



28 CFR, 501.3(a)
Upon direction of the Attorney General,
the Director, Bureau of Prisons, may
authorize the Warden to implement
special administrative measures

THE DARKEST CORNER

Special Administrative Measures and
Extreme Isolation in the Federal Bureau of Prisons



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rights

Allard K. Lowenstein International Human Rights Clinic
Yale Law School

*I believe that very few men are capable
of estimating the immense amount of torture
and agony which this dreadful punishment,
prolonged for years, inflicts upon the sufferers;
and in guessing at it myself, and in reasoning
from what I have seen written upon their faces,
and what to my certain knowledge they feel within,
I am only the more convinced that there is
a depth of terrible endurance in which none
but the sufferers themselves can fathom,
and which no man has a right to inflict upon
his fellow creature*

– Charles Dickens (1842)

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Allard K. Lowenstein International Human Rights Clinic
The Center for Constitutional Rights

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I. Summary

Prisoners, psychologists, and human rights advocates have long attested to the horrors of solitary confinement: cramped concrete cells, sensory deprivation, and overwhelming social isolation.¹ Scientific consensus that such conditions cause permanent harm led the former United Nations (“U.N.”) Special Rapporteur on Torture to declare that “any imposition of solitary confinement beyond 15 days constitutes torture or cruel, inhuman or degrading treatment.”² The practice has prompted hearings before the U.S. Senate, and at the state level, many corrections leaders have recognized that long-term isolation is unnecessary and even counterproductive.³

Yet amid growing recognition of these harms, the federal government has been expanding its use of a lesser known and more extreme form of isolation: Special Administrative Measures (“SAMs”). SAMs are the darkest corner of the U.S. federal prison system, combining the brutality and isolation of maximum-security units with additional restrictions that deny individuals almost any connection to the human world. Those restrictions include gag orders on prisoners, their family members, and their attorneys, effectively shielding this extreme use of government power from public view.

SAMs deny prisoners the narrow avenues of indirect communication – through sink drains or air vents – available to prisoners in solitary confinement. They prohibit social contact with anyone except for a few immediate family members, and heavily regulate even those contacts. And they further prohibit prisoners from connecting to the social world via current media and news, limiting prisoners’ access to information to outdated, government-approved materials. Even a prisoner’s communications with his lawyer – which are supposed to be protected by attorney-client privilege – can be subject to monitoring by the FBI.

The U.S. Attorney General has sole discretion to impose SAMs, and a prisoner lacks the most basic procedural protections to allow him to contest the SAMs designation. Indeed, prisoners may be left in the dark as to why they have been subjected to SAMs, because the Attorney General’s justification often cites little more than the prisoner’s charges or conviction. Many prisoners remain under these conditions indefinitely, for years or in some cases even decades.⁴ And court challenges are difficult. For convicted prisoners in particular, the regulations operate to obstruct their access to counsel, impeding the act of filing a challenge. And even when prisoners can bring challenges, courts routinely rule against them, accepting the government’s vague national security justifications.⁵

The imposition of SAMs extends beyond convicted prisoners. Federal prosecutors regularly request that the Attorney General place defendants under these punishing conditions while they await trial, before they have been convicted of any crime. In numerous cases, the Attorney General recommends lifting SAMs after the defendant pleads guilty. This practice erodes defendants’ presumption of innocence and serves as a tool to coerce them into cooperating with the government and pleading guilty. Indeed, the Central Intelligence Agency (“CIA”) for years relied on the torture of isolation and sensory deprivation as a tool to elicit what it termed “learned helplessness” in detainees suspected of terrorism. For those defendants who do fight their charges at trial, SAMs infect the entire proceeding, limiting prisoners’ capacity to participate in their defense and hindering their attorneys’ abilities to investigate and zealously advocate.

In addition to shrinking the entirety of the prisoner's world to the four corners of his prison cell, SAMs prevent anyone else from understanding what happens within. Prisoners under SAMs are prohibited from communicating with anyone except a few pre-approved individuals – their attorneys and immediate family members – and SAMs prohibit those individuals from repeating the prisoner's words to anyone else. There is also an explicit prohibition on all forms of communication with the media. In effect, the regulations silence those most qualified to attest to the harms of SAMs. The Department of Justice ("DOJ") further shrouds SAMs under a veil of secrecy by concealing *who* is subject to these conditions and *why*. Indeed, the DOJ and Federal Bureau of Prisons ("BOP") consistently ignore or deny Freedom of Information Act ("FOIA") requests seeking basic information about prisoners under SAMs. The psychological and physiological harms are thus hidden from public oversight and democratic accountability.

The lack of transparency surrounding SAMs makes these measures ripe for discriminatory use against "disfavored" populations. Interviews, publicly available information, and FOIA documents obtained through litigation reveal that the federal government has leveraged SAMs predominantly against Muslims. While the government refuses to reveal the religious identities of people under SAMs,⁶ publicly available evidence makes two facts clear: the use of SAMs has increased dramatically since September 11, 2001, and a disproportionately high number of SAMs prisoners are Muslim. In November 2001, there were only sixteen individuals under SAMs;⁷ by 2009 there were thirty,⁸ and, as of June 8, 2017 there were fifty-one.⁹ SAMs represent the extreme end of a spectrum of discriminatory "counterterrorism" measures targeting Muslims since 9/11, including abusive conditions of confinement and lack of due process at Communication Management Units ("CMUs"),¹⁰ indefinite detention and the military commissions system at Guantánamo Bay,¹¹ suspicionless surveillance,¹² sweeping immigration roundups,¹³ coerced informancy and entrapment,¹⁴ placement on various administrative watch lists,¹⁵ and criminal convictions based on overbroad interpretations of material support and conspiracy statutes.¹⁶ The widespread use of these tools is particularly troubling now, under an administration that has openly discriminated against Muslims and a President who has specifically advocated for the use of torture.¹⁷ Particularly in light of the Trump Administration's open animosity towards other groups, including immigrants and protestors, there is a risk that these tools will be used to target other marginalized groups in the future.

The imposition of SAMs raises serious concerns under U.S. and international law. SAMs eviscerate fair trial protections and the presumption of innocence. They infringe on the rights to free speech and association, religious freedom, family unity, due process, and equal protection under the Constitution and international law. And, not least, they constitute inhumane treatment that may rise to the level of torture. So, while many on both sides of the aisle have criticized President Trump for vowing to "bring back" torture,¹⁸ the torture of SAMs and its underlying conditions of solitary confinement never went away.

This report aims to shed light onto this darkest corner of the U.S. federal prison system. The report necessarily fails to represent the views of the people who are most intimately familiar with SAMs – those who have been subjected to them. Nonetheless, the available information reveals that the severity of SAMs, their increasing use, their lack of procedural protections, and their potential discriminatory application pose urgent concerns for our democracy.

II. Methodology

This report relies on interviews, legal research, and analysis of public documents conducted by the Allard K. Lowenstein International Human Rights Clinic at Yale Law School in collaboration with the Center for Constitutional Rights.

The authors interviewed eleven attorneys who have represented clients under SAMs. The authors also discussed the barriers SAMs pose to investigation with two mitigation specialists, members of defense teams responsible for compiling and telling a defendant's full life history to advocate for a lesser sentence. The authors found these individuals through recommendations and Westlaw searches of attorneys who have litigated issues related to SAMs. Although most attorneys contacted were open to being interviewed, almost all noted that the protective order they signed when agreeing to represent a client under SAMs severely curtailed their ability to speak freely. Three attorneys declined interviews for fear that such an interview might violate SAMs.

In addition, the authors interviewed one reporter who has covered SAMs, two siblings of individuals held under SAMs, and two people who were convicted and sentenced for violating SAMs.

The authors utilized publicly available information from journalists, human rights reporters, and academics, as well as information available in the SAMs regulations themselves and litigation challenging SAMs conditions. Whenever possible, the authors relied on public findings, though the widespread practice of sealing filings containing information related to SAMs complicated those efforts. The authors contacted officials in the DOJ and the BOP for comments in April 2016 and April 2017, but the agencies did not respond to requests for interviews.

Finally, this report relies on documents obtained through FOIA requests sent by Human Rights Watch and Columbia Law School's Human Rights Institute.¹⁹ These documents have not previously been made public, and are published as an annex to this report.²⁰ The original FOIA requests were submitted in 2012 and sought detailed information about SAMs conditions and individuals subjected to them.²¹ For fourteen months, the BOP neglected its legal duty to respond to those FOIA requests, prompting Human Rights Watch to sue.²² Eventually, litigation forced the BOP to release over a thousand pages of information about SAMs that the BOP had initially refused to release to the public.²³ However, asserting a concern for prisoners' privacy, the BOP succeeded in withholding the prisoners' names, crimes, sentences, religions, nationalities, and associates, as well as the reasons SAMs were imposed and some information detailing the conditions of confinement.²⁴

III. The Development of SAMs

SAMs are a regime of prison restrictions that control a prisoner's access to all forms of human contact and information. They are typically imposed on prisoners already held in solitary confinement – that is, prisoners who are confined alone in a cell for over twenty-two hours per day.²⁵ SAMs intensify that experience and restrict the few remaining rights afforded to prisoners in solitary: the right to communicate with individuals outside of prison, the right to have privileged discussions with an attorney, and the right to acquire information.

The BOP first promulgated the regulations establishing SAMs in 1996 to target prisoners who allegedly posed extraordinary safety threats to the public from within prison, for example, by directing acts of violence against witnesses or others.²⁶ The rules permitted the Attorney General to restrict prisoners' communications that she determined might pose a threat to national security or lead to "acts of violence or terrorism."²⁷

Since 2001, the DOJ has been expanding its use of SAMs while altering the SAMs regulations to allow for longer and more severe restrictions.²⁸ Shortly after the terrorist attacks on September 11, 2001, the BOP placed all prisoners in its custody who were "in any way linked to terrorist activities" into administrative detention as part of an "immediate national security endeavor."²⁹ An October 2001 BOP memorandum noted that "some or all" of the "inmates with identified links to international terrorist organizations possibly involved in recent events" would likely be placed under SAMs.³⁰ It appears that a major criterion for deciding whom to place under SAMs was not the prisoner's demonstrated capacity to communicate dangerous information, but rather the prisoner's religion.³¹

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At the same time, the DOJ amended the SAMs regulations to allow for harsher restrictions and less oversight. First, the new regulations tripled the length of time for which SAMs can be imposed without internal review, from 120 days to one year.³² Second, they relaxed the standards for renewing SAMs. Before 2001, to renew SAMs the DOJ had to demonstrate that the original reason justifying the measures still existed.³³ In the post-9/11 era, the DOJ must only demonstrate that *some* reason exists for the continued imposition of SAMs – even if that reason has nothing to do with the original reason for their imposition.³⁴ Third, the amended regulations clarified that SAMs could be imposed on pre-trial detainees.³⁵ Finally, the post-9/11 SAMs regulations authorize prison officials to monitor communications between a prisoner and his attorney.³⁶

The effect of the amended regulations is to give the Attorney General broad discretionary authority to impose SAMs on prisoners any time allegations of "terrorism" or "national security" arise.³⁷ Prisoners may be subjected to SAMs without any meaningful explanation or hearing regarding what they did or *why* the Attorney General thought the restrictions were necessary.³⁸ They cannot challenge the SAMs designation until *after* they are placed under SAMs. Even then, like all federal prisoners, they risk having their cases dismissed for failure to exhaust the effectively meaningless Administrative Remedy Program.³⁹ Because the very measures they wish to challenge also forbid communication with outside parties, prisoners whose requests to contact attorneys are denied must proceed without the assistance of counsel.⁴⁰ That would be a challenging feat for any layperson, and nearly impossible for someone operating under the debilitating circumstances of solitary confinement.

While SAMs conditions vary slightly from prisoner to prisoner, the standard regulations severely restrict or altogether prohibit contact with other human beings, including other prisoners and visitors.⁴¹ Calls can only be made to approved “immediate family members” and may be limited to one fifteen-minute call per month.⁴² These calls are monitored and recorded by the FBI,⁴³ and they must be in English unless a government-approved translator is available to contemporaneously monitor the call.⁴⁴ In-person visits for SAMs prisoners are similarly monitored and recorded by the FBI, and generally restricted to one approved immediate family member at a time, with fourteen days written notice to the BOP.⁴⁵ Mail is likewise restricted to those family members, with the frequency limited to three 8.5 x 11 pieces of paper “once per week to a single recipient, at the discretion” of the BOP.⁴⁶ This mail must also be copied and analyzed by the FBI before it is delivered.⁴⁷ SAMs prisoners are generally prohibited from communicating with other prisoners within the cellblock,⁴⁸ praying together,⁴⁹ communicating with media organizations in any manner,⁵⁰ and reading or seeing any publication that has not been approved by the BOP.⁵¹ Finally, the government imposes what amounts to a “gag order” on the few people who can contact the prisoner – that is, the prisoner’s attorney and authorized immediate family members – prohibiting them from conveying any message from the prisoner to a third person.⁵² The net result is that SAMs seal off the prisoner from the outside world and shield his treatment from public scrutiny.

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IV. SAMs Impose Sensory Deprivation and Social Isolation

SAMs inflict the most severe form of isolation found in United States federal prisons.⁵³ Imposed on top of solitary confinement, they operate to seal off prisoners' narrow avenues for human contact and communication. Government control pervades every aspect of the prisoner's life, including what others may say about him.

A. Physical Isolation

Prisoners under SAMs are subject to the same baseline of extreme restrictions as federal prisoners held under solitary confinement. Many prisoners currently under SAMs are incarcerated in the Administrative Maximum ("ADX") prison in Florence, Colorado,⁵⁴ where prisoners in the "general population" are held in small cells for twenty-two to twenty-four hours a day. SAMs prisoners at ADX are held in a separate section of the prison called the Special Security Unit ("SSU") or H-Unit.⁵⁵ These prisoners are confined to cells that measure less than eight by ten feet, requiring them to eat their meals within an arm's length of their toilet.⁵⁶ They are typically allowed only ten hours total outside of their cell per week, like general population prisoners.⁵⁷ But this time is also spent alone, either in a small indoor room or in a cage hardly bigger than their cell.⁵⁸ For many prisoners, the cage is too small to run or do anything but walk a few steps in each direction.⁵⁹ For one prisoner, "recreation" meant dribbling a basketball alone in his cage and without a hoop.⁶⁰

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That "recreation" can be cancelled or curtailed at the discretion of BOP officers.⁶¹ When first placed under SAMs at ADX Florence, Nidal Ayyad was limited to five hours of exercise per week, and recreation, as well as showers, were cancelled any time a lieutenant and two officers were not present.⁶² Also at ADX, SAMs prisoner Mahmud Abouhalima was only permitted to go to inside or outside recreation if he submitted to a strip-search by three staff and a Lieutenant, both on the way out to recreation and on the way back to his cell. He refused recreation under such degrading circumstances.⁶³ As a result, SAMs prisoners in the H-Unit at ADX often go days without leaving their cells.⁶⁴

Physical conditions are similarly inhumane at pre-trial facilities where SAMs detainees are held – that is, facilities designed to hold individuals who have been charged, but not convicted, of a crime. Conditions at the Metropolitan Correctional Center ("MCC") in Manhattan, where defendants charged with terrorism-related offenses are often held pre-trial, are particularly harsh. Detainees in the MCC's "10 South," where "high-level" defendants – including those under SAMs – are held, have little natural light and no possibility for outdoor recreation.⁶⁵ "Recreational time" is provided in a closed room identical to the detainee's cell.⁶⁶ Unable to open windows or spend time outdoors, detainees in 10 South have no access to fresh air.⁶⁷

B. Social Isolation

SAMs add to the already draconian conditions of solitary confinement by limiting the prisoner's few means of communicating with other living beings. Whereas people under other forms of solitary confinement may try to maintain some minimal human contact by yelling through the walls or talking while outside their cells, prisoners under SAMs are forbidden from communicating with other prisoners when they are in their cells.⁶⁸ SAMs also cut prisoners off from communication with their loved ones outside of

prison. Federal prisoners in standard solitary confinement may face limits on the number of letters or calls they may make, but they generally retain the ability to correspond with approved contacts outside prison.⁶⁹ Under SAMs, communications with people outside of prison walls are usually restricted to prisoners' attorneys and a few immediate family members, all of whom must be cleared by the U.S. government as a condition of access.⁷⁰

While ADX does not generally restrict the number of letters prisoners in the general population can send,⁷¹ SAMs typically restrict prisoners to writing one letter per week to a single cleared family member.⁷² The letter may not exceed three double-sided sheets of paper.⁷³ Moreover, whereas prison officials check the correspondence of general population prisoners, prison officials forward all SAMs prisoners' mail to FBI agents for analysis and approval.⁷⁴ If foreign translation is required, or there is "reasonable suspicion that a code was used" in the mail, it may take up to sixty days to pass letters along.⁷⁵ These delays have significant implications for prisoners; when one prisoner's father received a terminal cancer diagnosis, his father's goodbye letter took two months to reach him.⁷⁶ Over time, the limitations and delays of mail can degrade the quality of communication between a prisoner and his family to the point where it can feel worthless.

