
Thomas P. McCarty
University of Nebraska College of Law

TABLE OF CONTENTS

I. Introduction ............................................. 539
II. History and Background .................................. 541
   A. Brief History of Equal Protection Principles ...... 541
   B. History of the Selective Prosecution Defense ...... 542
      1. Development of the Selective Prosecution Defense in the U.S. Supreme Court .......... 542
      2. Undecided Definition of “Similarly Situated” Individual .................................. 547
      3. Islamic Faith-Based Selective Prosecution Cases .............................................. 548
   C. United States v. Khan ..................................... 551
      1. Factual Background ..................................... 551
      2. District Court Ruling ..................................... 553
      3. Fourth Circuit Court of Appeals: Arguments and Ruling ..................................... 554
      4. The Defendants’ Petition to the U.S. Supreme Court for a Writ of Certiorari .......... 556
III. Analysis ................................................... 557
   A. Stringent v. Lenient Discovery Standard .............. 558

© Copyright held by the NEBRASKA LAW REVIEW.
* Thomas P. McCarty, B.S. 2006, University of Nebraska at Kearney; J.D. expected 2009, University of Nebraska College of Law (NEBRASKA LAW REVIEW, Editor-in-Chief, 2008-2009). Thanks are due to God for His patience, grace, and guidance; Michael Holtje, Russell Sprague, Erin Gerdes, and Lanae Pierson for their suggestions and edits; Dr. Peter Longo of the University of Nebraska at Kearney for fostering my passion for Constitutional issues; the late Dr. James Gilbert of the University of Nebraska at Kearney for fostering my passion for research and criminal justice; and, of course, special thanks are due to Jack, Renée, Tim, Anissa, and Liam McCarty for their unending love and support.
B. "Similarly" or "Identically" Situated? .......................... 559
1. Difficulty Satisfying the Fourth Circuit's "Similarly Situated" Definition ................. 560
2. First Circuit v. Fourth Circuit: "Similarly Situated" Definitions ............................................. 561
C. The Aftermath ................................................. 565
IV. Conclusion ...................................................... 567

I. INTRODUCTION

On November 8, 2001, U.S. Attorney General John Ashcroft announced that "[d]efending our nation and defending the citizens of America against terrorist attacks is now [the Department of Justice's] first and overriding priority."1 Ashcroft explained that the Department of Justice would "arrest and detain any suspected terrorist who has violated our laws."2 However, under the new strategy, "[s]uspects without links to terrorism or who are not guilty of violations of the law will not be detained."3 Ashcroft reallocated the Department's resources to execute the prosecutorial strategy.4

Generally, courts do not interfere with such prosecutorial strategies.5 The U.S. Supreme Court has long held that "[t]he Attorney General and the United States Attorneys retain 'broad discretion' to enforce the Nation's criminal laws."6 Under this tradition, courts "'presume that [prosecutors] have properly discharged their official duties'"7 absent "clear evidence to the contrary . . . ."8 However, prosecutors' strategies and decisions are also "'subject to constitutional constraints.'"9 The U.S. Constitution's Equal Protection principles demand that a prosecutor's "decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification.'"10

2. Ashcroft, supra note 1.
3. Id.
4. In the past, Attorney General Robert F. Kennedy adopted a similar strategy to target organized crime syndicates. Id. Under Kennedy's strategy, "'[t]he Justice Department . . . would arrest a mobster for spitting on the sidewalk if it would help in the fight against organized crime.'" Id.
6. Id. (quoting Wayte v. United States, 470 U.S. 598, 607 (1985)).
7. Id. (quoting United States v. Chem. Found., Inc., 272 U.S. 1, 14–15 (1926)).
8. Id. at 465 (quoting Chem. Found., 272 U.S. at 14–15).
9. Id. at 464 (quoting United States v. Batchelder, 442 U.S. 114, 125 (1979)).
10. Id. at 465 (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)).
If a prosecutor prosecutes a defendant based on such arbitrary classifications, the defendant may raise the selective prosecution defense under the Equal Protection principles of the U.S. Constitution. The U.S. Supreme Court first recognized the validity of the selective prosecution defense over one hundred years ago. Since that time, the Court has continuously narrowed the defense’s application. As a result, the standard for proving the elements of a selective prosecution defense is now “a demanding one.” Defendants seeking discovery to help prove the validity of their selective prosecution defenses also face a “correspondingly rigorous” discovery standard.

In 2006 the Fourth Circuit determined whether the U.S. District Court for the Eastern District of Virginia erred when it denied three Islamic defendants’ discovery request for their selective prosecution defense. The district court convicted the defendants of various crimes relating to their ties to an Islamic terrorist organization. The defendants claimed that the Government failed to prosecute non-Muslim individuals in the United States who engaged in similar criminal conduct. Furthermore, the defendants claimed that the Government prosecuted them because they were Muslims in a post-9/11 world. The Fourth Circuit affirmed the district court’s decision to deny the defendants’ discovery request.

To fully understand Khan’s contribution to selective prosecution jurisprudence, one must first review the history of the selective prosecution defense and the facts and procedural history of Khan. Therefore, Part II of this Note provides an in-depth background of the selective prosecution defense and the facts and procedural history of Khan. Then, Part III analyzes the Fourth Circuit’s application of the U.S. Supreme Court’s selective prosecution discovery standard in Khan. Please notice that this Note does not challenge the Fourth Circuit’s ultimate decision to deny the Khan defendants’ discovery request. However, it is important to recognize that ends do not always justify means. Courts may come to correct conclusions through incorrect applications of law or logic. The author proposes that the Fourth Circuit correctly denied the defendants’ discovery request, but did so

11. "A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." Id. at 463.
14. Id. at 463.
15. Id. at 468.
17. See id. at 487–90.
18. See id. at 497–98.
19. See id.
20. Id. at 498.
through a questionable application of the U.S. Supreme Court's discovery standard for selective prosecution claims. As a result, courts following Khan on this issue may bar future defendants with legitimate selective prosecution claims from obtaining discovery.

II. HISTORY AND BACKGROUND

A. Brief History of Equal Protection Principles

The selective prosecution defense is rooted in the Equal Protection principles of the U.S. Constitution's Fifth and Fourteenth Amendments. Therefore, this section provides a brief background of those principles.

In 1776, the Declaration of Independence proclaimed "that all men are created equal" and that "Governments are instituted among Men" to protect and reinforce such equality. The Declaration of Independence also declared that citizens may alter or overthrow their government if the government fails to protect equality and other inalienable rights. However, the U.S. Constitution did not explicitly provide for the equal protection of laws until the States ratified the Fourteenth Amendment on July 21, 1868. In the meantime, slavery—an ugly institution based on principles of inherent inequality—flourished in the United States.

The Fourteenth Amendment declared that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The U.S. Supreme Court later determined that this "Equal Protection Clause" prevents state prosecutors from prosecuting "based upon an unjustifiable standard such as race, religion, or other arbitrary classification."  

22. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
23. Id. ("But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.").
26. Oyler v. Boles, 368 U.S. 448, 456 (1962). The Court in Yick Wo ruled that such invidious prosecution mimicked slavery. The Court explained:

For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

Although the Fourteenth Amendment contains an explicit Equal Protection Clause, no such clause exists on the face of the Fifth Amendment.\(^{27}\) However, the U.S. Supreme Court’s “approach to Fifth Amendment equal protection claims has . . . been precisely the same as to equal protection claims under the Fourteenth Amendment.”\(^{28}\) Therefore, the Fifth Amendment prohibits federal prosecutors from prosecuting based on arbitrary classifications.

