ARTICLE: U.S. CIRCUIT COURTS & THE APPLICATION OF THE TERRORISM ENHANCEMENT PROVISION

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Text

[*85] The U.S. Sentencing Commission created the U.S. Federal Sentencing Guidelines (hereinafter referred to as the Guidelines) pursuant to their statutory mandate to provide guidance to federal courts to rationalize federal criminal sentencing practices and "further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation." [1] Congress created the Sentencing Commission and authorized it to establish the Guidelines to reduce perceived disparities in the sentencing behaviors of federal judges by limiting and systematizing the factors that went into arriving at a sentence for an individual defendant. [2] The goal was to have defendants receive comparable sentences when convicted of comparable crimes if the defendants had similar criminal histories and their crimes shared similar aggravating or mitigating factors. [3] The *Guidelines* operate by categorizing crimes, based on their characteristics, into base offense levels. After identifying the base offense level under the Guidelines, a trial judge determines a defendant's sentence taking into consideration the defendant's criminal history and individual factors that may justify either an upward or downward departure from the basic level.

Although titled "Guidelines," the Federal Sentencing Guidelines were envisioned by Congress to be mandatory and designed to function as a check on judicial discretion. [4] However, in 2005, the U.S. Supreme Court held the process of having a judge decide on the fact-based factors to be taken into account during sentencing beyond the elements of the crime determined by a jury violated a defendant's Sixth Amendment right to a trial by jury. [5] The

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[1] U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (U.S. SENTENCING COMM'N 2016).

[2] Sentencing Reform Act of 1984, Pub. L. No. 98-473, *98 Stat. 1988* *et seq.* (1984).

[3] U.S.S.G. ch. 1, pt. A. introductory cmt.

[4] *See* George D. Brown, *Punishing Terrorists: Congress, the Sentencing Commission, the Guidelines, and the Courts*, *23 CORNELL J. L. & PUB. POL'Y 517, 523 (2014)* (hereinafter Brown); *see also* U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991); *18 U.S.C. § 3553*(b)(1).

[5] *United States v. Booker, 543 U.S. 220 (2005).*

Court's remedy for this constitutional defect was to hold the Guidelines could continue in operation as guidelines in the true sense of the term. [6] Federal judges were not required to follow them. Rather, they provided guidance **[*86]** designed to assist the judges in systematically considering the factors to be taken into account when placing a defendant's sentence within the statutorily mandated range for a particular crime and the circumstances of a particular defendant.

To determine whether there should be an upward or downward departure from the base level sentence, the Guidelines specify a set of factors to be taken into consideration by the judge during the sentencing process. [7] These factors include victim related adjustments, consideration of the role--minor to major--that a defendant played in the commission of the offense, whether the defendant committed multiple counts of the offense, whether the defendant accepts responsibility for the offense, and the defendant's criminal history. [8] The selection of particular factors to consider as adjustments represents criminal justice policy made by Congress regarding aspects of criminal conduct that should either add to or reduce the punishment appropriate for a particular defendant given the crime they committed.

This article focuses on the terrorism adjustment, which falls under the first category of factors detailed in the Guidelines-victim related factors. In a series of statutes beginning in 1984, Congress directed the Sentencing Commission to mandate an upward adjustment to sentences for defendants whose crimes were connected to terrorism. [9] The terrorism adjustment, section 3A1.4 of the Guidelines, provides for an upward adjustment of twelve levels increasing the base level to at least a level thirty-two, "if the offense is a felony that involved, or was intended to promote, a federal crime of terrorism . . . ." [10] The maximum offense level is forty-three. [11] In addition, the terrorism enhancement requires increasing the defendant's criminal history category to a category VI from whatever it would have been based on the individual's actual history. [12] Category VI is the highest criminal history category. [13] Since it combines both a substantial increase in the base level offense and places the defendant in the maximum criminal history category, the terrorism adjustment represents a significant increase in the severity of punishment over and above what a defendant would be eligible for without its imposition.

