

Center on Law and Security, New York University School of Law



Terrorist Trial Report Card:

September 11, 2001-September 11, 2010

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With special thanks to Francesca Laguardia for her tireless effort and scholarly dedication to supervising the *Terrorist Trial Report Card* series since 2008

Terrorist Trial Report Card:

September 11, 2001 - September 11, 2010

Executive Director's Introduction

The 2010 edition of the *Terrorist Trial Report Card* comes at the end of a year punctuated throughout by noteworthy terrorism indictments. In fact, the past twelve months saw more significant terrorism plots alleged than in any one-year period since 9/11. While these cases may reveal much about whom we perceive as terrorists (and therefore indict), they also potentially tell us much about incipient threats and where they may lie. They certainly provide some demonstration of where the government has focused its counterterrorism law enforcement resources, and the results of that concentration.

The cases include the attempt of Umar Farouk Abdulmutallab to explode a plane over Detroit; the attempts of Najibullah Zazi and Faisal Shahzad to bomb the New York City subway and Times Square respectively; the FBI stings of Hosam Smadi and Michael Finton, each of whom tried to bomb federal buildings (with what were actually inert devices supplied by FBI informants); the indictment of David Headley for his involvement in the Mumbai attack; and the recruitment of dozens of young men to fight in Somalia alongside the terrorist group al Shabaab. In addition, since June 2009 we have seen the first deaths attributed to terrorism in the name of jihad on U.S. soil since 9/11 – the shootings at Fort Hood and at an Army recruitment center in Little Rock.

It has, in sum, been a year of terrorism headlines, with some of the more threatening circumstances that we have seen in a decade. Consequently, this year's TTRC tries to give some context to these events by providing greater focus on individual cases and by honing in on the issue of homegrown terrorism.

As before, the 2010 edition of the *Terrorist Trial Report Card* presents an analysis of the country's federal terrorism prosecutions – indictments, convictions, crimes charged, and verdicts – as well an examination of the threat. The resulting figures demonstrate that the trend in terrorism cases is towards more serious allegations, including a much larger percentage of WMD charges.

Continuing last year's trend of serious terrorism charges prevailing over lesser charges (e.g., document fraud prosecutions in which terrorism was only informally alleged), 77% of cases this year carried terrorism or national security charges, an increase of nearly 50% compared to the average over the previous eight years.

Nineteen percent of cases included a WMD terrorism charge, an increase of 14% compared to the average over the previous eight years.

This year's research also examined much about the defendants themselves, including information about country of birth, citizenship, number of years in the United States, religious affiliation, and terrorist associations.

More than half of this year's defendants are U.S. citizens.

Nearly 25% of this year's indictments involved Hezbollah.

Another 19% involved al Shabaab.

The past year's increase in alleged serious terrorism plots is partially influenced by several factors, including the conclusion of long-term surveillance efforts, the large number of Somalia-related indictments, and defendants' self-identification with jihad.

In an effort to expand our assessment of the danger posed by terrorism, our research this year included several new features, each of which promises to deepen our understanding of terrorism and counterterrorism law enforcement in the United States after 9/11.

First, we identified **50 alleged plots** to examine more closely, excluding terrorism finance cases (associated, for example, with Hamas and Hezbollah), and other, lesser-profile cases. These 50 represent the highest-profile cases of the nearly 1,000 terrorism prosecutions that have been initiated in our courts since 9/11. They include those that the public discourse has deemed to be the most significant. Many are well-known cases, including those known colloquially by names that reflect the location of either the defendants or the alleged targets – e.g., Liberty City, Fort Dix, JFK – and others identified by the individuals associated with them – e.g., Major Nidal Hasan, David Headley, Ali al-Timimi, Earnest James Ujaama. Directing our general questions to this smaller sample has told us much about terrorism and the threat it poses. While most resulted in conviction, several remain disputed to this day.

There is a 92% conviction rate in prosecutions resulting from the top 50 plots.

Where we identified an alleged affiliation with a terrorist group in these cases, it was most commonly with al Qaeda. Where we identified allegations of a specific target, those targets were most commonly civilians within the United States.

Second, the Center’s researchers looked to address the increasing attention being paid by the media and politicians to **Homegrown Terrorism**. At present, there is no consistently used definition of homegrown terrorism. Rather, experts mingle statistics about assimilation, radicalization, and geographic location. Moreover, it’s important to acknowledge that the term is not susceptible to a definition that will satisfy everyone, or which can encompass every element of the circumstances. As a starting point for a conversation which will occupy policymakers and researchers in the near future, we have looked at the residency of individuals indicted and prosecuted for terrorism since 9/11, creating a subset of the 50 most high-profile plots. The subset focuses on those defendants who were either born in the U.S. or who had lived in this country for 10 years or more. This period of time is long enough to allow for assimilation and can plausibly cover the formative years and alleged years of radicalization, as it does in fact for many of those already convicted.

Of the defendants prosecuted in relation to the top 50 plots prosecuted since 9/11, 81% were homegrown.

At least 35% of these homegrown defendants had converted to Islam.

How to understand and assess the current threat of terrorism in the United States remains a challenge. Areas of inquiry for future research include the socioeconomic status of individuals who are alleged to pose a threat to the nation’s citizens in the name of jihad; the correlation, if any, with those who target the government for ideological reasons other than jihadi-related causes; and psychological factors in understanding radicalization and recruitment. The Center on Law and Security looks forward to continuing its research into these questions.

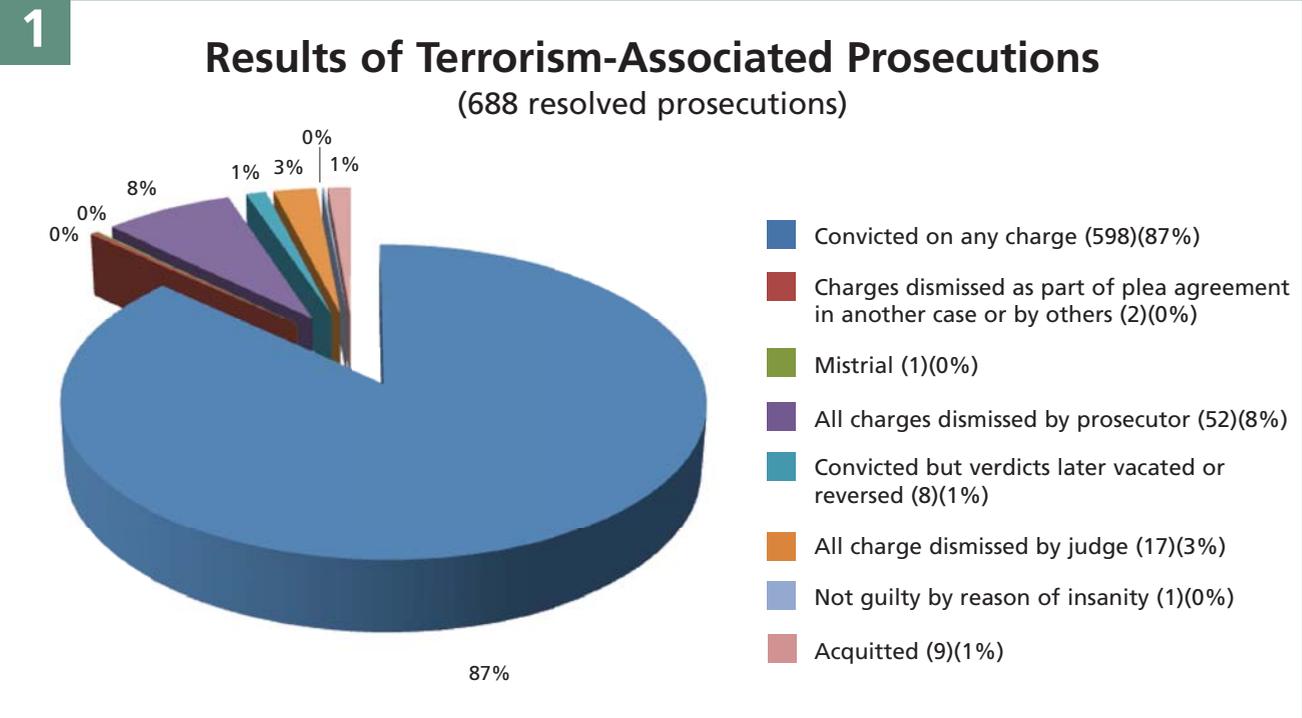
Karen J. Greenberg



Executive Director, Center on Law and Security
Editor in Chief

I. Terrorism Prosecutions: An Overview of Cases since 9/11

Since 9/11, the Department of Justice has indicted 998 defendants¹ in terrorism prosecutions.² Trials are still pending against 310 of them, leaving 688 resolved indictments. Out of these 688 defendants, 598 were convicted on some charge either at trial or by plea. **Conviction Rate: 86.9%.**



The Center on Law and Security has defined “core terrorism statutes” as those falling under the Terrorism chapter of the United States Code,³ as well as 18 U.S.C. §1992 (“Terrorist attacks and other violence against railroad carriers and against mass transportation systems on land, on water, or through the air”) and 18 U.S.C. §1993 (“Terrorist attacks and other acts of violence against mass transportation systems”). Attacks on mass transit, levying war against the United States, sabotage, hostage taking, and other crimes that may be committed by terrorists but also by others are included as national security violations.