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SAMs include severe restrictions on prisoners' phone use. ADX limits all prisoners to two fifteen-minute non-legal phone calls per month.⁷⁷ Under SAMs, prisoners may be restricted to just one such call.⁷⁸ And, whereas other prisoners may generally call approved contacts, SAMs prisoners are limited to authorized, immediate family members.⁷⁹ In practice, prisoners face numerous obstacles to actually speaking with even these family members because they may call only phone numbers that have been cleared and approved by the FBI.⁸⁰ If a family member gets a new number, they may not be able to communicate for months while the clearance process is ongoing.⁸¹ Further, call times are often limited to hours when loved ones are at work or school and unavailable to talk.⁸² Finally, if a government interpreter is not available, calls must be in English, making communication impossible for family members who do not speak the language.⁸³ For Fahad Hashmi, who was held under SAMs at the MCC for three years pre-trial, and whose SAMs were continued at ADX post-conviction, this restriction prevented his mother, who does not speak English, from speaking with him.⁸⁴

Even when SAMs prisoners manage to reach someone on the phone, they are unable to speak freely. Whereas BOP routinely records prisoner phone calls,⁸⁵ SAMs prisoners' calls are subjected to heightened scrutiny: an FBI agent must contemporaneously monitor calls.⁸⁶ Further, should that agent decide that the conversation is veering into prohibited topics, he may terminate the call immediately, without warning.⁸⁷ Prohibited topics have included questions like "what's going on in politics" or, even, "what's the weather."⁸⁸ This overwhelming surveillance causes both prisoners and family members to avoid any topic that could be construed as remotely political or controversial.⁸⁹ Family conversations become limited to "small talk."

As with phone calls, SAMs prisoners' non-legal in-person visits are sharply curtailed. All prisoners at ADX are denied physical contact during such visits and must speak through a telephone receiver.⁹⁰ Prisoners may be shackled and chained at their wrists, ankles, and to the ground, even though the conversation takes place through a thick glass barrier.⁹¹ But while prisoners in the general population may have three visitors at the same time,⁹² SAMs prisoners are generally restricted to one adult person at a time.⁹³ So, for example, if a prisoner's parents are visiting, one parent must wait outside the visiting booth while the

other is inside. And as with phone calls, if an FBI interpreter is not available, all conversations must be in English, which can be a barrier to communication for prisoners and family members for whom English is a second language or not spoken at all.⁹⁴

During visits with SAMs prisoners, an FBI officer monitors and, at his discretion, censors the conversation.⁹⁵ For example, when one SAMs prisoner attempted to ask his mother and son about whether his cousin and children survived the war in Gaza in 2009, the monitoring staff ordered him and his family to stop talking “politics about Gaza.”⁹⁶ If an FBI officer is not able to monitor the visit – for example, for operational reasons – visits can be cancelled, even at a moment’s notice, after families have traveled across the country to see their relatives.⁹⁷

The visits themselves are almost impossible for most families to undertake. Given ADX Florence’s remote location, relatives may struggle to pay expenses including airfare and lodging.⁹⁸ Although visiting hours ostensibly last from 8 AM to 3 PM, prison staff often delay the families, holding them for hours before finally permitting the visit.⁹⁹ They are also difficult to schedule. SAMs require fourteen-day advance notice for visits, but in reality visits can take months to coordinate because SAMs prisoners cannot use a visiting room when any other prisoner is present.¹⁰⁰ Further, while visiting hours for those in general population at ADX include Saturdays and Sundays, family members may only visit SAMs prisoners on Mondays, Tuesdays, and Wednesdays, excluding holidays.¹⁰¹ This forces family members to miss work and children to miss school, and entails considerable financial sacrifices in order to see their incarcerated loved one.¹⁰² Given all these barriers, Nidal Ayyad considers himself lucky when he is able to see his mother and son once a year.¹⁰³

Given all these barriers, Nidal Ayyad considers himself lucky when he is able to see his mother and son once a year.

For Mahmud Abouhalima, SAMs have severed his relationships with family members. Three of his uncles, his grandfather, his aunt, and his uncle’s daughter passed away since his incarceration. Since his SAMs prohibited him from contacting anyone outside of his immediate family, Abouhalima could not send condolence letters to his extended family following their deaths.¹⁰⁴ And because the family members he could contact were sworn to secrecy under the SAMs conditions, he was prohibited from even passing on his verbal condolences through them.¹⁰⁵

Phone calls are also exceedingly difficult to schedule. The prison gives Abouhalima the date and time when he can make a call without any prior arrangement with his immediate family. If no one answers at the assigned time, he loses his single phone call for the month.

The FBI never approved Abouhalima’s brother’s work phone number after he got a new job in a bakery. After a number of unsuccessful challenges to the rejection of his brother’s work phone, Abouhalima was only able to speak with that brother once in the three years that followed.¹⁰⁶

Abouhalima’s daughter’s phone number was denied approval for nearly six months, effectively prohibiting father-daughter communication for that time period.¹⁰⁷

Since his family lives thousands of miles away from ADX, in-person visits are burdensome and rare. Abouhalima’s family could only visit him three times in his first eight years at ADX.¹⁰⁸ Shackled and separated from his family by thick glass barriers during the precious few visits, Abouhalima reflected, “It feels like we are still living in a medieval period, where the human aspect of contact is not there at all.”¹⁰⁹

SAMs limits on family communication directly harm a prisoner's loved ones. Mariam Abu-Ali's brother Ahmed has been under SAMs continuously since 2005, mostly at ADX. She described her family's experience with SAMs:

Since the beginning of Ahmed's detention by U.S. authorities in 2005, he was immediately put under SAMs and held in solitary confinement. He has been in these conditions continuously since then. His SAMs seal him off as much as a person could be isolated within a prison, and severely limit our communication with him. The measures have devastated our family in every way. Ahmed's short, unscheduled phone calls have had my mother sitting by the phone every day for years, and only recently, every Tuesday and Thursday, awaiting his call. Due to SAMs, he is permitted only between two and four 15-minute phone calls a month, so he calls my parents. Effectively, that means that my older brother and I can no longer talk to him, unless we are lucky enough to be visiting home on the right Tuesday or Thursday.

In life events, the happy and the sad, we feel the heavy weight of Ahmed's absence. My brother and I have gotten married, and while it was painful enough that Ahmed could not partake in these milestones, it remains especially painful that Ahmed cannot congratulate or even say hello to his in-laws because they are not considered immediate family, because the SAMs only allow Ahmed to communicate with his parents and siblings. He has also not been able to talk to his grandfather, aunts, or uncles, four of whom passed away without the chance to say goodbye. When my grandfather became terminally ill in 2006, his dying wish was to talk to Ahmed, which we could not fulfill, due to SAMs.

Since Ahmed's detention in 2005, he has not been permitted a single contact visit with us. I was fourteen years old when Ahmed was detained. Now 28 years old, I have been denied the chance to ever hug my brother in all of those years. My family and I rarely get to have even our noncontact visits because he is so far away from home, at ADX in Florence, Colorado.¹¹⁰

C. Spiritual Isolation

Religious practice – one of prisoners' few methods of coping – is sharply restricted under SAMs.¹¹¹ SAMs regulations explicitly prohibit group prayer.¹¹² That ban is especially damaging to Muslims, as Islam requires that all able-bodied men attend a congregational Friday prayer, which includes a religious sermon.¹¹³ This is in addition to other religious harassment Muslim prisoners under SAMs have reported experiencing. Uzair Paracha, who was held under SAMs pre-trial at MCC's 10 South, alleged that guards purposefully targeted Muslims there by blasting the radio or delivering food while Muslim prisoners were praying, knowing they could not say anything during prayer.¹¹⁴

ADX restricts access to chaplains for all prisoners incarcerated there. A 2008 court agreement calls for an imam to visit ADX four times a month to speak with prisoners, but prison attorneys report that visits occur much less frequently in practice.¹¹⁵ When the visits do take place, the prisoner and imam must speak through a steel door, requiring them to speak so loudly that private consultations become impossible.¹¹⁶ Advocates have reported that, while Christian priests or chaplains are generally allowed beyond the solid steel door to pray next to the prisoner in the cell, Muslim chaplains are typically denied this possibility.¹¹⁷

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Under SAMs, religious visitations at ADX are even more heavily restricted. The chaplain and SAMs inmate can never meet in private, as SAMs require an FBI agent or BOP official to monitor all conversations.¹¹⁸ And they are prohibited from communicating in a language other than English unless a government-approved translator is “readily available.”¹¹⁹ Under such restrictions, Nidal Ayyad only received two imam visits a month, and found discussion of personal matters altogether impossible with so many onlookers present.¹²⁰ Muhanad al-Farekh, currently held at MCC, has only had one fifteen-minute conversation with an imam – at the insistence of counsel – despite his almost two-year detention.¹²¹

D. Information Isolation

SAMs aggravate prisoners’ social isolation by restricting their access to information about current events and the world around them.¹²² The BOP and FBI censor all magazines and newspapers before a SAMs prisoner may receive them.¹²³ Officers have broad discretion to redact information that they deem “detrimental to national security,” “good order,” or “discipline of the institution.”¹²⁴ For Fahad Hashmi, this censorship regime allowed him to receive newspapers only after a thirty-day delay, with any news covering Muslim majority countries redacted.¹²⁵ Books are censored under similar guidelines.¹²⁶ For instance, the BOP initially denied Ahmed Omar Abu Ali’s request for President Obama’s two memoirs.¹²⁷ As the case of Abouhalima demonstrates, censors tend to interpret these guidelines broadly.

SAMs aggravate prisoners’ social isolation by restricting their access to information about current events and the world around them.

For several years at ADX, Abouhalima was denied access to any periodicals, magazines, Arabic newspapers, books, or any other form of news other than the *Denver Post* and *USA Today*.¹²⁸ It was not until 2008, after nearly three years under SAMs, that Abouhalima was able to receive “daily newspapers with just a few days’ delay.”¹²⁹ However, the FBI continued to remove all articles relating to politics, and issues of *The Nation*, *Atlantic Monthly*, and *Time* were reduced to fifteen pages; even the world almanac was prohibited by the FBI for containing information that could be used for terrorism.¹³⁰

Prisoners under SAMs are wholly prohibited from communicating with “any member or representative of the news media.”¹³¹ Further, the few individuals granted access to SAMs prisoners are “gagged” from repeating the prisoner’s words to any third party.¹³² Thus, while some Guantánamo prisoners and their lawyers have managed to publish censored versions of their experiences in Guantánamo Bay,¹³³ SAMs prisoners and their advocates would face criminal charges for doing the same.¹³⁴ So while prisoners under SAMs may receive some information about the outside world – albeit censored and outdated – they may not impart any information, no matter how innocuous, in response.

The DOJ recognizes that this level of censorship is difficult to justify. When the DOJ imposes SAMs on a prisoner, an Assistant Attorney General sends a letter to the BOP explaining the conditions and reasons for that particular prisoner’s SAMs. In every letter that the BOP has released, the DOJ has conceded that “eliminating the inmate’s access to media may be an excessive measure except in the most egregious of circumstances.”¹³⁵ But in those letters, the DOJ never explains why an individual case constitutes “the most egregious of circumstances.” Instead, the DOJ provides a boilerplate explanation that restricting prisoners’ access to media may help to “interrupt communication patterns the inmate may develop with the outside world.”¹³⁶ The DOJ does not explain how reading an uncensored version of *Time* magazine might allow prisoners to develop such “communication patterns.”

V. SAMs Constitute Inhumane Treatment and May Amount to Torture

There is broad – and growing – consensus that the standard conditions of prolonged solitary confinement cause serious and often indelible harm after just weeks.¹³⁷ The United Nations Standard Minimum Rules for the Treatment of Prisoners or “Mandela Rules,” named for Nelson Mandela, define “prolonged” as beyond fifteen days, after which continued isolation constitutes cruel, inhuman and degrading treatment and, under some conditions, torture.¹³⁸ For prisoners under SAMs, isolation lasts at least a year and typically far longer. A 2013 count showed that eighty-two percent of prisoners placed under SAMs were under these restrictions for more than a year.¹³⁹ Of those prisoners, thirteen had lived under SAMs for more than a decade.¹⁴⁰

A 2013 count showed that eighty-two percent of prisoners placed under SAMs were under these restrictions for more than a year.

Scientific studies have concluded that prolonged isolation causes severe physical disease, including chronic headaches, digestive problems, dizziness, and even heart palpitations.¹⁴¹ One study of prisoners in solitary confinement at ADX found that all prisoners interviewed exhibited physical symptoms “that are well known in the literature to be caused by isolative confinement.”¹⁴² In particular, the study found that every prisoner exhibited memory problems and extreme lethargy, and most prisoners suffered from chronic insomnia and headaches.¹⁴³ Other studies demonstrate that the complete absence of stimuli experienced in solitary confinement causes structural changes to the brain.¹⁴⁴

Uzair Paracha was held in isolation for two-and-a-half years pending trial. He reported that, during that time, he and other prisoners suffered a severe weakening of their eyesight, brought about by “having [their] entire world just a few feet away.”¹⁴⁵ Paracha’s physical coordination also deteriorated, making it difficult to walk on stairs, and he developed breathing problems, particularly when he slept.¹⁴⁶

Additional studies demonstrate that solitary confinement also causes severe psychological damage. Symptoms of that damage include anxiety, panic, rage, loss of control, paranoia, and hallucinations.¹⁴⁷ Solitary can also drive prisoners to self-mutilation. A 2014 study found that prisoners in solitary confinement in New York City jails were nearly seven times more likely to harm themselves than those in general population.¹⁴⁸ Rates of suicide among prisoners in solitary are up to three times higher than within the general population.¹⁴⁹

These symptoms are widespread among prisoners under solitary confinement. In one study of pathology among solitary prisoners, every symptom of psychological distress measured was present in more than half of the prisoners interviewed, and some symptoms were present in nearly all.¹⁵⁰ There is “not a single published study of solitary or supermax-like confinement in which nonvoluntary confinement lasting for longer than 10 days . . . failed to result in negative psychological effects.”¹⁵¹

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These findings have prompted a nationwide movement to end solitary confinement,¹⁵² and they moved U.S. Supreme Court Justice Anthony Kennedy to declare in 2015 that “research still confirms what [the Supreme] Court suggested over a century ago: Years on end of near-total isolation exact a terrible price.”¹⁵³

Indeed, the price of long-term isolation includes prisoners' basic ability to relate to other humans.¹⁵⁴ A leading scholar on solitary confinement has used the term "social death" to describe the phenomenon wherein prisoners under prolonged solitary confinement lose the "ability to function as social beings."¹⁵⁵

Senior corrections officials have recognized the harmful effects of solitary confinement and called for reform:

- After spending just twenty hours in solitary confinement, the head of Colorado's Department of Corrections observed that maintaining his sanity "would be a battle [he] would lose."¹⁵⁶
- New York's correction commissioner found that solitary confinement at Rikers Island led to increased violence, and that the program in general "seem[ed] to defy logic."¹⁵⁷
- Mississippi's former commissioner of corrections publicly criticized that state's widespread use of solitary: "If you treat people like animals, that's exactly the way they'll behave."¹⁵⁸
- A former warden at ADX described the prison he ran: "This place is not designed for humanity. . . . It's not designed for rehabilitation."¹⁵⁹

Solitary confinement also exacerbates pre-existing forms of mental illness.¹⁶⁰ For this reason, the American Psychiatric Association has recommended against the use of solitary confinement for prisoners with mental illness.¹⁶¹ Even the BOP has recognized the precarious situation of mentally ill prisoners in solitary confinement: in a class-action lawsuit on behalf of prisoners with mental illness at ADX that the BOP settled in 2016, the BOP admitted "the need for new policies and practices that will better humanize the lives of those confined at ADX with mental illness."¹⁶² Yet people suffering from mental illness continue to languish in solitary confinement and under SAMs.¹⁶³

Even the BOP has recognized the precarious situation of mentally ill prisoners in solitary confinement.

Jeremy Pinson was sent to ADX Florence and held under SAMs following convictions for making false statements, threatening a juror, and threatening the president.¹⁶⁴ Pinson's threat to the president consisted of a letter to then-President Bush stating, "YOU WILL DIE SOON! DIE BUSH DIE!"¹⁶⁵

Pinson has been diagnosed with bipolar disorder, schizophrenia, and other psychiatric disorders, as well as severe and chronic PTSD resulting from a childhood of abuse and neglect.¹⁶⁶ While detained pending trial, Pinson attempted suicide several times.¹⁶⁷

Despite a documented history of severe mental illness, Pinson was sent to ADX and subjected to SAMs.¹⁶⁸ Shortly thereafter, Pinson "began to unravel . . . with increasing symptoms of psychiatric distress."¹⁶⁹

The effects of long-term solitary confinement mirror the effects of other forms of torture: anxiety, panic, paranoia, hallucinations, self-mutilation, and suicide.¹⁷⁰ When those symptoms develop, and when the purpose of solitary confinement is to coerce, punish, or discriminate, solitary confinement is torture.¹⁷⁰

In fact, prolonged isolation was a primary technique that the CIA employed in its "enhanced interrogation program" after 9/11 under the Bush administration.¹⁷² In addition to the more infamous techniques

such as waterboarding, CIA officers used isolation to “break” detainees by inducing a state of “learned helplessness,”¹⁷³ a condition in which “a subject is so broken he will not even attempt escape if the opportunity presents itself.”¹⁷⁴ CIA psychologists theorized that “inducing such a state could encourage a detainee to cooperate and provide information.”¹⁷⁵

The effects of long-term solitary confinement mirror the effects of other forms of torture: anxiety, panic, paranoia, hallucinations, self-mutilation, and suicide.