The terrorism enhancement is potentially applicable to defendants convicted of the federal crime of terrorism; to defendants convicted of harboring, concealing or obstruction offenses connected to crimes of **[*87]** terrorism; to defendants found guilty of promoting crimes of terrorism or promoting terrorism; or to defendants whose criminal offense was "intended to influence the conduct of government through intimidation or coercion or to retaliate against the government," or to "conduct intended to intimidate or coerce the civilian population." [14]

Two aspects of the terrorism enhancement provision have made it particularly controversial. [15] First, the enhancement is seen as applying to too broad a set of offenses. [16] It can be imposed on individuals convicted of a

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[6] *Id. at 245.*

[7] U.S.S.G. ch. 3 (2016).

[8] U.S.S.G. ch. 3-4 (2016).

[9] Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, ***108 Stat. 1796, 2022 (1994),*** amended by the Antiterrorism and Effective Death Penalty Act of 1996 *28 U.S.C. § 2254* (1996).

[10] U.S.S.G. § 3A1.4(a).

[11] U.S.S.G. ch. 5, pt. A, Sentencing Table.

[12] U.S.S.G. § 3A1.4(a).

[13] U.S.S.G. ch. 5, pt. A, Sentencing Table.

[14] Wadie E. Said, *Sentencing Terrorism Crimes*, *75 OHIO ST. L.J. 477, 500-01 (2014)* (hereinafter Said); U.S.S.G. § 3A1.4 cmt. 2, 4.

wide range of crimes ranging from those who have promoted terrorism through nonviolent acts such as donating money to a group as well as to those who have committed violent crimes such as murder or hostage taking. [17] Second, the terrorism enhancement is controversial because of the magnitude of the increase in the sentences under the enhancement. [18] The terrorism enhancement is thus criticized for being both too heavy a sanction and for being applied too indiscriminately. [19]

As the above description shows, the enhancement can have a grave impact on the potential sentence of a defendant to whom it is applied. For example, a defendant with no actual criminal history whose conduct consists of obstructing an investigation into terrorism has a base offense level offense of ten which increases to a twenty-two if the terrorism enhancement is applied. In addition, even though the defendant has no criminal history and would otherwise be placed at a criminal history level of I, under the terrorism enhancement, they are qualify for a maximum criminal history level of VI, the same criminal history category as if they had a career of armed felony convictions. [20] Had that defendant's obstruction offense not been linked to terrorism, the sentence range under the Guidelines would have been from six to twelve months imprisonment assuming there were no other factors leading to a departure from the basic range. [21] With the addition of the terrorism enhancement, the defendant's range jumps from imprisonment for a year or under to imprisonment from 210-262 months, or from 17.5 years to over 21 years. [22] As the wording of the enhancement indicates, the link to terrorism **[*88]** can be as thin as the defendant being found to have intended to promote terrorism, a standard considerably lower than a requirement that the defendant personally commit a federal crime of terrorism. As discussed later, these cases can involve defendants charged with providing material support for a terrorist organization based on as little as having made a small financial contribution to a group. [23]

Professor Wadie E. Said is a vocal critic of the terrorism enhancement as public policy as well as its application by the courts. [24] According to his perspective, the terrorism enhancement is too severe in magnitude and is applied too indiscriminately to too wide a range of crimes regardless of their actual severity or connection to violent acts of terrorism. [25] In a 2014 article, he presents an analysis of several cases involving the application of the terrorism enhancement which he argues demonstrates a pattern of use of the enhancement by judges seeking to establish their bona fides as aggressive participants in U. S. counterterrorism efforts at the expense of proper judicial conduct

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[15] *See generally* Said, *supra* note 14, at 480-81.

[16] *Id.* at 500-01.

[17] *Id.* at 506-12.

[18] *See generally* James P. McLoughlin, Jr, *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, *28 LAW & INEQ. 51 (2010).*

[19] *E.g.*, Joanna Baltes, et al., Symposium, *Trials And Terrorism: The Implications of Trying National Security Cases in Article III Courts: Convicted Terrorists: Sentencing Considerations and Their Policy Implications*, *8 J. NAT'L SECURITY L. & POL'Y 347, 356-58 (2016).*

[20] U.S.S.G. §§ 3A1.4, 4B1.1 (2016).

[21] U.S.S.G., § 2J1.2 (2016).

[22] *See* Said, *supra* note 14, at 505-06.

