warden.”); 28 C.F.R. § 500.1(c) (2002) (“*Inmate* means all persons in the custody of the Federal Bureau of Prisons or Bureau contract facilities, including persons charged with or convicted of offenses against the United States; D.C. Code felony offenders; and persons held as witnesses, detainees, or otherwise.”).

¹⁹⁹ *Id.*

media and, thus, little acknowledgement by bureaucrats or politicians, has had devastating effects on the same population that was targeted by the anti-terror legislation of 1996: criminal defendants, immigrants, and others suspected by the government of “some involvement with or knowledge of” suspected terrorist activities.²⁰⁰

The third, and perhaps most profound, change to the SAMs enabled the government to monitor communications – whether by mail, telephone, or in person – between attorneys and prisoners. The regulation provided that when there was “reasonable suspicion” to believe that an inmate would use such communications to “further or facilitate” acts of terrorism, monitoring could be conducted at the direction of the Attorney General.²⁰¹ Written notice must be provided

²⁰⁰ See, e.g., Tom Brune, *The War on Terror: Rule Would Bypass Attorney Privilege*, NEWSDAY, Nov. 6, 2001, at A24 (“The rule applies to everyone in federal detention, including those charged with or convicted of crimes, those being held as material witnesses and even those being held on violation of immigration laws. That would apply to the nearly 1,200 people the government has arrested and detained in its probe of the Sept. 11 attacks.”); George Lardner Jr., *U.S. Will Monitor Calls to Lawyers; Rule on Detainees Called ‘Terrifying,’* WASH. POST, Nov. 9, 2001, at A1 (expressing grave concern over the expansion of the rule to witnesses and others who have not been convicted).

²⁰¹ 28 U.S.C. § 501.3 (d) (2002)

[I]n any case where the Attorney General specifically so orders, based on information from the head of a federal law enforcement or intelligence agency that reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism, the Director, Bureau of Prisons, shall, in addition to the special administrative measures imposed under paragraph (a) of this section provide appropriate procedures for the monitoring or review of communications between that inmate and attorneys or attorneys’ agents who are traditionally covered by the attorney-client privilege, for the purpose of deterring future acts that 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.

(1) The certification by the Attorney General under this paragraph (d) shall be in addition to any findings or determinations relating to the need for the imposition of other special administrative measures as provided in paragraph (a) of this section, but may be incorporated into the same document.

(2) Except in the case of prior court authorization, the Director, Bureau of Prisons, shall provide written notice to the inmate and to the attorneys involved, prior to the initiation of any monitoring or review under this paragraph (d). The notice shall explain:

(i) That, notwithstanding the provisions of part 540 of this chapter or other rules, all communications between the inmate and attorneys may be monitored, to the extent determined to be reasonably necessary for the purpose of deterring future acts of violence or terrorism;

(ii) That communications between the inmate and attorneys or their agents are not protected by the attorney-client privilege if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal advice.

(3) The Director, Bureau of Prisons, with the approval of the Assistant Attorney General for the Criminal Division, shall employ appropriate procedures to ensure that all attorney-client communications are reviewed for privilege claims and that any properly privileged materials (including, but not limited to, recordings of privileged communications) are not retained during the course of the monitoring. To protect

to the inmate and the attorney prior to initiating any monitoring, with such notice explaining that all communications “may be” monitored and that communications that would facilitate criminal acts or communications not related to the “seeking or providing of legal advice” would not be protected by the attorney-client privilege.²⁰² Such monitoring could continue for as long as was deemed “reasonably necessary” to deter violence and terrorism.²⁰³ Further, the rule stated that a “privilege team” would be designated which would be responsible for distinguishing between communications that amounted to “legal advice” and those that were made to facilitate criminality; unless acts of violence or terrorism were “imminent,” the privilege team must receive federal court approval prior to disclosure of information to those involved in the underlying investigation.²⁰⁴

Unlike the 1996 version of the SAMs, which provided sixty days for the submission of public comments prior to its implementation, the post-9/11 version was implemented immediately – as of October 30, 2001 – with no time for public comment or a response from the Bureau of Prisons. This immediate implementation of the rule was deemed to be necessary to prevent the “wrongful disclos[ure] of classified information” that could pose an imminent threat to national security; it was stated that the rule would effect only a “small portion” of the inmate population; and it was, therefore, concluded that the “delays inherent” in the regular notice-and-comment process would be against the public interest.²⁰⁵

the attorney-client privilege and to ensure that the investigation is not compromised by exposure to privileged material relating to the investigation or to defense strategy, a privilege team shall be designated, consisting of individuals not involved in the underlying investigation. The monitoring shall be conducted pursuant to procedures designed to minimize the intrusion into privileged material or conversations. Except in cases where the person in charge of the privilege team determines that acts of violence or terrorism are imminent, the privilege team shall not disclose any information unless and until such disclosure has been approved by a federal judge.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ 28 C.F.R. §§ 500, 501 (2002).

Thus, given the absence of a period for public comment, the section entitled “Supplementary Information” (which accompanied the new provisions of the rule)²⁰⁶ attempted to anticipate – and respond to – some of the more likely legal objections. For instance, justifications were given for each of the new substantive changes to the regulation: as for the extension of applicability from 120 days to one year, it was held to be necessary because threats of violence or terrorism “may in many cases be manifested on a continuing basis,” such that a 120 day limit was not realistic. As for the relaxation of the standard used for granting such extensions, it was stated that changes over time in the grounds for imposing the SAMs on specific inmates should not prevent the extension of such measures or require a reevaluation of the original grounds. And as for the new section allowing for the monitoring of attorney-client communications, it was asserted that the attorney-client privilege does not protect communications that further illegal acts, that the use of a “taint team” and the building of a “firewall” will ensure that privileged communications will not be disclosed, and that, therefore, the rule “carefully and conscientiously” balances the inmate’s right to effective assistance of counsel against the government’s responsibility to prevent future acts of violence or terrorism committed by federal inmates.²⁰⁷

²⁰⁶ See National Security: Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 211 (proposed Oct. 30, 2001 (to be codified at 28 C.F.R. pts. 500,501 (2002))) (quoting the “Supplementary Information” section of the SAMs, which was prepared and written by the Rules Unit, Office of General Counsel, Bureau of Prisons).

²⁰⁷ *Id.* The government in its comments published with the rule cites *Weatherford v. Bursey*, 429 U.S. 545 (1977) to assert that the monitoring of attorney-client communications may, but need not, violate a defendant’s Sixth Amendment rights, that the protections afforded by the rule ensure that privileged information will not be disclosed and, therefore, that the inmate’s right to a fair trial will not be impaired. *Weatherford*, 429 U.S. at 545. There have been many commentators who support this position that the SAMs monitoring rule is a valid exercise of executive power and that it is necessary to protect national security. See, e.g., Viet D. Dinh, *Freedom and Security After September 11*, 25 HARV. J.L. & PUB. POL’Y 399 (2002); Frank Kearns, *Attorney-Client Privilege for Suspected Terrorists: Impact of the New Federal Regulation on Suspected Terrorists in Federal Custody*, 27 NOVA L. REV. 475 (2003); Katherine Ruzenski, *Balancing Fundamental Civil Liberties and the Need for Increased Homeland Security: The Attorney-Client Privilege After September 11th*, 19 ST. JOHN’S J.LEGAL COMMENT 467 (2005).