B. History of the Selective Prosecution Defense

1. Development of the Selective Prosecution Defense in the U.S. Supreme Court

In 1886, the U.S. Supreme Court first recognized the validity of the selective prosecution defense in *Yick Wo v. Hopkins*.\(^{29}\) In *Yick Wo*, two Chinese subjects alleged that their prosecution and imprisonment under San Francisco city and county ordinances violated the Fourteenth Amendment’s Equal Protection Clause.\(^{30}\) The ordinances prohibited the operation of laundries in wooden buildings in San Francisco city and county limits without the consent of the county’s board of supervisors.\(^{31}\) The defendants applied to the county board to operate their laundries in wooden buildings.\(^{32}\) However, the board denied their applications.\(^{33}\) Despite the board’s denial, the defendants continued to operate their laundries in wooden buildings.\(^{34}\) The defendants were subsequently arrested, convicted, and imprisoned for violating the ordinance.\(^{35}\) The defendants appealed their convictions and the case eventually came before the U.S. Supreme Court.\(^{36}\)

Before the U.S. Supreme Court, the defendants showed that the county board denied the laundry permits of all other similarly situ-
ated Chinese applicants. The defendants also showed that the board approved nearly all non-Chinese applications. After reviewing this evidence, the Court ruled that "[t]hough the law itself be fair on its face . . . if it is applied and administered by public authority with an evil eye and an unequal hand . . . the denial of equal justice is still within the prohibition of the constitution." Therefore, the Court held that the board's discriminatory application of the substantively constitutional ordinance violated the Equal Protection clause of the Fourteenth Amendment. Accordingly, the Court ordered the defendants' discharge from imprisonment. The Court's ruling in Yick Wo placed prosecutors on notice that they could not unequally enforce state laws with an "evil eye."

In 1905, a Chinese subject challenged the constitutionality of his prosecution under a different San Francisco ordinance in Ah Sin v. Wittman. The ordinance prohibited persons from placing gambling apparatuses in "barred or barricaded house[s] . . . to make it difficult of access or ingress to police officers." As in Yick Wo, the U.S. Supreme Court first ruled that the ordinance did not substantively violate the Constitution because the regulation of gambling was within the scope of the state's police powers.

The Court then determined whether the prosecutor's enforcement of the statute was unconstitutional. The Court explained that the defendants in Yick Wo were successful because they provided evidence that government officials treated Chinese individuals differently than non-Chinese individuals under the same ordinance. However, the defendant in Ah Sin did not provide evidence that Chinese subjects were treated differently than non-Chinese citizens under the gambling ordinance. Therefore, the Court ruled that the defendant's prosecution under the gambling ordinance was procedurally constitutional. Since Ah Sin, courts have required defendants wishing to

37. Id. at 359. For modern definitions of "similarly situated," see infra subsection II.B.2.
38. Yick Wo, 118 U.S. at 359. The board denied one non-Chinese applicant's application. Id.
39. Id. at 373-74.
40. Id. at 374.
41. Id.
42. Id. at 373.
43. 198 U.S. 500 (1905).
44. Id. at 505.
45. Id. at 505-06.
46. Id. at 507.
47. See id. at 507-08 (stating that selective prosecution claims are "a matter of proof; and no fact should be omitted to make it out completely, when the power of a Federal court is invoked to interfere with the course of criminal justice of a state").
48. Id. at 508.
successfully invoke the selective prosecution defense to provide evidence that the Government treated other similarly situated individuals differently under the same statute.\textsuperscript{49}

In 1962, the U.S. Supreme Court further defined the selective prosecution defense in \textit{Oyler v. Boles}.\textsuperscript{50} In \textit{Oyler}, two prisoners invoked selective prosecution defenses to challenge their respective life sentences under West Virginia's habitual criminal statute.\textsuperscript{51} The defendants alleged that the state neglected to prosecute other eligible habitual criminals under the statute.\textsuperscript{52} To satisfy \textit{Ah Sin}, the defendants provided statistics demonstrating the state's inconsistent prosecution of habitual criminals.\textsuperscript{53}

The Court held that the prisoners did not have a valid selective prosecution defense despite their statistical evidence.\textsuperscript{54} The Court explained that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation."\textsuperscript{55} The Court ruled that selective prosecution is unconstitutional only if it is based on "an unjustifiable standard such as race, religion, or other arbitrary classification."\textsuperscript{56} The \textit{Oyler} defendants failed to provide evidence of such invidious prosecution.\textsuperscript{57} Since \textit{Oyler}, courts have required defendants invoking selective prosecution defenses to show that the government prosecuted them because of their race, religion, or other arbitrary classification.\textsuperscript{58}

In 1985 in \textit{Wayte v. United States},\textsuperscript{59} the Court incorporated \textit{Yick Wo}, \textit{Ah Sin}, and \textit{Oyler} into a two-pronged selective prosecution test.\textsuperscript{60}


\textsuperscript{50} 368 U.S. 448 (1962).


\textsuperscript{52} \textit{Oyler}, 368 U.S. at 449.

\textsuperscript{53} Id. at 455–56.

\textsuperscript{54} Id. at 456.

\textsuperscript{55} Id.

\textsuperscript{56} Id.

\textsuperscript{57} Id.


\textsuperscript{59} 470 U.S. 598 (1985).

The Court ruled that defendants invoking the defense had to show that the Government's prosecution "had a discriminatory effect and that it was motivated by a discriminatory purpose."61 To show discriminatory effect, defendants must show that the Government failed to prosecute other "similarly situated individuals" under the same statute.62 To show discriminatory purpose, defendants must show that the Government prosecuted them because of their race, religion, or other arbitrary classification.63

Though the Wayte majority clearly articulated the elements of the selective prosecution defense, it left the nature of the defense's discovery standard for a future court to decide.64 However, Justice Marshall proposed a selective prosecution discovery standard in his dissenting opinion.65 Acknowledging the heavy burden defendants must overcome to succeed on the merits of a selective prosecution defense, Marshall proposed that "a defendant need not meet this high burden just to get discovery; the standard for discovery is merely nonfrivolousness."66 Under Marshall's "nonfrivolous" standard a defendant would only need to "allege sufficient facts in support of his selective prosecution claim 'to take the question past the frivolous state.'"67 In other words, a defendant would only need to present "'some evidence tending to show the existence of the essential elements of the defense.'"68

Despite Marshall's dissent in Wayte, the U.S. Supreme Court did not adopt a specific discovery standard for selective prosecution defenses until it decided United States v. Armstrong69 in 1996. In Armstrong, the Court implicitly rejected Marshall's "nonfrivolous" standard. The Court reasoned that granting discovery for selective prosecution defenses "divert[s] prosecutors' resources and may disclose the Government's prosecutorial strategy."70 Therefore, the Court adopted a "rigorous" discovery standard for selective prosecution defenses.71 Now, under Armstrong, defendants must make a

61. Wayte, 470 U.S. at 608 (emphasis added).
63. See Wayte, 470 U.S. at 610; Michael, supra note 49, at 689–93. This prong clearly incorporates Oyler. See Oyler, 368 U.S. at 449. Furthermore, this prong seems to correlate with what the Yick Wo court called an "evil eye." 118 U.S. at 373–74.
64. See Armstrong, 517 U.S. 456.
66. Id. at 625 (Marshall, J., dissenting).
67. Id. at 623–24 (quoting United States v. Hazel, 696 F.2d 473, 475 (6th Cir. 1983)).
68. Id. at 624 (quoting United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974)).
69. 517 U.S. 456.
70. Id. at 468.
71. Id.
“credible showing” of discriminatory effect and purpose to obtain discovery.72

Legal scholars have both praised and cursed the rigorous Armstrong discovery standard.73 The Armstrong discovery standard allows prosecutors to effectively allocate resources, develop effective prosecutorial strategies, and exercise legitimate prosecutorial discretion.74 A more lenient discovery standard could potentially overburden prosecutors, requiring them to spend valuable resources addressing weak selective prosecution defenses that would ultimately fail.75 However, some have argued that the rigorous Armstrong standard “fails to take into account that, prior to discovery, defendants generally do not have access to the type of information that would enable them to make the credible showing threshold.”76

The application of the selective prosecution defense has clearly narrowed a great deal since the Court first recognized the validity of the defense in Yick Wo.77 To obtain discovery for the defense, a defendant must first satisfy the rigorous Armstrong discovery standard. First, the defendant must make a credible showing that the Government failed to prosecute other “similarly situated individuals” under the same statute.78 Then, the defendant must make a credible showing that the Government prosecuted him because of his race, religion, or other arbitrary classification.79 If the defendant passes the rigorous Armstrong discovery standard, he must then pass the Wayte two-pronged selective prosecution test to successfully defend against his charge(s).80 To satisfy Wayte, the defendant must provide “clear evi-

73. See Jampol, supra note 49, at 954–65 (criticizing the Armstrong discovery standard); Michael, supra note 49, at 716–17 (criticizing the Armstrong court for not adequately defining “similarly situated”); Scully, supra note 72, at 559–60 (discussing the Armstrong discovery standard’s pros and cons).
74. See Armstrong, 517 U.S. at 468; Scully, supra note 72, at 558–59.
75. See Scully, supra note 72, at 559.
77. In fact, “No defendant since Yick Wo in 1886 has been successful in proving a race-based claim of selective prosecution.” Jampol, supra note 49, at 965.
78. Armstrong, 517 U.S. at 469.
79. See Scully, supra note 72, at 560 (discussing Armstrong where the Court provided that “discovery would only be appropriate after defendants make a ‘credible showing’ of both elements of selective prosecution.”)
dence” that the Government failed to prosecute other similarly situated individuals under the same statute. Then, the defendant must provide clear evidence that the Government prosecuted him because of his race, religion, or other arbitrary classification.

