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UNITED STATES v. BENKAHLA: ILLUSTRATING THE NEED FOR REFORM—THE FOURTH CIRCUIT'S UNPRECEDENTED APPLICATION OF THE UNITED STATES SENTENCING GUIDELINE TERRORISM ENHANCEMENT TO AN OBSTRUCTION OF JUSTICE CONVICTION

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In *United States v. Benkahla*,[1] the United States Court of Appeals for the Fourth Circuit considered whether Sabri Benkahla, who was convicted of obstructing grand jury and FBI investigations concerning terrorists and terrorist groups, qualified for the obstruction of justice terrorism enhancement under United States Sentencing Guideline Manual Section 3A1.4, Application Note 2.[2] At Benkahla's sentencing, the District Court for the Eastern District of Virginia held that Benkahla qualified for the terrorism enhancement despite the absence of case law with respect to the obstruction of justice terrorism enhancement[3] and even though the effect of the enhancement was "unequivocally severe."[4] The district court even declared, "Sabri Benkahla is not a terrorist."[5] Nonetheless, the court applied Section 3A1.4, which subjected Benkahla to an advisory sentence range of 210 to 262 months, after finding that the government's investigation in the case targeted specific terrorism offenses and that Benkahla's false statements actually obstructed that investigation.[6]

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1. 530 F.3d 300 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 950 (2009).
2. *Id.* at 303, 305–06.
3. United States v. Benkahla, 501 F. Supp. 2d 748, 756, 757 (E.D. Va. 2007), *aff'd*, 530 F.3d 300 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 950 (2009).
4. *Id.* at 751.
5. *Id.* at 759.
6. *Id.* at 757; *see infra* Part II.

Although the district court ultimately decided to downward depart[7] and place Benkahla within a Guideline range of 121 to 151 months,[8] its analysis, which the Fourth Circuit endorsed, is disconcerting because it significantly eases the government's burden to prove that obstruction of justice convictions warrant the application of the terrorism enhancement.[9] Based on the Fourth Circuit's deferral to the district court opinion, defendants who are not convicted of crimes that directly involve terrorism and are unaware that their testimony is obstructing a terrorism investigation can receive a sentence of up to 262 months of imprisonment.[10] In this case, there is a shocking disparity between the 33- to 41-month advisory sentencing range Benkahla would have received for a non-terrorism-related obstruction offense and the 210- to 262-month sentencing range imposed for obstructing an investigation into a federal crime of terrorism.[11] The Fourth Circuit's overzealous use of Section 3A1.4, Note 2 in *Benkahla* indicates that the United States Sentencing Commission needs to reevaluate the obstruction of justice terrorism enhancement.[12]

I. THE CASE

On the orders of the FBI, Sabri Benkahla, a 27-year-old master's degree recipient from Falls Church, Virginia,[13] was arrested in Saudi Arabia in 2003, where he had been studying Islamic law and traveling with Ahmed Omar Abu Ali, a member of the terrorist group al Qaeda.[14] Benkahla was detained by the United States government for a month[15] before he learned that he had been linked to a "Virginia jihad network" of young Muslim American men who played paintball in the Virginia

7. In the federal sentencing guidelines, a "downward departure" refers to "a court's imposition of a sentence more lenient than the standard guidelines propose." BLACK'S LAW DICTIONARY 496 (8th ed. 2004). United States Sentencing Guideline § 4A1.3 provides that a court may downward depart "[i]f reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes." U.S. SENTENCING GUIDELINES MANUAL § 4A1.3 (2008).

8. *Benkahla*, 501 F. Supp. 2d at 759.

9. *See infra* Part IV.A.

10. *See infra* Part IV.A–B.

11. *See infra* Part IV.C.

12. *See infra* Part IV.A–C.

13. Jenny Cuffe, *US Muslims 'Alienated by Patriot Act,'* BBC NEWS, July 4, 2006, http://news.bbc.co.uk/2/hi/programmes/file_on_4/5145970.stm.

14. United States v. Benkahla, 530 F.3d 300, 304 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 950 (2009).

15. Cuffe, *supra* note 13.

countryside as a means of training for violent jihad overseas.[16] A federal grand jury subsequently indicted Benkahla and charged him with "willfully supplying or attempting to supply services to the Taliban, in violation of 50 U.S.C. § 1705," and with using a firearm in furtherance of that offense in violation of 18 U.S.C. § 924(c).[17] According to the charges, Benkahla fired an automatic AK-47 rifle and rocket propelled grenades while at a training camp in Afghanistan operated by Lashkar-e-Taiba, a Pakistani terrorist group, in the summer of 1999.[18] Although provision of services to Lashkar-e-Taiba was not criminalized at that time, provision of services to the territory of Afghanistan controlled by the Taliban violated the International Emergency Economic Powers Act.[19]

In March 2004, Judge Leonie M. Brinkema of the United States District Court for the Eastern District of Virginia acquitted Benkahla of all charges after finding that the government did not prove beyond a reasonable doubt that he provided services to the Taliban or to the Taliban-controlled territory of Afghanistan.[20] After his acquittal, Benkahla was subpoenaed and compelled to testify before a federal grand jury in August 2004 regarding his participation in jihad training camps and combat in Afghanistan or Pakistan in the summer of 1999.[21] The government also questioned Benkahla about individuals he knew who participated in such camps[22] and several militants associated with the Dar al-Arqam Islamic Center, an organization in Falls Church, Virginia.[23] Throughout the investigation, Benkahla denied participating in training relevant to violent jihad or knowing anything about the persons who facilitated such training.[24]

16. Jerry Markon, *Man Indicted Again in Terror Probe; Defendant Was Acquitted in 'Virginia Jihad Network' Trial*, WASH. POST, Feb. 23, 2006, at B4.

17. United States v. Benkahla, 437 F. Supp. 2d 541, 545 (E.D. Va. 2006), *aff'd*, 530 F.3d 300 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 950 (2009). Benkahla was indicted with ten other individuals who were linked to the "Virginia jihad network," but his case was eventually severed because, unlike the other ten defendants, Benkahla was not charged with "conspiracy . . . to engage in armed hostilities against the United States . . . [and] tak[ing] part in military expeditions against nations with which the United States was at peace." *Benkahla*, 530 F.3d at 303–04.

18. *Benkahla*, 437 F. Supp. 2d at 545.

19. *Id.* (citing Exec. Order No. 13129, 64 Fed. Reg. 36759 (July 7, 1999)).

20. *Id.* at 545–46. Judge Brinkema believed that Benkahla attended a jihadist camp somewhere, either in Pakistan or Afghanistan, and fired a weapon while there, but ultimately determined there was insufficient evidence to establish that Benkahla's combat training activities occurred within the Taliban-controlled region of Afghanistan. *Id.* at 546.

21. *Id.* at 544. Benkahla testified before the grand jury a second time on November 16, 2004, *id.* at 545, and also met with the FBI several times in ancillary proceedings, *Benkahla*, 530 F.3d at 304. He was granted statutory immunity for truthful testimony. *Id.*

22. *Benkahla*, 437 F. Supp. 2d at 547–49.

23. *See* United States v. Benkahla, 501 F. Supp. 2d 748, 755 (E.D. Va. 2007) (mem.), *aff'd*, 530 F.3d 300 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 950 (2009).

24. *Benkahla*, 437 F. Supp. 2d at 544–45.