D. *Challenges to the Attorney-Monitoring Provision of the SAMs*

The SAMs monitoring rule has been challenged in two principal forums since the time of its implementation mere weeks after 9/11. Legal academics have written articles on the topic, basing their objections on constitutional, procedural, and practical grounds, while inmates have challenged the rule in a number of recent court cases, all of which rejected the argument that the very *possibility* of government-monitoring of attorney-client communications under the SAMs chills the attorney-client relationship and thus compromises the Sixth Amendment.

The scholars may be divided into three broad categories: those who argue that the monitoring rule violates the attorney-client privilege and the Sixth Amendment and that it is likely to have a chilling effect on communications between attorneys and their incarcerated clients;²⁰⁸ those who contend that it violates another constitutional amendment, whether the Fifth, Fourth, or First (or all three);²⁰⁹ and those who focus on the practical and pragmatic problems with the rule, contending that it is unacceptably vague as applied and that it offers no specifics, for example, as to the meaning of “reasonable suspicion,” the composition of the

²⁰⁸ See, e.g., Heidi Boghosian, *Taint Teams and Firewalls: Thin Armor for Attorney-Client Privilege*, 1 CARDOZO PUB. LAW, POL'Y & ETHICS J. 15 (2002) (arguing the SAMs monitoring rule violates the Sixth Amendment and the attorney-client privilege); Cohn, *supra* note 62 (arguing the same); Avidan Y. Cover, Note, *A Rule Unfit for All Seasons: Monitoring Attorney-Client Communications Violates Privilege and the Sixth Amendment*, 87 CORNELL L. REV. 1233 (2002) (arguing the same). See also Kristen V. Cunningham & Jessica L. Srader, *The Post 9-11 War on Terrorism. . . What Does it Mean for the Attorney-Client Privilege?*, 4 WYO. L. REV. 311, 357-62 (2004) (arguing that there are a number of other, equally-effective ways in which the government may obtain information regarding attorney-inmate communications that provide more judicial oversight than the SAMs, including Title III, FISA, and the common law crime-fraud exception to the attorney-client privilege as well as the issuance of grand jury subpoenas to attorneys, the appointment of “special masters” in lieu of “privilege teams,” and even changing the Model Rules of Professional Conduct to require attorneys to disclose confidential information in order to prevent death or injury); *supra* notes 60-66.

²⁰⁹ See Cunningham & Srader, *supra* note 208, at 335-49 (focusing on the ways in which the monitoring rule violates other constitutional amendments, such as the Fifth, Fourth, and First); Teri Dobbins, *Protecting the Unpopular from the Unreasonable: Warrantless Monitoring of Attorney-Client Communications in Federal Prisons*, 53 CATH. U.L. REV. 295 (2004) (focusing on the same).

“privilege team,” or the guidelines for when the privilege team may, in fact, disclose attorney-client communications to the prosecution.²¹⁰

The arguments advanced by these three general approaches are further strengthened when considered in the context of the implementation of the SAMs. As discussed, the first version of the SAMs was designed to isolate potentially-dangerous felons from the outside world, narrowly limiting their communications as well as their access to the media. Weeks after 9/11, the executive branch dramatically extended the reach of the SAMs by applying it to all detainees, including material witnesses and those held by the DHS, while simultaneously increasing the potential for abuse by allowing for government monitoring of attorney-inmate communications with no judicial oversight or effective means of administrative review. The SAMs monitoring provision, when viewed in combination with the material support statute, imposed a two-stage governmental assault on the rights and status of prisoners: they could now be prosecuted as terrorists without direct evidence that they had committed terrorist acts and then effectively denied their right to representation by monitoring (or threatening to monitor) their communications with counsel.

What the government accomplished with the SAMs was a steep progression from the imposition of strict limits on a convicted inmate’s contacts with the outside world to an extension of those limits to pre-trial detainees and others, to a further extension of the very same limits to the attorneys for such inmates, and ultimately to the criminal prosecution of attorneys for violations that occur during the course of their representation. It is a form of overreaching or bootstrapping, whereby the stated justification for the 1996 SAMs – as asserted by the government and accepted by the court in *Felipe*, for instance – may have been warranted after a

²¹⁰ See Cunningham & Srader, *supra* note 208, at 349-53 (expounding on other bases of objecting to the monitoring rule, stemming from its vagueness and its likelihood of being misused and misapplied through an abuse of discretion by the executive branch).

careful balancing of competing interests, but the application and reach of the 2001 SAMs goes too far and cannot be justified under the same calculus or by the same reasoning.

As mentioned above, there have been a number of cases since 9/11 that have challenged the attorney-client monitoring provisions of the new SAMs, all based on the contention that the very possibility of attorney-client monitoring has compromised the inmate's Sixth Amendment right to counsel. The first was the case of *United States v. Sattar*,²¹¹ an action initiated by one of Lynne Stewart's co-defendants.²¹² Soon after indictment, Ahmed Abdel Sattar moved to compel the government to disclose whether his attorney-client communications were being monitored pursuant to the SAMs and without prior court notification.²¹³ Sattar argued that without such notice, he could not effectively communicate with counsel, for he feared that his privileged communications would be intercepted without a judicial determination of probable cause.²¹⁴ Stewart and co-defendant Yousry joined in the motion, with Stewart also moving to compel the government to disclose whether it was surveilling pursuant to Title III, FISA, or the SAMs and to disclose whether a number of specific locations were being monitored.²¹⁵ The government responded to the motions by stating that it could not disclose any court-ordered surveillance – such as that allowed under Title III and FISA – because this would undermine ongoing investigations, that if such surveillance were being conducted under these laws, it would be done only in accordance with the “procedural safeguards” set forth in such statutes or regulations, and

²¹¹ *U.S. v. Sattar*, 02 Cr. 395 (JGK), 2002 U.S. Dist. LEXIS 14798 (S.D.N.Y. Oct. 24, 1995).

²¹² *See supra* note 7 and accompanying text.

²¹³ *Sattar*, 2002 U.S. Dist. LEXIS 14798, at *2.

²¹⁴ *Id.* at *9. The SAMs state that written notice of monitoring must be provided to the inmate and his attorneys, “except in the case of prior court authorization,” such as that given under Title III or FISA.

As Sattar's request for disclosure was limited to disclosure of surveillance conducted pursuant to the SAMs, and not Title III or FISA, it is curious that he would advance an argument that seemed to fail to recognize that notice would be required under the SAMs. The court's opinion in *Sattar* clarified this point directly. *Id.* at *10.