2. Undecided Definition of “Similarly Situated” Individual

As discussed in the preceding section, the Armstrong discovery standard first requires defendants to make a credible showing that the Government failed to prosecute other “similarly situated” individuals. However, the U.S. Supreme Court has not defined “similarly situated.” In the absence of such a ruling, the U.S. Courts of Appeals have adopted varying definitions of the phrase.

In United States v. Olvis, the Fourth Circuit ruled that “defendants are similarly situated when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them.” Several other Circuits have adopted the same or similarly narrow definitions. The First Circuit, however, has provided an arguably more flexible definition for general Equal Protection cases. To determine whether individuals are similarly situated, the First Circuit determines “whether an objective person would see two people similarly situated based upon the incident and context in question.”

82. See id.
83. Id. at 464.
84. See discussion supra subsection II.B.1.
85. In a recent U.S. Supreme Court selective prosecution case, the Court denied a defendant discovery for his selective prosecution defense because he failed to show that the Government failed to prosecute other “similarly situated” individuals. See United States v. Bass, 536 U.S. 862 (2002). Still, the Court failed to define “similarly situated” in its analysis.
86. 97 F.3d 739 (4th Cir. 1996).
87. Id. at 744 (emphasis added).
88. See Skehan v. Vill. of Mamaroneck, 465 F.3d 96, 110 (2d Cir. 2006) (adopting a similar definition); United States v. Deberry, 430 F.3d 1294, 1301 (10th Cir. 2005) (adopting the Fourth Circuit definition); Racine Charter One, Inc. v. Racine Unified Sch. Dist., 424 F.3d 677, 680 (7th Cir. 2005) (“To be considered ‘similarly situated,’ comparators must be ‘prima facie identical in all relevant respects’ . . .”) (quoting Purze v. Vill. of Winthrop Harbor, 286 F.3d 452, 455-56 (7th Cir. 2004)).
89. Marrero-Gutierrez v. Molina, 491 F.3d 1, 9 (1st Cir. 2007). In a previous ruling, the First Circuit articulated the test in a slightly different way: “[t]he test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated.” Tapalian v. Tusino, 377 F.3d 1, 6 (1st Cir. 2004) (quoting Barrington Cove Ltd. P’ship v. R.I. Hous. and Mortgage Fin. Corp., 246 F.3d 1, 8 (1st Cir. 2001)). After this Note was submitted for publication, the First Circuit decided United States v. Lewis, 517 F.3d 20 (1st Cir. 2008) in which an African-American Muslim defendant with alleged
“objective person” test focuses on “factual elements which determine whether reasoned analogy supports, or demands, a like result.” The test does not require “[e]xact correlation . . . but the cases must be fair congeners.” Such definitions have a profound impact on the Armstrong discovery standard. The degree of the Armstrong discovery standard's stringency depends on whether courts adopt a flexible or narrow “similarly situated” definition. Such definitions have a profound impact on the Armstrong discovery standard. The degree of the Armstrong discovery standard's stringency depends on whether courts adopt a flexible or narrow “similarly situated” definition.

3. Islamic Faith-Based Selective Prosecution Cases

After the September 11th attacks, several defendants attempted to use the selective prosecution defense to defend against terror-related charges. Two such cases are included in this subsection. The cases discussed below are relevant because they provide contemporary examples of courts' application of the Armstrong discovery standard and the Wayte two-pronged selective prosecution test. The cases also share striking factual similarities with Khan. In all three cases, defendants with ties to Islamic terror organizations alleged in the U.S. District Court for the Eastern District of Virginia that the U.S. Government selectively prosecuted them because they were Muslims in a post-9/11 world.

In United States v. Lindh, the Government charged John Phillip Walker Lindh with conspiracy to murder U.S. nationals, conspiracy to contribute services to the Taliban, and various federal weapons violations. Lindh, an American citizen, joined al-Qaeda and Taliban forces in Afghanistan to fight against American forces in 2001.

When it applied the Armstrong discriminatory effect prong, the court explained: "Although we have not previously provided a distinct definition of the term 'similarly situated' in the selective prosecution context, classical equal protection principles light our path and limn the attributes of one who is similarly situated." Id. at 27. Surprisingly, the court did not look to Molina or Tapalian for a definition of “similarly situated.” Rather, the court applied a more stringent definition, apparently specific to the selective prosecution defense, and even cited the Fourth Circuit's definition in Olvis for support. Id. at 27-28. Thus, when the author refers to the First Circuit's definition of "similarly situated," he is referring to the more lenient "objective person" standard articulated in Molina and Tapalian.
American forces captured Lindh and his fellow soldiers in December 2001.98 Lindh argued before the U.S. District Court for the Eastern District of Virginia that the court should dismiss the Government's charges because "he [was] the victim of impermissible selective prosecution" under the Fifth Amendment.99 Specifically, Lindh argued that the Government selectively prosecuted him because he exercised his First Amendment rights and associated with the Taliban for religious purposes.100 Lindh sought discovery to help prove the validity of his claim.101 Therefore, the court employed the Armstrong discovery standard to determine whether Lindh provided sufficient evidence of discriminatory effect and purpose to obtain discovery.102

Under the discriminatory effect prong of the Armstrong test, the court analyzed whether Lindh had made a credible showing that the Government neglected to prosecute other similarly situated persons for the same offenses.103 Lindh provided evidence that the Government did not prosecute other entities who contributed services to the Taliban for non-religious purposes.104 Lindh cited the University of Nebraska at Omaha ("UNO") among such entities.105 Lindh provided evidence that UNO had received money from another entity to fund visits by Taliban members to the United States prior to the September 11th attacks.106

To determine whether Lindh and the entities were "similarly situated," the court applied the Fourth Circuit's definition of the term.107 The court determined that the entities were not similarly situated with Lindh because they provided non-military services to the Taliban.108 Therefore, the court determined that Lindh had not made a credible showing of discriminatory effect under the Armstrong discovery standard.109

Although Lindh's failure under the first prong of the Armstrong test was sufficient to deny discovery, the court analyzed Lindh's evidence under the discriminatory purpose prong of the Armstrong test.110 To succeed under this prong, Lindh had to show that the Gov-

98. Id. at 547.
99. Id. at 564.
100. Id.
101. Id.
102. Id. at 565.
103. Id.
104. Id. at 565–66.
105. Id. at 566 n.62.
106. Id.
107. Id. at 566. See United States v. Olvis, 97 F.3d 739, 744 (4th Cir. 1996).
109. Id. at 568.
110. Id. at 567.
ernment prosecuted him because he was exercising his Islamic faith. Lindh argued that the Government's complaint, which chronicled Lindh's religious history, was evidence of the Government's discriminatory purpose. However, the court determined that such information merely explained the extent of Lindh's relationship with the Taliban. The court ruled that "[d]iscriminatory purpose cannot be inferred from a recitation of historical facts that merely provide context for criminal charges." The court reasoned that Lindh was prosecuted because of the gravity of his offenses and not because of his religion. Therefore, the court held that Lindh had not made a credible showing of the Government's discriminatory purpose. Accordingly, the court denied Lindh's discovery request as he failed to satisfy both the first and second prongs of the Armstrong discovery test.