On February 9, 2006, Benkahla was indicted for making false declarations to the grand jury in violation of 18 U.S.C. § 1623, obstructing justice on account of false declarations in violation of 18 U.S.C. § 1503, and making false statements to the FBI in violation of 18 U.S.C. § 1001(a).[25] On February 5, 2007, a jury convicted Benkahla on all counts.[26]

At Benkahla's sentencing, the government argued that Benkahla qualified for a sentencing enhancement pursuant to Section 3A1.4, Application Note 2 of the United States Sentencing Guideline Manual.[27] The Eastern District of Virginia observed that Section 3A1.4 prescribes substantial sentencing increases when the offense for which a defendant has been convicted involved or was intended to promote (1) an "investigation of a federal crime of terrorism" and (2) obstruction of that investigation.[28] The court noted at the outset that "[t]he guidelines provide no guidance as to what constitutes 'an investigation of a federal crime of terrorism' or 'obstructing' within the meaning of this seemingly broad enhancement."[29]

In the absence of such guidance, the district court first concluded that an investigation is only an "investigation of a federal crime of terrorism" within the meaning of Section 3A1.4 if it seeks specific information regarding particular terrorism offenses.[30] Without such specificity, the court reasoned, the terrorism enhancement cannot apply to an obstruction of justice conviction.[31] Because the government pointed to specific facts and circumstances of its ongoing investigation,[32] the court held that Benkahla's false testimony satisfied the terrorism enhancement's "motivational element"—namely, that the testimony was "calculated to influence or affect the conduct of [the United States] government."[33] Significantly, the district

25. *Benkahla*, 530 F.3d at 305. During the jury trial, the government's expert witness provided ample background testimony on terrorism and violent jihad worldwide, and an FBI agent working on Benkahla's case also testified on the subject. *Id.*

26. *Id.* Although the jury convicted Benkahla on all counts, it acquitted him of certain particular allegations in its special verdict form. *Id.*

27. *Benkahla*, 501 F. Supp. 2d at 751.

28. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2007)) (internal quotation marks omitted).

29. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2007)).

30. *Id.* at 754.

31. *Id.*

32. *Id.* at 756. Specifically, the court found that the government met its burden of proof by demonstrating that the investigation sought information on al-Qaeda and Lashkar-e-Taiba affiliates, and that those persons were being investigated for potential commissions of crimes within the "enumerated offenses" of 18 U.S.C. § 2332b(g)(5). *Id.*

33. *Id.* at 754–56. The district court explained that this "motivational element" derives from 18 U.S.C. § 2332b(g)(5), which defines "'federal crime of terrorism'" as "'an offense that—(A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to

court found that Benkahla's obstruction met this motivational requirement even though it did "not believe [Benkahla] had the willful intent to promote an act of terrorism."[34] The court thereby ascertained that the investigation in Benkahla's case constituted an "investigation of a federal crime of terrorism" as contemplated by Section 3A1.4.[35]

Second, the district court explained that Section 3A1.4 requires a showing of *actual* obstruction.[36] In its analysis of this requirement, the court observed that "[i]n the same investigation in which [Benkahla] was questioned, eight individuals to whom he was connected went to foreign jihad training camps and one was convicted of soliciting treason to fight against the United States."[37] The court also recognized that, at the time the FBI and grand juries questioned Benkahla, two leaders of Dar al-Arqam had not yet been indicted.[38] Moreover, the government claimed that it still did not know the details about Lashkar-e-Taiba training camps or the whereabouts of Lashkar-e-Taiba's leaders due to Benkahla's false testimony.[39] For these reasons, the district court concluded that Benkahla's false or intentionally misleading answers *actually* obstructed the investigation.[40] Accordingly, the court ruled that Benkahla qualified for the terrorism enhancement under Section 3A1.4, which increased his offense level from 26 to 32 and his criminal history category from Category I to Category VI.[41] This ruling caused Benkahla's guideline range to jump from 33 to 41 months in prison to 210 to 262 months in prison.[42]

Having determined the applicable sentencing range for Benkahla, the district court examined whether a prison sentence within the range of 210 to 262 months served the goals set forth in 18 U.S.C. § 3553(a).[43] The court

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retaliate against government conduct; and (B) is a violation of . . . [a list of enumerated offenses].'" *Id.* at 751–52 (quoting 18 U.S.C. § 2332b(g)(5) (2006)) (alteration in original).

34. *Id.* at 760.

35. *Id.* at 756 (internal quotation marks omitted).

36. *Id.* (citing United States v. Biheiri, 356 F. Supp. 2d 589, 598 (E.D. Va. 2005)).

37. *Id.* at 755. Testimony secured from some of those individuals led to convictions for "specific terrorist acts in Australia, France, and England." *Id.*

38. *Id.* One of those individuals, Ali Al-Timimi, was the leader Dar al-Arqam's violent faction and was later convicted of solicitation to levy war against the United States. United States v. Benkahla, 530 F.3d 300, 303 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 950 (2009). The other individual, Ahmed Omar Abu-Ali, was under investigation for conspiracy to levy war against the United States and to assassinate the President of the United States when Benkahla testified before the grand jury. *Benkahla*, 501 F. Supp. 2d at 755.

39. *Benkahla*, 501 F. Supp. 2d at 757.

40. *Id.*

41. Id.

42. *Id.*

43. *Id.* Section 3553(a) provides that a court shall impose a sentence "sufficient, but not greater than necessary" to reflect the seriousness of the crime, promote respect for the law, punish

concluded that Benkahla was the "quintessential candidate for a downward departure" under these criteria and reduced his sentence to 121 months.[44] On appeal, the Fourth Circuit considered: (1) whether Benkahla's second prosecution violated the collateral estoppel component of the Double Jeopardy Clause of the Fifth Amendment; (2) whether the trial court "admitted irrelevant or unduly prejudicial evidence regarding radical Islamic terrorism;" (3) whether the trial court violated the Sixth Amendment by applying Section 3A1.4's terrorism enhancement; and (4) whether the trial court erred in concluding that sufficient evidence existed to corroborate Benkahla's admissions and support the guilty verdict.[45]

II. LEGAL BACKGROUND

In passing the Sentencing Reform Act of 1984 ("SRA"), Congress created the United States Sentencing Commission (the "Commission") and authorized it to promulgate mandatory guidelines to eliminate "unwarranted sentencing disparities."[46] Following the Supreme Court of the United States' ruling in *United States v. Booker*,[47] a district court judge must consult the advisory sentencing ranges in the United States Sentencing Guidelines Manual (the "Guidelines"), but may specifically tailor a sentence based on other statutory concerns.[48] On appeal, assuming the lower court made a procedurally correct sentencing decision, an appellate

justly, deter adequately, protect the public from further crimes, and provide adequate training or medical treatment to the defendant. 18 U.S.C. § 3553(a)(2) (2006).

44. *Benkahla*, 501 F. Supp. 2d at 759. The court stated that the Category IV range over-represented the seriousness of Benkahla's criminal history because, outside of his conviction, he had no criminal record and there was no evidence that he ever committed an illegal act. *Id.* Furthermore, the court reasoned that "[Benkahla's] likelihood of ever committing another crime is infinitesimal." *Id.*

45. United States v. Benkahla, 530 F.3d 300, 306 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 950 (2009). This Note focuses on Benkahla's claim that the district court should not have applied the terrorism enhancement.

46. 28 U.S.C. § 991 (2006). The Supreme Court has upheld the constitutionality of both the Commission and the United States Sentencing Guidelines. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 374, 396–97 (1989) (holding that the use of the Commission to establish the United States Sentencing Guidelines is a constitutional delegation of legislative authority and does not violate the separation of powers doctrine).

47. 543 U.S. 220 (2005). The *Booker* Court declared that the United States Sentencing Guidelines should be considered in formulating criminal sentences but they would be only advisory, not mandatory, guidelines. *See id.* at 244–46 (concluding that the SRA provision that made the Guidelines mandatory was incompatible with the Sixth Amendment right to jury trial, and therefore had to be severed and excised from the SRA).