²¹⁵ *Id.* at *3. Stewart's motion to compel disclosure of ongoing electronic surveillance specifically requested notice of whether the government was monitoring the following locations: the telephones in her law office; the office phone of her attorney at the time, Susan V. Tipograph; the law offices in which she and her colleagues worked; and any of her visits with her incarcerated clients in either state or federal custody. *Id.* at *5-6.

that Sattar, who was incarcerated, was not subject to any SAMs and that his communications with counsel were not monitored pursuant to 28 C.F.R. 501.3 (c) or (d).²¹⁶ This was, in essence, a response that provided no true answer to the inquiries of the defendants, for it meant that any of the three could still be monitored without notice pursuant to Title III or FISA. Having been assured, however, that the SAMs monitoring provision was not being applied to him, Sattar subsequently withdrew his motion.²¹⁷

With Sattar's motion withdrawn and Stewart and Yousry's concerns regarding Sattar's position thus rendered moot, the court focused its decision on the grounds advanced by Stewart.²¹⁸ After detailing the protections afforded by Title III and FISA, the court directly confronted the core of Stewart's claim by challenging her to cite an authority for the proposition that "a bare fear of surveillance, without more, is sufficient to establish a constitutional requirement" that the government disclose whether it is engaging in any court-authorized surveillance under Title III or FISA.²¹⁹ As the government did in its comments in support of the SAMs monitoring rule,²²⁰ the court relied on *Weatherford v. Bursey*²²¹ to assert that intercepted

²¹⁶ *Id.* at *6-7.

²¹⁷ *Id.* at *11. Sattar's withdrawal of his motion was in all likelihood done with the knowledge that while there is a legitimate argument that the imposition of the SAMs can chill the attorney-client relationship – even without receipt of specific notice that one's attorney-client communications "may be" monitored – this argument was very difficult to make with regard to surveillance pursuant to Title III or FISA. This was so, not because the possibility of monitoring under Title III or FISA does not or cannot chill attorney-client communications, but because unlike the SAMs – which are implemented without judicial review and provide no judicial oversight – the surveillance ordered under both of these Acts must pass judicial muster, including a showing of probable cause that must be reviewed by a court, minimization procedures to protect any genuine privacy or confidentiality concerns, and provisions for notice and the opportunity to bring a judicial challenge to surveillance after it occurs and before it is used against a defendant. *Id.* at *13-18. Once the government assured Sattar that the SAMs did not apply, it was no longer strategic for him to advance an argument that his Sixth Amendment rights were compromised as a result of possible monitoring pursuant to Title III or FISA, although Stewart did, in fact, pursue such an argument – though without success. See *infra* notes 218-24 and accompanying text.

²¹⁸ *Sattar*, 2002 U.S. Dist. LEXIS at *2. Interestingly, Stewart also argued that her Sixth Amendment rights were threatened by the possibility that the government might engage in monitoring without any legal authority. The court summarily rejected this argument on the basis of the government's assertion that any surveillance will be pursuant to the "relevant governing statutory or regulatory provision, and 28 C.F.R. § 501.3(d) relates only to Sattar." *Id.* at *12 n.1.

²¹⁹ *Id.* at *19.

²²⁰ See *supra* note 207 and accompanying text.

communications between attorneys and clients do not violate the Sixth Amendment without a showing that the defendant has been prejudiced and held that Stewart had failed to establish “legitimate grounds to fear” that her privileged communications, i.e. communications not made in the furtherance of a crime, would be used against her.²²² In response to Stewart’s assertion that she is “nevertheless chilled in her ability to consult with her attorneys,” the court proclaimed that such belief was “not a reasonable one and does not present a valid claim that her right to the effective assistance of counsel is being violated.”²²³

The *Sattar* decision was one of the first to touch on the legality of the post-9/11 SAMs monitoring provision, and while it was decided on other grounds, it can be seen – like *El-Hage* – as another instance of the judiciary turning a blind eye to the reality of what it means to be a criminal defendant. The court in *Sattar* refused to recognize that defendants’ communications with their attorneys can be hindered merely as a result of their awareness of the *possibility* of surveillance – even when it is “court-authorized FISA or Title III surveillance in accordance with relevant statutory procedures and subsequent screening procedures.”²²⁴ This pattern – the court rejecting as “unreasonable” the defendant’s assertion that the *potential* for attorney-client monitoring has compromised her right to effective assistance of counsel – can be found again and again in cases that challenge the SAMs.

²²¹ 429 U.S. 545 (1977).

²²² *Sattar*, 2002 U.S. Dist. LEXIS 14798, at *21.

²²³ *Id.* at *20-23. There is a strong argument that *Weatherford*’s holding should not be extrapolated to the prison setting where monitoring is conducted pursuant to the SAMs. In *Weatherford*, an undercover agent – to protect his identity – had participated in two separate trial-planning sessions with the defendant and his attorney. The Supreme Court found that there was no Sixth Amendment violation, as the defendant had not been aware of the monitoring, the purpose of the monitoring was benign, no information was revealed to prosecutors, and the defendant could not show actual prejudice. See *Weatherford*, 429 U.S. at 551. An inmate subject to monitoring pursuant to the SAMs, however, is aware that monitoring may take place, understands that monitoring is for the purpose of detecting criminal activity, and knows that information can be revealed to the prosecution – hence, there is a strong likelihood that attorney-client communications may be inhibited. In fact, the “ambiguities” of *Weatherford* have led to a circuit split regarding what particular set of circumstances justifies a finding of a Sixth Amendment violation. See Cunningham & Srader, *supra* note 208, at 330-34.

²²⁴ *Sattar*, 2002 U.S. Dist. LEXIS 14798, at *23.

Another case following this theme is *Al-Owhali v. Ashcroft*,²²⁵ in which a convicted member of al Qaeda brought an unsuccessful challenge to the SAMs monitoring provision. The Bureau of Prisons had imposed SAMs upon Mohamed Rashid Daoud Al-Owhali, who was serving life imprisonment in connection with the bombing of the United States embassy in Kenya, both pre-trial and post conviction.²²⁶ While the measures limited his contact with family members and denied him all exposure to the media, they did not provide him with notice that his communications with his attorney might be monitored, as per 28 C.F.R. § 501.3(d).²²⁷ Al-Owhali's argument, therefore, echoing that of the defendants in *Sattar*, was that the regulation placed him in danger of being monitored without prior notice, accomplished through an *ex parte* application to the judge.²²⁸ Al-Owhali contended that the monitoring of his attorney-client communications, *with or without notice*, "chills the attorney-client relationship and deprives the plaintiff . . . of the right to discuss any aspect of his case with an attorney and receive honest advice in return."²²⁹ He stated that such monitoring was unconstitutional without a judicial determination that the communication fell within a recognized exception to the attorney-client privilege, and he sought to enjoin the government from monitoring without such a finding.²³⁰ Again, echoing the decision in *Sattar*, the court rejected Al-Owhali's allegation of a "chill," as he did not claim to have suffered from a "specific present objective harm or a threat of specific future harm," but rather that he was merely "within the class of persons subject to monitoring,"

²²⁵ 279 F.Supp. 2d 13 (D.D.C. 2003).

