

Silencing stories

Special administrative measures handcuff First Amendment

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Date: March 1, 2012

Published: The News Media & the Law

Online: <http://www.rcfp.org/node/124093>

Bryan Denson, a reporter at *The Oregonian* in Portland, Ore., spent two years researching and writing about the case of convicted CIA operative-turned-Russian spy, Harold James “Jim” Nicholson.

His writings eventually culminated in a six-part series in May, “The Spy’s Kid,” that examined the journeys of both Nicholson and his son Nathan into the world of espionage. For the series, Denson interviewed Nicholson’s lawyer Sam Kauffman and members of the Nicholson family, including an exclusive interview with Nathan.

But Denson was missing one major voice in his story — the voice of Nicholson, himself.

“For a couple of years, I was trying to get an interview with Jim Nicholson,” Denson said. “His lawyer agreed to allow me to talk to him. I thought it would be a matter of just going to the federal Bureau of Prisons to get an interview. I was denied any chance of an interview by the BOP.”

For now, Nicholson’s side of the story will remain a mystery. As a part of his sentence, Nicholson was placed under Special Administrative Measures, or SAMs, a government effort to curb the threats of terrorism by limiting prisoner communications with the outside world.

Nicholson is one of 49 prisoners placed under SAMs by the U.S. Bureau of Prisons. SAMs are supposed to be a way to monitor and prevent inmates from providing instruction or direction for future terrorist attacks or information about national security, according to the Department of Justice.

But for reporters trying to cover cases involving SAMs prisoners, the measures are frustrating.

Prisoners placed under SAMs are not allowed outside communication with the media. This means not only can they not be contacted by members of the press, but they cannot contact the press themselves or through a lawyer, essentially removing the option of placing their story in the public record.

“Should we trample the First Amendment in service of further punishment of prisoners who are already being locked down in single cells 23 hours a day?” Denson said. “As I mentioned previously: This is not about Jim Nicholson’s right to tell his story as much as it’s the right of all Americans to read it.”

However, a prisoner’s ability to communicate is often “a black hole in the Constitution,” according to David Hudson, a scholar at the First Amendment Center and adjunct law professor at Vanderbilt University.

“People do have a right to receive information and ideas, and the press is a conduit of that,” Hudson said. “Inmates have a unique perspective of the prison system, which is a matter of public interest. They deserve to have their perspective told.”

Nicholson was accused of handing over confidential secrets to Russia from 1994 until his arrest in 1996, and was on trial for a second time in 2009 for using his then 23-year-old son, Nathan, to pass notes from his cell in Portland to the Russian Foreign Intelligence Service.

Nicholson initially pleaded not guilty to the charges against him in January 2009. Two years later, however, he pleaded guilty to charges of conspiracy to act as an agent of a foreign government and conspiracy to commit money laundering. He was sentenced to eight additional years in prison. He was placed under SAMs in July 2011.

“This guy’s a two-time turncoat and he has done some terrible things. But before that, he also served for 20 years as a distinguished member of the Army and CIA,” Denson said. “He does have a compelling story to tell.”

What are Special Administrative Measures?

Like the prisoners placed under them, Special Administrative Measures are often a mystery.

Kauffman, who has represented Guantanamo detainees in addition to Nicholson, worked with communication restrictions before, but only heard rumors of SAMs before his client was placed on them in 2011.

“They were designed for terrorists, espionage and violent crimes — particularly violent crimes, where outside communication can result in the harm of others,” said Dean Boyd, a U.S. Department of Justice spokesman. “Each SAM is different.”

SAMs were imposed against “American Taliban” John Walker Lindh after he pleaded guilty to aiding the Taliban in 2002, and have long been in force against Zacarias Moussaoui, accused of conspiring in the Sept. 11 attacks, Richard Reid, the “shoe bomber” who tried unsuccessfully to blow up an American Airlines flight from Paris to Miami, and many others convicted on terrorism charges.

Special Administrative Measures were first established in 1996, soon after the bombing of the Alfred P. Murrah Federal Building in Oklahoma City. Less than two months after the Sept. 11 terrorist attacks, the Justice Department issued an interim rule that drastically expanded the scope of the Bureau of Prisons’ powers under the measures. The regulation became effective immediately without the usual opportunity for public comment. After more than 5,000 comments were submitted opposing the new regulations, the Bureau of Prisons finalized the rule nearly six years later in April 2007.

In the Bureau of Prisons system, SAMs affect a small number of prisoners — about 0.02 percent. There are 49 prisoners under SAMs in the United States, 28 of whom are being held on charges related to terrorism. Since 1996, more than 90 inmates have been placed under the measures.

SAMs may be placed on an inmate by the Bureau of Prisons under authorization of the U.S. Attorney General in cases of national security and to prevent acts of violence and terrorism if there is a “substantial risk” that outside communications by a prisoner that may result in “death or serious bodily injury to persons” or property damage that also may result in death or injury (28 C.F.R. § 501.3).

The 2001 amendments include extending the length of

include extending the length of the measures from 120 days to one year, and language that allows the BOP to monitor client-attorney communications. The bureau must submit a written notification to the inmate and attorneys that client-attorney communications will be monitored.

There is no limit to the number of times SAMs may be renewed for a prisoner.

Once a prisoner is placed under SAMs, according to the rule, he or she may be placed in special housing and/or have limited privileges, which may include restricted correspondence of any form with the news media, the use of the telephone and/or communications with his or her attorney.

Kauffman said he was not permitted to speak to Nicholson until Kauffman agreed to the terms of the measures.

"In the post 9/11 world, these things have become more prevalent," Kauffman said. "I had to sign an affidavit or declaration of some sort that I agree not to disclose anything my client tells me."

For reporter Denson, this seems overly protective.