If “breaking” detainees was the goal, the tactics were effective. CIA officers noted that isolation had rendered one detainee “clearly a broken man” and “on the verge of complete breakdown.”¹⁷⁶ After assessing a prisoner who had been held in “social isolation” for two and a half years, a CIA psychologist concluded that isolation was having a “clear and escalating effect on [his] psychological functioning.”¹⁷⁷ Other psychologists “identified the lack of human contact experienced by detainees as a cause of psychiatric problems.”¹⁷⁸ Thus, while waterboarding and cramped confinement are frequently touted as the most extreme forms of CIA torture, prolonged isolation may have been just as damaging.

CIA officers noted that isolation had rendered one detainee “clearly a broken man” and “on the verge of complete breakdown.”

Jose Padilla first experienced total sensory and social deprivation while in the custody of the Department of Defense at the naval brig in South Carolina. For nearly three years, Padilla lived under SAMs-like conditions and had no human contact, apart from his interrogators. In a declaration responding to a habeas challenge brought by Padilla’s lawyers, Vice Admiral Lowell Jacoby, director of the Defense Intelligence Agency (“DIA”), publicly declared that isolation was necessary to establish a detainee’s “dependency” upon his interrogators.¹⁷⁹ Jacoby argued that providing Padilla the basic constitutional right of access to counsel would “create expectations by Padilla that his ultimate release may be obtained through an adversarial civil litigation process” – a process guaranteed to him by the Constitution – and thus “break” the dependency that interrogators sought to create.¹⁸⁰

By the time the government ultimately transferred Padilla to civilian custody for prosecution in 2006, psychiatric experts found that he suffered from post-traumatic stress disorder as a result of prolonged isolation.¹⁸¹ One military interrogator described Padilla as “a piece of furniture.”¹⁸²

Padilla was transferred to ADX upon conviction in civilian court and placed under SAMs. His treatment as a prisoner in the SAMs unit largely mirrors his conditions in military custody as an alleged enemy combatant.¹⁸³

In sum, robust scientific and anecdotal evidence confirms that long-term solitary confinement causes severe physical and psychological damage. Given that SAMs create isolation even *more* extreme than that of standard solitary confinement, the substantial risks of permanent harm are only heightened.

VI. SAMs Coerce Pre-Trial Detainees into Pleading Guilty

The DOJ inflicts these draconian SAMs restrictions on individuals before they are ever convicted of a crime. According to the former U.N. Special Rapporteur on Torture, “the practice of solitary confinement during pretrial detention creates a de facto situation of psychological pressure which can influence detainees to make confessions or statements against others and undermines the integrity of the investigation.”¹⁸⁴ Research has shown that people detained prior to trial are more likely to plead guilty than those who are released pending trial.¹⁸⁵ SAMs exacerbate the already coercive effects of pre-trial detention by depriving prisoners of virtually all contact with other living beings. And they may remain under these restrictive conditions for months or even years pending trial.

The coercive nature of these harsh conditions is no accident: experience shows that the DOJ uses total isolation as a tool to break people, just as the CIA did during its foray into detention.¹⁸⁶ SAMs, says an attorney who has represented numerous clients under these restrictive measures, are “meant to bludgeon people into cooperating with the government, accepting a plea, or breaking their spirit.”¹⁸⁷ Another attorney concurred, noting that “everyone knows” that solitary confinement is disorienting and dehumanizing; “this is no surprise and this is calculated.”¹⁸⁸ The sister of a prisoner under SAMs opined that these measures appear to be “intentionally used on certain people to break them; to make the prisoner and his family’s lives as difficult as possible.”¹⁸⁹

SAMs, says an attorney who has represented numerous clients under these restrictive measures, are “meant to bludgeon people into cooperating with the government, accepting a plea, or breaking their spirit.”

This coercion undermines the most basic principle of the U.S. criminal justice system: defendants are presumed innocent until proven guilty.¹⁹⁰ As the cases of Fahad Hashmi, Uzair Paracha, and Mohamed Warsame illustrate, the government sends a clear message to prisoners accused of crimes related to terrorism: Waive your Fifth Amendment right not to incriminate yourself, or face the consequences of SAMs.

Fahad Hashmi was placed under SAMs five months after he was extradited to the U.S. to face charges, around the time he rejected an offer from the Bush administration to cooperate. While the DOJ cited Hashmi’s “proclivity for violence” as the reason for imposing SAMs, Hashmi had no criminal record, had never been charged with committing or assisting any act of violence, and had no direct links to terrorist groups.¹⁹¹ His pre-SAMs detention, both in the U.S. and in the U.K. before his extradition, had also been without incident.

Hashmi spent three years under solitary confinement and SAMs at the MCC before finally pleading guilty in the face of decades in prison, in exchange for a fifteen-year sentence. The government, which had insisted throughout Hashmi’s pre-trial detention that he must be kept under these extreme measures, removed the SAMs the year after he pleaded guilty. U.N. Special Rapporteur on Torture Juan Méndez found that Hashmi’s SAMs were “no more than a punitive measure that is unworthy of the United States as a civilized democracy.”¹⁹²

Uzair Paracha was placed under SAMs nine months after his arrest, when he refused to accept a plea deal.¹⁹³ Under the terms of his pre-trial SAMs, Paracha was prohibited from speaking with anyone inside the prison but his guards. After he was convicted, the government permitted him to communicate with other prisoners.¹⁹⁴ “I faced the harshest part of the SAMs while I was innocent in the eyes of American law,” Paracha wrote.¹⁹⁵

Mohammed Warsame spent five and a half years under SAMs pending trial.¹⁹⁶ In 2003, Warsame was picked up by federal agents and interrogated about terrorism-related activities.¹⁹⁷ After Warsame refused to cooperate, he was arrested, denied bail, and placed under SAMs.¹⁹⁸ The government vigorously fought Warsame’s five motions to lift his harsh conditions of confinement, claiming “[t]here is every reason to believe that if the defendant were moved to ‘a more normal pretrial detention facility,’ the Marshals Service would not be able to adequately limit the defendant’s ability to communicate with and contact known and suspected terrorists.”¹⁹⁹ Then in 2009, the government offered to drop four of Warsame’s five charges if he pleaded guilty to the remaining count of material support and agreed to immediate deportation following two more years in prison.²⁰⁰ The government’s newfound willingness to end Warsame’s confinement – and allow open communication – suggests that it used SAMs to coerce Warsame into accepting a plea offer.²⁰¹ Indeed, after Warsame accepted the plea deal, the judge stated that “the Court has seen nothing in the record or the last five years of proceedings demonstrating that Warsame posed an immediate danger.”²⁰²

VII. SAMs Prevent Prisoners and Their Attorneys from Effectively Advocating in Court

Defendants who decide to fight their charges in court face barriers created by SAMs every step of the way. The deleterious psychological effects of SAMs prevent defendants from participating in their own defense. Defendants and attorneys face difficulties forming productive relationships under the severe restrictions and monitoring of SAMs. And the gag orders that accompany SAMs have a chilling effect on lawyers, inhibiting both investigation and public advocacy. The gag orders also prevent the defendant from speaking publicly and the press from directly investigating, creating a system where the government effectively controls the narrative surrounding the case. These obstacles undermine basic constitutional protections owed to criminal defendants.

One attorney described how SAMs “eliminate [defendants] as participants in their defense.”

SAMs deprive defendants of the ability to participate in their own defense. One attorney described how these measures “dehumanize defendants and create a situation where they cannot exist in a defiant posture [to] fight the case,” and ultimately “eliminate them as participants in their defense.”²⁰³ This is particularly problematic, the attorney said, with respect to a defendant’s right to testify: “The first time [a defendant] talk[s] to anyone besides me after two and a half years in solitary confinement is the jury. There is no way to prepare [him] for it. It really discourages the client from testifying.”²⁰⁴

Years of isolation and sensory deprivation rendered Jose Padilla effectively unable to communicate with his attorneys, let alone strategize about his case. A psychological evaluation revealed that Padilla could not “assist his attorneys in reviewing the evidence provided by the government,” and was unable to even “consider watching the tapes [of his interrogation] or reviewing the evidence against him.”²⁰⁵ When reminded of the importance of reviewing the evidence in order to fight the case, Padilla “plead[ed] with his attorneys not to ‘make him’ look at or listen to the material.”²⁰⁶ Moreover, his trauma has resulted in memory gaps, rendering him unable to provide vital information.²⁰⁷

The psychologist concluded that Padilla suffered from “post traumatic stress disorder, complicated by the neuropsychiatric effects of prolonged isolation” and as such lacks the capacity to assist in his own defense.²⁰⁸

Further, SAMs “can destroy or even inhibit the birth of a trusting relationship” between a defendant and his attorney.²⁰⁹ The SAMs regime creates a climate of fear and suspicion. Particularly when attorneys are appointed instead of sought out and hired, they face challenges gaining a client’s trust. Many defendants understandably fear that their appointed attorneys are part of the system that has harmed them since their arrest: An unknown person who may look and dress like the government lawyers approaches the client and says that everything they say will be monitored; the lawyer cannot reveal anything the defendant tells him, even if it will help his case; and the client cannot talk to anyone but his immediate family.²¹⁰ As a result, SAMs “suggest to the client that [defense attorneys] are under the government’s control and are therefore untrustworthy.”²¹¹

Defendants and their attorneys must operate in an environment where everything they say, write, or signal may be monitored by the government.

Even when attorneys successfully establish a relationship with the client, SAMs chill candid conversations about trial strategy. Under certain circumstances, SAMs regulations permit monitoring of attorney-client communications.²¹² Accordingly, defendants and their attorneys must operate in an environment where everything they say, write, or signal may be monitored by the government. While SAMs regulations purportedly create a firewall whereby no official involved in prosecuting a case can listen to these privileged conversations,²¹³ attorneys' conversations are chilled nonetheless.²¹⁴

Many defense attorneys interviewed for this report operated under the assumption that all of their conversations were seen and heard.²¹⁵ Some lawyers avoid speaking with clients on the phone because they worry that listeners will hear confidential information.²¹⁶ Even in-person visits are not necessarily secure. In MCC, cameras mounted to the walls in attorney-client visiting rooms stare down throughout the visit, creating the appearance – if not the reality – that interactions are constantly watched.²¹⁷ This monitoring, whether perceived or actual, leads to self-censorship. Lawyers avoid certain questions, fearing they will tip off the government about their trial strategy, and defendants withhold information that could help with their defense.

Further, conditions in facilities housing SAMs prisoners impede meaningful access to counsel. For instance, in MCC's 10 South attorneys and clients are placed in separate cells during visits, divided by a mesh grate that makes sharing documents difficult and making eye contact impossible.²¹⁸ As a result of all of these circumstances, "[p]otential witnesses will not be identified, documents will not be located, and the entire defense investigation of the case will be limited to those discovery materials produced by the government."²¹⁹

Outside of attorney-client communications, SAMs prevent lawyers from effectively investigating their cases. As an initial matter, because of the huge toll SAMs exact on defendants, attorneys often need to expend much of their limited resources fighting their client's conditions of confinement.²²⁰ As a result, they have less time to spend preparing a substantive defense to the charges.²²¹ When they do investigate, attorneys face high barriers in building trust with witnesses.²²² Many people – not unfairly – assume that the lawyer is "in cahoots with the FBI" because the attorney cannot reveal any information about her client, and all of the attorney's conversations regarding the client are monitored.²²³ One mitigation specialist described speaking with witnesses close to the defendant: The "first thing they ask is 'How's he doing? What did he say?'"²²⁴ But SAMs prohibit her from answering that basic question. This inability to speak freely "kills the relationship."²²⁵

The consequences of [violating SAMs] are so significant and frightening that most lawyers err on the side of caution even with things that would be beneficial to their clients.

Additionally, SAMs create an uneven playing field, eroding the right to a fair trial. SAMs prevent the defendant and his advocates from educating the public about the defendant's side of the case, because in doing so the attorney risks violating the SAMs prohibition against relaying information from the prisoner to third parties and the media.²²⁶ The government, however, is able to selectively leak information about the defendant's purported dangerousness or supposed lack of remorse. As a result, media coverage about SAMs defendants is one-sided. A mitigation specialist described one situation in which a client had expressed remorse in two written statements, but the prosecution invoked SAMs regulations to refuse the attorney's requests to release those statements. This decision "had a huge impact on the case."²²⁷

The risk of prosecution for violating SAMs leads attorneys to self-censor. As one attorney stated:

The lines are not clearly drawn, so it ends up sort of amplifying the fear because it's hard to know whether you're going to say something that is going to sort of trip someone's wire. The consequences of [violating SAMs] are so significant and frightening that most lawyers err on the side of caution even with things that would be beneficial to their clients.²²⁸

Those consequences include criminal prosecution. Defense attorney Lynne Stewart was sentenced to a decade in prison for revealing her client's statements to the press, in violation of his SAMs.²²⁹ Multiple attorneys interviewed for this report described feeling wary of representing people under SAMs in the wake of Stewart's conviction.²³⁰ Stewart's prosecution "has had a chilling effect on lawyers throughout the country; many will not take these terror cases, and those who do operate with excessive caution about what they can say in public and about whom they consult for legal strategy."²³¹

Beyond attorneys, other members of a legal team also face the threat of prosecution. Mohamed Yousry, the government-appointed interpreter who translated communications between Lynne Stewart and her client, was also convicted of violating SAMs – not for any public disclosure, but rather for translating the client's letters and statements.²³² As a translator, Yousry was not even asked to sign the SAMs order: from his understanding, the lawyers would tell him what communications violated the law. Yet he was prosecuted along with Stewart and sentenced to sixteen months in prison.²³³ Once an adjunct lecturer at the City University of New York completing his doctoral dissertation, Yousry has been unable to find a job since his release from prison.²³⁴

Finally, SAMs can prevent prisoners from bringing legal challenges after conviction. Because convicted prisoners are not guaranteed the Sixth Amendment right to counsel beyond the first appeal,²³⁵ an unrepresented convicted prisoner's only two options are to represent himself or reach out to an attorney. But as described above, SAMs often so psychologically damage defendants that they cannot represent themselves. And because SAMs prohibit prisoners from writing to anyone who is not on their list of approved contacts, it can be nearly impossible to find a lawyer.²³⁶ Left to fend for themselves from the confines of their cell, prisoners often lack any meaningful administrative remedy and face significant obstacles to judicial review.

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Abouhalima filed an administrative remedy request concerning his access to lawyers, asking "how I could find a lawyer willing to accept my case without first contacting that lawyer and letting him or her know about me and that case."²³⁷ The BOP refused to modify its approach, claiming the Attorney General imposed the restrictions and BOP "merely implemented them."²³⁸ Abouhalima was ultimately allowed to submit names of potential advocates, but he was only permitted to contact up to ten lawyers through mail that would be copied and analyzed by the FBI.²³⁹

An attorney described this situation from her perspective: "You're putting me as a lawyer in a position of either not being able to respond to this person in the way he deserves because the condition is that the communication is monitored, or just not respond at all," isolating the prisoner even more.²⁴⁰

Even those prisoners who secure a lawyer risk having their cases dismissed in court if the prisoner has not “exhausted” the BOP’s Administrative Remedy Program (“ARP”).²⁴¹ Exhausting the ARP requires prisoners to (1) raise the issue of concern informally with BOP staff,²⁴² (2) wait for the staff’s response,²⁴³ (3) obtain and file a Remedy Form,²⁴⁴ (4) wait for the prison’s response to the request,²⁴⁵ (5) obtain and file a Regional Appeal Form,²⁴⁶ (6) wait for the BOP Regional Office’s response,²⁴⁷ and (7) obtain and submit a Central Office Appeal Form.²⁴⁸ BOP officials may return without response any filing that fails to adhere to extensive regulations concerning form and timing.²⁴⁹ Attorneys may not submit these complicated requests or appeals on the prisoner’s behalf.²⁵⁰

As the case of Mostafa Kamel Mostafa demonstrates, it is nearly impossible for some SAMs prisoners to follow this process. Thus, while the ARP ostensibly affords prisoners an opportunity to redress issues related to their confinement,²⁵¹ in practice it can prevent courts from conducting any substantive review of SAMs conditions. Fortunately, U.S. district courts are increasingly holding that the exhaustion requirement does not apply to SAMs challenges, at least when the challenge relates to conditions that impede the prisoner’s ability to prepare his defense.²⁵²

Mostafa Kamel Mostafa is a prisoner with a physical disability – the amputation of both arms – who has been living under SAMs since early 2013.²⁵³ For years he has been requesting ARP review of his conditions, with little success.²⁵⁴ For instance, on at least one occasion, a BOP official returned his request for administrative review on the grounds that the carbon copy of Mostafa’s request was insufficiently clear.²⁵⁵ The writing on the carbon copy was faint because Mostafa could not press hard while writing the request, due to the inadequacy of his BOP-issued prosthetic device – the very subject of Mostafa’s previous ARP requests.²⁵⁶

When Mostafa’s defense counsel wrote to the Warden concerning his conditions, she was instructed that Mostafa should seek review through the ARP.²⁵⁷

VIII. SAMs Erode Democratic Accountability

SAMs undermine the fundamental principle of democratic accountability by silencing those who have experienced the harms of SAMs. Prisoners themselves are categorically prohibited from speaking to reporters,²⁵⁸ and the SAMs gag order allows the government to criminally prosecute other individuals for repeating anything a SAMs prisoner has said.²⁵⁹ Consequently, family members of SAMs prisoners often adopt a policy of declining interviews with journalists altogether.²⁶⁰ The same is true for lawyers, particularly following the prosecution of Lynne Stewart and her interpreter.²⁶¹ The public must, then, rely on the government for any information concerning SAMs and those subjected to them. That information is sparse – it took three years of litigation for Human Rights Watch to get basic information about SAMs conditions.²⁶²

The SAMs gag order allows the government to criminally prosecute other individuals for repeating anything a SAMs prisoner has said.

