

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :  
 :  
 vs. : CRIMINAL NO. 3:04CR301(JCH)  
 :  
 BABAR AHMAD : June 16, 2014

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**BABAR AHMAD'S MEMORANDUM IN AID OF SENTENCING**

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BABAR AHMAD'S MEMORANDUM IN AID OF SENTENCING

This case is not simply a criminal case. It has broader ramifications. The United States has taken the extraordinary step of extraditing British citizens for operating a passive website in the United Kingdom that focused on Muslim conflicts outside of the United States. The United Kingdom declined, repeatedly, to prosecute Babar Ahmad.<sup>1</sup> More than 149,000 British citizens signed a petition to prevent his extradition, insisting that any charge against Mr. Ahmad should be tried in the United Kingdom.<sup>2</sup> Azzam.com and Qoqaz.net were popular websites among Muslims in the United Kingdom, in Europe, and in the Middle East. This case now involves, whether we like it or not, a battle for the hearts and minds of the Muslim world. As former CIA officer and terrorism expert Dr. Marc Sageman explained in *Leaderless Jihad: Terror Networks in the Twenty-first Century*, University of Pennsylvania Press (2008),<sup>3</sup> “Likewise, the Muslim community is carefully following these trials for evidence of prejudice or persecution.” *Id.* at 141. Unwarranted harsh punishment generates a feeling of moral outrage among Muslims. *Id.* at 141-42. As noted by Dr. Usama Hasan:

[T]here is a huge danger that an excessive prison term for Mr. Ahmad will be used by extremist groups for recruiting purposes. The general theme of terrorism prisoners being glorified as “persecuted mujahideen” has been a favourite of Al-Qaeda-type groups for decades.

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<sup>1</sup>See, e.g., Letter from UK Attorney General Lord Goldsmith (Oct. 24, 2006) (stating that the Crown Prosecution Service reviewed a file of evidence against Mr. Ahmad in 2004 and “concluded there was insufficient evidence to provide a realistic prospect of conviction”) (attached hereto at Exhibit A).

<sup>2</sup><http://epetitions.direct.gov.uk/petitions/885>

<sup>3</sup>Hereafter “*Leaderless Jihad*.”



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\* \* \*

Although Mr. Ahmad's case is far less serious compared to the above notorious names [Omar Abd el Rahman, Abu Qatada al Falastini, Abu Hamza al Masri, and Anwar al-Awlaki], extremists may well use his example as a case in point to argue that "the West" is unjust, since Mr. Ahmad was not even part of Al-Qaeda and yet he was treated unduly harshly."

BADEF-000130.

Indeed, *because* Mr. Ahmad's offense conduct was far less serious than many others convicted of terrorism-related offenses, and because of his personal background and character, as well as the context in which he committed his offense conduct, that distance between him and others convicted of terrorism-related offenses must be reflected in his sentence.

The question in the Muslim world is "Can the government of the United States post- 9/11 be fair to a Muslim charged in this country?" The government in this case urges a sentence of 25 years in jail. Respectfully, the Court must contain the government's appetite for giant sentences. We do not win this battle for hearts and minds with harshness or excess. We win it with justice.

Nor, as discussed below, is justice in this case inconsistent with the objectives of sentencing set forth in 18 U.S.C. § 3553(a)(2)(A)-(D), or the other factors in § 3553(a) that apply in this case. For example, specific and general deterrence are often important considerations, particularly in the context of cases involving terrorism-related charges.

Yet, as demonstrated herein (including in the letters from Mr. Ahmad and others) specific deterrence with respect to Mr. Ahmad is not a serious issue, and the concept of general deterrence is flipped on its head. As noted above, general deterrence – the message to others who might consider similar conduct – is best served by a sentence that avoids an unnecessarily harsh punishment in favor of a term that informs the world that the U.S. does not employ an excessively punitive, one-size-fits-all, disproportionate and myopic approach to Muslims whose criminal conduct must be examined in a broader context. Thus, the challenge in this case can be met with a sentence that accomplishes both specific and general deterrence, yet refuses to yield to the reflexive but misguided position that all

terrorism cases merit the maximum punishment available.

Accordingly, it is respectfully submitted that for the reasons set forth below, a sentence for Mr. Ahmad that fulfills the statutory mandate of being “sufficient, but not greater than necessary” to achieve the goals of sentencing enumerated in 18 U.S.C. § 3553(a)(2), should be substantially below the Guidelines range. As detailed below, those reasons include:

- (a) the historical and religious context of this case, and Mr. Ahmad’s conduct;
- (b) Mr. Ahmad’s background and character, as well as his motivation for his conduct;
- (c) particular aspects of Mr. Ahmad’s offense conduct, which involved operating a purely *passive* web site;
- (d) the terrorism enhancement applied via § 3A1.4 of the Guidelines significantly overstates Mr. Ahmad’s otherwise blemish-free Criminal History as well as any prospect of recidivism; and
- (e) the need, pursuant to 18 U.S.C. § 3553(a)(6), to avoid unwarranted sentencing disparities between Mr. Ahmad and others who have been sentenced for similar conduct, and, in some instances, far more serious conduct.

**Part I: Historical and Religious Context**

A. The Historical and Religious Context of this Case Matters.

Cases that involve “terrorism,” perhaps the most highly charged word in the contemporary vocabulary, demand particular focus on the factors in 18 U.S.C. § 3553(a) to ensure that sentencing is individualized, just, and “sufficient, but not greater than necessary.” Sentencing, as mandated by 18 U.S.C. §§ 3553(a) and 3661, is never a “one size fits all” function, and Courts in this District have been careful always to consider the nature and circumstances of the offense and the history and characteristics of the defendant. One is tempted to say that terrorism cases are no different. But they are. Due to the tragedy of 9/11, terrorism cases require special diligence to ensure that a just result is obtained. In such cases, a sentencing court must be careful *not* to punish more harshly than the purposes of sentencing require for the particular person before the Court.

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The government throughout this case has tried to strip Mr. Ahmad's conduct of any broader context, erase the world that existed prior to 9/11, and eliminate any attendant pre-9/11 perspective. The government's 20-20 hindsight would engraft on every act, on every opinion, on every state of mind, a post-9/11 consciousness that simply not only did not exist prior to that date, but which also reverses the historical record, thereby *post hoc* pitting the U.S. against causes and conflicts that it *supported* at the time those events in fact occurred.

Yet, sentencing, and in turn punishment, would be neither individualized nor just if it bypassed consideration of a defendant's motivation and purpose in committing criminal acts. Also, consideration of the factual and historical context in which those acts were undertaken is essential to evaluating the "nature and circumstances of the offense." *See* 18 U.S.C. § 3553(a). Indeed, the failure to address those factors would render § 3553(a) a nullity, and leave the statutory objectives of sentencing in a vacuum. After all, how is a court to determine what sentence is "sufficient but not greater than necessary" to achieve punishment, deterrence, incapacitation, and rehabilitation unless it examines not only the offense itself, but also the circumstances and conditions under which it was committed, and what the defendant hoped to accomplish by its commission?

The government may say that motive and surrounding context are not elements of the offenses of conviction. Mr. Ahmad is not contesting his guilt. He has pled guilty and has admitted that he violated the law. He is fully cognizant that he committed a crime. But the factors set forth in § 3553(a) govern *sentencing*, and not merely the limited threshold issue of criminal liability. Consideration of these contextual matters surrounding the crime provides a more complete, accurate, and proportional portrayal of the entire situation. Such consideration better enables the Court to perform its sentencing function and to impose a sentence that is "sufficient but not greater than necessary," as the sentencing statute requires.

In *United States v. Thavaraja*, 740 F.3d 253 (2d Cir. 2014), a terrorism case that involved a defendant who procured \$20 million worth of weaponry for a designated terrorist organization in Sri Lanka, the Second Circuit endorsed the district court's consideration of the defendant's motives:

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The district court found that Pratheepan was motivated not by “power” or “self aggrandizement,” but by a desire “to help the Tamil people.” ***His actions had to be evaluated in context: Pratheepan was caught in an “ongoing civil war,” one with “serious human rights violations on both sides of the conflict.” As Pratheepan explained at his sentencing, “There is not a single day I have not thought about our people back at home. They are struggling for their freedom and their future.” While these motivations do not justify or excuse acts of terrorism, it was not inappropriate for the district court to take Pratheepan’s motivations into account.***

*Id.* at 260 (emphasis added).

In the pages that follow, Mr. Ahmad will explain his actions in the political, historical, and religious context in which they took place.

B. Bosnia was the Muslim Holocaust.

In the early 1990’s, in the wake of the dissolution of Yugoslavia into its component province-states, Serbia and ethnic Serbs in neighboring Bosnia-Herzegovina took advantage of the resulting political instability to settle a long-simmering historical grudge against Bosnia’s Muslims.

Consequently, in 1992, a Muslim awakening occurred in Europe. Serbs in Bosnia – located in the former Republic of Yugoslavia, a place easily accessible to all of Europe – began a program of “ethnic cleansing.” BADEF000031. Serb military commanders proudly proclaimed that they were seeking to avenge the Muslim triumph of the 14<sup>th</sup> Century when the Ottoman Empire ascended. “It is time to take revenge upon the Muslims,” said Serb General Ratko Mladic. *See Exhibit B (Srebrenica: A Cry from the Grave* (BBC television documentary broadcast January 10, 1999).

Initially, the West stood by, taking no action at all. The Serb forces designed and executed a strategy that was comprised of mass execution, the establishment of Muslim detention camps, and the systematic and large-scale rape of Muslim women. In passing judgment later on those responsible for one “rape camp,” the International Criminal Tribunal for the former Yugoslavia said:

The evidence showed that rape was used by members of the Bosnian Serb armed forces as an instrument of terror. An instrument they were given free rein to apply whenever and against whomsoever they wished.

The evidence also showed that it was possible for the Serb forces to set up and maintain detention centres for scores of Muslim women, such as Partizan Sports Hall, next to the municipal police building in Foca, from

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which women and young girls were taken away on a regular basis to other locations to be raped.

ICTY Case Information Sheet, "Foca" (IT-96-23 and 23/1), *available at* [http://www.icty.org/x/cases/kunarac/cis/en/cis\\_kunarac\\_al\\_en.pdf](http://www.icty.org/x/cases/kunarac/cis/en/cis_kunarac_al_en.pdf).

As reported by former Prime Minister of Poland, Tadeusz Mazowiecki, "Massive violations of human rights and international humanitarian law are not simply features of the war in Bosnia and Herzegovina. They are being used deliberately to achieve ethnically homogenous areas." Report on the Situation of Human Rights in the Territory of the Former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1992/S-1/1 of 14 August 1992, Feb.10, 1993, *available at* <http://www.unhchr.ch/huridoca.nsf/70ef163b25b2333fc1256991004de370/c0a6cfd5274508fd802567900036a9a?OpenDocument>.

President William Clinton sought to intervene, but European powers blocked his efforts in the United Nations. The UN sent "peacekeepers," but they had no enforcement powers, and they largely stood by and watched a humanitarian crisis unfold. This crisis reached astonishing proportions in Srebrenica, where more than eight thousand Muslim men and boys were slaughtered in a weekend, *in the presence* of a battalion of UN Dutch peacekeepers. BADEF000032. It was the largest massacre in Europe since the Holocaust of World War II. On November 15, 1999, the Report of the Secretary-General of the United Nations pursuant to General Assembly Resolution 53/35 titled *The Fall of Srebrenica* concluded: "The body of this report sets out in meticulous, systematic, exhaustive and ultimately harrowing detail the descent of Srebrenica into a horror without parallel in the history of Europe since the Second World War."<sup>4</sup>

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<sup>4</sup> United Nations A/54/549, p. 108, *available at* [www.un.org/en/peacekeeping/resources/reports.shtml](http://www.un.org/en/peacekeeping/resources/reports.shtml).

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Eerily similar to the Holocaust in some respects,<sup>5</sup> Srebrenica witnessed Muslim men being separated from their families. Buses (instead of trains) took women and children. The men were all gathered with the promise of more buses to come for them to reunite them with their families. *See* Exhibit B. Those buses never came. The men were herded into fields and warehouses, and they were executed.<sup>6</sup> Again,

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<sup>5</sup> Commentators frequently draw the parallels to the Holocaust. President Clinton, in 1995, did the same, as the following quotation demonstrates:

For nearly four years, a terrible war has torn Bosnia apart. Horrors we prayed had been banished from Europe forever have been seared into our minds again. Skeletal prisoners caged behind barbed-wire fences, women and girls raped as a tool of war, defenseless men and boys shot down into mass graves, evoking visions of World War II concentration camps and endless lines of refugees marching toward a future of despair.

\* \* \*

This summer, Bosnian Serb shelling once again turned Bosnia's playgrounds and marketplaces into killing fields.

Transcript of President Clinton's speech on Bosnia (November 27, 1995), *available at* [http://www.cnn.com/US/9511/bosnia\\_speech/speech.html](http://www.cnn.com/US/9511/bosnia_speech/speech.html).

<sup>6</sup> An AP report from 1995 relayed the experiences of some of the massacre's few survivors:

"We went a bit up the hill, slowly," Suljic recalled. "The sound of some machines was becoming louder and louder. We were obviously approaching them. The truck turned left and stopped in the grass. We saw a field covered with bodies."

"They ordered us to come out and line up with our backs to the soldiers, and our faces to the field of bodies. There were two firing squads of five soldiers each, armed with automatic rifles." Suljic was in the first row looking at the bodies, with two rows of prisoners between him and Serb guns.

"I could hear automatic gunfire. They fell on me, and I fell on my stomach. But I wasn't hit," he said.

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UN Dutch peacekeepers, lacking the authority or the will to stop the slaughter, stood and watched. Exhibit B.<sup>7</sup>

The International Criminal Tribunal for the former Yugoslavia (ICTY), would later indict Radovan Karadzic, Ratko Mladic and many others for crimes against humanity. The ICTY, however, only came into being after the atrocities had occurred. Announcing the indictment on November 16, 1995, Judge Riad at the ICTY at the Hague stated:

After Srebrenica fell to besieging Serbian forces in July 1995, a truly terrible massacre of the Muslim population appears to have taken place. The evidence tendered by the Prosecutor describes scenes of unimaginable savagery: thousands of men executed and buried in mass graves, hundreds of men buried alive, men and women mutilated and slaughtered, children killed before their mothers' eyes, a grandfather

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In intervals between the shooting, a Serb soldier walked among the bodies and finished off those still moving with a pistol shot to the head, Oric and Suljic said.

Oric said whenever anyone showed signs of life, he was killed. At one point, he heard an old man plead: "Please don't do this to us, children. We haven't done anything to you."

He, too, was killed.

*3 Muslims Survive Slaughter: Witness describes massacre by Serbs, says Ratko Mladic was there*, BANGOR DAILY NEWS, October 5, 1995, available at <https://bosniagenocide.wordpress.com/2011/01/20/eyewitness-testimony-of-the-srebrenica-massacre/>.

<sup>7</sup>The conduct – or lack thereof – of the Dutch peacekeepers was truly inexplicable. First, they disarmed the local Muslims in Srebrenica. They also traded thousands of Muslims to the oncoming Bosnian Serb battalions in return for 14 Dutch peacekeepers held captive by the Bosnian Serbs. Even with the Bosnian Serbs approaching Srebrenica, and the Serbs's intent was no mystery (in light of their ongoing campaign of "ethnic cleansing"), the Dutch contingent nevertheless refused to return to the Bosniaks the arms they had surrendered, and even denied unarmed civilian Bosniak refugees from Srebrenica entry to the Dutch U.N. compound. What person learning of these events would conclude that international peacekeeping mechanisms were sufficient to ensure the safety of the Bosniaks, and not think they needed to take the defense of Bosnia's Muslims into their own hands?

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forced to eat the liver of his own grandson. These are truly scenes from hell, written on the darkest pages of human history.<sup>8</sup>

As it did during Vietnam, television brought the horrors of the Bosnian war into living rooms. Dr. Norman Cigar, of the Marine Corps University in Quantico, Virginia, writes that “television’s vivid images, seen by millions of viewers around the world, made this the first case of genocide being televised as it was actually taking place.”<sup>9</sup> British Muslims watched closely. As noted by Dr. Hasan,

The graphic videos of “ethnic cleansing,” a term widely regarded as a euphemism for “massacres” or “genocide,” of Bosnian Muslims caused shock and outrage within British Muslim communities. . . . Footage of ethnic cleansing from Bosnia that was available on mainstream news and/or smuggled out of Bosnia was regularly shown at mosques, community events and charity fundraisers in aid of Bosnia.

BADEF000120.

Muslims throughout Europe followed the news of the atrocities on their TV sets. They could see blonde-haired, blue-eyed Bosniaks – Muslim residents of places like Srebrenica – being slaughtered. There was a strong sense throughout Europe, but especially in the United Kingdom, where there were many Muslim citizens, that a holocaust was occurring a short distance away.<sup>10</sup> And it was taking place against white-skinned Muslims while no one came to their aid. Indeed, the initial UN response was to impose an arms embargo on Bosnia. That embargo had the effect of guaranteeing an advantage to the already heavily armed Serbs. BADEF000030. According to Bosnia expert Dr. Darryl Li, “The embargo effectively locked into place the relative weakness of the Bosnian Muslim side, handicapping their ability to defend themselves.” *Id.* The Bosniaks had difficulty, due to the embargo, of acquiring arms

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<sup>8</sup> Available at [www.icty.org/sid/7221](http://www.icty.org/sid/7221)

<sup>9</sup> Norman Cigar, GENOCIDE IN BOSNIA: THE POLICY OF “ETHNIC CLEANSING” 9 (1995).

<sup>10</sup> One can drive from London to Srebrenica in 21 hours, the same amount of time it takes to drive from Hartford to Miami. This can easily be verified through Google Driving Directions, Mapquest or any similar online gps driving service.



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to defend themselves. Secretary of State Madeleine Albright described the situation as “sending David against Goliath, only without the slingshot or any sign of divine help.”<sup>11</sup>

For brown-skinned Muslims, there were two simultaneous concerns. First, as applied to all Muslims, white or brown, the Quran teaches that Muslims must defend each other. “As for the believers, men and women, they are protectors of one another.” (Quran 9:41). As explained by religious historian Karen Armstrong:

Muslims believe they are members of a world-wide Muslim community [*ummah*] that transcends tribal, ethnic and national identities. They regard their fellow Muslims, wherever they are, as their “brothers” and “sisters” and consistently refer to them in this way. This has led to the conviction that Muslims should always come to each other’s aid; they must defend and protect one another, in exactly the same way as they would rush to the defence of their own kinsfolk.

BADEF000010.

Second, there was the fear that if no one came to the aid of white Muslims in Bosnia, there would be no stopping this holocaust from spreading to the much larger and darker Muslim population that was already subject to discrimination in Europe. The Bosniaks were being killed because, and only because, they were Muslim. The Bosniaks were not a particularly devout group of Muslims. BADEF 000123. They drank alcohol. They married outside the faith. BADEF000030 (“In Yugoslavia, intermarriage between individuals bearing different national labels was not uncommon.”). They were well integrated into Bosnian society. *See* BADEF000123. Their indistinguishable appearance from other white Europeans was of no help to them. They were being killed *en masse* because of their Muslim heritage. There was a perception in the Muslim world that a much bigger holocaust was soon to come. As explained by Dr. Hasan:

Since Muslims in Western Europe were then (and still are) largely recent immigrants, they are not as integrated as the Bosnian Muslims were and these events led to widespread fear amongst British Muslims and the feeling that Western Muslims were therefore more vulnerable to attack than even the Bosnian Muslims had been.

BADEF000123.

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<sup>11</sup>Madeleine Albright, MADAM SECRETARY 277(2003).

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All of these factors contributed to the conclusion among Muslims – not unreasonable in light of objective facts – that self-help in the form of self-defense was the only solution. People of conscience, people like Babar Ahmad, decided that they would not sit still. At the age of 18, he decided to go and to take aid to Bosnia. He began by collecting clothing and money from the Muslim population of Tooting, an area of South London. Paying his own way, he went to Bosnia to deliver the supplies. It bears repeating. He was 18 years old. He was, however, not alone.

