BEYOND CONSPIRACY? ANTICIPATORY PROSECUTION AND THE CHALLENGE OF UNAFFILIATED TERRORISM

Robert M. Chesney*

ABSTRACT

How early does criminal liability attach along the continuum between planning and committing a terrorist act? And in light of the answer to that question, have we struck an appropriate balance between the benefits of prevention and the off-setting costs in terms of a potentially-increased rate of false-positives and foregone opportunities to gather additional intelligence and evidence? These questions are pressing, particularly in light of statements from senior government officials that the Justice Department will be "forward-leaning" in its interpretation of its anticipatory-prosecution powers. My aim in this article is to establish a shared understanding regarding the first question in order to facilitate an intelligent debate regarding the second.

In some respects, this is well-trodden ground. I and others have written previously of the government's sweeping capacity under 18 U.S.C. § 2339B to prosecute potential terrorists who can be linked in some fashion to a designated Foreign Terrorist Organizations ("FTOs"). But it is becoming clear that the utility of § 2339B is eroding in the face of several developments, most notably the ongoing decentralization of what might be called the "global jihad movement." Simply put, it is becoming less common for a suspected terrorist to be vulnerable to a § 2339B FTO-support prosecution. What, then, is the government's capacity for anticipatory prosecution when confronted with "unaffiliated" terrorism?

Setting aside the possibility of a "pretextual" charge based on some unrelated offense by a suspect, the basic options are a conspiracy charge under a terrorism-related provision such as 18 U.S.C. § 956(a) or a charge under 18 U.S.C. § 2339A, the lesser-known of the two material-support statutes. The article identifies the earliest plausible point of intervention under both options, and examines the extent to which indictments in post-9/11 prosecutions have stayed within these boundaries. My most notable conclusion, perhaps, is that § 2339A can be and arguably has been used to create a capacious form of inchoate liability in circumstances that otherwise would have to be charged under the relatively-demanding standards of attempt.

* Associate Professor of Law, Wake Forest University School of Law, and chair-elect, Section on National Security Law of the Association of American Law Schools. J.D., Harvard University, *magna cum laude*. Special thanks to William Banks, Bob Behlen, Jeff Breinholt, Phil Heymann, Peter Margulies, Wayne McCormack, Steve Vladeck, and Tung Yin. I also am indebted to the Southeast Association of American Law Schools and to the University of Iowa College of Law for providing me with opportunities to present this project.

TABLE OF CONTENTS

BEYOND CONSPIRACY? ANTICIPATORY PROSECUTION AND THE CHALLENGE OF UNAFFILIATED TERRORISM

Robert M. Chesney*

> *"Prevention is the goal of all goals when it comes to terrorism because we simply cannot and will not wait for these particular crimes to occur before taking action."*
>
> - Attorney General Alberto Gonzales, August 16, 2006[1]

There is a continuum that runs from contemplation to completion of a criminal act. Precisely how early along that continuum does federal criminal liability attach in circumstances involving potential acts of terrorism?

The significance of this question became apparent during the summer of 2006 in the wake of a string of arrests in terrorism-related cases both at home and abroad. The first set of arrests came in Toronto in early June, when approximately seventeen men were taken into custody by the Royal Canadian Mounted Police on charges that they had acquired three tons of ammonium nitrate and were planning to bomb a variety of targets in Ottawa.[2] Eventually, two men from Georgia would also be arrested in connection with this group.[3] Meanwhile, in late June, FBI agents in Miami arrested the head of an obscure religious sect known as the Seas of David, along with six followers, on charges

* Associate Professor of Law, Wake Forest University School of Law, and chair-elect, Section on National Security Law of the Association of American Law Schools. J.D., Harvard University, *magna cum laude*. Special thanks to William Banks, Bob Behlen, Jeff Breinholt, Phil Heymann, Peter Margulies, Wayne McCormack, Steve Vladeck, and Tung Yin. I also am indebted to the Southeast Association of American Law Schools and to the University of Iowa College of Law for providing me with opportunities to present this project.

[1] Attorney Gen. Alberto Gonzales, Remarks to the World Affairs Council of Pittsburgh, "Stopping Terrorists Before They Strike: The Justice Department's Power of Prevention" (Aug. 16, 2006), *available at* http://www.usdoj.gov/ag/speeches/2006/ag_speech_060816.html.

[2] *See The Toronto Terror Plot: The Plan to Behead the Prime Minister*, THE ECONOMIST, June 10, 2006, at 3 (providing an overview of the arrests).

[3] *See* Dan Eggan, *Georgia Pair Charged in Plot to Strike Capitol, World Bank*, WASH. POST, July 20, 2006, at A12 (discussing arrests of Syed Haris Ahmed and Ehsanul Islam Sadequee).

that they were conspiring to carry out a bombing campaign, possibly to include the Sears Tower in Chicago.[4] Two weeks later, the press reported that officials in Lebanon and elsewhere had arrested at least some participants in a plot to destroy the Holland Tunnel, running under the Hudson River between New Jersey and New York City.[5]

In each of these cases, U.S. government officials have gone out of their way to calm the public by emphasizing that the plots were disrupted at a preliminary stage. Speaking of the Miami arrests, for example, FBI Deputy Director John Pistole observed that the plot was "more aspirational than operational."[6] But the early nature of prosecutorial intervention in these and other terrorism-related cases has not been welcomed in every quarter. The prospect that the government has adopted a policy of prosecuting suspected terrorists at the earliest available opportunity has generated criticism from both the civil liberties and national security perspectives, with the former contending that we risk prosecuting dissenting thought uncoupled from culpable action and the latter contending that such a policy would sacrifice the benefits of additional intelligence- and evidence-gathering.

The wisdom of early-stage anticipatory prosecution is, ultimately, a question of policy. But an intelligent policy debate cannot take place without a shared understanding

---

[4] "Seas of David is not a Muslim organization. By all accounts, the group uses Muslim discourse and symbols. Yet it also relies heavily on Jewish and Christian discourse and symbols," and "appears to subscribe to its own brand of radical pan-African identity and national worldview." Chris Zambelis, *Florida African-American Group Inspired by al-Qaeda Ideology*, 27 TERRORISM FOCUS: A WEEKLY JOURNAL OF NEWS AND ANALYSIS OF INTERNATIONAL TERRORISM 3, 4 (2006). As Zambelis writes, the Seas of David arrests "may point to a growing trend among other radical groups that have little or no connection to al-Qaeda" but that nonetheless find inspirational value in al Qaeda's success. *Id.*

[5] *See* Nancy Soloman, *Arrests Made in Alleged N.Y.C. Tunnel Plot*, NATIONAL PUBLIC RADIO ALL THINGS CONSIDERED, July 7, 2006 (observing that suspects had not yet acquired resources or engaged in surveillance but were about to do so, and quoting the deputy director of the FBI's New York City field office for the proposition that "[a]t that point, . . . it is entirely appropriate to take them down"), *available at* http://www.npr.org/templates/story/story.php?storyId=5541999&ft=1&f=2.

[6] Press Conference (June 23, 2006), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/06/23/AR2006062300942.html.

of the scope of the government's power to prosecute in anticipation of a terrorist attack. Unfortunately, there is a gap in the literature regarding the precise scope of that power. That gap is particularly wide, moreover, with respect to an important – and expanding – category of cases: those in which the suspect is "unaffiliated" in the sense that he or she cannot be linked to an organization that already has been formally designated as a "Foreign Terrorist Organization" ("FTO") by the Secretary of State.

This article aims to fill that gap, and thus improve the quality of the emerging debate, with a close study of the substantive criminal laws that constitute the government's anticipatory prosecution power. I begin in Part I by documenting the emergence of a preference for early prosecutorial intervention in terrorism investigations within the United States. I then contextualize the discussion that follows with an overview of the costs and benefits that might be associated with such a policy. On one hand, maximizing early prosecutorial intervention might be seen as desirable in that it reduces the risk that investigators will misjudge their ability to shift from surveillance to arrest in time to prevent violent acts from occurring. On the other hand, there are both security and civil liberty costs to that approach. From a security perspective, early criminal prosecution also means early termination of covert efforts to gather intelligence and evidence, entailing both lost opportunities and greater risks of acquittals. From a civil liberties perspective, maximized early prosecution may be undesirable in that it is likely to increase the rate of false positives (*i.e.*, prosecutions of persons who would not in fact have gone on to commit the anticipated violent act). Each of these considerations must be kept in mind in evaluating the merits of how federal criminal law currently is

calibrated with respect to early intervention, as well as in formulating recommendations for recalibration.

Against this backdrop, Parts II through IV establish the parameters of the government's anticipatory prosecution power in the terrorism context, with special reference to how it actually has been employed since 9/11 and how its constituent elements relate to one another. Part II begins by acknowledging that the government has broad power to intervene with prosecutions in cases involving suspects linked to FTOs, in light of two closely-related statutory regimes prohibiting the provision of support or services to them. That capacity is declining in significance, however, in the face of a trend I describe as "unaffiliated" terrorism. Briefly stated, the ongoing decentralization of what might be described as the "global jihad movement," combined with the increasing popularity of the "leaderless resistance" organizational model among a diverse array of extremist movements, combine to decrease the likelihood that a given terrorism suspect can be linked to an FTO.

Parts III and IV examine the charging options and actual practice of federal prosecutors faced with this "unaffiliated" terrorism scenario. In the context of conspiracy liability – the subject of Part III – the issue turns on the degree of specificity that a given statute requires as to the objectives of the alleged agreement, and also on the closely-related question of how the participants to an agreement are identified. Is it enough that a group of individuals share a generalized desire to use violence against United States government employees or citizens? Does it matter if the suspects are associated with the global jihad movement? Must they come to some degree of agreement with respect to

the particular type of offense they might attempt, or perhaps even the particular means to be used or target to be struck?

Part III opens with a survey of how questions regarding the scope and specificity of conspiratorial agreements have been resolved by federal courts in run-of-the-mill, non-terrorism prosecutions. The resulting "general rules" indicate that liability ordinarily attaches at the point when the agreement becomes specific as to the type of criminal offense to be achieved, and that it is not necessary also to prove any agreement (let alone knowledge on the part of any one defendant) as to any of the details of executing the offense, such as method, target, or date. They also establish that individuals who have no direct contact with or actual knowledge of one another may nonetheless be part of a single conspiracy, so long as there is a sufficient showing of their understanding of the scope of their common endeavor. With that reference point established, I then consider whether the same standards apply to federal statutes specifically associated with terrorism conspiracies. By and large they do, though the inquiry is complicated with respect to 18 U.S.C. § 956, a conspiracy provision that has proven to be of critical importance in post-9/11 terrorism prosecutions. Part III concludes by reviewing the fact patterns in recent § 956 cases, and suggesting that prosecutors to some degree have pushed the envelope with respect to the scope of conspiracy liability in circumstances involving the global jihad movement.

Conspiracy liability does not, however, set the outer boundaries of the government's anticipatory prosecution power when dealing with unaffiliated potential terrorists. In that context, prosecutors in recent years have come to rely frequently on 18 U.S.C. § 2339A. This statute criminalizes the provision of material support or resources

to any recipient (not just designated FTOs), so long as the defendant knew or intended that the aid would be used "in preparation for, or in carrying out, a violation of" any of several dozen predicate crimes listed in the statute. Part IV explores the role of § 2339A as a vehicle for anticipatory prosecution of potentially-dangerous persons who cannot be linked to a designated FTO, inquiring whether it provides liability in circumstances that are – or at least should be – beyond the scope of liability under inchoate crime concepts such as conspiracy and attempt. A close study of the fact patterns in post-9/11 § 2339A cases indicates that it does, and also that prosecutions taking place at these outer boundaries tend to present an exacerbated version of the policy tensions inherent in anticipatory prosecutions. Part V concludes.

I. The Early Intervention Dilemma

It has been clear for some time that the Department of Justice ("DOJ") has made the prevention of terrorist attacks a top strategic priority, and thus that it will intervene before an attack occurs whenever it is possible to do so.[7] What is less clear is whether there is a policy – formal or otherwise – concerning the appropriate point of prosecutorial intervention in the ex ante scenario. Should suspects be arrested and indictments unsealed at the earliest possible opportunity? Should prosecutors instead be encouraged to delay intervention as long as possible in order to maximize the collection of intelligence and evidence? Should the issue of timing be left to the discretion of the officials involved, to be resolved on an ad hoc basis?

It seems highly unlikely that there is any rigid policy purporting to determine, in across-the-board fashion, the proper timing for prosecutorial intervention. Indeed, such

[7] *See, e.g.,* Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 26-28 (2005) (describing emergence of the prevention-oriented paradigm).

an approach presumably would be resisted by other significant stakeholders in the interagency process relating to terrorism policy, including among others the Director of National Intelligence, the Director of the Central Intelligence Agency, and perhaps even the Secretary of Defense.[8] Nevertheless, the events of the summer of 2006 suggest that there is at least a presumption in favor of maximizing early intervention in terrorism cases.

In an address to the American Enterprise Institute in May 2006 that foreshadowed the series of arrests that would soon follow, Deputy Attorney General Paul McNulty advocated an aggressive approach to anticipatory prosecution.[9] "On every level," McNulty said, "we [are] committed to a new strategy of prevention. The 9/11 attacks shifted the law enforcement paradigm from one of predominantly reaction to one of proactive prevention."[10] Under this paradigm, DOJ does not "wait for an attack or an imminent threat of attack to investigate or prosecute," but instead does "everything in its power to identify risks to our Nation's security at the earliest stage possible and to respond with forward-leaning – preventative – prosecutions."[11] Citing several post-9/11 prosecutions in which the government had intervened at a relatively early stage, McNulty elaborated that "[w]e could await further action by these men and then arrest and

[8] Each of these officials, in their intelligence-gathering capacities, may prefer that prosecution be delayed or foregone entirely in some circumstances.

[9] Dep. Atty. Gen. Paul McNulty, Prepared Remarks to the American Enterprise Institute (May 24, 2006), *available at* http://justice.gov/dag/speech/2006/dag_speech_060524.html.

[10] *Id.* *See also id.* ("[I]n deciding whether to prosecute, we will not wait to see what can become of risks. The death and destruction of September 11, 2001 mandate a transformed and preventative approach.").

[11] *Id.* McNulty acknowledged that the new posture might come at a cost in terms of prosecutorial success rates. The "reality of our prevention strategy," he explained, "is that we may find it more difficult in certain cases to marshal the evidence sufficient to convince 12 jurors beyond a reasonable doubt." *Id.* Such acquittals were inevitable, he noted, "because we must bring charges before a conspiracy achieves its goals – before a terrorist act occurs. To do so, we have to make arrests earlier than we would in other contexts where we often have the luxury of time to gather more evidence." *Id.* The development of further evidence also might reduce rather than bolster concerns about a particular suspect, of course, meaning that an increased reliance on anticipatory prosecutions may foster false positives as well as false negatives.

prosecute them. Or we could prosecute at the moment our investigation reveals both a risk to our national security and a violation of our Nation's laws. In the wake of September 11, this aggressive, proactive, and preventative course is the only acceptable response . . . ."[12]

Homeland Security Secretary Michael Chertoff echoed this perspective in the wake of the Holland Tunnel plot arrests later that summer. Though the arrests in that case occurred overseas and were carried out by agents of other governments, Chertoff took the opportunity to emphasize their consistency with our own preference for early intervention and to explain why that approach is warranted:

> [W]e always intervene at the earliest possible opportunity, just as we've done in a series of operations we've undertaken over the last couple of months . . . . We don't wait until someone has lit the fuse to step in and prevent something from happening. That would be playing games with people's lives. . . . Last year's attacks in London, 2004's attacks in Madrid and, of course, the attacks in 2001 are all reminders of the fact that we cannot drop our guard. But at the same time, people can rest assured that we move very swiftly, at the first sign of a plot, and we do not wait until the last minute to intervene. . . . We swoop in as early as possible. Because experience shows – and I think London is a great example – that the distance between planning and actually operational activity is a very short distance. And anybody who thinks they have time to wait and see how things play out I think is really taking a foolish approach to the issue of security."[13]

The most recent and significant statements on this subject have come from Attorney General Alberto Gonzales, in the wake of arrests in London in mid-August 2006 that apparently disrupted a plot to detonate liquid explosive on board a number of

---

[12] *Id.* (referring to the prosecutions of "Ahmed Omar Abu Ali, Iyman Faris, and members of the Northern Virginia Jihad"). *See also id.* (noting that in the prosecution of Soliman Biheiri, the DOJ had chosen to prosecute for immigration fraud "rather than prolong the investigation . . . and thus leave open the risk to our Nation's security presented by all of the facts and circumstances we knew at the time about Biheiri").

[13] Secretary of Homeland Security Michael Chertoff, Press Conference (July 7, 2006) (italics added) *available at* http://transcripts.cnn.com/TRANSCRIPTS/0607/07/lol.02.html.

transatlantic flights.[14] In a speech at the World Affairs Council of Pittsburgh titled "Stopping Terrorists Before They Strike: The Justice Department's Power of Prevention,"[15] the Attorney General noted that the key question for preventive prosecution is "when to arrest and begin prosecution."[16] He observed that ordinarily "we need to gather enough information and evidence during our investigations to ensure a successful prosecution," and that the choice of when to intervene ultimately "must be made on a case-by-case basis by career professionals using their best judgment – keeping in mind that we need to protect sensitive intelligence sources and methods and sometimes rely upon foreign evidence in making a case."[17] That said, however, the Attorney General also declared that "we absolutely cannot wait too long, allowing a plot to develop to its deadly fruition. Let me be clear, preventing the loss of life is our paramount objective. Securing a successful prosecution is not worth the cost of one innocent life."[18]

Of course, criminal prosecution is not the only mode of response available to government officials once they have made the decision to intervene to incapacitate a suspected terrorist.[19] But the two most significant alternatives – immigration enforcement and military detention – may be of declining utility in the years to come. Immigration enforcement by definition has no application with respect to citizens, and

---

[14] See Joshua Partlow, *Police Keeping Most Plot Suspects in Custody, Without Charges, Under Terror Law*, WASH. POST, Aug. 13, 2006, at A14, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/08/12/AR2006081200566.html

[15] *See supra* note 1.

[16] *Id.*

[17] *Id. See also id.* ("Determining when to arrest would-be terrorists depends on countless factors like the dangerousness of the possible attack, the parties involved, and the imminence of the plot becoming operational.").

[18] *Id.*

[19] It is important to note that covert surveillance and other forms of information gathering by intelligence and criminal investigators is itself a significant mode of response, and that there is a sharp debate about the merits of shifting from the covert information-gathering mode to any form of overt intervention. I do not intend to express a view on that debate here, but instead to shed light on the scope of the government's options once the decision has been made to intervene overtly via criminal prosecution.

recent trends indicate that the threat of terrorism often will emanate from "homegrown" sources rather than aliens in the future.[20] And while military detention has been used on two occasions since 9/11 in circumstances involving suspected terrorists captured in the U.S.,[21] lingering uncertainty about the legality of that approach[22] combined with extensive political pressure not to employ it tends to curb its availability going forward. The Supreme Court's recent decision in *Hamdan v. Rumsfeld* – striking down the military commission process established by the Administration as a mechanism for prosecuting terrorists for war crimes – further undermines the attractiveness of the military model.[23] Considering that when it comes to persons arrested in the U.S. the government already relies primarily on criminal prosecution even with respect to al Qaeda suspects,[24] these

---

[20] For a discussion of the "home-grown" terrorism phenomenon, see Part II.C.2, *infra.* The Miami arrests in the Seas of David case, as well as the Georgia arrests associated with the Toronto plot, provide illustrations from the summer of 2006.

[21] *See* Rumsfeld v. Padilla, 542 U.S. 426, 430-32 (2004) (describing military detention of U.S. citizen arrested in the U.S.); Al-Marri v. Hanft, 378 F.Supp.2d 673, 674-75 (D.S.C. 2005) (describing military detention of Qatari citizen arrested in the U.S.).

[22] *See* Tung Yin, *Dodging the Jose Padilla Case*, 28 NAT. SEC. L. REP. 3 (2006) (describing the twists and turns of litigation associated with the military detention of Jose Padilla, including the government's decision to transfer him to civilian custody for criminal prosecution at a time when a petition for *certiorari* challenging the legality of his military detention was pending in the Supreme Court), *available at* http://www.abanet.org/natsecurity/nslr/NSLR_july2006.pdf. *See also* Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005) (holding that the September 18, 2001, Authorization for Use of Military Force empowered President to detain at least those persons who bore arms against the U.S. and its allies in Afghanistan, even if not captured until they arrived in the U.S.). In contrast, it remains clear that military detention is lawful with respect to persons captured in the course of armed conflict in more traditional battlefield contexts. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 518-21 (2004) (affirming legality of using military detention in connection with persons captured in connection with hostilities in Afghanistan).

[23] *See* 126 S. Ct. 2749 (2006). Another limiting factor comes into play where a suspect is in the hands of a state which will not transfer the individual without assurances that the U.S. will eschew military detention. *See, e.g.,* Rob Gifford, *Bankers' Extradition to U.S. Angers British Business*, NATIONAL PUBLIC RADIO MORNING EDITION, July 12, 2006 (describing efforts by suspected terrorism supporters Babar Ahmed and Haroon Rashid Aswat to resist extradition from the U.K. to the U.S. on the ground that the U.K. should not trust U.S. assurances that the men will receive civilian criminal trials rather than be held as enemy combatants), *available at* http://www.npr.org/templates/story/story.php?storyId=5551003.