²²⁶ *Id.* at 16.

²²⁷ *Id.* at 17. In addition to limiting his contacts with immediate family members and his attorneys, the SAMs imposed against Al-Owhali forbade him from watching television, listening to the radio, reading newspapers, utilizing the law library, taking an English language course, and meeting with a Muslim Cleric.

²²⁸ *Id.* at 18-19. Again, such surveillance could be accomplished by means of Title III, FISA, or a regular search warrant.

²²⁹ *Id.* at 19. The case suggests that Al-Owhali and his counsel were in the process of seeking post-conviction relief.

²³⁰ *Id.*

alleging a harm that was hypothetical.²³¹ Ultimately, the court dismissed the motion based on Al-Owhali's lack of standing, resulting from his failure to apply for administrative relief, which even the court admitted would have been an act of "futility."²³²

A final case of the same vein, also focusing on the impact of the *possibility* of monitoring, is that of *United States v. Esawi*,²³³ in which the defendant brought a pre-trial motion requiring the government to reveal whether it was monitoring attorney-client communications pursuant to the SAMs rule. Without delving into any of the nuances or intricacies of the arguments on either side, the court declared the motion moot "because under subsection (d)(2), the government or the Bureau of Prisons would have been required to notify Defendants and their attorneys of any recording of privileged communications."²³⁴ The issue was, thus, summarily closed, and the defendant did not pursue the argument further.

In sum, this section has attempted to demonstrate the ways in which the development of the SAMs represents a classic case of governmental bootstrapping with judicial acquiescence – from the SAMs' initial implementation in 1996 to their regulatory extension and expansion in 2001 to their testing in the courts in the years since. In the wake of terrorist attacks on domestic soil, the executive branch amended an administrative regulation with no opportunity for public comment, placing stringent limitations on the rights of prisoners and, with its monitoring provision, fundamentally impacting the relationship between lawyers and their incarcerated clients. The cases that first challenged the SAMs, from *Felipe* and *El-Hage* to *Sattar* and *Al-Owhali*, confirm that the administrative remedy provided lacks teeth and that courts are loath to

²³¹ Al-Owhali v. Ashcroft, 279 F. Supp. 2d 13, 26-27 (D.D.C. 2003).

²³² *Id.* at 21-29. The court cites *Yousef v. Reno*, discussed *supra* note 189, to support its argument that all administrative remedies must be exhausted before a judicial challenge can be mounted, regardless of the inherent "futility" of such administrative appeals. See *Al-Owhali*, 279 F. Supp. 2d at 17 n.5.

²³³ *United States v. Esawi*, 02 CR 038, 2003 U.S. Dist. LEXIS 1695, (N.D.Ill. Feb. 3, 2003).

²³⁴ *Id.* at *13.

recognize that the mere *possibility* of monitoring attorney-client communications can – and does – chill the relationship that the Sixth Amendment is designed to protect.

IV. The Future of the Right to Defend

A. *A Small Measure of Success: United States v. Reid*

As the previous sections have demonstrated, there is ample reason to view the *Stewart* case as cause for concern – both for the future of the right to defend and for the rights of criminal defendants generally. However, it is crucial to recognize that – even in the face of *Stewart*'s indictment and subsequent conviction – there are several recent examples of lawyers providing aggressive, and ultimately effective, advocacy for clients accused of acts of terrorism. This section describes in some detail a number of these cases and presents these examples as evidence that the prosecution of Lynne Stewart represents more than just “the end of the world as we know it,” but that her case can help clarify where to draw the line between rigorous advocacy that challenges the status quo and legal representation that is not only inappropriate but illegal.²³⁵

The case of *United States v. Reid*²³⁶ is noteworthy for being one of the first successful challenges to the SAMs.²³⁷ In December 2001, Richard Reid tried to detonate explosives in his

²³⁵ R.E.M., *It's the End of the World as We Know I (And I Feel Fine)*, on DOCUMENT (Capitol Records 1987). During much of the writing of this article, I found myself invoking the chorus of this song (which echoes the title), gripped by the feeling that the prosecution and subsequent conviction of a defense attorney for acts committed on “behalf of” her client and during the course of her representation was a death knell for the Sixth Amendment. Much legal scholarship has been produced that expounds on this theme. See, e.g., Alissa Clare, *We Should Have Gone to Med School: In the Wake of Lynne Stewart, Lawyers Face Hard Time for Defending Terrorists*, 18 GEO. J. LEGAL ETHICS 651; Cohn, *supra* note 58, at 1249-54; Kevin R. Johnson, *Civil Liberties Post-September 11: A Time of Danger, A Time of Opportunity*, 2 SEATTLE J. SOC. JUST. 3, 6-7 (2004). Upon further reflection, however, while I am neither optimistic nor “feel fine,” particularly about the impact of the SAMs monitoring rule on the attorney-client relationship, I have confidence that the defense bar has enough moxie to use the *Stewart* case, learn from it, and take away from it what is necessary to ensure that rigorous advocacy will – and can – continue, even in the post-9/11 era.

²³⁶ 214 F.Supp. 2d 84 (D. Mass. 2002).

²³⁷ Although I served as one of the defense attorneys in this case, I must give credit to my co-counsel, Owen S. Walker, former Federal Defender for the District of Massachusetts, who initiated our challenge to the SAMs provisions and persisted with his fight against certain aspects of the measures – even at the post-conviction stage.

sneakers, intending to blow up an American Airlines flight en route from Paris to Miami.²³⁸ Two months after his arrest and detention, SAMs were imposed on Reid.²³⁹ The SAMs stipulated that Reid’s attorneys could “disseminate the contents of the inmate’s communications to third parties for the sole purpose of preparing the inmate’s defense – and not for any other reason.”²⁴⁰

The measure also required Reid’s attorneys to sign an “Attorney Affirmation” that confirmed receipt of the document and acknowledged their understanding that the SAMs applied to them.²⁴¹ When Reid’s attorneys refused to sign the affirmation, the government cut off all communication between them and their client.²⁴² Defense counsel filed an emergency motion to enjoin the government from barring their communication with Reid, and the court ultimately issued an order that reestablished counsel’s right to have access to their client and forbade the government from requiring the defense to provide “any specific undertaking or affirmation without express order of this Court.”²⁴³ The government subsequently modified the SAMs to

See United States v. Reid, 369 F.3d 619 (1st Cir. 2004). *Reid* was the first recorded case in which the SAMs were limited by a protective order and the first in which defense counsel and their staff were not required to sign the attorney affirmation. *See* Government’s Response to Defendant’s Motion Regarding Detention at 11, United States v. Ujaama, No. CR02-283R (W.D. Wash. Oct. 2002)(on file with author).