Since only one side has the power to speak, citizens are denied the full picture of what their government is doing in their name.²⁶³ Claims of psychological damage, abuse, and discrimination cannot be effectively investigated, and the Attorney General's justifications for SAMs cannot be tested. This situation allows the government to selectively release information to exaggerate the effectiveness of particular policies while suppressing evidence of those policies' failures.²⁶⁴ It allows prosecutors to vilify SAMs detainees in public but it prevents defense attorneys from revealing the defendant's perspective. As was the case with the CIA's foray into secret detention,²⁶⁵ it is a situation ripe for abuse.

In September 2013 the U.K.-based organization Cage Prisoners reported that Mahdi Hashi, a former British citizen of Somali origin who was detained under SAMs for three years pending trial at MCC, went on a hunger strike to protest his conditions of confinement.²⁶⁶ Hashi was reportedly hospitalized with jaundice and near-liver failure.²⁶⁷

Journalists could not verify this claim because the people with access to this information – Hashi, his family, and his U.S. lawyer – were prohibited from talking under the SAMs. And prosecutors and prison administrators declined to comment.²⁶⁸ Reporters have not been able to establish whether the hunger strike occurred, how long it lasted, or whether Hashi, like many detainees at Guantánamo Bay, was being force-fed.²⁶⁹ Even his former lawyers in the U.K. could not know his condition. Thus, whereas hunger strikes and brutal force-feeding at Guantánamo Bay sparked a national debate,²⁷⁰ similar protests by SAMs prisoners and the treatment they may suffer as a result cannot be reported and have been largely invisible.

IX. SAMs Invite Discrimination

The lack of process and transparency surrounding SAMs allows for their discriminatory application against disfavored minorities. Indeed, the limited information available suggests that such discrimination is already occurring. Due to the extreme secrecy surrounding SAMs, the official list of individuals held under these measures remains a carefully guarded BOP secret. Moreover, the BOP refuses to divulge SAMs prisoners' religion on the dubious grounds that such information would interfere with the prisoners' privacy rights.²⁷¹ However, the available evidence suggests that the government currently uses SAMs disproportionately against Muslims.

Out of the thirty-nine current or former SAMs prisoners the authors identified, at least twenty-eight are Muslim.

Specifically, the authors have compiled through public sources a list of all individuals known to have been incarcerated under SAMs. Out of the thirty-nine current or former SAMs prisoners the authors identified,²⁷² at least twenty-eight are Muslim.²⁷³ Virtually every attorney the authors interviewed confirmed this high rate of Muslims under SAMs.

In addition, FOIA documents reveal that a disproportionately high percentage of prisoners in Communication Management Units ("CMUs") are Muslim.²⁷⁴ CMUs are federal prison units that share some key elements of SAMs – constant monitoring and heavy restrictions on prisoners' communications with the outside world – but they differ in that prisoners are not subjected to solitary confinement.²⁷⁵ While Muslim prisoners constitute only six percent of the total federal prison population,²⁷⁶ 2013 data suggests that they comprised 50% of the CMU population in that year,²⁷⁷ and 2014 data indicates that the percentage rose to 60% the following year.²⁷⁸

Both SAMs and CMUs are part of a larger "counterterrorism" political framework that has targeted Muslims since 9/11. For example, shortly after the 9/11 attacks, the Attorney General authorized the arrest of "any Muslim or Arab man encountered during the investigation of a tip received in the 9/11 terrorism investigation" who had violated the terms of his visa, and instructed officials to hold all such individuals until the FBI "affirmatively cleared them of terrorist ties."²⁷⁹ Pursuant to these directives, government officials rounded up more than 750 Muslim men and detained them for months while subjecting them to solitary confinement and physical abuse.²⁸⁰ In early 2002, the Bush administration began labeling certain Muslims "enemy combatants," denying them legal protections, and detaining them at Guantánamo Bay, a prison reserved for Muslim men and boys.²⁸¹ While public outrage began to build over Guantánamo Bay, however, the government developed what is often referred to as "Guantánamo North" – special units and regimes within domestic prisons that are subject to a separate system of justice, such as CMUs and SAMs.²⁸²

Concerns about the discriminatory application of federal laws have escalated in the early months of the Trump administration.

Concerns about the discriminatory application of federal laws have escalated in the early months of the Trump administration. President Trump has openly supported discrimination against Muslims,²⁸³ and senior advisors in the administration have publically stated they do not consider Islam a religion.²⁸⁴ After only eight months in office, the Trump Administration has signed two executive orders barring Muslim immigrants and refugees from particular countries from entering the United States that have been rejected by federal courts as a likely violation of the Establishment Clause,²⁸⁵ and taken steps to

change the government's "Countering Violent Extremism" program to focus only on "Islamic Extremism," removing right-wing extremist groups from its mandate.²⁸⁶ Attorney General Jeff Sessions, who is in charge of placing people under SAMs, was one of the first policymakers to publically defend Trump's Muslim ban, and has repeatedly spoken out against immigration from Muslim countries.²⁸⁷

President Trump has also deemed "criminal" or "dangerous" other groups including Mexican immigrants,²⁸⁸ undocumented people,²⁸⁹ and political protestors.²⁹⁰ And President Trump has been unabashed in his rejection of transparency – he regularly accuses and punishes news organizations that are critical of him.²⁹¹ Given the Trump administration's blatantly discriminatory statements and policies, and penchant for opacity, there is a high risk that the Executive will target disfavored individuals and groups with its discretionary power to impose SAMs.

Given the Trump administration's blatantly discriminatory statements and policies, and penchant for opacity, there is a high risk that the Executive will target disfavored individuals and groups with its discretionary power to impose SAMs.

X. SAMs Violate U.S. and International Law

The harsh conditions imposed on SAMs prisoners violate fundamental rights guaranteed by the U.S. Constitution and international law. The prolonged isolation and sensory deprivation experienced by SAMs prisoners constitutes cruel and unusual punishment, and can rise to the level of torture under the Eighth Amendment and international human rights law. The use of SAMs infringes on the right to a fair trial, particularly when SAMs are imposed before trial, while the prisoner is presumed innocent. And SAMs restrict fundamental human rights and civil liberties, such as the rights to free speech and association, due process, and equal treatment.

A. SAMs Constitute Impermissible Treatment and Punishment

SAMs constitute impermissible punishment under U.S. and international law. The Eighth Amendment and international law prohibit torture, which encompasses both physical and psychological harms.²⁹² Increasingly, U.S. courts are recognizing that harms such as those inflicted by prolonged isolation can rise to the level of cruel and unusual punishment, in violation of the Eighth Amendment.²⁹³ This growing recognition of prisoners' social needs reflects "evolving standards of decency that mark the progress of a maturing society."²⁹⁴ Justice Kennedy recently emphasized the constitutional dangers of solitary confinement, noting the "human toll wrought by extended terms of isolation."²⁹⁵ Picking up on Justice Kennedy's opinion, in March 2017 Justice Breyer affirmed that prolonged solitary confinement "raises serious constitutional questions."²⁹⁶

Prolonged solitary confinement also violates international legal prohibitions on torture and other forms of cruel, inhuman, or degrading treatment. International law defines torture as the intentional infliction of severe mental or physical suffering as punishment, for the purpose of obtaining a confession, or for any reason based on discrimination.²⁹⁷ Under the newly revised U.N. Standard Minimum Rules for the Treatment of Prisoners, or "Mandela Rules," prolonged solitary confinement – defined as lasting longer than fifteen days – constitutes torture or other cruel, inhuman, or degrading treatment.²⁹⁸ The monitoring body of the U.N. Convention Against Torture has called on the United States to substantially limit its use of prolonged isolation,²⁹⁹ and the Inter-American Court of Human Rights has described solitary confinement as "cruel and inhuman treatment[], damaging to the person's psychic and moral integrity and the right to respect of the dignity inherent to the human person."³⁰⁰ The former U.N. Special Rapporteur on Torture has recognized the "adverse acute and latent psychological and physiological effects" of prolonged isolation,³⁰¹ and in 2013, he specifically determined that solitary conditions in ADX prison "violate[] the obligations of the United States under international law."³⁰²

Under the newly revised U.N. Standard Minimum Rules for the Treatment of Prisoners, or "Mandela Rules," prolonged solitary confinement – defined as lasting longer than fifteen days – constitutes torture or other cruel, inhuman, or degrading treatment.

If prolonged solitary confinement constitutes inhumane treatment or torture, confinement under SAMs is even more extreme. SAMs are imposed *in addition to* solitary confinement, are inherently prolonged, and their pre-trial application can coerce people into pleading guilty.³⁰³ In 2011, the then-Special Rapporteur on Torture opposed the extradition to the United States of certain individuals facing terrorism-related charges on the ground that it may violate international law.³⁰⁴ He specifically cited the danger that the

accused would be placed under solitary confinement and SAMs, and could therefore face torture or other cruel, inhuman, or degrading treatment or punishment.³⁰⁵

B. SAMs Violate The Right to a Fair Trial

1. Pre-Trial Punishment and Coercion

The presumption of innocence is a fundamental precept of the U.S. criminal justice system and international law.³⁰⁶ By imposing extreme restrictions on people based on the crime for which they have been charged, SAMs eviscerate that presumption. The extreme and debilitating conditions imposed pursuant to SAMs constitute impermissible pre-trial punishment, prohibited under both U.S. and international law.³⁰⁷

Furthermore, leveraging SAMs to induce defendants to plead guilty violates the prohibitions against coercion in the Fifth and Fourteenth Amendments of the U.S. Constitution and international law.³⁰⁸

The Supreme Court has recognized that holding someone in seclusion – particularly away from lawyers, friends, and family – creates an environment that is ripe for coercion.³⁰⁹ The likelihood of these coercive effects, in part, prompted the U.N. Committee on Torture to recommend the prohibition of solitary confinement, particularly for pre-trial detainees.³¹⁰

The extreme and debilitating conditions imposed pursuant to SAMs constitute impermissible pre-trial punishment, prohibited under both U.S. and international law.

2. Right to Participate in Defense

Defendants have a right under U.S. and international law to participate meaningfully in their own defense.³¹¹ The Supreme Court “has long recognized that when a State brings its judicial power to bear on [a] defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense.”³¹² This right encompasses an “opportunity to participate meaningfully” in the proceeding.³¹³ If a defendant’s mental state is so compromised that he cannot understand the charges against him, consult with his attorney, or assist in preparing his defense, he cannot be subjected to trial.³¹⁴ The documented severe psychological impact of SAMs can render defendants unable to discuss strategy with their attorneys or participate meaningfully in their case, depriving them of their rights under U.S. and international law.

3. Effective Assistance of Counsel

The right to counsel is “indispensable to the fair administration of our adversarial system of criminal justice.”³¹⁵ The U.S. Supreme Court has repeatedly emphasized the necessity of lawyers to protect defendants from state power and impermissible coercion.³¹⁶ These concerns are particularly acute when defendants are detained prior to trial, isolated from their loved ones, and facing discrimination and public hostility.³¹⁷ International legal bodies have reiterated that attorneys serve as an essential safeguard against government coercion and other human rights violations.³¹⁸

In restricting SAMs defendants’ access to counsel,³¹⁹ SAMs infringe upon this right. SAMs burden the right to counsel from the outset by prohibiting prisoners’ access to counsel until an attorney agrees to be subject to the SAMs and the government approves the attorney. This approval process may constitute “[r]egulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts.”³²⁰

SAMs further prevent attorneys from effectively meeting with their clients to prepare their case. A fundamental component of the right to counsel is attorney-client privilege: Defendants and their attorneys

must be able to speak freely to each other, without fear that their conversations will be monitored.³²¹ As the Supreme Court has acknowledged, government interception of attorney-client communications inhibits “free exchanges between defendant and counsel because of the fear of being overheard.”³²² International law similarly protects an attorney’s right to meet with clients in private, free from government intrusion.³²³ Provisions of SAMs allowing the government to monitor attorney-client communications violate this right.³²⁴ Further, international and regional human rights bodies emphasize that the right to counsel includes the ability to meet in facilities where trial preparation is practicable.³²⁵ Challenging physical conditions in facilities like ADX Florence and the MCC may unlawfully inhibit the attorneys’ abilities to effectively meet with their clients.

As the Supreme Court has acknowledged, government interception of attorney-client communications inhibits “free exchanges between defendant and counsel because of the fear of being overheard.”

SAMs also prohibit attorneys from advocating for their clients in public. This becomes particularly important when the government selectively discloses negative information about a defendant, potentially prejudicing the jury pool.³²⁶ The U.S. Supreme Court has recognized that defense lawyers have a right – and sometimes even a duty – to defend their client’s reputation in the public arena.³²⁷ International legal principles likewise protect attorneys’ rights to speak to the public free from interference.³²⁸ The SAMs gag order prohibits lawyers from fulfilling this obligation of zealous advocacy.

C. SAMs Violate Fundamental Civil Liberties

1. Right to Free Speech

A number of SAMs provisions burden free speech rights guaranteed under the First Amendment and international law.³²⁹ While prisoners’ First Amendment rights are limited, restrictions on prisoners’ rights cannot be arbitrary or irrational.³³⁰ SAMs restrictions on prisoners’ communications are impermissibly overbroad because they restrict far more speech than is necessary to achieve their stated purpose of protecting national security.³³¹ The censorship regime that restricts prisoners’ access to materials also unjustifiably restricts their First Amendment “right to receive information and ideas.”³³² The gag order accompanying SAMs restrictions further violates prisoners’ family members’ First Amendment rights, functioning as content-based restrictions on their right to speak.³³³ Further, by forbidding journalists from any form of communication with SAMs prisoners, SAMs regulations may violate newsgatherers’ First Amendment rights to access information and the public’s concomitant right to receive information.³³⁴

2. Right to Association

SAMs violate prisoners’ rights to associate with forms of community. By severely curtailing their ability to maintain relationships with family members, SAMs violate the right to family integrity, which is recognized in the U.S. Constitution and protected under international human rights law.³³⁵ Restrictions on group prayer, along with limited access to chaplains and religious texts, further burden their right to exercise their religion under U.S. and international law.³³⁶ Together, these restrictions deprive prisoners under the debilitating conditions of SAMs of their ability to access lifelines of support and community.

3. Right to Due Process

SAMs violate prisoners’ rights to protection against deprivations of life, liberty, or property without the due process of law – particularly, the requirements of adequate notice and a fair hearing. The government’s failure to sufficiently explain why SAMs are authorized for certain prisoners means

that people lack notice of what behavior leads to their imposition. The boilerplate language used to justify individual SAMs inhibits people from effectively challenging their conditions. Deficiencies in the Administrative Remedy Program and barriers to accessing federal courts make challenging the conditions after they are imposed extremely difficult.³³⁷ Further, courts' consistent deference to the Executive's arguments that SAMs are necessary based on broad and vague allegations of "national security interests" has limited meaningful judicial review of the purported justifications for SAMs.

The boilerplate language used to justify individual SAMs inhibits people from effectively challenging their conditions.

Prison conditions trigger these due process protections when a prisoner suffers from an "atypical and significant hardship" in relation to the "ordinary incidents of prison life,"³³⁸ and particularly when those conditions last for a long time.³³⁹ The Supreme Court determined that the conditions of extreme isolation and infrequent review at a state supermax prison were both atypical and significant compared to ordinary prison life.³⁴⁰ Numerous appellate courts have held that prolonged isolation implicates prisoners' due process rights under this standard.³⁴¹ SAMs bear many of the same features condemned in these cases: they impose more isolation than other solitary conditions and deprive prisoners of almost all human contact; they can last for an entire year without review, and can be renewed indefinitely; and they bar prisoners from participating in programs that would ease their conditions as a reward for good behavior.

4. Right to Equal Treatment

To the extent that SAMs are being applied arbitrarily and selectively against Muslims, they violate the rights to equal protection under the Fifth Amendment³⁴² and international law.³⁴³ Even if a law or policy does not explicitly discriminate on the basis of religion, the First and Fifth Amendments are violated by "[o]fficial action that targets religious conduct for distinctive treatment."³⁴⁴ SAMs restrictions, such as restrictions on group prayer and access to imams, disproportionately impact Muslims. Further, given the disproportionate number of Muslims that have been subjected to SAMs, these measures raise serious constitutional concerns about the targeting of Muslims.

Recommendations

End the Use of SAMs. Given abundant evidence that prolonged total isolation causes irreparable damage to prisoners, SAMs constitute cruel and unusual punishment under all circumstances, and, when used pre-trial or for any reason based on discrimination, they are tantamount to torture. The U.S. government should immediately cease subjecting prisoners to SAMs. Regardless of any real or purported dangers a prisoner might pose, the government cannot impose a policy that amounts to systematic cruelty or torture. The government must find another way to protect the public while upholding basic human rights.

Increase Transparency. The DOJ and the BOP should immediately release basic information about prisoners under SAMs, including the identities of all prisoners who have been subjected to SAMs, their conditions of confinement, and the justifications for imposing SAMs on those individuals. Moreover, the government should allow prisoners, family members, and attorneys to respond to the government's allegations in public, and permit those who have witnessed first-hand the effects of SAMs to participate in public debate.