Muslim men throughout the UK and from many countries went on similar journeys. They openly raised funds. They openly went door to door to shopkeepers asking for clothing and supplies for the Bosniaks. There was nothing clandestine or illegal about these activities. Indeed, members of the Tooting community helped to organize a charity event held at a church in Tooting to raise money for the Bosnia Relief Fund in 1992. There was nothing sinister about it; the photographs attached at Exhibit C depict a family event replete with cotton candy, balloons, and children wearing silly glasses. *See* Exhibit C (photographs of Bosnia Relief Fund event). At least 1,000 UK Muslims went to Bosnia. BADEF000125 (report of Dr. Hasan). They were not prosecuted upon their return. *See* BADEF000138 (legal opinion letter from Max Hill, Q.C.).

Mr. Ahmad went and delivered aid. While he was there, he spoke with the refugees. He heard their stories. He learned of the atrocities. He saw their trauma, and he was convinced that he had to do more. He needed to defend helpless people under attack.

There is precedent in Europe for crossing borders to aid an embattled population. In the Spanish Civil War, Francisco Franco and his Fascists violently overthrew the government of Spain. Thousands of non-Spanish volunteers (including many from Oxford University and Cambridge University), famously written about by Ernest Hemingway, answered the call of conscience to fight Franco's oppression. These volunteers were not prosecuted upon their return. They were not disparaged as "unlawful foreign fighters," except perhaps by Franco. They were praised throughout the West. *Leaderless Jihad*, p. 74.

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There were other examples as well. In *Leaderless Jihad*, Dr. Sageman makes an apt analogy:

In 1948, 1967, and 1973, when the existence of the young state of Israel was threatened by its neighbors, young Jews came to Israel to offer their services. They did this because they felt themselves to be Jewish even though they were not particularly religious. They reasoned, “I’m Jewish, and if Israel was gone, we’ll have the Holocaust again, so it is really what keeps us safe.” Jews in their twenties, who traveled to Israel to fight, were celebrated in the newspapers as young idealists who had answered the call.

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Nobody makes the argument that these young Jews were brainwashed, fanatics, or crazy. At the time, they were heroes. Many Muslims answered a similar call in the last decade [Note: *Leaderless Jihad* was published in 2008]. They, too, believed that they are defending their fellow Muslims, whose only crime is that they are Muslim.

*Leaderless Jihad*, p. 74.

Moreover, the concepts of national borders and being “foreign fighters” are themselves somewhat foreign concepts to Muslims. Muslims believe they are members of a world-wide Muslim community – the *ummah*. As Karen Armstrong reveals:

The concept of the *ummah* was severely challenged when the Islamic world experienced the colonial invasion of European powers. Starting with the British in Moghul India in the latter part of the 18<sup>th</sup> century, through to the annexation of large parts of the Middle East and North Africa by the British and French in the 19<sup>th</sup> century, the Muslim world was quickly and permanently dismembered, split up into different mandates and protectorates, and reduced to a dependent bloc by the European powers. The ideal of the *ummah* helps explain why nationalism, an essentially 19<sup>th</sup> century European idea, has no grass roots among many of the people and was experienced as foreign and alien. The new nation-states of the Islamic world were created by the colonialists in an arbitrary manner. Peoples, who had no natural allegiances and sometimes did not even share a common language, were lumped together in the new “nation.”

\* \* \*

This explains why many Islamists insist today that Muslims should give their first allegiance to the *ummah* rather than to the nation state. It also explains why Muslims are so concerned about the plight of their brothers and sisters in other parts of the world: why they were so distressed by the ethnic cleansing of Bosnian Muslims (1992-95) and of Kosovar Albanian Muslims in 1998-99. It also explains why Muslims all over the world are so deeply troubled by the apparently hopeless situation of the Palestinians and now by the plight of the people in Syria and Afghanistan. Of course, each of these historical events has a complex

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set of causes, but the Islamic concept of the *ummah* provides for a particular way of interpreting the events and experiencing their consequences in Muslim suffering and loss of life. The Qur'an makes it clear that even though warfare is a "terrible evil" (2:190) it is sometimes necessary to fight to defend fundamental human rights (22:26-40). We see clear examples of this Islamic commitment to justice and concern for the oppressed in the response of the Muslim world to these conflicts, but they particularly help to explain the will to defend Muslim life as part of jihad in defence of Islam in ostensibly far away places.

BADEF000010-11.

Babar Ahmad initially went to Bosnia to deliver aid. He went to assist an oppressed population. Eventually, he took up arms to fight.

Again, he was not alone. At least 1,000 British Muslims made that journey because they saw a crisis and an injustice. They make no apologies for their actions. They were on the right side of history. Put differently, imagine if a non-German had learned of Auschwitz or Dacau while the camps were in operation and had crossed borders to defend the Jewish people who were being killed. Would anyone seriously consider incarcerating that person, even if there was a legal claim that going to fight in Germany violated some law?

In 1995, the UN, with the active support of the United States, finally intervened militarily on behalf of the Bosniaks. U.S. forces bombed Serb forces. No one called our troops "foreign fighters" or "terrorists."

Mr. Ahmad was wounded in battle in Bosnia. He still has shrapnel embedded in his skull and in his arms from a hand grenade. Today, he can set off metal detectors as he passes through with no external metal in his clothing. He went back to London to recuperate. His heart and his conscience, however, remained with the Bosniaks.

The vast majority of so-called foreign fighters from around the world returned to their lives after the conclusion of the war.<sup>12</sup> They did not join al Qaeda.<sup>13</sup> They were not proponents of a global jihad.

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<sup>12</sup> As noted by Dr. Li: "At the end of the war, the Bosnian army dissolved the Mujahids' Battalion, in accordance with a demand from the United States. The U.S., Bosnian, and Croatian authorities coordinated the evacuation of most of the foreign fighters to Croatia, whence they flew

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*See* BADEF000041. They did not have an anti-Western agenda. *See* BADEF000042. They fulfilled what they saw as a religious obligation to defend Muslims under attack, and having accomplished that goal, they went home.

Mr. Ahmad lost more than 30 friends in the war. When he returned home, he memorialized their stories in an audiocassette. He wanted to preserve their legacies. He released the audiocassette under the label Azzam Recordings on the first anniversary of the Srebrenica massacre. He sold this audiocassette at street stalls around the United Kingdom. The Azzam Publications website was set up the following year, and he marketed his audiocassette on the site.

C. Jihad Does Not Equal Terrorism.

The 9/11 terrorist attacks created the lens through which most Americans now understand the concept of jihad. From the government's Indictment of Mr. Ahmad, it is clear that the prosecutors understand jihad only as al Qaeda defines it. The government believes jihad is characterized by three principle features: 1) proactive aggression; 2) indiscriminate targets and methods; and 3) religious supremacism.

In Mr. Ahmad's Indictment, the government defines jihad as follows:

As used by fundamentalist Muslim groups, the term "jihad" is an Arabic term meaning "holy war" and refers to the use of violence, including paramilitary action, against persons or governments that are deemed to be enemies of its proponents, who espouse a fundamentalist version of Islam that advocates the use of military action and violence in this respect.

BA-000192.

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home or to countries in Europe. Several dozen stayed in the country, married local women, and became Bosnian citizens." BADEF000039.

<sup>13</sup> Dr. Li's research bears out this point. "I have thoroughly investigated alleged links between the Bosnian jihad and al Qa'ida. I have identified a handful of individuals who fought in Bosnia and later joined al Qa'ida." BADEF000040. Again, more than 1000 Muslims from the United Kingdom went to fight in Bosnia. BADEF000120. There were thousands more from other countries. BADEF000033. The "handful" that joined al Qaeda is not representative of the whole.

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According to the government, all those who participate in jihad share the same vision of a violent mission carried out against those who threaten not a particular country or people, but the concept of Islam itself as defined by its most extreme adherents.

In an affidavit in support of the Request for Extradition, the government defines “mujahideen” as follows:

As used herein, the term “mujahideen” refers to militant Islamic guerilla fighters, including Taliban fighters in Afghanistan and militant Muslim guerilla fighters in Chechnya, who engage in jihad and fight against persons or governments that are deemed to be enemies of a fundamentalist version of Islam.

BA-000238.

The government emphasizes the lawless violence of these campaigns, alleging that the jihads “in the geographic areas of Bosnia, Chechnya, Afghanistan and elsewhere have involved murder, maiming, kidnaping, and the destruction of property.” BA-000192 (Ahmad Indictment).

In light of this vision, the government unsurprisingly equates jihad and terrorism. Mr. Ahmad is accused of “providing material support to terrorists” because he helped run a website that advocated support for Muslim fighters – referred to by the government as “jihadis” or “mujahideen” – in Bosnia, Chechnya, and Afghanistan. The government argues that the groups he advocated support for (particularly the Taliban) were or are proponents of jihad: “At all times material to this Indictment, the Taliban has been a group of individuals that espoused and practiced jihad.” *Id.* at 2.

As Karen Armstrong explains:

Jihad is also a core Islamic concept. The fact that someone like Osama bin Laden declared himself to be fighting a global jihad inevitably distorts the understanding of the concept in today’s world for those who are not Muslim.

\* \* \*

Like almost all social systems, Islam has developed a theory of justified violence. Its treatment in the Qur’an bears an analogy with the concepts of justification and self-defence in civil law. The only possible justification for war is self-defence (2:190).

BADEF000015-16.

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The government's understanding of jihad and of the Taliban is inexact and incorrect. As John M. Berger (a widely cited and respected terrorism analyst) writes

One area where important definitions can get murky is the distinction between “terrorist” and “jihadist.” The two terms have become conflated in recent years, in part due to a deliberate and systemic rebranding of the world by Western diplomatic maneuvers and psychological operations. Here, I think an important distinction can be drawn. Not all jihadists are terrorists, but virtually all Muslim terrorists define their activities as jihad.

John M. Berger, *Jihad Joe: Americans Who Go to War in The Name of Islam*, ix (2011).

Karen Armstrong further warns of the dangers of confusing jihad with terrorism at the definitional stage:

Al-Qaeda’s views, exemplified by the terrorist attacks in the United States in September of 2001, do not accord with the classical view that violence must be proportional and that innocent civilians should not be targeted.

\* \* \*

Violence is justified under international law where it is borne out of necessity to save life or to defend occupied land. There are then rules of proportionality and distinction between combatants and non-combatants that govern conduct of war. This leads us to the erroneous underlying assumption that jihad is terrorism *essentially by definition*. I emphasize that this is an assumption at the *definitional* stage, because once a Muslim makes a decision to discharge his obligation of jihad his conduct may or may not amount to a terrorist offence. It is not the case that merely by discussing an obligation to fight, that a writer or theory can further be characterised as encouraging unlawful violence (or in this context ‘terrorist offences.’)

BADEF000019.

The view expressed by the government obscures important divisions in contemporary jihadist thought and inappropriately imputes the ideology of Osama bin Laden and al Qaeda to all Muslim combatants who understand their militarism in religious terms.

D. Al Qaeda Has Nothing to Do With This Case.

The government has gone to desperate lengths to try and connect Mr. Ahmad, Azzam Publications and this case to al Qaeda. It has trotted out Evan Kohlmann, who believes that every jihad struggle, from Bosnia till today, is part of al Qaeda’s “global jihad” against the West. Defense experts

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Armstrong, Li, Sageman, Hasan, and Kuehn/Farrall/Strick van Linschoten all reject Kohlmann's simplistic theory.

The government, in a failed effort to make the connection between Mr. Ahmad, Azzam Publications and al Qaeda, cites to articles posted on other websites long after the Azzam websites permanently closed in July 2002. *See* Plea Agreement, Stipulation of Offense Conduct (doc. # 108) ¶¶ 3, 6, 7 (stipulating that the websites shut down permanently in July 2002). Mr. Ahmad and Azzam Publications had nothing to do with these articles.

In addition, the government has deposed a cooperating witness who was a self-described al Qaeda operative in a number of very serious, murderous plots. *See* Mr. Ahmad's Memorandum in Support of Motion to Preclude Unreliable Evidence (doc. # 177). He repeatedly stated in his testimony that Mr. Ahmad did not support al Qaeda and did not support the killing of civilians. The classified discovery letter sheds additional light on this issue.

In short, the government should not be allowed to prejudice this case with baseless suggestions and innuendos that Mr. Ahmad or his websites supported al Qaeda. The facts are clear on this point.

E. Martyrdom is an Important Tenet of Islam.

In the same way, the government makes the mistake of viewing the Islamic concept of martyrdom through the aggressive, terrorist acts of the 9/11 hijackers. Since al Qaeda praised the 9/11 hijackers as "martyrs" by releasing their "martyrdom videos," the government seeks to criminalize any veneration of martyrs and martyrdom as incitement to terrorism by definition. The government cites the stories and images of martyrs featured on the Azzam websites, audiocassettes, and videocassettes as proof of material support for terrorism.

Yet the government makes the fundamental, and dangerous, mistake of viewing Islam only through the lens of terrorism. Thus distorted by that perspective, the image of Islam, and the meaning of its terms and tenets, will of course itself be misshapen. Only by examining Islam independent of terrorism can its terminology and precepts be understood properly – an essential precondition to understanding Mr. Ahmad's conduct as well.



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Martyrdom is a core Islamic concept. There are multiple verses in the Quran and dozens of hadiths (Prophetic sayings) extolling the virtues of martyrs and martyrdom. The government seeks to outlaw, in effect, parts of the Islamic faith under the mantle of fighting terrorism. Karen Armstrong charts the origins of martyrdom in the Quran, and then she goes on to warn of the dangers of equating martyrdom with terrorism:

One further use of religious generalisation that requires care is the treatment of the praise of the “martyr” and “martyrdom.” It is not axiomatic that such praise amounts to an incitement to terrorism. Commentators tend automatically to regard martyrdom as an essentially aggressive and violent act. Suicide bombing and the suicidal terrorism of 9/11 have naturally brought this type of “martyrdom” to the forefront of any discussion of so-called “Islamic” base violence. But this is a modern aberration and is not the way these terms have been used in the Muslim tradition as a whole.

Islam is not alone in regarding the martyr as a hero of the faith. Jews and Christians revere martyrs who died as victims of persecution at the hands of a tyrannical state and regard their sacrifice as a supreme religious achievement. In the same way, Muslims who sacrifice their lives to establish or defend Islamic ideals hold an important place in Islam. Like the Greek martyrs (which give us our English “martyr”), the Arabic *shahid* (“martyr”) means “witness.”

\* \* \*

A traditional martyr, in Islamic as well as in Jewish and Christian history, is not a terrorist but a victim of tyranny and a champion of justice. These martyrs do not seek their own death; it is inflicted upon them. In Islam, as we have seen, the term is chiefly applied to those who die in the service of God and the *ummah* in battles and defensive wars against the enemy.

Two general observations can therefore be made. First, the virtues placed upon military sacrifice in defence of faith are not exclusive to Islam, and find strong parallels in other religions, particularly those that underpin Western secular law. Second, the huge value that Islam accords to those who battle on behalf of the *Din* [religion], has parallels in the way in which modern secular states understandably idealise their war dead. It is readily accepted that soldiers “make the greatest possible sacrifice for their country.”

BADEF000022-23

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F. The United States has Supported Jihad.

In the recent past, the most enthusiastic supporter of foreign jihads has been the United States' government itself. In 1979, months before the Russian invasion of Afghanistan, the CIA began assisting Afghan insurgents rebelling against the Russian-backed Communist government. In what one author calls "the largest covert operation in the history of the CIA," "[f]rom 1979 to 1992, America channeled at least three billion dollars to the various mujahideen factions fighting the Russians and the [Russian-backed] Najibullah regime." Christian Parenti, *America's Jihad: A History of Origins*, 28 SOCIAL JUSTICE 31-38, 32 (Fall 2001) (hereinafter "Parenti").<sup>14</sup> "Branches of the MAK [offices run by the cleric Abdullah Azzam dedicated to organizing fighters in Afghanistan] were established in cities all over the world; the central one, known as the Al-Kifah Refugee Center, Inc., was located in Brooklyn, New York, and even received economic aid from the Reagan administration." Asaf Maliach, *bin Ladin, Palestine and al-Qa'ida's Operational Strategy*, 44 MIDDLE EASTERN STUDIES 353-375, 354 (May 2008).

Dr. Sageman writes:

As we saw, the Makhtab was created in 1984. It had offices in almost a dozen cities in the United States in the 1980s. At the time, the Makhtab was encouraging young Muslims to go and fight in Afghanistan, which the U.S. government also did. I was both on the Afghan Task Force in Langley at the CIA and at the CIA station in Islamabad at the time, handling the Afghan mujahedin. I can attest to it, as a direct, primary source. The Makhtab and the U.S. government were on the same side during Azzam's lifetime.

BADEF000179.

Indeed, Dr. Azzam was invited to the United States to recruit Muslims (mostly students and young men) for the Afghan jihad against the Soviets. In fact, in the early-to-mid 1980's, Dr. Azzam spoke in dozens of U.S. cities for that very purpose, sponsored, facilitated, and encouraged by the U.S. government.

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<sup>14</sup> See also BADEF000251 (expert report of Kuehn *et al*) ("The Afghans were loosely organised into seven main mujahideen groups through which foreign money and support (from Saudi Arabia and America, among others) was channeled.").

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As Christian Parenti points out, “The most radically Islamic groups always received the bulk of the funding: fully one-third of U.S. monies went to the religious zealot and Pashtun, Gulbuddin Hekmatyar.” Parenti at 31-38, 32. Although the CIA’s financial support for the Afghan anti-Soviet jihadists was kept secret, American presidents frequently voiced their enthusiasm for the cause of the mujahideen. In 1982, Ronald Reagan had this to say on the occasion of the launch of the *Columbia* space shuttle:

Just as the *Columbia*, we think, represents man’s finest aspirations in the field of science and technology, so too does the struggle of the Afghan people represent man’s highest aspirations for freedom. The fact that freedom is the strongest force in the world is daily demonstrated by the people of Afghan[istan]. Accordingly, I am dedicating on behalf of the American people the March 22nd launch of the *Columbia* to the people of Afghanistan.

Remarks on Signing Proclamation 4908, Afghanistan Day, March 10, 1982, *available at* <http://www.reagan.utexas.edu/archives/speeches/1982/31082b.htm>.

President Reagan promised the “support of the American people” in ensuring “not just freedom in Afghanistan, [but] freedom wherever it is threatened or suppressed the world over.” *Id.* Reagan encouraged the world to see the jihad of the Afghan mujahideen in terms familiar from American history, as outnumbered freedom fighters struggling to shake off the oppression of a mighty alien power and establish a new, self-governing state.

American presidents defined the jihads they supported as heroic defensive actions against the intolerable cruelties of foreign oppressors. As quoted above, President Clinton evoked images of the Holocaust in his speech about the plight of the Bosniaks. He also said “We can then say to the people of the world, whether you live in Africa, or Central Europe, or any other place, if somebody comes after innocent civilians and tries to kill them en masse because of their race, their ethnic background or their religion, and it is within our power to stop it, we will stop it.” Henry Kissinger, *Does America Need A Foreign Policy* 254 (2001). In a similar vein, candidate George W. Bush condemned American isolationism when criticizing Russia’s campaign against the “Islamist rebels” it considered terrorists, urging the international community to support the efforts of Chechen Muslims to defend themselves.

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*Bush condemns US isolationism*, BBC NEWS, Nov. 18, 1999, available at <http://news.bbc.co.uk/2/hi/americas/527105.stm>.

This presidential oratory helped to encourage US citizens to join the Afghan jihad as foreign fighters. John M. Berger, whose book examines the history of American jihadists, writes, “It’s not surprising that American Muslims would take part in the jihad against the Soviets when Ronald Reagan was denouncing communism and pronouncing the mujahideen heroes and freedom fighters.” John M. Berger, *Jihad Joe: Americans Who Go to War in The Name of Islam* xiii (2011). According to Berger, the jihadis American foreign policy likely helped inspire represented a broad cross-section of the population: “They include all levels of economic success and failure and every sort of background and ethnicity, including blacks and whites, Latinos, women, and even Jews. They come from big cities and small towns and every part of America, including the East and West Coasts, the Deep South, and the Midwest.” *Id.* Given the United States’ history of such oratorical and material support for jihads around the world, it might be said that Muslims who travel abroad to fight in defense of those they consider part of their religious community are therefore participating in a tradition that is as much American as it is Islamic.