¹ A single individual may be indicted in multiple criminal cases. In those instances, we have counted such individuals as separate defendants for each case in order for the conviction and acquittal rates to remain as accurate as possible. As a result, although there are only 969 individuals in the Terrorist Trial Database, there are 998 defendants.

² “Terrorism prosecutions” as used herein includes all individuals prosecuted in association with terrorism, as described by the Department of Justice in indictments or press releases. Not all defendants were charged with terrorism statutes.

³ U.S. Code, Part I, Chapter 113B: “Terrorism.”

Since 9/11, only 315 indictments, or 31.6% of defendants in cases associated with terrorism, have contained a charge under one of the core terrorism statutes.

An additional 122 defendants, or 12.2% of defendants in cases associated with terrorism, have been charged with national security violations or hostage taking but not terrorism.

Defendants charged with terrorism/national security violations:	437	
Defendants against whom charges have been resolved:	257	
<i>Convicted on some charge:</i>		
Convicted of terrorism/national security violations:	193	75%
Charged with terrorism/national security violations, convicted only on lesser crimes:	25	10%
Overall conviction rate where terrorism or national security violations are charged, including those convicted only of lesser crimes:		85%

Results of trials where terrorism or national security violations were charged:

Convicted on Some Charge	218
Mistrial	1
Charges Dismissed by Prosecutor	18
Charges Dismissed as Part of Plea by Other Defendant or In Other Case	1
Guilty Verdicts Vacated or Charges Dismissed by Judge	11
Not Guilty by Reason of Insanity	1
Acquitted	7

Average Sentences

Overall: Minimum sentence: 0
Maximum sentence: 1,920 months, or 160 years
Average sentence: 65.6 months, or 5.5 years
Average sentence for persons charged with terrorism: 180.8 months, or 15.1 years
Average sentence for persons convicted of terrorism: 181.2 months, or 15.1 years
Average sentence for persons charged with national security violations but not terrorism: 132.5 months, or 11.0 years
Average sentence for persons convicted of national security violations and not charged with terrorism: 94.9 months, or 7.9 years
Average sentence for persons not charged with terrorism or national security violations: 16.1 months, or 1.3 years

For purposes of calculating average sentences, life sentences have been quantified herein as 30 years. There are 13 life sentences in the dataset. Sentence totals herein do not include defendants who have been convicted but not yet sentenced or where sentence is sealed.

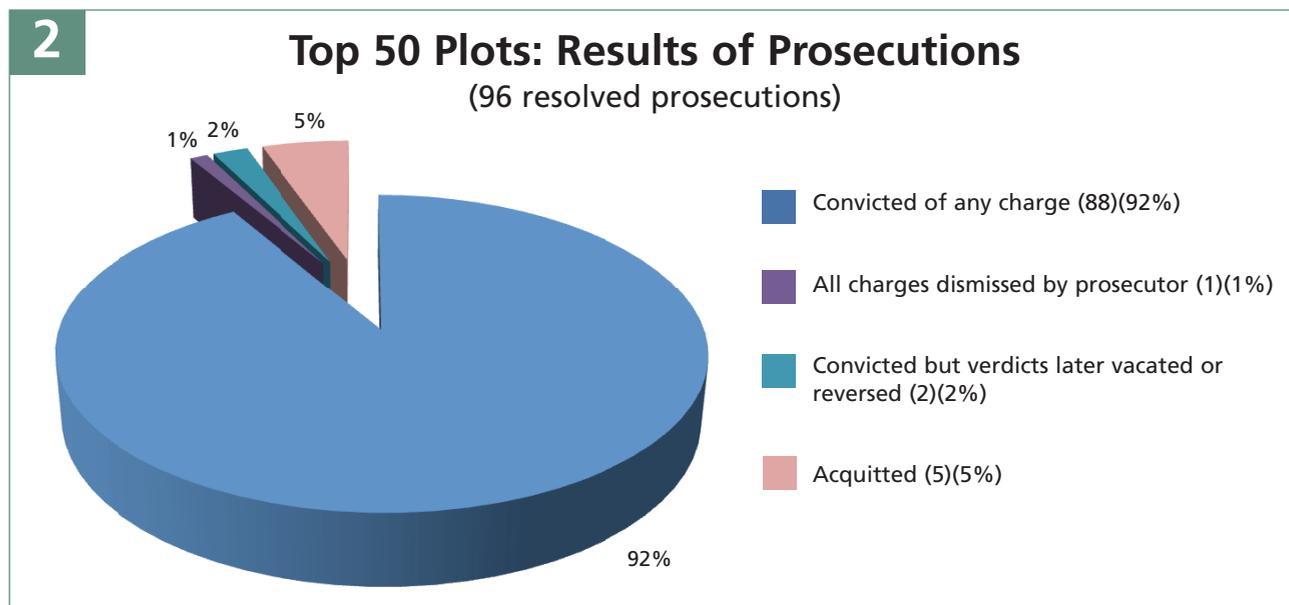
II. Top 50 Plots Alleged

Although almost 1,000 federal prosecutions associated with terrorism have been instituted since September 2001, the 50 alleged plots described below – resulting in prosecutions against 156 individuals – represent the highest-profile non-financial cases among them, plus one brought in state court and another in the military justice system. They were selected by looking at the number of news articles about each case, limiting them to those with some allegation of a jihadi connection,⁴ and excluding those based on purely financial support. (As an example, laundering money for the express purpose of purchasing a Stinger missile would not be considered purely financial).

The 50 alleged plots – constituting 59 cases (as defendants implicated in these plots may be indicted together or separately) – cover the range of questions presented by non-financial terrorism prosecutions.

They include a wide variety of cases, from those that fell apart (i.e., the alleged Detroit Sleeper Cell case) to cases where the evidence for conviction was overwhelming (i.e., the attempted Times Square bombing case). Between these poles there are cases that were murky and confusing (i.e., the Lodi case), cases that raised the specter of entrapment either implicitly (i.e., the JFK case) or explicitly (i.e., the Albany Pizza and Bronx Synagogue cases). There are cases of clear violence and unclear terrorism connections (i.e., the Little Rock recruiting station shooting) and cases of clear sympathies for terror groups but very little evidence of violent potential (i.e., the Hashmi case).

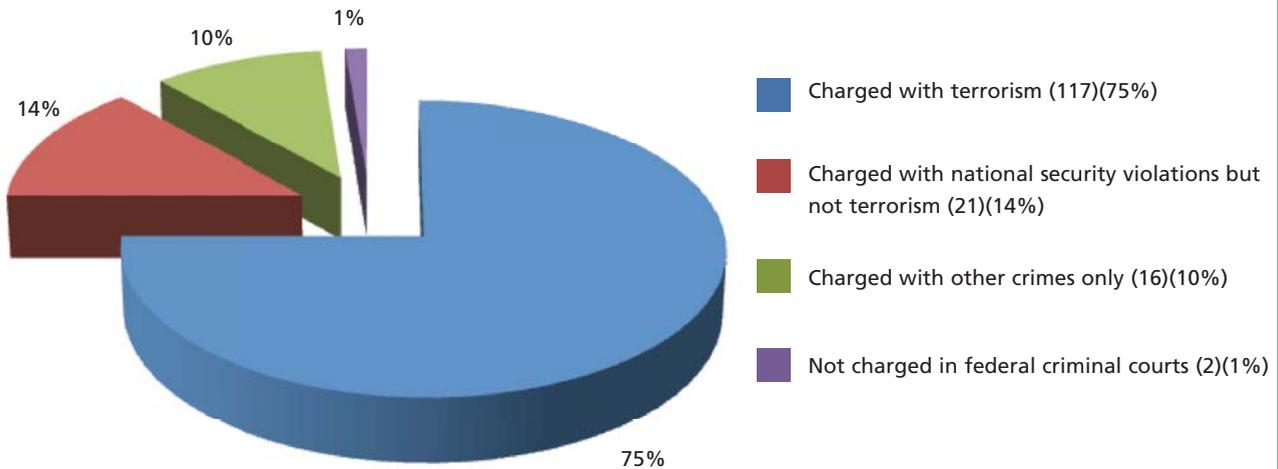
Overall, these are the cases that represent what policymakers and the public envision when thinking of terrorism prosecutions. **Conviction rate: 92%.**



⁴ We use the phrase “jihadi connection” to refer to terrorism that is not based on left- or right-wing political movements but instead on either nationalistic or international Islamist goals. Notably, while this might include affiliations with Hamas or Hezbollah, plots linked to these groups fell out of the sample because of a lack of media coverage or because they were purely financial.