[23] *See, e.g.*, *United States v. Ali, 799 F.3d 1008 (8th Cir. 2015).*

[24] *See* Said, *supra* note 14.

[25] *Id.* at 479-81.

under the U. S. Constitution. [26] He argues this pattern of behavior has spread from the trial courts to the appellate courts. [27]

Professor Said asserts the terrorism enhancement provision in the sentencing Guidelines has served "as a kind of statutory basis to embolden courts of appeals to overturn a sentence as too lenient. . .", in disregard of the instructions of the U. S. Supreme Court that appellate courts' reviews in such cases should be highly deferential to the determinations of the trial courts. [28] He goes on to deconstruct what he sees as the perspective of the appellate court judges engaged in such vigorous reviews in contravention of Supreme Court instructions.

> At the heart of these opinions lies a message that terrorism is especially heinous, and those convicted of terrorist crimes are particularly dangerous to the point of being irredeemably incapable of deterrence. From this expressive exercise in condemning terrorists qua terrorists as being worthy of the most serious sentences allowed by law, appellate judges can demonstrate their participation in the project of protecting national security. [29]

[*89] In contrast to the perspective of Professor Said, Professor George D. Brown sees U.S. District Courts sentencing under the terrorism enhancement and appellate court reviews of these sentences as essential elements of the proper involvement of Article III courts in the adjudication of a special category of criminal offenses. [30] Arguing in favor of the appropriate use of the terrorism enhancement provision of the Guidelines, Professor Brown asserts, "[t]he case for the policy behind the enhancement is strong. Terrorism is different from other crimes. . . . If terrorists are to be tried in the regular criminal justice system, harsh sentences seem to be a fair tradeoff. More importantly, Congress has spoken. The enhancement represents a major national policy goal." [31]

However, Professor Brown shares some of Professor Said's concerns when it comes to the standards used by appellate courts reviewing application of the terrorism enhancement. [32] In his 2014 article, Professor Brown describes the uneven pattern of results in these cases, which he sees as the result of two factors. First, he describes the confusion among lower courts arising from mixed signals sent by the U. S. Supreme Court after the *Booker* decision [33] on what appellate courts should do when reviewing challenges to district court sentences under the Guidelines. [34] Such mixed signals center on the issue of how much discretion district courts have to depart from the Guidelines if they are, as *Booker* holds, advisory rather than mandatory. [35] Second, Professor Brown sees confusion among both the trial and appellate courts on the appropriate posture judges should assume when asked to apply enhancement provisions they, individually, consider to be too harsh. [36] This confusion

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[26] *Id.* at 480-81.

[27] *Id.*

[28] *Id.* at 481.

[29] *Id.* (exact quote).

[30] *See* Brown, *supra* note 4.

[31] *Id.* at 546.

[32] *Id.* at 519-21.

[33] *Id.* at 523-33.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 535-39.

centers on the extent to which circuit courts should defer to the judgment of the trial court regarding the presence or absence of factual justifications for sentencing a defendant under such provisions. [37]

This research in this article was motivated by a desire to use the insights of both Professor Said and Professor Brown to determine what has been the actual behavior of U.S. Circuit Courts of Appeal in cases where they have been asked to review the application of the terrorism enhancement by district courts. Drawing from the literature examining the terrorism enhancement, this research examines the population of circuit court cases from 2012 through March of 2017 to identify patterns of behavior by those circuit courts in reviewing district courts' imposition of the terrorism enhancement. Does **[*90]** the behavior of the Circuit Courts of Appeal indicate the concerns articulated in the literature are common or, instead, do these cases show routine examination of sentencing decisions under the post-*Booker* regime?