G. The Concept of Modern Jihad is Complicated.

Some of the most influential contemporary concepts of jihad were developed in response to the Soviet invasion of Afghanistan in 1979, which attracted the financial and physical support of Muslims from around the world who hoped to defend Afghan Muslims against the huge Russian army. “Conservative elements sought to fight the regime, rallying behind religious edicts as local Mullahs declared the conflict a jihad. Afghans who took up the struggle against the central government and its allied forces were known as mujahideen.” BADEF000251. One of those drawn to the Afghan Jihad was Abdullah Azzam. Azzam was born in the West Bank in 1941. His family relocated to Jordan following the Six Day War and Azzam joined the Muslim Brotherhood there in 1969; he completed a doctorate on Islamic law at Egypt’s foremost religious institution and taught at universities in Saudi Arabia and Pakistan. In 1984, Azzam relocated to Peshawar, Pakistan, where he established the

Services Office (Maktab Al-Khidamat) with funding from bin Laden and others, to support the Afghan jihad and channel foreign fighters into Afghanistan. BADEF000253.

Kuehn *et al* describe Azzam's ideology: "Where jihad was normally seen as a duty carried out by those whose land was under direct attack, and with support from the umma, Azzam called for all Muslims, wherever they were to join the fight in defence of Muslim lands . . . . In essence, Azzam was advocating for a classical jihad; a defensive jihad against invaders on Muslim soil, but arguing the umma itself should step beyond a support role into a more active role including participation in combat to liberate the land." BADEF000252

Azzam differed with bin Laden, however, in crucial ways. Although bin Laden was one of the initial sponsors of the Maktab Al-Khidamat created by Azzam in 1984, the two developed irreconcilable differences. They split in 1986. Kuehn *et al* write:

Although bin Laden and Azzam agreed as to the necessity for jihad in Afghanistan, their views came to differ on how the Afghan Arabs should best support the Afghan jihad.

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Bin Laden ceased funding of the Services Office in 1986.

\* \* \*

Bin Laden's visit ultimately set the stage not only for his split with the Services Office, but also for the eventual emergence of al-Qaeda – an organization founded and led by him until his death in 2011.

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Thus, when bin Laden opted to cease funding the Services Office in late 1986 and go his own way, owing to their differing views, Azzam said very little on the matter.

BADEF000255-56.

The 1986 bin Laden – Azzam split grew in time to encompass major ideological and strategic differences. As Thomas Hegghammer, director of terrorism research at the Norwegian Defence Research Establishment, points out, Azzam maintained that the use of violence should be restricted to the defense of Muslim lands under threat or occupation by a non-Muslim power. "Azzam's vista is more modest [than bin Laden's]: fighting against the infidels who occupy Islamic land (Soviets in

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Afghanistan, Israelis in Palestine) rather than engaging in a world war against the infidels.”<sup>15</sup> Fawaz A. Gerges, a professor at the London School of Economics and former director of the LSE Middle East Centre, confirms this view of Azzam’s philosophy, writing that his emphasis was “on resistance, not expansion or aggression. For example, [he] focused almost exclusively on the Afghan war against the Russians and opposed meddling in the internal affairs of Arab and Muslim countries, including Afghanistan.”<sup>16</sup>

In insisting on the defensive nature of jihad, Azzam was articulating a long-standing view within Islamic thought; Karen Armstrong, citing the Qur’an, writes that this view held that “the only possible justification for war is self-defence.” BADEF000016. Azzam believed in the creation of a strong Islamic society in Afghanistan that would go on to defend Muslims around the world. “[S]uch a society,” wrote Azzam, “cannot be founded without a movement that has been forged in the fire of trials, and unless its members have developed in the heat of conflict.”<sup>17</sup>

Azzam and bin Laden were, however, completely divided on the way forward after the Soviets withdrew from Afghanistan. The basics of bin Laden’s view became widely known in the West on September 11, 2001. Azzam, on the other hand, conceived of jihad as a defensive action: all Muslims had the obligation to participate when they saw their co-religionists being oppressed, he argued. “Azzam’s conception of jihad also differed from that of the new ideologues, including Zawahiri, by being more limited and defensive,” writes Gerges. “Azzam stressed that jihad becomes a personal duty (fard’ayn) when Muslims lands are either imminently threatened or occupied by nonbelievers.”<sup>18</sup> Bin Laden’s supporters saw Azzam’s concerns as too parochial because the senior cleric hoped to use jihad

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<sup>15</sup> Farhad Khosrokhavar, *INSIDE JIHADISM: UNDERSTANDING JIHADI MOVEMENTS WORLDWIDE* 24-25 (2009).

<sup>16</sup> Fawaz A. Gerges, *THE FAR ENEMY: WHY JIHAD WENT GLOBAL* 136 (2009).

<sup>17</sup> Alex Strick van Linschoten & Felix Kuehn, *AN ENEMY WE CREATED: THE MYTH OF THE TALIBAN-AL QAEDA MERGER IN AFGHANISTAN, 1970-2010* 61 (2012).

<sup>18</sup> Fawaz A. Gerges, *THE FAR ENEMY: WHY JIHAD WENT GLOBAL* 135-136 (2009).

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as a tool with which to combat specific instances of oppression, rather than to attack and kill anyone who stood in his way.

Azzam also differed sharply from bin Laden over whether it was permissible for jihadis to target civilians. Gerges writes that Azzam “eschewed terrorism, targeting civilians, and taking jihad global, stating that unless directed into the right path, jihadis ‘could turn into bandits that might threaten people’s security and would not let them live in peace.’”<sup>19</sup> Numerous scholars point to disagreements between Azzam and his more radical colleagues and followers over the question of terrorism designed to inflict civilian casualties. Richard Rubenstein – a Holocaust scholar who has written on what he sees as the genocidal ideology of some contemporary jihadis – writes that “Azzam rejected that position. . . . There was no choice for Azzam. He insisted that intentional killing of civilians, especially women and children, was forbidden.”<sup>20</sup>

Hegghammer highlights the same difference of opinion: “[W]hile Azzam advocated guerilla warfare within defined conflict zones against enemies in uniform, Bin Ladin called for indiscriminate mass-casualty out-of-area attacks.”

Hegghammer demonstrates that the ideological and tactical divide between Azzam and bin Laden has been reflected in the different motivations and actions of foreign Muslim fighters in places like Afghanistan, Bosnia, and Chechnya. The government, relying primarily on the analysis of the self-declared terrorism expert Evan Kohlmann, sees these conflicts as part and parcel of al Qaeda’s global jihad against the West because they encouraged foreign fighters to use the tools of violence against a non-Muslim oppressor; it was then easy, according to the government’s theory, for these combatants to see the entire non-Muslim world as complicit in the suffering of Muslims everywhere, and therefore as a target against which acts of violence were permissible.

Hegghammer, however, warns against efforts like Kohlmann’s to equate all Muslim self-defense struggles with al Qaeda’s global jihad against the West. Hegghammer writes that “the study of foreign

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<sup>19</sup> Fawaz A. Gerges, *THE FAR ENEMY: WHY JIHAD WENT GLOBAL* 136 (2009).

<sup>20</sup> Richard L. Rubenstein, *JIHAD AND GENOCIDE* 28 (2010).

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fighters has largely been confined to the subfield of terrorism studies, where, too often, they are conflated with al-Qaida (even though most foreign fighters do not blow up planes, but use paramilitary tactics in confined theaters of war). They are insurgents in every respect but their passports.”<sup>21</sup> These fighters, asserts Hegghammer, were indoctrinated with the “classical jihadist” ideas of Abdullah Azzam, whose intellectual influence limited the scope of the violence of Muslim conflicts in Eastern Europe. Azzam’s intellectual legacy, writes Hegghammer, “is why Arabs in 1980s Afghanistan or 1990s Bosnia and Chechnya, all of whom were classical jihadists, practically never undertook international terrorist operations, while al-Qaida militants have attacked a broad range of Western targets in a variety of locations.”<sup>22</sup>

After spending more than one year in Bosnia researching the role of foreign fighters in the war, Dr. Li rejects the Kohlmann notion that al Qaeda was involved in the conflict in Bosnia. BADEF000039-42. Likewise, Kuehn *et al* concluded that Saudi commander Khattab’s involvement in the conflict in Chechnya was not only unrelated to al Qaeda, but that it posed a strategic threat to al Qaeda. BADEF000276. Most Muslims who fought alongside or otherwise supported Muslims under attack in those regions did not employ terrorist tactics and were not “anti-Western” in any general sense, harboring none of al Qaeda’s vision for a global jihad. Based on his extensive research, Hegghammer estimates that 1000-2000 foreign fighters went to Bosnia between 1992 and 1995, and that far fewer traveled to Chechnya from 1995-2001; in both cases, these fighters were mostly from Arab countries, Europe, and the United States.<sup>23</sup> Dr. Hasan estimates that approximately 1000 British Muslims went to Bosnia to fight and that “[t]housands more organized and participated in humanitarian aid convoys to Bosnia.” BADEF000120. Dr. Li estimates several thousand Muslim activists went to Bosnia (not

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<sup>21</sup> Thomas Hegghammer, *The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad*, 35 INTERNATIONAL SECURITY 53-94, 55 (Winter 2010/2011).

<sup>22</sup> Thomas Hegghammer, JIHAD IN SAUDI ARABIA: VIOLENCE AND PAN-ISLAMISM SINCE 1979 7-8 (2010).

<sup>23</sup> Thomas Hegghammer, *The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad*, 35 INTERNATIONAL SECURITY 53-94, 61 (Winter 2010/2011).



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all fighters). BADEF00033. In examining the history of all recent major conflicts in which Muslim foreign fighters participated, Hegghammer concludes that the ideology of these fighters derives largely from the life and works of Abdullah Azzam: “It is clear from the available material that Abdullah Azzam is by far the most influential foreign fighter ideologue. Subsequent writers cite and praise him, and later recruitment videos include recordings from his speeches. His texts are emblematic of the foreign fighter doctrine.”<sup>24</sup>

What Hegghammer means is that it is primarily Azzam’s vision of a limited, defensive jihad in the defense of Muslim lands under threat by non-Muslim oppressors that has guided the actions and thinking of the foreign fighters. Because Azzam argued that participating in these defensive jihads was an absolute duty for Muslim men everywhere, Hegghammer claims that the emergence of his ideology in the 1980s enabled the emergence of the foreign fighter movement in Afghanistan, Bosnia, Chechnya, and elsewhere.<sup>25</sup>

Ultimately, the split between Azzam’s defensive jihad philosophy and al Qaeda’s strategy of global jihad led to the creation of two distinct communities of foreign fighters, communities that have frequently been antagonists. “Crucially, the two communities have often competed over resources, usually to the detriment of [al Qaeda]... foreign fighters consistently enjoy higher levels of popular support across the Muslim world, and thus recruit and fundraise more easily than al-Qaida.”<sup>26</sup> Kuehn *et al* describe how Chechen commander Khattab’s popularity with the independent Khalden camp in Afghanistan posed a strategic threat to al Qaeda:

As outlined above, the Chechen jihad increased the popularity of Khalden and the relationship between Khalden and Ibn al-Khattab drew volunteers to the camp. The relationship, moreover, increased al-

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<sup>24</sup> Thomas Hegghammer, *The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad*, 35 INTERNATIONAL SECURITY 53-94, 61 (Winter 2010/2011).

<sup>25</sup> Thomas Hegghammer, *The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad*, 35 INTERNATIONAL SECURITY 53-94, 74-77 (Winter 2010/2011).

<sup>26</sup> Thomas Hegghammer, *The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad*, 35 INTERNATIONAL SECURITY 53-94, 89 (Winter 2010/2011).

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Qaeda's rivalry with Khalden, as Ibn al-Khattab and Khalden diminished the importance of al-Qaeda and frustrated its ambitions. The Chechen conflict – and the relationship between Ibn al-Khattab and Khalden – infringed on al-Qaeda's ambitions both because of its differing recruitment objectives as well as the fact that al-Qaeda had no open, legitimate jihad front of its own. Khalden could train and dispatch volunteers to Chechnya, as a key part of its objective to train volunteers to fight in occupied Muslim lands. Meanwhile, al-Qaeda was seeking to train volunteers and retain them for its own organisational benefit.

BADEF000276.

Perhaps due to that rivalry and al Qaeda's inability to compete with Azzam, and perhaps also due to the significant philosophical differences between bin Laden and Azzam, Azzam was assassinated, and the prevailing view among scholars is that bin Laden sponsored the assassination. *See* BADEF000180.

H. The Chechen Conflict Was Seen as the "Next Bosnia."

Like Bosnia, Chechnya is predominately Muslim, but its conflict with Russia turns on the question of independence rather than the competing territorial claims of semi-autonomous ethnic groups. For centuries, Chechnya has been the focus of Russian annexation efforts. The 1720s marked "the start of a century and a half of military engagement and colonization, as the Caucasus became a frontier of strategic and cultural-religious competition between the Orthodox Christian Russian and the Islamic Ottoman empires."<sup>27</sup> After the Russian Revolution, a "North Caucasus emirate" enjoyed a brief independence before being dismantled by the victorious Bolsheviks.<sup>28</sup> Joseph Stalin deported more than 500,000 Chechens during World War II.<sup>29</sup> In the 1990s, Chechnya attempted to follow the example of numerous other Soviet bloc countries after the Union's collapse by declaring its independence, a move

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<sup>27</sup> James Hughes, *CHECHNYA: FROM NATIONALISM TO JIHAD* 7 (2007).

<sup>28</sup> *Id.* at 10 (2007).

<sup>29</sup> "In 1944, Stalin deported almost the whole Chechen nation, more than 500,000 persons, to Central Asia, while falsely accusing it of collaboration with the invading Nazis. This deportation, recognized by the European parliament as genocide, resulted in the deaths of a third of the Chechen population during their transportation and the first year of their resettlement."

Zbigniew Brzezinski in forward to *Chechen Struggle*, xii.

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that the Russian government resisted swiftly and brutally, ordering a massive military intervention beginning in 1994 and ending in 1996 with the Khasavyurt Peace Accord. Internationally monitored elections resulted in the selection of a Chechen president and parliament. Russia again invaded Chechnya in 1999 in an attempt to re-establish control over the autonomous province it had long considered part of its territory. The parallels with Ukraine today are striking. Russia claimed it was conducting a “counter-terrorist” operation in Chechnya. A British judge rejected that claim while denying a request to extradite to Russia a senior exiled member of the Chechen resistance. In 2003, Senior District Judge Timothy Workman ruled:

The Government maintain that the fighting which was taking place in Chechnya amounted to a riot and rebellion, “banditry” and terrorism. . . . I have taken into account the scale of the fighting – the intense carpet bombing of Grozny within excess of 100,000 casualties, the recognition of the conflict in terms of a cease fire and a peace treaty. I was unable to accept the view expressed by one witness that the actions of the Russian Government in bombing Grozny were counter-terrorist operations.

*See The Government of the Russian Federation v. Akhmed Zakaev*, Bow Street Magistrates Court (November 13, 2003) (attached hereto at Exhibit D). Judge Workman went on to rule that he was “quite satisfied that the events in Chechnya in 1995 and 1996 amounted in law to an internal armed conflict. Indeed, many observers would have regarded it as a civil war.” *Id.*

Again, European Muslims watched as Russian tanks destroyed Muslim villages and Russian troops brutalized the Chechen population. The Muslim world feared another Srebrenica, and there was a determination among Muslims to prevent another humanitarian catastrophe.

The long-running bombing campaigns carried out by Russia’s powerful military inflicted extraordinary harm on Chechnya. Russian attacks on the Chechen capital of Grozny became emblematic of the war’s ruthlessness. One conservative estimate puts the number civilian casualties at 25,000-29,000 in the 1994-1995 bombing of the city. “The devastation was such that the respected Russian newspaper *Literaturnaya gazeta* published a photograph of the ruins of Grozny with the

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headline: ‘This is not Stalingrad in ‘42, It’s Grozny in ‘95.’”<sup>30</sup> Grozny was again bombed during the second Russian-Chechen War, resulting in thousands more deaths. Secretary of State Madeleine Albright describes the position of the United States on Russia’s actions in Chechnya:

Under Putin’s direction, the Russian military bombed Chechen cities and villages, before moving in on the ground. There were reports of indiscriminate violence and massacres, and tens of thousands of people fled their homes, prompting an international outcry. At meeting after meeting I told Foreign Minister Ivanov that Russia couldn’t act as if all Chechens were terrorists. I pressed him to permit an independent investigation of the alleged atrocities, allow access for humanitarian organizations, and negotiate a political settlement. President Clinton confronted Yeltsin over the same issues at the November 1999 OSCE summit in Istanbul.<sup>31</sup>

The arguments of the American government had no effect on Russia’s actions and did nothing to remedy the crisis in Chechnya. According to Mark Kramer:

Huge swaths of Chechnya were destroyed during the 1994-96 war, and promises of large-scale reconstruction aid from Moscow never materialized. Although the federal government provided a limited amount of assistance (mostly energy supplies and grain), economic recovery and the rebuilding of destroyed facilities never made any headway. Further destruction occurred in 1999-2000, rendering many towns, including Grozny, almost uninhabitable. Chechnya’s infrastructure has been obliterated, and basic services (*e.g.*, running water, electricity, heat, and natural gas) are nonexistent or nearly so in many areas, including Grozny. Even if the war were to end and reconstruction were to begin on a serious footing, most of Chechnya would remain blighted for years to come.<sup>32</sup>

Barry Renfrew, who reported from Grozny during the first Russian incursion, describes the tremendous brutality of the fighting: effective Chechen insurgents inflicted heavy casualties on poorly trained and badly organized Russian troops, who then resorted to the wholesale destruction of the areas they targeted. “What was supposed to be a swift police action turned into a gigantic disaster for the

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<sup>30</sup> James Hughes, *CHECHNYA: FROM NATIONALISM TO JIHAD* 81 (2007).

<sup>31</sup> Madeleine Albright, *MADAM SECRETARY* 684 (2003).

<sup>32</sup> Mark Kramer, *The Perils of Counterinsurgency: Russia's War in Chechnya*, 29 *INTERNATIONAL SECURITY* 5-63, 6 (Winter 2004/2005).

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Russian military. Atrocities began almost at once, with Chechens literally tearing captured Russian airmen to bits while Russian forces indiscriminately bombed civilian settlements.”<sup>33</sup>

Many of the factors that had been at work in Bosnia facilitated the dissemination of news about the situation in Chechnya and caught the attention of Muslims around the world. “The Chechen rebels, assisted by images of horror and destruction caused by Russian units and air strikes, prevailed in the media battle during the First Chechen War.”<sup>34</sup> As in the Bosnian case, these graphic images attracted the sympathy of both Western governments and Muslims everywhere: “the international public was shocked by the pictures of massive and indiscriminate artillery and air strikes aimed at the capital city of Grozny and other urban areas heavily populated by civilians.” A TIME Magazine story from February of 2000 graphically describes the effects of the second Russian invasion:

Grozny has ceased to exist. In their enthusiasm to “liberate”—Moscow’s politically correct term for what happened here – the Chechen capital, the Russian army and air force have flattened what was once a city of 500,000. The war of 1994-96 left Grozny badly scarred but still alive, with even a comfortable middle-class area near the center of town. Now all that is left is a horrible dreamscape of destroyed houses, mangled, mud-filled streets and the occasional dazed civilian wandering through the city in search of firewood or other basics. Even the trees have been shattered, beheaded by artillery blasts ...<sup>35</sup>

But although Western and Muslim governments sharply criticized Russian military policy in Chechnya, they refrained – undoubtedly due in large part to Russia’s size and influence – from taking any effective action. Henry Kissinger criticized NATO’s double standards for intervening militarily in Kosovo (an autonomous province in Serbia) but not Chechnya (an autonomous province in Russia):

Leaders of the NATO coalition lapsed into embarrassing silence when Russia launched a crackdown in Chechnya that was, structurally, nearly identical to the Serb actions in Kosovo. Russian actions in Chechnya

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<sup>33</sup> Barry Renfrew, *Chechnya*, available at <http://www.crimesofwar.org/a-z-guide/chechnya/>.

<sup>34</sup> Emil Souleimanov & Ondrej Ditrych, *Internationalization of the Russian-Chechen Conflict: Myths and Reality*, 60 EUROPE-ASIA STUDIES 1199-1222, 1203 (2008).

<sup>35</sup> Paul Quinn-Judge, *Landscape of Horror: Russian troops may have pacified Grozny, but the war isn't close to over*, time magazine, Feb. 21, 2000, available at <http://content.time.com/time/magazine/article/0,9171,996123,00.html>.

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were more sustained, on a much larger scale, than Serb actions in Kosovo, and resulted in even a greater loss of life.