Top 50 Plots: Percent Charged with Terrorism or National Security Violations

(156 prosecutions - 154 federal criminal prosecutions, 1 state,* 1 military**)



* Abdulhakim Mujahid Muhammad

** Nidal Malik Hasan

117 indictments, or 76% of defendants in federal criminal cases resulting from the top 50 alleged plots, contain a charge under one of the core terrorism statutes.

An additional 21 defendants, or 13.6% of defendants in federal criminal cases resulting from the top 50 alleged plots, have been charged with national security violations or hostage taking but not terrorism.

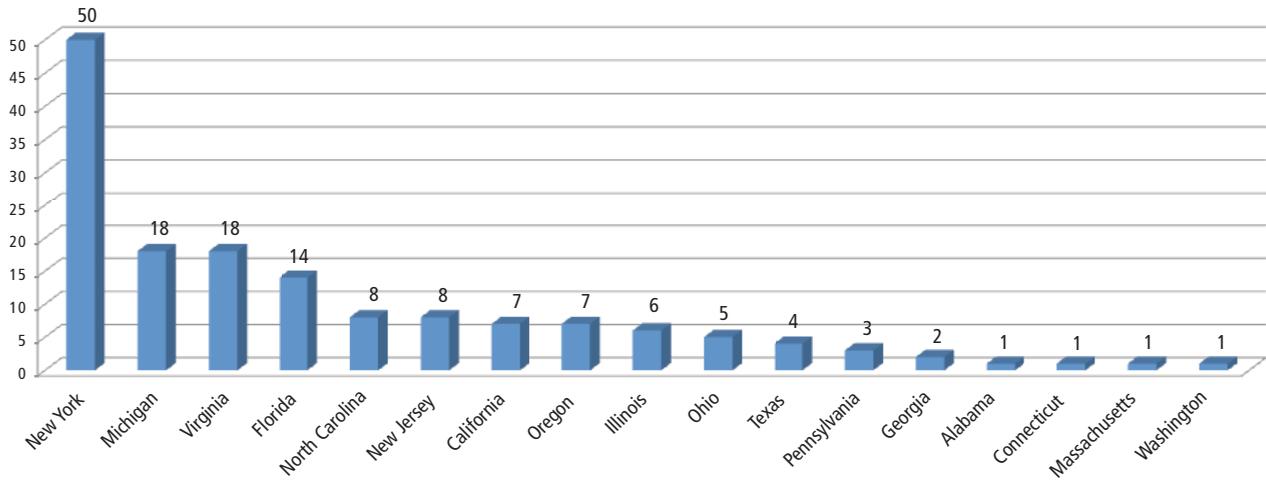
Defendants charged with terrorism/national security violations:	138	
Defendants against whom charges have been resolved:	93	
<i>Convicted on some charge:</i>		
Convicted of terrorism/national security violations:	72	77%
Charged with terrorism/national security violations, convicted only on lesser crimes:	13	14%
Overall conviction rate where terrorism or national security violations are charged, including those convicted only of lesser crimes:		91%

Results of resolved trials where terrorism or national security violations were charged:

Convicted on Some Charge	85
Mistrial	0
Charges Dismissed by Prosecutor	1
Guilty Verdicts Vacated or Charges Dismissed by Judge	2
Acquitted	5

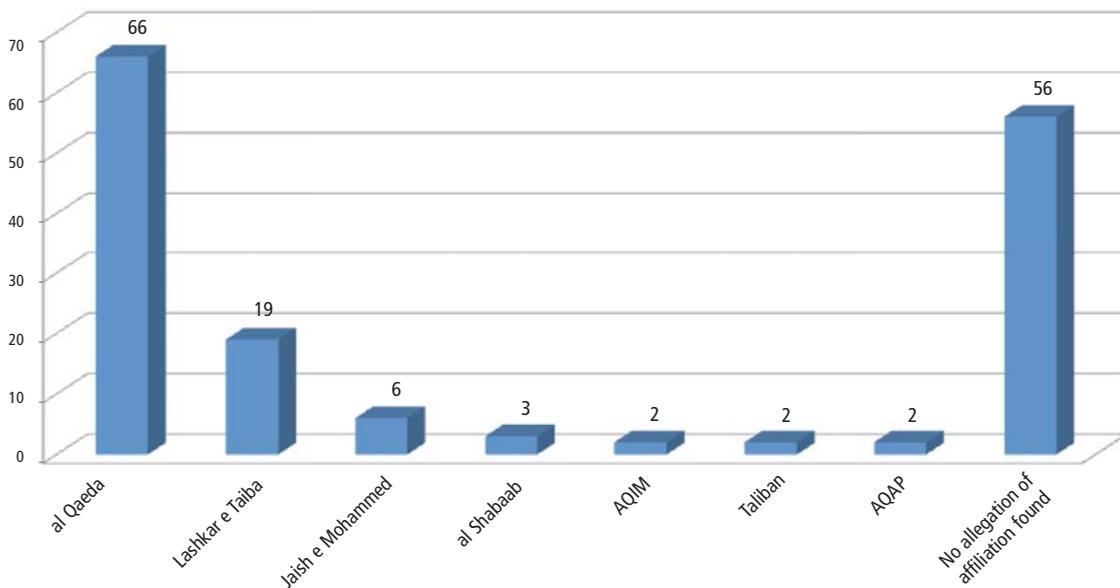
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Top 50 Plots: Geographic Distribution of Prosecutions (154 federal criminal prosecutions)

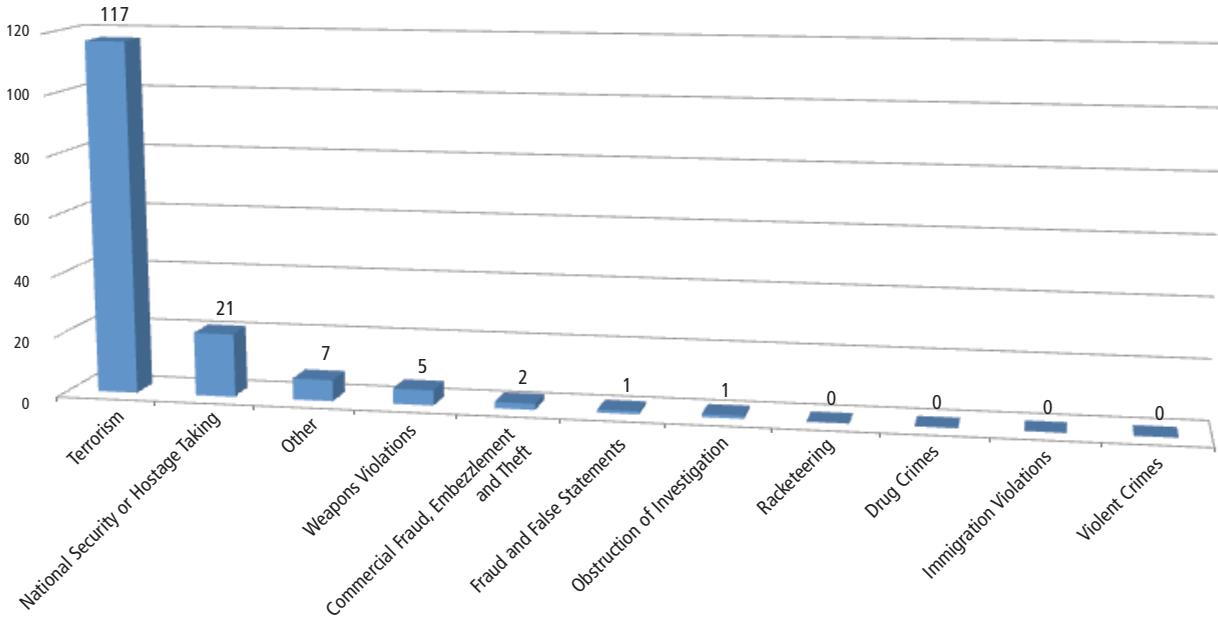


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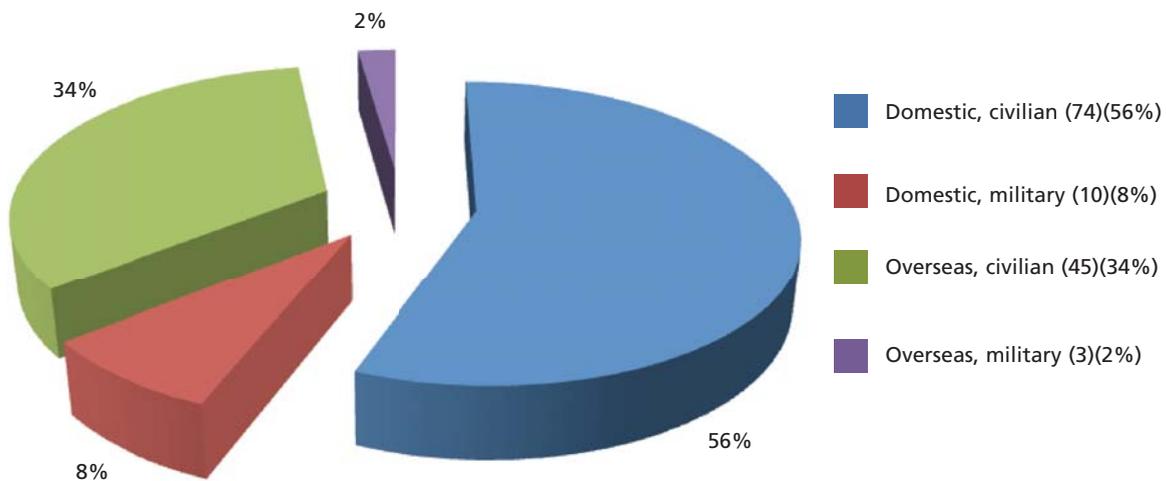
Top 50 Plots: Alleged Affiliation (156 prosecutions-154 federal criminal prosecutions,1 state,1 military)