Professor Brown asserts Circuit Courts of Appeal reviewing whether the imposition of the terrorism enhancement was appropriate should begin their review of the district courts' decisions to determine the extent to which the district courts have followed the procedures set out by the U.S. Supreme Court in *Gall v. U.S.* [38] for sentencing under the Guidelines. [39] *Gall* is one of the series of post-*Booker* opinions in which the U.S. Supreme Court attempted to clarify what the appropriate posture of a Circuit Court should be when reviewing District Court decisions under the Guidelines given that those Guidelines are advisory. [40] *Gall* instructed that sentencing judges must start by calculating a defendant's base level sentence under the Guidelines; [41] then, seek input from the parties and probation through the presentence report regarding individual factors that could lead to downward or upward departures; and, finally arrive at a resulting sentence supported by a clearly articulated justification. [42] According to *Gall*, reviewing courts are required to examine the record created by the sentencing court to determine whether the proper procedures were followed. [43] After that examination of the procedures used by the district court to arrive at the defendant's sentence, the Circuit Court could then examine the substantive reasonableness of the resultant sentence using an abuse-of-discretion standard. [44] The first question asked by this research is the extent to which the Circuit Court of Appeals' discussions of their review of District Court cases conforms to the approach mandated by *Gall* and described as appropriate by Professor Brown--a review of the district court decisions for procedural compliance with *Gall* and a review of the substantive reasonableness of the resultant sentence using the abuse of discretion standard. [45]

A second question suggested by the literature on the terrorism enhancement provision asks whether appellate court opinions show the judges, at that level, becoming involved in arguing the substantive appropriateness of the sanction of the terrorism enhancement. [46] Professor Said asserted such cases would encourage judges to voice their support for national counterterrorism policy as it is represented in the terrorism **[*91]** enhancement. [47] If

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[37] *Id.*

[38] *Gall v. United States, 552 U.S. 38 (2007).*

[39] *See* Brown, *supra* note 4, at 548-49.

[40] *Gall, 522 U.S. at 40.*

[41] *Id. at 49.*

[42] *Id. at 50-51.*

[43] *Id. at 50-53.*

[44] *Id.*

[45] *Gall, 522 U.S. at 46-53;* see Brown, supra note 4.

[46] *See* Said, *supra* note 14.

judges fall prey to this temptation, one would expect appellate court opinions to contain language indicating the authors of the opinions are using the case to stake out a position on whether the terrorism enhancement is a proportionate sanction that has a role in prosecuting terrorism offenses.

Finally, in their examination of the terrorism enhancement, both Professors Brown [48] and Said [49] expresses concern that the sentences resulting from the imposition of the terrorism enhancement will be unduly harsh with defendants convicted of nonviolent material support crimes receiving sentences from the upper level of the sentencing charts. This research will examine the sentences handed out in the cases where the Courts of Appeals were asked to review the imposition of the terrorism enhancement to material support convictions to determine whether sentences of such magnitude are common within the population of the cases.

This paper is not concerned with these larger questions regarding the appropriate conduct of judges as parts of a government implementing counterterrorism policy, or of the constitutionality and ethics of the terrorism enhancement. Rather, this paper will focus on a simple empirical task of examining recent cases in which U.S. Circuit Courts of Appeals have explicitly reviewed U.S. district courts' sentencing decisions involving the applicability of the terrorism enhancement. The goal is to determine exactly what appellate courts are really doing when they review trial judges' decisions in terrorism enhancement cases. The purpose of this task is to find out whether the pattern of actual review across circuits seems to indicate that Circuit Courts of Appeals are aggressively pursuing the nation's fight against terrorism or if they are treating the cases as another routine category of sentencing cases.

Searching for U.S. Circuit Courts of Appeals cases decided between January 1, 2012 through March 1, 2017 that involved challenges to the imposition of the terrorism enhancement by a federal district court produced seventeen cases. The population includes both opinions and summary orders decided between January 1, 2012 and March 1, 2017. [50]

[*92] I. FOCUS ON THE *GALL*-MANDATED APPROACH TO REVIEW

Professor Brown's observation that the circuit courts' analysis when reviewing the imposition of the terrorism enhancement would focus primarily on the approach mandated in *Gall* was proven out by the sixteen cases. In all sixteen cases, the analysis presented by the Courts of Appeals examined the procedural regularity of the methods used by the district courts to arrive at the imposition of the terrorism enhancement. Then, the circuit courts employed the abuse-of-discretion standard when examining the substantive reasonableness of the sentence arrived at by the district courts using the *Guidelines* as advisory. In all of the sixteen cases examined in this research, except one, the district courts' imposition of the terrorism enhancement was upheld after an examination of the procedures used to arrive at its imposition. In that one case, *U.S. v. Fidse*, the Fifth Circuit Court of Appeals held the record from the District Court was not sufficiently clear regarding the analysis used to determine the defendant's intent. [51] The case was remanded for clarification of the enumerated crimes of terrorism the defendant

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[47] *Id.* at 480-81.