The U.S. District Court for the Eastern District of Virginia decided United States v. Biheiri just after it decided Khan, but before Khan reached the Fourth Circuit Court of Appeals. In Biheiri, the Government charged Soliman Biheiri with two counts of making false statements to federal agents to obstruct the investigation of terrorism and one count of using a fraudulent passport. The Government provided evidence that Biheiri had served as an investment banker for a leader of the Islamic terrorist organization HAMAS. In an interview with a federal agent, Biheiri denied ever knowing the HAMAS leader or other terrorist leaders.

Biheiri moved to dismiss the claims, alleging that he had been the victim of selective prosecution. Biheiri claimed that the Government had "unfairly and selectively targeted persons either of the Muslim religion or of Middle Eastern descent and prosecuted them for crimes that have not been charged against the general population." However, Biheiri made a critical mistake. The court emphasized that

111. Id.
112. Id.
113. Id.
114. Id.
115. Id.
116. Id. at 568.
120. Id. at 596. "HAMAS and [the leader] were each listed by the Department of State as a Specially Designated Terrorist (SDT) on January 25, 1995 and August 29, 1995, respectively." Id.
121. Id.
122. Id. at 598.
123. Id. at 600.
Biheiri "failed to identify even a single non-Muslim or non-Middle Eastern individual who was not prosecuted despite having engaged in offense conduct similar to that for which defendant has been indicted."\(^{124}\) The court ruled that such a showing is an "'absolute requirement'" for selective prosecution defenses.\(^{125}\) Therefore, the court denied Biheiri's motion to dismiss the charges under his selective prosecution defense.\(^{126}\)

C. United States v. Khan

1. Factual Background

On February 9, 2004, the U.S. District Court for the Eastern District of Virginia heard United States v. Khan.\(^{127}\) The U.S. Government charged defendants Masoud Khan ("Khan"), Seifullah Chapman ("Chapman"), and Hammad Abdur-Raheem ("Hammad") with serious crimes relating to their contact and association with Islamic terrorist groups before and after the September 11th attacks.\(^{128}\) The charges arose out of the defendants' conduct which allegedly "constituted preparation for violent jihad overseas against nations with whom the United States was at peace and providing material support to terrorist organizations."\(^{129}\) The defendants argued that the Government selectively prosecuted them because they were Muslims in a post-9/11 world.\(^{130}\) The district court denied the defendants' discovery request for their selective prosecution claim.\(^{131}\)

Khan, Chapman, and Hammad each attended the Dar al Arqam Islamic Center (the "Center") in Falls Church, Virginia.\(^{132}\) Chapman and Hammad led a group composed of other Center members in paintball games.\(^{133}\) A group member testified that the group was set up as a "way of doing jihad."\(^{134}\) "Jihad literally means a struggle, which may range from exercising self-discipline . . . to violent combat against perceived enemies of Islam."\(^{135}\) The Government provided evidence that Chapman and Hammad led the games to prepare members for violent combat in foreign nations and not as exercises of mere

---

124. Id.
125. Id. (quoting United States v. Armstrong, 517 U.S. 454, 467 (1996)).
126. Id.
128. Id. at 795–96.
129. Id. at 796.
131. Id. at 497–98.
132. Id. at 483.
133. "Paintball is a game that simulates military combat in which players on one team try to eliminate players on the opposing team by shooting capsules of water-soluble dye at them from air powered rifles." Id. at 483 n.2.
135. Id.
self-discipline. The Government showed that Chapman and Hammad had both served in the U.S. military and led the group in "military-type drills" and physical training. Furthermore, the Government showed that Chapman enforced physical punishment on members who violated the group's rules. Chapman and Hammad denied that they used the games for violent combat training and argued that the games were for recreational purposes only.

In the summer of 2001, Chapman left the paintball group and traveled to Lashkar-e-Taiba ("LET") training camps in Pakistan. Pakistani Muslims originally founded LET to organize violent jihad against Russians in Afghanistan. However, from 1999 to 2003 LET primarily conducted violent jihad against Indian troops in Kashmir. In fact, prior to Chapman's visit, a member of his paintball group joined LET forces and attacked Indian troops in Kashmir. The Government provided evidence that LET also advocated the destruction of Israel and the U.S. "on its web site and elsewhere." The U.S. State Department officially designated LET as a terrorist organization in December 2001. Although Chapman did not engage in combat during his stay at the LET camp, he did participate in weapons training and met top LET leaders.

After the September 11th attacks, Khan and other Center members followed Chapman's lead and decided to attend LET training camps. The Government provided evidence that Khan and other Center members attended LET camps to train with the intent to join Taliban forces in violent jihad against U.S. troops in Afghanistan. Khan attended the LET camps for six weeks and participated in military and weapons training. However, in November 2001 Khan learned that U.S. forces were defeating Taliban forces in Afghanistan and that LET would not facilitate his travel to fight against U.S. forces. Therefore, Khan left the LET camp without fighting against U.S. forces.

136. See id. at 804–06.
137. Id. at 805.
138. Id.
139. Id. at 803.
140. United States v. Khan, 461 F.3d 477, 484 (4th Cir. 2006).
142. Id.
143. Id. at 807–08.
144. Khan, 461 F.3d at 488.
146. Khan, 461 F.3d at 484.
147. Id.
148. Id.
149. Id. at 485.
150. Id.
151. Id.
Although Chapman and Khan never actually fought as members of LET, the Government provided evidence that the defendants aided LET with military operations. In 2002, Chapman and Khan helped an LET leader purchase equipment for an unmanned aerial vehicle (“UAV”) used in LET military reconnaissance missions. Furthermore, both Chapman and Khan housed the LET leader during his visit to the United States in the summer of 2002.

2. District Court Ruling

Based on the above facts, the United States charged Khan, Hammad, and Chapman with conspiracy to violate the Neutrality Act, among other charges. The Neutrality Act declares:

Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined under this title or imprisoned not more than three years, or both.

The court convicted Chapman and Hammad under the conspiracy charges. The court determined that both defendants had knowingly organized expeditions to LET camps to attack Indian troops in Kashmir. The United States was and still remains at peace with India. Furthermore, the court determined that both defendants furthered the conspiracy “by training co-conspirators in combat skills through paintball games and the acquisition of weapons, with the knowledge that some co-conspirators had already traveled to Kashmir and fired on Indian positions . . . .”

However, the court found insufficient evidence to convict Khan of conspiracy to violate the Neutrality Act. Unlike Chapman and Hammad, Khan did not participate in the paintball games. Furthermore, the court reasoned that Khan attended the LET training camp to fight against U.S. forces in Afghanistan, not against Indian forces in Kashmir.

The U.S. also charged Khan and Chapman with actual violations of the Neutrality Act for their attendance at the LET camps. How-

152. Id. at 484.
153. Id.
156. Khan, 309 F. Supp. 2d at 818.
157. Id.
158. Id.
159. Id.
160. Id. at 818–19.
161. Id. at 819.
162. Id. at 823–24.
ever, the court found insufficient evidence to convict either defendant under the charges. The U.S. provided no evidence that either defendant "participated in any operations against India, or that their intent in traveling to the LET camp was directed at waging war against India."

3. Fourth Circuit Court of Appeals: Arguments and Ruling

In their appeal to the Fourth Circuit Court of Appeals, the defendants argued that the district court erred by denying their discovery request for their selective prosecution claim. Unfortunately, the district court did not discuss its reasons for denying the discovery motion in its opinion. Regardless, the district court clearly did not consider the selective prosecution defense at the conviction or sentencing phases of the trial.

In their brief to the Fourth Circuit Court of Appeals, the defendants argued that the Government had selectively prosecuted them because they were "Muslim in a post-9/11 world." In an attempt to fulfill the discriminatory effect prong of the Armstrong discovery standard, the defendants argued that the Government failed to prosecute other similarly situated individuals who conspired and actually violated the Neutrality Act. First, the defendants argued that the Government failed to prosecute members of the Cambodian Freedom Fighters ("CFF") for Neutrality Act violations. The defendants explained that the CFF had "a long, well-documented, history of planning and carrying out attacks on the Cambodian government, a country with whom the United States is at peace." More specifically, the defendants provided evidence that the Government failed to prosecute over twenty Cambodian-American CFF members that launched an attack against the Cambodian capital in November 2000. Instead of prosecuting the CFF members for the apparent conspiracy and actual Neutrality Act violations, Government officials allegedly invited CFF leaders to dinners with President George W. Bush and appointed them as fundraisers for the Republican Party.