Top 50 Plots: Indictments by Most Serious Charge Brought (154 federal criminal prosecutions)



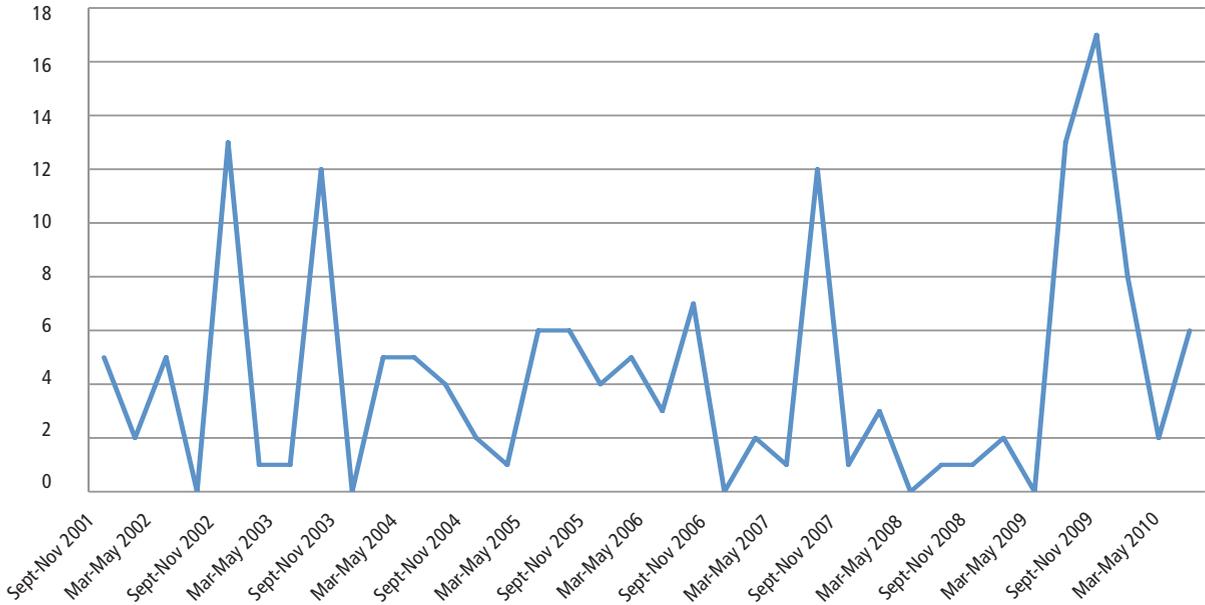
Top 50 Plots: Alleged Targets (132 prosecutions with targets mentioned)



8

Top 50 Plots: Defendants Indicted by Date

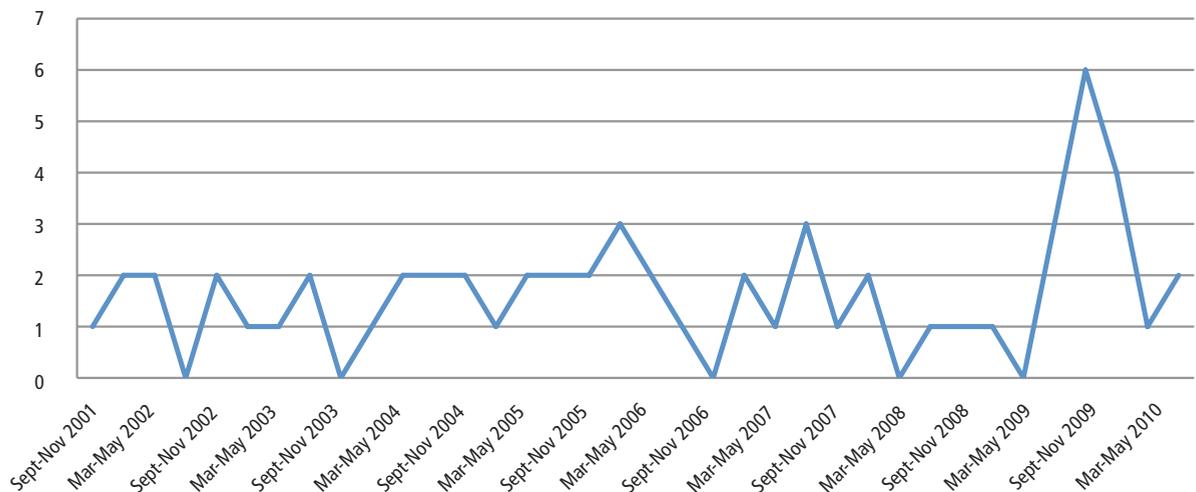
(156 prosecutions - 154 federal criminal prosecutions, 1 state, 1 military)



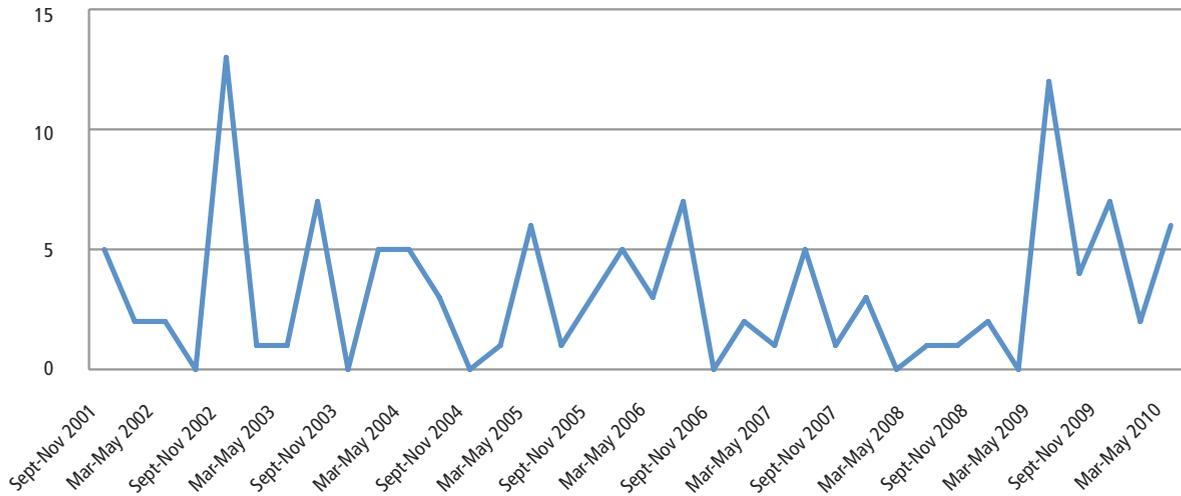
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Top 50 Plots: Cases Indicted by Date

(59 cases)

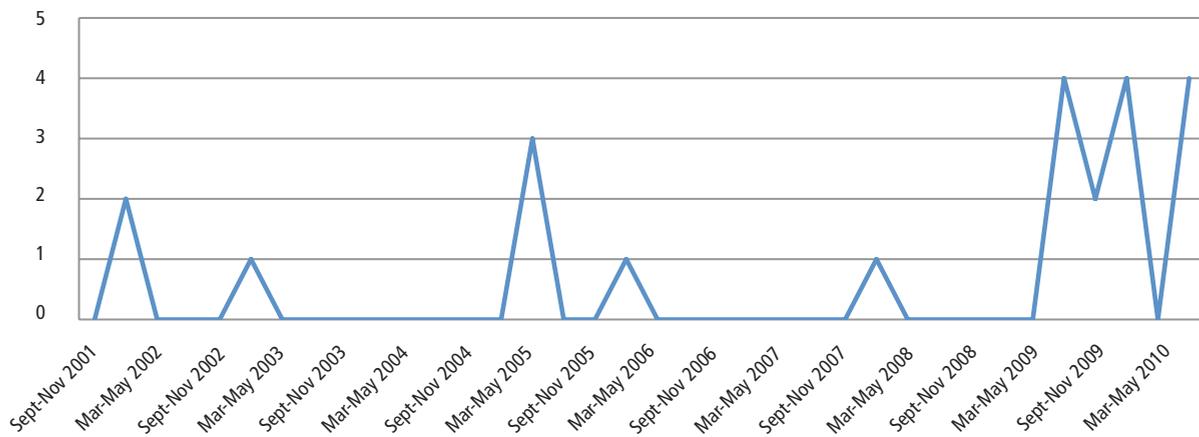


Top 50 Plots: Defendants Charged under Terrorism Statutes by Date (117 prosecutions)