Allow Independent Monitoring. The BOP should grant full and unfettered access to ADX, MCC, and other federal prisons where SAMs prisoners are held pre-trial and post-conviction to the U.N. Special Rapporteur on Torture, whose office has made repeated requests for such access to no avail. There is no justification for denying the Special Rapporteur and other independent human rights monitors access to SAMs prisoners.

Endnotes

- 1 See, e.g., HELL IS A VERY SMALL PLACE: VOICES FROM SOLITARY CONFINEMENT (Jean Casella et al. eds., 2016); Reginald Dwayne Betts, *Only Once I Thought About Suicide*, 125 YALE L.J. F. 22 (2016), <http://www.yalelawjournal.org/forum/only-once-i-thought-about-suicide>; Shane Bauer, *Solitary in Iran Nearly Broke Me. Then I Went Inside America's Prisons*, MOTHER JONES (2012), <http://www.motherjones.com/politics/2012/10/solitary-confinement-shane-bauer>.
- 2 Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *Interim Rep. of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman, or degrading treatment or punishment*, 76, U.N. Doc. A/66/268 (Aug. 5, 2011) (by Juan Méndez) [hereinafter *Special Rapporteur on Torture 2011 Report*].
- 3 For an overview of the national debate about solitary confinement, see THE LIMAN PROGRAM, TIME IN CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON 1-2 (2014), https://law.yale.edu/system/files/area/center/liman/document/asca-liman_administrativesegregationreport.pdf. For statements from corrections officials, see *infra* Part V.
- 4 DEP'T OF JUSTICE, FEDERAL BUREAU OF PRISONS, SPECIAL ADMINISTRATIVE MEASURES, at BOP000089-95 (2013) [hereinafter BOP FOIA DOCUMENTS] (appended to this Report) (listing dates when SAMs were first imposed on prisoners currently confined under SAMs, the earliest of which date back to 1996). As described further in Section II, *infra*, the authors acquired these documents as a result of FOIA litigation in *Human Rights Watch v. Dep't of Justice Federal Bureau of Prisons*, No. 13-CV-7360, 2015 WL 5459713 (S.D.N.Y. Sept. 16, 2015).
- 5 See, e.g., *United States v. Mohamed*, 103 F. Supp. 3d 281, 287-88 (E.D.N.Y. 2015); *United States v. El-Hage*, 213 F.3d 74, 81 (2d Cir. 2000).
- 6 See Declaration of Jonathan Manes in Support of Cross Motion for Summary Judgment, Ex. O 2, *Human Rights Watch v. Dep't of Justice Federal Bureau of Prisons*, No. 13-CV-7360, 2015 WL 5459713 [hereinafter Manes Decl.] (Plaintiff in a FOIA suit agreeing not to challenge the government's withholding of information that would reveal the religion of prisoners under SAMs).
- 7 *Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 14 (2001) (statement of Hon. Michael Chertoff, Ass't Att'y Gen., Criminal Div., Dep't of Justice).
- 8 HUMAN RIGHTS WATCH & COLUMBIA LAW SCHOOL HUMAN RIGHTS INSTITUTE, ILLUSION OF JUSTICE: HUMAN RIGHTS ABUSES IN US TERRORISM PROSECUTIONS 143 (2014), <https://www.hrw.org/report/2014/07/21/illusion-justice/human-rights-abuses-us-terrorism-prosecutions> [hereinafter ILLUSION OF JUSTICE].
- 9 See Letter from Jennifer A.H. Hodge, Director, Office of Enforcement Operations, D.O.J. Criminal Division, to Hope Metcalf, (June 8, 2017) [on file with authors].
- 10 See CENTER FOR CONSTITUTIONAL RIGHTS, COMMUNICATION MANAGEMENT UNITS 2 (2014), https://ccrjustice.org/sites/default/files/assets/CCR_CMU_2014Documents-20140709.pdf.
- 11 See, e.g., Inter-Am. Comm'n Hum. Rts., *Towards the Closure of Guantanamo*, Report No. 20/15, OAS/Ser.LV/II (2015), <http://www.oas.org/en/iachr/reports/pdfs/Towards-Closure-Guantanamo.pdf>.
- 12 See *Hassan v. City of New York*, 804 F.3d 277, 306-07 (3d Cir. 2015) (finding that New Jersey Muslims subject to NYPD suspicionless surveillance program stated valid claim of religious discrimination); Stipulation of Settlement and Order, *Raza v. City of New York*, No. 1:13-cv-03448 (E.D.N.Y. Mar. 20, 2017) (proposed settlement agreement in response to challenge to NYPD suspicionless surveillance program targeting Muslim communities in New York City).
- 13 See, e.g., *Turkmen v. Ashcroft*, 589 F.3d 542 (2d Cir. 2009) (challenge to sweeping round ups and abusive detention of Muslim, Arab, and South Asian non-citizens with no individualized suspicion of terrorism-related activity).
- 14 See Eric Lichtblau, *F.B.I. Steps Up Use of Stings in ISIS Cases*, N.Y. TIMES (June 7, 2016), https://www.nytimes.com/2016/06/08/us/fbi-isis-terrorism-stings.html?_r=0; Paul Harris, *Fake terror plots, paid informants: the tactics of FBI 'entrapment' questioned*, THE GUARDIAN (Nov. 16, 2011), <https://www.theguardian.com/world/2011/nov/16/fbi-entrapment-fake-terror-plots>.
- 15 See, e.g., *Tanvir v. Lynch*, 128 F. Supp. 3d 756 (S.D.N.Y. 2015) (challenge to plaintiffs' placement on No-Fly List after refusing to serve as FBI informants due to their seriously held religious beliefs); *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014) (finding that Department of Homeland Security's process for redressing erroneous placement of airline passengers on the "No-Fly List" carried a high risk of erroneous deprivation of constitutionally-protected liberty interests).
- 16 See Amna Akbar, *How Tarek Mehanna Went to Prison for a Thought Crime*, THE NATION (Dec. 31, 2013), <https://www.thenation.com/article/how-tarek-mehanna-went-prison-thought-crime>.
- 17 See, e.g., Jeremy Diamond, *Trump on torture: 'We have to beat the savages'*, CNN (Mar. 6, 2016), <http://www.cnn.com/2016/03/06/politics/donald-trump-torture>; Mark Hensch, *Trump won't rule out database, special ID for Muslims in US*, THE HILL (Nov. 19, 2015), <http://thehill.com/blogs/ballot-box/presidential-races/260727-trump-wont-rule-out-database-special-id-for-muslims>; Jenna Johnson & Abigail Hauslohner, *'I think Islam hates us': A timeline of Trump's comments about Islam and Muslims*, WASHINGTON POST (May 20, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims>; Adam Serwer, *Jeff Sessions's Fear of Muslim Immigrants*, THE ATLANTIC (Feb. 8, 2017), <https://www.theatlantic.com/politics/archive/2017/02/jeff-sessions-has-long-feared-muslim-immigrants/516069>.
- 18 See Vincent Charles Keating, *Will Donald Trump Bring Back Torture?*, THE WIRE (Jan. 21, 2017), <https://thewire.in/101638/will-donald-trump-bring-back-torture>.
- 19 For details about those requests, see Manes Decl., *supra* note 6, at 5.

- 20 For citation purposes, this report cites to the numbers in the lower right-hand corner of the released documents. These are the documents' "Bates" numbers, which the government assigned to the documents during processing of the FOIA requests.
- 21 Manes Decl., *supra* note 6.
- 22 *Id.* 11-25. In this litigation, Human Rights Watch was represented by Yale Law School's Media Freedom and Information Access Clinic.
- 23 *Id.* 27-45.
- 24 *Human Rights Watch*, No. 13-CV-7360, 2015 WL 5459713 at **9-11.
- 25 See Juan E. Méndez, *Preface to SHARON SALEV, SOURCEBOOK ON SOLITARY CONFINEMENT* (2014), <http://solitaryconfinement.org/uploads/JuanMendezPrefaceSourcebookOnSolitaryConfinementTranslation2014.pdf>.
- 26 Most authors date the origination of SAMs to May 1996, when the Bureau of Prisons codified as an interim rule a regulation allowing for the implementation of "special administrative procedures that are reasonably necessary to protect persons against the risk of death or serious bodily injury." Prevention of acts of violence and terrorism, 61 Fed. Reg. 25,120 (May 17, 1996). The Bureau of Prisons had initially published an interim rule on preventing the disclosure of classified information in the Federal Register on October 13, 1995, without public comment. National security cases, 60 Fed. Reg. 53,490 (Oct. 13, 1995). The 1996 regulations were nearly identical to the 1995 rule regarding classified information, but added the violence and terrorism grounds. Both rules became final in 1997. National Security; Prevention of Acts of Violence and Terrorism, 62 Fed. Reg. 33,730 (June 20, 1997) (codified at 28 C.F.R. §§ 501.2, 501.3).
Just months after the BOP promulgated SAMs regulations, a federal judge in New York sentenced a gang member to serve his term in solitary confinement under similarly restrictive conditions. The individual had been convicted of ordering murders from prison. See *United States v. Felipe*, 148 F.3d 101, 106-107 (2d Cir. 1998). Although his restrictions were not imposed pursuant to SAMs, his case is often cited as the origin of SAMs. See, e.g., WADIE E. SAID, *CRIMES OF TERROR: THE LEGAL AND POLITICAL IMPLICATIONS OF FEDERAL TERRORISM PROSECUTIONS* 136 (2015).
- 27 28 C.F.R. § 501.3 (2016).
- 28 See National Security; Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062 (Oct. 31, 2001).
- 29 Memorandum issued by Michael B. Cooksey, Assistant Director, Correctional Programs Division, Federal Bureau of Prisons, on Guidance for Handling of Terrorist Inmates and Recent Detainees (Oct. 1, 2001) (on file with authors).
- 30 *Id.*
- 31 See Laura Rovner & Jeanne Theoharis, *Preferring Order to Justice*, 61 AM. U. L. REV. 1331, 1406-08 (2012) (showing that Muslim prisoners were disproportionately selected for SAMs and providing examples of Christian terrorists who were not selected, despite their demonstrated capacity to disseminate dangerous information from prison).
- 32 28 C.F.R. §§ 501.2(c), 501.3(c) (2016).
- 33 28 C.F.R. §§ 501.2(c), 501.3(c) (2000) (stating SAMs can be extended upon notice "that the circumstances identified in the original notification continue to exist.").
- 34 28 C.F.R. §§ 501.2(c), 501.3(c) (2016); National Security; Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. at 55,062-63 ("[T]his rule modifies the standard for approving extensions of the special administrative measures. The existing regulation requires that the head of the intelligence agency certify that 'the circumstances identified in the original certification continue to exist.' This standard, however, is unnecessarily static, as it might be read to suggest that the subsequent certifications are limited to a reevaluation of the original grounds. Instead, this rule provides that the subsequent certifications by the head of an intelligence agency may be based on any information available to the intelligence agency."); see also Rovner & Theoharis, *supra* note 31, at 1368.
- 35 28 C.F.R. § 500.1(c) (2016) (defining "inmates" covered by the rule to include pretrial detainees and material witnesses).
- 36 28 C.F.R. § 501.3(d) (2016). Under the SAMs regulations, the government must provide notice before monitoring attorney-client communications. However, the government may monitor those communications without providing notice to the attorney or defendant if it has authorization under FISA or the Title III wiretapping statute. See Memorandum from James Brown, Acting Ass't Att'y Gen. to James Sensenbrenner, Chairman, Comm. On the Jud. 51-53 (May 13, 2003), <http://permanent.access.gpo.gov/websites/www.judiciary.house.gov/media/pdfs/patriotlet051303.pdf> ("DOJ May 2013 Rep.").
- 37 See Rovner & Theoharis, *supra* note 31, at 1368.
- 38 28 C.F.R. §§ 501.2 (b), 501.3(b) (2016) (providing that notice "may be limited" at the discretion of prison staff).
- 39 See Geraldine Doetzer, *Hard Labor: The Legal Implications of Shackling Female Inmates During Pregnancy and Childbirth*, 14 WM. & MARY J. WOMEN & L. 363, 380 (2008) (noting "courts, prison officials, and inmates all recognize that so-called administrative 'remedies' are all but meaningless," requiring prisoners to "jump through time-consuming and ultimately futile hoops in order to justify a court action when the administrative process inevitably fails."). *But see* *United States v. Hashmi*, 621 F. Supp. 2d 76, 84 (S.D.N.Y. 2008) (considering the merits of a SAMs prisoner's claim despite the prisoner's failure to exhaust the BOP's Administrative Remedy Program).
- 40 See *infra* Part VII.
- 41 See, e.g., Memorandum from Att'y Gen. to Charles E. Samuels, Jr., Director, Federal Bureau of Prisons re Origination of Special Administrative Measures for Pretrial Inmate Dzhokhar Tsarnaev (Aug. 27, 2013), *United States v. Tsarnaev*, No. 13-CR-10200 (D. Mass. Jun 27, 2013), ECF No. 100-1 ("The inmate shall be limited within the USMS/BOP/DF's reasonable efforts and existing confinement conditions, from communicating with any other inmate by making statements audible to other inmates or by sending notes to other inmates"). Analysis of similar memoranda released through the Human Rights Watch FOIA litigation reveals that Tsarnaev's conditions are similar to those of other

- SAMs prisoners. Indeed, those memoranda, appended to this Report, reveal that the DOJ does not recommend tailored conditions for each individual prisoner so much as it applies a boilerplate set of extremely isolative conditions.
- 42 See, e.g., Memorandum from Lanny A. Breuer, Assistant Attorney General, to Charles E. Samuels, Jr., Director, Bureau of Prisons, "Extension of Special Administrative Measures Pursuant to 28 C.F.R. § 501.3 for Federal Bureau of Prisons Inmate [redacted]" at CRM000386 (Nov. 14, 2012) (appended to this Report) ("Religious Visitation").
 - 43 See, e.g., *id.* at CRM000387 ("Family Call Monitoring").
 - 44 See, e.g., *id.* at CRM000386 ("Rules for Telephone Calls").
 - 45 See, e.g., *id.* at CRM000388 ("Visit Criteria"). Exceptions to the one-visitor-at-a-time rule may be made for "FBI-verified children of the inmate." *Id.*
 - 46 See, e.g., *id.* at CRM000388 ("General correspondence with limitations"). Correspondence with U.S. courts, U.S. Attorney's Offices, and other federal law enforcement agencies is exempted from these limitations, "unless there is evidence of abuse of these privileges." *Id.* ("General correspondence without limitations").
 - 47 See, e.g., *id.* at CRM000389.
 - 48 See, e.g., *id.* ("No Communal Cells and No Communication Between Cells").
 - 49 See, e.g., *id.* ("The inmate shall not be allowed to engage in group prayer with other inmates.").
 - 50 See, e.g., *id.* ("The inmate shall not be permitted to speak, meet, correspond, or otherwise communicate with any member or representative of the news media in person; by telephone; by furnishing a recorded message; through the mail, his attorney, or a third party; or otherwise.").
 - 51 See, e.g., *id.* at CRM000391 ("Access to Mass Communications").
 - 52 See, e.g., *id.* at CRM000384 ("No telephone call/communication, or portion thereof, except as specifically authorized by this document: (a) Is to be overheard by a third party. (b) Will be patched through, or in any manner forwarded or transmitted, to a third party. (c) Shall be divulged in any manner to a third party"); see also Interview with Arun Kundhani, Author, in New York, N.Y. (Feb. 4, 2016).
 - 53 In fact, SAMs are far more restrictive than even the most severe conditions found in most established legal systems. See, e.g., U.K. Ministry of Justice, *Government response to the review of Islamist extremism in prisons, probation and youth justice* (Aug. 22, 2016), <https://www.gov.uk/government/publications/islamist-extremism-in-prisons-probation-and-youth-justice/government-response-to-the-review-of-islamist-extremism-in-prisons-probation-and-youth-justice>; Alison Hind, *France prepares to tackle jihadi recruitment in prisons*, RFI (July 2, 2015), <http://en.rfi.fr/france/20150207-france-prepares-tackle-jihadi-recruitment-prisons>; Chris Vallance, *The Prison Wing Housing Only Terrorists*, BBC (May 20, 2016), <http://www.bbc.com/news/uk-36336011>.
 - 54 BOP FOIA DOCUMENTS, *supra* note 4, at BOP000237 (revealing that 36 out of 52 SAMs prisoners were held at ADX Florence as of November 25, 2013).
 - 55 U.S. DEP'T OF JUSTICE, REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTED HOUSING 43-44 (2016), <https://www.justice.gov/dag/file/815551/download> [hereinafter DOJ SOLITARY REPORT].
 - 56 Declaration of Nidal Ayyad at 24, *Ayyad v. Holder*, No. 05-cv-02342 (D. Colo. Aug. 12, 2013) [hereinafter *Ayyad Decl.*]; ILLUSION OF JUSTICE, *supra* note 8, at 146.
 - 57 DOJ SOLITARY REPORT, *supra* note 55, at 44.
 - 58 See *id.*; *Yousef v. United States*, No. 12-CV-2585-RPM, 2014 WL 1908711, at *3 (D. Colo. May 13, 2014); Eli Hager, *My Life in the SuperMax*, THE MARSHALL PROJECT (Jan. 8, 2016), <https://www.themarshallproject.org/2016/01/08/my-life-in-the-supermax#.JsEm3o4ev>.
 - 59 *Ayyad Decl.*, *supra* note 56, at 27.
 - 60 Telephone interview with Michael Caruso, Federal Public Defender, Southern District of Florida (Oct. 24, 2016).
 - 61 Rovner & Theoharis, *supra* note 31, at 1405
 - 62 *Ayyad Decl.*, *supra* note 56, at 26-27.
 - 63 Declaration of Mahmud Abouhalima at 34, *Ayyad v. Holder*, No. 05-cv-02342 (D. Colo. Aug. 12, 2013) [hereinafter *Abouhalima Decl.*].
 - 64 Rovner & Theoharis, *supra* note 31, at 1405.
 - 65 AMNESTY INTERNATIONAL, ENTOMBED: ISOLATION IN THE FEDERAL PRISON SYSTEM 7 (2014), <https://www.amnestyusa.org/files/amr510402014en.pdf> [hereinafter ENTOMBED]; Arun Kundhani, *The Guantanamo in New York You're Not Allowed to Know About*, THE INTERCEPT (Feb. 5, 2016), <https://theintercept.com/2016/02/05/mahdi-hashi-metropolitan-correctional-center-manhattan-guantanamo-pretrial-solitary-confinement>.
 - 66 ILLUSION OF JUSTICE, *supra* note 8, at 119.
 - 67 ENTOMBED, *supra* note 65, at 7.
 - 68 See, e.g., Memorandum from Lanny A. Breuer, Assistant Attorney General, *supra* note 42, at CRM000390 ("No Communal Cells and No Communication Between Cells"); see also ILLUSION OF JUSTICE, *supra* note 8, at 144.
 - 69 28 C.F.R. § 540.16 (2016); U.S. DEP'T OF JUSTICE, ADMISSION AND ORIENTATION HANDBOOK, UNITED STATES PENITENTIARY ADMINISTRATIVE MAXIMUM FACILITY FLORENCE, COLORADO 5 (2008), https://www.bop.gov/locations/institutions/flm/FLM_aohandbook.pdf [hereinafter ADX HANDBOOK]. Based on allegations of certain forms of misconduct, prisoners may be placed on "restricted correspondence status," which limits their list of approved contacts and subjects communications to monitoring. The prisoner must receive notice and an opportunity to respond to the allegations. Additionally, the prisoner can contest the designation under the Administrative Remedy Program. 28 C.F.R. § 540.15 (2016).