48. *Id*. at 245–46; *see also* 18 U.S.C. § 3553(a) (listing the factors a district judge should consider when imposing a sentence).

court must then review the sentence under an abuse of discretion standard with an eye toward "substantive reasonableness."[49]

Although federal appellate courts have heard a number of Guidelines cases since *Booker*,[50] *Benkahla* represents the first time a district court judge applied the Section 3A1.4 terrorism enhancement for an individual convicted of obstructing justice.[51] The issues in *Benkahla* are therefore best understood by examining the legislative history of Section 3A1.4 and offenses for which federal courts have found the terrorism enhancement appropriate.[52] It is also helpful to consider the court's discussion of Section 3A1.4, Note 2 in *United States v. Biheiri*[53] and the sentences imposed in non-terrorism-related obstruction cases.[54]

A. Section 3A1.4 Establishes an Upward Sentencing Adjustment for Offenses that Involve or Are Intended to Promote Federal Crimes of Terrorism

Prior to 1995, the Guidelines did not include an enhancement for conduct relating to terrorism offenses.[55] In 1994, the Commission promulgated Section 3A1.4 pursuant to authority granted by Congress in Section 120004 of the Violent Crime Control and Law Enforcement Act of 1994 ("VCCA").[56] Section 3A1.4 now requires a twelve-level increase in offense level, to at least level thirty-two, and an increase in criminal history

49. Gall v. United States, 128 S. Ct. 586, 597 (2007).

50. *See, e.g.*, United States v. Demaree, 459 F.3d 791, 795 (7th Cir. 2006) (concluding that a change in the Guidelines that expands a sentencing range for a particular crime is not an ex post facto law because the Guidelines are merely advisory); United States v. Espinoza-Cano, 456 F.3d 1126, 1136 (9th Cir. 2006) (finding that after the PROTECT Act amendment of 2003, prosecutors possess the same discretion to file "acceptance of responsibility" motions under § 3E1.1(b) as they do "substantial assistance" motions under § 5K1.1); United States v. Brehm, 442 F.3d 1291, 1300 (11th Cir. 2006) (holding that a district court remains obligated to correctly calculate the Guidelines range under the safety valve provision, 18 U.S.C. § 3553(f)(1), and that *Booker* did not render such calculation advisory).

51. United States v. Benkahla, 501 F. Supp. 2d 748, 751 (E.D. Va. 2007) (mem.), *aff'd*, 530 F.3d 300 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 950 (2009).

52. *See infra* Part II.A–B.

53. 356 F. Supp. 2d 589 (E.D. Va. 2005) (mem.).

54. *See infra* Part II.C.

55. *See generally* U.S. SENTENCING GUIDELINES MANUAL (1994).

56. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 526 (2008). The VCCA directed the Commission to amend the Guidelines "to provide an appropriate enhancement for any felony, whether committed within or outside the United States, that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120004, 108 Stat. 1796, 2022. In 1996, the Commission amended § 3A1.4 to apply "more broadly to 'Federal crimes of terrorism,' as defined in 18 U.S.C. § 2332b(g)." U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 564 (2008).

to Category VI for any felony "that involved, or was intended to promote, a federal crime of terrorism."[57] Under 18 U.S.C. § 2332b(g)(5), a "federal crime of terrorism" is defined as "an offense that . . . is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and . . . is a violation of" one of a list of federal criminal statutes.[58]

The Guidelines Manual breaks down the general procedure for determining a sentence into a series of steps.[59] After first determining the total offense level and criminal history category under those steps, the sentencing judge uses the Guidelines Sentencing Table to ascertain the applicable guideline range.[60] A district court may depart from this guideline range and sentence a defendant outside that range if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines . . . ."[61]

B. The Terrorism Enhancement Applies to a Variety of Federal Offenses

Section 3A1.4 applies to a broad range of felonies,[62] and operates even when the defendant was not convicted of a "federal crime of terrorism."[63]

57. U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2008). A criminal history Category VI and offense level thirty-two produces a sentencing range of 210 to 262 months. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (2008) (Sentencing Table).

58. 18 U.S.C. § 2332b(g)(5) (2006). Application Note 1 of § 3A1.4 provides that "'federal crime of terrorism' has the meaning given that term in 18 U.S.C. § 2332b(g)(5)." U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2008).

59. For general sentencing application instructions, see the U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2008). First, the sentencing judge must determine the applicable offense guideline section in Chapter Two. *Id.* § 1B1.1(a). Next, the court selects the base-offense level and "appl[ies] any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline . . . ." *Id.* § 1B1.1(b). The sentencing court then makes any adjustments to that base-offense level as warranted by adjustment factors. *Id.* § 1B1.1(b)–(c). When there are multiple counts of conviction, the preceding steps are repeated for each count. *Id.* § 1B1.1(d). After the total offense level is determined, the court must calculate the defendant's criminal history category. *Id*. § 1B1.1(f). The criminal history category number is the sum of points given for each prior sentence the defendant has received. *Id.* § 4A1.1.

60. *See generally* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (2008) (Sentencing Table).

61. 18 U.S.C. § 3553(b)(1) (2006).

62. *See id.* § 2332b(g)(5)(B) (enumerating the specific offenses that Congress considers "[f]ederal crime[s] of terrorism").

63. *See, e.g.*, United States v. Arnaout, 431 F.3d 994, 997–98, 1001–02 (7th Cir. 2005) (finding that conviction for conspiracy to violate RICO in violation of 18 U.S.C. § 1962(d), which is not specifically enumerated in § 2332b(g)(5)(B), could serve as the basis for the terrorism enhancement); United States v. Graham, 275 F.3d 490, 517 (6th Cir. 2001) (holding that § 3A1.4

Indeed, as of June 2006, federal courts had convicted and sentenced 261 defendants on terrorism charges.[64] One of the most publicized of these convictions was in *United States v. Lindh*,[65] in which the defendant, an American citizen, pled guilty to supplying services to the Taliban government in Afghanistan in violation of 50 U.S.C. § 1705(b), 18 U.S.C. § 2, and 31 C.F.R. §§ 545.204 and 545.206(a), and to carrying an explosive during the commission of a felony in violation of 18 U.S.C. § 844(h)(2).[66] Pursuant to a written plea agreement, the parties agreed that the "offense involved, or was intended to promote, a federal crime of terrorism within the meaning of . . . Section 3A1.4."[67] The *Lindh* court determined that a reduced sentence of twenty years was reasonable in part because the defendant convincingly declared his opposition to terrorism, proclaiming that he would not have joined the Taliban had he been fully informed about that regime.[68]

Federal courts have also applied the terrorism enhancement to more "traditional" cases of terrorism, such as highjacking, murder, and mass destruction.[69] For example, in *United States v. Mandhai*,[70] the defendant pled guilty to conspiring to use explosives to destroy buildings used in interstate commerce.[71] The Eleventh Circuit held that the defendant's felony qualified for Section 3A1.4's sentencing enhancement because the defendant intended to promote a federal crime of terrorism.[72] In support of its holding, the *Mandhai* court cited evidence that the defendant wanted to bomb electrical power stations in retaliation for the United States government's support of Israel and hoped that the resulting power outages

could be applied to a sentence for conviction of the general conspiracy statute, 18 U.S.C. § 371, which is not mentioned in § 2332b(g)(5)(B)).

64. COUNTERTERRORISM SECTION, DEPARTMENT OF JUSTICE, COUNTERTERRORISM WHITE PAPER 14 (2006) [hereinafter COUNTERTERRORISM WHITE PAPER], *available at* http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf.

65. 227 F. Supp. 2d 565 (E.D. Va. 2002).

66. *Id.* at 566.

67. *Id.* at 569. The parties agreed that § 3A1.4 applied to the defendant's felony because "the Taliban's control of Afghanistan and the activities of those individuals fighting in support of the Taliban provided protection and sanctuary to al Qaeda, a designated foreign terrorist organization." *Id.*

68. *Id.* at 571–72.

69. COUNTERTERRORISM WHITE PAPER, *supra* note 64, at 25.

70. 375 F.3d 1243 (11th Cir. 2004).

71. *Id.* at 1246–47. Although the defendant in *Mandhai* was convicted under 18 U.S.C. § 844(i), which specifically lists the destruction of buildings used in interstate commerce by fire or explosives as a federal terrorism crime in 18 U.S.C. § 2332b(g)(5)(B), *conspiracy* to commit the same offense is not listed in the statute. *Id.* at 1247.