Top 50 Plots: Defendants Charged under the WMD Terrorism Statute by Date

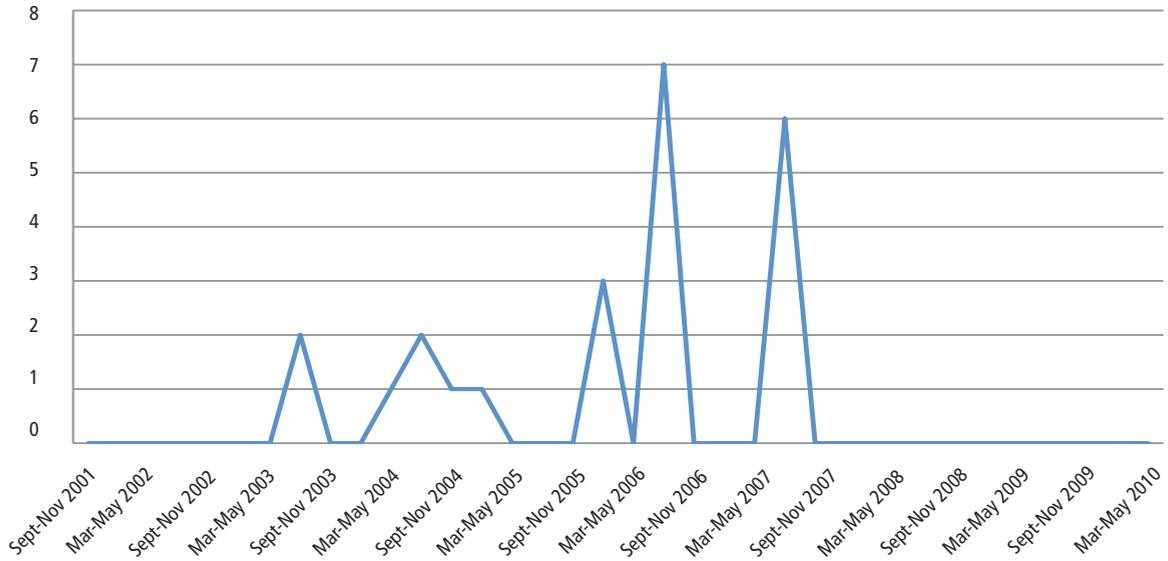
(18 U.S.C. §2332a) (22 prosecutions)



12

Top 50 Plots: Defendants Charged under Non-Terrorism Explosives Statutes by Date

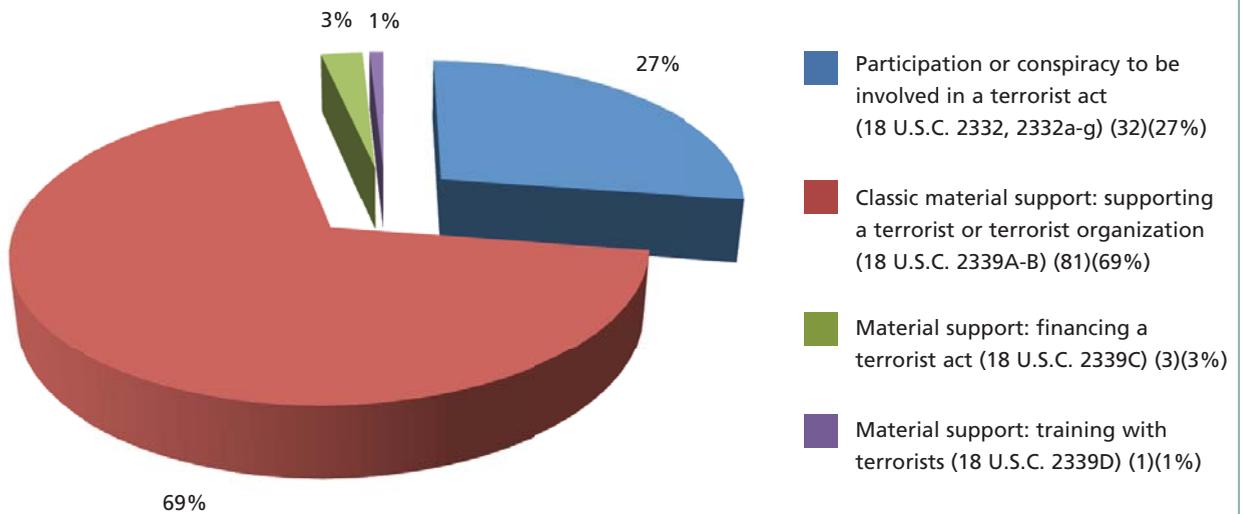
(18 U.S.C. §§841, 842, 844) (23 prosecutions)



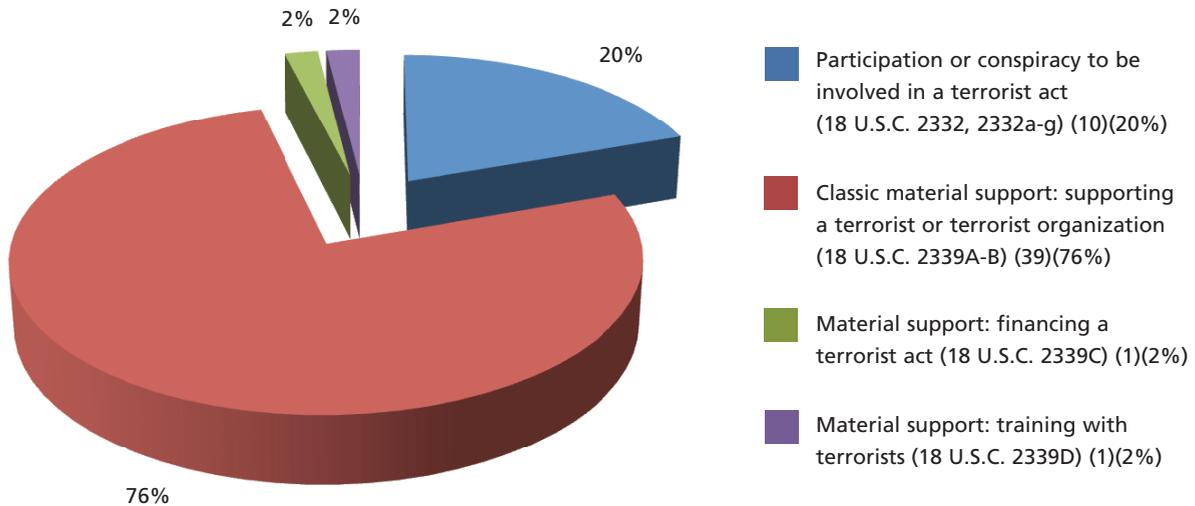
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Top 50 Plots: Types of Terrorism Charges Brought

(117 federal criminal prosecutions)



Top 50 Plots: Types of Terrorism Charges that Resulted in Conviction (51 convictions)



Average Sentences

Top 50 Plots:

Minimum sentence: 0

Maximum sentence: 804 months, or 67 years

Average sentence: 202.6 months, or 16.9 years

Average sentence for persons charged with terrorism: 183.6 months, or 15.3 years

Average sentence for persons convicted of terrorism: 206.4 months, or 17.2 years

Average sentence for persons charged with national security violations but not terrorism: 296.0 months, or 24.7 years

Average sentence for persons convicted of national security violations and not charged with terrorism: 189.9 months, or 15.8 years

Average sentence for persons not charged with terrorism or national security violations: 17.0 months, or 1.4 years

For purposes of calculating average sentences, life sentences have been quantified herein as 30 years. There are 13 life sentences in the dataset. Sentence totals herein do not include defendants who have been convicted but not yet sentenced or where sentence is sealed.