- 70 See, e.g., Memorandum from Lanny A. Breuer, Assistant Attorney General, *supra* note 42, at CRM000386-88 (“Inmate’s Non-legal Contacts”).
- 71 ADX HANDBOOK, *supra* note 69, at 5; ENTOMBED, *supra* note 65, at 16.
- 72 See, e.g., Memorandum from Lanny A. Breuer, Assistant Attorney General, *supra* note 42, at CRM000388 (“Non-legal Mail”).
- 73 See *id.* (“General Correspondence with limitations”). Prisoners may write to U.S. courts, members of Congress, attorneys’ offices, and other federal law enforcement agencies without limitation, “unless there is evidence of abuse of these privileges.” *Id.* (emphasis added).
- 74 U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, THE FEDERAL BUREAU OF PRISONS’ MONITORING OF MAIL FOR HIGH-RISK INMATES, at 13 (2006), <https://www.oig.justice.gov/reports/BOP/e0609/final.pdf> [hereinafter 2006 OIG REPORT].
- 75 *Id.*
- 76 Ayyad decl., *supra* note 56, at 32.
- 77 ENTOMBED, *supra* note 65, at 16.
- 78 2006 OIG REPORT, *supra* note 74, at 75; ILLUSION OF JUSTICE, *supra* note 8, at 149.
- 79 See, e.g., Memorandum from Lanny A. Breuer, Assistant Attorney General, *supra* note 42, at CRM000386 (“The inmate is limited to non-legally privileged telephone calls with his immediate family members.”).
- 80 See Abouhalima Decl., *supra* note 63, at 44.
- 81 See *id.* at 44-48.
- 82 See Ayyad Decl., *supra* note 56, at 33.
- 83 See, e.g., Memorandum from Lanny A. Breuer, Assistant Attorney General, *supra* note 42, at CRM000386 (“All telephone calls shall be in English unless a fluent USMS/BOP/DF- or FBI- approved interpreter/translator is available to contemporaneously monitor the telephone call.”); 2006 OIG Rep., *supra* note 74, at 13, 75.
- 84 Interview with Pardiss Kebriaei, Attorney, in New York, N.Y. (Apr. 14, 2017).
- 85 28 C.F.R. § 540.102 (2016).
- 86 See, e.g., Memorandum from Lanny A. Breuer, Assistant Attorney General, *supra* note 42, at CRM000387 (“Family Call Monitoring”); 2006 OIG Rep., *supra* note 74, at 13, 75.
- 87 Telephone interview with Laura Rovner, Professor, University of Denver, Sturm College of Law (Feb. 24, 2016); see, e.g., Memorandum from Lanny A. Breuer, Assistant Attorney General, *supra* note 42, at CRM000387 (“Improper Communications”).
- 88 Interview with Laura Rovner, *supra* note 87.
- 89 Interview with Faisal Hashmi (Apr. 21, 2016).
- 90 ILLUSION OF JUSTICE, *supra* note 8, at 148-49.
- 91 *Id.* at 148-49; ENTOMBED, *supra* note 65, at 16; see also Abouhalima Decl., *supra* note 63, at 62-63.
- 92 U.S. DEP’T OF JUSTICE, ADMINISTRATIVE MAXIMUM FACILITY FLORENCE, COLORADO, VISITING PROCEDURES 2 (May 7, 2014), https://www.bop.gov/locations/institutions/flm/FLM_visit_hours.pdf [hereinafter ADX FLORENCE VISITING PROCEDURES].
- 93 See, e.g., Memorandum from Lanny A. Breuer, Assistant Attorney General, *supra* note 42, at CRM000388 (“Visit Criteria”). Exceptions to the one-visitor-at-a-time rule may be made for “FBI-verified children of the inmate.” *Id.*
- 94 See, e.g., *id.* at CRM000387-88 (“All communications during non-legal inmate visits will be in English unless a fluent USMS/BOP/DF- or FBI-approved interpreter/translator is readily available to contemporaneously monitor the communication/visit.”).
- 95 See, e.g., *id.* at CRM000388 (“Visit Criteria”); 2006 OIG Rep., *supra* note 74 at 13, 75.
- 96 Ayyad Decl., *supra* note 56, at 35.
- 97 Interview with Pardiss Kebriaei, *supra* note 84.
- 98 ENTOMBED, *supra* note 65, at 16; Abouhalima Decl., *supra* note 63, at 62-63.
- 99 *Id.*
- 100 ADX FLORENCE VISITING PROCEDURES, *supra* note 92, at 3; see also Abouhalima Decl., *supra* note 63, at 62.
- 101 ADX FLORENCE VISITING PROCEDURES, *supra* note 92, at 2.
- 102 See Ayyad Decl., *supra* note 56, at 36.
- 103 *Id.*
- 104 Abouhalima Decl., *supra* note 63, at 42.
- 105 *Id.*
- 106 *Id.* at 44-45.
- 107 *Id.* at 46-47.
- 108 *Id.* at 62.
- 109 *Id.* at 63.
- 110 Letter from Mariam Abu Ali to President Barack Obama (Dec. 7, 2016) (on file with authors).
- 111 See, e.g., Memorandum from Lanny A. Breuer, Assistant Attorney General, *supra* note 42 at CRM000390 (“Religious Visitation”).
- 112 *Id.* (“The inmate shall not be allowed to engage in group prayer with other inmates.”).

- 113 The Qur'an, *Al-Jum'ah* 62:9; see also Salahuddin v. Coughlin, 993 F.2d 306, 307 (2d Cir. 1993) (Friday congregated prayer "is commanded by the Qur'an" and "is the central observance of Islam.").
- 114 ILLUSION OF JUSTICE, *supra* note 8, at 117.
- 115 ENTOMBED, *supra* note 65, at 14.
- 116 *Id.*
- 117 *Id.* at 14-15.
- 118 See, e.g., Memorandum from Lanny A. Breuer, Assistant Attorney General, *supra* note 42, at CRM000388 ("All non-legal visits shall be . . . [c]ontemporaneously monitored by the USMS/BOP/DF and/or FBI.").
- 119 See, e.g., *id.* at CRM000387-88.
- 120 See Ayyad Decl., *supra* note 56, at 29-30.
- 121 Telephone interview with Sean Maher, Attorney (Feb. 17, 2016).
- 122 See, e.g., Memorandum from Lanny A. Breuer, Assistant Attorney General, *supra* note 42, at CRM000391-92 ("Access to Mass Communications").
- 123 See, e.g., *id.*
- 124 *Id.* at CRM000391.
- 125 Rovner & Theoharis, *supra* note 31, at 1362.
- 126 See, e.g., Memorandum from Lanny A. Breuer, Assistant Attorney General, *supra* note 42, at CRM000392 ("Access to Books").
- 127 ILLUSION OF JUSTICE, *supra* note 8, at 145.
- 128 Abouhalima Decl., *supra* note 63, at 40.
- 129 *Id.*
- 130 *Id.* at 40-41.
- 131 See, e.g., Memorandum from Lanny A. Breuer, Assistant Attorney General, *supra* note 42, at CRM000390 ("The inmate shall not be permitted to speak, meet, correspond, or otherwise communicate with any member or representative of the news media in person; by telephone; by furnishing a recorded message; through the mail, his attorney, or a third party; or otherwise.").
- 132 See, e.g., *id.* at CRM000384 ("No telephone call/communication, or portion thereof, except as specifically authorized by this document: (a) Is to be overheard by a third party. (b) Will be patched through, or in any manner forwarded or transmitted, to a third party. (c) Shall be divulged in any manner to a third party . . ."); see also Interview with Arun Kundnani, *supra* note 52.
- 133 See, e.g., MAHVISH KHAN, MY GUANTANAMO DIARY: THE DETAINEES AND THE STORIES THEY TOLD ME (2009); MOHAMEDOU OULD SLAHI, GUANTANAMO DIARY (2015).
- 134 See United States v. Stewart, 590 F.3d 93 (2d Cir. 2009) (defense attorney sentenced to a decade in prison for revealing to the press statements from her client under SAMs).
- 135 See, e.g., Memorandum from Lanny A. Breuer, Assistant Attorney General, *supra* note 42, at CRM000394.
- 136 See, e.g., *id.*
- 137 See, e.g., Expert Report of Craig Haney, Ph.D., J.D. 29 *et seq.*, Ashker v. Brown, No. C 09-5796, 2013 WL 1435148 (N.D. Cal. Apr. 9, 2013) (describing the "very broad" "empirical consensus on the harmfulness of isolated solitary confinement"). Dr. Haney's report, along with others submitted into evidence in *Ashker v. Brown*, is available at <https://ccrjustice.org/home/what-we-do/our-cases/ashker-v-brown>.
- 138 Economic and Social Council Res. 2015/20, annex, U.N. Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. A/C.3/70/L.3, r. 44 (Sept. 29, 2015) [hereinafter Mandela Rules]. The Mandela Rules reflect "the general consensus of contemporary thought and the essential elements of the most adequate systems of today [and] set out what is generally accepted as being good principles and practice in the treatment of prisoners and prison management." *Id.* at 7.
- 139 BOP FOIA DOCUMENTS, *supra* note 4, at BOP000089-95 (manual count revealing that as of October 21, 2013, SAMs were extended beyond one year in 56 out of 68 cases in which SAMs were applied, excluding the 10 cases in which SAMs were authorized less than one year prior to October 21, 2013).
- 140 *Id.* at BOP000089-90.
- 141 Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQUENCY 124, 130 *et seq.* (2003) (surveying studies on the effects of isolation).
- 142 Expert Report of Terry A. Kupers, M.D., M.S.P., at 62, Ashker v. Brown, No. C 09-5796, 2013 WL 1435148 (N.D. Cal. Apr. 9, 2013) ("[A]ll of the prisoners I interviewed told me a list of symptoms and emotional problems that fit exactly the list of symptoms reported in the literature about the damaging effects of long-term isolative confinement.").
- 143 *Id.* at 23.
- 144 Maclyn Willigan, *What Solitary Confinement Does to the Human Brain*, SOLITARY WATCH (Aug. 4, 2014), <http://solitarywatch.com/2014/08/04/what-solitary-confinement-does-to-the-human-brain> (detailing those studies).
- 145 Uzair Paracha, *Innocent in the Eyes of the Law, in HELL IS A VERY SMALL PLACE: VOICES FROM SOLITARY CONFINEMENT* 48-49 (2016).
- 146 *Id.*
- 147 For a comprehensive list of these studies, see Expert Report of Dr. Craig Haney, *supra* note 137, at 16-18.
- 148 Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM. J. PUB. HEALTH 442, 44 (2014).

- 149 AMERICAN CIVIL LIBERTIES UNION, *THE DANGEROUS OVERUSE OF SOLITARY CONFINEMENT IN THE UNITED STATES* 5 (2014), https://www.aclu.org/sites/default/files/assets/stop_solitary_briefing_paper_updated_august_2014.pdf (citing a study of suicides at the Indiana Department of Corrections).
- 150 Expert Report of Dr. Craig Haney, *supra* note 137, at 35.
- 151 Haney, *supra* note 141, at 132.
- 152 See, e.g., SOLITARY WATCH, <https://solitarywatch.com> (last visited May 29, 2017); American Civil Liberties Union, *Stop Solitary – Advocacy Campaign Tools*, <https://www.aclu.org/other/stop-solitary-advocacy-campaign-tools> (last visited May 29, 2017).
- 153 *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring). The question before the Court in *Ayala* did not involve the constitutionality of solitary confinement under the Eighth Amendment, but Justice Kennedy wrote separately to raise the issue of solitary confinement.
- 154 Expert Report of Dr. Craig Haney, *supra* note 137, at 192.
- 155 *Id.*
- 156 Rick Raemisch, *My Night in Solitary*, N.Y. TIMES (Feb. 20, 2014), <https://www.nytimes.com/2014/02/21/opinion/my-night-in-solitary.html>.
- 157 Michael Winerip & Michael Schwartz, *Rikers to Ban Isolation for Inmates 21 and Younger*, N.Y. TIMES (Jan. 13, 2015), <https://www.nytimes.com/2015/01/14/nyregion/new-york-city-to-end-solitary-confinement-for-inmates21-and-under-at-rikers.html>.
- 158 Erica Goode, *Prisons Rethink Isolation, Saving Money, Lives and Sanity*, N.Y. TIMES (Mar. 10, 2012), <http://www.nytimes.com/2012/03/11/us/rethinking-solitary-confinement.html>.
- 159 Mark Binelli, *Inside America's Toughest Federal Prison*, N.Y. TIMES MAGAZINE (Mar. 26, 2015), <https://www.nytimes.com/2015/03/29/magazine/inside-americas-toughest-federal-prison.html>.
- 160 Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 329 (2006) (“[S]olitary confinement often resulted in severe exacerbation of a previously existing mental condition.”).
- 161 AMERICAN PSYCHIATRIC ASSOCIATION, *POSITION STATEMENT ON SEGREGATION OF PRISONERS WITH MENTAL ILLNESS* 1 (2012), http://www.dhcs.ca.gov/services/MH/Documents/2013_04_AC_06c_APA_ps2012_PrizSeg.pdf (“Prolonged segregation of adult inmates with serious mental illness, with rare exceptions, should be avoided due to the potential for harm to such inmates.”).
- 162 Order Approving Settlement at 6, *Bacote v. Federal Bureau of Prisons*, No. 12-cv-01570 (D. Colo., Dec 29, 2016), ECF No. 391.
- 163 *Id.* at 1 (challenging placement of mentally ill prisoners, including at least one person under SAMs, in solitary confinement).
- 164 *United States v. Pinson*, 542 F.3d 822, 826 (10th Cir. 2008).
- 165 *Id.* at 827.
- 166 *Id.* at 828-29.
- 167 *Id.* at 828.
- 168 *Pinson v. Berkebile*, 553 F. App'x 852, 853 (10th Cir. 2014), *cert. denied*, 134 S. Ct. 1771 (2014).
- 169 *Pinson v. Santana*, No. 13-CV-2098, 2015 WL 10550962 at *1 (N.D. Tex. Nov. 23, 2015).
- 170 Rovner & Theoharis, *supra* note 31, at 1364.
- 171 Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Accordance with General Assembly resolution 67/161*, ¶ 60, U.N. Doc. A/68/295 (Aug. 2, 2013) (by Juan E. Méndez) [hereinafter *Special Rapporteur on Torture 2013 Report*].
- 172 SENATE SELECT COMM. ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, EXECUTIVE SUMMARY 40, (declassified and released Dec. 3, 2004) [hereinafter *SENATE TORTURE REPORT*] (“After Abu Zubaydah had been in complete isolation for 47 days, the most aggressive interrogation phase began”); see *id.* at 51 (listing “extended isolation” as a frequent technique used at a CIA detention facility, along with “required standing, loud music,” nudity, and “rough treatment,” among others).
- 173 *Id.* at Findings and Conclusions 11.
- 174 Terrence McCoy, ‘Learned Helplessness’: *The Chilling Psychological Concept Behind the CIA's Interrogation Methods*, WASH. POST (Dec. 11, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/12/11/the-chilling-psychological-principle-behind-the-cias-interrogation-methods>; see also *SENATE TORTURE REPORT*, *supra* note 172, at Findings and Conclusions, 19 fn. 32.
- 175 *SENATE TORTURE REPORT*, *supra* note 172, at 21.
- 176 *Id.* at 53.
- 177 *Id.* at 80; see also *id.* at 114 (“CIA psychologists linked bin al-Shibh’s deteriorating mental state to his isolation and inability to cope with his long-term detention.”).
- 178 *SENATE TORTURE REPORT*, *supra* note 172, at Findings and Conclusions, 4.
- 179 Declaration of Vice Admiral Lowell E. Jacoby (USN), Director of the Defense Intelligence Agency at 4, *Padilla v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003) [hereinafter *Jacoby Decl.*]; see also Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 OXFORD J.L. STUDIES 235, 237 (2006) (arguing that Jacoby’s declaration showed that interrogators aimed to inspire a “complete sense of dependency on [Padilla’s] interrogators and to convince him of the hopelessness of his situation”).