Henry Kissinger, *Does America Need A Foreign Policy?* 257 (2001).

Muslims thus saw mass killings of their fellows that surpassed the Bosnian atrocities – so decried by both the West and the Arab nations – greeted by an even weaker response from the international community. Supporting Muslims in Chechnya financially or as a fighter did not mean championing an anti-Western terrorist agenda; it meant helping to defend members of a community that had been abandoned to torture and massacre by the major powers. Dr. Hasan describes the reaction of British Muslims to Russia’s invasion of Chechnya:

The enmity towards the USSR generated by the Afghan “Jihad” of the 1980s also continued into the Chechnya conflicts from 1999 onwards: British Muslim opinion was now firmly in support of Chechen Muslims, seen as fighters for freedom and independence, victims of the ruthless and imperialist Russian forces. Amongst Muslim activist circles, that were large and very active, it was certainly not regarded as extremist, terrorist or fringe to support the Muslim causes in Bosnia, Kosovo, and Chechnya during the 1990s: on the contrary, such support was mainstream and regarded as legitimate resistance by oppressed freedom fighters, seen as very similar to the Afghan mujahedin fighters against the USSR (1979-1989) who were supported by the US and CIA via Saudi Arabia and Pakistan.

BADEF000122.

It is also important to understand that the sense of transnational community inherent in Islam provided an impetus beyond compassion for Muslims to support their fellows in places like Bosnia and Chechnya. Kuehn *et al* describe how Khattab and other foreign fighters in Chechnya enjoyed widespread support in the Muslim world, unlike al Qaeda:

Al-Qaeda and bin Laden’s sway and prominence also continued to be dwarfed by Ibn-al Khattab. A key part of his appeal was not only his Afghan jihad heritage and participation but also his status as a commander of a foreign fighter contingent on the Chechen jihad front. The jihad in Chechnya was widely considered legitimate and supported by extensive fatwas as well as funds and volunteers from the Gulf, particularly Saudi Arabia. For this reason, Ibn al-Khattab rebuffed advances by al-Qaeda for him to bring his Chechen program under the al-Qaeda umbrella.

BADEF000269-70.

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Karen Armstrong writes that the concept of “ummah” developed by Muhammad “was an astonishing innovation in seventh century Arabia, where people had always defined themselves first and foremost as tribesmen.” BADEF000009. According to Armstrong, Muhammad provided his followers with a way to overcome their tribal rivalries and join together in a community defined by practice and belief; common rituals such as prayer, and a common understanding of their function and significance, allowed Muslims of very different heritages to recognize a shared system of values in one another. Again, as noted above and worth emphasizing, “Today Muslims believe that they are members of a world-wide Muslim community that transcends tribal, ethnic and national identities. They regard their fellow Muslims, wherever they are, as their ‘brothers’ and ‘sisters.’” BADEF000010. The concept of ummah helps explain the erroneousness of the government’s belief that the jihads in Bosnia and Chechnya are manifestations of a sinister transnational plot dedicated only to the reestablishment of an Islamic caliphate at any cost in death, suffering, and repression. Rather than being motivated by political ambitions, the Muslims who traveled to defend those they considered their brothers were largely moved by their sense of connection to the ummah. Muslims believe that they “must defend and protect one another, in exactly the same way as they would rush to the defence of their own kinsfolk.” BADEF000010. Armstrong identifies this connection as the reason for the strength of Muslim reactions around the world to the massacres in Afghanistan, Bosnia, and Chechnya. *Id.*

Again, “foreign fighters” went to the aid of the Chechens. This time Mr. Ahmad did not fight in Chechnya. Instead he saw a role for himself through the use of his educational and computer skills. He helped to launch Qoqaz.net, a website providing news of the Chechen resistance, which he hoped would embarrass Russia into withdrawing from Chechnya.

Qoqaz.net became the most up-to-date news source in English about the fighting in Chechnya. It proved to be very popular, sometimes attracting one million visitors a day. Russia made great efforts to suppress any international news agencies from reporting on the war. There was largely a news blackout in place in Chechnya. But Qoqaz.net posted actual photographs and news bulletins from the battlefield. Dr. Sageman writes: “In this sense, accessing websites supportive of the Chechen fighters was an antidote to the propaganda emerging from Moscow.” BADEF000202-203. Qoqaz.net obtained

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and sold video footage of actual fighting. Qoqaz.net also urged others to support the Chechen resistance fighters through non-violent means. In 2001, Qoqaz.net organized a World Solidarity Day for Chechnya which resulted in 21 peaceful protests in 15 countries attended by more than 15,000 people of many faiths.

It is important in evaluating the charges in this case to keep the time line of events in mind. The United States did not in any way outlaw material support to the Muslims in Chechnya fighting against Russian troops until February of 2003, and even then it only outlawed support to one specific, small group of Chechens who broke away from the Chechen resistance in 2002 to conduct terrorist attacks inside Russia itself. In fact, in 1999, a group of notable American political figures, mostly “neo-conservatives,” formed the American Committee for Peace in Chechnya. The name of the organization was later changed to the American Committee for Peace in the Caucasus, and it still bears that name today. The list of its members was impressive, including former Secretary of State Alexander M. Haig, former National Security Advisor Zbigniew Brzezinski, former CIA Director R. James Woolsey, political commentator William Kristol, former Congressman Stephen Solarz, Director of the Heritage Foundation, Midge Decter, Richard Perle, and Elliott Abrams. This committee was formed to *support* the Chechens fighting against the Russians. See John Laughland, *The Chechens’ American Friends*, *The Guardian*, September 8, 2004, available at <http://www.guardian.co.uk/world/2004/sep/08/usa.russia> (last accessed June 3, 2013). Plainly, it was not a crime in the United States when the Committee was formed to support Chechen independence. It was not a crime in the United Kingdom, either. No Chechen resistance group fighting Russian troops was ever proscribed in the United Kingdom, and the United Kingdom has granted political asylum to exiled leaders of the Chechen resistance. So has the United States.

The United Kingdom granted political asylum to former Chechen Deputy Prime Minister Akhmed Zakaev, after he was wounded fighting Russian troops in 2000. Russia sought his extradition, claiming he was a terrorist, and likening him to Osama bin Laden. In 2003, the United Kingdom refused to extradite Zakaev to Russia. *The Government of the Russian Federation v. Akhmed Zakaev*, Bow Street Magistrates Court, November 13, 2003 (Exhibit D).



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The United States granted political asylum to Ilyas Akhmadov in 2004. Akhmadov received asylum with the assistance of Zbigniew Brzezinski, Madeleine Albright, Ted Kennedy, John McCain, and Frank Carlucci.<sup>36</sup> Akhmadov was the foreign minister of the Chechen government and served in the Chechen army under Shamil Basayev in Chechnya's resistance to the Russian invasion. The Russian government opposed his asylum in the United States, calling him a terrorist. He received asylum, and he has lived in the United States for the past 10 years.

On February 28, 2003, by Executive Order 13224, *United States persons* were prohibited from providing material support to the Riyadus-Salikhun Reconnaissance and Sabotage Battalion of Chechen Martyrs (hereafter "RSRSBCM"), a group under the command of Shamil Basayev in Chechnya. On August 8, 2003, by Executive Order 13224, *United States persons* were prohibited from providing material support to Basayev. It goes without saying that Mr. Ahmad, a British citizen, is not a United States person. Moreover, Mr. Ahmad's Chechen website, Qoqaz.net permanently shut down on September 15, 2001, *see Plea Agreement, Stipulation of Offense Conduct* (doc. # 108) ¶ 7, long before these Executive Orders were issued.

Additionally, the Azzam.com website was not hosted on any United States server after September 27, 2001 and ceased to exist anywhere in the world after July 2002. *See Plea Agreement, Stipulation of Offense Conduct* (doc. # 108) ¶¶ 3, 6, 7. Therefore, any speech or advocacy or religious views maintained on either the Qoqaz.net or Azzam.com websites could not have violated United States laws when the United States had not outlawed support for the Chechens when the speech was made. *See United States v. El-Mezain*, 664 F.3d 467, 489, 537 (5th Cir. 2011) ("Prior to 1995 it was not illegal for HLF to have a relationship with or to provide support for Hamas." . . . . "We recognize that the pre-1995 video recordings of Abdulqader's speech could not themselves be criminal under Humanitarian Law Project because it was not illegal at that time to support Hamas."). Also, the speech contained on the websites was not unlawful when it was uttered in the United Kingdom.

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<sup>36</sup> Mr. Carlucci was Secretary of Defense under Ronald Reagan and Deputy Director of the CIA under Jimmy Carter.

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Finally, speech that represents independent advocacy – that is the thoughts and opinions of the administrators of a website acting independently of a blocked organization – is not prohibited even under the material support statute unless it is made at the direction of or in coordination with a foreign terrorist organization. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 31-32 (U.S. 2010) (“The statute reaches only material support coordinated with or under the direction of a designated foreign terrorist organization. Independent advocacy that might be viewed as promoting the group’s legitimacy is not covered.”). In other words, there is no authority for the government of the United States to prohibit British citizens in the United Kingdom from expressing their own thoughts on the defense of Muslim civilians in Chechnya.

In London, where Mr. Ahmad lived, there was strong and open public support for the Chechens. *See* BADEF000122. The UK government did not attempt to quash this support. The Crown Prosecution Service did not prosecute fundraisers or those who advocated going to Chechnya to fight. *See* BADEF000139 (legal opinion letter of Max Hill, Q.C.). In London, people openly raised funds and held rallies on the streets and in the public squares to gather support for the Chechens.

Mr. Ahmad does not deny that he provided support to the Chechens or that he sent them satellite phones from the United Kingdom. Those facts are not in dispute. What is also not in dispute is that Mr. Ahmad provided those phones four days after an internationally condemned atrocity, the Alkhan Yurt massacre in which Russian troops killed and raped 41 Chechen Muslim civilians. Mr. Ahmad thought that he was on solid moral footing in supporting the Chechens against the Russian Army. According to the laws of the United Kingdom, he was on solid legal footing, too. *See* Max Hill opinion, BADEF000139 at ¶ 23.

That is not to say that Mr. Ahmad agreed with all of the tactics that some Chechen fighters later employed. He did not know that Basayev was capable of doing what he later did in Moscow or at Beslan, and Mr. Ahmad did not support such heinous actions. Attacking civilians and attacking children is not within Islam. In fact, it is specifically forbidden. Those actions of Basayev occurred in 2002 and 2004, well after the websites were permanently shut down.

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Likewise, he recognizes that in killing the captured Russian soldier, Khattab committed a war crime. Terrible things happen in wars, and there has likely never been a war in which a war crime did not take place. That some individuals commit them does not mean that their actions represent the entire cause over which the war was fought, nor does it mean that the cause itself is unjust. William Calley's actions at My Lai did not represent the cause of the United States in Vietnam, and Khattab's crime did not make the Chechen cause one of terrorism or global jihad. It was a barbarous act in the course of a war – no more, no less. In his heart, Mr. Ahmad thought that it was right to support the Muslims in Chechnya against the Russians. Mr. Ahmad hoped to prevent another Srebrenica from occurring.

I. The Taliban and al Qaeda Were Not the Same.

The Taliban was a group of religious students who rose to power in Afghanistan in 1996 with a promise to restore law and order in a country ravaged by two decades of war. Uneducated outside of theology, and naive, they struggled in their mandate. Initially, the Taliban were welcomed by a broad swath of the Afghan population as an antidote to unremitting, arbitrary, and authoritarian rule by competing predatory warlords who exploited and abused the population at whim, and perpetuated a culture of constant, indiscriminate violence triggered by the slightest insult or indignity. Kuehn *et al* spent a combined total of 12 years in Afghanistan researching the Taliban. They write:

The Taliban's evolution is complex and somewhat unprecedented in Afghanistan. Starting as a small local movement drawn from the rural areas from southern Afghanistan, the group rose to control most of Afghanistan. Untrained, poorly equipped to carry out the project of state building and governance the group struggled to maintain control and order. While early on trying to establish good relationships with the international community, the Taliban government was only recognized by three countries, Pakistan, the United Arab Emirates, and Saudi Arabia. It was subject to sanctions due to its harboring of Osama bin Laden and other foreign fighters. The Taliban's internal and external problems grew considerably throughout its time in power, and it never succeeded in driving out the last resistance of the Northern Alliance, against which it fought for full control of Afghanistan.

BADEF000264.

As explained by Dr. Hasan, many Muslims, motivated by religious idealism, initially supported the Taliban, only to become disillusioned with them later. "It should be remembered that the Taliban's accession to power was widely welcomed in many parts of Afghanistan and the wider Muslim world,

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although not all.” BADEF000127. Mr. Ahmad was one of those who advocated support for the Taliban regime. Toward the end of the websites’ existence, Azzam.com posted appeals for Muslims around the world to support the Taliban with money, people, and supplies, a decision Mr. Ahmad now deeply regrets. The Taliban was not engaged in a defensive jihad against invaders – it was fighting other Muslims in a civil war. Moreover, in failing to hand over bin Laden and his fighters, the Taliban enabled al Qaeda to engage in terrorism.

This is not to say that al Qaeda and the Taliban were the same. Indeed, it is a common mistake to conflate them. Kuehn *et al* explain the dangers of understanding the Taliban through the single lens of al Qaeda’s presence in Afghanistan:

Much of the popular perception of ‘terrorist training camps’ in Afghanistan, al-Qaeda, and the Taliban from the time of the jihad against the Soviets through to the fall of the Taliban in late 2001, is more myth than reality. Accounts often suffer from a conflation of al-Qaeda with a wide array of other militant groups. At various times too, the Taliban has been conflated with al-Qaeda – as have all other foreign militant groups (and some non-militant groups) in Afghanistan during this timeframe. Because al-Qaeda has been the subject of the most attention, a consequence has been our understanding of these other groups and the role of foreign fighters in Afghanistan more generally has tended to be framed in their (often misunderstood and misrepresented) relationship to al-Qaeda.

BADEF000240.

Kuehn *et al* describe a more complicated relationship between the Taliban and al Qaeda after the Taliban inherited the latter in 1996. Ultimately, after many years of research, Kuehn *et al* came to the following conclusions:

- The Taliban’s relation with foreign military groups was complex.
- Some foreign militant groups did not accept the legitimacy of the Taliban. There were splits among the foreign militant groups over this issue. Foreign militant groups competed for influence over the Taliban, and of leadership of the foreign militant presence in Afghanistan.
- Al-Qaeda and the Taliban did not share the same ideology or worldview.
- There were splits among the Taliban over how to deal with al-Qaeda and the other foreign militant groups.
- Some senior Taliban figures did not support al-Qaeda’s presence in the country.

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- Bin Laden never directly gave a pledge of allegiance to Mullah Muhammad Omar.
- Their relationship was fraught with tension over al-Qaeda's activities in Afghanistan and its attacks overseas.
- These attacks were not undertaken with the permission of Mullah Muhammad Omar.
- The Taliban did not have foreknowledge of al-Qaeda's attack plans.
- Bin Laden planned and ordered attacks and continued his media campaign against the expressed will of the Taliban leadership.
- In December 2001, the Taliban, after Mullah Muhammad Omar decided to order a withdrawal of forces from Afghanistan, asked foreign fighters remaining in the country to leave.

BADEF000245-46.

Mr. Ahmad regrets his support for the Taliban. He had high hopes that an idealistic Muslim state would emerge in Afghanistan under the Taliban's leadership. Perhaps those hopes allowed him to ignore all the bad things that the Taliban was doing. He, for a time, lost sight of the important principles he had believed in, and he threw his support, in three ways, behind a group that was at war with other Muslims and was likely to face an attack from the United States in retribution for al Qaeda's bombing of the *U.S.S. Cole*. Mr. Ahmad realizes, looking back at his actions, that he should not have solicited funds for the Taliban; he should not have conspired to provide personnel to the Taliban; and he should not have conspired to provide physical items for the Taliban. He was wrong to have done those things, and he is sorry that he allowed himself to lose sight of the principles that previously had guided him.

J. Mr. Ahmad is a Person of Conscience and Obligation.

Mr. Ahmad has long been a person of conscience with a deep sense of obligation to the ummah – the Muslim community. This is one of the unmistakable themes running through the more than 50 letters of support submitted to the Court on behalf of Mr. Ahmad. *See* Exhibit E (including 53 letters to the Court from friends, family, professionals, and community members). At the age of 15, he founded the Friday Circle to organize boys in his neighborhood to help people in the predominantly

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Muslim community of Tooting, in South London. *See* Exhibit F (photographs of Tooting); Exhibit G (photographs of Derinton Road Community Centre, where Circle was held for a time); Exhibit H (photograph of Chicken Cottage where Circle attendees socialized after the Circle). The two Abbasi brothers, who have written to the Court and provided video character references, were founding members of the Friday Circle along with Mr. Ahmad. Today, they are both successful medical doctors. They wrote to the Court to describe how, for no compensation, Mr. Ahmad and the other boys cleaned out gardens, attended funerals where there were not enough relatives to bury the dead (actually on occasion lowering the casket into the ground with other boys because the family could not afford grave attendants), and washed dishes at a wedding where the families of the bridal party were of very limited means. Mr. Ahmad had strong beliefs, inspired by his study of Islam, that a Muslim must perform acts, on a regular basis, to help other Muslims.

As a case in point, Mrs. Malik was a Muslim woman in Tooting with three children – twin girls and a younger boy. Mr. Ahmad and his mother used to tutor local children to prepare them for their 11+ secondary school admissions exams. In the United Kingdom’s educational system, doing well on these examinations can determine the long-term success of the student because the examination results determine whether the student matriculates into a good academic school or gets relegated to an inferior school. In the United Kingdom, it is difficult to advance academically to universities from inferior secondary schools.

Mr. Ahmad and his mother initially tutored Mrs. Malik’s daughters together, and eventually, Mr. Ahmad tutored them himself. While Mr. Ahmad was the tutor, Mrs. Malik ended her marriage because of her husband’s unrelenting physical abuse. The children were traumatized by the family violence and by the divorce. Mr. Ahmad was moved by their trauma, and he not only tutored them, but he frequently picked them up from school, took them to museums, and looked in on them. The Malik family had to move from place to place repeatedly and often to avoid their still-angry patriarch, but Mr. Ahmad still visited them to teach the girls. The chaos was all very disruptive for the children. Mr. Ahmad encouraged the children and took on a role as their older brother. To this day, well over a decade later, the Maliks still refer to Mr. Ahmad as “Babar Bhai” – brother Babar. The now adult Malik twins have

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both written to the Court and one of them has provided a video character reference. They attribute their success – the twins have graduated from university and are now working in good jobs – to Mr. Ahmad’s deep commitment to them – far above and beyond his role as an academic tutor. The Maliks, by the way, are Shia Muslims, and Mr. Ahmad is Sunni. He did not allow religious differences to affect his concern for their well-being.

Mrs. Naseem Aboobaker MBE runs a shelter in Tooting for Muslim women victims of domestic violence. While she was coping with her own abusive marriage, she writes that Mr. Ahmad used to visit her house to give company to her young boys. Today, the now-adult boys are married and working in good jobs. Mrs. Aboobaker later received an MBE honor from the Queen of England for her community work. Despite her success and notoriety, she has not forgotten the help that Mr. Ahmad gave her family.

Indeed, over the course of his life, Mr. Ahmad has helped many people when one might expect that he would not. One might have expected, quite reasonably, that while incarcerated in England awaiting the extradition decision he would not have the time or the inclination to worry about anyone’s fate but his own. During his incarceration in England, he received a letter from a young woman in his community named Najma Gani. She wrote to him to say that she had read about his case, and she let on that she had leukemia. He began a regular, two-year correspondence with her to aid her through her painful arsenic and other medical treatments. Her mother, Mrs. Gani, has written to the Court and provided a video character reference describing how her daughter, in the depths of her misery during treatments in the hospital, would ask to hear Mr. Ahmad’s letters read aloud in the days before she died. Mr. Ahmad published an obituary about her called *How Najma Taught Us How To Live*. See Exhibit I (obituary for Najma Gani written by Babar Ahmad).

Another woman from Tooting, Hannah Ali, writes that she lost her sister in 9/11 and that Mr. Ahmad spent days after 9/11 calling and trying online to locate the missing sister in New York hospitals.<sup>37</sup> He visited the family numerous times to give them support and to pray with them.

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<sup>37</sup> Ms. Ali has also provided a video character reference.