[24] Notwithstanding the adoption and extensive reliance on military detention as a tool of prevention since 9/11 – and notwithstanding occasional rhetoric critical of reliance on criminal law enforcement in the terrorism context – the Bush Administration has continued to rely heavily on domestic criminal prosecution in cases involving both domestic and foreign terrorist threats, including threats directly linked to al Qaeda. High-profile examples include the prosecutions of Zacarias Moussaoui and Richard Reid. *See* United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004) (addressing witness issues raised by the Moussaoui

developments suggest that DOJ will bear an increasing share of the burden when the decision is made to incapacitate a suspected terrorist within the United States in the future. This, in turn, will sustain or even enhance the pressure on DOJ to push the envelope with respect to its capacity for early intervention in such cases.

Assuming that there is at least a preference within DOJ for "forward-leaning – preventative – prosecutions,"[25] difficult policy questions arise. On one hand, seeking to maximize early intervention in terrorism cases entails plausible and significant benefits. The sooner that one moves to incapacitate a potential terrorist, the less risk one runs that the person will slip surveillance or otherwise get into position to commit a harmful act before officials can intervene.[26] Even if the risk enhancement associated with delay is relatively small, the magnitude of the harm to be averted in the terrorism context – from the perspective of both the individuals who may be subjected to violent acts and the larger society – may be such that any appreciable risk enhancement should be avoided if at all possible.

On the other hand, there are a variety of offsetting costs associated with a policy of maximizing early-stage prosecution. From the national security perspective, these costs are at least three-fold. First, and most significantly, overt intervention in the form of a prosecution presumably will end any covert intelligence-gathering program that may have been in place with respect to the defendant; opportunities to monitor frank communications, to identify confederates, and to learn a variety of other critical facts will

---

prosecution); United States v. Reid, 211 F. Supp.2d 366 (D. Mass. 2002) (denying motion to suppress evidence in "shoe bomber" prosecution). *See also* Appendix B.

[25] McNulty, *supra* note 9.

[26] For an excellent discussion of these risks, see Wayne McCormack, *Inchoate Terrorism: Liberalism Clashes with Fundamentalism*, 37 GEORGETOWN J. INT'L L. 1, 13-16 (2005) (citing United States v. Sarkissian, 841 F.2d 959 (9th Cir. 1988), which "demonstrates the dilemma of conspiracy investigators, as even with the wiretap the plotters succeeded in getting dynamite on board a U.S. commercial airliner").

come to an end at that point. Indeed, for this reason some have argued that security goals frequently will be better served by *delaying* prosecution as long as possible.[27] The second point is closely related: ongoing observation does not merely serve to collect intelligence, but may also yield additional evidence that will enhance the prospects for success at trial. A delayed prosecution in this sense may be a more viable prosecution, perhaps significantly so. The third and final point follows from the second: to the extent that an early-stage prosecution is perceived as unjustified, it may have a negative impact on the willingness of members of a critical community – such as Arab- or Muslim-Americans – to actively cooperate with intelligence and criminal investigators.[28]

Early-stage prosecution also entails significant civil liberty concerns. This point is well-illustrated by Philip K. Dick's short story (and motion picture) *The Minority Report*, which envisioned a future in which government officials believe that they have developed the ultimate form of preventive criminal law enforcement. By relying on the visions of a trio of seemingly unerring psychics, police are able to consistently detect crime before it occurs, sometimes even before the perpetrator begins to contemplate the course of conduct that would lead to the offense. "Precrime," as it is called, appears to be the realization of a law enforcement fantasy: all criminal harms are averted,[29] without any false positives in the form of persons wrongly accused. Or so it seems at first. Suffice to say that events soon call into question the accuracy of the predictions, suggesting in

---

[27] *See* RICHARD POSNER, UNCERTAIN SHIELD: THE U.S. INTELLIGENCE SYSTEM IN THE THROES OF REFORM 96 (2006) (making this point); MARC SAGEMAN, UNDERSTANDING TERROR NETWORKS 180-81 (2004) (describing the arrest of terrorism suspects in one instance as a "mishandled opportunity" to try and turn the suspects into intelligence assets).

[28] *Cf.* PHILIP B. HEYMANN, TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR 78, 100-01 (2003) (emphasizing the need for community cooperation in intelligence-gathering).

[29] At least as to violent crimes, that is. It is unclear whether the psychics were similarly attuned to con artists, insider traders, jaywalkers, and so forth. The plot certainly suggests, however, that they were asleep at the switch with respect to public corruption.

dramatic fashion that there is no avoiding the cost-benefit tradeoff between crime prevention measures and the risks of false positives.

To a certain extent, of course, the problem of false positives cannot be avoided. It is a risk that is inherent in the task of criminal prosecution, whether prevention-oriented or not. But the degree of risk is not uniform across all types of criminal liability. The farther that one moves from the paradigm of a completed act – as one moves backwards successively through attempt, to advanced planning, to initial planning, and so forth – the more tenuous the link between the defendant and the anticipated harm becomes and, hence, the more likely it is that false positives will be generated.

Concerns under this heading appear to have sparked the recent surge in interest in the government's capacity for anticipatory prosecution. Writing in the *Washington Post*, Dahlia Lithwick argued that federal prosecutors are running too great a risk of false positives in their efforts to intervene at the aspirational-but-not-operational stage.[30] Invoking the imagery of *The Minority Report*, Lithwick contends that early-stage intervention as practiced in the Miami Seas of David arrests approaches the criminalization of mere thoughts, and strikes the wrong balance between the benefits of preventive action and the risks that defendants will be prosecuted for acts that they might never actually have committed.[31]

---

[30] *See* Dahlia Lithwick, *Stop Me Before I Think Again*, WASH. POST, July 16, 2006, at B3, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/07/14/AR2006071401383.html.

[31] *See id.* Less dramatically, but with more substance, National Public Radio's Talk of the Nation recently devoted a segment to the "ongoing debate over preemptive arrests," asking whether a crime had yet been committed in these scenarios. *See Making the Arrest Before the Crime*, NATIONAL PUBLIC RADIO TALK OF THE NATION, July 12, 2006, *available at* http://www.npr.org/templates/story/story.php?storyId=5552058. The issue also is percolating in the U.K., with a particular emphasis on the false-positives concern. *See, e.g,* Jennifer Quinn, *Focus in Britain Falls on Prosecution*, WASH. POST, Aug. 12, 2006 (discussing such concerns in the wake of the liquid-explosives plot arrests), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/08/12/AR2006081200840.html.

In short, there is an inherent tension between the costs and benefits associated with preventive interventions in general, a tension that grows sharper the earlier that the intervention occurs. Whether it is wise in light of this tension to maximize early intervention is, for the most part, a question of policy rather than of law. But just as one cannot properly assess the legal status quo without an appreciation for these policy consequences, an intelligent policy debate cannot take place without a shared understanding of just how early it is that current criminal laws permit prosecutors to intervene. I turn to that question in the pages that follow.

II. The Declining Utility of FTO-Support Prosecutions

In prior work, I have described in detail the capacity of the federal government to prosecute individuals under 18 U.S.C. § 2339B for providing "material support or resources" to foreign entities that have been formally designated as FTOs by the Secretary of State and under 50 U.S.C. § 1705 for providing services to foreign entities and individuals that have been subjected to a similar terrorism-related designations pursuant to Executive Order.[32] I will not repeat that analysis here, other than to summarize the manner in which these statutes provide the government with a robust capacity for anticipatory prosecution.

Briefly stated, § 2339B and §1705 were designed to achieve prevention indirectly by reducing the flow of resources to FTOs,[33] but also are capable of serving the goal of prevention more directly in that they provide a readily-available charge in circumstances

[32] *See* Chesney, *Sleeper Scenario*, *supra* note 7; Robert M. Chesney, *Civil Liberties and the Terrorism-Prevention Paradigm: The Guilty by Association Critique*, 101 MICH. L. REV. 1408 (2003) (book review).
[33] *See* Chesney, *Sleeper Scenario*, *supra* note 7, at 4-18 (describing the origins of the terrorism-support laws).

involving potentially-dangerous persons whom the government wishes to incapacitate.[34] The statutes define the forbidden forms of support quite broadly, sufficiently so to encompass most forms of interaction that might take place between a suspected terrorist and an FTO.[35] Indeed, "material support or resources" is defined to include not only the provision of various forms of equipment and services, but also the act of providing one's own self as "personnel" to the designated group.[36] In most circumstances in which a suspected terrorist in linked to an FTO, therefore, the conduct that constitutes that very linkage most likely constitutes a violation of the support statutes. This gives the government a ground to intervene that is independent of whether prosecutors can prove that the suspect is actually planning to carry out a terrorist attack.[37]

There is, however, a significant limit on the reach of prosecutions under § 2339B and § 1705. By definition, these statutes have no application unless a designated entity (hereinafter simply "FTO") is involved. The threat of terrorist violence, however, is not always attributable to an FTO.

"Unaffiliated" terrorism – *i.e.*, acts of political violence carried out by an actor not affiliated with a formally designated FTO – can arise in many ways. Terrorism can be used by groups that previously were unknown or in any event have not yet been designated formally by the U.S. government. It can emanate from individuals – lone wolves – who do not appear to have any particular organizational ties, designated or otherwise. And as highlighted in connection with the Seas of David arrests in Miami,

---

[34] *See id.* at 39-46 (discussing the use of § 2339B to prosecute potential terrorists rather than "mere" supporters of terrorist groups).
[35] The definition is contained in 18 U.S.C. § 2339A(b)(1), and incorporated by reference in 18 U.S.C. § 2339B(g)(4).
[36] *See* 18 U.S.C. § 2339A(b)(1).
[37] *See* Chesney, *Sleeper Scenario, supra* note 7, at 39-46.

terrorism can emanate from domestic as well as foreign sources. Unfortunately, it appears that the category of unaffiliated terrorism is growing.

A. The Growth of Unaffiliated Terrorism

There was a time when terrorism was thought to be of strategic significance only insofar as it was employed as a deniable method of asymmetric warfare by a sovereign state, acting either through agents of their own clandestine services or through private groups subject to their direction or control.[38] Over time, that view changed to accommodate the existence and significance of terrorist organizations that operated relatively or even entirely independently of state control, a model that arguably reached its apex in the form of al Qaeda as it existed at the time of the 9/11 attacks.[39] Since 9/11, however, the nature of the terrorist threat has continued to diversify.

Vice Admiral John Scott Redd, the Director of the National Counterterrorism Center ("NCTC"), recently spoke of this development in testimony before the Senate Foreign Relations Committee in June 2006.[40] Admiral Redd explained that there are "three distinct incarnations of the terrorist threat" today.[41] First, "al-Qa'ida and its core senior leadership" continue to be the government's "preeminent concern."[42] Second, a "host of other Sunni terrorist groups around the globe . . . have been inspired by al-Qa'ida and . . . subscribe to the violent extremist worldview articulated by the al-Qa'ida senior

---

[38] *See generally* TIMOTHY NAFTALI, BLIND SPOT: THE SECRET HISTORY OF AMERICAN COUNTERTERRORISM (2005) (describing the origins and evolution of U.S. counterterrorism policy). *See also* DAVID C. WILLS, THE FIRST WAR ON TERRORISM: COUNTERTERRORISM POLICY DURING THE REAGAN ADMINISTRATION (2003) (analyzing the counterterrorism policy decision-making process); NEIL C. LIVINGSTONE, THE WAR AGAINST TERRORISM 12 (1982) (contending that most "major" terrorist groups at that time were subject to the influence of the USSR).

[39] *See* NAFTALI, *supra* note 38.

[40] Prepared testimony of Vice Admiral John Scott Redd, Director, National Counterterrorism Center, Senate Foreign Relations Committee, 109th Cong., 2d Sess. (June 13, 2006), *available at* http://www.nctc.gov/press_room/speeches/20060613.html.

[41] *Id.*

[42] *Id.*

leadership."[43] "Many members of these groups," Redd observed, "view themselves as part of a global violent extremist network that aims to advance the al-Qa'ida agenda and target U.S. interests around the world."[44]

These first two categories – al Qaeda itself, and other militant Sunni fundamentalist groups willing to employ violence for political ends – in theory are amenable to an anticipatory-prosecution strategy that depends on identification of links between terrorism suspects and formally-designated FTOs. But Admiral Redd went on to identify a third category that has begun to emerge recently, one that is not so amenable:

> "Our third area of concern with respect to the terrorist threat is the relatively recent emergence of a 'homegrown' variant of the traditional terrorist cell or group. Following on the attacks last summer in England, the recent arrests in Canada highlight the growing salience of this trend. We are uncovering the spread of new violent extremist networks and cells that *lack formal ties or affiliation with al-Qa'ida or other recognized terrorist groups.* These groups or cells do not fall under the command and control of the AQ senior leadership and indeed operate quite independently."[45]

Unaffiliated terrorism of this variety is not an entirely new phenomenon, of course. Any circumstance in which terrorist methods are employed by individuals or small cells who share ideological inspirations but not formal organizational ties arguably can be characterized in this way. By that definition, examples in the modern era trace back at least to the anarchist violence of the late 19th and early 20th centuries.[46] In more recent years, the concept of "leaderless resistance" – popularized in the early 1990s by an Aryan Nations supporter named Louis Beam[47] – has led to the conscious cultivation of

---

[43] *Id.*
[44] *Id.*
[45] *Id.* (emphasis added).
[46] *See* WALTER LAQUEUR, A HISTORY OF TERRORISM 14 (2002) (discussing the anarchist "propaganda of the deed").
[47] *See* JESSICA STERN, TERROR IN THE NAME OF GOD 150-51 & n. 8-9 (2002) (citing Louis Beam, *Leaderless Resistance*, SEDITIONIST 12, February 1992).

the unaffiliated model for the violent fringes of movements focused on issues ranging from the environment[48] to abortion.[49]

Technological developments are contributing to the growth of the unaffiliated model. In the past, the limited nature of communication technologies imposed significant limits on the threat that could be posed by truly decentralized or leaderless movements. First, it was difficult for such movements to spread their ideology given their lack of access to mass media (a problem which contributed to their desire to resort to terrorism as a form of propaganda). Second, even for those who already were duly inspired, it was difficult to identify like-minded individuals with whom to cooperate in carrying out an attack, and equally difficult to acquire knowledge of techniques and methods that might be necessary to succeed in an attack. Unfortunately, the emergence of internet communications, coupled with encryption technology, has significantly reduced these natural barriers.[50] Ideology can be spread and inflamed on a global scale with relative ease through the online posting of various media.[51] Contacts are made in chat rooms and email exchanges, opening the door to in-person cooperation at a later stage.[52] Advice and

---

[48] *See, e.g.,* Peter Chalk, *U.S. Environmental Groups and 'Leaderless Resistance*, JANE'S INTELLIGENCE REVIEW, July 1, 2001 (describing the Environmental Liberation Front as a "movement [that] exists more as a networked entity than as a concrete group with a clearly identified leader and member roll"), *available at* http://www.rand.org/commentary/070101JIR.html.

[49] *See, e.g.,* STERN, *supra* note 47, at 150-51 & accompanying notes (discussing embrace of the leaderless resistance model by the "Army of God," a "shadowy organization that advocates killing abortion providers as 'justifiable homicide'").

[50] These developments also create new opportunities for surveillance and infiltration of decentralized networks. *See* Nadya Labi, *Jihad 2.0*, THE ATL. MONTHLY, July/August 2006, at 102; Benjamin Wallace-Wells, *Private Jihad: How Rita Katz Got Into the Spying Business*, THE NEW YORKER, May 29, 2006, at 28.

[51] *See* Labi, *supra* note 50.

[52] *See id.*

expertise on technical issues ranging from online security to the construction of improvised explosive devices is just a click away.[53]

The emergence of this appealing information environment for the formation of decentralized networks and leaderless resistance coincides, moreover, with two other significant developments: the rapid expansion of an ideo-theological movement extolling the use of violent force as a vehicle for spreading a particular conception of Islam,[54] and worldwide efforts to suppress that movement making it difficult for supporters to organize along traditional, hierarchical lines.[55] The movement itself is closely linked to and often conflated with al Qaeda, but the two are not coextensive, as a brief review of the relevant history indicates.

B. The Origins and Evolution of the Global Jihad Movement

Al Qaeda is not coextensive with the global jihad movement, thought it certainly plays a critical role within it. Rather, it is best to conceive of al Qaeda as the would-be vanguard of the movement, seeking both to define and propagate its tenets and goals and to radicalize and organize the many factions, organizations, and individuals that adhere to its perspective.[56] The global jihad movement itself, in contrast, might fairly be described as the violent operational fringe of a highly-controversial interpretation of Islam rooted in, but distinct from, the Wahhabi and Salafist movements.

---

[53] *See, e.g.,* H. Brian Holland, *Inherently Dangerous: The Potential for an Internet-Specific Standard Restricting Speech that Performs a Teaching Function*, 39 U. S. F. L. Rev. 353 (2005) (discussing the online posting of information relating to the construction of bombs and other dangerous devices).

[54] By focusing on the threat of terrorism associated with the global jihad movement, I do not mean to downplay the significance of terrorism inspired by other ideological or theological sources.

[55] One might also point to a third contemporaneous development in the form of the ongoing proliferation of the technology and materials associated with nuclear, radiological, chemical, and biological weaponry.

[56] *See* AHMED FEKRY & SARA NIMIS, *Preface*, *in* MONTASSER AL-ZAYYAT, THE ROAD TO AL-QAEDA: THE STORY OF BIN LADEN'S RIGHT-HAND MAN (2004) xi-xxi (locating al Qaeda's role within the movement).

The following sketch necessarily oversimplifies matters, but it suffice for the purpose of emphasizing these distinctions. "Salafism," Khaled Abou El Fadl writes, "is a creed founded in the late nineteenth century by Muslim reformers" who contended that "on all issues, Muslims ought to return to the original textual sources of the Qu'ran and the Sunna (precedent) of the Prophet."[57] According to El Fadl, it was not an anti-modernist or reactionary creed at that time,[58] but became so over time as it converged with Wahhabism to form what El Fadl describes as the "puritan" strain of Islamic thought.[59] Wahabbism originated with the writings of Muhammad bin 'Abd al-Wahhab, an 18th century evangelist who objected to a wide array of practices and perspectives of the Muslims of his day as incompatible with the original understanding of Islam.[60] Over time – particularly as the result of an alliance between al-Wahhab's intellectual successors and the dynasty that eventually established the Saudi Arabian state – Wahhabism came to be highly-influential.[61]

These influences became significant in the thought of Sayyid Qutb, a mid-20th century Egyptian intellectual whose writings are often cited as foundational to the subsequent emergence of the jihad movement.[62] Qutb's 1964 book *Milestones*, which has been described as the "manifesto of the Salafi jihad and its later global variant,"[63] contended that the Muslim governments of his day were in a state of *jahiliyya*, which is

[57] KHALED M. ABOU EL FADL, THE GREAT THEFT: WRESTLING ISLAM FROM THE EXTREMISTS (2005) 75.
[58] *See id.* at 76-77.
[59] *See id.* at 79-80.
[60] *See id.* at 45-51. El Fadl contends that al-Wahhab was in fact advancing an interpretation of Islam heavily reflective of the strict cultural norms of the Bedouin society of which he was part. *See id.*
[61] *See id.* at 62-74.
[62] *See id.* at 81-83. *See also* ADNAN A. MUSALLAM, FROM SECULARISM TO JIHAD: SAYYID QUTB AND THE FOUNDATIONS OF RADICAL ISLAMISM (2005) (exploring the evolution of Qutb's thought); SAGEMAN, *supra* note 27, at 8-14 (discussing Qutb's influence).
[63] SAGEMAN, *supra* note 27, at 9.

to say that they were not true Muslims.[64] *Milestones* thus provided theological justification for resistance to government authority in Muslim states notwithstanding the injunction against spreading discord (*fitna*) within the community of believers.[65]

There is some dispute regarding the extent to which Qutb's writings endorsed the use of violence to advance that goal. Some describe him as contending that preaching (*dawa*) would not suffice to bring about the restoration of a true Islamic order, and advocating instead that "[s]triving through the use of the sword (*jihad bis sayf*) must clear the way for striving through preaching"[66] and that armed struggle in the name of *jihad* should be understood offensively rather than merely in terms of narrow self-defense.[67] Others describe Qutb as "reluctan[t] to resort to military force."[68] In any event, Qutb's ideas were particularly influential among Egyptian dissident groups in the 1970s, and these groups did indeed embrace the need for immediate armed struggle against the Egyptian government.[69]

In the 1980s, these ideas spread beyond Egypt thanks in significant part to the catalyzing effect of the Soviet invasion of Afghanistan. The Soviet's invasion triggered a call to participate in a relatively traditional form of jihad in that the struggle was defensive in nature, a response to armed aggression by a non-Muslim power against a Muslim state.[70] Thousands from across the Muslim world responded by traveling to

---

[64] FEKRY & NIMIS, *supra* note 56, at xvi.
[65] SAGEMAN, *supra* note 27, at 9-14.
[66] *Id.* at 12 (paraphrasing Qutb's viewpoint).
[67] *Id.* (quoting Qutb's statement that '[i]f we insist on calling Islamic *Jihad* a defensive movement, then we must change the meaning of the word 'defense' and mean by it the 'defense of man' against those elements that limit his freedom").
[68] EL FADL, *supra* note 57, at 86.
[69] *See* SAGEMAN, *supra* note 27, at 14-17. *See also* DANIEL BENJAMIN & STEVEN SIMON, THE AGE OF SACRED TERROR 78 (2003) (noting influence of Qutb on subsequent Egyptian radicals).
[70] BENJAMIN & SIMON, *supra* note 69 at 99 (noting that the call for a defensive jihad against the Soviets "resonated loudly").