The defendants explained that "[t]he government's only response to the [defendants'] discovery request . . . was that the CFF was not being prosecuted because it did not espouse hatred for the United

163. Id. at 824.
164. Id.
165. Brief of Appellants at 87-88, United States v. Khan, 461 F.3d 477 (4th Cir. 2006) (Nos. 04-4519, 04-4520, 04-4521, 05-4811, 05-4818, 05-4893).
166. Id. at 88.
167. See id. at 88-90.
168. Id.
169. Id. at 88.
170. Id.
171. Id. at 89.
States, [or] show support for the Taliban and Al-Qaeda . . . all of which the government attributed to LET."\textsuperscript{172} The defendants argued that such factors were irrelevant because "the Neutrality Act criminalizes any acts planned and initiated in the United States to be carried out against a country with which the United States is at peace."\textsuperscript{173}

The defendants also cited the Government's failure to prosecute Irish-Catholic American members of the Irish Republican Army ("IRA")\textsuperscript{174} under the Neutrality Act. The defendants argued that such Irish-Catholic Americans "have provided arms and money to [the IRA] for the purpose of conducting expeditions against England, a country with which the United States is at peace."\textsuperscript{175} Furthermore, despite the IRA's expeditions against England, the Government failed to designate the IRA as a terrorist organization.\textsuperscript{176}

The defendants emphasized that despite CFF and IRA members' apparent conspiracies and actual Neutrality Act violations, the Government had only prosecuted Muslims in the Fourth Circuit for violations of the Neutrality Act. In fact, "the Neutrality Act ha[d] only been used in the [Fourth Circuit] within the last 100 years for the singular purpose of convicting and attempting to convict Muslims . . . ."\textsuperscript{177} The defendants apparently offered such evidence to show discriminatory purpose under the second prong of the \textit{Armstrong} test. Therefore, the defendants argued that they provided sufficient evidence of discriminatory effect and discriminatory purpose to obtain discovery under the \textit{Armstrong} discovery standard.\textsuperscript{178}

In its brief to the Fourth Circuit, the Government cited the Fourth Circuit's definition of "similarly situated" to support the district court's denial of the defendants' discovery request.\textsuperscript{179} The Government argued that LET's support for the Taliban and al-Qaeda in their war with the United States differentiated LET from the CFF and IRA.\textsuperscript{180} Specifically, the Government argued that LET's exhibition of hostility towards the U.S. was a "legitimate and quintessential" prosecutorial factor that justified the defendants' prosecution.\textsuperscript{181} Therefore, the Government argued that the defendants failed to show

\textsuperscript{172} Id.
\textsuperscript{173} Id. (emphasis added).
\textsuperscript{174} One of the IRA's goals was to drive the British government out of Northern Ireland. Id.
\textsuperscript{175} Id. at 89-90.
\textsuperscript{176} Id.
\textsuperscript{177} Id. at 90.
\textsuperscript{178} Id.
\textsuperscript{179} Brief for the United States at 86, United States v. Khan, 461 F.3d 477 (4th Cir. 2006) (Nos. 04-4519, 04-4520, 04-4521, 05-4811, 05-4818, 05-4893) (quoting United States v. Olvis, 97 F.3d 739, 744 (4th Cir. 1996)).
\textsuperscript{180} Id.
\textsuperscript{181} Id.
that the Government failed to prosecute other “similarly situated” individuals under the Neutrality Act to satisfy the first prong of the \textit{Armstrong} discovery standard.\textsuperscript{182}

After hearing the parties’ arguments, the Fourth Circuit analyzed whether the district court erred when it denied the defendants’ discovery request. First, the court acknowledged the validity of the Government’s anti-terror prosecutorial strategy. The court explained that “[t]he Executive branch has the right to focus its prosecutorial energies on alleged terrorist groups that present the most direct threat to the United States and its interests.”\textsuperscript{183}

The court then determined whether the defendants satisfied their evidentiary burden under the first prong of the \textit{Armstrong} discovery standard. The court employed its narrow definition of “similarly situated” and determined whether any legitimate prosecutorial factors might have distinguished the Khan defendants from CFF and IRA supporters.\textsuperscript{184} The court sided with the Government and ruled that LET’s “direct conflict” with the United States was a legitimate factor which differentiated LET from the CFF and IRA.\textsuperscript{185} Therefore, the court determined that the defendants did not satisfy the discriminatory effect prong of the \textit{Armstrong} discovery standard.\textsuperscript{186} Accordingly, the Fourth Circuit affirmed the district court’s denial of the defendants’ discovery request.\textsuperscript{187}

\textbf{4. The Defendants’ Petition to the U.S. Supreme Court for a Writ of Certiorari}

On December 28, 2006, the defendants petitioned the U.S. Supreme Court for a Writ of Certiorari to review the Fourth Circuit’s decision.\textsuperscript{188} The defendants again argued that they were similarly situated with CFF and IRA supporters. In light of the similarities between the groups, the defendants argued that “the [Fourth Circuit] erred by not granting the [defendants’] request for additional discovery, particularly when the information was in the sole possession of the government and was vital to substantiate” the defendants’ claim.\textsuperscript{189} Finally, the defendants emphasized the seriousness of the issue. “Fifty-five years of Mr. Chapman’s sixty-five year sentence

\begin{itemize}
\item \textsuperscript{182} \textit{Id}.
\item \textsuperscript{183} \textit{Khan}, 461 F.3d at 498.
\item \textsuperscript{184} \textit{Id.} See \textit{Olvis}, 97 F.3d at 744.
\item \textsuperscript{185} \textit{Khan}, 461 F.3d at 498.
\item \textsuperscript{186} \textit{Id}.
\item \textsuperscript{187} \textit{Id}.
\item \textsuperscript{188} Petition for Writ of Certiorari, Khan v. United States 127 S. Ct. 2428 (2007) (No. 06-1116).
\item \textsuperscript{189} \textit{Id.} at 29.
\end{itemize}
were directly connected to his conspiracy to violate the Neutrality Act conviction."\textsuperscript{190}

The Government dismissed the validity of the defendants' claims and again asserted that LET's open hostility toward the U.S. differentiated the defendants from CFF and IRA members.\textsuperscript{191} The Government cited LET's proclamations that it would join the Taliban in battle if the United States attacked Afghanistan to show the extent of LET's hostility toward the U.S.\textsuperscript{192} The Government argued that "because LET presented a direct threat to the United States and its interests, [the defendants' prosecution] was a perfectly proper exercise 'of the Government's enforcement priorities.'"\textsuperscript{193}

On May 21, 2007, the U.S. Supreme Court denied the defendants' petition for a Writ of Certiorari.\textsuperscript{194} To date, the U.S. Supreme Court has not heard a selective prosecution case involving defendants with alleged terrorist ties. Therefore, the Fourth Circuit is the highest court to rule on such a case. Whether other jurisdictions will adopt the Fourth Circuit's "similarly situated" definition and application of the \textit{Armstrong} discovery standard remains uncertain.\textsuperscript{195}

\section*{III. ANALYSIS}

After more than three years of litigation, the U.S. Supreme Court laid \textit{Khan} to rest when it denied the defendants' petition for a Writ of Certiorari. However, questions surrounding the selective prosecution