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Mr. Ahmad was horrified by the 9/11 attacks. Dr. Abbasi and Mr. Arif wrote letters to the Court recounting how they were present in large gatherings where Mr. Ahmad publicly condemned the 9/11 attacks.

Mr. Ahmad had a good, full-time job at Imperial College in London until his arrest in 2004. *See* Exhibit J (photographs of Imperial College). His supervisor and two of his colleagues have written to the Court about how he would go out of his way to help students and staff with their problems. *See* Exhibit E (letters of Mr. Belli, Dr. Nadiri and Mr. Raby). Four of Mr. Ahmad's friends at Imperial College, all of whom are today highly successful professionals, describe how Mr. Ahmad was balanced, open-minded, and tolerant in his Islamic views. Two of them write about how Mr. Ahmad played a role in preventing an extremist group from taking over the student Islamic Society. *See* Exhibit E (letters of Dr. Jalisi, Mr. Arif, Dr. Khreegi, and Dr. Abdus-Samee).

One might expect, since the government describes Mr. Ahmad as a radical Muslim extremist that he would have misogynist views of women. But such views are neither part of his upbringing nor part of his world view. His mother has a Master's Degree in Biology, and was a lecturer in biology at a college in Pakistan. She was a teacher, and she tutored children in the UK. Mr. Ahmad's father was not particularly religious. He was an actor and comedian in Pakistan, and he was also a sports reporter covering cricket matches. In the UK, he was a civil servant in an economic development office. Mr. Ahmad's mother was a far greater influence in his life in matters of Islam than was Mr. Ahmad's father.

Mr. Ahmad's sisters are highly educated. One is a physician and the other is a pharmacist. Mr. Ahmad is very close to both of them, and he is extremely proud of their academic and professional success. Both have written to the Court to describe how, when they were ill, Mr. Ahmad would spoon feed them and sleep on the floor in their bedrooms in case they needed anything during the night. Three of Mr. Ahmad's first cousins, Sheza, Sana and Muzna, write about how Mr. Ahmad encouraged them to follow their career dreams as young girls. Today, one is a teacher, one is an architect, and one is a professional photographer and film-maker. Another one of Mr. Ahmad's former students, Sara Agha, has written to the Court to describe how Mr. Ahmad inspired her as a young girl to pursue a career in



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teaching. Mr. Ahmad's lawyers in the UK were mainly women. He chose to be represented in the extradition battle by Gareth Peirce and Sajida Malik. Both women represented Mr. Ahmad for nearly eight years. They remain close to him and have visited him here in Connecticut. For his civil action against the police, who severely beat him during his arrest, he chose Fiona Murphy as his solicitor and Phillippa Kaufmann as his QC. Ms. Murphy along with Mrs. Peirce and Ms. Malik have also written to the Court. *See* Exhibit E. In short, Mr. Ahmad is not a misogynist and cannot be described by stereotypes.

Babar Ahmad is a person who was motivated by a deep sense of commitment to those in need in his community. This commitment arose from personal conscience, religious belief, and idealism. These forces led him, as a matter of conscience, to Bosnia. They led him to start a website to advocate for the Chechen resistance. And they misled him to support the Taliban.

Youthful idealism sometimes loses its way. In the 1960s in the United States, Students for a Democratic Society ("SDS") sprung up on college campuses across the country to advocate for the withdrawal of American troops from Vietnam. SDS began as a movement of peace, but frustration – not only with the failure to end the war, but with the escalation of the war – led to radical elements hijacking the movement. The Weatherman, or Weather Underground, who evolved from SDS, thought that the way to bring a quick end to the war was to bring the horrors of war to American soil. They plotted to blow up American buildings, and they were prosecuted for their crimes. Their actions did not mean that the entire anti-war movement was wrong. The wrong-headed fanaticism of the Weatherman crossed the line into serious criminal behavior, and so they were punished for their crimes. It sometimes happens in political movements that some adherents cross the line, even when they started out with idealistic dreams.

Many Muslims, like Mr. Ahmad, thought that the establishment of a Muslim state in Afghanistan would create a sanctuary for Muslims following the tragedies of Bosnia and Chechnya. Afghanistan's defeat of the Russians and the emergence of the Taliban appeared to provide a means to achieve that dream of a Muslim society governed by a grass roots Muslim government. No dictators,

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no royal families – this would be a religious society built from the ground up. Mr. Ahmad misjudged the Taliban.

The Taliban turned out to be an intolerant and repressive government. The Taliban squandered the opportunity to create the just society that its supporters had hoped it would create. It instead attempted to impose strict religious interpretations on all residents, and it adopted a highly misogynist approach to life in that country. Mr. Ahmad was appalled at the recent story of Malala Yousefzai, the young girl who spoke out about educating girls and who was shot in the head at close range by a Pakistani Taliban gunman. Mr. Ahmad was raised in a household where women were encouraged to seek professional degrees. His idealistic dreams regarding the Taliban are over. He deeply regrets his support for them.

## **Part II: Legal and Factual Analysis**

### **A. The Example of *United States v. Thavaraja* is Instructive.**

Mr. Ahmad does not expect the Court to resolve the righteousness of each side's actions during the wars in Bosnia, Chechnya, and Afghanistan. Those wars provide a context, however, for evaluating Mr. Ahmad's motives and purposes. In a similarly complex situation, the Honorable Raymond J. Dearie looked at the spirit behind the defendant's actions to arrive at a just sentence. The Second Circuit affirmed the reasonableness of the sentence, and quoted at length from Judge Dearie's analysis. In *United States v. Thavaraja*, 740 F.3d 253 (2d Cir. 2014), the defendant was the "principal procurement officer" for the Liberation Tigers of Tamil Eelam (LTTE) for four years. *Id.* at 256. The LTTE was a militant separatist group in Sri Lanka. *Id.* at 255. The United States' State Department designated the LTTE a "foreign terrorist organization" long before the defendant became its procurement officer. *See id.* at 255-56. At the direction of the LTTE, the defendant purchased at least \$20 million worth of military-grade weapons (including anti-aircraft guns, rocket launchers, and explosives) and materials used to make suicide bombs. *Id.* at 256.

Judge Dearie said, prior to imposing sentence: "I will not miss this case because it's given me some of the most difficult and, in many ways, loneliest moments of my career trying to figure out a rational, reasonable sentence. . . ." 740 F.3d at 257. The Court went on to observe that this was an

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unusual case “because it carries the banner of terrorism and yet involves people who certainly pose no direct threat to the United States.” *Id.*

Judge Dearie pointed out that the defendant was not motivated by power or self-aggrandizement but by a desire to help the Tamil people. *Id.* “It’s beyond me to make sense of the situation in Sri Lanka,” he said. *Id.* He did not attempt to sort out the righteousness of the combatants. He did note that the defendant’s “function [in procuring the weapons for the LTTE] was critical and involved . . . procurement of deadly merchandise, almost inevitably used to injure, murder, maim, not only military but civilians.” *Id.* at 258.

The government asked for a sentence of 240 months. The Court imposed a sentence of 108 months (along with 60 months concurrent for a bribery conspiracy). To support his sentencing decision, the district court said:

[T]he Court is called upon to make a difficult judgment in fashioning an appropriate and reasonable sentence. The defendant is a 37 year old, educated Tamil who has never been to the United States, but was extradited to this country following his January 2007 arrest in Indonesia. He has no criminal record and has been in custody ever since.

The defendant admits to serving as a principal procurement officer for the LTTE arranging for the purchase of weaponry and technical equipment by and through others, many of whom are co-defendants. Unlike most co-defendants he remained in Sri Lanka where he lived with his parents and sister whom he has not seen since the day of his arrest.

Despite his serious criminal conduct, all indications are that this defendant, like most of his co-defendants, is a person of substance and decency who was motivated solely to assist the Tamil minority in Sri Lanka who were engaged in an ongoing civil war that it now appears involved serious human rights violations on both sides of the conflict

\* \* \*

The defendant has been in custody for almost six years, separated from his family for the entire period. He has voluntarily served as a tutor of other detainees who have written the Court on the defendant’s behalf expressing their appreciation of his efforts and their thanks for the successes they have realized as a result. In the Court’s view, supported by judges with whom I have consulted, a substantial variance is appropriate and reasonable given the full range of circumstances presented.

740 F. 3d at 258.

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After quoting these remarks, the Second Circuit upheld the substantive reasonableness of the sentence, and in a remark particularly pertinent to Mr. Ahmad's argument about the need to evaluate the context of his actions, the Second Circuit said:

On the other hand, many mitigating circumstances were presented. The district court found that Pratheepan [the actual surname of the defendant Thavaraja] was motivated not by "power" or "self aggrandizement," but by a desire "to help the Tamil people." *His actions had to be evaluated in context: Pratheepan was caught in an "ongoing civil war," one with "serious human rights violations on both sides of the conflict."* *As Pratheepan explained at his sentencing, "There is not a single day I have not thought about our people back at home. They are struggling for their freedom and their future." While these motivations do not justify or excuse acts of terrorism, it was not inappropriate for the district court to take Pratheepan's motivations into account.*

740 F.3d at 260 (emphasis added).

Like the defendant in *Thavaraja*, Mr. Ahmad was not motivated by power or self-aggrandizement. He was trying to help Muslims who were under attack and engaged in a civil war. Like Pratheepan, Mr. Ahmad has no prior criminal record and is an educated person of decency and substance. Unlike Pratheepan, he did not provide \$20 million dollars of weaponry to anybody. His sentence should approximate that of Pratheepan's 9 years, not the 25 years the government seeks in this case.

B. The Websites Were Entirely Passive.

Azzam.com and Qoqaz.net were passive websites, as opposed to dynamic, interactive websites. This distinction is legally significant. *See, e.g., Kun Shan Ge Rui Te Tool Co. Ltd. v. Mayhew Steel Products, Inc.*, 821 F. Supp.2d 498, 503 (D. Conn. 2010)(Hall, J.) ("Passive websites that require a potential customer to initiate contact with the foreign corporation by telephone, mail, or email, rather than allowing them to order directly over the Internet, cannot support personal jurisdiction."). That is, users could access the sites on the Internet from anywhere in the world, and they could read the content, but they could not alter the content. Users could not post messages on the sites, could not conduct business transactions on the websites, could not communicate with each other through the websites, or in any way add to the content of the websites. Users could not send money to the websites. There was no "PayPal" or credit card capability on the site. The sites were one dimensional in that users could

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read content but could not otherwise transact business on the sites. In contrast, if one were to go to Southwest.com, one could buy a plane ticket, book a hotel, rent a car, and pay for it all by filling in credit card information in computer fields directly on the southwest.com website. Nothing analogous was possible on Azzam.com or Qoqaz.net.

For users who wanted to communicate with the administrators of the websites or who wanted to purchase literature or videos referenced on the websites, there were email accounts that were separately maintained – apart from the websites – where such communications could be sent or users could print out an order form, fill it out by hand, and mail it to a post office box in London. The websites, however, were static. Users could not enter information on them or communicate through them.

The websites were registered to a physical address in London, United Kingdom. The same United Kingdom address was openly advertised on the homepage of the websites, on the order forms, and on all products and literature advertised on the sites. All responses to reader emails on behalf of the websites, originated, and were typed up on computers in the United Kingdom.

During their existence, all content of the sites, including every keystroke to enter content, was entered outside of the United States – the majority, if not all of it, in the United Kingdom. OLM and Allwebco did not provide content, edit the sites, advertise on the sites, or do anything other than host the websites on the Internet. Web hosting means that the hosting company provided webspace either directly or indirectly to the websites.<sup>38</sup> Azzam.com and Qoqaz.net received from their hosting provider an Internet address and webspace on the Internet.

The point here is that these websites published content, such as articles and pictures, but they did not have chat rooms or forums or any capacity to engage in or facilitate dialogue with or between the readers. The lack of interactive capability means that the websites were, despite the government's

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<sup>38</sup> OLM, LLC provided webspace to Alabama-based Allwebco, and Allwebco resold the space to Azzam.com. Azzam.com did not know of the existence of OLM and never communicated with or conducted business with OLM. This is an example of the indirect provision of webspace.

claim to the contrary, not instruments of radicalization. Dr. Sageman has distinguished the role that passive websites play in radicalization as vastly different from interactive, forum sites:

No matter how important for propaganda purposes these passive websites are, they are not the engine of radicalization. People in general do not change their minds or harden their views by reading newspaper articles or books. They usually read what conforms to their original bias, and thereby only confirm their views, which were created elsewhere. Yet, the images and general direction found on the websites fascinate communications analysts, who assume that these are the active elements in fostering a terrorist worldview. Most of the work on the importance of the Internet to this terrorist movement has focused on these passive websites and assume that the images found therein have intrinsic power to influence people into taking arms up against the West. I disagree. These sites merely reinforce already made-up minds.

*Leaderless Jihad*, p.114.

In sharp contrast, Dr. Sageman reveals the role of interactive sites:

The new forums have the same influence that these radical mosques played in the previous generation of terrorists. It is the forums, not the images of passive websites, which are crucial in the process of radicalization. People change their minds through discussion with friends, not be simply reading impersonal stories. People discuss these stories online and draw their own conclusions. Sometimes the discussion refers them to stories and images on passive sites, but is in support of an active argument from a friend or a relative. The images and text of the horrors of Chechnya and Iraq found on websites play a supportive role in the transformation of the individuals, but the forums are the engine of this transformation. Just as people are rarely convinced or radicalized by simply reading a newspaper story, so no one is converted by a website alone. It is the discussion of the newspaper article with one's friends and family and the interactive exchanges in the chat rooms that inspire and radicalize.

*Id.* at 116.

C. The Terrorism Enhancement Always and Automatically Increases a Defendant's Guidelines Range Regardless of the Nature of His Conduct .

The terrorism enhancement, USSG § 3A1.4, adds 12 offense levels and converts every offender's criminal history category to a VI. The 12-level increase applies alike in cases where there was actual violence resulting in death and in cases where there were utterly non-violent actions. The criminal history category is increased to VI even if the instant case represents the first time that the defendant has been arrested for anything. The terrorism enhancement is a blunt instrument that is so indiscriminate and yields such draconian results that courts often depart from it or impose non-guideline

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sentences. *See* Part F, below. In Mr. Ahmad's case, the enhancement wildly exaggerates the nature of his criminal actions and his likelihood of recidivism. Its application would lead to a substantively unreasonable sentence. Accordingly, the Court should depart or impose a non-guideline sentence to avoid an unjust result.

**1. The Automatic Application of the Guidelines' Terrorism Enhancement Should be Remedied by Resort to the § 3553(a) Sentencing Factors.**

The mere applicability of § 3A1.4 does not end the analysis or dictate the sentence, as the other § 3553(a) sentencing factors, and the parsimony clause, must be considered in counterpoint to the drastic impact of § 3A1.4. In that context, the Second Circuit's decision in *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010), in which the Court addressed essentially automatic but severe Guidelines enhancements in child pornography cases that placed Guidelines ranges at or near the statutory maximum(s), is particularly pertinent here, too.

In *Dorvee*, addressing enhancements relating to possession of child pornography (§ 2G2.2), the Circuit noted that “the district court was working with a Guideline that is fundamentally different from most and that, unless applied with great care, can lead to unreasonable sentences that are inconsistent with what § 3553 requires.” 616 F.3d at 184.

Similarly, in *Dorvee* the Court noted the high frequency with which § 2G2.2's component enhancements applied in child pornography cases (“to the vast majority of defendants sentenced under §2G2.2 ”), “resulting in a typical total offense level of 35[,]” which in turn led to Guidelines ranges at or beyond the statutory maximum even in routine cases. 616 F.3d at 186. In the terrorism context, too, the scope of the terrorism enhancement in § 3A1.4, as interpreted by the Second Circuit, is so broad that it invariably applies in every terrorism case. *See, e.g., United States v. Stewart*, 590 F.3d 93 (2d Cir. 2009); *United States v. Awan*, 607 F.3d 306 (2d Cir. 2010).

The Circuit also explained in *Dorvee* that § 2G2.2 is different from most Guidelines in that it is not based on empirical data. 616 F.3d at 186. Indeed, that was a defect in the crack-cocaine Guidelines at issue in *Kimbrough v. United States*, 552 U.S. 85 (2007). The same is true with respect

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to § 3A1.4 as well: it represents merely a point in space chosen arbitrarily, and is not the result of the Sentencing Commission's core function, *i.e.*, assigning Guidelines levels that conform with conclusions based on data compiled from a statistically significant number of cases.

In *Dorvee*, the Court further examined the extent to which a sentencing court owes deference to the Guidelines when a particular enhancement is not the product of empirical evidence, explaining that the ordinary

deference to the Guidelines is not absolute or even controlling; rather, like our review of many agency determinations, “[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 [] (1944); *see Kimbrough*, 552 U.S. at 109 [] (citing the crack cocaine Guidelines as an example of Guidelines that “do not exemplify the Commission’s exercise of its characteristic institutional role”).

616 F.3d at 188.

In evaluating § 2G2.2 in *Dorvee*, the Court identified specific problems with such enhancements. For example, “[a]n ordinary first-time offender is therefore likely to qualify for a sentence of at least 168 to 210 months, rapidly approaching the statutory maximum, based solely on sentencing enhancements that are all but inherent to the crime of conviction.” 616 F.3d at 186.

As a result, the Court in *Dorvee* recognized that under such circumstances

adherence to the Guidelines results in virtually no distinction between the sentences for defendants like *Dorvee*, and the sentences for the most dangerous offenders who, for example, distribute child pornography for pecuniary gain and who fall in higher criminal history categories.

616 F.3d at 187.

Confronted with that situation in *Dorvee*, the Court concluded that “[t]his result is fundamentally incompatible with § 3553(a)[,]” because “[b]y concentrating all offenders at or near the statutory maximum, § 2G2.2 eviscerates the fundamental statutory requirement in § 3553(a) that district courts consider ‘the nature and circumstances of the offense and the history and characteristics of the defendant[.]’” *Id.*



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In language particularly relevant here with respect to Mr. Ahmad, the Court in *Dorvee* added that mechanical application of such Guidelines enhancements

violates the principle, reinforced in *Gall*, that courts must guard against unwarranted similarities among sentences for defendants who have been found guilty of dissimilar conduct. *See Gall*, 552 U.S. at 55 [] (affirming a sentence where “it is perfectly clear that the District Judge considered the need to avoid unwarranted disparities, but also considered the need to avoid unwarranted *similarities* among other co-conspirators who were not similarly situated” (emphasis in original)).

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

Thus, as the Court in *Dorvee* lamented with respect to § 2G2.2, “sentencing enhancements cobbled together through this process routinely result in Guidelines projections near or exceeding the statutory maximum, even in run-of-the-mill cases.” 616 F.3d at 186. Yet, as the Court cautioned, “[i]n all events, even a statutory maximum sentence must be analyzed using the § 3553(a) factors.” 616 F.3d at 184.

Ultimately, the Court in *Dorvee* reminded:

[d]istrict judges are encouraged to take seriously the broad discretion they possess in fashioning sentences under § 2G2.2 – ones that can range from non-custodial sentences to the statutory maximum – bearing in mind that they are dealing with an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results.

616 F.3d at 188.

That “broad discretion” exists here as well, even when the specter of terrorism is present. As the Court concluded in *Dorvee*, “[w]hile we recognize that enforcing federal prohibitions on child pornography is of the utmost importance, it would be manifestly unjust to let *Dorvee*’s sentence stand.”

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<sup>39</sup> In *Dorvee*, the Court offered an example of how Guidelines like § 2G2.2 create – via automatic substantial enhancements applied across a broad spectrum of a specific offense conduct – unwarranted similarities among dissimilar defendants: “[e]ven with no criminal history, this [defendant’s] total offense level of 23 would result in a Guidelines sentence of 46 to 57 months. This is the same Guidelines sentence as that for an individual with prior criminal convictions placing him in a criminal history category of II, who has been convicted of an aggravated assault with a firearm that resulted in bodily injury.[.]” 616 F.3d at 187 (footnote omitted).

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*Id.* Here, the same is true with respect to applying § 3A1.4 to Mr. Ahmad, notwithstanding the importance of counterterrorism policy and practice.

Here, as in *Dorvee*, “adherence to the Guidelines results in virtually no distinction between sentences for the most dangerous offenders,” and someone like Mr. Ahmad who did not commit any violent criminal acts and has not committed any offenses in the past. 616 F.3d at 187.