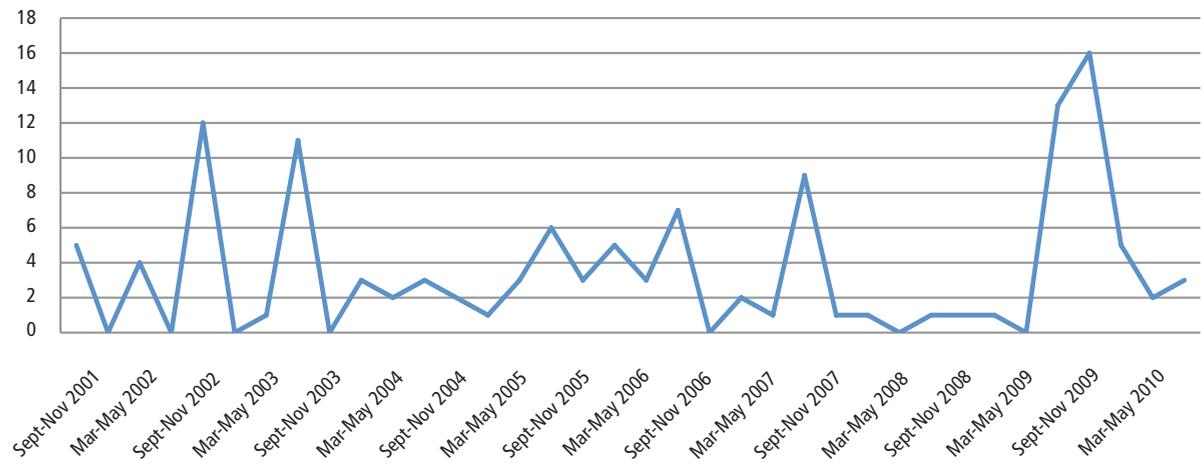
III. Top 50 Plots: Homegrown Terrorists

Over the last year, the question of whether the U.S. is creating its own homegrown terrorists has come to the fore. Of the 156 defendants alleged to be involved in the top 50 plots since September 2001, 127 had lived in the U.S. for 10 years or more before being indicted. As a definitional starting point (see Executive Director’s Introduction), the Center on Law and Security considers these 127 individuals to be “homegrown.” Notably, of these 127, more than 100 lived in the U.S. for 20 years or longer and more than 80 defendants lived in the U.S. for their entire lives or almost that long.

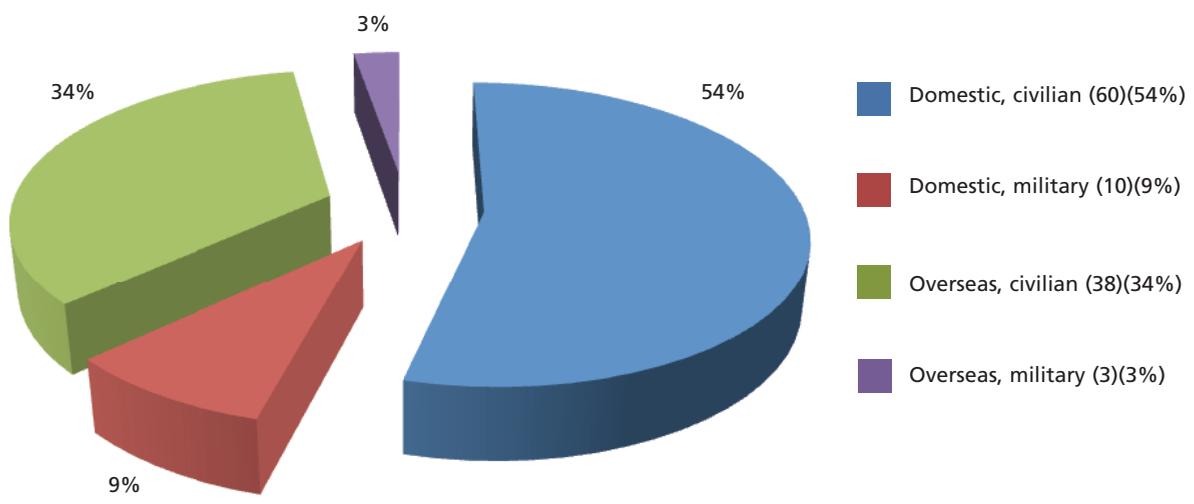
Homegrown terrorists constitute 81% of the defendants alleged to be involved in the top 50 plots prosecuted in the U.S. since 9/11.

We have seen a slight spike in indictments of homegrown defendants in high-profile cases since last fall. Yet, it is early to tell if this spike represents an actual increase in homegrown terrorists. As can be seen in the chart below, homegrown terrorism defendants have been a constant presence in high-profile terrorism prosecutions. The spike over the past year may be accounted for by the length of investigations prior to actual indictment – investigations are often ongoing for several years before arrests (and indictments) are made. Additionally, even if investigations are not ongoing, a defendant may spend years endeavoring to become a terrorist before being arrested. For example, Tarek Mehanna and his co-defendant, Ahmad Abousamra, began plotting to join a terrorist training camp in 2002 but were only indicted in 2009. In another example, Daniel Boyd first traveled to join the mujahideen in Afghanistan in 1989 and was indicted in 2009 for a conspiracy that had allegedly already begun by 2006. For these reasons, it is difficult to determine, as of yet, whether the spike we have seen can truly be attributed to an increase in homegrown terrorism or whether the assumption that there is an increase stems instead from a generalized reaction to an increase in serious cases and the first two successful attacks on U.S. soil since 2001, both perpetrated by homegrown terrorists. This is an area where more research can and should be conducted.

Top 50 Plots: Homegrown Defendants Indicted by Date (127 prosecutions)



Top 50 Plots: Alleged Targets of Homegrown Defendants (111 prosecutions with target mentioned)

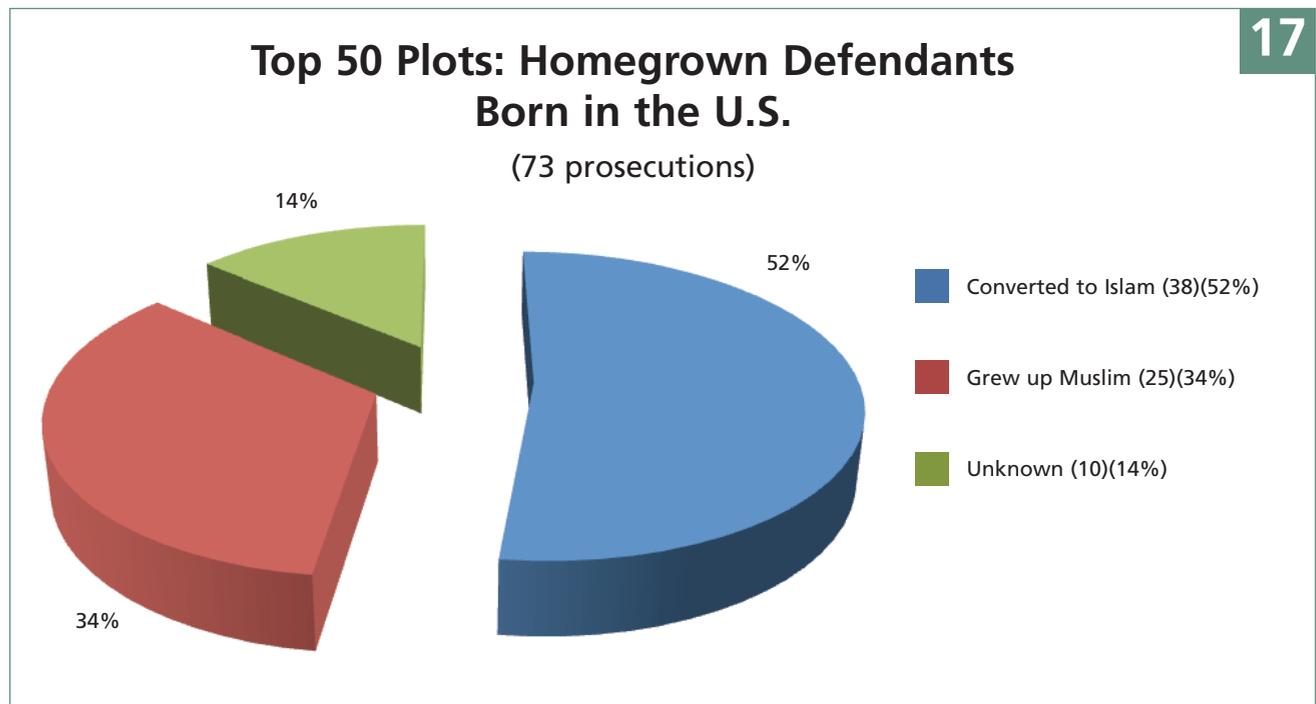


A Matter of Conversion

Of the 127 homegrown defendants alleged to be implicated in the top 50 plots, 45, or 35%, converted to Islam, generally in their late teens or early twenties. This number includes one defendant in the Liberty City case who maintained at trial that he had not converted and that he is in fact Catholic, as well as his six codefendants, members of a religious group that might or might not be considered Islamic. Their inclusion here more accurately represents the non-Islamic upbringing of many of these defendants.