Afghanistan to fight as *mujahedin*, and many more contributed through the donation of funds and other resources to the jihadist cause.[71] One did not have to subscribe to Salafism or Wahhabism in order to join the struggle, let alone the substrain of thought that viewed the use of violence as an appropriate means of propagating the true faith. Nonetheless, the conflict provided an unprecedented milieu for circulation of such views – an ideo-theological crucible – while at the same time creating a dense transnational social network connecting a vast body of both fighters and financial backers.[72]

Inevitably, tension emerged between traditionalists (who viewed armed jihad as legitimate against the Soviets in Afghanistan, but were disinclined to turn the network against Muslim governments) and others, such as Ayman al-Zawahiri of Egypt, who were eager to leverage the resources and capacities of the mujahedin network for use against their own governments.[73] The most significant organizer among the jihadists at that time – Sheikh Abdallah Azzam – took the traditionalist view.[74] With financial support from Osama bin Laden, Azzam had founded the *Mekhtab al-Khidemat* (Service Bureau) and other logistical support structures – including training camps – to facilitate the flow of fighters and resources into Afghanistan.[75] In the wake of the Soviet withdrawal, and in keeping with the traditionalist perspective, Azzam's inclination was to turn the jihad infrastructure that had been established – the "base," or *al Qaeda* – toward the support of similar projects aimed at ejecting non-Muslim governments or threats from current or

[71] *See* STEVE COLL, GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001 155 (2004).
[72] SAGEMAN, *supra* note 27, at 18, 34-39. *See generally* COLL, *supra* note 71.
[73] *See* COLL, *supra* note 71, at 203-04; SAGEMAN, *supra* note 27, at 36-37.
[74] *See* COLL, *supra* note 71, at 203-04. *See also* AL-ZAYYAT, *supra* note 56, 69 (observing that Azzam "was not interested in clashing with the Arab governments that supported him").
[75] *See* COLL, *supra* note 71, at 155.

formerly Muslim lands such as Kashmir and Bosnia.[76] But Azzam was killed in a car-bomb explosion in 1989, leaving control of the Azzam's organization, such as it was, largely in the hands of individuals who accepted the necessity for an offensive approach to armed jihad.[77] Bin Laden, who appears to have come around to this less traditional perspective in part through the influence of al-Zawahiri,[78] was perhaps the most significant of these leaders. He eventually seized the reins of the organization.[79]

By the 1990s, the entity that eventually became known as al Qaeda had evolved in several significant ways. First, although it continued its legacy function (tracing back to the *Mekhtab al-Khidemat*) of providing logistical support for the activities of other like-minded groups (through funding, training, and coordination), it also began planning and executing its own operations.[80] Second, it spearheaded a critical doctrinal development in terms of the locus of jihadist efforts. Instead of focusing on the "near enemy" (i.e., allegedly apostate Muslim governments such as the Mubarak government in Egypt), al Qaeda eventually advanced the view that the priority of the jihad movement should be the "far enemy" in the form of the West, particularly the United States, on the theory that local apostate regimes could not be removed so long as they retained the support of Western powers, particularly the United States.[81] Third, al Qaeda clearly asserted the propriety – indeed, the duty – of targeting civilians rather than just government personnel in pursuit of these goals.[82]

---

[76] SAGEMAN, *supra* note 27, at 36.
[77] *Id.* at 37. *See also* COLL, *supra* note 71, at 204.
[78] *See* AL-ZAYYAT, *supra* note 56, 68-69.
[79] *See* COLL, *supra* note 71, at 204.
[80] *See generally* NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, FINAL REPORT ch. 2 (2004) (describing the emergence of al Qaeda in the 1990s).
[81] *See, e.g.,* FEKRY & NIMIS, *supra* note 56, at xvii-xviii.
[82] *See* SAGEMAN, *supra* note 27, at 47; World Islamic Front Statement, *Jihad Against Jews and Crusaders* (Feb. 23, 1998), *in* LAQUEUR, VOICES, *supra* note 46, at 410 (reprinting 1998 fatwa on behalf of al Qaeda

Al Qaeda arguably reached its peak in organizational terms during this pre-9/11 period, maintaining a relatively traditional hierarchical structure and occupying a position at the hub of a network of groups, subnetworks, and individuals subscribing to varying degrees to its ideological perspective. Even at its peak, however, it was never the case that all uses of armed force in the name of jihad could be attributed to it. In any event, al Qaeda's formal structure appears to have degraded since this period as a result of the post-9/11 destruction of its facilities in Afghanistan, the death or capture of substantial numbers of its pre-9/11 leadership and operatives, and the limited ability of remaining members to communicate while remaining at liberty.[83] At the same time, the ideo-theological agenda that al Qaeda advances – including the goal of establishing a pan-Islamic state consistent with Salafist-Wahhabist principles, the necessity of removing American support for secular governments in Muslim states, and the propriety of using violence against civilians – remains a potent force, and has begun to manifest itself in a far more decentralized manner.

Michael Scheuer – formerly the head of the CIA station devoted specifically to bin Laden and al Qaeda – recently warned that "it is . . . vital to understand that [bin Laden] has never claimed that al-Qaeda could achieve this goal by itself. Quite the contrary, he has consistently maintained that al-Qaeda is only the vanguard of the large-scale movement that is needed to achieve this goal."[84] In Scheuer's view, moreover, bin Laden has had considerable success with this strategy. He describes such recent events

---

and four other organizations declaring that killing "the Americans and their allies – civilians and military – is an individual duty for every Muslim who can do it in any country in which it is possible to do it").

[83] *See* James Fallows, *Declaring Victory*, THE ATL. MONTHLY, September 2006.

[84] Michael Scheuer, *Toronto, London, and the Jihadi Spring: Bin Laden as Successful Instigator*, 22 TERRORISM FOCUS 6, 7 (2006), *available at* http://www.jamestown.org/terrorism/news/uploads/tf_003_022.pdf.

as the discovery of the Toronto plot in the summer of 2006 as just the latest examples in a "series of events that now stretch back over three-plus years," each involving militants acting independently of but inspired by al Qaeda in locations ranging from London to Bangladesh.[85] "Today," Scheuer concludes, "the United States and Europe are not only confronted by a still undefeated al-Qaeda, but by an increasing number of Muslims in their own populations who—inspired and religiously agitated by bin Laden—are prepared to pick up arms and spend their lives to act on that inspiration."[86]

This is precisely what Admiral Redd of NCTC meant when he testified to the threat posed by "new networks . . . often made up of disaffected, radicalized individuals who draw inspiration and moral support from al-Qa'ida and other violent extremists," and when he warned that "[w]e have begun to see cells like these here in the United States."[87] It also explains FBI Director Robert Mueller's recent statement that

> the convergence of globalization and technology has created a new brand of terrorism. Today, terrorist threats may come from smaller, more loosely-defined individuals and cells who are not affiliated with al Qaeda, but who are inspired by a violent jihadist message. These homegrown terrorists may prove to be as dangerous as groups like al Qaeda, if not more so. We have already seen this new face of terrorism on a global scale in Madrid, London, and Toronto. We have also witnessed this so-called 'self-radicalization' here at home.[88]

In summary, al Qaeda is representative of but not identical to the ideo-theological movement referred to in this article as (for the sake of convenience) the "global jihad movement." That movement has had many manifestations *other* than al Qaeda over the years, and in the wake of 9/11appears to be more decentralized than had been the case

---

[85] *Id.* at 7-8.
[86] *Id.* at 8.
[87] Redd, *supra* note 40; *See also* Reuters, *U.S. Officials Seeing New Home-Grown Terror Cells*, ABCNEWS.COM, June 14, 2006, at http://abcnews.go.com/US/print?id=2072248 (quoting Senator Biden as stating that "[e]veryone I've spoken to in the intelligence community says there are more cells now in the United States").
[88] FBI Director Robert Mueller, Remarks to the City Club of Cleveland (June 23, 2006), *available at* http://www.fbi.gov/pressrel/speeches/mueller062306.htm.

during the 1990s at the peak of al Qaeda's efforts to orchestrate the activities of its constituent parts. Some aspects of the global jihad movement thus have always been "unaffiliated," and at least in the near term this will tend to be true more and more frequently in cases involving Muslim extremists suspected of involvement in terrorism.

These trends reduce the government's options for incapacitating potentially-dangerous persons in several respects. First, even assuming that military detention of enemy combatants remains a legally and politically viable option for al Qaeda suspects within the United States, the grounds for using that approach with respect to a suspect unaffiliated with al Qaeda are comparatively weak. Second, as Director Redd warned, some instances of unaffiliated terrorism involve U.S. citizens who are not amenable to immigration enforcement as an alternative form of preventive intervention. For both of these reasons, criminal law enforcement is far and away the most plausible option available when the unaffiliated terrorism scenario arises (aside, of course, from the option of remaining in an evidence- and intelligence-gathering mode). But as noted previously, the most useful tools for intervening at the earliest possible stage – § 2339B and § 1705 – by definition have no application in this context. In such cases, DOJ's anticipatory prosecution power instead turns on its capacity to link the suspect directly to the prospect of a future act of violence. That is, DOJ in that context must rely on its capacity to prosecute inchoate crimes. As indicated below in Parts III and IV, the manner in which it has done so presents difficult questions about the outer boundaries of conspiracy and other forms of inchoate criminal liability.

III. Unaffiliated Terrorism and Conspiracy Liability

If a suspected terrorist cannot be charged with providing material support to an FTO or otherwise incapacitated on pretextual grounds, the remaining prosecutorial option is to proceed on an inchoate crime theory based on the harmful conduct that the government anticipates the person might commit. In light of the Justice Department's commitment to prosecution at the earliest possible stage, this raises a question about the scope of inchoate crime liability. Just how early does federal law permit prosecutors to intervene in anticipation of a criminal act?

The answer depends on two closely-related questions of conspiracy liability. First, how specific must an evolving agreement be before it becomes possible to characterize it as a crime? That is, does conspiracy liability attach at the point that discussions become specific as to a particular type of offense to be committed, or is more detail required? Second, even assuming the existence of a sufficiently-specific objective among some individuals, how broadly may the net of conspiracy liability be cast? That is, in what circumstances may persons who are not in direct contact with one another be found to be part of a single conspiracy?

I begin this section with an overview of how these questions would be answered as a matter of what might be described as the "general rules" of federal conspiracy liability, by which I mean to refer to the doctrinal rules that would be applied to prosecutions under the general federal conspiracy statute (18 U.S.C. § 371) and comparable provisions. I then examine how these rules have been applied in the context of terrorism-related conspiracies, using a case study of practice under a particularly-significant statute – 18 U.S.C. § 956 – to examine the extent to which prosecutors have

pushed the envelope since 9/11 with respect to the boundaries of conspiracy liability. Although I conclude that most such prosecutions fit comfortably within the expansive scope of conspiracy liability, there are circumstances involving the global jihad movement in which the limits of that liability at least arguably have been exceeded.

A. The Role of Conspiracy Liability

The concept of conspiracy liability has long had its detractors.[89] Some criticisms are rooted in the procedural and evidentiary advantages that accrue to the prosecution in such cases.[90] Others have more to do with the nature of inchoate crime itself, and in particular with the policy tensions inherent in all preventive prosecution:

> "When a person is seriously dedicated to commission of a crime, a firm legal basis is needed for the intervention of the agencies of law enforcement to prevent its consummation. In determining that basis, there must be attention to the danger of abuse; equivocal behavior may be misconstrued by the unfriendly eye as preparation to commit a crime. It is no less important, on the other side, that lines should not be drawn so rigidly that the police confront insoluble dilemmas in deciding when to intervene, facing the risk that if they wait the crime may be committed while if they act they may not yet have any valid charge."[91]

These tensions are particularly acute in the context of terrorism prevention. There, the stated preference for intervention at the earliest possible stage may lead prosecutors to act in circumstances in which the evidence is less well-developed than might otherwise be the case, thus exacerbating the prospects both for false positives and, possibly, false negatives (*i.e.*, unsuccessful prosecutions of individuals who are in fact dangerous).

---

[89] *See, e.g.,* Krulewitch v. United States, 336 U.S. 440, 446 (1949) (Jackson, *J.*, concurring) (contending that the "modern crime of conspiracy is so vague that it almost defies definition," and cataloguing pro-government aspects of the doctrine); WAYNE R. LAFAVE, CRIMINAL LAW 616 (4th ed. 2003) (arguing that "the vagueness stems from . . . [among other things,] the uncertainty over what is sufficient to constitute the agreement and what attendant mental state must be shown").

[90] For a review of these advantages, *see Krulewitch*, 336 U.S. at 453; AMERICAN LAW INSTITUTE, MODEL PENAL CODE, § 5.03, Comment 1, p.389.

[91] MODEL PENAL CODE, Comment to Article 5 293-94 (1985).

Accordingly, it is important to understand precisely how early it is that conspiracy law permits prosecutors to act.

In general, the point of potential intervention arises sooner with respect to conspiracies than it does when a single individual is involved.[92] Whereas an individual becomes liable for attempt only where his or her intent to commit an unlawful act is joined with conduct that constitutes a substantial step toward completion of that act,[93] conspiracy liability typically attaches the moment that such intent is joined simply with an agreement formed among two or more individuals to achieve that purpose.[94] Some statutes also require commission of an overt act in furtherance of that goal, but even when this is so the overt act requirement does not require conduct rising to the level of the substantial-step standard associated with the law of attempt. Thus, prosecutors in the conspiracy context in theory may intervene at a very early stage: if not at the moment the conspiratorial agreement is struck, then soon thereafter when an overt act takes place.

Determining precisely when that intervention point has arrived is not, however, a simple matter. The problem is not simply that the agreement may be reached implicitly rather than overtly.[95] In practice, the agreement is not always "struck" at a discrete point in time. In some instances, the agreement instead comes into being organically over time via a sequence of communications and interactions, a process that may prove to be

---

[92] *Cf.* Peter Buscenni, Note, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1122 n.5 (1975) (observing that conspiracy in general provides "an opportunity for earlier intervention" than attempt, which typically requires evidence of a much greater degree of progress toward completion of the contemplated criminal act).

[93] MODEL PENAL CODE, *supra* note 90, at § 5.01(1)(c).

[94] "As an inchoate crime, conspiracy fixes the point of legal intervention at agreement to commit a crime, or at agreement coupled with an overt act which may, however, be of very small significance." *Id.* at § 5.03, comment 1, p. 387.

[95] As one treatise has observed, "[t]here are few, if any criminal conspiracies in which a writing sets forth the terms of the agreement." Mark Pomerantz & Otto G. Obermaier, *Defending Charges of Conspiracy*, *in* WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES (Otto G. Obermaier and Robert G. Morvillo, eds.) § 4.02[1], 4-14 (2006)

particularly common in connection with the global jihad movement. The issue of how soon conspiracy law lets prosecutors intervene thus depends in the first instance on the standard the law provides for recognizing that such interactions have evolved to the point at which an actionable agreement has been formed. That is, the law must have some means to distinguish between interactions that are too indefinite or indeterminate – and thus too preliminary – to constitute a conspiratorial agreement, and those with sufficient detail for liability to attach.

Relatedly, the law also must distinguish between situations involving an individual but sprawling conspiracy and those involving closely-related but distinct conspiracies. This is particularly important where a sufficiently-specific agreement clearly exists as to one set of individuals, but the question is close as to others who are not in direct contact with the former group. In the pages that follow, I identify the "general rules" governing both of these questions, and consider the extent to which they hold true for terrorism prosecutions.

B. The "General Rules" Regarding the Scope of Conspiratorial Agreements

It is conventional to describe the scope of a conspiracy as consisting of two elements: the "party dimension" and the "object dimension."[96] The former refers to the determination of which individuals are party to an alleged agreement, though in some contexts this also becomes an inquiry into whether there are multiple conspiracies or just one overarching agreement.[97] The latter ordinarily refers to the determination of which goals count as the objects of the particular agreement in question, with difficulties arising either when (i) the asserted object is clearly identified but is not clearly within the

[96] WAYNE R. LAFAVE, 2 SUBSTANTIVE CRIMINAL LAW § 12.3(b) (2d ed. 2003).
[97] *See id.* § 12.3(b)(2).

substantive scope of the conspiracy statute or (ii) it is unclear just what it is, if anything, that the alleged conspirators have agreed to do.[98] These inquiries are, of course, interrelated.

1. Identifying the Parties to the Agreement(s)

Difficult questions arise when prosecutors seek to extend conspiracy liability to a group of individuals not in direct contact with one another, particularly where the defendants can plausibly argue that distinct conspiracies are in issue. This subject is much-discussed in the literature, and usually is framed as an inquiry into the scope of two structural models:

> (1) the so-called "wheel" or "circle" conspiracy, in which there is a single person or group (the "hub") dealing individually with two or more other persons or groups (the "spokes"); and (2) the "chain" conspiracy, usually involving the distribution of narcotics or other contraband, in which there is successive communication and cooperation in much the same way as with legitimate business operations between manufacturer and wholesaler, then wholesaler and retailer, and then retailer and consumer.[99]

Both models can involve individuals who are not in direct contact with one another but who may nonetheless be found to be part of a single conspiracy in light of their shared understanding of and intent to participate in the overarching plan or scheme. As between the two, it is the wheel model that "is by its nature less likely to support the conclusion that the parties had a community of interest."[100] Even in that context, however, courts have proved willing to cast a wide net in defining the extent to which the separate spokes may be said to be involved in a single conspiracy via the intermediation of the hub.

---

[98] *See id.* § 12.3(b)(1).
[99] LAFAVE, *supra* note 96, at 293. The models can, of course, be combined. *See, e.g.,* McCormack, *supra* note 26, at 11 (discussing chain-wheel conspiracy).
[100] LAFAVE, *supra* note 96 at 295.

In *United States v. Baker*, for example, the 11th Circuit acknowledged that "[w]hen a charged conspiracy centers around a central organizer or organizers . . . the Government must establish that a given defendant was party to that central conspiracy, rather than to a separate and uncharged conspiracy with one of the organizers."[101] But "the defendant need not participate in all the activities forming the larger conspiracy, so long as he is aware of the general scope and purpose of the conspiratorial agreement."[102] The critical issue, the court concluded, is "whether the different sub-groups are acting in furtherance of one overarching plan."[103] Thus the various distribution chains in a narcotics prosecution can be said to be part of a single conspiracy, despite their limited-to-nonexistent contact with one another, where the participants in one spoke-chain know or should know of the existence of others acting in furtherance of the common enterprise.[104] In contrast, where an individual (the "hub") repeatedly engaged in loan fraud under the National Housing Act on behalf of a variety of other individuals who were unaware of one another and who had no reason to presume one another's existence, the Supreme Court concluded that the several instances did not constitute a single conspiracy because "[t]here was no drawing of all together in a single, over-all comprehensive scheme."[105]

2. Identifying the Objects of the Agreement(s)

Assuming for the sake of argument that only a single potential conspiracy is in issue, a separate question arises as to when preliminary interactions evolve to the point

[101] 432 F.3d 1189, 1232 (2005) (citing Kotteakos v. United States, 328 U.S. 750, 755 (1946)).
[102] *Id.* (citations omitted).
[103] *Id.* (citation and internal quotation marks omitted).
[104] *See* LAFAVE, *supra* note 96, at § 12(b)(2), at 294-95 & n. 74 (discussing examples of United States v. Bruno, 105 F.2d 921 (2d Cir.), *rev'd on other grounds*, 308 U.S. 298 (1939), and United States v. Borelli, 336 F.2d 376 (2d Cir. 1964)).
[105] Blumenthal v. United States, 332 U.S. 539, 558 (1947) (commenting on *Kotteakos*, 328 U.S.750)).

that a cognizable agreement can be said to exist. Most conspiracy statutes – including the general federal conspiracy provision, 18 U.S.C. § 371 – are silent regarding the issue of agreement specificity, leaving the issue to be worked out in the caselaw. Unfortunately, opinions addressing the point are surprisingly few and far between. This probably reflects the fact that most conspiracy prosecutions are not truly preventive in nature, and thus provide little occasion for inquiries into this aspect of the agreement element; typically, defendants allegedly have completed or at least attempted to carry out the objective of the conspiracy before they are prosecuted, leaving little room to raise questions regarding the specificity of the alleged objective. Nonetheless, the question has arisen from time to time, and courts have been reasonably clear and consistent in resolving it. As the cases discussed below illustrate, the general rule is that an agreement is sufficiently specific for conspiracy liability to attach when the conspirators concur as to the type of offense to be committed, even if the details of execution – where, when, and how the offense will be committed – are yet to be determined.

a. Agreement as to the Type of Offense – a Necessary Condition?