\textsuperscript{190}. \textit{Id.}
\textsuperscript{191}. \textit{Id.}
\textsuperscript{192}. \textit{Id.} at 30 (quoting \textit{United States v. Armstrong}, 517 U.S. 456, 465 (1996)).
\textsuperscript{193}. \textit{Id.} at 30 (quoting \textit{United States v. Armstrong}, 517 U.S. 456, 465 (1996)).
\textsuperscript{195}. After the author submitted this Note for publication, the U.S. Court of Appeals for the First Circuit cited \textit{Khan} in \textit{United States v. Lewis}, 517 F.3d 20 (1st Cir. 2008). In \textit{Lewis}, the Court affirmed the district court's decision to deny the African-American Muslim defendant's discovery motion for his selective prosecution defense. \textit{Id.} at 29. The Government alleged that the defendant had ties to terrorist organizations. \textit{Id.} at 26. The court cited \textit{Khan} to support its proposition that "courts have upheld the government's decision to prosecute more readily when the specter of terrorism is implicated." \textit{Id.} at 28. Furthermore, the First Circuit cited the Fourth Circuit's stringent "similarly situated" definition in \textit{Olvis} and held that whether other unprosecuted violators of federal statutes have terrorist ties is a legitimate distinguishing factor when determining whether defendants are "similarly situated" with such unprosecuted individuals. \textit{Id.} at 27-28. Unlike the \textit{Khan} defendants, the \textit{Lewis} defendants did not provide evidence that other similarly situated non-Muslim terrorists violated the statute in question. Therefore, it is unclear whether the First Circuit would have come to the same decision as the Fourth Circuit in \textit{Khan}. However, the First Circuit's citation of \textit{Khan} and \textit{Olvis} and its failure to follow its previously articulated "objective person" test to define "similarly situated" demonstrates \textit{Khan}'s influence.
defense's future remain. This section analyzes Khan's impact on the Armstrong discovery standard for selective prosecution defenses. First, subsection A compares the stringent Armstrong discovery standard with Marshall's "nonfrivolous" standard in light of Khan. Then, subsection B analyzes the Fourth Circuit's application of its "similarly situated" definition in Khan in light of Lindh and Biheiri. Subsection B also compares the Fourth Circuit and First Circuit definitions of "similarly situated." Finally, subsection C summarizes the aftermath of Khan. The analysis below shows that a stringent discovery standard for selective prosecution claims is necessary to keep sensitive Government information from falling into the hands of terrorists. However, the Fourth Circuit's narrow "similarly situated" definition makes the Armstrong discovery standard so stringent that defendants with substantial selective prosecution claims may be barred from obtaining discovery. Therefore, courts should apply the First Circuit's more flexible "similarly situated" definition to the Armstrong discovery standard.

A. Stringent v. Lenient Discovery Standard

As discussed above, some legal scholars criticized the Armstrong court for adopting a stringent discovery standard for selective prosecution claims instead of Justice Marshall's relatively lenient "nonfrivolous" standard. The Fourth Circuit denied the Khan defendants' discovery request despite the defendants' evidence that the Government failed to prosecute other non-Muslim individuals who conspired and actually violated the Neutrality Act. The Fourth Circuit's decision clearly demonstrates the stringent nature of the Armstrong discovery standard. Under Justice Marshall's proposed "nonfrivolous" discovery standard, the Khan defendants may have obtained discovery for their selective prosecution claim.

Khan demonstrates the necessity of the more stringent Armstrong discovery standard for selective prosecution claims in the post-9/11 world. The Armstrong court likely never envisioned the September 11th attacks. However, the stringent nature of the Armstrong discovery standard has become a critical Government tool in the War on Terror. In times of war, a more lenient discovery standard such as

---

196. See discussion supra subsection II.B.1.
197. See discussion infra subsection III.B.1.
198. The U.S. Supreme Court decided Armstrong in 1996, five years before the September 11th attacks. See Armstrong, 517 U.S. at 456.
Marshall's "nonfrivolous" standard could be disastrous. Under such a standard, defendants with ties to terrorist organizations could potentially gain access to sensitive Government documents. Such documents could reveal the intricacies of the Government's War on Terror investigation methods and prosecutorial strategies. If terrorists gained access to such information, it could be detrimental to the Government's war effort.

Therefore, the discovery standard for selective prosecution claims should be stringent enough to prevent defendants with terrorist ties from obtaining discovery through "insubstantial" selective prosecution claims. Khan provides a good example of the Armstrong discovery standard's success in meeting this objective. The Khan defendants had direct ties to LET and indirect ties to the Taliban and al-Qaeda. Furthermore, the defendants did not have a substantial selective prosecution claim because they did not provide credible evidence that the Government prosecuted them because they were Muslims. Rather, the Government likely prosecuted the defendants in light of the Department of Justice's post-9/11 anti-terror prosecutorial strategy.

If the Fourth Circuit applied a lenient discovery standard in Khan, LET, the Taliban, and al-Qaeda may have gained access to sensitive War on Terror documents.

B. "Similarly" or "Identically" Situated?

As discussed in the preceding section, the War on Terror demands a stringent discovery standard for selective prosecution claims. However, the selective prosecution discovery standard must not become so stringent that defendants with substantial claims are barred from ob-

---

200. In Armstrong, the court explained that "[i]f discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant's claim." 517 U.S. at 468.

201. If defendants obtain discovery for their selective prosecution claims, it "will divert prosecutors' resources and may disclose the Government's prosecutorial strategy." Id.; see also Robert Hardaway, The Role of the Media, Law, and National Resolve in the War on Terror, 33 DENV. J. INT'L L. & POL'Y 104, 123 (2004) ("Since 9/11, a number of new legal issues have arisen" including defendants' "discovery of sensitive information.").

202. Armstrong, 517 U.S. at 464 ("[T]he showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims.").

203. The defendants never expressly provided evidence of discriminatory purpose. However, the defendants emphasized that the Government prosecuted only Muslims under the Neutrality Act in the Fourth Circuit within the last one hundred years. However, such evidence is not likely "credible evidence" of discriminatory purpose. See Oyler v. Boles, 368 U.S. 448, 456 (1962) (determining that statistics showing selective prosecution of habitual offender statute did not, by themselves, show discriminatory purpose); Lindh, 212 F. Supp. 2d at 567 ("Discriminatory purpose cannot be inferred from a recitation of historical facts that merely provide context for criminal charges.").

204. See Ashcroft, supra note 1.
taining discovery. The stringency of the Armstrong discovery standard may vary depending on how the court defines "similarly situated." In Khan, the Fourth Circuit applied its "similarly situated" definition to the Armstrong discovery standard. The first subsection below analyzes Khan in light of Lindh and Biheiri to demonstrate the stringency of the Fourth Circuit's "similarly situated" definition. The second subsection compares the First and Fourth Circuit "similarly situated" definitions' impact on the Armstrong standard's stringency.

1. Difficulty Satisfying the Fourth Circuit's "Similarly Situated" Definition

As discussed above, the U.S. District Court for the Eastern District of Virginia denied the Biheiri defendant's selective prosecution claim. The court rejected the defense because the defendant failed to show that the Government did not prosecute other non-Muslim individuals that "engaged in offense conduct similar to that for which" the defendant had been indicted. Unlike the defendant in Biheiri, the Khan defendants showed that the Government failed to prosecute Cambodian-Americans and Irish-American Catholics who also violated the Neutrality Act. Though the Khan defendants seemed to fulfill this "absolute requirement," the Fourth Circuit still determined that the defendants failed to provide evidence of discriminatory effect.

In Lindh, the district court convicted the defendant for contributing services to the Taliban after the court denied his discovery request for his selective prosecution defense. Unlike the defendant in Biheiri, the Lindh defendant provided some evidence that the government failed to prosecute other non-Muslim Taliban contributors. However, the district court determined that the defendant could be distinguished from other contributors because they contributed non-military services to the Taliban. Under the Fourth Circuit's "similarly situated" definition, the court determined that the defendant's contribution of combatant services to the Taliban was a legitimate prosecutorial factor which differentiated the defendant from other contributors. Thus, to distinguish the defendant from other Taliban contributors, the Lindh court focused on the manner in which the Lindh defendant violated the statute in question.