[48] *See* Brown, *supra* note 4, at 546-47.

[49] *See* Said, *supra* note 14, at 480-81.

[50] *United States v. Fidse, 778 F.3d 477 (5th Cir. 2015); United States v. Haipe, 769 F.3d 1189 (D.C. Cir. 2015); United States v. Stafford, 782 F.3d 786 (6th Cir. 2015); United States v. Ali, 799 F.3d 1008 (8th Cir. 2015); United States v. Hassan, 742 F.3d 104 (4th Cir. 2014); United States v. Mohamed, 757 F.3d 757 (8th Cir. 2014); United States v. Banol-Ramos, 566 Fed.App'x. 40 (2d Cir. 2014); United States v. Banol-Ramos, 516 Fed.App'x. 43 (2d Cir. 2013); United States v. Ortiz, 525 Fed.App'x. 41 (2d Cir. 2013); United States. v. Thomas, 521 Fed.App'x. 741 (11th Cir. 2013); United States v. Ibrahim, 529 Fed.App'x. 59 (2d Cir. 2013); United States v. Dye, 538 Fed.App'x. 654 (6th Cir. 2013); United States v. Chandia, 675 F.3d 329 (4th Cir. 2012); United States v. Mora-Pestana, 496 Fed.App'x. 98 (2d Cir. 2012); United States v. Salim, 690 F.3d 115 (2d Cir. 2012); United States v. Mohammed, 693 F.3d 192 (D.C. Cir. 2012); United States v. Siddiqui, 699 F.3d 690 (2d Cir. 2012); United States v. Wright, 747 F.3d 399 (6th Cir. 2013).*

was to have promoted: "Fidse's relevant offense of conviction--conspiracy to make false statements--is not a 'crime of terrorism' enumerated in § 2332b(g)(5). Even so, a non-enumerated offense qualifies for the enhancement if it was intended to promote--that is, 'was intended to encourage, further, or bring about'--a federal crime of terrorism." [52] The Fifth Circuit sought clarification of the evidentiary basis for the District Court's conclusion that Fidse's non-enumerated offense qualified for an imposition of the enhancement because it was committed with an intent to promote terrorism. [53]

The first case chronologically in the population examined for this research, *U.S. v. Chandia*, [54] provides an example of the depth and persistence of a Circuit Court's examination of a District Court's justification for imposition of the terrorism enhancement. Ali Asad Chandia was convicted in 2006 of three counts of conspiring to provide material support to a foreign terrorist organization, and sentenced to 180 months in prison with the application of the terrorism enhancement. [55] Had the District Court not applied the terrorism enhancement, because Chandia had no criminal history, his sentence under the *Guidelines* would have been 63-78 months. [56] Under **[*93]** the *Guidelines* with the terrorism enhancement, the sentence could have been from 360 months to life. [57]

Even though Chandia's sentence was half of what it could have been under the bottom range of the *Guidelines* after the imposition of the terrorism enhancement, the Fourth Circuit remanded the case to the District Court for resentencing, because it felt the District Court had not provided factual evidence that Chandia had intended his conduct to influence the government or retaliate against the government, necessary elements for application of the terrorism enhancement. [58] The District Court asserted the terrorism enhancement automatically applied to a conviction for material support to a foreign terrorist organization, an assertion which the Fourth Circuit rejected. [59] Upon remand, the District Court resentenced Chandia to the same 180 months, and the sentence was again appealed. [60] In its 2010 opinion, the Circuit Court still found the District Court's factual justification for the imposition of the terrorism enhancement to be insufficient and remanded the case, yet again, for resentencing consistent with a testily reiterated explanation of what was required as sufficient support for the application of the terrorism enhancement. [61] In particular, the Circuit Court asked the District Court to specifically provide evidence of Chandia's intent to influence the government or retaliate against the government as a basis for his actions that constituted material support of a foreign terrorist organization. [62]

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[51] *United States v. Fidse, 778 F.3d 477, 484 (5th Cir. 2015).*

[52] *Id. at 481* (citing *United States v. Awan, 607 F.3d 306, 314-15 (2d Cir. 2010)).*

[53] *Id.* at 484.