A pair of Second Circuit cases illustrates the point that an agreement must at least be specific as to the type of illicit objective to be achieved in order for conspiracy liability to attach. In *United States v. Gallishaw*,[106] the Second Circuit reviewed the conviction of Ernest Gallishaw for conspiring to rob a federally-insured bank. The evidence at trial demonstrated that Gallishaw had provided an automatic weapon to a group of men who subsequently robbed a bank. Gallishaw had not participated directly in the robbery, though his gun was used during the crime. A witness at trial testified that Gallishaw had been told at the time he handed over the gun that it would be used for the "bank job" or,

[106] 428 F.2d 760, 762 (2d Cir. 1970).

failing that, to "pull some other job." During deliberations, the jury requested additional instruction with respect to whether Gallishaw could be found guilty if the jury concluded that he did not know the use to which the gun would be put. The trial judge's answer: they could convict Gallishaw so long as he knew that "there was a conspiracy to do something wrong and to use the gun to violate the law."[107]

That ruling suggested a particularly low-threshold for the level of specificity required in order for a conspiratorial agreement to exist: knowledge of a general unlawful intent on the part of others would suffice. And Gallishaw duly was convicted. The Second Circuit vacated and reversed, however, ruling that the trial judge had misstated the law. A conspirator, the Second Circuit explained, must at least "know what kind of criminal conduct was in fact contemplated."[108]

A similar result occurred in *United States v. Rosenblatt*,[109] a case which involved the prosecution of Rabbi Elyakim Rosenblatt for his role in an alleged conspiracy to defraud the federal government. Rosenblatt's alleged co-conspirator, Morris Brooks, had taken advantage of employment at the headquarters of the Manhattan Postal Service in order to fraudulently induce the government to issue eight checks worth more than $180,000. Brooks then obtained Rosenblatt's assistance in laundering the money. Critically, however, Brooks did not admit to Rosenblatt that he had defrauded the government to obtain the checks. Instead, he told Rosenblatt that the checks were issued legitimately but that laundering was needed in order to enable the payees to avoid tax obligations and to conceal the fact that some checks had been issued as part of a kickback

[107] *Id.* at 762.
[108] *Id.* at 763 n.1.
[109] 554 F.2d 36 (2d Cir. 1977).

scheme.[110] In short, by agreeing to assist Brooks, Rosenblatt intended to facilitate illegal acts, but not the same illegal acts actually committed by Brooks. Rosenblatt nonetheless was convicted under the general conspiracy statute, 18 U.S.C. § 371, for conspiring to defraud the United States.[111]

The Second Circuit again reversed. Rosenblatt and Brooks had a meeting of the minds at one level of generality in that they had agreed to cooperate in a course of fraudulent conduct, but they lacked agreement at a more specific level because Brooks had misled Rosenblatt regarding the nature of the offense to be committed. As the Second Circuit framed the issue, the matter thus turned "on the degree of specificity that is required as to the agreement."[112] The court concluded that the degree of agreement in this instance was too generalized to support liability.[113] "[I]t is clear," the court explained, "that a general agreement to engage in unspecific criminal conduct is insufficient to identify the essential nature of the conspiratorial plan."[114] In conclusion, the court stated, "just as the particular offense must be specified under the 'offense' branch" of § 371, so too "the fraudulent scheme must be alleged and proved under the conspiracy-to-defraud clause."[115]

Gallishaw and *Rosenblatt* stand for the proposition that agreement as to the particular type of offense to be committed is a necessary condition for conspiracy liability to attach.[116] But they leave open the question whether that level of agreement also counts

---

[110] *See id.* at 37-38.
[111] *See id.* at 37.
[112] *Id.* at 38.
[113] *Id.*
[114] *Id.* at 39.
[115] *Id.* at 42.
[116] *See also* United States v. Provenzano, 615 F.2d 37, 44 (2d Cir. 1980) (requiring agreement to "commit a particular offense and not merely a vague agreement to do something wrong").

as a *sufficient* condition, or if instead prosecutors also must prove agreement regarding the at least some of the details of executing the objective, such as method, time, or target.

b. Agreement as to Type of Offense –a Sufficient Condition?

It is "axiomatic in the law of conspiracy," one court has written, "that all of the defendants need not have knowledge of all of the details of the conspiracy" in order for liability to attach.[117] Instead, "[t]o sustain [a] conspiracy conviction, there need only be a showing that [the] defendant knew of the conspiracy's purpose," in addition of course to evidence that the defendant agreed to and intended the achievement of that purpose.[118] But does it suffice if the defendant's understanding of the purpose is limited to the category of offense to be committed and does not include any particulars with respect to the particular target of the offense, the date it will be attempted, or the manner in which it will achieved?

Williamson v. United States,[119] an early-20th century decision of the Supreme Court, suggests that agreement as to the particulars of the offense to be committed is not required above and beyond agreement as to the nature of the offense itself. In that case, the Court upheld the conviction of John Newton Williamson, who while a member of the House of Representatives had been indicted for conspiracy to suborn perjury.[120] Prosecutors had alleged that Representative Williamson was involved in a plot to have numerous individuals make false statements in order to obtain public lands in Oregon which then would be transferred to the control of the conspirators.[121] Williamson

[117] United States v. Krasner, 841 F. Supp. 649, 659 (M.D. Pa. 1993) (citing United States v. Janotti, 729 F.2d 213 (3d Cir. 1984); United States v. Sophie, 900 F.2d 1064 (7th Cir. 1990)). *See also* United States v. Whittington, 26 F.3d 456, 465 (4th Cir. 1994) (same).
[118] Whittington, 26 F.3d at 465 (quoting United States v. Collazo, 732 F.2d 1200, 1245 (4th Cir. 1984)).
[119] 207 U.S. 425 (1908).
[120] *See id.*
[121] *See id.*

objected that the conspiracy charge was fatally defective in that the government had neither pled nor proved that the conspirators knew whom they would ask to make such false statements, nor when they would do so.[122] The Supreme Court rejected this argument, stating that "all that is requisite in stating the object of the conspiracy" is "a common intent, sufficient to identify the offense which the defendant conspired to commit."[123] "It was not essential to the commission of the crime," the Court explained, "that in the minds of the conspirators the precise persons to be suborned, or the time and place of such suborning, should have been agreed upon."[124]

The Court reached a similar conclusion eleven years later in *Frohwerk v. United States*.[125] It is a decision far more well-known for Justice Holmes' much-criticized determination that the First Amendment did not protect the publishers of a German-language newspaper espousing anti-war sentiments from conviction on charges of conspiring to interfere with military recruiting, but Frohwerk had not appealed his conviction on First Amendment grounds alone. He also had argued in the alternative that the conspiracy charge against him was deficient for lack of specificity. In particular, he argued that the government failed to plead the means by which the conspiracy's objective (to disrupt military recruiting) was to be carried out. Holmes was unpersuaded. A "conspiracy to obstruct recruiting," he wrote, "would be criminal even if no means were agreed upon specifically by which to accomplish the intent."[126]

---

[122] *Id.* at 447.
[123] *Id.*
[124] *Id.* at 449.
[125] 249 U.S. 204 (1919).
[126] *Id.* at 209. A similar sentiment appears as dicta in a similar case from that era, *Pierce v. United States*, where the Court stated that a conspiracy "is none the less punishable because the conspirators fail to agree in advance upon the precise method in which the law shall be violated." 252 U.S. 239, 244 (1920).

These sentiments reappeared in 1947's *Blumenthal v. United States*,[127] where the Court held that defendants may be convicted of conspiracy only "upon showing sufficiently the *essential nature* of the plan" and the defendants' "connections with it, without requiring evidence of knowledge of all its details or of the participation of others."[128] Noting that "[s]ecrecy and concealment are essential features of successful conspiracy," Justice Rutledge explained that the rule could not be otherwise in light of the practical difficulties that an alternative rule would impose.[129]

These decisions suggest two closely-related propositions. First, and most clearly, an individual defendant may be liable for conspiracy even without knowledge of the particulars of how a conspiratorial objective is to be achieved. That rule is clearly stated in *Blumenthal*, and has been extensively restated in the lower courts.[130] Might it nonetheless be necessary, though, for the prosecution to prove that the agreement did become focused with respect to at least some details of execution, regardless of the state of knowledge of any one individual defendant? It would seem unlikely, in light of the first rule, and in any event *Williamson* and *Frohwerk* reject that possibility.

3. Summarizing the General Rules

The preceding discussion suggests a set of three rules that help to define the scope of conspiracy liability. First, the alleged agreement must have evolved to the point of

---

[127] 332 U.S. 539, 557 (1947).

[128] *Id.* at 557 (italics added) (citing Marino v. United States, 91 F.2d 691 (9th Cir. 1937); Lefco v. United States, 74 F.2d 66 (3rd Cir. 1934); Jezewski v. United States, 13 F.2d 599 (6th Cir. 1926); Allen v. United States, 4 F.2d 688 (7th Cir. 1925). *See also* Williamson v. United States, 19 F.2d 801 (1st Cir. 1927) (upholding jury instruction that "[i]t is enough if a man, understanding that there is a crowd banded together to break the law, knowing in a general way what the purposes of the crowd are in that respect, becomes a member of it and acts with them to a greater or lesser extent.").

[129] *Id.*

[130] *See, e.g.,* United States v. LaSpina, 299 F.3d 165, 176 (2d Cir. 2002) ("The conspirators had agreed to launder the proceeds of the scheme" in violation of federal law, and thus "did not have to agree further on the details of each transaction in furtherance of that objective").

becoming specific as to the type of offense to be committed. Second, there is no need to prove that the agreement evolved further to the point of specifying the details of executing the offense, such as the intended victim or target, the date of the offense, or the persons, methods, and materials to be used in carrying out the offense. Third, individuals who are not in direct contact with one another, nor even actually aware of one another, nonetheless may be deemed to be part of a single conspiracy where they understand that they are part of a single, overarching plan and where they know or should know that others must also be part of the plan in order for it to be achieved. Going forward, I shall refer to these as the "general rules" regarding agreement specificity.

C. Terrorism Conspiracies

The general rules permit prosecutors to intervene at a relatively early stage in the planning process, and in doing so to cast a broad net of liability. Both qualities are conducive to the goal of maximizing anticipatory prosecution in the terrorism context. Assume for example that the FBI is monitoring the activities of two individuals known to support the goals of the global jihad movement. If those individuals can be shown to have agreed to carry out a truck-bomb attack, prosecutors have the option of intervening at that point without having to await evidence that the suspects have chosen a particular target or have begun assembling explosives. Even if the fact pattern is modified such that there is one cell involved in constructing the bomb while another is strictly responsible for financing the project, the entire group may yet be subject to prosecution for the single conspiracy.

What would happen, however, if the suspects are not directly linked to any particular plot? Might prosecutors nonetheless be able to bring a conspiracy prosecution

based on the involvement of the defendants in the affairs of an FTO or even the global jihad movement itself? The answers to these questions define the outer limits of conspiracy liability in the terrorism context.[131]

1. Core Applications of the General Rules in Terrorism Cases

There is no single federal statute criminalizing "terrorism" as such. Rather, there are a wide variety of violent crime provisions that concern conduct that may be viewed as terrorism in certain circumstances.[132] Most of these statute provide directly for conspiracy liability,[133] sparing prosecutors the need to rely instead on the general conspiracy statute (18 U.S.C. § 371) and thus permitting much higher maximum sentences.[134] But with one potential exception, they are comparable to § 371 in that nothing in their text arguably calls for a departure from the general rules.

The Second Circuit's 1998 decision in *United States v. Salameh*, arising out of the 1993 World Trade Center bombing, illustrates the applicability of the general rules in this context.[135] Approximately seven months after the bombing, a grand jury in the Southern District of New York indicted six individuals on a variety of charges, including conspiracy. In particular, the indictment alleged that the men had formed an agreement to commit at least four offenses: 18 U.S.C. § 33 (using explosives to attack vehicles used in interstate commerce); 18 U.S.C. § 844(d) (transportation of explosives across state

---

[131] The extent to which 18 U.S.C. § 2339A might provide criminal liability in circumstances beyond the scope of conspiracy liability is discussed in Part IV, *infra*.

[132] A representative list of relevant criminal statutes is contained in 18 U.S.C. § 2339A. *See* Appendix A, *infra* (identifying predicate offenses listed in § 2339A).

[133] *See id.* (indicating those that provide directly for conspiracy liability).

[134] *See, e.g.,* 18 U.S.C. § 2332b(c)(1)(F) (providing that the penalty for attempting or conspiring to commit an offense under § 2332b shall be the same as that for the completed offense, entailing penalties up to and including the death penalty); 18 U.S.C. § 844(m) (providing twenty-year maximum sentence for conspiracies to violate § 844(h), which in turn criminalizes the carrying or use of explosives in connection with other felonies). The maximum sentence under § 371 is five years' imprisonment.

[135] For further discussion of the significance of this case as an illustration of conspiracy liability in the terrorism context, see McCormack, *supra* note 26, at 6-7.

lines for purposes of attacking property); 18 U.S.C. § 844(f) (bombing property or vehicles owned by the United States government; and 18 U.S.C. § 844(i) (bombing buildings involved in interstate commerce). At trial, defendant Mahmoud Abouhalima requested a jury instruction to the effect that the government was obliged to prove that he had specifically intended to attack the World Trade Center, as opposed to proving that he had a more generalized intent to carry out attacks against unspecified targets. The trial judge declined to give such an instruction, and the Second Circuit affirmed that decision. "The indictment does not charge the defendants with conspiring to bomb the World Trade Center," the court wrote, but instead with conspiring to "bomb buildings, vehicles and property of the United States" in a general sense.[136] The particular bombing the defendants actually executed certainly constituted an overt act in furtherance of the agreement, but conspiracy liability attached without respect to whether any of the defendants specifically contemplated making the World Trade Center their target; it was enough that they had agreed at a general level to carry out a bombing campaign.[137]

On this understanding of conspiracy liability, prosecutors could have intervened with these same charges if they had known of the plot in advance of the bombing, even if they was uncertainty regarding the particular target to be attacked. Indeed, this resembles what happened in the summer of 2006 in connection with the arrests of the Seas of David defendants in Miami.[138] Among other things, the indictment in *United States v. Batiste* charges that the defendants conspired to violate 18 U.S.C. §§ 844(f) and 844(i), with

[136] United States v. Salameh, 152 F.3d 88, 146 (2d Cir. 1998).
[137] *See id.* *See also id.* at 147-48 (rejecting similar argument that the trial judge had improperly instructed the jury with respect to the requirement that the government prove a defendant's knowledge of the "essential nature of the plan," noting that the instructions spoke clearly in terms of the four types of offenses described as the object of the conspiracy and concluding that this sufficiently "guarded against the possibility that Ajaj would be convicted of merely entering into 'a general agreement to engage in unspecified criminal conduct'") (citations omitted).
[138] *See supra* note 4 and accompanying text.

particular reference to the FBI building in Miami and the Sears Tower in Chicago.[139] *Salameh* makes clear, moreover, that these same charges would have been available even if the defendants had not yet determined which particular buildings they hoped to strike. From that point of view, *Batiste* does not actually represent intervention at the earliest possible point at which conspiracy liability would have attached.

We might think of prosecutions such as *Salameh* and *Batiste* as examples of the relatively-uncontroversial "core" form of anticipatory prosecution made possible by conspiracy liability. But does such liability extend beyond the core?

In the pages that follow, I rely on a particular terrorism-related conspiracy statute – 18 U.S.C. § 956 – as a window onto this question. This makes sense for several reasons. First, as the data provided below will demonstrate, prosecutions under § 956 have played a particularly important role in post-9/11 terrorism cases. Second, the fact patterns in these prosecutions can be grouped in ways that help to illustrate the extent to which post-9/11 conspiracy prosecutions have moved beyond the core scenario described above. Third, § 956 prosecutions also serve as the most common predicate offense for terrorism-related prosecutions under a separate statute – 18 U.S.C. § 2339A – which is the focus of discussion in Part IV, *infra.* Finally, § 956 is unique among the terrorism-related conspiracy statutes in terms of the extent to which its text expressly engages the question of agreement specificity.

2. Origins and Evolution of § 956

Section 956 originally was intended to protect the federal government's control over foreign affairs by regulating the private projection of force outside the United

[139] United States v. Batiste, 06-cr-20373 (S.D.Fla.) (indictment) (on file with author), at 9-10 (Count 3).

States.[140] It originated in 1917 as part of the legislative package generally known as the Espionage Act,[141] enacted in the special session of Congress that included America's declaration of war against the Imperial German Government.[142]

As originally drafted, the statute would have criminalized conspiracies "to injure or destroy property of a foreign government . . . with which the United States is at peace," so long as that property is "situated within a foreign country," the act would be "a felony under the laws of such country," and at least one overt act in furtherance of the conspiracy occurs within the U.S.[143] But this formulation prompted sharp objections during hearings on the bill, on the ground that it might be construed to apply to persons in the U.S. who provided general financial support to overseas independence movements.[144] The version of § 956 eventually enacted reflected a compromise to avoid such a construction, making it a crime for "two or more persons within the jurisdiction of the United States" to "conspire to injure or destroy *specific* property situated within a foreign country and belonging to a foreign Government . . . with which the United States is at peace."[145] Adding additional emphasis, the statute also included a clause at the end providing that "[a]ny indictment or information under this section shall describe the specific property which it was the object of the conspiracy to injure or destroy."[146]

---

[140] Federal criminal law has regulated the private projection of force since the early days of the Republic and the passage of the Neutrality Act. *See* Act of 1794, Revised Statutes 5281-91 (Title 67), *codified at* 18 U.S.C. §§ 958-962. *See also* Theodore B. Olson, "Application of the Neutrality Act to Official Government Activities," 8 U.S. Op. Off. Legal Counsel 58, 59-65 (Apr. 25, 1984) (discussing origins of the Neutrality Act); Ebenezer R. Hoar, *Neutrality Act*, 13 U.S. Op. Atty. Gen. 177, 178 (Dec. 16, 1869) (same).
[141] Olson, *supra* note 140, at n.9.
[142] Pub. L. No 65-24, 40 Stat. 217, 65th Cong., First Session (June 15, 1917).
[143] The original proposed text of § 5 (the future § 956) is reprinted in.
[144] *See* H.R. 291, Serial 53-Part 2, 65th Cong., 1st sess., at 57-61 (Apr. 9 and 12, 1917) (Hearing before the House Committee on the Judiciary on the subject of the Act "To Punish Espionage and Interference with Neutrality") (hereinafter "April Hearing"); S.8148, Serial 53, 64th Cong., 2d sess., at 18-26 (Feb. 22, 1917) (DOCE CIS Hrgs MF Gp 1—H170-6) (hereinafter "February Hearing").
[145] Section 5 (italics added).
[146] *Id.*

The original version of § 956 thus included language in its text explicitly requiring prosecutors to plead and prove that the conspiratorial agreement had evolved to the point of targeting specific property. In this respect, § 956 appeared to break with the general rules.

Section 956 prosecutions were few and far between in the ensuing years. The first two reported opinions involving § 956 prosecutions, however, both raised the specificity issue. The first, *United States v. Elliot*,[147] was relatively straightforward, serving mainly to emphasize that § 956 did indeed require a specific target to be identified. The case involved an alleged conspiracy to destroy a railroad bridge in Zambia, with the goal of disrupting copper exports and thus manipulating copper prices.[148] The defendants argued that the case against them failed to satisfy the specificity requirement of § 956 because the government had not been consistent regarding the identity of the particular bridge in issue.[149] The court rejected that argument, finding it sufficient that the most recent indictment specified a single, particular bridge.[150]

The second reported § 956 decision demonstrated a slightly more flexible reading of the specificity requirement. *United States v. Johnson*[151] involved the prosecution of a group of IRA supporters in the United States for conspiring to destroy military helicopters located at the Royal Air Force Station in Aldergrove, Northern Ireland.[152] The defendants moved to dismiss on the ground that § 956 required specificity as to the

[147] 266 F. Supp. 318 (S.D.N.Y. 1966). The defendants in that case unsuccessfully raised a desuetude defense premised on the "apparent absence of any prosecution under the statute since its promulgation in 1917." *Id.* at 325.
[148] *See id.*
[149] *See id.* at 327.
[150] *See id.*
[151] 738 F. Supp. 591 (D. Mass. 1990) (Magistrate's Report and Recommendation).
[152] *See id.* at 591-92.

particular helicopters to be attacked, or at least details as to precisely where and when an attack would occur. The magistrate judge who first considered this argument rejected that interpretation of § 956, citing the legislative history recounted above for the proposition that the specificity requirement was intended primarily to preclude prosecutions based on mere support for dissident organizations which might contribute indirectly to property damage.[153] That goal could be achieved without resort to the level of detail sought by the defendants, and thus the statute did not require that "the property which is the object of the conspiracy to destroy . . . be described in minute detail."[154] It was sufficient, the magistrate judge concluded, that the target in this instance had "been delineated by number, class and location."[155] On appeal, the First Circuit affirmed this holding, and clarified that it applied equally to the proof to be required at trial.[156]

There things stood in 1996,[157] at which point Congress substantially expanded the range of conduct prohibited by § 956 by (1) adding a subsection to the statute extending conspiracy liability to agreements focused on harming people rather than property and (2) modifying the existing statutory text to reduce its specificity requirements.[158] Going forward, the long-standing prohibition against conspiracies to destroy property abroad would be found in subsection § 956(b), while a new, victim-focused provision – criminalizing conspiracies to "kill, kidnap, or maim" persons abroad – became § 956(a).