- 180 Jacoby Decl., *supra* note 179, at 8.
- 181 Aff. of Angela Hegarty, MD ¶ 19, *United States v. Hassoun*, 477 F. Supp. 2d 1210 (S.D. Fla. 2007), ECF No. 695-3.
- 182 Deborah Sontag, *Video Is a Window Into a Terror Suspect's Isolation*, N.Y. TIMES (Dec. 4, 2006), <http://www.nytimes.com/2006/12/04/us/04detain.html>.
- 183 Sentencing Memorandum of Jose Padilla at 24-25, *United States v. Padilla*, No. 04-CV-60001 (S.D. Fla. Sept. 5, 2014), ECF No. 1454.
- 184 *Special Rapporteur on Torture 2011 Report*, *supra* note 2, 73.
- 185 See, e.g., Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from NYC Arraignments 3* (Working Paper, Nov. 9, 2016), http://home.uchicago.edu/~npope/pretrial_paper.pdf (“[P]retrial detention increases the probability that a felony defendant will be convicted by at least 13 percentage points. The increase in conviction rates is driven by detainees accepting plea deals more frequently.”); Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges 25* (NBER Working Paper No. 22511), https://scholar.princeton.edu/sites/default/files/wdobbie/files/dgy_bail_0.pdf (“[P]re-trial release significantly decreases the probability of conviction, primarily through a decrease in guilty pleas.”).
- 186 See Rovner & Theoharis, *supra* note 31, at 1369-70 (“The harshness of the conditions . . . are a powerful inducement on the SAMs prisoner to break, cooperate, and plead.”); *supra* Part V (describing the CIA’s use of isolation as a technique to induce “learned helplessness” in detainees); see also Interview with Sean Maher, *supra* note 121; Telephone interview with Jeanne Theoharis, Professor, Brooklyn College of CUNY (Feb. 17, 2016).
- 187 Interview with Sean Maher, *supra* note 121.
- 188 Telephone interview with Joshua Dratel, Attorney (Apr. 22, 2016).
- 189 Telephone interview with Mariam Abu Ali (Mar. 17, 2016).
- 190 The Supreme Court’s recognition of the “compulsion inherent in custodial surroundings” led it to create the *Miranda* procedural safeguards. *Miranda v. Arizona*, 384 U.S. 436, 458 (1966) (“Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.”).
- 191 Rovner & Theoharis, *supra* note 31, at 1369.
- 192 Sally Eberhardt & Jeanne Theoharis, *Five Years Ago, Obama Pledged to End Torture. He Still Hasn’t*, THE NATION (Jan. 22, 2014), <http://www.thenation.com/article/five-years-ago-obama-pledged-end-torture-he-still-hasnt>.
- 193 ILLUSION OF JUSTICE, *supra* note 8 at 121.
- 194 *Id.*
- 195 *Id.*
- 196 Rovner & Theoharis, *supra* note 31, at 1385.
- 197 David Thomas, *How Mohammed Warsame Became an Accidental “Terrorist,”* THE NATION (Nov. 27, 2013), <http://www.thenation.com/article/how-mohammed-warsame-became-accidental-terrorist>.
- 198 *Id.*
- 199 Motion to Vacate Order Directing the Marshals Service to Change Defendant’s Conditions of Detention, *United States v. Warsame*, 537 F. Supp. 2d 1005 (D. Minn. 2008), ECF No. 122.
- 200 Rovner & Theoharis, *supra* note 31, at 1384.
- 201 *Id.* at 1385.
- 202 *United States v. Warsame*, 651 F. Supp. 2d 978, 981 (D. Minn. 2009). The Court further noted “it simply finds nothing that adequately demonstrates that Warsame was a part of a specific plot against the United States, and very little suggests that he was especially useful to Al Qaeda.” *Id.*
- 203 Interview with Joshua Dratel, *supra* note 188; see also Rovner & Theoharis, *supra* note 31, at 1366 (SAMs “psychologically break down the accused, making it difficult for them to participate effectively in their own defense.”).
- 204 Interview with Joshua Dratel, *supra* note 188.
- 205 Aff. of Angela Hegarty, MD, *supra* note 181, ¶ 16.
- 206 *Id.* ¶ 8.
- 207 *Id.* ¶ 13.
- 208 *Id.* ¶ 19.
- 209 Interview with Denny LeBeouf and Scharlette Holdman, in New Haven, Conn. (Feb. 5, 2016).
- 210 Joshua Dratel, *Ethical Issues in Defending a Terrorism Case: Stuck in the Middle*, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 65, 68-69 (2003).
- 210 Interview with Denny LeBeouf and Scharlette Holdman, *supra* note 209.
- 212 28 C.F.R. § 501.3(d) (2016) (permitting monitoring of attorney-client communications after giving notice to the attorney and if “reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism”); see also Joshua Dratel, *Ethical Issues in Defending a Terrorism Case: How Secrecy and Security Impair the Defense of a Terrorism Case*, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 81, 89 (2003).
- 213 28 C.F.R. § 501.3(d)(3) (2016).
- 214 See, e.g., Interview with Sean Maher, *supra* note 121.
- 215 *Id.*

- 216 *Id.*
- 217 *Id.*
- 218 Kundnani, *supra* note 65.
- 219 Dratel, *supra* note 212, at 90.
- 220 *Id.* at 86.
- 221 *Id.* (“Instead of concentrating on defending against the charges in the indictment . . . the defendant is preoccupied with ameliorating the conditions of confinement. The client is consumed with the petty and capricious aspects of the S.A.M.s, which can reinforce his negative preconceptions about the United States government and justice system.”).
- 222 Telephone interview with Indrani Balaratnam, Mitigation Investigator (Mar. 2, 2016) (“[T]rust with witnesses is just as important as with your client.”).
- 223 Interview with Denny LeBeouf and Scharlette Holdman, *supra* note 209.
- 224 *Id.*
- 225 *Id.*
- 226 See, e.g., Memorandum from Lanny A. Breuer, Assistant Attorney General, *supra* note 42, at CRM000390 (“The inmate shall not be permitted to speak, meet, correspond, or otherwise communicate with any member or representative of the news media in person; by telephone; by furnishing a recorded message; through the mail, his attorney, or a third party; or otherwise.”).
- 227 Interview with Indrani Balaratnam, *supra* note 222.
- 228 Interview with Laura Rovner, *supra* note 87.
- 229 See *United States v. Stewart*, 590 F.3d 93 (2d Cir. 2009).
- 230 See Interview with Joshua Dratel, *supra* note 188 (“Particularly after Lynne Stewart, attorneys became more cautious”); Interview with Fiona Doherty, Clinical Associate Professor, Yale Law School, in New Haven, Conn. (Feb. 19, 2016) (In New York, representing clients under SAMs “comes with the baggage of knowing what happened to Lynne Stewart.”).
- 231 Rovner & Theoharis, *supra* note 31, at 1374.
- 232 Telephone Interview with Mohamed Yousry (Apr. 27, 2016); Michael Powell and Michelle Garcia, *Translator’s Conviction Raises Legal Concerns*, WASH. POST, Jan. 16, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/15/AR2006011500940.html>.
- 233 The government argued that, while Yousry did not know about the particular legal violations at issue, or support Islamic extremism in any way, by translating the communications he supported a conspiracy. Murtaza Hussain, *Extraordinary Measures: How an Arabic Translator Got Caught in a Net Designed for Terror and Gang Leaders*, THE INTERCEPT (June 6, 2016), <https://theintercept.com/2016/06/06/how-arabic-translator-got-caught-net-terror-gang-leaders>.
- 234 Interview with Mohamed Yousry, *supra* note 232.
- 235 See *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).
- 236 Interview with Laura Rovner, *supra* note 87.
- 237 Abouhalima Decl., *supra* note 63, at 39.
- 238 *Id.*
- 239 *Id.*
- 240 Interview with Laura Rovner, *supra* note 87.
- 241 Prison Litigation Reform Act of 1995, 110 Stat. 1321-73, as amended, 42 U.S.C. § 1997e(a) (2012) (“No action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted.”). While judges retain the ability to review conditions of confinement to ensure a defendant receives a fair trial, they rarely exercise that power. *Porter v. Nussle*, 534 U.S. 516, 520 (2002) (“§ 1997e(a)’s exhaustion requirement applies to all prisoners seeking redress for prison circumstances or occurrences.”).
- 242 U.S. DEP’T OF JUSTICE, FEDERAL BUREAU OF PRISONS, PROGRAM STATEMENT NO. 1330.17: ADMINISTRATIVE REMEDY PROGRAM, at § 542.13(a) (2012), <http://www.lb7.uscourts.gov/documents/13-946.pdf>.
- 243 *Id.*
- 244 *Id.* at § 542.14(c).
- 245 *Id.* at § 542.15(a).
- 246 *Id.* at § 542.14(c).
- 247 *Id.* at § 542.15(a).
- 248 *Id.* at § 542.14(c).
- 249 *Id.* at § 542.17(a).
- 250 *Id.* at § 542.16(a).
- 251 See 28 C.F.R. § 501.3(e) (“The affected inmate may seek review of any special restrictions imposed in accordance with paragraph (a) of this section through the Administrative Remedy Program.”).
- 252 See, e.g., *United States v. Savage*, No. 07-550-03, 2010 WL 4236867, at *7 (E.D. Pa. Oct. 21, 2010); *United States v. Hashmi*, 621 F. Supp. 2d 76, 84 (S.D.N.Y. 2008).
- 253 Prior to 2013, Mostafa lived among other prisoners in general population in a U.K. prison. Telephone interview with Lindsay Lewis, Attorney (May 31, 2017).
- 254 *Id.*
- 255 *Id.*
- 256 *Id.*
- 257 *Id.*

- 258 See, e.g., Memorandum from Lanny A. Breuer, Assistant Attorney General, *supra* note 42 at CRM000390 (“The inmate shall not be permitted to speak, meet, correspond, or otherwise communicate with any member or representative of the news media in person; by telephone; by furnishing a recorded message; through the mail, his attorney, or a third party; or otherwise.”).
- 259 See, e.g., *id.* at CRM000384 (prohibiting individuals from divulging communications from the SAMs prisoner “in any manner to a third party.”); see also Interview with Arun Kundnani, *supra* note 52.
- 260 Interview with Arun Kundnani, *supra* note 52.
- 261 Interview with Joshua Dratel, *supra* note 188; Interview with Sean Maher, *supra* note 121 (stating that advocates’ speech is chilled beyond what is required in the gag order because individuals allowed contact with SAMs prisoners err on the side of caution in not violating the gag order and risking prosecution).
- 262 Manes Decl, *supra* note 19, at 11-25 (describing Human Rights Watch’s litigation with the BOP).
- 263 See *Globe Newspaper Co. v. Superior Court for Norfolk City*, 457 U.S. 596, 604 (1982) (The “free discussion of governmental affairs” is necessary “to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.”).
- 264 The paradigmatic example of this phenomenon is the CIA’s manipulation of classified data to improve the public’s perception of its torture program. See SENATE TORTURE REPORT, *supra* note 172, at Findings and Conclusions, 8 (“The CIA coordinated the release of classified information to the media, including inaccurate information concerning the effectiveness of the CIA’s enhanced interrogation techniques.”).
- 265 See *id.*
- 266 Falguni A. Sheth, *This Is Counterterrorism? The Shocking Story of Mahdi Hashi*, SALON (Sept. 25, 2013), http://www.salon.com/2013/09/25/this_is_counterterrorism_the_shocking_story_of_mahdi_hashi.
- 267 Kundnani, *supra* note 65.
- 268 *Id.*
- 269 *Id.*
- 270 Devin Dwyer, “Force-Feeding at Gitmo: Obama’s ‘Torture’ Debate,” ABC NEWS (Dec. 11, 2014), abcnews.go.com/Politics/force-feeding-gitmo-obamas-torture-debate/story?id=27531783.
- 271 Human Rights Watch v. Dep’t of Justice Federal Bureau of Prisons, No. 13-cv-7360, 2015 WL 5459713 at *2, *9 (S.D.N.Y. Sept. 16, 2015).
- 272 The authors created a list of prisoners known to be held at one time under SAMs by using Google, Factiva, and Alt Press Watch engines to search for all news articles containing the terms “SAMs” and Bureau of Prisons, as well as Westlaw to search for people who had challenged SAMs.
- 273 The authors determined individuals to be Muslim based on descriptions of them as Islamic fundamentalists, or allegations that they were affiliated with Islamic fundamentalist groups. Those prisoners are: Omar Abdel-Rahman, Mahmoud Abouhalima, Ahmed Omar Abu Ali, Ahmed Abu Khattala, Ali Yasin Ahmed, Mohamed Rashed Al-Owhali, Mohaned Al-Farekh, Khalid Al Fawwaz, Ahmed Ghailani, Nidal A. Ayyad, Wadih El-Hage, Mahdi Hashi, Syed Fahad Hashmi, John Walker Lindh, Mohammed M. Jabarah, Alhassane Ould Mohamed, Khalfan Khamis Mohammed, Oussama Abdullah Kassir, Terek Mehanna, Zacarias Moussaoui, Mohamed Odeh, Uzair Paracha, Richard Reid, Tarik Shah, Dzhokhar Tsarnaev, Mohammed Warsame, Ramzi Yousef, Mohamed Yusuf.
- Based on publicly available information, the authors concluded that the following individuals under SAMs are not Muslim: Frank Calabrese, Joseph Lombardo, Steven Mandell, Iouri Mikhel, Ana Baylin Montez, Harold James Nicholson, Ricardo Palmera, Jeremy Pinson, and Peter Rollock.
- Authors have not been able to ascertain the religious identities of the following individuals under SAMs: Ossama Hilder and Abduwali Muse.
- 274 Those units are colloquially known as “Muslim Management Units,” due to their high proportion of Muslim inmates. See Interview with Laura Rovner, *supra* note 87; Interview with Arun Kundnani, *supra* note 52.
- 275 See 28 C.F.R. §§ 540.203, 540.204, 540.205 (2016) (setting forth limitations on visits, written correspondence limitations, and telephone communication for prisoners in CMUs).
- 276 Besheer Mohamed, *A new estimate of the U.S. Muslim Population*, PEW RESEARCH CENTER (Jan. 6, 2016), <http://www.pewresearch.org/fact-tank/2016/01/06/a-new-estimate-of-the-u-s-muslim-population>.
- 277 BOP FOIA DOCUMENTS, *supra* note 4, at BOP000097 (showing that 23 out of 47 inmates at Marion’s CMU were Muslim, as of November 25, 2013); *id.* at BOP000124 (24 out of 47 at Terre Haute).
- 278 CENTER FOR CONSTITUTIONAL RIGHTS, *supra* note 10, at 2 (“60 percent of CMU prisoners are Muslim, though Muslims comprise only six percent of the federal prisoner population”).
- 279 *Turkmen v. Hasty*, 789 F.3d 218, 227 (2d Cir. 2015).
- 280 U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 2 (Apr. 2003), <http://www.justice.gov/oig/special/0306/full.pdf>.
- 281 See *Inter-Am. Comm’n Hum. Rts.*, *supra* note 10, ¶ 221.