[54] *United States v. Chandia, 675 F.3d 329 (4th Cir. 2012).*

[55] *United States v. Chandia, 514 F.3d 365, 369-70 (4th Cir. 2008).*

[56] *Id. at 370-71.*

[57] *Id.*

[58] *Id. at 376*

[59] *Id. at 371.*

[60] *United States v. Chandia, 395 Fed. Appx. 53, 57 (4th Cir. 2010).*

[61] *Id. at 59-60.*

[62] *Id.*

The iteration of the *Chandia* case that falls within the timeframe of this research, his third appeal, represents another appeal by Chandia of his sentence of 180 months. [63] Chandia's argument remained that the government had not provided sufficient basis in the presentence report which would allow the District Court to conclude Chandia had the required intent to influence the government when he engaged in the actions that led to his conviction. [64] In this third appeal, the Circuit Court upheld the sentencing by the District Court and found the District Court did not commit significant procedural errors and its conclusions were not the result of clear error. [65]

For the purposes of this research, the Chandia case contradicts the assertions that Circuit Courts of Appeals are reflexively affirming the application of the terrorism enhancement. In fact, the three Chandia appeals and the Fidse case remand show two circuit courts engaging in in-depth **[*94]** examination of the adequacy of the record developed by the district courts to support application of the terrorism enhancement.

The issue most commonly raised by defendants in these cases was, as in *Chandia* and *Fidse*, the adequacy of the evidence used by the district courts regarding the defendants' intent to influence the actions of the government. In all of the cases, except *Fidse*, the circuit courts upheld the district courts' determinations. The courts of appeals' decisions emphasized their obligation to defer to the lower court unless clear error was evident, once it was clear the requisite procedures had been followed to determine the sentence, including the application of the terrorism enhancement.

II. COURTS OF APPEALS APPROVAL OR DISAPPROVAL OF THE TERRORISM ENHANCEMENT

Professors Brown and Said acknowledged the application of a sanction as controversial as the terrorism enhancement can provide a stimulus leading judges, both at the district court and the circuit court levels, to express their opinions regarding the justifiability of the sanction within the constitutional structure of the criminal justice system. [66] Professor Said expressed concern that judges would use the issue of the terrorism enhancement as a vehicle to express their whole-hearted involvement in the nation's counterterrorism strategy. [67] Professor Brown expressed concerns regarding the appropriateness under a system of separation of powers of judges defying a public policy direction chosen by the legislature. [68]

The tone and language of the opinions, in all but two cases examined for this research, were what one would expect in sentence review cases post-*Booker* and *Gall*. The focus was on the obligation of the reviewing court to defer to the sentencing court unless either a procedural error was present or a sentencing determination was not supported by a record that could allow the conclusion that the sentencing court's decision was reasonable. There were two exceptions.

In *U.S. v. Hassan*, the Fourth Circuit's opinion contains strident language arguing for the need for law enforcement, prosecutors, and trial courts to make use of conspiracy offenses as an essential element in the overall counterterrorism effort. [69] In *Hassan*, Mohammad Omar Aly Hassan, Ziyad Yaghi, and Hysen Sherifi were convicted of multiple counts of conspiracy to provide material support to a foreign terrorist organization and conspiracy to commit murder and other violent offenses against persons **[*95]** outside of the United States. [70]

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[63] *United States v. Chandia, 675 F.3d 329 (4th Cir. 2012).*

[64] *Id. at 338.*

[65] *Id. at 342.*

[66] *See* Brown, *supra* note 4; Said, *supra* note 14, at 480-81.

[67] Said, *supra* note 66.

[68] Brown, *supra* note 4, at 546.