²³⁸ *Reid*, 214 F. Supp. 2d at 87.

²³⁹ *Id.* at 86.

²⁴⁰ *Id.* at 87. The SAMs restriction on the dissemination of information to third parties was challenged by Reid’s attorneys on the grounds that the mounting of an effective defense requires the ability to discuss the case with colleagues, to consult a variety of experts, and to “shop your ideas.” *Id.* at 90. The court agreed with the defense’s position and expanded the description of those persons with whom the lawyers could consult to include “third parties who are engaged in the preparation of Mr. Reid’s defense or providing information which is necessary and helpful to that defense.” *Id.* at 91.

²⁴¹ *Id.* at 88, 91. The “Attorney Affirmation” typically states the following: “I, [Attorney’s Name], am in receipt of the Special Administrative Measures implemented against [Inmate’s Name], pursuant to 28 C.F.R. § 501.3(c). I have read and understand the measures enacted by the Bureau of Prisons. I acknowledge my responsibilities in the SAM document and agree to fully abide by the restrictions as outlined therein.” *See, e.g.*, “Acknowledgment and Affirmation of Receipt,” United States v. Ujaama, No. CR02-283R,(W.D. Wash. Oct. 2002) (on file with author). The fact that Lynne Stewart signed the “Attorney Affirmation” in the course of her representation of Rahman and then took action in ways that violated – on its face – the conditions set forth in those SAMs formed the basis of the government’s case against her vis-à-vis the charges of false statements and conspiracy to defraud the United States. *See* Superseding Indictment, *supra* note 8.

²⁴² *Reid*, 214 F. Supp. 2d at 88.

²⁴³ *Id.* at 91.

state that an Attorney Affirmation must be signed, “except where such affirmation is excused, precluded, or barred by judicial determination.”²⁴⁴

Although the issue of the affirmation requirement was made moot by the government’s modification, the court ruled on its own that such an affirmation was not required by the attorneys representing Reid because it “fundamentally and impermissibly intrudes on the proper role of defense counsel.”²⁴⁵ The court considered the attorneys’ duty as one that required them to “zealously . . . defend Reid to the best of their professional skill without the necessity of affirming their bona fides to the government.”²⁴⁶ It perceived them to be “subordinate to the existing laws, rules of court, ethical requirements, and case-specific orders of this Court – and to nothing and no one else.”²⁴⁷ The court also quoted Justice Stevens who has written that “‘the citizen’s right of access to the independent, private bar is itself an aspect of liberty that is of critical importance in our democracy,’ chiding the Supreme Court majority for ‘its apparent unawareness of the function of the independent lawyer as a guardian of our freedom.’”²⁴⁸ Further, the court even took judicial notice of the indictment of Lynne Stewart, stating, “[w]hatever the merits of this indictment, its chilling effect on those courageous attorneys who represent society’s most despised outcasts cannot be gainsaid.”²⁴⁹ The *Reid* opinion has been

²⁴⁴ *Id.* at 91. An interesting practical question is why federal prosecutors, in the face of successful challenges to the Attorney Affirmation, continue to include it within the SAMs. The answer seems to lie with the government’s apprehension – whether or not justified is difficult to say – that attorneys are likely to be unwittingly used or willingly enlisted by clients to assist in the commission of terrorist acts.

²⁴⁵ *See id.* at 92-94 (reaching this conclusion after highlighting the essential role played by lawyers as advocates and “practical law teachers” within U.S. culture).

²⁴⁶ *Id.* at 94.

²⁴⁷ *Id.*

²⁴⁸ *United States v. Reid*, 214 F.Supp. 2d 84, 93 (2002) (quoting *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 371 (1985) (Stevens, J., dissenting)).

²⁴⁹ *Id.* at 95. Interestingly, the court felt it necessary to remark, in the opinion’s “Background” section, “Throughout, the conduct of all counsel for the government and the defense has been, and continues to be, marked by the utmost professionalism and civility.” *Id.* at 87. One wonders if this comment – an explicit judicial endorsement of the conduct of the attorneys – may have been catalyzed by the recent indictment of Stewart and the ensuing public debate over the bounds of ethical representation.

frequently cited by defense counsel when challenging aspects of the SAMs perceived as threatening to their clients' Sixth Amendment rights.²⁵⁰

B. *The Attorney Affirmation Falls by the Wayside*

A number of cases have followed in which defense attorneys have refused to sign the attorney affirmation, and many of them – based on the success of *Reid* and the foreboding symbol of *Stewart* – have been successful. In the case of *United States v. Ujaama*,²⁵¹ James Ujaama, a U.S. citizen raised in Seattle, Washington, was charged with conspiracy to provide material support and resources to al Qaeda in connection with his efforts to establish an al Qaeda training camp in Bly, Oregon, and with using a firearm during a crime of violence.²⁵² After Ujaama's indictment, the government imposed the SAMs and required that his attorneys sign the

²⁵⁰ See, e.g., Memorandum of Law in Support of Defendant's Motion for Emergency Hearing to Prohibit the Attorney General From Restricting Defense Counsel's Access to Defendant and Impairing Defendant's Sixth Amendment Right to Effective Assistance of Counsel at 2-3, *United States v. Ujaama*, No. CR02-283R, (W.D. Wash.) (on file with author)[hereinafter Memorandum of Law]. *Ujaama* is discussed *infra* at notes 251-59 and accompanying text. The *Reid* opinion was also cited by the court in its denial of Stewart's Motion to Dismiss. The court held that because defense attorneys can refuse to sign the affirmation (and did so with judicial support in *Reid*), Stewart's post-indictment challenges of the SAMs and the attorney affirmation were invalid; the court found that Stewart should have pursued "avenues of redress within the legal system" prior to affirming that she would abide by the regulations. *Sattar*, 272 F.Supp. 2d at 372. Yet, it must be stated that the court's contention that Stewart should have challenged the SAMs and refused to sign the affirmation at the time they were imposed, based on the fact that another lawyer in a different case was successful at doing so subsequent to Stewart's indictment, is unfair; the truth, as evidenced by the court's opinion in *Reid*, was that attorneys and judges had become sensitized to the issue only after Lynne Stewart had been indicted. To use her failure to challenge the SAMs at the time of her representation of Rahman to support its rejection of her challenge to the SAMs' validity after her indictment is wholly unpersuasive. And, finally, legal commentators have argued that the *Reid* case suggests that defense attorneys may have an *ethical duty* to challenge all aspects of the SAMs – from the imposition of the regulations and the affirmation requirement to any attempt at government monitoring. See, e.g., Charlie Cassidy & Cassandra Porsch, *Government Monitoring of Attorney-Client Communications in Terrorism-Related Cases: Ethical Implications for Defense Attorneys*, 17 GEO. J. LEGAL ETHICS 681, 686-91 (2004).