---

[153] *See id.* at 592.
[154] *Id.*
[155] *Id.*
[156] *United States v. Johnson*, 952 F.2d 565, 575-76 (1991).
[157] The only other pre-1996 case involving a § 956 prosecution was *United States v. McKinney*, 995 F.2d 1020 (11th Cir. 1993), which was similar to *Johnson* in that it involved a § 956 charge against IRA supporters interested in supporting attacks on British helicopters in Northern Ireland, but did not address the specificity issue. *See* Telephone Conversations with Stephen Bronis, attorney for defendant Joseph McColgan, and Fred Haddad, attorney for defendant Kevin McKinley, on July 11, 2006 (stating that the specificity issue was not part of the defense theory at trial and was not otherwise litigated in the case).
[158] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 704 (amending § 956).

At the same time, Congress quietly eliminated some – though not all – of the specificity language that previously had distinguished § 956 conspiracy liability from the general rules.

Congress accomplished this in two ways. First, the new § 956(a) conspicuously lacked any language suggesting that prosecutors must plead or prove the particular target of an agreement to commit a murder, kidnapping, or act of maiming overseas. That omission strongly suggests that the general rules regarding agreement-specificity govern § 956(a) prosecutions, whatever may have been the case with respect to the earlier version of the statute.

Second, the specificity requirements that had long been part of the property-focused version of the statute were partially removed in the new § 956(b) provision. On one hand, Congress removed from § 956(b) the clause that had expressly required that the indictment identify the particular property to be destroyed as the object of the conspiracy. On the other hand, Congress did *not* remove the express reference to "specific property" that also had appeared in the actual definition of the offense. This curious state of affairs probably is best understood as reflecting a congressional intent to retain the target-specificity requirement as an element to be proved by the government at trial, while at the same time removing the heightened pleading standard that the earlier version of § 956 had long imposed with respect to the indictment. Ultimately, however, the question may be moot, or at least of declining significance.

Sections 956(a) and (b) overlap considerably, particularly where terrorism is concerned, because an agreement to blow up or otherwise attack a building or structure (within the scope of § 956(b)) often can simultaneously be characterized as an agreement

to harm people (within the scope of § 956(a)). While the lingering specificity requirement of § 956(b) would present prosecutors with no obstacles where the conspiracy in issue already has come to focus on a specific property as the target, the requirement would require delay if investigators could prove only that the suspects had agreed to carry out an attack on a target to be identified later. Accordingly, we should expect prosecutors seeking to maximize their capacity for early intervention will elect the § 956(a) option when it is available.

In fact, this is precisely what prosecutors have done since the 1996 amendments. As described below in Table 1, there have been six cases involving 20 individual defendants charged directly with violating § 956 during the eight-year period following the addition of § 956(a) to the statute.[159] In every instance, prosecutors have charged § 956(a) rather than § 956(b). For all intents and purposes, then, the scope of conspiracy liability under § 956 today is comparable to that under any other federal conspiracy statute, at least insofar as the general rules are concerned.

TABLE 1 – Section 956 Prosecutions Between 1996 and 2004

Case	Docket and Court	Defendants charged under § 956	Version of § 956	Nature of the Objective(s)	Disposition	Sentence
United States v. Bin Laden	98-cr-1023 (S.D.N.Y.)	• Wadih El Hage • Ali	956(a)	• "kill United States nationals employed by the United States military who were serving in Somalia and on the	• El Hage: dismissed after jury convicted on other	• El Hage: n/a • Mohamad: pending[161]

[159] As I discuss in detail in Part IV, § 956 violations often serve as the predicate offense for prosecutions under 18 U.S.C. § 2339A. In that indirect context, § 956(b) does make the occasional appearance. *See* Part IV, *infra.*

[160] United States v. bin Laden, S(9) 98-cr-1023 (S.D.N.Y.) (ninth superseding indictment), ¶ 15, *available at* http://www.mipt.org/pdf/binLadenetals2-98cr1023.pdf.

		Mohamed		Saudi Arabian peninsula";[160] • "kill United States nationals employed at the United States Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania" • "kill United States civilians anywhere in the world "	charges (resulting in life sentence) • Mohamed: guilty plea	
United States v. Wharton	01-cr-30998 (W.D. La.)	• Curtis Wharton	956(a)	• murder of defendant's wife while in Haiti	convicted	life
United States v. Ahmad	04-cr-301 (D. Conn.)	• Baber Ahmad • Azzam Publications	956(a)[162]	• "murder of the enemies of the Taliban and Chechen Mujahideen"[163]	extradition pending	n/a
United States v. al-Arian	03-cr-77 (M.D. Fla.)	• Sami al-Arian • Ramadan Shallah • Bashir Nafi • Sameeh Hammoudeh • Muhammed al-Khatib • Abd al Aziz Awda • Ghassan Zayed Ballut • Hatem Naji Fariz • Mazen al-Najjar	§ 956(a)	• acts of violence against Israelis and others to facilitate the Palestinian Islamic Jihad's goal of removing Israel from land claimed by Palestinians	• Al-Arian, Ballut, Hammoudeh, Fariz, were acquitted by a jury • The charge remains pending against absentee defendants Shallah, Awda, al-Khatib, Nafi and al-Najjar.	n/a
United States v. Sattar	02-cr-395 (S.D.N.Y.)	• Ahmed Abdel Sattar	§ 956(a)	• acts of violence against Israelis, Americans, and others in furtherance of the goals of the Egyptian Islamic Group	• convicted by jury	• pending
United States v. Hassoun	04-cr-60001 (S.D. Fla.)	• Adham Amin Hassoun	§ 956(a)	• "It was a purpose and object of the conspiracy to advance violent jihad, including supporting, and	• pending	n/a

[161] Ali Mohamad pled guilty to a variety of charges in connection with the East African Embassy bombings in October 2000. *See* Docket Report Entry Oct. 20, 2000 (on file with author). There is nothing in the docket indicating that he has yet been sentenced, however.

[162] The indictment in this case merely cites 18 U.S.C. § 956, without specifying subsection (a) or (b). *See* United States v. Ahmad, No. 04-cr-301 (D. Conn.) (indictment), at 11 (on file with author). The details of the indictment's allegations sound in § 956(a) rather than § 956(b), however, and the affidavit submitted by DOJ in support of a request to extradite Ahmad from the United Kingdom speaks exclusively of homicide, not property destruction. *See* United States v. Ahmad (Affidavit of Robert Appleton, in Support of Request for Extradition of Babar Ahmed), 36-37, *available at* http://www.usdoj.gov/usao/ct/Documents/AHMAD%20extradition%20affidavit.pdf.

[163] Appleton Affidavit, *supra* note 162, at 37.

		• Mohamed Hesham Youssef • Kifah Wael Jayyousi • Kassem Daher • Jose Padilla		participating in, armed confrontations in specific locations outside the United States, and committing acts of murder, kidnapping, and maiming, for the purpose of opposing existing governments and civilian factions and establishing Islamic states under Sharia."[164]		

3. Examining the Boundaries of Conspiracy Liability

Five of the six cases described in Table 7 allege an agreement to use violence against persons outside the United States without any attempt on the part of prosecutors to prove that the agreement was particularized as to the individuals to be harmed, where the harm might occur, when the harm might occur, or how the harm might be inflicted.[165] But these cases do more than reinforce the basic applicability of the general rules to § 956, however. They also raise an important question about the outer boundaries of conspiracy liability in circumstances that arguably are distinct from the core scenario embodied in cases such as *Salameh*. Specifically, they raise the question whether some variation of the "wheel" model of conspiracy liability might be applied to the entire global jihad movement, or at least to some portions thereof, in order to make it possible to prosecute an individual for conspiring to kill people overseas based on proof that the defendant provided various kinds of support to the movement.

United States v. bin Laden, a pre-9/11 case, gave an early indication of the potential breadth of conspiracy liability under § 956(a). To be sure, the charge in that case was firmly grounded in a very specific act of violence: the murder of U.S. nationals

---

[164] United States v. Hassoun, No. 04-cr-60001 (S.D. Fla.) (superseding indictment) (Nov. 17, 2005) ¶ 13 (on file with author).

[165] The sole exception – *United States v. Wharton* – happens not to be a terrorism case at all, nor even a prevention scenario, but instead simply a run-of-the-mill murder-for-hire scenario in which the defendant happened to arrange for the hit to take place in Haiti rather than in the United States. *See* United States v. Wharton, 320 F.3d 526, 529-31 (5th Cir. 2003).

in the 1998 East African Embassy bombings. And the defendants who went to trial in that case were personally involved in that particular attack. In that respect, the *bin Laden* indictment did not even require application of the general rule relating to agreement specificity. But a close look at the indictment's description of the objectives of the § 956(a) agreement shows that they were not limited to those particular bombings, nor – and this is the critical distinction – were they limited to acts in which these defendants might themselves be personally involved. On the contrary, the indictment alleged a range of more-generalized objectives associated with al Qaeda's violent agenda (in addition to those relating to the embassy bombings), culminating in the allegation that the conspiracy's objectives included the killing "United States civilians anywhere in the world."[166]

Even this broad charge was relatively uncontroversial, however, given the personal involvement of the defendants in the East African embassy bombings. In contrast, the four other § 956(a) prosecutions in terrorism-related cases in Table 7 (all post-dating 9/11) depend entirely, or least in significant part, on allegations that link the defendants only indirectly to the violent objective.

a. Conspiracy Liability via Participation in an FTO?

In two of these four cases, the link between the defendants and the violent objective of the alleged § 956(a) agreement is provided by their activities in support of an FTO. In *United States v. Sattar*, for example, defendant Ahmed Abdel Sattar was charged with violating § 956(a) in connection with the violent activities of the Egyptian Islamic Group ("EIG").[167] The indictment did not allege that Sattar was personally

[166] *Bin Laden*, *supra* note 160, ¶ 15.
[167] United States v. Sattar, 02-cr-395 (S.D.N.Y.) (superseding indictment) (on file with author).

involved in any act of violence or anticipated violence, nor that he intended the commission of any particular act of violence in the future. Instead, it alleged that Sattar had acted as an intermediary in communications between imprisoned EIG leader Omar Abdel Rahman and EIG leadership in Egypt. It also alleged, however, that other EIG members had committed violent acts overseas in the past and intended to do so again in the future, and that Sattar in effect had agreed to the fulfillment of these violent objectives.[168]

The theory of liability at work in *Sattar* thus might be characterized as follows. EIG itself is the embodiment of an ongoing agreement among numerous individuals – many of whom have no direct contact with one another – to commit various violent crimes. Some participants are operatives who have engaged or will engage in carrying out violent acts. Others provide leadership. Still others serve various and sundry related purposes, such as Sattar's role in facilitating communications among leadership figures. But all intend to assist the organization in realizing its overarching goals, including the commission of violent acts.[169]

Under the general rules, this is not an implausible analysis. Indeed, it resembles the sort of conspiracy charge that might be brought in connection with a sprawling narcotics operation. In both cases, a particular defendant may be unaware of the identity and specific activities of other persons involved in the overall enterprise, but nonetheless may be said to have conspired with these individuals insofar as they knew or should have

---

[168] *See id.*

[169] When viewed in this light, the theory of conspiracy liability at issue in cases such as *Sattar* sounds very much like conspiracy liability under the Racketeer Influence and Corrupt Organization Act of 1970, better known as "RICO." There have been a handful of cases in which RICO conspiracy charges have been brought alongside of other charges in terrorism conspiracy cases, though in the one such case to go to trial thusfar, the defendants were acquitted. *See, e.g.,* United States v. al-Arian, 02-cr-77 (M.D. Fla.) (docket report) (on file with author).

known that such persons and activities were necessary to the achievement of the entity's purposes. The intermediating role of EIG actually enhances the possibility of finding Sattar to be part of a violent conspiracy, in comparison to a relatively amorphous narcotics network, in that it provides a relatively-formal structure to knit together the intentions and actions of the individuals allegedly involved. Combined with the premises that one need only know the "essential purposes" of the agreement and that the agreement itself need not be specific beyond the nature of the offense to be committed, these considerations suggest that the reach of conspiracy liability extends beyond the core scenario associated with *Salameh*.

The district court in *Sattar* appears to have agreed, at least implicitly. Variations of this issue actually were litigated in the case at least twice. The first occasion involved a challenge to the sufficiency of the indictment, with one defendant contending that the indictment was "defective because it alleges" a conspiracy to murder in violation of § 956(a) "without identifying the 'persons' or 'foreign country' with any specificity."[170] The government responded that it was not obliged to plead or prove such details, and added that it in fact had no intention of trying to prove such details at trial.[171] The court accepted this view. Citing *Salameh* as indirect support, it held that "§ 956(a) does not require that an indictment allege the identities of contemplated victims or the specific location outside the United States where the contemplated killing, kidnapping, or maiming is to occur. . . . Nor are these specific facts an essential element of the crime charged."[172] The court did not also address the question of whether it was appropriate to

[170] United States v. Sattar, 314 F. Supp.2d 279, 303 (S.D.N.Y. 2004).
[171] *Id.* at 304 (citing Oral Argument Transcript 39).
[172] *Id.* at 304.

treat the activities of EIG as a single, ongoing conspiracy of which Sattar was a part, though its conclusion implicitly rejects any objection on that score.

Because that aspect of the decision in *Sattar* addressed only the sufficiency of the indictment, the possibility remained that the Court might nonetheless be persuaded that the government must prove Sattar's knowledge of and assent to such details at trial. But in the same opinion, the court foreclosed that possibility in the course of rejecting a request for a bill of particulars. "[T]he Government is not required . . .," the court wrote, "to prove that any specific persons were killed or kidnapped."[173] The court reaffirmed this holding, moreover, in the face of a post-conviction challenge to the sufficiency of the evidence supporting Sattar's conviction.[174] The *Sattar* decisions thus expressly applied the general rules regarding agreement specificity, while at the same time implicitly endorsing the extension of that approach to a model in which EIG as a whole is treated as a single conspiracy.[175]

To say that a person associated with an FTO might plausibly be prosecuted for conspiring to commit the violent acts that constitute the group's goals, even though not directly involved in planning or executing such acts, is not to say that all such persons necessarily will be convicted on those grounds, however. The more remote the defendant is from the group's violent activities, the more difficult it becomes to prove that the defendant specifically intended those activities to occur. In Sattar's case, the jury was persuaded of his guilt, and he was duly convicted. But in the closely-analogous

---

[173] *Id.* at 318.
[174] United States v. Sattar, 395 F. Supp.2d 79, 98-99 (S.D.N.Y. 2005).
[175] The trial judge in *United States v. al-Arian* appeared to reach a similar conclusion, rejecting a motion to dismiss the § 956(a) charge in that case (premised on the homicidal activities of the Palestinian Islamic Jihad ("PIJ")) with little comment. *See* United States v. al-Arian, 308 F. Supp.2d 1322, 1350 (M.D. Fla. 2004).

prosecution of Sami al-Arian and other defendants for their alleged role in providing fundraising and other logistical support in the United States to Palestinian Islamic Jihad ("PIJ") – on a theory of indirect liability just like that in *Sattar* – the jury acquitted those defendants who went to trial on the § 956(a) charge.[176]

b. Conspiracy Liability via Participation in the Global Jihad Movement?

Does conspiracy liability of this indirect variety also apply in the unaffiliated terrorism scenario? Up to a point, the answer surely is yes. It is not the fact that an FTO has been formally-designated as such that makes it persuasive to describe a participant in its affairs as being part of a broad conspiracy to carry out the group's violent agenda, but rather the evidence of the defendant's intentions and understanding regarding that agenda. Status as an FTO matters in this context only insofar as the label is a proxy for the notion that the entity in issue is relatively organized and hence that it will be relatively easy as a result for prosecutors to demonstrate the nature and scope of the defendant's intentions. Lacking that advantage is not necessarily fatal, however. Even if the defendant is linked to some group or network that has not been formally designated, the available evidence nonetheless may support a finding of participation in a broad, wheel-type conspiracy.

That said, concerns about the scope of conspiracy liability are heightened once one moves beyond the FTO scenario, and particularly where the indirect relationships through which a defendant is linked to violent conduct are defined with reference to the global jihad movement. As described above, the movement is not monolithic. It is, at best, a convenient label for referring collectively to a constellation of groups, networks, and individuals operating in an array of states over many years. Participants in the

[176] Docket Report, *supra* note 169.

movement share an ideo-theological perspective on the propriety of using force to achieve certain goals, but beyond that may be highly disparate. It is convenient, but not accurate, to objectify the movement as such into a sort of all-encompassing uber-FTO.

The two remaining § 956 prosecutions mentioned in Table 7 both arise against the backdrop of these concerns. In *United States v. Ahmad*, for example, a British citizen has been charged with violating § 956(a) in connection with his conduct in creating a set of websites through which he allegedly engaged in fundraising and incitement to violence in support of the global jihad movement in general, including manifestations of that movement in Afghanistan and Chechnya. The indictment frames the case broadly, stating by way of introduction that "fundamentalist Muslim groups" use the term *jihad* to "refer[] to the use of violence . . . against persons or governments that are deemed to be enemies of its proponents," and that "armed conflicts in the geographic areas of Bosnia, Chechnya, Afghanistan and elsewhere" carried on by such groups in the name of *jihad* "have involved murder, maiming, kidnapping, and the destruction of property."[177] Ahmad's activities at times are specifically alleged to have been for the benefit of the Taliban – making the indictment partially akin to the FTO-oriented § 956(a) charges at issue in *Sattar* and *al-Arian* – but at other times are alleged to have been directed toward the benefit of the broader jihad movement, particularly as it manifested in Chechnya.[178]

[177] *Ahmad* Indictment, *supra* note 162, at ¶ 6.

[178] An affidavit filed by DOJ in support of an extradition request for Ahmad summarizes the basis for the § 956(a) charge as follows: "AHMAD engaged in his efforts with an understanding that it was in support of the murder of the enemies of the Taliban and Chechen Mujahideen. . . . AHMAD's participation in this agreement, and his understanding of the goals of these terrorist organizations, is confirmed through the evidence obtained from AHMAD's residence and work space. . . . Further, AHMAD possessed classified U.S. Naval information and a document which discussed the vulnerabilities of the Naval battle group to an attack." Appleton Affidavit, *supra* note 162, at 37.

United States v. Hassoun, a once-obscure case that grabbed headlines when it became the vehicle for the civilian prosecution of Jose Padilla,[179] is framed in similar terms. The civilian criminal charges against Padilla do not turn on the dramatic allegations – involving plots to detonate a dirty bomb or to set off natural gas explosions in high-rise apartment buildings – that were publicized during the course of his military detention.[180] Indeed, the indictment does not actually allege that Padilla or his co-defendants were involved with al Qaeda as such, nor with any particular violent plots. Instead, the co-defendants are depicted as being a "support cell" for the global jihad movement in general, engaging in recruiting and other logistical support activities, and Padilla himself is described as one of their recruits.

As in *Ahmad*, the indictment in *Hassoun* begins with an evocation of the global jihad movement: "There existed a radical Islamic fundamentalist movement dedicated to the establishment of a pure Islamic state . . . governed by strict Islamic law . . . . Followers and supporters of this movement adhered to a radical Salafist ideology that encouraged and promoted 'violent jihad.'"[181] According to the definition offered in the indictment, "violent jihad" includes "planning for, preparing for, and engaging in, acts of physical violence, including murder, maiming, kidnapping, and hostage-taking."[182] The indictment notes that al Qaeda and a number of other groups espouse this view and carry

[179] Padilla had been held for a number of years as a military detainee on the ground that he was an al Qaeda operative dispatched to the U.S. to carry out terrorist attacks. The legality of his detention recently had been upheld by the Fourth Circuit Court of Appeals, though on the distinct ground that Padilla allegedly had carried arms for al Qaeda in Afghanistan at the time of the U.S. invasion in fall 2001. *See* Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005). While Padilla's petition for *certiorari* was pending in the Supreme Court, however, the government moved to transfer Padilla back to civilian custody for prosecution as a co-defendant in *Hassoun*. *See* Yin, *supra* note 22.

[180] *See* Remarks of Deputy Attorney General James Comey Regarding Jose Padilla (June 1, 2004) (describing allegations), *available at* http://www.usdoj.gov/dag/speech/2004/dag6104.htm.

[181] United States v. Hassoun, 04-cr-60001 (S.D. Fla.) (superseding indictment) (Nov. 17, 2005), ¶¶ 1-5.