72. *Id.* at 1247–48.

would lead to civil strife throughout Miami.[73] Nonetheless, the Eleventh Circuit found that the sentence range of 188 to 235 months, resulting from the twelve-level increase to the defendant's offense level under Section 3A1.4, was disproportionate compared to the nature of the crime.[74] On remand, the district court imposed a sentence of 168 months, which the Eleventh Circuit concluded was reasonable.[75]

Courts have also found that "domestic terrorism" offenses committed by American citizens disaffected from mainstream society are subject to enhanced sentences under Section 3A1.4.[76] Recently, in *United States v. Thurston*,[77] defendant Kevin Tubbs pled guilty in the United States District Court for the District of Oregon to acts of arson across five different states and destruction of a high voltage electric tower.[78] The defendant and others committed these crimes, which demolished numerous buildings and vehicles and caused tens of millions of dollars in damages, on behalf of the Animal Liberation Front and the Earth Liberation Front.[79] At sentencing, the defendant claimed that using the terrorism enhancement to calculate his and his co-defendants' sentences "contravene[d] congressional intent that the Guidelines achieve fairness and avoid unwarranted disparities in sentencing."[80] The District of Oregon rejected this argument, stating that "[i]f . . . the government is overreaching due to political considerations, either the enhancement will not apply to defendants' offenses or defendants will be eligible for a downward departure."[81] Thus, the district court

73. *Id.* at 1246, 1248. Based on this evidence, the court concluded that the defendant intended his crime to influence government conduct. *Id.* at 1248.

74. *Id.* at 1249–50. In *Mandhai*, the defendant had conspired to destroy government buildings by means of fire or explosives, had second thoughts about the conspiracy, and finally withdrew after being confronted by government agents. *Id.* at 1250.

75. United States v. Mandhai, 179 F. App'x 576, 577 (11th Cir. 2006).

76. COUNTERTERRORISM WHITE PAPER, *supra* note 64, at 59.

77. No. CR 06-60070-01-AA, 2007 WL 1500176 (D. Or. May 21, 2007).

78. *Id.* at *1–*2.

79. *Id.* at *2. The district court explained that the defendants, including Tubbs, "targeted federal government agencies and private parties they believed responsible for degradation of the environment, tree harvesting, and cruel treatment of animals." *Id.*

80. *Id.* at *18. The defendants argued that the government had not sought the terrorism enhancement in other Animal Liberation Front and Earth Liberation Front prosecutions related to their case or in prosecution of persons who possessed biological toxins. *Id.*

81. *Id.* Moreover, the district court noted that "the terrorism enhancement ha[d] been applied in cases where far fewer or no acts of arson were committed." *See id.* at *18–*19 (referencing *United States v. Harris*, 434 F.3d 767, 774 (5th Cir. 2005), where the Fifth Circuit upheld the application of the enhancement to a defendant who threw a Molotov cocktail into a municipal building housing a police department; *United States v. Dowell*, 430 F.3d 1100, 1105, 1110 (10th Cir. 2005), where the defendant who committed arson by pouring and igniting gasoline on an Internal Revenue Service office received an enhanced sentence; and *United States v. Mandhai*, 375 F.3d 1243, 1246 (11th Cir. 2004)).

concluded that the longer sentence the defendant would receive did not render application of Section 3A1.4 disparate or unfair.[82] On appeal, the Ninth Circuit upheld the defendant's 151-month sentence.[83]

C. Application of the Terrorism Enhancement to the Offense of Obstructing an Investigation of a Federal Crime of Terrorism

In *Lindh*, *Mandhai*, and *Thurston*, the application of Section 3A1.4 was fairly straightforward because each case involved defendants convicted of committing or conspiring to commit violent acts of terrorism.[84] There are, however, a variety of less dangerous and less violent offenses to which Section 3A1.4 also applies. Following the events of September 11, 2001, Congress focused with renewed intensity on terrorism offenses and expanded the scope of the terrorism enhancement to include crimes involving the obstruction of justice. In response to the USA PATRIOT Act of 2001,[85] the Commission adopted Application Note 2 to Section 3A1.4,[86] which provides that "obstructing an investigation of a federal crime of terrorism [is] considered to have involved, or to have been intended to promote, that federal crime of terrorism."[87]

United States v. Biheiri is one of just three cases in which the government requested that the court apply the terrorism enhancement for "'obstructing an investigation of a federal crime of terrorism.'"[88] In *Biheiri*, the government proved at trial that the defendant fraudulently procured his naturalization in violation of 18 U.S.C. § 1425(a) and made false statements in his naturalization application in violation of 18 U.S.C.

82. *Id.* at *19.

83. United States v. Tubbs, 290 F. App'x 66, 67–68 (2008).

84. *See supra* Part II.B.

85. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"), Pub. L. No. 107-56, § 803, 115 Stat. 272.

86. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 637 (2008).

87. *Id.* § 3A1.4 cmt. n.2.

88. *See* United States v. Benkahla, 501 F. Supp. 2d 748, 751 & n.3 (E.D. Va. 2007) (citing *United States v. Biheiri*, 356 F. Supp. 2d 589 (E.D. Va. 2007) (mem.), and *United States v. Arnaout*, 431 F.3d 994 (7th Cir. 2005), as the only two cases before *Benkahla* in which the government requested the enhancement under Note 2 of § 3A1.4). The Seventh Circuit's analysis of Note 2 to § 3A1.4 provides little guidance because the facts of that case clearly established that the defendant did not obstruct an investigation of a federal crime of terrorism. *See Arnaout*, 431 F.3d at 1003 (upholding the district court's refusal to apply the obstruction of justice terrorism enhancement). Even though the defendant, who was the executive director of an alleged humanitarian organization, made false statements that obstructed an investigation of aid to military forces in Bosnia and Chechnya, that investigation was not concerned with the provision of support to terrorists or terrorist organizations. *Id.* at 999, 1003.

§ 1015(a).[89] On three separate occasions, the government sought the terrorism enhancement under Section 3A1.4, Application Note 2.[90] On the third attempt, the government argued that the defendant lied about his relationship with an individual who was known to be affiliated with a terrorist organization, thus obstructing a terrorist-financing investigation.[91] Judge Thomas Ellis of the United States District Court for the Eastern District of Virginia first stated that 18 U.S.C. § 3553 requires sentencing judges to consider various factors in determining whether a sentencing range is appropriate, but emphasized that "sentencing, in the end, must involve the exercise of *judgment*."[92] Later in its opinion, the district court declared that the plain language of Section 3A1.4 clearly demonstrates that a defendant must *actually* obstruct an investigation of a federal crime of terrorism to receive the enhancement; a mere attempt to obstruct an investigation is insufficient.[93] As such, the district court found that the defendant did not actually obstruct the investigation because the interviewing federal agents knew that his statement regarding ties to a known terrorist was false.[94] Thus, the district court concluded that the terrorism enhancement was unwarranted.[95]

While no court other than the District Court for the Eastern District of Virginia and the Fourth Circuit Court of Appeals has applied the obstruction of justice terrorism enhancement, the Guidelines section for non-terrorism-related obstruction of justice convictions has been applied extensively by many courts. Obstruction of justice crimes are governed by 18 U.S.C. §§ 1501–1520.[96] Sentencing of defendants convicted under those statutes mainly proceeds in accordance with Section 2J1.2 of the Guidelines,[97] which carries with it a base offense level of fourteen.[98] Section 2J1.2(c) specifies that when a defendant's offense involves obstructing the investigation or prosecution of a criminal offense, the court should cross-reference and apply Section 2X3.1.[99] The base offense level

89. *Biheiri*, 356 F. Supp. 2d at 591.

90. *Id.*

91. *Id.* at 598.

92. *Id.* at 594.

93. *Id.* at 598. The district court explained that unlike § 3C1.1—the general obstruction of justice sentencing guideline—and 18 U.S.C. § 1503—the federal obstruction of justice statute—which both punish attempts to obstruct, § 3A1.4 makes no mention of attempted obstruction. *Id.*

94. *Id.* at 600.

95. *Id.*

96. 18 U.S.C. §§ 1501–1520 (2006).

97. U.S. SENTENCING GUIDELINES MANUAL app. A, at 546 (2008).

98. *Id.* § 2J1.2(a). Where the defendant has a criminal history of Category I, the resulting guideline range is fifteen to twenty-one months. *Id.* ch. 5, pt. A.