²⁵¹ There have been no published opinions on the *Ujaama* case. However, on file with author are the following: *United States v. Ujaama*, No. CR02-283R (W.D. Wash. Oct. 2, 2002) (detention order); Defendant's Motion for Emergency Hearing to Prohibit the Attorney General from Restricting Defense Counsel's Access to Defendant and Impairing Defendant's Sixth Amendment Right to Effective Assistance of Counsel, *Ujaama*, No. CR02-283R, (W.D. Wash.) (with proposed order, memorandum of law, and copy of the SAMs implemented against Ujaama); *United States v. Ujaama*, No. CR02-283R (W.D. Wash. Oct. 11, 2002) (transcript of hearing); Government's Response to Defendant's Motion Regarding Detention, *Ujaama*, No. CR02-283R, (W.D. Wash.); Defendant's Pre-Hearing Memorandum Regarding Special Administrative Measures, *Ujaama* (No. CR02-283R); and *United States v. Ujaama*, No. CR02-283R (W.D. Wash. Dec. 12, 2002) (protective order).

²⁵² Indictment, *United States v. Ujaama*, No. CR02-283R (W.D. Wash., Aug. 28, 2002), <http://news.findlaw.com/hdocs/docs/terrorism/usujaama82802ind.pdf>.

Acknowledgment and Affirmation of Receipt.²⁵³ When his lawyers refused to sign and filed a motion for an emergency hearing on the matter, the government cut off all contact between them and their client.²⁵⁴

What ensued was a months-long battle to define the conditions under which Ujaama was held and to establish the means of oversight of such conditions. During this time, Ujaama's lawyers challenged a number of specific provisions of the SAMs²⁵⁵ and asserted that these aspects of the measures violated Ujaama's Sixth Amendment right to effective assistance of counsel.²⁵⁶ Ultimately, the court imposed a comprehensive protective order that excused Ujaama's attorneys and their staff from signing or affirming the SAMs, relaxed the SAMs restrictions placed on prison visits and telephone calls to Ujaama by the attorneys and their staff, and expanded the types of discovery materials and court papers that the attorneys could share with their client.²⁵⁷ While the defense attorneys expressed satisfaction with the Order and relief that they would "be answering to [the presiding judge] instead of the Attorney General," the prosecutor voiced confidence that the "deal" did not compromise national security or set a "bad

²⁵³ Ray Rivera, *Ujaama Lawyers Fight Security Rules: Federal Restrictions Hamper Defense*, SEATTLE TIMES, Oct. 29, 2002, at B3. Ujaama had actually been held in federal custody as a material witness since July 22, 2002, although he wasn't indicted criminally until five weeks later. See also Memorandum of Law, *supra* note 250, at 5.

²⁵⁴ *Id.*

²⁵⁵ Ujaama's lawyers challenged the requirement of an "attorney affirmation," the lack of "prisoner specific" measures establishing that the SAMs were "uniquely suited" to Ujaama, the fact that attorney-client contact visits were left to the discretion of the detention facility, the limits placed on the dissemination of Ujaama's communications to third parties, the limits on a defense investigator's access to Ujaama, the requirement that defense experts must be pre-cleared with the F.B.I. and the local United States Attorney, the prohibition on defense counsel from displaying "inflammatory materials" or "materials inciting to violence" to Ujaama without pre-clearance by the F.B.I. and the local United States Attorney, the prohibition on defense counsel from divulging any portion of Ujaama's legal mail to third parties, the placement of microphones in the hallway of the detention facility, the recording of Ujaama's conversations with other inmates or staff, and the frequent search of Ujaama's prison cell. See Memorandum of Law, *supra* note 250, at 9-11.

²⁵⁶ Memorandum of Law in Support of Defendant's Motion for Emergency Hearing to Prohibit the Attorney General From Restricting Defense Counsel's Access to Defendant and Impairing Defendant's Sixth Amendment Right to Effective Assistance of Counsel at 6-13, *United States v. Ujaama*, No. CR02-283R, (W.D. Wash.) (on file with author).

²⁵⁷ *Ujaama*, No. CR02-283R, (W.D. Wash. Dec. 12, 2002) (protective order). See also Ray Rivera, *Deal Eases Limits in Ujaama Case: Court to Oversee Client-Lawyer Contact*, SEATTLE TIMES, Dec. 13, 2002, at B6.

precedent” for the SAMs in other cases.²⁵⁸ Four months later, Ujaama pled guilty to a less serious charge of conspiracy to provide goods and services to the Taliban, and it was revealed that he had been cooperating with the government in ongoing terrorism investigations and that, in exchange, he would receive only a two-year prison sentence.²⁵⁹

Two other cases illustrate that after the indictment of Lynne Stewart and the SAMs decision in *Reid*, judges could be persuaded that the attorney affirmation need not be signed. The first, *United States v. Hale*,²⁶⁰ concerned Matthew Hale, a self-proclaimed white supremacist charged with plotting to kill a federal judge.²⁶¹ After the SAMs were imposed on Hale, his attorneys refused to sign the required affirmation, and – as in the previous cases – they were denied all contact with him.²⁶² Ultimately, the court ruled that while the government could not require the attorneys to sign the affirmation, the other provisions of the SAMs would stand.²⁶³

²⁵⁸ Rivera, *supra* note 257. Assistant U.S. Attorney Andrew Hamilton stated at the time, “A SAM is a work in progress, and it’s a relatively new thing. [The deal] will make future SAMs much easier to manage. I think it’s made the process better.” *Id.*

²⁵⁹ Press Release, Department of Justice, Washington, D.C. (Apr. 14, 2002), http://www.usdoj.gov/criminal/press_room/press_releases/2003_3513_EARNEST_JAMES_UJAAMA_PLEADS_GUILTY_TO_CONSPIRACY_TO_SUPPLY_GOODS_AND_SERVICES_TO_THE_TALIBAN_AGREES_TO_COOPERATE_WITH_TERRORISM_INVESTIGATIONS.htm. See also Press Release, Department of Justice, Washington, D.C. (Feb. 13, 2004), http://www.usdoj.gov/opa/pr/2004/February/04_crm_086.htm. One can only wonder if the tenor of the fight over the SAMs might have been different had Ujaama not cooperated with the government, although it is difficult to determine whether he had been cooperating at the time of the litigation over the SAMs or if he agreed to cooperate only after the protective order had been put in place.

²⁶⁰ *United States v. Hale*, No. 03 CR 11 (N.D. Ill.) (docket report) (on file with author).

²⁶¹ Hale was ultimately convicted of the charges and sentenced to forty years imprisonment. *Id.* Tragically, the husband and mother of the judge whom Hale was convicted of plotting to kill, U.S. District Judge Joan Humphrey Lefkow, were murdered on February 28, 2005. Bart A. Ross, another litigant who had appeared before Judge Lefkow, is suspected of committing the killings. Notably, Ross committed suicide nine days later. Jeff Coen & David Heinzmann, *Lefkow Killer’s Suicide Note Reveals His Hatred, Plotting*, CHI. TRIB., Mar. 23, 2005, at C1.