[182] *Id.*

out violent acts in pursuit of it, but it does not allege that the defendants' conduct was limited to any one such group. Rather, it alleges that the "defendants . . . operated and participated in a North American support cell that sent money, physical assets, and mujahideen recruits to overseas conflicts for the purpose of fighting violent jihad. This North American support cell supported and coordinated with other support networks and mujahideen groups waging violent jihad.[183]

This description of the global jihad movement has the virtue of accurately distinguishing between al Qaeda itself and the broader movement of which it and other groups are a part, and also of reflecting the related reality that the organizational affiliations of some participants in that movement are not limited to one specific group or even identifiable at all. But this virtue has the potential to be a vice insofar as the scope of conspiracy liability is concerned. It runs the risk of portraying the entire movement as one giant agreement to commit murder and mayhem, making every single adherent around the world a potential § 956(a) conspirator.

Post-indictment developments in *Hassoun* have shown this concern to be well-founded. In the late spring of 2006, defendant Adham Amin Hassoun moved for a bill of particulars with respect to the § 956(a) charge against him, among other things. Arguing that he "cannot defend against" the § 956(a) charge "without knowing *who* were the actual or intended victims of the alleged conspiracy,"[184] Hassoun requested information including the "time, place, and nature of all acts of murder, kidnapping, or maiming which were committed, or which were intended or planned to be committed, as part of

[183] *Id.*
[184] *Id.* at 27.

the conspiracy" and the "name of all persons who were the actual or intended victims."[185] Eventually, this request came before the court for oral argument, at which time prosecutors offered to identify broad categories of victims, though in keeping with the general rules they did not offer to identify specific individuals. The court incorporated this offer into an order partially granting Hassoun's motion,[186] and the government subsequently provided the following "clarification":

> [T]he defendants herein were part of a larger radical Islamic fundamentalist movement that waged "violent jihad" by opposing governments, institutions, and individuals that did not share their view of Islam or their goal of reestablishing a Caliphate. As it pertains to this case, these defendants supported violence, including murder, maimings and kidnappings, committed by mujahideen groups operating in various jihad theaters around the world. Specifically, the violent Islamist groups in Egypt, Algeria, Tunisia, Libya, Somalia, Afghanistan, Tajikistan, Chechnya, Bosnia and Lebanon.
>
> In some of these theaters, such as Afghanistan, Bosnia and Chechnya, and Tajikistan their violence was directed mainly towards existing central government regimes they believed were oppressing Muslims and resisting the establishment of strict Islamic states. Therefore, they engaged in armed confrontations, including murders, maiming, and kidnappings, against Serbian and Croat forces in Bosnia, Russian forces in Chechnya and Tajikistan, and opposing Muslim forces in Afghanistan during the civil strife that ensued after the Russian forces withdrew in 1989. In other theaters such as Egypt, Algeria, Libya, Somalia, and Tunisia, they supported the violent Islamist groups and factions committing acts of murder, maiming, and kidnapping against leaders, members, and supporters of what they viewed as apostate regimes, including other Muslims.[187]

This "clarification" of the indictment demonstrates that the § 956(a) charge in *Hassoun* rests at least in part on the proposition that the global jihad movement is a single overarching agreement involving the use of violence by a vast array of groups and individuals around the world, in furtherance of a revolutionary political agenda with both

[185] United States v. Hassoun, 04-cr-60001 (S.D. Fla.) ("Defendant Hassoun's Motion for Bill of Particulars and Incorporated Memorandum of Law") (Feb. 13, 2006), at 3 (on file with author).
[186] *Id.* (italics added).
[187] Letter from Russell R. Killinger, Assistant United States Attorney, to Kenneth Schwartz and Jeanne Baker (July 7, 2006) at 1-2, attached to United States v. Hassoun, 04-cr-60001, Defendant Hassoun's Motion for Clarification of Court's Ruling as to What Government Must Particularize Regarding the "Manner and Means" of the Conspiracy (July 25, 2006) (on file with author).

global and parochial goals. Notwithstanding the ample scope of liability provided by the general rules, this approach overstates the bounds of conspiracy liability. And it does so unnecessarily.

The problem is not that Padilla and his co-defendants cannot properly be prosecuted under § 956(a). They can be, on a more narrowly-conceived understanding of the scope of their intentions and agreements. As noted above, wheel-type conspiracies can be defined in very broad terms, enabling prosecutors to establish a common agreement among individuals who may not be directly related. If a jury can be persuaded that these defendants mutually agreed to engage in conduct that they intended would produce violent acts overseas, they are liable notwithstanding the lack of evidence showing that they intended to support a particular FTO or cause a particular attack to occur. But it is important that the court police against the prospect of an unbounded definition of the agreement that would bring within its scope quite literally the entire swath of conduct associated with the global jihad movement.

In the final analysis the outer boundaries of conspiracy liability remain necessarily indeterminate, as they ultimately turn on the particulars of what specific individuals intended and agreed to accomplish. It is clear, however, that conspiracy charges have a tremendous capacity to support anticipatory prosecution. Prosecutors need not show that the agreement in issue has evolved beyond the point of specifying a type of offense, and may cast a broad net in identifying the persons whose illicit intentions and grasp of the essential nature of the agreement's objectives make them parties to it. But that broad net must have limits. Unaffiliated terrorism prosecutions premised on a defendant's involvement with the global jihad movement, defined

artificially in quasi-organizational terms, pose a particular threat in that regard. Courts must proceed with caution when considering the viability of such charges, their evidentiary and other collateral consequences, and the jury instructions that they require, lest the floodgates open to an essentially uncabined form of conspiracy liability.

Taking a cautious approach with the scope of conspiracy statutes such as § 956(a) in any event will not unduly hamper the government's anticipatory prosecution options. Quite apart from the fact that conspiracy liability would still be quite capable of providing grounds for prosecuting those who collaborate with others while intending to cause violent acts to occur, conspiracy charges are not the only alternative available to prosecutors in the terrorism scenario, unaffiliated or otherwise. Indeed, conspiracy charges are not even the most capacious option. That honor goes instead to 18 U.S.C. § 2339A, the subject of the next section.

IV. Section 2339A and the Scope of Anticipatory Prosecution

Section 2339A, like its close cousin § 2339B, is a statute that prohibits the provision of "material support or resources" in certain circumstances. But unlike the FTO-oriented § 2339B, § 2339A does not turn in any way on the identity of the recipient. Perhaps for this reason, § 2339A charges have been common in unaffiliated terrorism cases since 9/11, more so than conspiracy charges under § 956 and comparable statutes. One cannot appreciate the full extent of the government's anticipatory prosecution power without understanding the utility of § 2339A for that purpose.

A. An Overview of § 2339A and Its Use Since 9/11

Section 2339A states:

> "Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing

> or intending that they are to be used in preparation for, or in carrying out, a violation of . . . [any of 46 separate predicate crimes] . . . or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life."[188]

With only a few arguable exceptions, the 46 predicate offenses upon which § 2339A liability depends are not *necessarily* terrorism crimes.[189] They certainly describe conduct that might be characterized as terrorism depending upon the perpetrator's motivations, however. As detailed in Appendix A, the predicate offenses cover conduct ranging from the manufacture, possession, or transfer of weapons of mass destruction to the use of violence against various categories of persons and properties both within the United States and abroad, and even include certain computer hacking offenses.[190] The list of predicates does not include the general federal conspiracy statute (18 U.S.C. § 371), but it should be noted that a full 35 of the 46 offenses provide for conspiracy liability in their own right. Indeed, one of them – the ubiquitous § 956 – provides for liability only on that basis.[191]

A close review of charging patterns in post-9/11 terrorism prosecutions makes clear that prosecutors have frequently relied on § 2339A and have met with considerable success in doing so. Appendix B reports the results of a survey of all § 2339A prosecutions initiated during the three-year period from September 2001 through September 2004.[192] During that period, § 2339A was charged a total of 46 times (including attempts and conspiracies to violate § 2339, as well as "completed" violations)

---

[188] 18 U.S.C. § 2339A(a).
[189] *See id.*
[190] *See* Appendix A.
[191] This would seem to preclude any argument that Congress did not intend § 2339A to be used in connection with conspiracy-based violations of the predicate offenses.
[192] This data set has not previously been published.

against 23 individual defendants in 14 separate cases.[193] Not surprisingly, the charge has been particularly important in cases where there does not appear to be an FTO link that would support a § 2339B charge; of the 23 defendants charged with one or more violations of § 2339A, only 6 (from 5 separate cases) simultaneously were charged with a § 2339B, FTO-based violation.[194]

These § 2339A prosecutions are divided roughly equally between activity directed toward terrorism in the United States and terrorism abroad, as measured by the nature of the predicate offenses at issue. Section 956 has been a predicate offense for 27 counts involving 18 individual defendants. On the other hand, § 2332b (criminalizing violent acts in the U.S. involving an element of transnational planning) has been the predicate for 10 counts against 8 individuals, and § 2332a (criminalizing the use or threatened use of weapons of mass destruction, broadly understood, against U.S. persons or within the U.S.) has been the predicate for 16 counts against 3 individuals. Only three other statutes have served as § 2339A predicates in these cases, including one instance of § 32 (destruction of aircraft), two counts relating to § 844 (explosives), and one count relating to § 1114 (murder of U.S. employees).[195] Tables 2 and 3 summarize:

[193] *See* Appendix B, *infra.*

[194] Defendants al-Hussayen, Arnaout, Abdi, Royer, Kahn, and Mustafa are the only defendants who faced simultaneous § 2339A and § 2339B charges. A seventh defendant – Stewart – faced the charges in sequence rather than simultaneously. *See Sattar*, 314 F. Supp.2d 279 (discussing dismissal of original § 2339B charge and subsequent addition of a § 2339A charge).

[195] It should be noted that § 2339A charges were predicated on more than one offense in connection with eight of the defendants. The most common combination of predicate offenses – applicable to eight § 2339A charges against six defendants – was § 956 paired with § 2332b.

Table 2
§ 2339A Predicate Offenses 9/01-9/04 (by count)

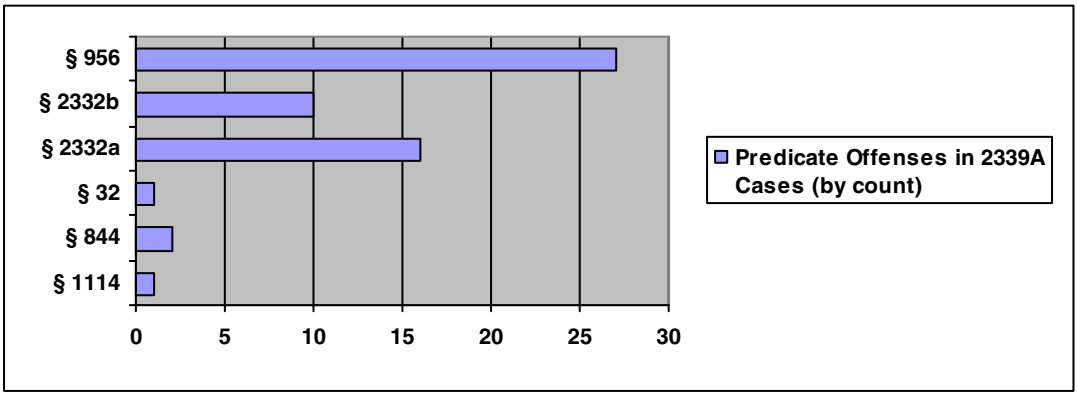
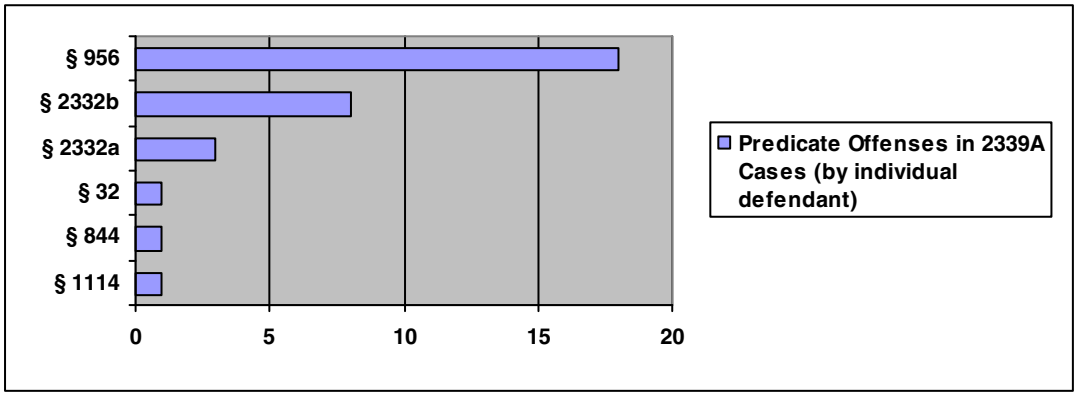


Table 3
§ 2339A Predicate Offenses 9/01-9/04 (by individual defendant)

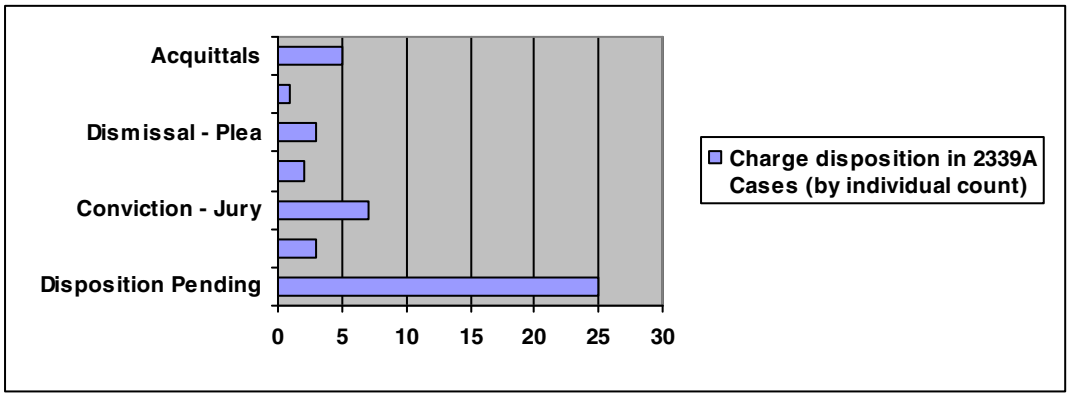


Although 25 charges against six individuals remain pending, disposition information is available for the bulk of these defendants. Five counts against four individual defendants resulted in jury acquittals, and one charge against one defendant was dropped on the government's own motion. Plea agreements have led to the dismissal of three charges against three defendants, but also to convictions on two charges for one defendant. Five individuals have been convicted by a jury on a total of seven counts,[196] with three other individuals convicted on three counts during a bench trial. Only 4

[196] This figure includes two defendants whose convictions subsequently were vacated on the government's own motion upon revelations of alleged prosecutorial misconduct. *See* United States v. Koubriti, 336 F. Supp.2d 676 (E.D. Mich. 2004). One reasonably could include them instead under the heading of dropped charges, or else exclude them altogether from the discussion.

individuals have been sentenced at the time of this writing, however, with three receiving the maximum sentence of 180 months and one sentenced to a relatively forgiving 97 month term. Table 4 illustrates the disposition data on a per-count basis.

Table 4
§ 2339A Charge Disposition 9/01-9/04 (by individual count)



This data makes clear that § 2339A is charged frequently and with at least some degree of success. And yet up to this point it has received relatively little attention from scholars, who have tended to focus instead on § 2339B and FTO-oriented prosecutions.[197] This very likely reflects a perception that § 2339A prosecutions raise no significant issues in light of the fact that the statute requires proof of knowledge or intent linking the support to the commission of a specific predicate offense, whereas § 2339B and § 1705 impose a form of strict liability on those who would provide aid to FTOs. If so, however, that is a mistaken impression. Section 2339A, as it has actually been charged in recent years, raises important and difficult questions about the scope of the government's anticipatory prosecution power.

[197] My own prior work on terrorism prosecutions exhibits this fault. *See, e.g.,* Chesney, *Sleeper Scenario*, *supra* note 7 (focusing primarily on FTO-support prosecutions).

B. The Utility of § 2339A for Prevention

A close review of how § 2339A has been charged in recent cases suggests that the statute may indeed impose criminal liability in circumstances that otherwise might exceed the reach of federal law, including even conspiracy liability. This makes § 2339A a particularly important tool for prosecutors tasked with intervening at the earliest possible opportunity in cases potentially involving terrorism, though at the same time it raises concerns as to whether § 2339A strikes an appropriate balance between the benefits of prevention and offsetting harms such as a potentially-increased rate of false positives.

Section 2339A's broad scope follows from the interaction of several features of the statute. First, the statute applies without respect to whether the predicate offense actually occurs; so long as the defendant provided support with the intent (or knowledge) that the support would be used for a predicate offense, liability attaches immediately. In this abstract respect, § 2339A liability is akin to conspiracy liability, which also attaches independent of whether the predicate offense is even attempted, let alone completed. But § 2339A is broader than conspiracy liability in several respects. Most obviously, prosecutors need not prove an agreement with anyone, as the *actus reus* consists entirely in the provision of material support. In addition, whereas the object of a conspiracy must be the commission of an unlawful act, the "object" of support given in violation of § 2339A may either be the commission of a predicate offense or conduct merely constituting "*preparation for*" commission of such an offense. That subtle distinction, which is express in the text of § 2339A, has the practical effect of expanding the range of conduct that would count as a predicate offense, reaching beyond the offenses themselves

to encompass anticipatory activity intended to culminate in offense conduct. Thus one might describe § 2339A as prohibiting the provision of support with intent to facilitate either a violation of a predicate statute or activity preliminary to such a violation.

Complicating matters, the list of predicate offenses under § 2339A includes numerous conspiracy-capable provisions. Thus it is a crime not only to provide support with knowledge or the intent that it will facilitate the commission of certain violent acts, but also to do so knowing or intending that it will facilitate the formation of various conspiratorial agreements. In this aspect, § 2339A might be characterized in terms of aiding-and-abetting a conspiracy.[198]

A final factor that contributes to the preventive capacity of § 2339A arises from the definition of "material support." As noted previously, that definition is surpassingly broad. Most notable for present purposes, however, is the fact that it includes the provision of one's own self as "personnel." Thus one might violate § 2339A by providing one's self as personnel to others (whether an FTO or not) with the goal of assisting in commission of, or preparation for the commission of, a predicate offense (including an offense in the nature of a conspiracy). This proposition has important implications for the capacity of the government to intervene in cases involving potential terrorists.

C. The Spectrum of § 2339A Applications

A close review of the fact patterns underlying recent § 2339A prosecutions suggests that prosecutors are well aware of the expansive capacity for early intervention that § 2339A provides in light of these factors.

---

[198] As Norm Abrams has observed, § 2339A thus resembles an accomplice liability, or aiding-and-abetting, provision. *See* Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT'L SEC. L. & POL. 5, 10-11 (2005).

These cases can be grouped into three fact-pattern categories, depending on the strength of the nexus among the defendant's conduct, the defendant's intentions, and the nature of the anticipated harm upon which the charge ultimately is predicated. Some of the cases, for example, involve a relatively tight nexus between the defendant and the harm to be averted, as indicated by the defendant's awareness of the specific harmful conduct that the support will facilitate (the "close-nexus scenario"). The second category is a grey area in which there are glimmers of specificity regarding the predicate offense to be facilitated, but also a sense in which the defendant's aim is to provide support at a generalized level (the "intermediate-nexus scenario"). In the third and most challenging category, there are no such elements of specificity or direct involvement (the "open-nexus scenario"). Under that heading we find the broadest assertions of liability, and the cases that present the most difficult issues in terms of reconciling the costs and benefits of preventive prosecution.

1. Category 1 – The Close-Nexus Scenario

It is possible for a § 2339A prosecution to be attempted in circumstances in which there is a clear and close connection among the defendant's conduct and intentions and the anticipated harm reflected in the underlying predicate offense. *United States v. Nettles* provides a paradigmatic example.

Gale Nettles was serving time in connection with a counterfeiting conviction when he indicated to a fellow inmate that he was interested in bombing the federal courthouse in Chicago.[199] The FBI learned of this, and after Nettles was released, arranged a sting operation. Using contact information provided to him by a jailhouse

[199] The description in this paragraph derives both from the indictment in United States v. Nettles, 04-cr-699 (N.D. Ill.) (on file with author), and Matt O'Connor & Glenn Jeffers, *FBI Aids Suspect in Catching Himself*, CHI. TRIB., Aug. 6, 2004, at 1.

cooperator, Nettles contacted an undercover agent who posed as a farmer willing to sell a large amount of ammonium nitrate (which Nettles planned to mix with fuel oil in order to create a bomb along the lines of that used in the 1995 Oklahoma City bombing). Nettles also solicited help from another undercover agent whom he believed to be associated either with al Qaeda or Hamas. After acquiring a large amount of what he believed to be ammonium nitrate from the "farmer," Nettles then sold a portion of the material to the "terrorist representative." Nettles ultimately was prosecuted on a variety of charges, including two counts relating to attempts to use explosives to destroy a building (18 U.S.C. § 844(f) (attacking a federal building with explosives) and § 844(i) (attacking a building used in interstate commerce with explosives)) and also a number of counts relating to his counterfeiting activities. In addition, prosecutors also charged him with violating § 2339A on the theory that when he sold the "ammonium nitrate" to the "terrorist representative," he thereby attempted to provide material support with the intent to assist the commission of both the aforementioned explosives offenses as well as a violation of 18 U.S.C. § 1114 (addressing homicide of U.S. employees).[200] Ultimately, the jury convicted Nettles on the explosives and counterfeiting charges. He was acquitted on the § 2339A count, however, indicating that the jurors may have been uncomfortable with the aspect of the operation in which the FBI supplied an undercover agent to pose as a representative of a terrorist organization.