99. *Id.* § 2J1.2(c).

for Section 2X3.1 is computed by subtracting six levels from the offense level "for the underlying offense,"[100] and is not to exceed thirty or fall below four.[101]

Because Section 2J1.2(c) requires a sentencing court to cross-reference Section 2X3.1 for cases in which a defendant obstructed an investigation or prosecution of a criminal offense, the resulting sentences are longer than those where Section 2X3.1 does not apply. For example, in *United States v. Crawford*,[102] the defendant, a Memphis attorney, pled guilty to obstructing the prosecution of one of his clients for possessing a firearm after having already been convicted of a felony.[103] The court first applied Section 2J1.2 to the defendant's obstruction of justice charges and then considered Section 2X3.1.[104] The applicable Guidelines section for the client's conduct was Section 2K2.1,[105] which carried a base level offense of twenty-four.[106] The Sixth Circuit upheld the district court's application of Section 2X3.1(a) to the defendant's sentence because the resulting offense level of eighteen was greater than fourteen, the level attributable to an obstruction of justice offense.[107] The court ultimately sentenced the defendant to seventy-one months imprisonment for obstructing justice.[108]

Similarly, in *United States v. Bell*,[109] the United States District Court for the Northern District of Illinois convicted the defendant of obstructing justice after he refused to testify before a federal grand jury about a murder that he and five other individuals committed.[110] In applying Section 2X3.1, the district court determined that the underlying offense committed by the subject of the grand jury investigation was a racketeering charge under 18 U.S.C. § 1959.[111] Because the most serious racketeering activity attributed

100. *Id.* § 2X3.1(a)(1). "An [u]nderlying offense" is "the offense as to which the defendant is convicted of being an accessory." *Id.* § 2X3.1 cmt. n.1.

101. *Id.* § 2X3.1(a)(2)–(3).

102. 281 F. App'x 444 (6th Cir. 2008).

103. *Id.* at 446–47. The obstruction violated 18 U.S.C. §§ 1510(a) and 1512(c)(2). *Id.* at 446. Specifically, the defendant obstructed justice by bribing two undercover police officers to get a firearms charge against the defendant's client dismissed and by supplying an undercover police officer with a pistol and two shipments of crack cocaine as part of an agreement to have one of the defendant's fellow gang members murdered. *Id.* at 447–48.

104. *Id.* at 450.

105. Section 2K2.1 applied because the court found that unlawfully possessing a firearm was the underlying crime. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 446.

109. No. 02 CR 51, 2002 WL 31804211 (N.D. Ill. Dec. 12, 2002) (mem.).

110. *See id.* at *1–*2. The defendant's actions in obstructing justice violated 18 U.S.C. § 1503. *Id.* at *2.

111. *Id.* at *3.

to the defendant was murder, the district court applied the second degree murder offense level of thirty-three.[112] Section 2X3.1 reduced the defendant's offense level to twenty-seven and, with a Category IV criminal history, the resulting guideline range was seventy-seven to ninety-six months.[113] The district court judge consequently sentenced the defendant to ninety-six months in prison.[114]

Finally, in *United States v. Quam*,[115] the defendant was convicted of obstructing justice after she falsely told a grand jury that she knew nothing about her live-in boyfriend's drug-trafficking activities.[116] Although the defendant would have had an offense level of fourteen under Section 2J1.2, the district court also applied Section 2X3.1 because the defendant had obstructed a criminal investigation.[117] The underlying drug-charge offense—possession of roughly 2.3 grams of methamphetamine and 111.5 grams of marijuana[118]—prescribed an offense level of twenty, from which the district court subtracted six levels to arrive at the defendant's total offense level of fourteen.[119] The district court thereby imposed a mere fifteen-month prison sentence, which was subsequently upheld by the Eighth Circuit.[120]

III. THE COURT'S REASONING

In *United States v. Benkahla*,[121] the Fourth Circuit held that Benkahla qualified for the terrorism enhancement under Section 3A1.4, and thus affirmed the judgment of the District Court for the Eastern District of Virginia.[122] Judge James Harvie Wilkinson, writing for the Fourth Circuit, noted that the appellate court must "'review the sentence under an abuse-of-discretion standard' with an eye toward both 'procedural' and 'substantive reasonableness.'"[123] After reviewing the language and legislative histories

112. *Id.* at *3–*4.

113. *Id.* at *4. In reaching this sentencing range, the district court reduced the defendant's total offense level to twenty-four because he accepted responsibility for the crime. *Id.*

114. United States v. Jackson, No. 02 CR 52, 2003 WL 444459, at *6 (N.D. Ill. Feb. 24, 2003) (mem.). The defendant in *Bell* actually received an effective sentence of just twenty-six months because the district court judge ruled that the first seventy months would be served concurrently with the defendant's related state sentence. *Id.* at *6.

115. 367 F.3d 1006 (8th Cir. 2004).

116. *Id.* at 1007.

117. *Id.*

118. *Id.*

119. *See id.* at 1007, 1009.

120. *Id.* at 1007.

121. 530 F.3d 300 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 950 (2009).

122. *Id.* at 303.

123. *Id.* at 311 (quoting Gall v. United States, 128 S. Ct. 586, 597 (2007)).

of Section 3A1.4 and 18 U.S.C. §§ 2332b(g)(5), the Fourth Circuit determined that applying the terrorism sentencing enhancement in Benkahla's case "seem[ed] straightforward."[124]

First, Judge Wilkinson affirmed the district court's finding that the investigation in which Benkahla was questioned was an investigation of a federal crime of terrorism.[125] The Fourth Circuit reasoned that Benkahla satisfied the second element of Section 2332b(g)(5) by obstructing a grand jury investigating violations of 18 U.S.C. §§ 2339A and 2339B.[126] The Fourth Circuit rejected Benkahla's contention that the investigation in his case was too general because the violations the government was investigating involved specific jihadist camps training people to fight the governments of India, Russia, and the United States.[127] Thus, the Fourth Circuit concluded that the "motivational element" of Section 2332b(g)(5) was satisfied.[128]

Second, the Fourth Circuit deferred to the district court's determination that the term "obstructing" in Section 3A1.4 required *actual* obstruction.[129] Judge Wilkinson extensively quoted the district court's factual findings, and found that Benkahla's falsehoods "not only delayed some parts of the investigation, but wholly frustrated others."[130] In conclusion, the Fourth Circuit stated that "the terrorism enhancement is doing just what it ought to do: Punishing more harshly than other criminals those whose wrongs served an end more terrible than other crimes."[131] Accordingly, the Fourth Circuit approved the terrorism enhancement as applied to Benkahla.[132]

IV. ANALYSIS

In *United States v. Benkahla*, the United States Court of Appeals for the Fourth Circuit upheld the United States District Court for the Eastern

124. *Id.* Judge Wilkinson rejected Benkahla's argument that Note 2 of Section 3A1.4 contradicted Section 3A1.4 itself because the language of the commentary and the Guidelines are "identical in all material respects." *Id.* at 312.

125. *Id.* at 313.

126. *Id.* at 311–12.

127. *Id.* at 313.

128. *Id.* at 312–13. The Fourth Circuit essentially reiterated the district court's analysis of the motivational element. *See supra* notes 32–37 and accompanying text.

129. *See Benkahla*, 530 F.3d at 313 ("There is no need to review the district court's legal conclusions. Whether those conclusions are correct or incorrect, the court's factual findings clearly support applying the enhancement.").

130. *Id.*

131. *Id.*

132. *Id.*

District of Virginia's application of the Section 3A1.4 terrorism sentencing enhancement and found that a sentence of 121 months, after a downward departure, was appropriate.[133] The Fourth Circuit deferred entirely to the district court, which had found that Benkahla qualified for the obstruction of justice terrorism enhancement because he made false material declarations to a grand jury, obstructed justice, and made false material statements to the FBI, all in connection with the government's investigation of terrorist groups and terrorist training camps.[134] The district court's analysis of the obstruction of justice terrorism enhancement, however, disregarded both the nature and seriousness of Benkahla's offense and principles of sentencing proportionality.[135] Moreover, the district court's interpretation of Section 3A1.4, Note 2 significantly dilutes the standard for proving that the terrorism enhancement applies to an obstruction of justice conviction.[136] In effect, the district court's opinion did not properly distinguish between an individual who directly promotes a federal crime of terrorism and an individual who obstructs an investigation into a federal crime of terrorism.[137] *Benkahla*, therefore, represents an overzealous use of the terrorism enhancement and indicates that the Commission needs to reevaluate the scope and severity of Section 3A1.4's Note 2.