205. See discussion infra subsection III.B.2.
207. See supra subsection II.B.3.
209. Id.
211. Id. at 566 n.62; see Biheiri, 341 F. Supp. 2d at 600.
213. Id. at 567.
Unlike the *Lindh* defendant, the Khan defendants provided evidence that other non-Muslims conspired and actually violated the Neutrality Act in a similar manner. They showed that members of the CFF and IRA planned, supported, and even engaged in *combatant expeditions* against countries with which the United States was at peace.\(^{214}\) In fact, CFF and IRA members' conspiracies and actual violations of the Neutrality Act were arguably more egregious than the *Khan* defendants' conspiracy to violate the Neutrality Act. Whereas the *Khan* defendants led paintball games as training for violent jihad with knowledge that one member had attacked Indian troops, Cambodian-American CFF members conspired and attacked the Cambodian capital in an attempt to overthrow the Cambodian government. Furthermore, Irish-Catholic American IRA members continuously funded bombings in England. Still, the Fourth Circuit determined that the *Khan* defendants failed to show that they were similarly situated with CFF and IRA members.\(^{215}\)

Despite arguable success where the *Biheiri* and *Lindh* defendants failed, the Fourth Circuit denied the defendants' discovery request because the defendants were not "similarly situated" with others who conspired and actually violated the Neutrality Act. The court came to its decision despite the defendants' evidence that the Government failed to prosecute other non-Muslim individuals who conspired and actually violated the Neutrality Act in an arguably more egregious manner. Clearly, defendants have had difficulty satisfying the Fourth Circuit's narrow "similarly situated" definition. As discussed above, the *Armstrong* discovery standard must be stringent to prevent defendants with ties to terrorism from obtaining sensitive documents or other information.\(^{216}\) However, the Fourth Circuit's determination that the *Khan* defendants failed to show credible evidence of discriminatory effect may suggest that the Fourth Circuit's definition of "similarly situated" is too stringent for any defendant to ever satisfy.

2. First Circuit v. Fourth Circuit: "Similarly Situated" Definitions

As discussed above, the Fourth Circuit determined that defendants are similarly situated with other individuals when "no distinguishable legitimate prosecutorial factors" exist that "might justify" the prosecutor's decision to prosecute the defendants and not the other individuals.\(^{217}\) The Fourth Circuit has determined that such legitimate prosecutorial factors may include: "the strength of the evidence

\(^{214}\) *See* Brief of Appellants *supra* note 165, at 88–90.

\(^{215}\) United States v. Khan, 461 F.3d 477, 498 (4th Cir. 2006).

\(^{216}\) *See discussion supra* section III.A.

\(^{217}\) United States v. Olvis, 97 F.3d 739, 744 (4th Cir. 1996) (emphasis added). *See supra* subsection II.B.2.
against a particular defendant . . . the amount of resources required to
convict a defendant . . . the potential impact of a prosecution on re-
lated investigations and prosecutions, and prosecutorial priorities for
addressing specific types of illegal conduct. In Khan, the Fourth
Circuit determined that the Government's prosecutorial priority of
prosecuting defendants with ties to anti-U.S. terror groups was a le-
gitimate prosecutorial factor.

The Fourth Circuit's "similarly situated" definition seems to re-
quire that defendants be virtually identical (not merely similar) with
other unprosecuted individuals. Under the definition, defendants
must show that the prosecutor could not have differentiated the de-
fendants from other unprosecuted individuals by using legitimate
prosecutorial factors. Whether the prosecutor actually prosecuted
the defendants in light of such factors is irrelevant under the defini-
tion. Rather, the discriminatory purpose prong of the Armstrong
discovery standard addresses the prosecutor's actual intent. Therefore,
as long as the prosecutor could have justified the selective prosecution
with such factors, defendants cannot satisfy the definition and fulfill
the Armstrong test's first prong. Thus, if a defendant cannot satisfy
the "similarly situated" definition, he cannot obtain discovery. If the
defendant cannot obtain discovery, his selective prosecution defense
will fail.

Therefore, the Fourth Circuit's definition of "similarly situated"
may make it easier for prosecutors to selectively prosecute defendants
for invidious purposes. Altering the facts of Khan helps illustrate this
point. Assume that the defendants in Khan were able to make a credi-
ble showing that the Government prosecuted them primarily because
they were Muslims in a post-9/11 world. A showing of such invidious
prosecution would satisfy the discriminatory purpose prong of the
Armstrong discovery standard. Applying its "similarly situated" defi-
nition, however, the Fourth Circuit would still likely deny the defend-
ants' discovery request. The court would likely determine that the
prosecutor could have differentiated the defendants from CFF and
IRA members in light of LET's conflict with the U.S. Therefore, de-
fendants would still not be able to satisfy the "similarly situated" defi-
nition to establish the discriminatory effect prong of the Armstrong
discovery standard. Without discovery, the defendants would not sat-
ify the showing of clear evidence necessary to succeed on the merits
of their selective prosecution defense. Such a result contradicts the

218. Olvis, 97 F.3d at 744.
219. Khan, 461 F.3d at 498.
220. See Olvis, 97 F.3d at 744.
purpose of the selective prosecution defense: the prevention of invidious, discriminatory prosecution.  

In addition, ponder the following example. Assume that one Caucasian individual and one African-American individual sold methamphetamine in Virginia. The Caucasian sold a considerably larger quantity of the drug in rural Virginia, while the African-American sold a relatively small quantity of the drug in the City of Richmond. A federal prosecutor chose to prosecute the African-American individual and not the Caucasian individual. Assume that the African-American can provide credible evidence that the prosecutor prosecuted him because of his race.

Under the Fourth Circuit's "similarly situated" definition, the federal district court would likely deny the African-American discovery for his selective prosecution defense. The prosecutor could pay lip service to any of the following legitimate factors that might have justified the selective prosecution: 1) the case against the African-American was stronger than the case against the Caucasian, 2) the prosecutor decided to focus resources on combating methamphetamine traffic and use in cities instead of in rural Virginia, and/or 3) the African-American is tied to a larger trafficking ring, while the Caucasian trafficker ran a smaller operation. In light of such factors that could have justified the prosecution, the court would likely determine that the defendant did not satisfy the discriminatory effect prong of the Armstrong discovery standard. Without the aid of discovery, the African-American would fail on the merits of his legitimate selective prosecution defense. Therefore, the prosecutor could continue invidiously prosecuting African-Americans under the guise of "legitimate" prosecutorial factors that could justify the prosecutions.

In contrast, the First Circuit applies a more flexible "objective person" test to determine whether individuals are similarly situated. Whereas the Fourth Circuit's test requires that defendants be virtually identical in all material aspects, the First Circuit's test does not require such "[e]xact correlation." Rather, the First Circuit re-

221. "[T]he decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification' . . . ." United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)).

222. See Olvis, 97 F.3d at 744 (non-exclusive listing of legitimate prosecutorial factors).

223. The author proposes that such factors should only be deemed "legitimate" if the prosecutor can show that they actually directed his decision to prosecute. Furthermore, such factors should only be relevant under the discriminatory purpose prong of the Armstrong discovery standard as they pertain to prosecutorial intent.

224. Tapalian v. Tusino, 377 F.3d 1, 6 (1st Cir. 2004) (quoting Barrington Cove Ltd. P'ship v. R.I. Hous. & Mortgage Fin. Corp., 246 F.3d 1, 8 (1st Cir. 2001)).
quires that "cases must be fair congeners." 225 Furthermore, the First Circuit's test focuses primarily on the "factual elements" of cases to determine whether defendants are similarly situated. 226 Conversely, the Fourth Circuit focuses primarily on the existence of legitimate "prosecutorial factors" that might justify the prosecutor's selective prosecution. 227

Under the First Circuit's "objective person" test, the Khan defendants may have satisfied the discriminatory effect prong of the Armstrong discovery standard. An objective person could possibly, if not probably, determine that the Khan defendants were similarly situated with CFF and IRA supporters. The Khan defendants organized paintball games to train fighters in military tactics. 228 One paintball participant traveled to Kashmir and fired on Indian troops. In contrast, Cambodian-American CFF supporters continuously planned and carried out attacks on the Cambodian government. 229 Similarly, Irish-American Catholics continuously supplied the IRA with arms and funding to attack England and Northern Ireland. 230

At this point, some may argue that the Khan defendants' ability to satisfy the discriminatory effect prong would have only placed terrorists one step closer to discovering sensitive Government documents. Although that is a valid concern, the stringent nature of the Armstrong discovery standard still would have prevented discovery. While the defendants likely could have made a credible showing of discriminatory effect, the second prong of the Armstrong discovery standard would still have required the defendants to make a credible showing of discriminatory purpose. The Khan defendants provided no credible evidence that the Government prosecuted them because they were Muslims. 231 Rather, the Government argued that it prosecuted the defendants because of their ties with LET, the Taliban, and al-Qaeda. In the absence of evidence to the contrary, such a justification is dispositive, particularly in light of the Department of Justices' publicized decision to reallocate resources to zealously prosecute members of anti-U.S. terrorist groups.