The mixed verdict in *Nettles* suggests that the § 2339A count against him ultimately was superfluous in light of the weightier and more direct charges that he faced. In close-nexus cases, this often if not always will be the case. As the nexus among intentions, conduct, and anticipated harm becomes looser, however, the prospect for a

[200] *See* O'Connor & Jeffers, *supra* note 199.

conviction on a charge deriving directly from the anticipated harm decreases, and the need to rely instead on § 2339A (or else forego prosecution) grows correspondingly.

2. Category 2 – The Intermediate-Nexus Scenario

Few if any other § 2339A prosecutions compare to *Nettles* insofar as the nexus among conduct, intent, and anticipated harm are concerned. But the extent to which the other cases depart from the close-nexus scenario varies considerably.

Some of the cases may be grouped together in an intermediate category that still involves considerable potential overlap with other forms of liability, including in particular conspiracy liability. Under this heading, it is relatively clear to the § 2339A defendant that a particular type of violent act or offense will occur, but the defendant is not personally involved in the offense other than via the rendering of support, and may be unaware of the particulars of how, when, or by whom the offense will be executed. Such circumstances would not necessarily preclude a conspiracy prosecution in light of the standards described in the previous section, and thus the need for the § 2339A charge from the prosecutor's perspective remains relatively low, though stronger than in the close nexus scenario. On the other hand, where the circumstances are such that the only available inchoate crime charge would involve attempt rather than conspiracy, the relative need for the § 2339A charge is much higher.

United States v. Babar arguably provides an example of § 2339A liability overlapping with conspiracy liability in the intermediate-nexus scenario.[201] Mohammed Junaid Babar, a Pakistani-American, established and operated a training camp in a remote area near the Pakistan-Afghanistan border in 2004, providing instruction in a variety of military-type skills to would-be jihadists. But his conduct was not limited to supporting

[201] United States v. Babar, 04-cr-528 (S.D.N.Y.) (docket report) (on file with author).

potential violence in this general sense. As he admitted at his plea allocution, he also supplied aluminum powder to certain individuals who had attended his camp, and had attempted to acquire ammonium nitrate for them as well, while understanding that the men intended to use these bomb ingredients "for a plot somewhere in the U.K."[202] Under the rules relating to agreement specificity described above, this would seem to have made Babar eligible for prosecution under § 956(a), not just under § 2339A.

Conspiracy liability will not always be available in the intermediate-nexus scenario, however, and where it is not the utility of § 2339A becomes more apparent. Consider *United States v. Lakhani*. That case arose out of a sting operation against an arms dealer who believed that he was supplying a surface-to-air missile ("SAM") to a representative of a foreign terrorist organization. The undercover agent posing as that representative made clear to the defendant that his intention was to use the SAM to shoot down a commercial jet in the United States. *Lakhani* thus was an intermediate-nexus case, in that the defendant was aware of the type of offense to be committed with the assistance of his support but was not planning to be involved personally in the offense and was unaware of when or where the attack would happen or who in particular would execute it.

Lakhani ultimately was charged and convicted under § 2339A, though the case has generated criticisms from an entrapment perspective.[203] Had he been working with an actual terrorist rather than an undercover agent, prosecutors might well have pursued a conspiracy charged predicated on violations of 18 U.S.C. §§ 32 and 2332b, rather than or

---

[202] Jonathan Wald, *N.Y. Man Admits He Aided al Qaeda, Set Up Jihad Camp*, CNN.COM, Aug. 11, 2004, *available at* http://www.cnn.com/2004/LAW/08/11/ny.terror.suspect/.

[203] *See, e.g., The Arms Trader*, THIS AMERICAN LIFE, WBEZ RADIO, July 8, 2005 (suggesting that Lakhani was a harmless individual entrapped by the government) (recording on file with author).

in addition to the § 2339A approach it actually took. One cannot unilaterally conspire with a person who is in fact an undercover agent with no intent to carry out the purported agreement's objective, however.[204] Accordingly, as was the case in *Nettles*, the relevant inchoate offense would arise instead under the heading of attempt. But whereas it was possible to convict Nettles of attempt in light of the close-nexus fact pattern in that case, an attempt charge would have been difficult to prove in the intermediate-nexus scenario involving Lakhani. In this sense, the § 2339A charge provided an option in *Lakhani* that prosecutors might otherwise have lacked.[205]

3. Category 3 – The Open-Nexus Scenario

In the fact patterns described above, the defendant has some direct connection to those who will actually perpetrate the anticipated harm, coupled with an awareness at least of the nature of the harm and the manner in which the support rendered would be employed toward that end. A number of § 2339A prosecutions lack these characteristics, however. In these "open-nexus" fact patterns, the defendant has only an attenuated relationship to the anticipated harmful act.

Six of the fourteen § 2339A cases included in Appendix B arguably fit this description.[206] In these cases, the alleged support typically consists of either fundraising, recruiting of personnel, or the establishment of training facilities, all directed in a general way toward assisting the activities of either an FTO or the global jihad movement rather than in connection with a more specific plot to carry out any particular offense.

---

[204] *See, e.g.,* United States v. Kelly, 888 F.2d 732, 740 (11th Cir. 1989); United States v. Lively, 803 F.2d 1124, 1126 (11th Cir. 1986); Sears v. United States, 343 F.2d 139, 142 (5th Cir. 1965).

[205] Lakhani would not have walked free if not for the § 2339A charge. His conduct separately exposed him to money laundering and arms-importation charges, and he was convicted on these as well. *See* United States v. Lakhani, Judgment in a Criminal Case (on file with author).

[206] The six cases I have in mind are United States v. Hassoun, United States v. al-Hussayen, United States v. Arnaout, United States v. Sattar, United States v. Abdi, and United States v. Mustafa.

In *United States v. Arnaout*, for example, prosecutors alleged that Enaam Arnaout – a naturalized American citizen who since 1993 had been the Chief Executive Officer of a charity known as the Benevolence International Foundation ("BIF") – had fraudulently diverted BIF funds in order to provide weapons, supplies, and funding for a wide range of "groups and organizations engaged in violent activities, including *al Qaeda*, *Hezb e Islami*, and persons engaged in violent confrontations in Bosnia-Herzegovina, Chechnya, and their neighboring regions"[207] (*i.e.*, to various manifestations of the global jihad movement). Similarly, the § 2339A charges against the defendant in *United States v. Mustafa* (a London-based cleric known as Abu Hamza) stem from his role in attempting to establish a "jihad training camp" in Oregon and "facilitating violent jihad in Afghanistan" by assisting others in their attempts to reach training facilities there.[208] In another case, Nuradin Abdi is charged with violating § 2339A by, apparently, providing himself as personnel, based at least in part on allegations that he traveled to Ethiopia "for the purpose of obtaining military-style training in preparation for violent Jihad."[209] In *United States v. Sattar*, defendants Lynne Stewart and Mohammed Yousry were convicted under § 2339A in connection with their conduct in enabling Omar Abdel Rahman, the imprisoned EIG leader, to communicate to EIG members his decision to withdraw support for the group's "ceasefire" with the Egyptian government.[210] In *United States v. al-Hussayen*, defendant Sami Omar al-Hussayen ultimately was acquitted on

[207] United States v. Arnaout, No. 02-cr-892 (E.D. Ill.) (indictment) ¶ 7 (on file with author).
[208] United States v. Mustafa, No. 04-cr-356 (S.D.N.Y.) (indictment) (on file with author). Mustafa separately is charged in connection with his personal involvement in a hostage-taking conspiracy in Yemen, but notably is not charged under § 2339A for that offense. *See id.*
[209] United States v. Abdi, No.04-cr-88 (S.D. Ohio) (indictment) ¶ 3a (on file with author). There is reason to believe that the government ultimately would have attempted to link Abdi directly to a plot to attack an Ohio shopping mall. *See* Kevin Mayhood, *Suspect's Arrest Was Legal, U.S. Argues; Judge Suppressed Man's Comments about Terror Attack*, COLUM. DISPATCH, July 20, 2006 (referencing bombing suspicions).
[210] *See* United States v. Sattar, 314 F. Supp.2d 279, 288-90 (S.D.N.Y. 2004) (describing § 2339A charge).

charges of violating § 2339A through online activities "designed to recruit mujahideen and raise funds for violent jihad in Israel, Chechnya and other places."[211] Lastly, the *Hassoun* prosecution includes a § 2339A charge that is difficult to distinguish from the § 956(a) count in that case. The § 2339A charge against defendants Adham Amin Hassoun and Mohamed Hesham Yousef rests on their alleged conduct in operating a "support cell" that "supported and coordinated with other support networks and mujahideen groups waging violent jihad," including by engaging in recruiting activity.[212] The § 2339A charge Jose Padilla in turn appears to rest on a self-provision-of-personnel theory, as it is specifically alleged that he "was recruited by the North American support cell to participate in violent jihad, and traveled overseas for that purpose."[213]

Not surprisingly, given the relatively indirect nature of these allegations, none of the § 2339A charges in these six cases are or were predicated on an offense constituting a completed or attempted act of violence. Rather, the § 2339A predicate for each of these prosecutions is a conspiracy offense – § 956(a) in each instance.

For the reasons discussed above in Part III, it may be that each of these defendants could be convicted directly under § 956(a); indeed, several have been charged both with participating in a § 956(a) conspiracy and with providing material support to that offense. But the important point here is that liability under § 2339A does not depend on proof that the defendant also violated § 956(a). On the contrary, § 2339A does not even require that the predicate violation of § 956(a) ever actually occurred. So long as the defendants intended the money that they raised (or the equipment that they sent, the persons whom

[211] United States v. al-Hussayen, No. 3-cr-48 (D. Idaho) (second superseding indictment) ¶ 1 (on file with author).
[212] United States v. Hassoun, No. 04-cr-60001 (S.D. Fla.) (superseding indictment) ¶ 5 (on file with author).
[213] *Id.* ¶ 11. Padilla is not included as a defendant in Appendix B because he was added as a defendant in 2006, outside the time frame of that data set.

they recruited, the communications that they facilitated, and so forth) would assist in the formation of such an agreement, or even if they merely knew that it would, then their conduct was culpable under § 2339A the moment support was rendered. It is in this sense that § 2339A provides a ground for prosecution in circumstances that might exceed the grasp of conspiracy liability.

D. Using § 2339A to Incapacitate the Personally-Dangerous Suspect

The preceding discussion establishes that federal prosecutors interpret § 2339A in a manner that provides them with a weighty charging option even in attenuated circumstances that (1) might not otherwise be covered by a conspiracy charge, (2) clearly would not be covered by an attempt charge, and (3) would not be covered by § 2339B or § 1705 in the unaffiliated terrorism context. Accordingly, and bearing in mind that DOJ currently is seeking to maximize the extent to which it can intervene in advance of a potential terrorist attack, one would expect to find examples of § 2339A being used not merely in order to cut off the flow of support to dangerous persons but also as a means to incapacitate suspects who are themselves thought by the government to be capable of engaging directly in violent acts.

By and large, the post-9/11 prosecutions under § 2339A have been of the traditional, cut-off-the-flow-of-resources variety.[214] But there have been examples in which prosecutors have taken advantage of the capacious reach of § 2339A in order to incapacitate a potentially-dangerous person in preliminary circumstances that otherwise might be beyond prosecution. The most significant example is *United States v. Hayat*, a

[214] These "traditional"-style material support cases arguably include *Ahmad*, *Arnaout*, *al-Hussayen*, *Sattar*, *Mustafa*, and – with respect to defendants Hassoun and Youssef – *Hassoun*.

case that epitomizes the anticipatory prosecution strategy and the tension it generates between the benefits of prevention and the costs of potential false positives.[215]

Umer Hayat, a Pakistani immigrant, hoped that his oldest son Hamid might grow up to become a religious scholar.[216] Toward that end, Umer had arranged for Hamid to spend his teenage years studying the Koran while living with relatives back in Pakistan. When Hamid returned to the family's home in Lodi, California more than a decade later, however, he did not pursue further training at the local mosque. Instead, he got a job at a cherry-packing plant, and for a time seemed to be pursuing a relatively mundane life. That would soon change.

In 2002 Hamid became acquainted with Naseem Khan, a Pakistani immigrant who unbeknownst to Hamid was acting as a confidential informant for the FBI (code-name: Wildcat). The two became close, with Khan ultimately recording more than forty hours of their conversations. The tapes leave little doubt that Hamid held unpleasant, controversial views. At one point, for example, Hamid asked Khan if he had heard of the killing in Pakistan of Wall Street Journal reporter Daniel Pearl, saying "I'm so pleased about that. They cut him into pieces and sent him back. That was a good job they did. Now they can't send one Jewish person to Pakistan." Hamid also kept a scrapbook filled with articles clipped from Pakistani newspapers, articles that sharply criticized the U.S.

---

[215] The Seas of David arrests in Miami during the summer of 2006 also include an anticipatory charge under § 2339A, but because their fact pattern is akin to the "close-nexus scenario" – they are, in fact, also charged directly with conspiring to commit certain explosives offenses – that case is not on point for the current discussion. *See Batiste*, Indictment, *supra* note 139.

[216] The following account is derived from a combination of sources including United States v. Hayat, 05-cr-240 (E.D. Cal.) (First Superseding Indictment) (on file with author); Mark Arax, *The Agent Who Might Have Saved Hamid Hayat*, L.A. TIMES, May 28, 2006, at 16 (magazine); Carolyn Marshall, *Government Will Retry Terror Case*, N.Y. TIMES, May 6, 2006, at A11; Rone Tempest, *In Lodi Terror Case, Intent Was the Clincher*, L.A. TIMES, May 1, 2006, at B1; Rone Tempest & Eric Bailey, *Conviction for Son, Mistrial for Father in Lodi Terror Case*, L.A. TIMES, Apr. 26, 2006, at A1; Michele Norris, *Lacking a Tie to Jihadist Camp, Prosecution Rests*, NATIONAL PUBLIC RADIO ALL THINGS CONSIDERED, Apr. 5, 2006; Rone Tempest, *Prosecutors Rest Case in Terrorism Trial*, L.A. TIMES, Mar. 29, 2006, at B1.

government and its role in the world, and he owned books about jihad written by Massood Azhar (the leader of Jaish-e-Mohmmed, a Pakistani group included on the State Department's list of designated foreign terrorist organizations).

Whether Hamid was prepared to take up arms in the name of the global jihad movement was less clear, however. At one point Khan suggested that he was "going to fight jihad," but Hamid replied that "these days there's no use in doing that. Listen, these days we can't go into Afghanistan . . . The American CIA is there." When Khan later pressed him about the possibility of attending a jihadist training camp in Pakistan, Hamid equivocated: "I'm ready, I swear. My father tells me, 'Man, what a better task than this.' But when does my mother permit it? Where is a mother's heart?"

Eventually, Hamid did return to Pakistan, leaving California in the summer of 2003 for a two-year stay. Precisely what he did while there, however, became the subject of considerable dispute. At the very least, he was there for an arranged marriage and, when that fell through, to make alternative arrangements. But according to the government, Hamid also took the occasion of his stay in Pakistan to enroll in a camp where he received "training in physical fitness, firearms, and means to wage jihad."[217]

Was Hamid a terrorist who intended to carry out attacks upon returning to the U.S., or merely a misguided young man seeking adventure abroad without any intent to cause harm to others in the future? At this early stage, it was difficult to say with any certainty. Nonetheless, the FBI took Hamid into custody shortly after his return to the U.S. A fifteen-hour interrogation ensued as investigators sought a confession that he had attended a training camp and that he had returned to the U.S. with the goal of carrying out an attack. Ultimately, Hamid did confess to attending a training camp (an admission

[217] Hayat Indictment, *supra* note 215, at ¶ 7.

corroborated by his father in a separate interrogation), although he muddled the issue by giving a series of inconsistent accounts regarding its location and sponsorship. But initially he denied that he had any intent to carry out an attack in the U.S. He was not "ready for jihad," he claimed, adding that this simply "was not on [his] mind." Ss the interrogation wore on, however, he eventually changes his story and agreed to the interrogator's suggestion that he might be awaiting orders from an imam at the Lodi mosque. When pressed for details of his plans, the following exchange occurred:

FBI: So jihad means that you fight and you assault something?

Hamid: Uh-huh.

FBI: Give me an example of a target. A building?

Hamid: I'll say no buildings. I'll say people.

FBI: OK, people. Yeah. Fair enough. People in buildings . . . I'm trying to get details about plans over here.

Hamid: They didn't give us no plans.

FBI: Did they give you money?

Hamid: No money.

FBI: Guns?

Hamid: No.

FBI: Targets in the U.S.?

Hamid: You mean like buildings?

FBI: Yeah, buildings. Sacramento or San Francisco?

Hamid: I'll say Los Angeles and San Francisco.

FBI: Financial, commercial?

Hamid: I'll say finance and things like that.

FBI: Hospitals?

Hamid: Maybe, I'm sure. Stores.

FBI: What kind of stores?

Hamid: Food stores.[218]

At this point, the evidence of his actions and intentions plausibly could have been construed in very different ways. To be sure, prosecutors had good reason to believe that Hayat was a potentially-dangerous person in light of the likelihood that he had received some kind of military-style training in Pakistan, and in light of his stated sympathy with the global jihad movement's anti-American perspective. But the evidence arguably also was consistent with the view that Hayat was not likely actually to act on his views. And thus the government faced a familiar dilemma. Should DOJ go ahead and prosecute Hayat in order to eliminate the chance that he might attempt a violent act and that he might succeed in that act before the FBI could intervene? Or should the government instead remain in a surveillance and intelligence-gathering mode, in order both to identify other potentially-dangerous persons with whom Hayat might have contact and to develop more reliable indicators (and evidence) of his intentions?[219]

Ultimately, the government chose to prosecute rather than wait, reflecting the preference described above for prosecuting at the earliest plausible moment in the terrorism context. And, in the end, Hayat was convicted by a jury. But on what charge?

He had not committed or attempted an act of violence, of course, and so could not be charged directly with such an offense. It does not appear that his journey had placed

[218] Arax, *supra* note 215.

[219] In this respect, the *Hayat* fact-pattern closely resembles that involving the Lackawanna defendants discussed above. *See* Chesney, *Sleeper Scenario*, *supra* note 7, at 39-44.

him in contact with a designated FTO such as al Qaeda, moreover, meaning that FTO-oriented charges would not be available. Instead, the case seemed to turn on the proposition that Hayat had become part of the global jihad movement, or at least some manifestation of it that had not at the time been specifically designated for purposes of § 2339B or § 1705 liability.

What about a conspiracy charge? Investigators did plainly believe that Hayat was not merely a lone wolf, but was collaborating with others as part of a network of some description. And as noted above in connection with *Hassoun*, prosecutors have on occasion taken a very broad view of conspiratorial liability in the context of the global jihad movement. This raised the possibility in Hayat's case of a conspiracy charge premised on the prospect of a future act of violence within the United States (in violation of 18 U.S.C. § 2332b, for example). Ultimately, however, there was no conspiracy charge. We do not know, of course, whether such a charge was rejected by the grand jury or was simply not presented in the first instance. In any event, given the murky evidence of Hayat's activities and intentions, it perhaps is not surprising that no conspiracy charge made it into the indictment.

Hamid Hayat was instead prosecuted under § 2339A, with a pair of additional counts relating to false statements made to investigators. In particular, the indictment alleged that Hayat "provided material support or resources . . . knowing and intending that the material support and resources were to be used in preparation for, and in carrying out, a violation of Title 18, United States Code, Section 2332b (Acts of Terrorism

Transcending National Boundaries)."[220] How had he done so? By providing himself as "personnel" in furtherance of his *own* anticipated violation of § 2332b.[221]

Simply put, the § 2339A charge against Hayat functioned as a sweeping form of individual inchoate crime liability. This is not to say that Hayat was prosecuted purely for his illicit intentions, though the prosecutor's closing argument did emphasize that "Hamid Hayat had a jihadi heart and a jihadi mind."[222] Hayat had, after all, engaged in the conduct of obtaining military-type training. But it is to say that § 2339A when employed in this manner provides a potent alternative to pursuing an attempt charge, sparing prosecutors the need to await the point at which a lone wolf suspect has reached the "substantial step" threshold required for attempt liability.