A. The Benkahla *Court Diluted an Already Weak Framework for Determining Applicability of the Obstruction of Justice Terrorism Enhancement*

Senior District Judge James C. Cacheris applied the obstruction of justice terrorism enhancement in *Benkahla* despite recognizing that "[t]he [G]uidelines provide no guidance as to what constitutes 'an investigation of a federal crime of terrorism' and 'obstructing' within the meaning of this seemingly broad terrorism enhancement."[138] Judge Cacheris's analysis, which the Fourth Circuit subsequently endorsed, makes it significantly easier for the government to prove that an obstruction of justice conviction similar to Benkahla's warrants application of the terrorism enhancement.

In the first part of its analysis, the district court concluded that the obstruction of justice terrorism enhancement should apply only when a defendant obstructs investigations into specific terrorism offenses within a

133. *Id.* at 303, 305–06.

134. *Id.* at 303.

135. *See infra* Part IV.A–B.

136. *See infra* Part IV.A.

137. *See infra* Part IV.B–C.

138. United States v. Benkahla, 501 F. Supp. 2d 748, 751 (E.D. Va. 2007) (mem.), *aff'd*, 530 F.3d 300 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 950 (2009).

discrete set of facts.[139] The requirement of an investigation into a sufficiently specific offense limits the scope of "an investigation of a federal crime of terrorism" by making the enhancement inappropriate in the context of "*general* terrorism investigations or intelligence gathering."[140] At the same time, however, it enables the government to prove that a defendant's obstruction was "calculated to influence or affect the conduct of the government" merely by showing that a terrorism investigation focused on specific facts, persons, and offenses.[141] In other words, rather than focusing on the individual's intent, the district court's evaluation of the obstruction of justice terrorism enhancement shifts the focus to the nature of the investigation. As a result, the prosecution in *Benkahla* had to prove only that its terrorism investigation was sufficiently specific to satisfy 18 U.S.C. § 2332b(g)(5)'s "motivational element"—whether or not Benkahla willfully intended to promote an act of terrorism was irrelevant.[142]

Second, in concluding that Benkahla's offense actually obstructed the FBI and grand jury investigations,[143] the district court appears to have relaxed its own standard for determining what constitutes an obstruction of justice under Section 3A1.4.[144] In his discussion of the terrorism enhancement's "actual obstruction" requirement, Judge Cacheris found that the FBI investigation in which Benkahla was questioned sought information regarding (1) Lashkar-e-Taiba training camps, training techniques, curriculum, and locations; (2) individuals who may have received training at such camps; and (3) individuals believed to have aided others in obtaining jihad training.[145] Next, the court stated that the government "did

139. *Id.* at 752.

140. *Id.*

141. *Id.* (internal quotation marks omitted).

142. The district court stated:

> As to the motivation for his untruthfulness, this Court is unsure. Defendant may have been motivated out of a desire not to be seen as involved with illegal activities. He may have been concerned about potential hardship he might cause others. He may have been embarrassed of his own conduct.

Id. at 760. The court also opined that a sentence of 210 months for making false statements "without the intent to promote a crime of terrorism" is too harsh to achieve the goals set out in 18 U.S.C. § 3553(a)(2). *Id.* at 761.

143. *Id.* at 757.

144. In *United States v. Biheiri*, decided three years before *Benkahla*, the District Court for the Eastern District of Virginia ruled that § 3A1.4, Note 2 applies only if a defendant *actually* obstructed an investigation of a federal crime of terrorism. 341 F. Supp. 2d 589, 598 (E.D. Va. 2005). The *Biheiri* Court ruled that the defendant's obstruction offense in that case did not satisfy the enhancement's *actual* obstruction prong because the government was already aware of the information that it sought. *Id.* at 600; *see supra* Part II.C.

145. *Benkahla*, 501 F. Supp. 2d at 757. Before detailing the evidence related to the government's investigation, the district court made the threshold observation that Benkahla's conviction involved providing false or misleading statements. *Id.*

not, and in some cases, still does not, possess the specific information which it sought," and thus concluded that Benkahla actually obstructed the FBI's investigation.[146]

The district court's reasoning is flawed in that it fails to establish a causal connection between Benkahla's false statements and the government's lack of information on violent jihad. Specifically, if the government did not know any details about Lashkar-e-Taiba training camps or the identities of persons believed to have aided others in obtaining jihad training, what was the court's factual basis for determining that, but for Benkahla's obstruction, the government would have known those details?[147] Moreover, even if Benkahla lied during the 2004 grand jury and FBI investigations regarding his relationships with certain individuals, there was insufficient evidence to support a finding that those falsehoods "not only delayed some parts of the investigation, but wholly frustrated others."[148] In sum, the district court's reasoning, adopted by the Fourth Circuit, suggests that the obstruction of justice terrorism enhancement applies even in the absence of any evidence that a defendant's false statements actually obstructed the investigation in which he was questioned. Accordingly, enhancing Benkahla's sentence under Section 3A1.4 was unjustifiable.

B. Application Note 2 of Section 3A1.4 Creates Inequitable Results Because It Provides an Identical Guideline Range for Obstruction

146. *Id.*

147. *See id.* ("[B]ecause of Defendant's false or intentionally misleading answers, the Government still does not know the identity or whereabouts of the persons about whom Defendant was questioned, their involvement with Lashkar-e-Taiba, and their role in aiding persons to obtain jihad training."). Indeed, this section of the district court's opinion failed to acknowledge that it had acquitted Benkahla in 2004 on charges that he participated in a Lashkar-e-Taiba training camp in the territory of Afghanistan controlled by the Taliban. *See supra* note 20 and accompanying text. Instead, the court observed that the government could not account for Benkahla for a mere five days during his 1999 trip to South Asia. *Benkahla*, 501 F. Supp. 2d at 757.

148. United States v. Benkahla, 530 F.3d 300, 313 (4th Cir. 2008) (mem.), *aff'd*, 530 F.3d 300 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 950 (2009). The Fourth Circuit's assertion that Benkahla's obstruction "wholly frustrated" parts of the FBI's investigation directly contradicts the district court's finding that "the extent of [Benkahla]'s actual obstruction was hardly devastating to the [FBI's] investigation." *Benkahla*, 501 F. Supp. 2d at 760. The fact that the two primary persons of interest to the FBI in its investigation were each convicted in 2005, despite Benkahla's false declarations, substantiates the district court's findings. A jury convicted Ali al-Timimi in April 2005 on various charges, including soliciting others to levy war against the United States, and sentenced him to life imprisonment. *Benkahla*, 530 F.3d at 303; News Release, Dep't of Justice, Dep't of Justice Examples of Terrorism Convictions Since Sept. 11, 2001 (June 23, 2006). In November 2005, a jury convicted Ahmed Omar Abu Ali of, among other violations, providing material support to al Qaeda, conspiracy to assassinate the U.S. President, conspiracy to commit air piracy, and conspiracy to destroy aircraft. United States v. Abu Ali, 528 F.3d 210, 225–26 (4th Cir. 2008).

Offenses and Offenses that Directly Involve a Federal Crime of Terrorism

Benkahla marks the first time a federal court applied the terrorism enhancement for obstructing an investigation of a federal crime of terrorism.[149] In contrast, numerous defendants have "received similar or even lesser sentences for significantly more severe, violent [terrorism] offenses."[150] Section 3A1.4 provides an appropriate punishment for those defendants due to the seriousness of their crimes and the need to protect the public.[151] By broadening Section 3A1.4 to include the offense of obstructing a terrorism investigation, however, the severity of the penalty no longer fits the dangerousness of the crime.