The religion of 11 additional defendants indicted in the Dearborn, Michigan, case in 2009, who are often referred to as "Muslim converts" but without additional supporting information, has not been documented. Consequently, the number of these defendants who did not grow up in Islamic households may be as high as 56, or 44% of homegrown defendants in the top 50 terrorism plots.

Seventy-three of the homegrown defendants, or 57%, are known to have been born in the United States. The birthplaces of another eight defendants have not been documented.



IV. Civil Liberties: Primers by NYU Law Students*

Special Administrative Measures

By **Samantha Schott** (NYU School of Law, Class of 2012)

Special administrative measures, or “SAMs,” are conditions of detention implemented where the attorney general deems that a prisoner’s communications or contacts with others are sufficiently threatening that they merit prevention.¹ The SAMs rule is codified in two parts: the first allows for communication to be restricted where classified information could be disclosed that could threaten national security; the second allows for such restrictions to be implemented where a prisoner’s interactions could result in the serious injury or death of others through acts of violence or terrorism.² SAMs can be imposed on any individual in the custody of the Bureau of Prisons (“BOP”), including persons convicted of crimes, charged with crimes, or awaiting charge.³ Examples of SAMs conditions authorized by the rule are placement in a special housing unit; limiting privileges, including access to television or newspapers; and restricting visitors and telephone use – all effectively amounting to conditions of solitary confinement.⁴ Actual conditions imposed are meant to be designed according to the individual inmate and the security concerns surrounding him or her.⁵ SAMs can be recommended by U.S. attorneys through the Department of Justice (“DOJ”), Criminal Division, Office of Enforcement Operations, but they must be approved by the attorney general.⁶

As originally introduced in 1996 and codified in 1997, SAMs could be imposed for only 120 days at a time, at which point they could be renewed indefinitely. However, in 2001 the length was lengthened to a year, with extensions also increased to a year at a time.⁷ The interim rule further allowed for monitoring of communications between an inmate and his or her attorneys where “reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism.”⁸

*The essays in this section have been excerpted from longer works.

¹ 28 C.F.R. §§ 501.2-501.3 (2010).

² §§ 501.2(a), 501.3(a).

³ 28 C.F.R. § 500.1 (2010).

⁴ §§ 501.2(a), 501.3(a).

⁵ National Security; Prevention of Acts of Violence and Terrorism, 72 Fed. Reg. 16,271, 16,274 (Apr. 4, 2007) (to be codified at 28 C.F.R. pts. 500-01).

⁶ Evaluation and Inspections Div., Office of Inspector Gen., Dep’t of Justice, *Rep. No. I-2006-09, The Federal Bureau of Prisons’ Monitoring of Mail for High-Risk Inmates*, at 14 (2006), available at <http://www.justice.gov/oig/reports/BOP/e0609/final.pdf>.

⁷ National Security; Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062, 55,063-64 (proposed Oct. 31, 2001) (to be codified at C.F.R. pts. 500-01).

⁸ *Id.* at 55,066.

Special Administrative Measures

In 2009, the Department of Justice revealed that 44 federal prison inmates, including defendants awaiting trial, were being held under special administrative measures (SAMs) in prisons across the United States. Twenty-nine of those inmates were being held in connection with terrorism allegations or convictions.* No other information was given as to who the defendants were, and the DoJ has not released updated information since then.

While SAMs are often discussed in the context of supermax detention facilities, in fact SAMs may be used in any jurisdiction. Defendants and/or convicts may be placed in special housing units, used for either punitive or administrative detention, that exist generally in prisons across the country. Additionally, without reaching the level of restriction involved in SAMs, defendants may be held in communication management units (CMUs), which involve lesser restrictions on individual defendants but also may be less regulated.

*Press Release, Office of Pub. Affairs, Dep't of Justice, No. 09-564, Fact Sheet: Prosecuting and Detaining Terror Suspects in the U.S. Criminal Justice System, available at <http://www.justice.gov/opa/pr/2009/June/09-ag-564.html>.

SAMs have been frequently criticized by defense counsel, families of the defendants, and members of the human and civil rights communities. Media outlets have focused on the “gag orders” placed on inmates, preventing them from speaking to the press.⁹ Human rights and civil liberties groups have criticized SAMs provisions that impose solitary confinement. The bulk of law journal articles on SAMs, however, detail the threat they pose to the attorney-client privilege. Some authors focus on the effect they have on the Sixth Amendment right to counsel, especially in the wake of Lynne Stewart’s conviction and lengthy sentence for violating the SAMs placed on her client, “Blind Sheikh” Omar Abdel Rahman.¹⁰

Famous SAMs Cases

Syed Hashmi

Syed Hashmi was extradited from the UK to the U.S. in 2007 and sentenced in June 2010 to 15 years in prison after pleading guilty to conspiring to provide material support or resources to al Qaeda, including socks and plane tickets.¹¹ Although the charges against him offered little reason to think his communications could be dangerous, he was held under pre-trial SAMs, losing repeated challenges to their constitutionality and necessity.¹²

⁹Jane Mayer, *Lost in the Jihad: Why did the government's case against John Walker Lindh collapse?*, NEW YORKER, Mar. 10, 2003, at 50.

¹⁰See Marjorie Cohn, *The Evisceration of the Att’y-Client Privilege in the Wake of September 11, 2001*, 71 FORDHAM L. REV. 1233, 1259-60 (2003); John Eligion, *Sentence is Sharply Increased for Lawyer Convicted of Aiding Terror*, N.Y. TIMES, July 15, 2010, available at http://www.nytimes.com/2010/07/16/nyregion/16stewart.html?_r=1&sq=lynne%20stewart&st=cse&adxnnl=1&scp=1&adxnnlx=1280426449-coC6BY1q1cwzTbv9KaFMFw.

¹¹Colin Moynihan, *U.S. Man Draws 15 Years for Plot to Supply Al Qaeda*, N.Y. TIMES, June 9, 2010, available at http://www.nytimes.com/2010/06/10/nyregion/10hashmi.html?ref=syed_hashmi.

¹²United States v. Hashmi, 621 F. Supp. 2d 76, 87 (S.D.N.Y. 2008); Entry for proceedings held before Judge Loretta A. Preska, No. 1:06-442 (S.D.N.Y. Jan. 23, 2009).

Zacarias Moussaoui

Zacarias Moussaoui was arrested and indicted in December 2001 for conspiring with the September 11th hijackers.¹³ SAMs were implemented on January 7, 2002; although Moussaoui attempted to appear pro se, his standby counsel moved to have his SAMs lifted twice.¹⁴ He pleaded guilty in April 2005 and was sentenced to life in prison.¹⁵

Richard C. Reid

Richard C. Reid was arrested in December 2001 after unsuccessfully attempting to detonate explosives in his shoes on a flight from Paris to Miami. He pleaded guilty in October 2002 and was subsequently sentenced to life in prison.¹⁶ After an FBI agent removed the “letters to the editor section” from the *Time* magazines that he received, Reid challenged the SAMs that had been imposed in February 2002.¹⁷ The First Circuit dismissed his appeal of the district court’s decision as moot, as new SAMs had been implemented before the appeal reached the court.¹⁸ Reid filed a civil suit challenging his SAMs in 2007, but by the time it reached a courtroom, the government had allowed his SAMs to expire.¹⁹

John Walker Lindh

The SAMs imposed on John Walker Lindh after his arrest in 2001 were allowed to expire in March 2009 as part of a “gradual easing of restrictions” imposed on him.²⁰

Mohammed Abdullah Warsame

Mohammed Abdullah Warsame was indicted in January 2004 on charges related to time spent in training camps in Afghanistan and associations with militants.²¹ He pleaded guilty in May 2009²² after being held under SAMs for over five years – the longest pre-trial SAMs since their inception in 1996.

¹³ United States v. Moussaoui, 591 F.3d 263, 266 (4th Cir. 2010).

¹⁴ *Id.* at 267-68, 278.

¹⁵ *Id.*

¹⁶ United States v. Reid, 369 F.3d 619, 620 (1st Cir. 2004).

¹⁷ *Id.* at 620-21.

¹⁸ *Id.* at 624-25.

¹⁹ Reid v. Wiley, No. 07- 01855 (D. Colo. Nov. 13, 2009).

²⁰ Carrie Johnson, *Prison Officials Are Loosening Restrictions on Taliban Supp.er; Number of People Who Contact Lindh Grows*, WASHINGTON POST, March 18, 2009, at A06.

²¹ Press Release, Dep’t of Justice, Minneapolis Man Pleads Guilty to Conspiracy to Provide Material Supp. to Al-Qaeda (May 20, 2009) available at <http://www.justice.gov/opa/pr/2009/May/09-nsd-494.html>.