²⁶² Defendant’s Emergency Motion to Enforce Mag. J. Rodovich’s Det. Order of Feb. 12, 2003, Regarding Att’y Consultation at 2-4, *Hale*, No. 03 CR 11 (on file with author) [hereinafter Defendant’s Emergency Motion].

²⁶³ *United States v. Hale*, No. 03 CR 11 (N.D. Ill. April 17, 2003) (docket entry) (on file with author). See also John McCormick, *Judge Clarifies Hale Limits; His Lawyers Don’t Have to Sign Edict About Messages*, CHI. TRIB., Apr. 18, 2003, at C6. Interestingly, a statement made by the judge in the *Hale* case was cited by the court in its denial of Stewart’s Motion to Dismiss to the effect that even though an attorney may not be required to sign a pledge to abide by the SAMs, if that attorney chooses to engage in acts that do evade those measures, the attorney may be found in violation of criminal laws. *United States v. Sattar*, 272 F.Supp. 2d 348, 372 (S.D.N.Y. 2003) (quoting *Hale* Tr. at 11-12 attached as Ex. 1 to Stewart Reply). In contrast, the court in *Reid* questioned the legality of prosecuting Stewart for false statements based only on her alleged violation of the SAMs attorney affirmation, stating that “serious constitutional issues might arise in that the Attorney General would himself be criminalizing a variety of

Similarly, in the case of *United States v. Warsame*,²⁶⁴ the defense attorneys also refused to sign the Attorney Affirmation required by the SAMs.²⁶⁵ Mohammed Abdullah Warsame, a Canadian citizen of Somali descent, had been charged with conspiring to provide material support to al Qaeda.²⁶⁶ In this instance, the defense and the prosecution agreed to a compromise whereby defense counsel signed an acknowledgment that they had read the rules without providing an explicit, written agreement to follow them.²⁶⁷

With a slightly different twist, the case of Ali Saleh Kahlah al-Marri illustrates that unwavering tenacity on the part of a defense attorney can even help bring about a compromise in the imposition of the SAMs' attorney-client monitoring provision. Al-Marri, a citizen of the State of Qatar who had lived in Illinois with his wife and five children, was originally arrested as a material witness in the 9/11 attacks.²⁶⁸ He was held under coercive conditions for six weeks before being criminally charged with credit card fraud.²⁶⁹ A year later, having refused to cooperate with government agents, al-Marri was indicted for six additional fraud-related

conduct by imposing the SAMs and then seeking indictments for their violation. It is constitutional bedrock that only the Congress can enact federal criminal statutes.” *United States v. Reid*, 214 F. Supp.2d 84, 95 n.8 (D.Mass. 2002). Stewart challenged the false statements charge on a slightly different ground in her motion to dismiss – that the affirmation was merely a “promise of future conduct” and not a factual statement – but this was rejected by the court which found that “a knowingly false promise, which is a knowingly false statement of present intent, can be a false statement within the meaning of 18 U.S.C. § 1001.” *Sattar*, 272 F.Supp. 2d at 375, 377-78.

²⁶⁴ *United States v. Warsame*, No. 04 CR 29 (D. Minn.) (docket report) (on file with author).

²⁶⁵ Pam Louwagie, *Feds Want Restrictions in Terror Case; Warsame Attorney Balks at Limits on Conversation*, STAR TRIB., Feb. 3, 2004, at 1B.

²⁶⁶ *Id.*

²⁶⁷ Email from Daniel M. Scott, attorney for Mohamed A. Warsame, to author (June 27, 2005) (on file with author). Apparently Warsame had agreed to cooperate with F.B.I. investigators when news of his arrest was leaked to the press; this led to the government bringing formal charges against him. Greg Gordon, *FBI Hoped Warsame Would Act as Spy; News of the Minneapolis Man's Arrest Derailed Government Plans for a Deal*, STAR TRIB. (Minn.), Feb. 14, 2004, at 1B (“Federal counterterrorism agents make it a priority to thwart future attacks rather than emphasize prosecution of suspected Al-Qaida [sic] members.”). It is likely that Warsame’s cooperation with federal agents provided room for the government to negotiate with defense counsel regarding the Attorney Affirmation and other provisions of the SAMs.

²⁶⁸ Petition for Writ of Habeas Corpus at 3, *al-Marri v. Bush*, No. 1:03-CV-01220 (C.D. Ill. 2003) (on file with author) [hereinafter Petition for Writ]. See also *al-Marri v. Bush*, 274 F.Supp.2d 1003, 1004 (C.D. Ill. 2004) (describing the background of al-Marri).

²⁶⁹ Petition for Writ, *supra* note 268, at 4.

charges.²⁷⁰ Eventually SAMs were imposed against al-Marri that his attorneys rigorously opposed; they repeatedly attempted to negotiate with the prosecutors over the SAMs provisions, and they filed motions with the court when such negotiations stalled.²⁷¹ Just as it seemed that the court was willing to alter the SAMs, the government dismissed the criminal charges and declared al-Marri an enemy combatant; al-Marri was then moved immediately from federal custody to the Naval Consolidated Brig in Charleston, South Carolina.²⁷² Defense counsel, however, were not dissuaded. They continued to demand access to their client, filing a petition for habeas corpus on at least two occasions, and, once contact between counsel and client had been reestablished, they filed motions for unmonitored meetings and correspondence.²⁷³ Finally, the defense and the prosecution agreed upon revised SAMs which permitted unmonitored visits with al-Marri and which created a “mechanism for resolving disputes regarding the sharing of classified information” with him, another frequently thorny issue for attorneys who represent accused terrorists.²⁷⁴

Thus, while defense attorneys have achieved limited success in their attempts to challenge the substantive provisions of the SAMs, they have received almost uniform support from the courts in their refusal to affirm – in writing – that they will abide by those very same regulations. What does this reveal about the posture of the judiciary vis-à-vis the SAMs? How will future challenges to the Attorney Affirmation requirement be received? What of challenges to the substantive thrust of the SAMs themselves? These are questions that cannot be answered with absolute certainty, but it may be said that courts appear to be settled – for now, at least – on

²⁷⁰ *Id.* at 4-5. See also *al-Marri*, 274 F.Supp. 2d at 1004 (outlining the charges against al-Marri).

²⁷¹ Petition for Writ, *supra* note 268, at 8-10.

²⁷² *Id.* at 10-11.

²⁷³ Many of the filings made in connection with the representation of al-Marri are on file with author.

²⁷⁴ Letter from Andrew J. Savage, III, attorney for al-Marri, to The Honorable Robert S. Carr, D. S.C., the presiding judge in the case (Dec. 15, 2004) (on file with author).

the legitimacy of the government's right to impose the SAMs and to monitor attorney-inmate communications pursuant to the SAMs, and that the judiciary rejects the claim that the very existence of such regulations can "chill" the lawyer-client relationship and possibly even threaten a defendant's Sixth Amendment rights.