Sentencing Mr. Ahmad within the Guidelines range would result in a sentence that is “fundamentally incompatible with § 3553(a).” *Id.*

**2. Increasing Mr. Ahmad’s Criminal History Category From Category I to Category VI Grossly Overstates His Criminal History.**

Notwithstanding application of the enhancement in § 3A1.4 to Mr. Ahmad, the Court should depart downward a significant amount, or impose a non-Guidelines sentence substantially below the Guidelines range, because the prong of the enhancement that assigns Mr. Ahmad to Criminal History Category VI, § 3A1.4(b), constitutes a gross overstatement of his criminal history, which otherwise would be Category I (lacking any prior criminal history, and therefore having zero criminal history points). Also, as discussed below, the enhancement undermines the structure of the Guidelines, and the role and purpose of the Criminal History Category in maintaining individualized sentencing determinations. The enhancement, furthermore, overstates Mr. Ahmad’s likelihood of recidivism.

As a result, the Court should correct the inequity created by § 3A1.4(b) with a substantial “horizontal” downward departure with respect to Mr. Ahmad’s Criminal History Category. As the Guidelines instruct, the Court may depart downward if

reliable information indicates that the defendant’s criminal history category substantially over-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes[.]

USSG § 4A1.3(b)(1).

In addition, even without a formal departure on that ground, the distortion created by § 3A1.4(b) provides further compelling justification for a non-Guidelines sentence, dramatically below the Guidelines range, based on the factors set forth in 18 U.S.C. § 3553(a). As one District Court has

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recognized, “[a]fter applying § 3A1.4, defendant’s criminal history is maximized at category VI. For an individual with no criminal record and no evidence of ever having committed an illegal act in his life outside of the conduct for which he is convicted, this clearly over-represents the seriousness of his criminal history.” *United States v. Benkahla*, 501 F. Supp.2d 748, 759 (E.D. Va. 2007) (granting a departure pursuant to USSG § 4A1.3, and reducing the defendant’s criminal history category from VI to I), *affirmed*, 530 F.3d 300 (4th Cir. 2008).

Encouraging flexibility in addressing the impact of § 3A1.4 on a defendant’s Criminal History, the Second Circuit has instructed that “[a] judge determining that § 3A1.4(b) over-represents ‘the seriousness of the defendant’s past criminal conduct or the likelihood that the defendant will commit other crimes’ always has the discretion under § 4A1.3 to depart downward in sentencing.” *United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003).

Moreover, as the Introductory Commentary to Chapter Four of the Sentencing Guidelines (entitled “Criminal History and Criminal Livelihood”) states, “[t]he Comprehensive Crime Control Act sets forth four purposes of sentencing. (See 18 U.S.C. § 3553(a)(2).) A defendant’s record of past criminal conduct is directly relevant to those purposes. A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment.”

Here, the balance between the offense and the offender has been irremediably disrupted by the PSR’s reflexive placement of Mr. Ahmad in Criminal History Category VI. In addition to ignoring the mandate of § 3553(a)(1), and overstating Mr. Ahmad’s Criminal History score as much as possible under the Guidelines (from zero to the maximum), the enhancement precludes any retention of individualized sentencing of Mr. Ahmad because it effectively removes from advisory Guidelines consideration the only axis that integrates a defendant’s background and history into the advisory Guidelines equation.<sup>40</sup> The only means of restoring any equilibrium to Mr. Ahmad’s sentencing, and

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<sup>40</sup> Justice Breyer, who chaired the Sentencing Commission, recounted the “trade-offs” that were part of the initial Sentencing Commission’s compromises in formulating the Guidelines and their framework, including how the Criminal History Category was designed as the sole element that considered offender characteristics:

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complying with the dictates of § 3553(a)(1), is by departing downward based on Mr. Ahmad's lack of any prior criminal record, and/or imposing a non-Guidelines sentence grounded in the other § 3553(a) sentencing factors.

Because the exclusion of consideration of the defendant's background and history in the ordinary advisory Guidelines calculation is typically offset by the Criminal History score, it is respectfully submitted that here the imbalance created by assigning Mr. Ahmad to Criminal History Category VI can be rectified only by a substantial "horizontal" downward departure. *See, e.g., Czernicki v. United States*, 270 F. Supp.2d 391, 393 (S.D.N.Y. 2003) (downward departure granted upon a finding that the Criminal History Category had overstated the defendant's criminal history).

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[o]ne important area of such compromise concerns "offender" characteristics. The Commission extensively debated which offender characteristics should make a difference in sentencing; that is, which characteristics were important enough to warrant formal reflection within the Guidelines and which should constitute possible grounds for departure. Some argued in favor of taking past arrest records into account as an aggravating factor, on the ground that they generally were accurate predictors of recidivism. [] Others argued that factors such as age, employment history, and family ties should be treated as mitigating factors. [] [e]ventually, in light of the arguments based in part on considerations of fairness and in part on the uncertainty as to how a sentencing judge would actually account for the aggravating and/or mitigating factors, the Commission decided to write its offender characteristics rules with an eye towards the Parole Commission's previous work in the area.[] As a result, the current offender characteristics rules look primarily to past records of convictions. They examine the frequency, recency, and seriousness of past crimes, as well as age, treating youth as a mitigating factor. The rules do not take formal account of past arrest records or drug use, or the other offender characteristics which Congress suggested that the Commission should, but was not required to, consider.[] In a word, the offender characteristics rules reflect traditional compromise.

*See Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1 (Fall 1988), at 19-20 (footnotes omitted).

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In the alternative, the automatic placement of Mr. Ahmad in Category VI should be remedied by a non-Guidelines sentence that accounts for the other § 3553(a) factors that greatly outweigh the arbitrary application of the absolute and extreme horizontal Guidelines enhancement applied via § 3A1.4(b). *See also* United States Sentencing Commission March 2006 Final Report on the Impact of *United States v. Booker* on Federal Sentencing, at 78 (excessive Criminal History Category constitutes one of the four most common reasons post-*Booker* for non-Guidelines sentences imposed below the calculated range).

D. Criminal History Category VI Overstates Mr. Ahmad's Likelihood of Recidivism.

The Guidelines also authorize a departure when the likelihood of recidivism is overstated. Such is the case here. Mr. Ahmad has no history that suggests that he is an incorrigible criminal, as placement in Criminal History Category VI necessarily implies. To the contrary, the evidence is that Mr. Ahmad has never previously committed any crime. Moreover, in the ten years he has spent in prison since his arrest, he has reflected on his conduct, and he volunteered for and completed an anti-extremism program. Finally, two experts on terrorism who have worked for the United States and for the United Kingdom, respectively, on counter-terrorism issues, Dr. Sageman and Dr. Hasan, have submitted reports indicating his risk of recidivism is low.

**1. Mr. Ahmad Has No Criminal History.**

Mr. Ahmad has never previously been arrested for any crime whatsoever. He was an exceptional student in school, and has been involved in projects to improve his community since he was 15 years old. He had a good job, was married, and cared for his family and community. He is, as Judge Dearie described the defendant in *Thavaraja*, a "person of substance and decency." 740 F.3d at 258. Nothing about his past suggests that he would recidivate.

**2. Although Mr. Ahmad Has Suffered Greatly From His Arrest and Imprisonment, He Has Embraced the Rehabilitative Process and Has Not Become Embittered or Hardened.**

Moreover, ten years in jail, under highly restrictive conditions including nearly two years in solitary confinement and five years in small group isolation, have taken a terrible toll on him. Some courts have considered the harshness of pre-sentencing prison conditions as a basis for a downward

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departure. *See, e.g., United States v. Thomas Pressley*, 345 F.3d 1205 (11th Cir. 2003) (holding that six years spent in pre-sentence confinement, five of which were spent in 23-hour-a-day lock-down, was sufficient to support a two and a half year downward departure). The separation from his family has been the hardest part for Mr. Ahmad.<sup>41</sup> Yet, despite the harshness of his confinement conditions, he has been a model prisoner in both the United Kingdom and the United States.

On December 2, 2003, Mr. Ahmad was arrested by the UK Metropolitan Police. On March 18, 2009, the Commissioner of the Metropolitan Police admitted that his officers had subjected Mr. Ahmad to a brutal and sustained assault during his December 2, 2003 arrest, and the Court entered civil judgment in Mr. Ahmad's favor. *See* Exhibit K (Civil Judgment with Admission of Liability, and Photographs of Assault). Mr. Ahmad sustained over 70 separate injuries in the assault. In the Commissioner's admission of liability, which formed a part of the official court judgment, the Commissioner admitted, among other things, that his officers had repeatedly punched and kneed Mr. Ahmad about his head and body, repeatedly stamped his bare feet with their heavy boots, mocked Mr. Ahmad's religion, sexually assaulted him, placed him in a life-threatening headlock on two occasions, and inflicted terrible pain and serious injuries by repeatedly tugging Mr. Ahmad about by metal rigid bar handcuffs. The Commissioner also admitted that those acts occurred in spite of the fact that Mr. Ahmad had been compliant during his arrest. Mr. Ahmad was detained for seven days and then released without charge. He suffered from post-traumatic stress disorder ("PTSD") thereafter and continues to suffer from PTSD to this day. Mr. Ahmad's former wife has written to the Court about the effect Mr. Ahmad's PTSD had on him and their marriage.

Mr. Ahmad was arrested again on August 5, 2004 and remained in continuous custody thereafter. While incarcerated in the United Kingdom he was classified as a Category A prisoner, which is the most stringent prison classification implicating the most restrictive conditions of confinement.

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<sup>41</sup>Throughout his nearly eight years in UK prisons, Mr. Ahmad spoke to his family up to 10 times daily on the telephone and saw his family at least one or two times per week. While incarcerated at NCI, Mr. Ahmad telephones his family three times per week (15 minutes per call), which is the maximum permitted by the prison. He has visited with his family once in May 2013 when his parents, sister, and baby niece traveled from the UK to the U.S. to visit.

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From 2008 until the time of his extradition in October 2012, Mr. Ahmad was in a group isolation unit with six other detainees, meaning that he was isolated from the general prison population and placed in a small group isolation unit. From October 2012 until the present, Mr. Ahmad has been incarcerated at Northern Correctional Institution (“NCI”) in solitary confinement and on 22-23 hour/7 days per week lock-down.<sup>42</sup> He is permitted one hour of recreation in a 12 x 8 foot dog cage. Mr. Ahmad has lost approximately 20 to 25 pounds during his incarceration at NCI.

Mr. Ahmad has a very good disciplinary record and has actively engaged in available prison programming. In the UK, his good behavior enabled him to serve as a detainee wing representative at HMP Long Lartin on various committees, including the Race Equality Action Team (REAT), Governor’s Forum, Prisoner’s Consultative Committee, and the Canteen (Commissary) Committee comprised of both prison officials, including wardens and assistant wardens, as well as fellow detainees. Mr. Ahmad spent hundreds of hours in connection with his work with these committees, the purpose of which was to create a forum for prison inmates and prison staff to discuss issues of mutual importance.

Mr. Ahmad also built several models out of matchsticks while in prison. The most successful project was a model of a mosque, “The Mosque of Joseph,” that he built by hand out of 25,000 matches, putting in over 1,000 hours of work over a period of one year and four months from 2008 to 2009. Mr. Ahmad submitted his mosque to the Koestler Trust competition, a UK-based charitable foundation that runs an annual competition in the arts for the country’s more than 100,000 prisoners of which approximately 8,000 prisoners enter each year. Mr. Ahmad won the silver prize in the matchstick category of the 2010 awards. *See Exhibit L (Koestler Award and photographs of matchstick models).* Mr. Ahmad built several more, smaller models as “thank you” gifts for his family and attorneys. He built a 2000-match plaque of a boat sailing through stormy seas, which he gave to his attorney, Mrs. Gareth Peirce. He also built a 5000-match model, depicting two hands gripping prison bars, entitled,

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<sup>42</sup>There are virtually monthly suicide attempts at NCI, including one in the cell neighboring Mr. Ahmad.

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“I Will Always Live Free.” This model won the “Highly Commended” award in the 2012 Koestler Trust Awards.

As detailed in the PSR, Mr. Ahmad actively engaged in other prison programming as well, and did a great deal of reading and writing while incarcerated. PSR ¶¶ 5-14. Many of the letters submitted on his behalf have remarked upon how Mr. Ahmad has matured in prison. *See* Exhibit E (letters of Dr. Ali Abbasi, Dr. Irshad Hussain, Fahad Ansari, and Nazia Ahmad).

### **3. Mr. Ahmad Completed an Anti-Extremism Program.**

Mr. Ahmad had to petition to get into an anti-extremism program run by Dr. Mohammed El-Sharkawy in the United Kingdom. Dr. Sharkawy is an Islamic scholar who works for the prison system in the United Kingdom. He also is a counter-terrorism advisor to the government of the United Kingdom. His course is not typically open to pretrial prisoners. Mr. Ahmad sought permission from the United Kingdom prison service headquarters to participate in the program. He completed the program over a nine-month period and learned a great deal about jihad in the process. *See* Exhibit M (letter confirming completion of program). As a result of the program, Mr. Ahmad no longer holds the view that individuals are obliged to physically get involved in every Muslim conflict around the world. He learned in the program that conflicts today are complicated, so it is better for states, not individuals, to decide if, when, and how to get involved. The program confirmed Mr. Ahmad’s views that jihad prohibits attacking civilians and that it must only be carried out in self-defense. However, Mr. Ahmad did not know jihad must take place for the shortest possible time and it must be designed to achieve peace. Mr. Ahmad learned in the program that negotiating peaceful settlements to conflicts is an important goal of jihad. He no longer holds the view that jihad must be waged until a complete military victory is achieved.

It is significant that Mr. Ahmad petitioned, signed up for, and completed the program because it reveals that he was open to re-examining his views. A hardened extremist would have rejected any interpretation of Islam that was inconsistent with his own personal views, especially when that program was being taught by a scholar working for the government. Mr. Ahmad is a thoughtful person who examined Dr. Sharkawy’s interpretation and decided Sharkawy had the better argument.



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**4. Two Experts Have Opined That Mr. Ahmad Has a Low Risk of Recidivism.**

Dr. Sageman and Dr. Hasan advise the United States and the United Kingdom, respectively, on counter-terrorism. They are respected scholars with years of experience. Dr. Sageman, after reviewing the evidence in the case, interviewing Mr. Ahmad over two days, and discussing Mr. Ahmad's views has concluded that he is a very low risk of recidivism. BADEF000238.

Dr. Hasan said as follows:

As a UK Home Office-approved intervention provider in counter-terrorism, and as a member of the international Summit Against Violent Extremism (SAVE) Steering Committee, 2010-11, I am extremely confident that Mr. Ahmad, upon his return to the UK and release from prison, will be a powerful "neo-Former" voice against terrorism, particularly given his "street cred" as a former mujahid in Bosnia and as a record-breaking UK prisoner under anti-terrorism legislation: although Mr. Ahmad may never have been part of an extremist group, because of his history he certainly has the credibility to speak out on these issues.

BADEF000130.

In sum, Mr. Ahmad has no criminal history whatsoever. He has spent ten years in harsh conditions, so he has been punished and has learned a very hard lesson. He has undertaken and completed an anti-extremism program that he was not required to take, and he has changed his views based on what he learned. Two experts with experience in counter-terrorism view him as a low risk of recidivism. Simply put, there is no evidence that supports the idea that Mr. Ahmad is likely to recidivate, and there is considerable evidence that suggests he would not. His guideline placement in Criminal History Category VI vastly overstates the true risk of his recidivism. Accordingly, the effect of the terrorism enhancement, § 3A1.4, should be neutralized, both vertically (regarding his offense level) and/or horizontally (regarding his Criminal History Category), through consideration of the § 3553(a) factors consistent with the principles and concerns expressed in *Dorvee*.

**E. Mr. Ahmad's Criminal Conduct Should be Viewed in Perspective.**

There is a need in this case for perspective and proportionality. Mr. Ahmad supported the Chechen resistance and he supported the Taliban. He neither supported nor had anything to do with al

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Qaeda. He was not an al Qaeda member. He never pledged allegiance to al Qaeda or to any terrorist.<sup>43</sup> He did not hold views supporting al Qaeda, and he did not support attacks on civilians. He did not engage in any terrorist plot. No matter what one thinks of his views about Bosnia, Chechnya, Afghanistan, and the Taliban – or what one thinks of his support for those causes – there must be some recognition that his conduct was significantly different in kind and degree from those who conspired to behead Danish newspaper employees and throw their heads in the street for insulting the Prophet Muhammad (168 months),<sup>44</sup> or placing what the defendant believed was an explosive device outside of a baseball stadium (276 months),<sup>45</sup> or in front of a synagogue (300 months),<sup>46</sup> or on a subway platform (276 months).<sup>47</sup> Simply put, there is a critical moral difference between, on the one hand, asking people to send money or to send gas masks to a war-torn country in anticipation of a feared chemical Armageddon and, on the other hand, supporting the bombing of a discotheque full of young revelers in Tel Aviv. Mr. Ahmad's fervency crossed the boundaries of what is legal under United States law, but it must be adjudged in the context of other material support cases. A review of those cases demonstrates that a non-Guidelines sentence far below the 25 years sought by the government is warranted here.

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<sup>43</sup> Compare *United States v. Wesam El-Hanafi*, 01:s6 10 CR 162 (KMW)(S.D.N.Y.); *United States v. Khalid Ouazzani*, (Kansas City) (naturalized U.S. citizen swore oath to Al Qaeda and provided \$67000 to support terrorism; sentenced to 14 years); *United States v. Sabirhan Hasanoff*, 01:s4 10 CR 162-02 (KMW)(S.D.N.Y.) (relating how El-Hanafi swore an oath of allegiance to Al Qaeda and provided cooperating witness with an opportunity to do the same)

<sup>44</sup> *United States v. Tahawwur Hussain Rana*, 1:09-cr-830-8 (N.D. Ill.)(sentenced to 168 months after jury conviction).

<sup>45</sup> *United States v. Sami Samir Hassoun*, 1:10-cr-773-1 (N.D. Ill.)(sentenced to 276 months after guilty plea).

<sup>46</sup> *United States v. Cromitie et al.*, 7:09-cr-558-CM (S.D.N.Y.)(four defendants sentenced to 300 months after jury conviction).

<sup>47</sup> *United States v. Farooque Ahmed*, 1:10-cr-00413-001 (E.D. Va.)(sentenced to 276 months after guilty plea).

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F. The Court Should Avoid Unwarranted Sentencing Disparities.

In sentencing a defendant, a court must consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” 18 U.S.C. § 3553(a)(6). The Second Circuit quoted that statutory language in *United States v. Stewart*,<sup>1</sup> and said judges have “a responsibility, . . . , ‘to avoid unwarranted sentence disparities.’” 590 F.3d 93, 144 (2d Cir. 2009). The court in *Stewart* further explained that courts must undertake a rigorous review of similar sentences even in the context of applying the terrorism enhancement:

Perhaps all who merit this enhancement are culpable and dangerous – but some among them are more culpable, more dangerous, with crimes more serious, than others. It is the district court that is primarily charged with the responsibility for making such distinctions.

*Id.* See also *United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003) (“A judge determining that § 3A1.4(b) over-represents the seriousness of the defendant’s past criminal conduct or the likelihood that the defendant will commit other crimes *always* has the discretion under § 4A1.3 to depart downward in sentencing.”) (emphasis added); *Stewart*, 590 F.3d at 154 (Calabresi, J., concurring) (“When a Guidelines recommendation has such dramatic consequences and yet covers a multitude of sins, unusually broad sentencing discretion in the district court is essential.”).