²² *Id.*

Informants and the Entrapment Defense

By Chantene Berger (NYU School of Law, Class of 2012)

Terrorism conspiracies and cells are inherently clandestine.¹ Their detection will often require undercover informants instructed to infiltrate suspected terrorist groups.² The FBI, which conducts the majority of terrorism stings, may rely on a law enforcement agent or a confidential informant, often a criminal himself, to gather intelligence.³ The use of undercover agents presents civil liberty and legal concerns related to overzealous prosecution and inappropriate influence. This is particularly true in light of the unique nature of the body of law surrounding terror crimes, which allows law enforcement officials operational flexibility that may exceed the traditional legal boundaries established for “ordinary crimes.”⁴ This flexibility is often the subject of controversy, eliciting claims from defendants and commentators that police overstepped the line from detecting crime to creating it where it did not previously exist.

Informants and Entrapment Claims

Of the 156 prosecutions of defendants implicated in the top 50 plots, informants were relied on in 97 of them, or **62%**. The conviction rate in cases that rely on informants is **92%**.

Of those 97 informant trials, 27 defendants, or **28%**, claimed, at some point over the course of their prosecution, that they had been entrapped.

As of September 2010, the entrapment defense has never been used successfully in a post-9/11 federal terrorism trial.

The failure of entrapment claims in terrorism cases raises the question: Is entrapment weighed differently in terrorism prosecutions? If so, should Congress, legal policymakers, and/or judges re-evaluate the parameters of entrapment as it pertains to terrorism?

¹ Dru Stevenson, *Entrapment and Terrorism*, 49 B.C.L. REV. 125 (2008).

² See Jacqueline E. Ross, *Tradeoffs in Undercover Investigations: A Comparative Perspective*, 69 U. CHI. L. REV. 1501, 1511 (2002).

³ Jon Sherman, “A Person Otherwise Innocent”: Policing Entrapment in Preventative, Undercover Counterterrorism Investigations, 11:5 Journal of Constitutional Law 1475 (2009).

⁴ Daniel V. Ward, *Confidential Informants in National Security Investigations*, 47 B.C.L. REV. 627, 657 (2005-2006).

The primary legal mechanism for defendants to protect themselves from an improperly coercive sting operation or police misconduct is the entrapment defense.⁵ This is an option of last resort, however, as it requires a defendant to admit to criminal activity and may allow for a court to consider the defendant's past activity in order to assess the entrapment claim. The Supreme Court has never held that the defense exists as a constitutional matter.

The entrapment defense has two main tests, neither of which has been uniformly adopted. To the extent that the Supreme Court has acknowledged it,⁶ it and most other federal courts use the subjective test, which focuses on a defendant's predisposition to commit the crime – that is, whether an undercover agent used means to induce an otherwise innocent person to commit a criminal act.⁷ The defendant asserts that she would never have been disposed to committing the crime “but for” the government's actions. The focus on the defendant's predisposition leads to the introduction of a significant amount of character evidence as part of the proof, or test, of entrapment.

The objective test, used mostly in state courts and which serves as a framework for the Model Penal Code, focuses on the outrageous conduct of the government, regardless of the defendant's liability, with the intent of deterring unscrupulous police behavior.⁸ The objective test would not consider the reputation or criminal history of a defendant in most cases because what is relevant is not the defendant's predisposition but whether the methods used against him would likely ensnare the unwary or the innocent.⁹ In some cases a court will use an amalgam of these approaches, and often the standard of proof will vary in entrapment cases.¹⁰

Famous Cases where Entrapment Was Claimed

Hemant Lakhani

Hemant Lakhani agreed to sell weapons to an undercover FBI agent posing as a terrorist planning to destroy American passenger planes. The FBI followed him for a year, but it became apparent that he did not have personal access to missiles or a launcher. The FBI eventually enlisted undercover Russian operatives to sell him nonfunctional weapons so that he could, and did, make the sale.¹¹

⁵ Dru Stevenson, *Entrapment and the Problem of Deterring Police Misconduct*, 37 CONN. L. REV. 67, 103 (2004) (noting that entrapment is inseparable from sting operations in that “entrapment almost definitionally involves sting operations”).

⁶ The Supreme Court first recognized entrapment as a valid defense in *Sorrells v. United States*, 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413, 38 Ohio L. Rep. 326 (1932).

⁷ PAUL MARCUS, *THE ENTRAPMENT DEFENSE*, 58-59 (3rd ed. 2003).

⁸ Dru Stevenson, *Entrapment and Terrorism*, 49 B.C.L. REV. 125 (2008); See also Bruce Hay, *Sting Operations, Undercover Agents, and Entrapment*, 70 Mo. L. REV. 387, 401 (2005).

⁹ Hay, *supra* note 8, at 401.

¹⁰ See MARCUS, *supra* note 7, at 44-47 (some courts will acquit the defendant if entrapment can be established through either the subjective or objective test; others will acquit if entrapment is found under both tests); see Hay, *supra* note 9 n.39.

¹¹ Richard H. McAdams, *Reforming Entrapment Doctrine in United States v. Hollingsworth*, 74 U. CHI. L. REV. 1795, 1809 (2007) (detailing the Lakhani case and describing that “though when he [Lakhani] received the launcher from the Russians, Lakhani appeared to test it by placing it on his shoulder pointing backwards”).

Lakhani's defense team claimed that he had been entrapped as a matter of law, which the court analyzed under the subjective test.¹² The court remained unconvinced, and declined to dismiss the prosecution pre-trial, determining instead, as is customary, that the question of entrapment is for the jury to decide and that "even though the Government initiated this illegal arms deal, Lakhani's 'ready response' to its solicitation is amply demonstrated by his multiple, self-financed trips to the Ukraine in search of a missile."¹³ Ultimately, Lakhani was convicted at trial and sentenced to 47 years in prison.

The Bronx Synagogue Case

James Cromitie, accused of plotting to blow up a synagogue and a Jewish community center in the Bronx, allegedly conspired with an undercover informant posing as a wealthy representative of a Pakistani terrorist organization. The informant, Shaheed Hussain, promised Cromitie and his co-conspirators \$250,000 with which he would recruit other men. Defense lawyers argued that Cromitie and the other defendants – David Williams, Onta Williams, and Laguerre Payen – would not have proceeded but for Hussain's provocation and the repeated offers of a large sum of money.¹⁴ A motion to dismiss the case on the basis of entrapment was rejected. As of September 11, 2010, the case is before a jury in the Southern District of New York.

Shahawar Siraj

Shahawar Matin Siraj, charged and eventually convicted of conspiracy to bomb the Herald Square subway station in midtown Manhattan, argued that he had been entrapped by a paid undercover informer, Osama Eldawoody, an Egyptian-born nuclear engineer who allegedly provoked Siraj "by stoking his rage with images of Muslims abused at the hands of Americans."¹⁵ Despite Siraj's claims, the court found that "Matin's only evidence of inducement was his own testimony."¹⁶

¹²U.S. v. Lakhani, 480 F.3d 171, 178 (2007) (the court opinion described the entrapment defense as focused "on the defendant himself: if the defendant was predisposed to commit the crime, then it cannot be said that the Government is responsible, notwithstanding the egregiousness of its conduct." *Id.* at 178 (citing U.S. v. Russell, 411 U.S. 423, 432-36 (1973)). The court continued to say that entrapment is a "relatively limited defense" that may defeat a prosecution only "when the Government's deception actually implants the criminal design in the mind of the defendant." *Id.* at 179 (quoting U.S. v. Fedroff, 874 F.2d 178, 181 (3rd Cir. 1989) (quoting *Russell*, 411 U.S. at 435-36)). The court continues that "[o]nce properly raised by the defendant, 'the [G]overnment has the burden to disprove the whole (entrapment) defense beyond a reasonable doubt.'" *Id.* (footnote omitted) (quoting U.S. v. Jannotti, 673 F.2d 578, 597 (3rd Cir. 1982) (*en banc*)). Interestingly, the court also considered the government's conduct in attempting to induce Lakhani, but called this approach a "due process" challenge and not an entrapment defense, even though the test reflects the objective entrapment defense. *Id.* at 180.)

¹³*Id.* at 180.

¹⁴A.G. Sulzberger, *Defense Cites Entrapment in Terror Case*, N.Y. TIMES, Mar. 17, 2010 available at <http://www.nytimes.com/2010/03/18/nyregion/18newburgh.html?ref=nyregion>.

¹⁵William K. Rashbaum, *Guilty Verdict in Plot to Bomb Subway Station*, N.Y. TIMES, May 25, 2006 available at <http://www.nytimes.com/2006/05/25/nyregion/25herald.html> ("Evidence showed [the informant] was paid about \$100,000 over two years and nine months – \$25,000 during the 13 months he worked as an informer and the rest in relocation and living expenses over the 20 months between the arrests and the trial.").

¹⁶U.S. v. Siraj, 468 F.Supp.2d 408 (E.D.N.Y. 2007).



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