- 282 Carrie Johnson, 'Guantanamo North': Inside Secretive U.S. Prisons, NPR (Mar. 3, 2011), <http://www.npr.org/2011/03/03/134168714/guantanamo-north-inside-u-s-secretive-prisons>.
- 283 See Scott Shane, Matthew Rosenberg & Eric Lipton, *Trump Pushes Dark View of Islam to Center of U.S. Policy-Making*, N.Y. TIMES (Feb. 1, 2017), <https://www.nytimes.com/2017/02/01/us/politics/donald-trump-islam.html>.
- 284 Sarah Posner, *Does Trump think Islam is a religion? A top advisor won't say. That's alarming.*, WASHINGTON POST (Mar. 1, 2017), <https://www.washingtonpost.com/blogs/plum-line/wp/2017/03/01/does-trump-think-islam-is-a-religion-a-top-adviser-wont-say-thats-alarming>.
- 285 International Refugee Assistance Project v. Trump, No. 17-1351, 2017 WL 2273306 (4th Cir. May 25, 2017); *Hawai'i v. Trump*, No. CV 17-00050, 2017 WL 1167383 (D. Haw. Mar. 29, 2017); see also *Washington v. Trump*, 847 F.3d 1151 (9th Cir. Feb. 9, 2017).
- 286 Julia Edwards Ainsley, Dustin Volz & Kristina Cooke, *Trump to focus counter-extremism program solely on Islam – sources*, REUTERS (Feb. 2, 2017), <http://www.reuters.com/article/us-usa-trump-extremists-program-exclusiv-idUSKBN15G5VO>.
- 287 See Serwer, *supra* note 17.
- 288 *Full Text: Donald Trump Announces a Presidential Bid*, WASHINGTON POST (June 16, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid>; see also David Agren, 'Bad hombres': reports claim Trump spoke of sending troops to Mexico, THE GUARDIAN (Feb. 1, 2017), <https://www.theguardian.com/us-news/2017/feb/02/bad-hombres-reports-claim-trump-threatened-to-send-troops-to-mexico>; Hunter Walker, *Donald Trump just released an epic statement raging against Mexican immigrants and 'disease'*, BUSINESS INSIDER (Jul. 6, 2015), <http://www.businessinsider.com/donald-trumps-epic-statement-on-mexico-2015-7>.
- 289 See, e.g., Sophia Tesfaye, *Trump plans to shame sanctuary cities by publishing a weekly list of crimes committed by undocumented immigrants*, SALON (Jan. 25, 2017), <http://www.salon.com/2017/01/26/trump-plans-to-shame-sanctuary-cities-by-publishing-a-weekly-list-of-crimes-committed-by-undocumented-immigrants>.
- 290 Josh Sanburn, *President Trump Just Signaled Some Dramatic Changes for Police and Criminal Justice*, FORTUNE (Jan. 21, 2017), <http://fortune.com/2017/01/21/president-trump-criminal-justice>.
- 291 See, e.g., Rebecca Savransky, *Trump berates CNN Reporter: 'You are fake news'*, THE HILL (Jan. 11, 2017), <http://thehill.com/homenews/administration/313777-trump-berates-cnn-reporter-for-fake-news>; Harriet Sinclair, *Trump Suggested Imprisoning Journalists Over Leaks, Comey Memo Alleges*, NEWSWEEK (May 16, 2017), <http://www.newsweek.com/trump-comey-prison-journalists-over-intel-leaks-memo-alleges-fbi-russia-610499>.
- 292 U.S. CONST. amend. VIII; International Covenant on Civil and Political Rights art. 7, adopted Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); Convention on the Elimination of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 16, adopted Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT] ("Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment"); see also *Hudson v. McMillan*, 503 U.S. 1, 16 (1992) (Blackmun, J. concurring) ("It is not hard to imagine inflictions of psychological harm—without corresponding physical harm—that might prove to be cruel and unusual punishment.");
- 293 See, e.g., *Thomas v. Farley*, 31 F.3d 557, 559 (7th Cir. 1994) ("Mental torture is not an oxymoron, and has been held or assumed in a number of prisoner cases . . . to be actionable as cruel and unusual punishment.") *United States v. Corozzo*, 256 F.R.D. 398, 401–02 (E.D.N.Y. 2009) (recognizing that social interaction is a human need but not passing on the constitutionality of depriving a prisoner of it); *Wilkerson v. Stalder*, 639 F. Supp. 2d 654, 679 (M.D. La. 2007) (recognizing "social contact" as a "basic human need").
- 294 *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981).
- 295 *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring).
- 296 *Ruiz v. Texas*, 137 S. Ct. 1246, 1247 (Mar. 7, 2017) (Breyer, J., dissenting from denial of certiorari).
- 297 CAT, *supra* note 292, art. 1.
- 298 *Mandela Rules*, *supra* note 138, r. 43-45.
- 299 U.N. Comm. Against Torture, *Concluding Observations on the Third to Fifth Periodic Reports of the United States of America*, 20, U.N. Doc. CAT/C/USA/CO/3-5 (Dec. 19, 2014); U.N. Comm. Against Torture, *Conclusions and Recommendations of the Committee Against Torture: United States of America*, 36, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).
- 300 *Miguel Castro Castro Prison v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160, 323 (Nov. 25, 2006). The European Court of Human Rights has held that solitary confinement for three years constitutes inhumane and degrading treatment, and even shorter periods may amount to torture or ill-treatment. *Iorgov v. Bulgaria*, 40 Eur. H.R. Rep. 7, 83-86 (March 11, 2004).
- 301 *Special Rapporteur on Torture 2013 Report*, *supra* note 171, at 41, 76.
- 302 Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Observations on Communications Transmitted to Governments and Replies Received*, 168, U.N. Doc. A/HRC/25/60/Add.2 (Mar. 11, 2013).
- 303 *Special Rapporteur on Torture 2011 Report*, *supra* note 2, 72-76 (finding that discrimination and coercion raise the risk that conduct will constitute torture).

- 304 Letter from Juan Méndez, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to T.L. Early, Section Registrar European Court of Human Rights (Nov. 25, 2011), <http://www.ohchr.org/Documents/Issues/SRTorture/SRTECHRNov2011.pdf>. Despite Méndez's opposition, the European Court of Human Rights ultimately permitted the extradition, relying on U.S. government assurances that there were adequate procedural protections in place. For example, the court rejected Mostafa Kamel Mostafa's challenge to his extradition, based on the U.S. government's description of BOP procedures which the court assumed would "make detention at ADX impossible." Babar Ahmad v. United Kingdom, Eur. Ct. H.R. App. Nos. 24027/07 et al., 217, 2013 WL 5785362 (Apr. 10, 2012). The court's assumption proved incorrect when Mustafa was sent to ADX shortly after his conviction in U.S. courts. He has remained there since 2015.
- 305 Letter from Juan Méndez, *supra* note 304.
- 306 See, e.g., ICCPR, *supra* note 292, art. 14(2); Powell v. Alabama, 287 U.S. 45, 52 (1932) ("However guilty defendants, upon due inquiry, might prove to have been, they were, until convicted, presumed to be innocent. It was the duty of the court having their cases in charge to see that they were denied no necessary incident of a fair trial."); Mandela Rules, *supra* note 138, r. 111 ("Unconvicted prisoners are presumed innocent and shall be treated as such.").
- 307 ICCPR, *supra* note 292, art. 9(3) ("It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings should occasion arise, for execution of the judgement."); Bell v. Wolfish, 441 U.S. 520, 535 (1979) ("[A] detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."); Mandela Rules, *supra* note 138, r. 111-20 (providing enhanced protections for pre-trial detainees).
- 308 ICCPR, *supra* note 294, art. 14(3)(g); Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973) ("[T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force."); Brown v. Mississippi, 297 U.S. 278 (1936) (overturning a conviction that relied solely on evidence obtained through coercion).
- 309 See *Miranda v. Arizona*, 384 U.S. 436, 455 (1966) ("[T]o be alone with the subject is essential to prevent distraction and to deprive him of any outside support. . . . [T]he very fact of custodial interrogation exacts a heavy toll on individual liberty, and trades on the weakness of individuals.").
- 310 Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Rep. of Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Accordance with General Assembly resolution 62/148*, 80, U.N. Doc. A/63/175 (July 28, 2008) (by Manfred Nowak) ("Except in exceptional circumstances, such as when the safety of persons or property is involved, the Committee has recommended that the use of solitary confinement be abolished, particularly during pre-trial detention, or at least that it should be strictly and specifically regulated by law (maxim duration, etc.) and exercised under judicial supervision.").
- 311 ICCPR, *supra* note 292 art. 14(3); *Medina v. California*, 505 U.S. 437, 448 (1992).
- 312 *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).
- 313 *Id.*
- 314 *Godinez v. Moran*, 509 U.S. 389, 396 (1992) (citing *Drope v. Missouri*, 420 U.S. 162, 171 (1975)); see also *Medina v. California*, 505 U.S. at 448 ("If a defendant is incompetent, due process considerations require suspension of the criminal trial until such time, if any, that the defendant regains the capacity to participate in his defense and understand the proceedings against him.").
- 315 *Maine v. Moulton*, 474 U.S. 159, 168 (1985); see also *id.* at 169 ("Embodying 'a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself,' the right to counsel safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding." (quoting *Jonathan v. Zerbst*, 304 U.S. 458, 462-63 (1938))).
- 316 See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 455 (1966); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (noting the importance to a criminal defendant of "the guiding hand of counsel at every step in the proceedings against him." (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932))).
- 317 *Powell*, 287 U.S. at 71 (holding that impoverished black defendants facing the death penalty needed lawyers given "the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, [and] the fact that their friends and families were all in other states and communication with them necessarily difficult.").
- 318 U.N. Human Rights Comm., *General Comment No. 20*, 11, U.N. Doc. A/47/40 (1994) ("The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers . . ."); Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report of the Special Rapporteur, pursuant to Commission on Human Rights resolution 1991/38*, 284, UN Doc. E/CN.4/1992/17 (1991) ("Torture most often takes place during incommunicado detention, when the detainee is refused access to legal counsel.").
- 319 See *supra* Parts VI, VII.
- 320 *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) (citing *Ex Parte Hull*, 312 U.S. 546 (1941)), *overruled in part on other grounds*, *Thornburgh v. Abbott*, 490 U.S. 401, 419 (1989).
- 321 See *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 106, 108 (2009) (citing *Swindler & Berlin v. United States*, 524 U.S. 399, 403 (1998)) ("[Attorney-client privilege] is one of the oldest recognized privileges for confidential communications. . . . By assuring confidentiality, the privilege encourages clients to make full and frank disclosures to their attorneys, who are then better able to provide candid advice and effective representation").

- 322 *Weatherford v. Bursley*, 429 U.S. 545, 555 n.4 (1977). While the Court in *Weatherford* upheld a defendant's conviction after an undercover government agent had met with the defendant and his attorney, that case did not involve "discussions concerning respondent's trial strategy or the pending criminal action." *Id.* at 545.
- 323 See, e.g., U.N. Human Rights Comm., *General Comment 32*, 34, U.N. Doc. CCPR/C/GC/32 (2007) (Lawyers "should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications."); Special Rapporteur on the Independence of Judges and Lawyers, *Report on Independence of Judges and Lawyers*, 110, U.N. Doc. A/64/181 (2009) (noting lawyers' files and documents should be protected from seizure or inspection and that no communications, including telephone calls and other electronic communications, should be intercepted); see also Human Rights Comm., *Concluding Observations of the Human Rights Comm.: Spain*, 14, UN Doc. CCPR/C/ESP/CO/5 (2008) ("[T]he right to freely choose a lawyer who can be consulted in complete confidentiality by detainees and who can be present at interrogations should be guaranteed to all detainees").
- 324 In *United States v. DiDomenico*, Judge Posner of the Seventh Circuit Court of Appeals raised a hypothetical almost identical to SAMs, stating that a government policy of taping all conversations between defendants and their attorneys, and storing them even without disclosing them to prosecutors would still "greatly undermine the freedom of communication between defendants and their lawyers and with it the efficacy of the right to counsel, because knowledge that a permanent record was being made of the conversations between the defendants and their lawyers would make the defendants reluctant to make candid disclosures." 78 F.3d 294, 299-300 (7th Cir. 1996).
- 325 See U.N. Human Rights Comm., *Onoufriou v. Cyprus* (Communication No. 1636/2007), 6.11, UN Doc. CCPR/C/100/D/1636/2007 (2010) ("[A]dequate facilities' for the preparation of one's defence, within the meaning of article 14(3) (b) of the Covenant, include access to all evidentiary materials, which the prosecution plans to offer in court against the accused, or which are exculpatory."); see also *Modarca v. Moldova*, App. No. 14437/05, 84-99 (Eur. Ct. of H.R. 2007) (holding that a defendant's rights were violated in a case where the facilities in a detention center required detainees to speak to their lawyers through two panes of glass with holes covered with mesh, which also did not permit documents to be passed back and forth because they prevented effective confidential communication about the case).
- 326 *Chandler v. Florida*, 449 U.S. 560, 574 (1981) ("Any criminal case that generates a great deal of publicity presents some risks that the publicity may compromise the right of the defendant to a fair trial.").
- 327 *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1043 (1991). Similarly, while the ABA Model Rules of Professional Conduct prohibit out-of-court statements that have a "substantial likelihood of materially prejudicing" the proceeding, the Rules allow attorneys to "make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client." MODEL RULES OF PROF'L CONDUCT r. 3.6(a), (c) (AM. BAR ASS'N 2011).
- 328 See U.N. Human Rights Comm., *General Comment 32*, *supra* note 323, 38 (stating lawyers should be able to advise and represent people without restrictions, influence, pressure or improper interference from any quarter); Special Rapporteur on the Independence of Judges and Lawyers, *supra* note 323, 64-67 (raising concern that lawyers are often identified with their clients' causes, particularly when lawyers defend individuals in politically sensitive cases).
- 329 U.S. Const. amend. I; ICCPR, *supra* note 292, art. 19.
- 330 See *Turner v. Safley*, 482 U.S. 78, 89 (1987).
- 331 See *United States v. Stevens*, 559 U.S. 460, 481-82 (2010).
- 332 See *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 867 (1982); see *id.* at 872 (enjoining a local school board from removing books from library shelves "simply because they dislike the ideas contained in those books").
- 333 See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.").
- 334 See *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated."); *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989) (citing *Procurier v. Martinez*, 416 U.S. 396 (1974)) (newsgatherers have a legitimate interest in investigating and publishing information about prison conditions). While the Supreme Court has upheld restrictions on the media's access to prisoners, in each case the prisoner had some alternative means of communicating with the press. See, e.g., *Pell v. Procunier*, 417 U.S. 817 (1974) (upholding restrictions on face-to-face interviews between prisoners and members of the press in light of alternative means of communicating with the media, such as through writing letters to members of the press and by communicating with the press through their prison visitors); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (upholding restrictions on interviews between members of the media and certain prisoners because prisoners had alternative means of communicating with the press); *Houchins v. KQED Inc.*, 438 U.S. 1 (1978) (upholding restrictions on media visits to prison because prisoners have other ways to describe jail conditions to the media).
- 335 See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (zoning ordinance that prohibited extended family members from living together violated the due process clause based on the importance of extended family in American society); see also ICCPR, *supra* note 294, art. 23(1); American Convention on Human Rights art. 17(1), *opened for signature* Nov. 22, 1969, 36 O.A.S.T.S. ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.").
- 336 See U.S. Const. amend. I (forbidding any "law respecting an establishment of religion, or prohibiting the free exercise thereof"); ICCPR, *supra* note 294.
- 337 Letter from Juan Méndez, *supra* note 304.

- 338 *Wilkinson v. Austin*, 545 U.S. 209, 210-11 (2005); *Sandin v. Conner*, 515 U.S. 472, 484 (1995). The *Wilkinson* court ultimately found that the review procedures implemented by Ohio prison officials sufficed as process to protect the prisoners' liberty interests. The Court emphasized that the prison officials provided each prisoner with a factual basis for their solitary confinement, both protecting against arbitrary decision-making and giving the prisoner a basis for objection in future reviews. In addition, the Court cited the various levels of review required before assignment to solitary and that review was required after thirty days.
- 339 The Second Circuit has found that solitary confinement lasting more than 305 days is generally always "atypical and significant," any confinement for more than 101 days is subject to close examination, and that confinement less than 101 days can still be "atypical and significant" if restrictions are worse than general SHU conditions. *Colon v. Howard*, 215 F.3d 227, 231-32 (2d Cir. 1999).
- 340 *Wilkinson*, 545 U.S. at 214-15.
- 341 See, e.g., *Williams v. Pennsylvania Dep't of Corrections*, 848 F.3d 549 (3rd Cir. Feb. 9, 2017); *Incumaa v. Stirling*, 791 F.3d 517 (4th Cir. 2015); *Wilkerson v. Goodwin*, 774 F.3d 845 (5th Cir. 2014).
- 342 The Supreme Court has held on numerous occasions that the Fifth Amendment due process clause prohibits the federal government from denying equal protection of the laws. See, e.g., *Hampton v. Mow Sun Wong*, 426 U. S. 88, 100 (1976); *Buckley v. Valeo*, 424 U. S. 1, 93 (1976); *Weinberger v. Wiesenfeld*, 420 U. S. 636, 638 n. 2 (1975); *Bolling v. Sharpe*, 347 U. S. 497, 500 (1954).
- 343 International Convention on the Elimination of All Forms of Racial Discrimination art. 5, adopted Dec. 21, 1965, 660 U.N.T.S. 195; ICCPR, *supra* note 292, art. 18.
- 344 See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

About the Center for Constitutional Rights

CCR is a non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the U.S. Constitution and international human rights law. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR employs litigation, education, and advocacy to advance the law in a positive direction, to empower poor communities and communities of color, to guarantee the rights of those with the fewest protections and least access to legal resources, to train the next generation of constitutional and human rights attorneys, and to strengthen the broader movement for social justice. For more information about CCR's mission, history and current work, including our challenges to abusive prison policies, please visit www.ccrjustice.org.

About the Allard K. Lowenstein International Human Rights Clinic at Yale Law School

The Allard K. Lowenstein International Human Rights Clinic is a legal clinic at Yale Law School that undertakes projects on behalf of human rights organizations and individual victims of human rights abuses. The goals of the Clinic are to provide students with practical experience that reflects the range of activities in which lawyers engage to promote respect for human rights, to help students build the basic knowledge and skills necessary to be effective human rights lawyers and advocates, and to contribute to efforts to protect human rights through valuable, high-quality assistance to appropriate organizations and individual clients. To that end, the Clinic undertakes a wide variety of projects every year, including fact-finding, drafting reports, amicus briefs, legal manuals, submissions to various international human rights bodies, and other kinds of human rights advocacy. For more information about the Clinic and to access past projects and publications, please visit its website at law.yale.edu/schell/lowenstein-clinic.