So, one might ask what types of cases qualify as relevant comparisons? In answering the question, courts have focused not only on similar offense conduct, but also on how the case was disposed. Courts have considered whether a defendant pled guilty or went to trial as a relevant factor in determining the field of comparable cases. Consider the Fourth Circuit's approval in *United States v. Hammoud*, 483 Fed. Appx. 865 (4th Cir. 2012) of a district court's handling of the issue in the terrorism context:

The district court appropriately considered cases “in which the defendant [likewise] went to trial” and “was convicted by a jury of a terrorism . . . offense, particularly under Section 2339,” and then concluded that “in examining cases that fall within those parameters,” Hammoud’s [original] sentence “appear[ed] grossly disproportionate.” J.A. 53 16-17; cf. *Abu Ali*, 528 F.3d at 262-67 (holding that the district court erred when it compared Abu Ali to defendant who pled guilty and whose conduct underlying crimes of conviction was different in “substance and scope” and improperly compared Abu Ali with others, “overlook[ing]” “unrealized harm” and differences in the “serious[ness] and significan[ce]

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of] steps” taken and in the “infliction of harm”); *Khan*, 461 F.3d at 500-01 (holding that the district court erred when it considered defendant who pled guilty similarly situated to defendant who went to trial). In its sentencing memorandum, the district court cited to nine cases with brief explanations of the defendants’ convictions and sentences that it considered within these parameters. *See* J.A. 6499, 6501-02. The district court then concluded that, in the cases cited by the parties, no defendant “received a sentence in excess of 1800 months,” “life imprisonment was ordered [in] cases of violence,” and lighter sentences compared to Hammoud’s [original] sentence were imposed in cases “in which violence or mass physical carnage was possible.” J.A. 5316-17. *Id.* at 874-875.

Here, it appears that the relevant field of similar cases includes those where the defendant pled guilty to at least one material support charge but did not offer substantial assistance to government officials, since Mr. Ahmad did not offer substantial assistance.

Notwithstanding, in an effort to be as complete as possible, the defense has analyzed more than 500 sentences in terrorism cases. These cases include sentences received after trial, as opposed to the situation here, where the defendant pled guilty. A detailed compilation of those sentences is available for the Court’s review and is attached hereto at Exhibit N. *See* Exhibit N (sentencing compilation matrix). Mr. Ahmad has selected a sampling of those cases for discussion in this memorandum to illustrate his point about the needs for perspective and proportionality. The following cases draw appropriate parallels or provide sharp contrasts to the instant case. It is striking, moreover, that a sentence of 25 years, which the government seeks here, is far outside the norm in material support cases where the defendant has not gone to trial. Indeed, a 25-year sentence on a plea in a case with no violence, or no plot to commit a violent crime, would be so far outside the norm as to constitute an outlier. Such sentences are typically imposed in cases where there were specific plots to commit specific acts of violence.

### **Contrasts**

It may be helpful to begin with contrasts. It is sometimes easier to define a case by what it is *not*. Absent from this case are actions, plots, attempts or any other efforts to commit acts of violence against a civilian population. His case stands in stark contrast with the following other cases.

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1. *United States v. Cromitie*, 7:09-cr-558 (CM), 2011 WL 2693293 (S.D.N.Y. Jun. 29, 2011) (plot to bomb two New York City synagogues and fire missiles at U.S. military aircraft in New York). Defendants sentenced to 300 months after being convicted at trial.

2. *United States v. Rezwana Ferdous*, 1:11-cr-10331 (RGS) (D. Mass.): Ferdous designed and constructed detonation components for improvised explosive devices (IED) using mobile phones. Ferdous supplied 12 mobile phones, which he modified to act as an electrical switch for an IED, to FBI undercover employees (UCEs), who he believed were members of al Qaeda, with the intention that they be used to kill U.S. soldiers overseas. The UCEs falsely told Ferdous that his first phone detonation device had succeeded in killing three U.S. soldiers and injuring others in Iraq. Ferdous responded, "That was exactly what I wanted," and that he felt "incredible . . . We're changing the world. He also suggested that he could make "20 to 30 [detonation components] per week" to send to his "brothers overseas." Ferdous also planned to obtain a remote-controlled aircraft similar to a small drone aircraft, fill it with grenades and fly the plane into the Pentagon using a built-in GPS system. Ferdous told the UCEs that he conducted Internet research on remote-controlled aircraft and found a website that sells such airplanes, which can fly 100 mph. In May 2011, Ferdous traveled to Washington, D.C., where he conducted surveillance, and photographed the Pentagon and Capitol Building. He also identified and photographed sites at the East Potomac Park, in Washington, D.C. from which he planned to launch his airplanes filled with explosives. Pled guilty and sentenced to 204 months.

3. *United States v. Banol-Ramos et al.*, 1:09-cr-498 (WHP) (S.D.N.Y.): On the morning of February 22, 2008, the Panamanian Police approached a boat off the coast of Jaque, Panama that appeared in need of assistance. While the Panamanian police officers were towing the boat to shore, Banol-Ramos and other FARC members pointed weapons at the police. Other police boats arrived to render assistance and rescue the officers who were being held captive. After an exchange of gunfire, which wounded at least one officer, Banol-Ramos and her co-conspirators were arrested and taken into custody by the Panamanian police. Pled guilty and sentenced to 180 months.

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4. *United States v. Jose Padilla*, 0:04-cr-60001 (MGC) (S.D. Fla.): Padilla traveled throughout the Middle East, sought entry into al Qaeda, and was allegedly trained how to deploy a “dirty bomb.” Convicted by a jury and sentenced to 208 months.

5. *United States v. Iyman Faris*, 1:03-cr-189 (LMB) (E.D. Va.): Faris conspired with Christopher Paul and Nuradin Abdi on behalf of al Qaeda to destroy the Brooklyn Bridge and blow up an Ohio shopping mall as possible post 9/11 targets. Faris had exchanged emails with 9/11 mastermind Khalid Sheikh Mohammed about the plots and traveled to Afghanistan to meet Osama bin Laden. He pled guilty and was sentenced to 240 months.

#### **Material Support Sentences After Guilty Pleas**

The following are cases where the defendants pled guilty to material support charges. As will be evident, they demonstrate how the government’s proposed 300 month sentence for Mr. Ahmad would create unwarranted sentencing disparity.

1. *United States v. Thavaraja et al.*, 1:06-cr-616 (RJD) (E.D.N.Y.): Nachimuthu Socrates (12 months); Vijayshanthar Patpanathan (53.5 months); Murugesu Vinayagamoorthy (56 months); Karunakaran Kandasamy (61 months); Pratheepan Thavaraja (108 months).

Counsel for Mr. Ahmad discussed this case above with respect to one defendant. This brief synopsis covers the case as a whole.

Defendants Karunakaran Kandasamy, Pratheepan Thavaraja, Murugesu Vinayagamoorthy, and Vijayshanthar Patpanathan pled guilty to, among other crimes, conspiring to provide material support to the Liberation Tigers of Tamil Eelam (LTTE), a designated foreign terrorist organization. Gov’t Sent’g Memo at 4. Socrates pled guilty pursuant to an agreement with the government to Counts Two and Three of the superseding indictment, both charging him with conspiring to bribe public officials, in violation of 18 U.S.C. § 371.

Between 1983 and its defeat by the Sri Lankan army in a brutal 2009 offensive that continues to be the source of controversy and tension between the government of Sri Lanka and the U.N. (as well as the U.S., which co-sponsored a resolution for an inquiry that the government of Sri Lanka has steadfastly resisted), the LTTE directed a campaign of terrorism in Sri Lanka and India. The defendants

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ran its American branch, which operated as the World Tamil Coordinating Committee (“WTCC”), headquartered in Queens, New York. Gov’t Sent’g Memo at 7. The defendants and their co-conspirators were significant players in rupturing a cease-fire between the Tigers and the Sri Lankan government in 2006. They provided LTTE with substantial support by raising millions of dollars, providing scientific expertise, laundering money, purchasing and manufacturing arms and explosives, corruptly influencing public officials to support the LTTE, and disseminating false propaganda on its behalf. *See* Gov’t Sent’g Memo at 9.

Judge Raymond Dearie of the Eastern District of New York imposed sentences of time served for Patpanathan, Vinayagamoorthy, Kandasamy, and Thavaraja. Socrates received a sentence of one year and a day. The government sought the maximum permissible sentences.

**2. *United States v. Sriskandarajah et al.***, 1:06-cr-616 (RJD) (E.D.N.Y.): Suresh Sriskandarajah (24 months); Ramanan Mylvaganam (31.5 months).

Between September 2004 and April 2006, Sriskandarajah and several co-conspirators assisted a principal LTTE procurement officer in researching and acquiring aviation equipment, submarine and warship design software, night vision equipment and communications technology. Sriskandarajah used students as couriers to smuggle prohibited items into LTTE controlled territory in Sri Lanka. Additionally, Sriskandarajah helped the LTTE launder its proceeds in the United States and elsewhere. Following his indictment in the Eastern District of New York, Sriskandarajah, who is a Canadian citizen, was extradited to the United States from Canada in 2012.

Mylvaganam conspired to purchase approximately \$22,000 worth of submarine design software for the LTTE from a United Kingdom company. Mylvaganam also attempted to purchase night vision equipment for the LTTE from a company in British Columbia, Canada. To deceive this company, Mylvaganam falsely told its representative that the night vision equipment was for “a fourth year design project we are doing at our university.” Mylvaganam also assisted a co-conspirator in purchasing computer equipment, electronics components and communications equipment for the LTTE. Mylvaganam, a Canadian citizen who previously lived in the United States, was extradited from Canada in 2009 following his indictment.

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Each defendant was convicted of a single count of conspiring to provide material support and resources to a foreign terrorist organization in violation of 18 U.S.C. § 2339B. Notwithstanding the defendants' acceptance of the 12-level terrorism enhancement to their guidelines calculations, and notwithstanding the absence of a cooperation agreement with the government, Judge Dearie sentenced Mylvaganam to time served and Sriskandarajah to two years' imprisonment with credit for time already served. The government had sought a 180-month sentence for each defendant.

3. *United States v. Osman et al.*, 1:06-cr-0416 (CCB) (D. Md.): Reinhard Rusli (12 months); Helmi Soedirdja (12 months); Erick Wotulo (30 months); Haniffa Bin Osman (37 months); Thirunavukarasu Varatharasa (57 months).

According to the plea agreement, from April to September 29, 2006 the defendants conspired to provide state-of-the-art firearms, machine guns and ammunition, surface to air missiles, night vision goggles and other military weapons to the Liberation Tigers of Tamil Eelam (LTTE) operating within Sri Lanka, to be used to fight against the Sri Lankan government. The conspirators contacted an undercover business in Maryland about the sale of military weapons, requesting price quotes and negotiating the purchases. Subandi sent an itemized list of 53 military weapons, including sniper rifles, machine guns and grenade launchers that he wanted to acquire for the Tamil Tigers. Subandi advised the undercover business that Osman would inspect the weapons for the Tamil Tigers. Wotulo also advised that the chief of Tamil Tigers requested that he and Osman travel to Baltimore to meet with the undercover agents.

In July 2006, Osman met with undercover agents in Baltimore and stated that the weapons were for the Tamil Tigers from Sri Lanka. Osman said that he was not a Tamil Tigers member but was helping them obtain weapons. The agents showed Osman a number of weapons, ammunition and night vision devices. While in Baltimore, Osman discussed the illegality of the transfer of the arms to the Tamil Tigers and provided navigational coordinates for a delivery in the Indian Ocean. Osman stated that if the first transfer of the weapons were successful, the second order could be worth as much as \$15 million. Osman also inquired about pricing for unmanned aerial vehicles, and test-fired several weapons, including machine guns and sniper rifles. On August 1, 2006, Osman told the undercover



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agents that the Tamil Tigers wired a deposit of \$250,000 as a down payment for the purchase of the weapons. Indeed, the next day \$250,000 was wired from Malaysia to an undercover bank account in Maryland. On September 28, an additional \$452,000 was wired from Malaysia to the undercover account in Maryland as a further down payment on \$900,000 worth of weapons ordered by the Tamil Tigers.

The above-named defendants subsequently pled guilty, receiving sentences from 12 to 57 months in jail. Haji Subandi and Balraj Naidu were found guilty after trial and received respective sentences of 37 and 57 months.

4. ***United States v. Ul Haq et al.***, 1:11-cr-56 (JDB) (D.D.C.): Zahid Yousaf (36 months); Qasim Ali (40 months); Irfan Ul Haq (50 months).

On September 12, 2011, defendants Irfan Ul Haq, Qasim Ali, and Zahid Yousaf entered guilty pleas to a one-count information charging them with conspiracy to provide material support to a designated foreign terrorist organization, in violation of 18 U.S.C. § 2339(B). As part of a government sting operation, U.S. officials tasked three confidential informants with asking defendants to smuggle an individual purportedly belonging to the Pakistani Taliban into the United States from Ecuador. Govt's Memo in Aid of Sentencing at 1. In exchange for cash, the defendants agreed to make a fraudulent passport for said person and counsel him as to the proper route for entering the U.S. *Id.* at 2-5. One of the informants stated that he was a member of Tehrik-e Taliban, which the State Department designated a terrorist organization in September 2010. Ul Haq, in turn, stated that it was not his concern what the "Pakistani Person" intended to do in the U.S., *i.e.* whether he intended to "sweep floors" or "blow up." *Id.*

Ul Haq consented to a two-level increase in his offense level for his role as "organized, leader, or manager." *Id.* at 7. For its part, the government credited all of the defendants for their timely acceptance of responsibility and did not seek a terrorism enhancement. The government recommended a sentence from the low to middle end of Ul Haq's 57-71 month guideline range, and the middle end of the 46-57 month range for Yousaf and Ali.

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Ultimately, the district court adopted non-guidelines sentences for each of the defendants of 36, 40, and 50 months respectively.

5. *United States v. Akl et al.*, 3:10-cr-251 (N.D. Ohio): Amera Akl (40 months); Hor Akl (75 months).

Amera Akl, 38, of Toledo, Ohio, pleaded guilty to one count of conspiracy to provide material support to Hezbollah, a designated foreign terrorist organization. She was given a 40-month prison sentence and ordered to forfeit a vehicle as well as \$6,629.40 in cash.

Her husband, Hor Akl, 38, pleaded guilty to a total of five counts: conspiracy to provide material support and resources to a designated foreign terrorist organization; conspiracy to violate money laundering statutes; perjury; and two counts of bankruptcy fraud. The Akls met multiple times between August 2009 and June 2010 with a confidential source who was working on behalf of the FBI. During those meetings, the Akls discussed ways to secretly send money to Hezbollah leaders in Lebanon, according to court documents. Mr. Akl received a 75-month sentence.

Amera Akl told the confidential source during a meeting in Toledo on August 30, 2009 that she dreamed of dressing like Hezbollah, carrying a gun and dying for their causes. Hor Akl, in the presence of his wife, told the confidential source during a September 10, 2009, meeting in Toledo that he understood the money was being transported to “terrorists.” He also stated he understood the funds would be sent to a designated terrorist organization and used to target Israel.

Eventually, the Akls agreed to send the money by concealing it inside a 2004 Chevrolet Trailblazer, which they planned to send to Lebanon via a container ship. On June 3, 2010, the confidential source delivered \$200,000 to the Akls and told them he would return later in the day with more money. Shortly thereafter, the Akls were observed inside their residence wearing latex/rubber gloves, in close proximity to various automobile accessories, plastic wrap, duct tape, latex/rubber gloves and fragrant insect repellent sticks. Hor Akl had prepared a portion of the money for concealment into the auto accessories, wrapped it in plastic and taped into a bundle, according to court documents.

As part of his plea agreement, Hor Akl agreed to a two-level upward role adjustment. The government did not argue for the terrorism enhancement.

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6. *United States v. Issa et al.*, 1:09-cr-1244 (LAP ) (S.D.N.Y.): Idriss Abdelrahman (46 months); Oumar Issa (57 months); Harouna Toure (63 months).

Defendants were arrested in 2009 in Ghana as part of a DEA sting operation. In exchange for money, they agreed to provide secure transportation for a shipment of cocaine across Africa, false identification documents, and other material support and resources, knowing that the FARC was engaged in terrorist activity. They also agreed to provide material support and resources, including property, and currency and monetary instruments to al Qaeda and al Qaeda in the Islamic Maghreb (AQIM), knowing that these groups were engaged in terrorist activities.

Each defendant pled guilty to a single § 2339B count. The government sought a maximum 180-month sentence for each defendant. Judge Jones, while finding the terrorism enhancement applicable to her guidelines calculations, also found that application of the enhancement overstated the seriousness of the defendants' criminal conduct. In sentencing Toure, for instance, Judge Jones noted:

First of all, I think the terrorist enhancement treats all participants alike to the extent that it enhances by the same number the offense level and also elevates the Criminal History Category to VI for anyone found to have merited the enhancement. I find that this defendant did merit the enhancement but I think in his case the enhancement of the Criminal History Category overstates the seriousness of this defendant's criminal conduct, and I believe the terrorism enhancement, in terms of the guideline, the offense level as well, creates disparity with respect to different defendants because of the differences in their culpability. And it does not give you any range within this particular enhancement in order to reflect degrees of culpability.

Toure Sent'g Tr. at 34. Judge Jones went on to highlight the fact that the crime at issue involved a sting operation, and she contrasted the conspiracy with other sting cases involving much more detailed plots:

It's also quite clear that this defendant was certainly not told of any specific detailed terrorist act or plot of the sort involved in many of the other material support cases which I have reviewed. And I will simply mention the Cromitie case, the Aref case. And I would also cite to the Warsame case.

*Id.* at 35. For these reasons, Judge Jones chose to depart substantially from the guidelines and impose sentence ranging from 46 and 63 months.

7. *United States v. Naji Antoine Abi Khalil*, 1:04-cr-573 (GBD) & 4:05-cr-200 (GH) (S.D.N.Y. & E.D. Ark.) (60 months).

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Naji Antoine Abi Khalil pled guilty to violations of 18 U.S.C. § 2339B, 50 U.S.C. § 1705, and 18 U.S.C. § 371, after he attempted to provide night-vision equipment and infrared aiming devices to Hizbollah. On February 2, 2006, he was sentenced to a total of 60 months' imprisonment, his sentences on the three counts to run concurrently.

**8. *United States v. Mohamed Abdullah Warsame*, 0:04-cr-29 (JRT)(FLN) (D. Minn.) (92 months).**

From the government's sentencing memorandum:

In early 2000, the defendant, who was then a resident of Toronto, Canada, decided to travel to Afghanistan and attended an Al Qaeda training camp. After traveling first to Karachi, Pakistan, the defendant then illegally crossed the border into Afghanistan by walking over a mountain pass. Thereafter, the defendant entered into an [a] Qaeda training camp located near Kabul, Afghanistan.

In the summer of 2000, at the conclusion of the first training camp, the defendant joined other fellow trainees and traveled to Kandahar, Afghanistan, where they sought admittance to an al Qaeda training camp led by Usama bin Laden. The defendant thereafter knowingly and willfully received military training at an al Qaeda terrorist camp some distance from Kandahar. The defendant and others met with, and attended lectures by, al Qaeda leader Usama bin Laden. Thereafter, the defendant stayed at an al Qaeda guesthouse located in Kandahar. The defendant provided his services to al Qaeda as a security guard and by teaching English at a medical clinic for al Qaeda associates.

In approximately February-March 2001, the defendant sought financial assistance to bring his wife and daughter from Minneapolis, Minnesota, to join him in Afghanistan. Instead, a senior al Qaeda official directed the defendant to leave Afghanistan and return to his family. Moreover, the senior al Qaeda official authorized the payment of al Qaeda funds to pay for the defendant's return. At the time the defendant left Afghanistan, he was intending to relocate to Minneapolis, Minnesota. From March 2001 into April 2001, the defendant traveled from Afghanistan back to Toronto, Canada. Both during the course of this travel and after he returned to Toronto, the defendant established and maintained channels of communication with al Qaeda associates he had met in Afghanistan and Pakistan.

In approximately June and July of 2001, the defendant solicited money from others and wired the funds to a bank account in Pakistan at the specific request of a training camp commander who the defendant knew from Afghanistan. The commander told Warsame that the money was "for the brothers." Warsame thus knew that the funds would be used to support members of al Qaeda. (The amount of money Warsame sent to the training camp commander approximated the travel funds previously provided to Warsame by al Qaeda for him to leave Afghanistan.) In or

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about August 2001, for the purpose of entering the United States and while then in constant contact with known al Qaeda operatives, the defendant submitted an application for resident alien status in the United States and thereafter he entered the United States. After entering the United States, the defendant maintained communications with those al Qaeda associates he had met in Afghanistan and Pakistan. The defendant further admits that al Qaeda was at all times relevant a designated foreign terrorist organization and that the conduct described above meets the elements of a violation of Title 18, United States Code, Section 2339B.