[69] *United States v. Hassan, 742 F.3d 104 (4th Cir. 2014).*

Defendants' sentences ranged from 84 months to 540 months. [71] Among the issues raised by the defendants in their appeal was the appropriateness of the application of the terrorism enhancement, which was upheld by the Circuit Court using the *Gall*-directed approach to review of District Court sentences. [72] However, the language of Judge King's opinion for the court is worth noting because it does show an example of Professor Said's concern for judges going beyond the issues before them to express impassioned support for counterterrorism policy. The defendants had asserted the actions that were the basis of their material support conviction fell short of what could be considered terrorism or material support for terrorism and deserved First Amendment protection as political expression. [73] Judge King responded:

> [T]he evidence reveals that the appellants are dangerous men who freely and frequently exercised their constitutional right to speak, to be sure, but who also demonstrated a steadfast propensity towards action. Before the appellants' actions could escalate to visit grievous harm upon the government, other countries, or innocent civilians, the FBI and its associates timely intervened. The laudable efforts of law enforcement and the prosecutors have ensured that, on this occasion at least, we will not be left to second-guess how a terrorist attack could have been prevented. [74]

In a second case, *U.S. v. Ali*, the defendants were convicted of providing material support for a foreign terrorist organization, al Shabaab, and of making false statements to federal law enforcement officers. [75] The defendants argued the terrorism enhancement provision in the *Guidelines* represented a denial of due process because Congress was motivated by an unreasonable fear of terrorism when statutorily mandating the enhancement. [76] The Eighth Circuit upheld the terrorism enhancement provision ruling that Congress was only required to have a reasonable basis for its legislative determinations. [77] The Eighth Circuit's review of the application of the terrorism enhancement to the defendants was focused on determining whether the District Court made a clear error in its determination that the defendants' conduct was intended to influence the conduct of the **[*96]** government and, therefore, eligible for the imposition of the terrorism enhancement. [78] The Circuit Court found the record provided sufficient support for the District Court's conclusions. [79] In upholding the application of the terrorism enhancement to the defendants and rejecting the contention that the enhancement is unreasonable, Judge Gruender quotes from the case of *U.S. v. Meskini*[80] on the unique nature of terrorism as a crime:

> Applying rational basis review, the court concluded that Congress and the Sentencing Commission "had a rational basis for concluding that an act of **terrorism** represents a particularly grave threat because of the dangerousness of the crime and the difficulty of deterring and rehabilitating the criminal, and thus that terrorists

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70 *Id. at 110-11.*

71 *Id.*

72 *Id. at 147, 150.*

73 *Id. at 114-15.*

74 *Id. at 146.*

75 *United States v. Ali, 799 F.3d 1008, 1014 (8th Cir. 2015).*

76 *Id. at 1030-31.*

77 *Id. at 1031.*

78 *Id. at 1029.*

79 *Id. at 1029-30.*

80 *United States v. Meskini, 319 F.3d 88 (2d Cir. 2003); United States v. Meirick, 674 F.3d 802, 805 (8th Cir. 2012).*

> and their supporters should be incapacitated for a longer period of time." The court continued, "[E]ven terrorists with no prior criminal behavior are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation." [81] (citations omitted).

The language used by the circuit court judges writing the opinions in the cases of *U.S. v. Hassan* and *U.S. v. Ali* illustrate Professor Said's concern that a desire to jump on the anti-terrorism policy bandwagon influences the tone of judicial opinions regarding the applicability of the terrorism enhancement. However, in the other fourteen cases arising in the time period chosen for this research, the language of the Circuit Courts of Appeals in their opinions or summary orders indicates an entirely routine approach to the review of cases involving the applicability of a provision of the *Guidelines*. They stolidly follow the guidance provided by the U.S. Supreme Court post-*Booker* opinions regarding the review of trial court decisions under the *U. S. Sentencing Guidelines*.

III. THE TERRORISM ENHANCEMENT AND MATERIAL SUPPORT CASES

As mentioned above, critics of the terrorism enhancement argue the magnitude of the upward departure leads to disproportionate sentences in cases where defendants are convicted of conspiracy to provide material support to foreign terrorist organizations. Under the *Guidelines*, the base level offense for "Providing Material Support or Resources to Designated **[*97]** Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose" is at least a level twenty-six. [82] A defendant convicted of an offense with a base level twenty-six is eligible for a sentence of from 63 to 150 months imprisonment. [83] The addition of the terrorism enhancement would increase the potential sentence to from 210 to 262 months. [84]