The excessiveness of Benkahla's sentence is evidenced by comparing his criminal conduct with the criminal conduct and respective sentences of the defendants in *Thurston*, *Mandhai*, and *Lindh*. For instance, Benkahla's sentence of 121 months is only thirty months less than that given to a defendant who committed multiple acts of arson and destroyed a high voltage electrical tower by fire.[152] Similarly, Benkahla's sentence is only forty-seven months less than the sentence given to a defendant who conspired to bomb government buildings and recruited others to help carry out the plot,[153] and only eight years shorter than the sentence received by an American citizen who fought for the Taliban in Afghanistan against United States military forces.[154] Moreover, in contrast to the defendants in these cases, Benkahla did not commit or even attempt to commit any violent acts. This renders incomprehensible the Fourth Circuit's declaration that "the terrorism enhancement is doing just what it ought to do: Punishing more

149. *See Benkahla*, 501 F. Supp. 2d at 751 ("[N]o court has ever applied the enhancement for 'obstructing an investigation of a federal crime of terrorism,' and in only two such cases has the Government requested it.").

150. *Id.* at 761; *see also supra* Part II.B.

151. *See Benkahla*, 501 F. Supp. 2d at 761–62 (discussing Benkahla's co-defendants who "committed and were convicted of more dangerous and more violent offenses" than Benkahla, and thus received enhanced sentences under § 3A1.4 that adequately served the factors set forth in 18 U.S.C. § 3553(a)).

152. *See* United States v. Tubbs, 290 F. App'x 66, 67–69 (9th Cir. 2008) (applying § 3A1.4 to an eco-terrorist convicted of arson and destroying an energy facility, and thus affirming the sentencing court's imposition of a 151-month sentence following a downward departure).

153. *See* United States v. Mandhai, 179 F. App'x 576, 576–77 (11th Cir. 2006) (affirming a 168-month sentence, following a downward departure, for a defendant's felony offense of involving or intending to promote federal crime of terrorism by conspiring to destroy buildings affecting interstate commerce by means of fire or explosives).

154. *See* United States v. Lindh, 227 F. Supp. 2d 565, 566, 573 (E.D. Va. 2002) (sentencing a college-educated American citizen to twenty years in prison under § 3A1.4 after he pled guilty to supplying services to the Taliban and to carrying an explosive while fighting on behalf of the Taliban against United States soldiers in Afghanistan).

harshly than other criminals those whose wrongs served an end more terrible than other crimes."[155] In reality, the obstruction of justice terrorism enhancement—in terms of proportionality—is punishing more harshly those who interfere with terrorism investigations than those who committed the egregious acts themselves.

Finally, the district court rejected Benkahla's contention that application of the terrorism enhancement was unfair and disparate in light of his conduct on the grounds that a defendant will be eligible for a downward departure in sentencing if Section 3A1.4 over-represents the seriousness of his conduct.[156] Although the court's decision to reduce Benkahla's sentence seems appropriate, it further evinces that the 210- to 262-month guideline range under the obstruction of justice terrorism enhancement is draconian. Similarly, granting undue discretion to sentencing judges to depart from the guideline range is inconsistent with the Guidelines' objective of equal treatment and coordinated sentencing among the federal courts.[157]

C. Benkahla *Illustrates that the Obstruction of Justice Terrorism Enhancement Imposes a Disproportionate Sentence Range Compared to the Advised Sentence Range for Obstructing an Investigation of a Non-Terrorism Criminal Offense*

The obstruction of justice terrorism enhancement is unequivocally severe compared to the sentencing range for non-terrorism-related obstruction of justice convictions.[158] The district court's application of Section 3A1.4 maximized Benkahla's criminal history to Category VI and increased his offense level to thirty-two.[159] As a result of this adjustment, Benkahla's guideline range was 210 to 262 months.[160] By comparison, without judicial determination that the terrorism enhancement applied,

155. United States v. Benkahla, 530 F.3d 300, 313 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 950 (2009).

156. United States v. Benkahla, 501 F. Supp. 2d 748, 758–59 & n.7 (E.D. Va. 2007) (mem.), *aff'd*, 530 F.3d 300 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 950 (2009) (citing United States v. Thurston, No. CR 06-60070-01-AA, 2007 WL 1500176, at *18 (D. Or. May 21, 2007)).

157. *See supra* Part II.A.

158. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 2J1.2 (2008) (recommending a base offense level of fourteen that, combined with a criminal history of Category I, renders a guideline range of fifteen to twenty-one months), *with id.* § 3A1.4 (increasing a defendant's offense level to thirty-two and criminal history to Category VI, which renders a guideline range of 210 to 262 months); *see also id.* ch. 5, pt. A.

159. *Benkahla*, 501 F. Supp. 2d at 757.

160. *Id.*

Benkahla's sentence would have been only thirty-three to forty-one months, even taking into account Section 2X3.1.[161]

To appreciate how substantial this disparity is in light of the offense committed, consider a hypothetical defendant who is convicted of the same obstruction offense as Benkahla.[162] Assume, however, that the government's investigation was not actually obstructed because, although the hypothetical defendant misled the grand jury and the government, investigators were already aware of the information they sought prior to the defendant's testimony.[163] Assuming also that, like Benkahla, the defendant has no prior criminal history and has engaged in model citizenry outside the context of the instant case, the resulting guideline range would be fifteen to twenty-one months.[164] Under these circumstances, it is patently certain that an appellate court would find unreasonable a sentence of 121 months, a 600% upward departure from the highest guideline range.[165] None of the 18 U.S.C. § 3553(a) factors would support such an enhancement.[166]

A review of the sentences imposed on individuals who obstructed investigations of serious crimes unrelated to acts of terrorism further establishes the unreasonableness of Benkahla's 121-month sentence. Most notably, Benkahla's sentence is an astounding 106 months longer than that imposed on a defendant whose sentence was based on an underlying offense of trafficking 111.5 grams of marijuana, 2.3 grams of methamphetamine, and various other items associated with drug trafficking.[167] Benkahla's sentence was also fifty months greater than the

161. In *Benkahla*, the underlying crime that the government was investigating was providing resources to a designated foreign terrorist organization in violation of 18 U.S.C. §§ 2339A and 2339B, which carry a base offense level of twenty-six. *Benkahla*, 501 F. Supp. 2d at 754; U.S. SENTENCING GUIDELINES MANUAL § 2M5.3 (2008). Under § 2X3.1, a defendant's base offense level for obstruction of justice is set at six levels less than the offense level of the underlying offense, netting an adjusted offense level of twenty. U.S. SENTENCING GUIDELINES MANUAL § 2X3.1(a)(1). Because Benkahla had a criminal history of Category I, the resulting guideline range would have been thirty-three to forty-one months. *See id.* ch. 5, pt. A. The district court in *Benkahla* did not address the accessory after the fact guideline because the terrorism enhancement increased the guidelines sentence to 210 to 262 months, regardless of whether the cross-reference applied.

162. *See* Amici Curiae Br. of the Council on American-Islam Relations, and Muslim Am. Soc'y Freedom Found. in Supp. of the Appellant at 24, United States v. Benkahla, 530 F.3d 300 (4th Cir. 2008) (No. 07-4778).

163. *See id.*

164. *See supra* Part I and text accompanying note 98.

165. Amici Curiae Br. in Supp. of the Appellant at 25, *Benkahla*, 530 F.3d 300 (No. 07-4778).

166. *See supra* notes 43–44 and accompanying text.