Bearing this in mind, many questions remain as to the significance of the Hayat prosecution. Is it a laudable example of a criminal prosecution that nipped a terrorist plot in the bud? Is it a lamentable example of the capacity for early prosecutorial intervention to result in heavy punishments in cases where the defendant may never have committed the contemplated harm? We probably will never know for sure; we can only be certain that the case illustrates both the utility of § 2339A as a foundation for such early-stage prosecutions and the risks that such an approach entails.

---

[220] United States v. Hayat, No. 05-cr-240 (E.D. Cal.) (First Superseding Indictment), ¶ 3 (on file with author). Hayat also was charged with two counts of violating 18 U.S.C. § 1001(a)(2) by making false statements to federal agents when he denied attending the camp or having any involvement with terrorism. *See id.* Counts 2 and 3.

[221] First Superseding Indictment, ¶ 3. Notably, the § 2339A charge in *United States v. Batiste*, the Seas of David prosecution, relies on the same theory. *See Batiste*, Indictment, *supra* note 139, at 9.

[222] Tempest (May 1, 2006), *supra* note 216, (quoting from the government's closing argument in *United States v. Hamid Hayat*).

V. Conclusion

It is sometimes said of American law that it does not (or at least should not) criminalize thoughts standing alone.[223] The conclusions reached in this article about the broad scope of liability under terrorism-related conspiracy and support laws are not inconsistent with that claim. But they do show with some clarity just how far criminal liability extends along the continuum between thought and deed in the terrorism context.

In some circumstances, the option to prosecute is simply independent of that continuum. This is true, for example, where the suspect is liable (coincidentally or not) for some collateral or unrelated offense providing an immediate charging option. And it is also true where the suspect has purposefully assisted an FTO or other designated entity, under § 2339B and § 1705. Occasions will arise, however, when pretextual charges are not available (at least not on a scale that would satisfy the desire for incapacitation), and the suspect cannot clearly be linked to a designated group. Indeed, such scenarios are likely to arise with greater frequency in the years to come so long as the global jihad movement continues along its current decentralizing path.

The scope of the government's anticipatory prosecution power in the "unaffiliated terrorism" scenario therefore presents both difficult and pressing issues. Just how early can prosecutors intervene in that context? Conspiracy liability provides the traditional solution to this problem, and the pattern of post-9/11 cases does suggest that prosecutors are maximizing the preventive capacity of statutes such as 18 U.S.C. § 956(a). They need not wait for an agreement to evolve to the point of specifying the details of

[223] *See, e.g.,* United States v. Balsys, 524 U.S. 666, 713-14 (1998) (observing the privilege against self-incrimination helps to "discourag[e] prosecution for crimes of thought," and that "the First Amendment protects against the prosecution of thought crime"); Steffan v. Perry, 41 F.3d 677, 713-14 (D.C. Cir. 1994) (discussing our "constitutional heritage" of hostility to criminal liability based solely on a mental state).

executing an offense, so long as the participants have a shared understanding and intent regarding the type of offense to be committed. Nor must they cast their net narrowly so as to treat as co-conspirators only those persons who are in direct contact with one another. But at the same time, the scope of conspiracy liability must have limits. Conspiracy prosecutions premised on involvement in the global jihad movement pose a particular risk in this regard, in light of the temptation to portray the movement artificially in monolithic, organizational terms and thus to spread a vast, attenuated net of conspiracy liability.

Conspiracy liability is not, however, the only arrow in the quiver for prosecutors seeking to intervene at an early stage in the unaffiliated terrorism scenario. The "other" so-called material support law, 18 U.S.C. § 2339A, has quietly emerged as perhaps the single most important charge in post-9/11 terrorism prosecutions. Several features of the statute combine to make it applicable in a broad array of circumstances, including scenarios that might lie just beyond the grasp of conspiracy liability and that lie clearly beyond the grasp of attempt liability. This makes § 2339A a very attractive and useful charge from the point of view of prevention, but by shifting the point of potential prosecutorial intervention further back along the continuum between thought and deed, the statute entails a variety of off-setting costs. The troubling case of Hamid Hayat illustrates several of these, including the enhanced possibility of a false positive where liability turns largely (though by no means entirely) on proof of the defendant's intentions, and the lost opportunities to gather additional intelligence and evidence once overt intervention occurs.

* * *

Notwithstanding the emphasis in this article on criminal prosecutions as a vehicle for terrorism prevention, it should not be forgotten that terrorism prevention depends above all on the effective gathering, sharing, and analysis of intelligence. Criminal prosecution is only one of several potential modes of response that may be brought to bear after intelligence has coalesced to the point of establishing serious concern regarding the threat posed by a particular individual.

That said, it is clear that criminal prosecution has remained a critical mode of response since the 9/11 attacks, and is likely to become still more prominent in light of the ongoing legal and political difficulties associated with military detention and the prospect that terrorism suspects in the future frequently will be U.S. citizens not subject to immigration enforcement alternatives. Incidents such as the arrest of alleged terrorist cell members in Toronto, Miami, London, and elsewhere during the summer of 2006, moreover, emphasize the ongoing process of decentralization in the global jihad movement, the continuing potency of the terrorist threat, and the political pressure on prosecutors to offer senior policymakers a criminal law option for incapacitating suspects at the earliest possible opportunity.[224]

Selecting that option at times will be precisely the right thing to do, but at other times it will be unwise both in terms of our security and in terms of the rights of the individual defendant involved. This is, of course, but the latest round in a long-running debate regarding the proper bounds of early prosecutorial intervention in the inchoate crime context. Had the government been obliged to go to Congress after 9/11 to seek new substantive criminal laws broadly expanding its capacity for preventive prosecution,

[224] The disruption of an alleged airline-bombing plot in London in August 2006 no doubt will add to these pressures. *See* Partlow, *supra* note 14.

we would of course have engaged in a debate regarding these issues long ago. Thanks largely to the latent capacities of existing statutes such as §§ 2339A and 2339A, though, for the most part it proved unnecessary to seek such new authorities. Nonetheless, recent events have at last begun to draw attention to this exceedingly important issue.

For the debate to proceed intelligently, we must first come to a common appreciation of just how early it is that current federal criminal law permits prosecutors to intervene. I hope that in this Article I have made a substantial contribution to that common understanding.

Appendix A

Predicate Offenses Under § 2339A

Statute	Nature of Offense	"Terrorism"-link required?[225]	Conspiracy included?[226]
18 U.S.C. § 32	• attacks on aircraft and air navigation facilities	no	yes
18 U.S.C. § 37	• attacks on international airports and persons therein	no	yes
18 U.S.C. § 81	• arson within special maritime and territorial jurisdiction	no	yes
18 U.S.C. § 175	• development/possession of biological toxins as weapons, or without justification	no	yes
18 U.S.C. § 175b[227]	• possession or transfer of listed bio-agents	no	no
18 U.S.C. § 175c[228]	• development or possession of variola virus	no	yes
18 U.S.C. § 229	• development/possession of chemical weapons	no	yes
18 U.S.C. § 351	• killing, kidnapping, or assaulting members of Congress, cabinet officials, top CIA officials, Presidential candidates, or Justices	no	yes
18 U.S.C. § 831	• possession of nuclear materials	no	yes
18 U.S.C. § 832[229]	• possession of radiological weapon • providing material support to WMD programs of a designated FTO or a state sponsor of terrorism	no; yes	yes; yes
18 U.S.C. § 842(m, n)	• possession/shipment of plastic explosives lacking tagant	no	no
18 U.S.C. § 844(f, i)	• attacking property of U.S. or federally-funded institutions with explosives or fire • attacking property involved in interstate/foreign commerce with explosives or fire	no; no	yes; yes
18 U.S.C. § 930(c)	• killing in connection with attack on federal	no	yes

[225] Most violent crime statutes that might happen to be applicable in the terrorism context do not require the government to prove, as an element of the offense, that the defendant's conduct was intended to influence the government or otherwise was politically motivated.

[226] This column indicates whether the predicate offense itself provides for conspiracy liability. Because § 2339A does not include the general conspiracy statute, 18 U.S.C. § 371, as a predicate offense, one can violate § 2339A in connection with a conspiracy offense only with respect to some of these predicate crimes.

[227] Section 2339A(a) expressly identifies 33 individual statutes, and then also incorporates by reference the statutes separately identified in 18 U.S.C. § 2332b(g)(5)(B). That list largely overlaps with the provisions expressly identified in § 2339A, but does add a few additional provisions such as this one.

[228] *See id.*

[229] *See id.*

	facility using dangerous weapons		
18 U.S.C. § 956	• conspiracy to kill, kidnap, or maim outside the United States • conspiracy to attack specific property overseas	no	yes
18 U.S.C. § 1030(a)(1)	• possession or transfer of classified information obtained unlawfully from a computer	no	no
18 U.S.C. § 1030(a)(5)(A)(i)	• using virus, etc. to cause harm to computers of financial institutions or United States government	no	no
18 U.S.C. § 1114	• killing U.S. employee in course of duty, or person who assisted such employee	no	no[230]
18 U.S.C. § 1116	• killing internationally protected persons	no	no
18 U.S.C. § 1203	• kidnapping to compel act by government or third persons	no	yes
18 U.S.C. § 1361	• injury to government property	no	no
18 U.S.C. § 1362	• injury to or interference with communications equipment and infrastructure of U.S. government, or otherwise associated with civil defense or national security	no	yes
18 U.S.C. § 1363	• destruction of property within special maritime and territorial jurisdiction	no	yes
18 U.S.C. § 1366	• damage to energy facilities	no	no
18 U.S.C. § 1751	• killing, kidnapping, or assaulting President, Vice-President, or senior White House staff	no	yes
18 U.S.C. § 1992	• attacking trains or railroad infrastructure	no	yes
18 U.S.C. § 1993	• attacking mass transport systems	no	yes
18 U.S.C. § 2155	• injuring/contaminating national defense materials or facilities in order to disrupt national defense	no	yes
18 U.S.C. § 2156	• disrupting national defense through purposeful defective construction of defense materials, tools, or facilities	no	yes
18 U.S.C. § 2280	• damaging/seizing ship, injuring persons thereon in manner that threatens navigation, damaging navigational facilities, or communicating false information to endanger navigation	no	yes
18 U.S.C. § 2281	• attacking or endangering fixed maritime platforms	no	yes
18 U.S.C. § 2332	• homicide or other physical violence against U.S. national outside the U.S.	yes[231]	yes

[230] Sections 1114 and 1116 do not provide directly for conspiracy liability, but 18 U.S.C. § 1117 separately provides that conspiracies to violate these statutes are punishable by up to a life sentence. Since § 2339A does not list § 1117 as a predicate offense, however, it is not clear that § 2339A could be violated by providing support to a conspiracy to violate either §§ 1114 or 1116.

18 U.S.C. § 2332a	• use of WMD (broadly defined) within U.S. (with jurisdictional requirements), outside U.S. against U.S. nationals, or anywhere when defendant is a U.S. national	no	yes
18 U.S.C. § 2332b	• killings, kidnappings, assaults, and damage to property posing serious risk of injury within the U.S. (with jurisdictional requirements)	no	yes
18 U.S.C. § 2332f	• placing or detonating explosives in public places, government facilities, or infrastructure facilities	no	yes
18 U.S.C. § 2332g[232]	• creation or possession of guided missiles or rockets capable of targeting aircraft, and of related equipment and parts	no	yes
18 U.S.C. § 2332h[233]	• creation or possession of radiological device posing danger to human life	no	yes
18 U.S.C. § 2339[234]	• harboring/concealing person with knowledge they have committed or are about to commit certain of the above-listed offenses	no	no
18 U.S.C. § 2339C[235]	• intentionally funding conduct that would violate terrorism-related treaties or that will cause injury for political effect	yes	yes
18 U.S.C. § 2340A	• torture (outside the United States)	no	yes
42 U.S.C. § 2122[236]	• manufacture and possession of atomic weapons	no	no
42 U.S.C. § 2284	• attacking nuclear production, fuel, and storage facilities	no	yes
49 U.S.C. § 46502	• aircraft piracy	no	yes
49 U.S.C. § 46504[237]	• interference with flight crews by assault or intimidation	no	yes
49 U.S.C. § 46505(b)(3) and (c)[238]	• possession of concealed dangerous weapons or placement of explosives on aircraft	no	yes
49 U.S.C. § 46506[239]	• assaults and other crimes in the special aircraft	no	no

[231] Section 2332 requires a certification from senior DOJ officials to the effect that the violent act "was intended to coerce, intimidate, or retaliate against a government or civilian population." *See* 18 U.S.C. § 2332(d).
[232] *See supra* note 227.
[233] *See id.*
[234] *See id.*
[235] *See id.* The list provided at § 2332b(g)(5)(B) also includes the two material support provisions, but § 2339A understandably excludes them from incorporation as predicate offenses. *See* 18 U.S.C. § 2339A(a).
[236] *See supra* note 227.
[237] *See id.*
[238] *See id.*

	jurisdiction		
49 U.S.C. § 60123(b)	• attacking interstate pipelines	no	yes

[239] *See id.*

Appendix B

Charging and Disposition Data in 18 U.S.C. § 2339A Prosecutions
Initiated Between September 2001 and September 2004

Defendant[240]	Dck. #	District	§ 2339 Counts	Predicate Offense	Disposition	Sentence	Other Terrorism Conspiracy Charges
Baber Ahmad	04-cr-240	D. Conn.	Conspiracy to violate § 2339A (currency, financial services, communications equipment, personnel, lodging, training, safe houses, false documents, facilities, transportation, other physical assets, expert advice/assistance)	1. § 956(a) 2. § 2332(b)	extradition pending	n/a	§ 956 – pending
"	"	"	§ 2339A (same as above)	"	"	"	
Azzam Publications	"	"	Conspiracy to violate § 2339A (same as above)	"	pending	"	§ 956 – pending
"	"	"	§ 2339A (same as above)	"	"	"	
Adham Amin Hassoun[241]	04-cr-60001	S.D. Fla.	Conspiracy to violate § 2339A (currency, recruiting)	§ 956(a)	pending	"	*[242]
"	"	"	§ 2339A (same as above)	"	"	"	
Mohamed Hesham Youssef	"	"	Conspiracy to violate § 2339A (currency, recruiting)	"	"	"	*[243]
"	"	"	§ 2339A (same as above)	"	"	"	
Yassin Muhiddin Aref	04-cr-402	N.D.N.Y.	Conspiracy to violate § 2339A (money laundering)	§ 2332a	pending	n/a	n/a
"	"	"	§ 2339A		"	"	

[240] Defendants are identified on an individual basis; common docket numbers, of course, indicate co-defendants. In some instances, the lead defendant in an action does not appear in the table because that individual was not charged under § 2339B.
[241] The date restriction for this data requires exclusion of the three additional defendants (including Jose Padilla) who were joined to this prosecution in a subsequent superseding indictment.
[242] Subsequent iterations of the indictment have added a charge under § 956(a) itself, as discussed *supra*.
[243] *See id.*

			(concealment of support)				
"	"	"	"		"	"	
"	"	"	"		"	"	
"	"	"	"		"	"	
"	"	"	"		"	"	
"	"	"	"		"	"	
"	"	"	"		"	"	
Mohammed Mosharref Hossain	"	"	Conspiracy to violate § 2339A (money laundering)	§ 2332a	"	"	"
"	"	"	§ 2339A (concealment of support)		"	"	"
"	"	"	"		"	"	"
"	"	"	"		"	"	"
"	"	"	"		"	"	"
"	"	"	"		"	"	"
"	"	"	"		"	"	"
"	"	"	"		"	"	"
Sami Omar al-Hussayen	03-cr-48	D. Idaho	Conspiracy to violate § 2339A (currency, financial services, communications equipment, personnel)	§ 956	acquitted by jury	"	"
"	"	"	§ 2339A (currency, monetary instruments, financial services, expert advice or assistance, communications equipment)	§ 956	"	"	"
Enaam M. Arnaout	02-cr-892	E.D. Ill.	Conspiracy to violate § 2339A (equipment)	§ 956(a)	dismissed by plea agreement	"	RICO – dismissed by plea agreement
Hemant Lakhani	03-cr-880	D.N.J.	Attempt to violate § 2339A (weapons)	1. § 32 2. § 2332a 3. § 2332b	convicted by jury	180 months	n/a
Lynne Stewart	02-cr-395	S.D.N.Y.	Conspiracy to violate § 2339A (personnel)	§ 956	convicted by jury	pending	"[244]
"	"	"	§ 2339A (personnel)	"	convicted by jury	"	"
Mohammed Yousry	"	"	Conspiracy to violate § 2339A (personnel)	"	convicted by jury	"	"

[244] A separate defendant, Ahmed Abdel Sattar, was charged in the same superseding indictment with direct participation in the § 956 conspiracy that was the predicate for the § 2339A charges against Stewart and Yousry. Stewart and Yousry, however, were not charged with direct participation in that conspiracy.

"	"	"	§ 2339A (personnel)	"	convicted by jury	"	"
Samir Ait Mohamed	01-cr-1155	"	Conspiracy to violate § 2339A (personnel)	§ 2332b	charges dropped[245]	n/a	§ 2332b
Nuradin Abdi	04-cr-88	S.D. Ohio	Conspiracy to violate § 2339A (personnel)	§ 956[246]	pending	"	n/a
Gale Nettles	04-cr-699	E.D. Ill.	Attempt to violate § 2339A (explosives)	1. § 844(f) 2. § 844(i) 3. § 1114	acquitted by jury[247]	"	"
Mohammed Junaid Babar	04-cr-528	S.D.N.Y.	Conspiracy to violate § 2339A (equipment)	§ 956(a)[248]	convicted by plea agreement	pending	"
"	"	"	§ 2339A (equipment)	"	"	"	"
Randall Todd Royer	03-cr-296	E.D. Va.	Conspiracy to violate § 2339A (personnel)	§ 956(a)	dismissed by plea agreement	n/a	§ 2384 – dismissed by plea agreement § 960 – dismissed by plea agreement
Ibrahim Ahmed al-Hamdi	"	"	"	"	"	"	§ 960 – dismissed by plea agreement
Masoud Ahmad Khan	"	"	" (personnel, equipment)	"	convicted by bench trial	180 months	§ 2384 –convicted by bench trial § 960 – convicted by bench trial § 924(b) – convicted by bench trial
Seifullah Chapman	"	"	"	"	"	"	§ 960 – convicted by bench trial § 924(b) – convicted by bench trial
Hammad Abdur-Raheem	"	"	" (personnel)	"	"	97 months	"
Karim Koubriti	01-cr-80778	E.D.Mich.	Conspiracy to violate § 2339A (personnel, documents)	1. § 956 2. § 2332b[249]	convicted by jury; vac'd and dism'd[250]	n/a	n/a

[245] The United States had requested the extradition of Mohamed from Canada. Charges were dropped after the key witness against Mohamed – Ahmed Ressam, convicted for plotting to bomb LAX at the millennium – ceased cooperating with authorities. Mohamed subsequently was deported from Canada to an unknown country.

[246] The indictment in *Abdi* is unclear with respect to whether the predicate offense was meant to be § 956(a), (b), or both. Interestingly, though the indictment predicates § 2339A liability on violent activity directed overseas (under § 956), documents filed by the government in connection with a detention motion in his case alleges his involvement with convicted al Qaeda member Iyman Faris in a plot to bomb a shopping mall in Columbus, Ohio. *See* Department of Justice Press Release (June 14, 2004), *available at* http://www.usdoj.gov/opa/pr/2004/June/04_crm_399.htm.

[247] Nettles was convicted on all other counts, including multiple § 844 counts.

[248] Details of the Babar case are difficult to obtain, as the charging information and subsequent proceedings remain sealed. The docket entry for the case indicates, however, that two charges in the nature of § 2339A were filed, and media reports have described a plea agreement in which Babar pled guilty to the charges against him. Babar has not . *Cf. New York Man Admits He Aided al Qaeda, Set up Jihad Camp*, CNN.COM (Aug. 11, 2004), *available at* http://www.cnn.com/2004/LAW/08/11/ny.terror.suspect/. *See also Justice Department: Examples of Terrorism Convictions Sept. 11, 2001*, *available at* http://releases.usnewswire.com/GetRelease.asp?id=68129.

[249] The indictment at ¶ 8 mistakenly cites § 2332a, but from the context it is clear that the second predicate offense is intended to be § 2332b.

[250] As discussed in the text, *supra*, the government moved to vacate the convictions in *Koubriti* in light of post-trial revelations of alleged misconduct by prosecutors and investigators.

Abdella Lnu (a.k.a. Abdel-Ilah Elmardoudi)	"	"	"	"	"	"	"
Farouk ali-Haimoud	"	"	"	"	acquitted by jury	"	"
Ahmed Hannan	"	"	"	"	"	"	"
Mustafa Kamel Mustafa[251]	04-cr-356	S.D.N.Y.	Conspiracy to violate § 2339A (training, personnel)	§ 956(a)	pending	n/a	§ 1203
"	"	"	§ 2339A (training, personnel)	"	"	"	
"	"	"	Conspiracy to violate § 2339A (money)	"	"	"	
"	"	"	§ 2339A (money)	"	"	"	

[251] A superseding indictment filed in 2006 adds Aswat Haroon Rashid and Oussama Kassir as defendants on material support and other charges, but these counts have not been included in the data set because of the date restrictions.