In five of the sixteen cases considered in this research, defendants were charged with either conspiring to provide or providing material support to a terrorist organization. [85] In two of the five cases, the defendants were also convicted of violent offenses in addition to the convictions for providing material support. [86] In the other three cases, the defendants were not convicted of other violent offenses. [87] Since the critique against the imposition of the terrorism enhancement focuses on its application to defendants convicted only of nonviolent acts of material support, the remainder of this discussion will focus on the sentences imposed in the three cases in which the defendants were only convicted of non-violent acts of material support--*U.S. v. Chandia, U.S. v. Mohamed*, and *U.S. v. Ali*. [88]

Among these three cases, sentences ranged from a high of 240 months in the *Ali* case to a low of 144 months in the *Mohamed* case. [89] As discussed earlier in this paper, Chandia received a sentence of 180 months. [90] It is

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[81] *Ali, 799 F.3d at 1031.*

[82] U.S.S.G., § 2M5.3(a) (the level is increased if the material support involved provision of weapons or assistance in perpetrating violent acts); U.S.S.G., § 2M5.3(b)(1).

[83] U.S.S.G. ch. 5, pt. A, Sentencing Table.

[84] *Id.*

[85] *Ali, 799 F.3d 1008; United States v. Hassan, 742 F.3d 104 (4th Cir. 2014); United States v. Mohamed, 757 F.3d 757 (8th Cir. 2014); United States v. Banol-Ramos (Banol-Ramos II), 566 F. App'x. 40 (2d Cir. 2014); United States v. Banol-Ramos (Banol-Ramos I), 516 F. App'x. 43 (2d Cir. 2013); United States v. Chandia, 675 F.3d 329 (4th Cir. 2012).*

[86] *Banol-Ramos, 516 F. App'x. 43; Hassan, 742 F.3d 104.*

[87] *Ali, 799 F.3d 1008; Mohamed, 757 F.3d 757; Chandia, 675 F.3d 329.*

[88] *Ali, 799 F.3d 1008; Mohamed, 757 F.3d 757; Chandia, 675 F.3d 329.*

[89] *Ali, 799 F.3d at 1014; Mohamed, 757 F.3d at 758.*

important to note Mohamed's sentence of 144 months fell within the range permitted by the *Guidelines* for a material support conviction without the addition of the terrorism enhancement. [91] Chandia's sentence of 180 months is above the range for a material support conviction without the enhancement but below the bottom number of months recommended with the terrorism enhancement, 210 months. [92] Ali's sentence of 240 months, the most severe sentence among the three cases, falls toward the upper end of the range specified with the imposition of the terrorism enhancement. [93] Based on the examples of these three cases of defendants convicted of material support **[*98]** charges without also being convicted of violent offenses, the imposition of the terrorism enhancement does not appear to be producing significantly higher sentences in most of the cases.

In all five of the material support cases, defendants challenged the application of the terrorism enhancement, arguing their conduct did not meet the requirement of being intended to influence the conduct of the government. In all five cases, the Circuit Courts of Appeals held the trial courts had established a sufficient factual basis for drawing the conclusion that the defendants' conduct was intended to influence the conduct of the government and, therefore, the application of the terrorism enhancement was not in error.

IV. CONCLUSION

In conclusion, the behavior of the Circuit Courts of Appeals evidenced by this population of cases over a five-year period indicates their approach to the review of cases involving the applicability of the terrorism enhancement is routine. They steadfastly follow the approach mandated by the U.S. Supreme Court post-*Booker* opinions regarding the review of trial court decisions under the now-advisory *U. S. Sentencing Guidelines*. Circuit court judges seldom use their opinions to express views on the necessity of the terrorism enhancement or on the special nature of terrorism-related crimes. There is little evidence that the imposition of the terrorism enhancement in cases where the defendants are convicted of nonviolent material support charges leads to disproportionately high sentences.

While the debate over the constitutionality, the fairness and the justifiability of the terrorism enhancement under the *Guidelines* continues, there is little empirical evidence to be found among five years of Courts of Appeals cases, indicating that these cases represent significantly aberrant behavior under the regime required for the review of criminal sentences under the *Guidelines*.

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[90] *Chandia, 675 F.3d at 331.*

[91] U.S.S.G. § 3A1.4.

[92] *Id.*

[93] *Id.*