On the other hand, judges have shown extreme reluctance to uphold the government's requirement that defense lawyers must sign an "affirmation" vowing to adhere to the conditions imposed by the SAMs.²⁷⁵ In the wake of the *Stewart* case, courts have expressed unwillingness to subject defense lawyers to possible criminal prosecution in this way, and, in the alternative, they have assumed comprehensive oversight of attorney conduct as it relates to the SAMs. To accomplish this, judges have regularly issued protective orders – crafting their own rules and restrictions rather than relying on the government's versions – that are designed to ensure that inmates will not use attorney communications to disseminate their "message," and that attorneys will be loath to assist their clients in doing so. These developments have also helped create a climate in which more prosecutors and defense counsel are coming together, without the need for judicial involvement or interference, to carve out modified SAMs that are satisfactory to both sides – a result that suggests that the tripartite system of government may, in fact, be working, and that with continued rigor by defense counsel and commitment by judges, the SAMs will not succeed in trammeling defendants' rights and, by extension, the rights of us all.

Conclusion

²⁷⁵ Interestingly, there is nothing explicit in the SAMs that requires attorneys to sign an "affirmation" that they will abide by its conditions. In fact, the argument that there is no statutory or regulatory authority for requiring an attorney affirmation as a precondition to private consultation with inmates has been raised by defense attorneys, though no court has reached the issue, as of yet, in a written opinion. For an example of a defense motion on the topic, see, e.g., Defendant's Emergency Motion, *supra* note 262, at 3-10.

The conviction of Lynne Stewart resonates so broadly – whatever one’s perspective and judgment regarding the outcome – because it implicates many of the values that lie at the core of the criminal justice system. The first is the question of the proper parameters of the attorney-client relationship. What factors must be present to protect its integrity? This Article has proceeded from the presumption that the relationship between a criminal defendant and her attorney must be one that is characterized by mutual trust and candor, in which words may be spoken in confidence and without fear of blanket surveillance and capricious reprisals. As soon as external forces threaten to impinge upon this relationship, the Sixth Amendment is jeopardized and the likelihood that the defendant will, in fact, receive effective assistance of counsel is critically diminished.

The second value at stake is the matter of how far the government may go to prevent future acts of violence during times of war and unrest. What is the proper calculus for achieving balance between legitimate acts of prevention and the infringement of civil liberties? This Article has examined repeated instances in which the federal government has either expanded the scope of, or obviated the need for, criminal laws in order to accomplish the silencing of dissent. It has chronicled the aggressive use of immigration law to circumvent the due process protections of the courts, resulting in the preventive detention and deportation of foreign nationals. And it has demonstrated the ways in which such legislation has been uncompromising in its paralyzing impact upon those at society’s margins. Against this historical backdrop, the Article has provided a close analysis of the implementation of the SAMs and has argued that the regulation is a prime example of governmental overreaching, an instance in which the Sixth Amendment rights of defendants have been improperly – and unnecessarily, given the availability of other, more equitable means of monitoring privileged communications – trumped

by the government's commitment to prevention at all costs. As for the regulation's development, the 1996 version of the SAMs may have been justified, but – as a result of government bootstrapping with judicial acquiescence – the post-9/11 version has inexorably led to the chilling of attorney-client communications that is central to the Sixth Amendment.

Lastly, the conviction of Lynne Stewart raises the question of what this all means for the future of the right to defend. How can attorneys for criminal defendants ensure that their clients – and they, themselves – proceed with confidence in the sanctity of their communications? How can they provide rigorous advocacy post-9/11 without running afoul of the law? The Article has analyzed the decisions in recent cases challenging the SAMs and demonstrated that while the regulations have been upheld in substance, the attorney affirmation consistently has been found to be improper. We have seen related successes achieved by attorneys who have approached the problems and challenges posed by the SAMs with rigor – by filing motions to enjoin after the government terminates contact with one's client, by filing motions requesting unmonitored communications and clearly explaining the ramifications if such is denied, and by invoking the prosecution and conviction of Lynne Stewart as a basis for requesting that the court assume oversight of any restrictions imposed pursuant to the SAMs. Although there is every reason for the defense bar to proceed with eyes wide open – with the knowledge that the government can and does listen to privileged attorney-inmate conversations and that it will use its discretion to prosecute lawyers for crimes with such malleable parameters as “material support” – it is vital that the quality of representation not be compromised and that the importance of establishing true rapport with one's clients not be diminished.

With this in mind, it is, perhaps, apt to close with the words of Clarence Darrow, lead defense counsel in at least four cases that have been termed “trials of the century.”²⁷⁶ Renowned for his powerful oratory on behalf of others, Darrow himself became a criminal defendant in 1912 when he was charged with jury bribery that was alleged to have occurred during his defense of two labor organizers on trial for murder.²⁷⁷ By all accounts, the prosecution had amassed overwhelming evidence of guilt in its case against Darrow.²⁷⁸ While the ethics on both sides have been scrutinized in the decades since, few would doubt his sincerity when Darrow stated the following during summation:

I have committed one crime for which I cannot be forgiven. . . . I have stood for the weak and the poor. . . . I have lived my life and I have fought my battles, not against the weak and the poor -- anybody can do that -- but against power, injustice, against oppression.²⁷⁹

The full chronicle of Darrow’s legal career – both the successes *and* the failures – reminds us that even the most revered defenders are only human, capable of errors in judgment and even of criminal conduct during the course of their representation. Unlike Lynne Stewart, however, and perhaps a reflection of the differences in the nature of the charges, Clarence Darrow – who argued in his own defense that he was merely “fighting fire with fire” – was acquitted by his jury after only thirty minutes of deliberation.²⁸⁰

²⁷⁶ Gerald F. Uelmen, *Fighting Fire with Fire: A Reflection on the Ethics of Clarence Darrow*, 71 *FORDHAM L. REV.* 1543, 1544 n.3 (2003) (noting Darrow’s successful defense in 1907 of William D. Haywood, charged with murdering the former Governor of Idaho; his defense in 1911 of James and John McNamara, labor organizers who ultimately pled guilty to bombing a printing plant of the Los Angeles Times, killing twenty Times employees, and his subsequent defense of himself when charged with bribing jurors in the McNamara trial; his defense of Loeb and Leopold in 1924 for the murder of Bobby Franks; and his defense of Thomas Scopes in 1925).

²⁷⁷ *Id.* at 1543-45.

²⁷⁸ *Id.* at 1543-45, 1554.

²⁷⁹ William Kunstler, *Column: Informal Opinion*, 19 *CHAMPION* 47, 48 (1995).

²⁸⁰ *Id.* See also Uelmen, *supra* note 276, at 1554-57 (describing the circumstances of the case against Darrow).