Plea Agreement, Docket No. 162, at 1-3. The government sought a 150-month sentence, 30 months below the statutory maximum and guidelines recommendation. In its sentencing opinion, the district court acknowledged that Warsame had “trained at two terrorist training camps, and had access to al Qaeda leadership.” Nonetheless, in imposing a 92-month sentence, it further observed:

[T]his Court’s role at sentencing is not to construct the darkest possible interpretation of a defendant’s conduct and potential and then sentence the defendant as if that interpretation is truth. While this Court has given its utmost consideration to all of the public and non-public information in this case – including all of the information that in any way implicates the national security of the United States – it simply finds nothing that adequately demonstrates that Warsame was a part of a specific plot against the United States, and very little that suggests he was especially useful to al Qaeda, either during his training in the Middle East or upon his return to North America.

651 F. Supp.2d 978, 981 (D. Minn. 2009).

**9. *United States v. Shaker Masri*, 1:10-c- 655 (SJC) (N.D. Ill.) (118 months).**

Shaker Masri plead guilty to one count of providing material support and resources to a designated foreign terrorist organization, in violation of 18 U.S.C. § 2339B(a)(1). Specifically, Masri told a government cooperating source that he had decided to leave the United States in order to wage jihad as an armed combatant. 10 CR 655, Docket No. 91, p. 3. Masri explained to the source that he could either travel to Somalia to aid the terrorist group al-Shabaab, or travel to Afghanistan to aid al Qaeda. *Id.* The source then offered to provide funds for Masri’s travel, on the condition that the source travel with Masri to Somalia to join al-Shabaab. *Id.*

The source and Masri then met on several different dates in order to form a plan for how they would travel to Africa and connect with the al-Shabaab militia. *Id.* at 4. The men ultimately determined that they should travel to Mexico and then further into Latin or South America before traveling to

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Africa. *Id.* Prior to his arrest on August 3, 2010, Masri used a debit card provided by the source to book two one-way flights to Los Angeles, scheduled to depart on August 4, 2010. Masri was ultimately arrested after obtaining \$18,000 from a liquor store with the source, and purchasing a new laptop computer for the trip. *Id.*

As explained in the government's sentencing memorandum in the Masri case, Masri "did not simply want to offer himself as a soldier to fight in the ranks of a terrorist militia engaged in a bloody civil war, he wanted to die killing others." 10 CR 665, Docket No. 103, p. 3. Masri had also encouraged the source to review terrorist materials and provided recordings of terrorist lectures, and himself advocated extremist violence. *Id.* at 3-4. In a recorded conversation, Masri told the source that he wanted to learn how an explosive vest is made, and that he intended to wear one. *Id.* at 4. In another conversation, Masri stated that he wished he could blow himself up in the presence of United States' soldiers he had seen on the street. *Id.* Masri later stated that it would be better if he could kill a bus full of American soldiers. *Id.* After a plea agreement, but with no cooperation, Masri was sentenced to a term of imprisonment of 118 months. In sum, Masri was convicted of attempting to travel to a foreign nation in order to wage violent jihad, including violence and murder. Masri talked about his desire to kill American soldiers, expressed a desire to wear a bomb to kill a busload of Americans, and sought out and viewed terrorist lectures and materials. Masri's end goal was to personally kill "enemies" of Islam and end his life in the process. 10 CR 665, Docket No. 103, p. 3.

**10. *United States v. Abdi et al.*, 2:04-cr- 88 (ALM) (S.D. Ohio) (Columbus Shopping Mall Plot):** Nuradin Abdi (120 months).

Nuradin Abdi conspired with Iyman Faris and Christopher Paul to destroy the Brooklyn Bridge and blow up an Ohio shopping mall on behalf of al Qaeda. Faris corresponded with 9/11 mastermind Khalid Sheikh Mohammed in relation to the plots. Abdi admitted to attending terrorist training camps and having ties with Somali Islamists. He pled guilty and was sentenced to 120 months.

**11. *United States v. Fawzi Mustapha Assi*, 2:98-cr-80695-1 (GER) (E.D. Mich.)** (120 months).

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Assi pled guilty to one count of providing material support to a designated foreign terrorist organization in violation of 18 U.S.C. § 2339B. Assi received 120 months, which was the statutory maximum for § 2339B at the time of commission. *See* Rule 11 Plea Agreement, Doc. 140 at 1.

According to the Plea Agreement, Assi boarded a plane in 1998 with two Boeing global positioning satellite modules, night vision goggles, and a thermal imaging camera. *Id.* at 2. He intended to deliver these items to an individual in Lebanon who he knew was purchasing the items on behalf of Hizballah. *Id.* Following his arrest, defendant was released and remained in the U.S. under F.B.I. surveillance. *United States v. Assi*, 586 F. Supp.2d 841, 843 (E.D. Mich. 2008).

**12. *United States v. Banol-Ramos et al.***, 1:09-cr-498 (WHP) (S.D.N.Y.): Jorge Abel Ibarquen-Palacio (130 months); Yarlei Banol-Ramos (180 months).

Banol-Ramos and Ibarquen-Palacio were FARC members captured in a boat off the coast of Panama. When the Panamanian police attempted to arrest them, Banol-Ramos and Ibarquen-Palacio opened fire with semi-automatic weapons. At least one PNP officer was injured. Banol-Ramos and Ibarquen-Palacio each pled guilty to a single count of providing material support to the FARC. Banol-Ramos, who held a leadership position, received the statutory maximum sentence of 15 years, while Ibarquen-Palacio received 130 months.

**13. *United States v. Arteaga-Tapia et al.***, 1:10-cr-20094 (ASG) (S.D. Fla.): Carlos Alberto Arteaga-Tapia (135 months); Osman Jose Tobias-Rodriguez (135 months).

The defendants agreed to smuggle weapons and persons into the U.S. on behalf of al Qaeda. From the Factual Basis for the Plea Agreement with Tobias-Rodriguez:

Beginning in November 2009 and continuing through March 2010, the co-conspirators had various meetings and conversations with a law enforcement confidential source (source) discussing the details of this transportation. The co-conspirators agreed to move cocaine, illegal aliens and weapons into the United States from Peru. The cocaine, illegal aliens, and weapons were to be moved via maritime vessel from Peru to a location off the coast of Guatemala. A co-conspirator from Guatemala was to meet the vessel at sea with a second vessel in order to transport the cocaine, people, and contraband into Guatemala. Once in Guatemala, the cocaine, people and contraband were then to be moved by land through Mexico and into the US.

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Defendant Tobias-Rodriguez told the confidential source that he will move the cocaine, people, and contraband with the assistance of the Zetas (the violent Mexican drug gang) and that he has a corrupt United States border guard agent to walk the people across a bridge into Texas.

On December 5, 2009, the source arranged to meet with co-conspirator Arteaga-Tapia and showed him the weapons to be transported. The weapons shown were: (1) brown combination lock briefcase Improvised Explosive Device (IED) containing 12 inert blocks of C-4 explosive, two (2) plastic cases containing metal balls, and associated circuitry; (1) Rocket Propelled Grenade (RPG) Launcher; and one (1) wooden crate containing three (3) RPG projectiles. At one point during the meeting, Arteaga-Tapia reached forward to physically inspect one of the weapons.

Factual Basis for Plea Agreement at 1-2.

Both defendants faced life imprisonment after pleading guilty to a two-count Indictment charging them with providing material support to a designated foreign terrorist organization (§ 2339B) and conspiracy to distribute cocaine (18 U.S.C. § 963). The PSR, however, recommended a sentence of 135-168 months. *See United States v. Carlos Alberto Arteaga-Tapia*, 10 CR 20094 (11th Cir. Jan. 26, 2012) (unpublished opinion). The judge sentenced each defendant to 135 months. Tobias-Rodriguez's sentence was later reduced to 90 months.

**14. *United States v. Joseph Jeffrey Brice*, 2:11-cr-75-1 (LRS) (E.D. Wash.) (150 months).**

Brice made an explosive device that prematurely ignited, causing him significant injuries. Subsequent to his hospitalization, Brice apparently self-radicalized and then began using social media to espouse his new found radical beliefs. Between December 2010 and May 2011, Brice had both public and private contact with a foreign-based terrorist Internet site, upon which Brice posted instructions on the manufacturing of chemical improvised explosive devices ("IEDs") and other anti-law enforcement literature. In May 2011, after being asked over the Internet for help with a problem that a purported "terrorist" was having with detonating chemical IEDs that were intended to be used in retaliation for the death of Usama bin Laden, Brice agreed and provided a correct, chemical-based, detonation formula.

**15. *United States v. Syed Hashmi*, 1:06-cr-442-1 (LAP) (S.D.N.Y.) (180 months).**

From the government's sentencing memorandum:



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[I]n 2004, Hashmi agreed to provide material support to al Qaeda in the form of equipment and money to assist Abd al Hadi al Iraqi (“Hadi al Iraqi”), then al Qaeda's senior commander in charge of all al Qaeda soldiers waging attacks against U.S. and coalition forces in Afghanistan. In January 2004, when Mohammed Junaid Babar (“Babar”) contacted Hashmi to inform Hashmi that he was working for al Qaeda and needed Hashmi's help in those efforts, Hashmi agreed to assist al Qaeda and did everything that Babar asked of him. Fully aware that Babar and others were working for al Qaeda, Hashmi knowingly and willingly embraced the opportunity to join them and lend his support to al Qaeda.

*Id.* at 1.

**16. *United States v. Defreitas et al.*, 1:07-cr-543-1 (DLI) (E.D.N.Y.) (“JFK Terror Plot”):**

Abdel Nur (180 months).

The government’s sentence letter explains Nur’s role in the JFK plot:

Evidence presented at the trial of Nur’s codefendants proved that Nur played a substantial role in the plot to attack JFK Airport. As set forth in the PSR and proved at trial, Nur engaged in numerous meetings with the other members of the conspiracy and agreed to serve as the link between the conspiracy and the notorious and violent radical leader Yasin Abu Bakr. [] Nur informed the other members of the plot that he had a direct, long-standing personal relationship with Abu Bakr [] and that he was a founding member of Jamaat Al Muslimeen, [] and agreed to meet with Abu Bakr in an effort to gain his support and locate the Al Qaeda operative Adnan Gulshair el Shukrijumah []. Nur accurately advised the conspirators that Abu Bakr was connected to Libya and other terrorist organizations, [] and was likely to be interested in assisting the plot to attack JFK Airport[]. Nur accurately predicted that he would be able to meet with Abu Bakr upon arrival in Trinidad. [] In May 2007, Nur traveled to Trinidad, met with Abu Bakr, presented an overview of the plot to attack JFK Airport to Abu Bakr and arranged for the conspirators to meet with Abu Bakr to further discuss the plot. . . . Nur participated in the meetings in which the conspirators recruited defendant Kareem Ibrahim to join the plot and arranged with defendant Abdul Kadir to use Kadir’s mosque bank account to store funds to finance the plot.

Gov’t Sentencing Ltr. at 2-3.

**17. *United States v. Ulugbek Kodirov*, 2:12-cr-52 (AKK) (JEO) (N.D. Ala.) (188 months).**

Kodirov had been in communication with an individual whom he believed to be a member of the Islamic Movement of Uzbekistan (IMU). Kodirov then took steps to obtain weapons to carry out his plans to kill President Obama. Kodirov also acknowledges in the plea agreement that he had lengthy conversations in July 2011 with a different individual about Kodirov’s desire to kill President Obama

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and possible ways to carry out the assassination. That individual traveled to Birmingham to meet Kodirov and introduced him to another individual, an undercover agent, from whom Kodirov intended to obtain weapons he would use to kill the president. The three men met on July 13, 2011, at a motel in Leeds, Ala. In that meeting, the agent presented a fully automatic Sendra Corporation Model M15-A1 machine gun, a sniper rifle with a telescopic sight and four disassembled hand grenades and asked Kodirov if he would like to use any of them to “carry out his plan to kill the President,” according to the plea agreement. Kodirov chose the M15-A1 machine gun and the hand grenades and left the meeting with the weapons.

G. That Was Then; This Is Now.

If there is a theme for this case, it is “That was then, this is now.” Mr. Ahmad was a young man, driven by idealism and religious fervor when he committed his offense in this case. He was born on May 4, 1974. The websites were set up when he was 22 years old. Over the course of the life of both websites, 98% of the material published on the sites was devoted to Bosnia and Chechnya. Afghanistan only became an issue of any importance toward the end of the sites’ existence. As noted above, Mr. Ahmad regrets his support of the Taliban and the postings about Afghanistan. He deeply wishes that he had restricted his sites to Bosnia and Chechnya.

A lot has transpired over the past ten years. Mr. Ahmad has lost nearly everything of importance in his life. He was married, and happily so. His wife left him after he spent several years in jail awaiting the extradition decision. The strain of incarceration and its seemingly endless course were too much on the marriage. She divorced him in 2009. She has remarried. She still has kind feelings for Mr. Ahmad, and she has written to the Court to express her views of him.

He is best described as a family man. He was raised in a tiny, two bedroom home with two parents and three siblings. *See* Exhibit O (photograph of early childhood home in Balham); Exhibit P (photograph of later childhood family home in Tooting). The six of them were inseparable. Even when the children were grown and some were married or had their own places to live, they lived within blocks of each other and of their parents. *See* Exhibit Q (Mr. Ahmad’s adult home). They ate together regularly, and saw each other on a daily, or nearly a daily, basis, and they worshiped at the same

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mosque. *See* Exhibit R (photograph of Tooting Islamic Center). The separation from his family has been the hardest part of his incarceration. It has only gotten worse since his extradition to Connecticut as his family has only been able to make one trip to visit him.

He has missed the births of 10 of his 14 nieces and nephews. Many have only heard his voice over the phone. They have never seen him in person. He has missed the deaths and funerals of beloved family members and family friends. For a family-oriented person, these missed opportunities to be there when his family needed him or to have relationships with his nieces and nephews and watch them grow are the sources of much pain.

His parents have aged. His father has a heart condition, and his mom suffers from hypertension and kidney disease; her kidneys function at 60% of their capacity. Mr. Ahmad's primary goal at this time is to spend time with his parents. He has missed so much time with them.

Mr. Ahmad used to have a good job. He graduated from Imperial College, one of the world's great universities. He is a computer engineer, and he gained employment in Imperial College in Imperial's IT department. He has lost his career.

He has lost his liberty for 10 years. Mr. Ahmad had never previously spent a day in jail. He was never involved in any criminal activity. He was never in trouble as a youth. He has spent the last 10 years in high security prisons under highly restrictive conditions, including five years in a small group isolation unit. Most of the last two years have been spent in Connecticut's supermax facility in solitary confinement. One cannot underestimate the effects of long-term isolation and solitary confinement on a person, especially a person who is by nature an extrovert. His 10 years in jail have seemed much longer.

In sum, Mr. Ahmad has been punished in a variety of truly significant ways for his crime, and that punishment has gone on for 10 years. He has suffered devastating losses, and he is both physically and mentally a different person than he was before his incarceration began. He has lost more than 25 pounds at Northern CI, and he is now 40 years old. What matters to him today is not what drove him previously. He is not a young man anymore. He is not eager to get involved in foreign conflicts anymore. He has had time to reflect on his life and the causes he once supported. Bosnia and Chechnya

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are at peace. Afghanistan is more complicated than he once thought. The world is more complicated than he once thought.

He has made rehabilitative efforts while in prison. He went through a nine-month long anti-extremism program with Dr. Sharkawy, a senior cleric who works for the British prison system. Dr. Sharkawy has been decorated for his anti-extremist courses in the UK, and Mr. Ahmad petitioned to take his course. Mr. Ahmad learned that in the program that it is for states, not individuals, to decide when and how to wage war. He also learned that negotiating a peaceful settlement to conflict should be the aim of every jihad.

He has also read more than 200 books while in jail. He has read these books in an effort to gain a better, broader understanding of the world. He is trying to improve himself. He read and was moved by Nelson Mandela's *Long Walk To Freedom*, and the Bible. Sometimes, when one is young, the lines of political conflict seem so clear cut, but as one ages, the world gets more nuanced, more complex. Mr. Ahmad sees things differently today than he did when he thought that the Taliban was the solution to Afghanistan's problems.

He has made sincere efforts to rehabilitate himself. He did not have to take an anti-extremism course. He did not have to study and try to educate himself about the world and other people's viewpoints. He did these things to be a better person.

The Second Circuit has consistently recognized that the Guidelines did not adequately consider rehabilitation efforts undertaken at various times. Thus, the Court of Appeals has authorized departures for post-offense drug rehabilitation, *United States v. Maier*, 875 F.2d 944 (2d Cir. 1992); post-arrest non-drug rehabilitation, *United States v. Workman*, 80 F.3d 688 (2d Cir. 1996); and for the achievement of the ordinary responsibilities of citizenship that is the product of substantial commitment sustained over time, *United States v. Bryson*, 163 F.3d 742, 748 (2d Cir. 1998). The reasoning behind these departure decisions is the recognition that rehabilitation is a valuable goal. It is a valuable goal in this case, too.

Mr. Ahmad is a respected figure in the Muslim community in London. What he has learned and what he can teach, as Dr. Hasan has noted, can be valuable in helping young Muslim men. *See also*

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Exhibit E (letter from UK attorneys Gareth Peirce and Sajida Malik). Mr. Ahmad made bad decisions, particularly in his efforts to support the Taliban. He was not motivated by greed or a desire for power, but he lost sight for a time of the values that had guided him throughout his life. Ironically, at the time, he believed that by supporting the Taliban he was advancing the cause of his religion, but now he sees that he was wrong.

H. The Parsimony Clause Weighs in Favor of a Substantially Below-Guidelines/Below-Cap Sentence.

The Second Circuit explained in *United States v. Ministro-Tapia*, 470 F.3d 137 (2d Cir. 2006), that if the Court believes a lower sentence will be as effective as a higher sentence in serving the purposes of sentencing, it must choose the lower sentence. *See id.* at 142 (where a Guidelines sentence is “in equipoise with [a] below-the-range sentence,” parsimony clause requires imposition of the lower sentence).

Most often, sentencing occurs within a decent interval of the criminal conduct, and therefore presents the difficulty of projecting into the future the precise amount of prison time required to ensure that a particular defendant no longer presents a danger of recidivism, and has appreciated the wrongfulness of his conduct and the need for a different approach to life’s challenges. Here, though, the decade Mr. Ahmad has spent in custody provides demonstrable proof that such requisite prison time has already been served. Thus, here the question of what constitutes a sentence “sufficient, but not greater than necessary” can be answered with far greater precision and accuracy.

There is no goal of sentencing in 18 U.S.C. § 3553(a) that can be satisfied *only* with a guideline sentence or a sentence of 25 years, as the government seeks. Such a sentence would be extraordinary in a case where a defendant pled guilty to material support charges. Moreover, twenty-five years is an astonishing amount of time to incarcerate a person who did not kill anyone, and who was not involved in a specific plot or terrorist operation. Mr. Ahmad was a very young man when he broke the law. He has never committed any prior offense. Surely, the time he has spent in prison would satisfy the goals of just punishment, incapacitation, deterrence and rehabilitation. Or looked at differently, it is difficult

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to see how adding more years will somehow achieve those goals more effectively than the 10 years he has already spent in prison, with more than half of his time spent in various forms of isolation.

**Part III: Conclusion**

As a teenager, Mr. Ahmad was moved to action by the plight of Muslims in Bosnia. He fought there, not as a person desiring to engage in a global jihad to impose Islam on non-believers. He went to defend Muslims under attack who were the subjects of the worst genocide in Europe since the Holocaust. After being wounded in battle, he returned home to the United Kingdom – a place that he loves and is in every respect his home. From there, he operated websites to remind people of the lives lost in Bosnia and to advocate for Chechen Muslims who were under attack by the mighty Russian Army. Toward the end of the websites' existence, he sought and provided material support to the Taliban in Afghanistan. He deeply regrets that support.

For the past 10 years, he has been punished greatly for that support. He has lost nearly everything that mattered to him on this planet. He has lost his marriage, the companionship of his family, his career, and his liberty. He was brutally assaulted by the British police. He still suffers from Post-Traumatic Stress Disorder as a result of that assault. He has been confined in high security prisons under harsh conditions, and has spent a great deal of time in solitary confinement. He has been punished enough for his crime. It is time, in the interests of justice, to send him home.

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Respectfully submitted,

FEDERAL DEFENDER OFFICE<sup>48</sup>

Dated: June 16, 2014

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on June 16, 2014, a copy of the foregoing Memorandum in Aid of sentencing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Kelly M. Barrett  
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<sup>48</sup> Thomas McCudden, Research and Writing Attorney, as well as Daniel Friedman and David Keenan, law students at Yale Law School, assisted with the preparation of this memorandum.