"What they were afraid of was Jim passing Sam [Kauffman] information, which I was taking notes on and writing about," Denson said. "But he's already being held in a 24/7 security prison. Jim Nicholson, everything he says or does, is being monitored. Every letter has been copied, every phone call monitored. It baffles me."

However, the Department of Justice has reason for concern, Boyd said.

The Office of the Inspector General examined the BOP's mail review system in 2006 in

order to "evaluate how effectively the BOP prevents terrorist and other high-risk inmates from using the mail or the cover of a foreign language to continue or encourage criminal behavior, threaten the public, or compromise national security," after news organizations reported that three convicted terrorists sent letters from prison to radical terrorist cells.

The review said the staff of the Special Investigative Supervisor should be well-versed in foreign languages, international terrorist organizations, analysis techniques, extremist ideologies, as well as have a knowledge and ability to enforce SAMs.

"However, the BOP does not provide the SIS staff with the intelligence training needed to adequately undertake these tasks," the report found. "Further, we found that the BOP does not always take advantage of available intelligence resources, such as its Intelligence Operations Officers (IO) and the FBI."

Boyd said in the cases of Nicholson and also Sheikh Omar Abdel-Rahman, messages were also passed from behind bars. Abdel-Rahman's lawyer, Lynne Stewart, was convicted of violating the SAMs agreement after she passed a blessing from Abdel-Rahman to Egyptian terrorists in 2002, which the government alleged was a signal that he supported an attack. Stewart, initially sentenced to 28 months in jail in 2005, is in prison on a 10-year sentence imposed after the U.S. Court of Appeals in New York City (2nd Cir.) ruled that the initial sentence was not severe enough.



Nathan Nicholson, right, speaks to reporters while his defense attorney Gerald M. Needhan looks on. Nicholson's father, an imprisoned spy, is under special administrative measures in a federal prison.

Mohammed v. Holder and the future of SAMs

Though the DOJ maintains Special Administrative Measures are necessary, some think they harm prisoners.

The American Civil Liberties Union has raised concerns about the effects these measures have on the health of prisoners placed under them. Studies on the limited communications can have negative effects on mental health, according to Nusrat Choudhury, a staff attorney in the ACLU's National Security Project.

"I think in general we're concerned about the effect on prisoners and pretrial detainees SAMs have — the adverse effects on the mental health of prisoners, inability to communicate with lawyers," Choudhury said. "At this point, we believe that it's something the DOJ should be concerned about."

Khalfan Khamis Mohammed brought a suit against the U.S. Attorney General in 2011, claiming that the SAMs enforced against him violated his First Amendment rights.

The government argued that for Mohammed, SAMs have continued and are necessary because of

Mohammed's "longstanding commitment to jihad" and the fear he may try to communicate with other jihadists around the world to incite violence.

A Colorado District judge ruled in October that Mohammed may proceed with a lawsuit against the government, finding there was "no rational connection between the current restrictions on communication with those outside his immediate family," and that Mohammed had not tried to communicate with people or organizations with the intent of inciting violence.

Mohammed is one of four convicted terrorists involved in the bombings of U.S. embassies in Dar es Salaam, Tanzania, and Nairobi, Kenya, on Aug. 7, 1998 that left 224 people dead and more than 4,000 injured.

Sentenced to life without parole in 2001, Mohammed was placed under SAMs to prevent him from communicating with any terrorist organizations. The measures have been renewed every year since 1999, when Mohammed was placed in U.S. custody. Under his SAMs, Mohammed is limited to

two 15-minute telephone calls in English (unless prior notice is given) a month, three pieces of paper (double-sided) and visits from his immediate family, which consists of his mother and eight siblings. He may also correspond with four other family members via telephone and writing. All of his mail is copied and forwarded to the FBI for analysis and all of his telephone calls are monitored. Prior to 2005, however, his correspondence was not as limited.

Mohammed is not allowed to speak with prisoners who are not subject to SAMs, and his mail may be held for analysis by the FBI for up to 60 days for foreign language mail or 14 days for English mail. He is also not allowed to attend a prayer group, or to communicate with news media.

For prisoners such as Mohammed and former spy Nicholson, communications are limited to persons approved by the BOP, usually lawyers and immediate family. Anyone who is not approved by the bureau — particularly media — is excluded.

“I’d like to know why my government feels these orders have to be filed in virtual secrecy,” Denson said. “What public good does cutting off prisoners from communicating with news media actually serve?”

There are also concerns that by limiting access to lawyers, SAMs prisoners are unable to effectively petition the removal of the measures or to effectively aid in the defense of prisoners.

Though Kauffman and Nicholson’s correspondence is not held for analysis, Kauffman said SAMs limit

the “scope of communication” between him and his client.

Mohammed is not the only prisoner under the measures to attempt to sue for looser restrictions. Mohamed Rashed D. Al-Owhali, who was also convicted for his connection to the 1998 U.S. embassy bombings, had his case dismissed by a judge in the U.S. District Court in Colorado — the same court where a judge ruled in favor of Mohammed. Al-Owhali has filed an appeal. Many of the legal challenges to SAMs originate in the federal court in Colorado because the super-maximum security prison that houses terrorism inmates is located in Florence, Colo., about 100 miles south of Denver.

If the cases of Mohammed and Al-Owhali progress it may signal a need for the government to revisit the previous rulings on SAMs for prisoners. In 2009, U.S. Rep. John Conyers, Jr. (D-Mich.) recommended the Obama administration review SAMs and possibly modify the measures.

Though advocates for revisiting the measures often focus on attorney-client communication, any changes made may benefit reporters hoping to tell the stories of SAMs prisoners, as in the case of Bryan Denson and Jim Nicholson.

“Nicholson has basically been locked away from ever being able to tell his story to the public,” Denson said. “It baffles me.”