Thus, under the First Circuit's "similarly situated" definition, the Armstrong discovery standard still would have barred the defendants' insubstantial selective prosecution defense. However, unlike under the Fourth Circuit's "similarly situated" definition, the First Circuit

225. Id. (quoting Barrington Cove, 246 F.3d at 8).
226. Id. (quoting Barrington Cove, 246 F.3d at 8).
227. See Olvis, 97 F.3d at 744.
228. See supra subsection II.C.1.
230. Id.
231. See supra note 203.
definition would allow discovery for defendants with substantial selective prosecution claims.\textsuperscript{232}

For example, apply the First Circuit's flexible "objective person" test to the methamphetamine hypothetical discussed above. An objective person could determine that the African-American defendant and unprosecuted Caucasian were similarly situated because they both sold methamphetamine in clear violation of a federal statute. The African-American's case is particularly persuasive because he could show that he violated the statute in a less egregious manner by selling a smaller quantity of the drug. Therefore, under the First Circuit's "objective person" test, the African-American would satisfy the discriminatory effect prong of the \textit{Armstrong} discovery standard. Furthermore, the defendant's credible showing of the prosecutor's invidious prosecutorial intent would satisfy the discriminatory purpose prong of the \textit{Armstrong} discovery standard. Therefore, unlike in the Fourth Circuit, the African-American would obtain discovery for his substantial selective prosecution claim.

Thus, the First Circuit's "similarly situated" definition would provide for a more equitable application of the \textit{Armstrong} discovery standard without compromising the standard's necessary stringency. The more flexible test would still prevent terror suspects without credible evidence of discriminatory purpose from obtaining access to sensitive government documents. However, the test would also allow defendants with substantial selective prosecution claims to obtain discovery and ultimately succeed on the merits of the claims. Therefore, the Fourth Circuit should have adopted a more flexible "similarly situated" definition in \textit{Khan} to ensure the vitality of the selective prosecution defense. In the same vein, when and if the U.S. Supreme Court decides to define "similarly situated," it should adopt the First Circuit's more flexible "objective person" test.

\section*{C. The Aftermath}

The full impact of \textit{Khan} on selective prosecution jurisprudence remains somewhat unclear as few courts have cited \textit{Khan} in the selective prosecution context. Notably, in \textit{United States v. Lewis}\textsuperscript{233} the First Circuit cited \textit{Khan} in a selective prosecution case for the proposition that "courts have upheld the government's decision to prosecute more readily when the specter of terrorism is implicated."\textsuperscript{234} Furthermore, the court cited the Fourth Circuit's stringent "similarly situated" definition and held that whether other unprosecuted violators of

\textsuperscript{232} By "substantial" selective prosecution claims, the author is referring to those claims in which defendants provide credible evidence that the Government prosecuted them because of an arbitrary classification.

\textsuperscript{233} 517 F.3d 20 (1st Cir. 2008)

\textsuperscript{234} \textit{Id.} at 28.
federal statutes have terrorist ties is a legitimate distinguishing factor when determining whether defendants are "similarly situated" with such unprosecuted individuals. The court then denied the selective prosecution discovery request of an African-American Muslim defendant with alleged terrorist ties because the defendant had not shown that other non-African-American, non-Muslim defendants with terrorist ties had violated the statute in question.

Surprisingly, the First Circuit did not mention its previously articulated "objective person" test for determining whether individuals are "similarly situated" in Equal Protection cases. Thus, the First Circuit's decision in Lewis demonstrates that courts may follow Khan's lead and apply stringent definitions of "similarly situated" in the selective prosecution context even when such courts have applied a more lenient definition of "similarly situated" in other Equal Protection cases. The First Circuit's willingness to ignore its previously articulated "similarly situated" definition without discussion further demonstrates that the U.S. Supreme Court should define "similarly situated" in the selective prosecution context once and for all. As discussed above, the Court should adopt the First Circuit's previously articulated "objective person" test to determine whether individuals are "similarly situated" in the selective prosecution context.

Khan also may have directly impacted Government investigations and prosecutorial policies. Shortly after the U.S. District Court for the Eastern District of Virginia decided Khan, the Government arrested several individuals for past Neutrality Act violations. On June 1, 2005, the U.S. Department of Justice announced that federal agents arrested the CFF President for Neutrality Act violations. The Department of Justice explained that federal agents arrested Yasith Chhun for the role he played in CFF's attack on the Cambodian capital in November of 2000. The CFF attack wounded several Cambodian police officers and "an undetermined number of Cambodian Freedom Fighter attackers were killed and wounded." Prior to his arrest, Chhun told a Boston Globe reporter that "[t]he FBI comes here, they ask me questions, they don't do anything." Inter-
estingly, Chhun was arrested just over a year after the Khan defendants first cited CFF's members as examples of unprosecuted similarly situated individuals who conspired and actually violated the Neutrality Act.

On June 4, 2007, the U.S. Department of Justice announced that federal agents arrested "General" Vang Pao after a six month undercover investigation called "Operation Tarnished Eagle." Vang Pao, a 77 year-old Laotian refugee, had supported Hmong rebel fighters in Laos since the end of the Vietnam War. The Government charged Pao and other Laotian refugees with conspiracy to violate the Neutrality Act and actual Neutrality Act violations for planning to violently overthrow the Laotian government. Interestingly, Pao's arrest came just nine months after the Fourth Circuit decided Khan.

The extent of Khan's role in influencing the arrests of Chhun and Pao is unclear. Both Chhun and Pao lived in the United States and had long openly supported violence against nations with which the United States was at peace. The Government's newfound interest in prosecuting Neutrality Act violations soon after the Khan defendants invoked their selective prosecution defense should raise at least a few eyebrows. Although the Khan defendants ultimately lost their own selective prosecution battle, they may have ultimately persuaded the Government to prosecute blatant Neutrality Act violations. Again, those worried that a more flexible definition of "similarly situated" would allow terrorists to discover important Government documents may rest assured. In light of the arrests of Chhun and Pao, future defendants with ties to terrorism will have fewer, if any, obvious examples of domestic unprosecuted supporters of violence in foreign nations. Therefore, such defendants will have difficulty showing that the Government did not prosecute other "similarly situated" individuals under either the First Circuit's "objective person" test or the Fourth Circuit definition of the term.

IV. CONCLUSION

The Fourth Circuit's ruling in United States v. Khan was a partial success. The court denied defendants with ties to anti-U.S. terrorist organizations access to sensitive Government information. The Government simply cannot afford to have such information fall into the hands of terrorists. However, in denying the discovery request, the

Fourth Circuit erred by applying its narrow “similarly situated” definition to the *Armstrong* discovery standard. The court could have applied the First Circuit’s more flexible and equitable “objective person” test to the *Armstrong* discovery standard and still denied the defendants’ discovery request.

The selective prosecution defense is a necessary check on prosecutorial power. Though courts should generally defer to prosecutors’ discretion, they must not forget that absolute power corrupts absolutely. For over one hundred and twenty years, the U.S. Supreme Court has deferred to prosecutorial discretion and narrowed the selective prosecution defense. Now, selective prosecution is in danger of becoming a futile defense. The vitality of the defense depends on the U.S. Supreme Court’s definition of “similarly situated.” If the Court adopts the Fourth Circuit’s narrow definition, the defense may become futile as defendants with substantial selective prosecution claims may be barred from obtaining discovery. However, if the Court adopts the First Circuit’s more flexible “objective person” test to define “similarly situated,” the selective prosecution defense will continue to check prosecutorial power by allowing defendants with substantial selective prosecution claims to obtain discovery. Until the Court actually adopts a definition, however, the vitality of the defense hangs in the balance.