167. *See* United States v. Quam, 367 F.3d 1006, 1007 (8th Cir. 2004) (upholding the imposition of a fifteen-month sentence for a defendant convicted of false declarations before a grand jury and obstruction of justice, where the defendant actively participated in the selling of Schedule I drugs and lied to investigators about her boyfriend's drug trafficking activities).

sentence imposed on a defendant who obstructed the prosecution of his client for possessing a firearm after having been convicted of two prior violent felonies,[168] and twenty-five months greater than the sentence received by a defendant who refused to testify about the beating death of a young woman where the defendant was a known participant.[169]

The underlying crimes in those cases were of a violent nature or involved large quantities of potentially lethal drugs, yet the perpetrators of those crimes received far lighter sentences than Benkahla. There is nothing in the facts of *Benkahla* to suggest that a sentence of 121 months would have been reasonable without the finding that the terrorism enhancement applied. Indeed, all of the circumstances present in *Benkahla* that reflected upon Section 3553(a) factors were mitigating rather than aggravating.[170] According to the district court, Benkahla had absolutely no prior history of criminal behavior, presented little risk of criminal recidivism, was a model citizen, received a master's degree from The Johns Hopkins University, volunteered as a national elections officer in local, state, and national elections, and was a loving husband and father to his four-year-old son.[171] The district court even declared that "Sabri Benkahla is not a terrorist."[172] Thus, applying the terrorism enhancement to make Benkahla's sentence eighty months longer than the maximum sentence for a non-terrorism-related obstruction of justice conviction violates principles of fundamental fairness and sharply contradicts the intent of the Guidelines, which were designed to promote uniformity and proportionality in sentencing.[173]

V. CONCLUSION

The District Court for the Eastern District of Virginia's analysis of the sentencing issue in *United States v. Benkahla* is more than disappointing. Confronted by the question of whether a defendant convicted of obstructing justice qualified for the terrorism enhancement, the court begged the question by replying that Benkahla's offense was made in connection with the government's investigation of terrorism and thus warranted Section

168. *See* United States v. Crawford, 281 F. App'x 444, 450–53 (6th Cir. 2008) (finding that the district court properly computed the defendant's seventy-one-month sentence when it applied § 2X3.1).

169. *See* United States v. Bell, No. 02 CR 51, 2002 WL 31804211, at *1–*4 (N.D. Ill. Dec. 12, 2002) (sentencing the defendant to ninety-six months in prison based on the obstruction of justice guideline § 2J1.2, and the underlying offense of second degree murder).

170. *See supra* notes 43–44 and accompanying text.

171. United States v. Benkahla, 501 F. Supp. 2d 748, 759 (E.D. Va. 2007) (mem.), *aff'd*, 530 F.3d 300 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 950 (2009).

172. *Id.*

173. *See supra* Part II.

3A1.4's sharp sentencing increase.[174] The sparsity of the court's analysis is particularly troubling because Benkahla's offenses neither directly involved nor were intended to promote a federal crime of terrorism, and Benkahla did not share the same characteristics or conduct of a typical terrorist.[175] In addition, the district court's discussion of Section 3A1.4, Application Note 2's "actual obstruction" requirement is ineffectual because it does not show any link between Benkahla's obstruction and the government's inability to gather information about suspected terrorists and terrorist groups.[176] The Fourth Circuit nonetheless affirmed the district court's decision, averring, "[t]here is no need to review the district court's legal conclusions" because "[a]ll the evidence indicates" that Benkahla lied about his association with violent jihad and terrorism.[177]

Benkahla also illustrates the need to reform the obstruction of justice terrorism enhancement. The Guidelines are supposed to promote an objective sentencing system that eliminates unwarranted sentencing disparity.[178] Yet, in comparing the sentences imposed on persons who committed dangerous and violent offenses to Benkahla's 121-month sentence, the disparity is staggering.[179] For these reasons, the Sentencing Commission must provide a standard definition for "obstructing an investigation of a federal crime of terrorism" and reevaluate the severity of Section 3A1.4, Application Note 2's enhancement. To do otherwise would be a complete disregard of principles of proportionality and fundamental fairness.

174. *See supra* Part I.

175. *See supra* Parts I and IV.A.

176. *See supra* Part IV.A.

177. United States v. Benkahla, 530 F.3d 300, 313 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 950 (2009).

178. *See supra* Part II.

179. *See supra* Parts IV.B–C.

APPENDIX

United States Code

18 U.S.C. § 2332b. Acts of terrorism transcending national boundaries

(g) DEFINITIONS.—As used in this section—

(5) the term "Federal crime of terrorism" means an offense that—

(A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and

(B) is a violation of—

(i) section 32 (relating to destruction of aircraft or aircraft facilities), 37 (relating to violence at international airports), 81 (relating to arson within special maritime and territorial jurisdiction), 175 or 175b (relating to biological weapons), 175c (relating to variola virus), 229 (relating to chemical weapons), subsection (a), (b), (c), or (d) of section 351 (relating to congressional, cabinet, and Supreme Court assassination and kidnapping), 831 (relating to nuclear materials), 832 (relating to participation in nuclear and weapons of mass destruction threats to the United States)[,] 842(m) or (n) (relating to plastic explosives), 844(f)(2) or (3) (relating to arson and bombing of Government property risking or causing death), 844(i) (relating to arson and bombing of property used in interstate commerce), 930(c) (relating to killing or attempted killing during an attack on a Federal facility with a dangerous weapon), 956(a)(1) (relating to conspiracy to murder, kidnap, or maim persons abroad), 1030(a)(1) (relating to protection of computers), 1030(a)(5)(B)(ii) through (v) (relating to protection of computers), 1114 (relating to killing or attempted killing of officers and employees of the United States), 1116 (relating to murder or manslaughter of foreign officials, official guests, or internationally protected persons), 1203 (relating to hostage taking), 1361 (relating to government property or contracts), 1362 (relating to destruction of communication lines, stations, or systems), 1363 (relating to injury to buildings or property within special maritime and territorial jurisdiction of the United States), 1366(a) (relating to destruction of an energy facility), 1751(a), (b), (c), or (d) (relating to Presidential and Presidential staff assassination and kidnapping), 1992 (relating to terrorist attacks and other acts of violence against railroad carriers and against mass transportation systems on land, on water, or through the air), 2155 (relating to

destruction of national defense materials, premises, or utilities), 2156 (relating to national defense materials, premises, or utilities), 2280 (relating to violence against maritime navigation), 2281 (relating to violence against maritime fixed platforms), 2332 (relating to certain homicides and other violence against United States nationals occurring outside of the United States), 2332a (relating to use of weapons of mass destruction), 2332b (relating to acts of terrorism transcending national boundaries), 2332f (relating to bombing of public places and facilities), 2332g (relating to missile systems designed to destroy aircraft), 2332h (relating to radiological dispersal devices), 2339 (relating to harboring terrorists), 2339A (relating to providing material support to terrorists), 2339B (relating to providing material support to terrorist organizations), 2339C (relating to financing of terrorism), 2339D (relating to military-type training from a foreign terrorist organization), or 2340A (relating to torture) of this title;

(ii) sections 92 (relating to prohibitions governing atomic weapons) or 236 (relating to sabotage of nuclear facilities or fuel) of the Atomic Energy Act of 1954 (42 U.S.C. 2122 or 2284);

(iii) section 46502 (relating to aircraft piracy) . . . or section 60123(b) (relating to destruction of interstate gas or hazardous liquid pipeline facility) of title 49; or

(iv) section 1010A of the Controlled Substances Import and Export Act (relating to narco-terrorism).

18 U.S.C. § 2332b(g)(5) (2006).

United States Sentencing Guidelines

§ 3A1.4. Terrorism

(a) If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32.

(b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.

Commentary

Application Notes:

1. "Federal Crime of Terrorism" Defined.—For purposes of this guideline, "federal crime of terrorism" has the meaning given that term in 18 U.S.C. § 2332b(g)(5).

2. Harboring, Concealing, and Obstruction Offenses.—For purposes of this guideline, an offense that involved (A) harboring or concealing a terrorist who committed a federal crime of terrorism (such as an offense under 18 U.S.C. § 2339 or § 2339A); or (B) obstructing an investigation of a federal crime of terrorism, shall be considered to have involved, or to have been intended to promote, that federal crime of terrorism.

3. Computation of Criminal History Category.—Under subsection (b), if the defendant's criminal history category as determined under Chapter Four (Criminal History and Criminal Livelihood) is less than Category VI, it shall be increased to Category VI.

4. Upward Departure Provision.—By the terms of the directive to the Commission in section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, the adjustment provided by this guideline applies only to federal crimes of terrorism. However, there may be cases in which (A) the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct but the offense involved, or was intended to promote, an offense other than one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B); or (B) the offense involved, or was intended to promote, one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B), but the terrorist motive was to intimidate or coerce a civilian population, rather than to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. In such cases an upward departure would be warranted, except that the sentence resulting from such a departure may not exceed the top of the guideline range that would have resulted if the adjustment under this guideline had been applied.

U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2007).