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ARTICLE

THE SLEEPER SCENARIO: TERRORISM-SUPPORT LAWS AND THE DEMANDS OF PREVENTION

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September 11 gave rise to a number of new and significant issues, many of which present serious challenges for federal criminal law enforcement. In this Article, Professor Robert Chesney explores how the Department of Justice has used terrorism-support laws to respond to these challenges. In Part I, he describes the evolution of these laws from the early 1980s to 9/11 and beyond. In Part II, he situates these laws in context with the emerging emphasis on prevention within the Justice Department and the related phenomenon of competition from the Defense Department with respect to the incapacitation of potential terrorists in the United States. Part III then critiques the support laws from a civil liberties and a national security perspective. Professor Chesney concludes in Part IV by proposing several legislative reforms designed to remedy these flaws.

Our biggest problem is we have people we think are terrorists. They are supporters of al Qaeda They may have sworn jihad, they may be here in the United States legitimately and they have committed no crime And what do we do for the next five years? Do we surveil them? Some action has to be taken.¹

September 11 has had a significant but largely unnoticed impact on the substance of federal criminal law. In cases involving potential terrorists who cannot be linked to specific plans to commit violent acts—i.e., suspected “sleepers”²—prosecutors have evolved a capacity for preventive

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¹ Robert Mueller, Federal Bureau of Investigation, Director, *quoted in FBI Chief: 9/11 Surveillance Taxing Bureau*, WASH. POST, June 6, 2002, at A1.

² This Article assumes that a “sleeper cell” can consist of citizens or of non-citizens within the United States. Cf. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 263 (2004) [hereinafter 9/11 COMM. REP.] (implying a distinction between a “sleeper cell” and a group consisting of “foreigners who had infiltrated into the United States”), available at <http://www.9-11commission.gov/>

criminal prosecutions. In particular, prosecutors have creatively interpreted existing laws banning the provision of assets and other forms of support to terrorist organizations and individuals in order to make it a crime to be an active member of or to receive training from such groups.

This development goes to the heart of one of the central dilemmas generated by the demands of prevention in post-9/11 America: Are terrorists criminals who should be incapacitated through the civilian law enforcement process? Are they enemy belligerents engaged in war crimes who should be incapacitated through military detention, even when operating within the United States? Or are they something in between for which we lack both a legal framework and an adequate vocabulary?

Potential sleepers reside in the grey area between crime and war, revealing the ambiguity of these familiar concepts. Until these ambiguities are resolved, a degree of institutional competition between the Justice and Defense Departments will persist as both strive to satisfy the prevention imperative. The Justice Department's effort to establish grounds to prosecute in the sleeper context reflects that reality.

Starting from the premise that it is undesirable to encourage the expansion of the military's counterterrorism role within the United States in circumstances where the criminal justice system can act effectively,³ this Article has three aims: (1) to demonstrate the nature and significance of the impact of 9/11 on federal criminal law enforcement; (2) to appraise the terrorism-support laws that provide the foundation for the Justice Department's terrorism-prevention efforts (focusing in particular on 18 U.S.C. § 2339B, the law banning the provision of "material support or resources" to "designated foreign terrorist organizations");⁴ and (3) to propose constructive reforms designed both to ameliorate the civil liberties concerns associated with the support laws and to close significant gaps in their existing coverage. These proposals would not entirely resolve the dilemma posed by potential sleepers; even with them, situations may arise in which concerns about gathering intelligence or protecting sources thereof tempt policymakers away from the civilian alternative. These reforms would substantially improve the status quo from both the civil liberties and national security perspectives, however, and by doing

report/index.htm.

³ This Article is not intended to suggest that the military paradigm should not be applied or should be disfavored with respect to terrorists outside the United States. The use of military force to deal with al Qaeda in Afghanistan, for example, is a wholly appropriate and necessary measure. By the same token, Northern Command serves an essential function with respect to situations within the United States that exceed the capacities of civilian authorities, as may arise in the aftermath of an incident involving a weapon of mass destruction or a hijacking. See *Interview: General Bernard Trainor Explains the Pentagon's New Northern Command* (NPR Morning Edition, Apr. 18, 2002), available at 2002 WL 3187844.

⁴ 18 U.S.C. § 2339B (Supp. 2001).

so would provide a more stable foundation for the use of the criminal justice system for terrorism prevention within the United States.

Parts I and II lay the groundwork for these arguments. Part I provides the reader with a thorough review of the origins and evolution of the terrorism-support laws. This legislative history provides the backdrop for Part II, which describes the impact of 9/11 in terms of two changes: the adoption of a prevention paradigm within the Justice Department and the emergence of institutional competition, albeit of a coordinated variety, between prosecutors and the military with respect to the incapacitation of suspected terrorists within the United States. With the help of a comprehensive survey of charging decisions in post-9/11 terrorism-related cases (attached as an online appendix to this Article), this Article contends that these factors have led federal prosecutors to adopt creative interpretations of terrorism-support laws enabling them to act in the sleeper scenario.

Part III critiques the terrorism-support laws from both a civil liberties and a national security perspective. A review of the constitutional issues that have been raised by courts over the past three years illustrates that some, but not all, of the many civil liberties arguments have exhibited sufficient traction in the courts to render the support laws somewhat unreliable as grounds for prosecution. At the same time, these laws also can be criticized from a national security perspective on the grounds that they are too narrow and fail to account for emerging trends in the nature of the terrorist threat.

Having reviewed these weaknesses, this Article concludes in Part IV with a battery of legislative reform proposals. Among other things, this Article recommends that Congress:

- make it a crime for a person subject to U.S. jurisdiction to receive firearms or explosives training while outside the United States from any source without an *ex ante* license;
- make it a crime for a person subject to U.S. jurisdiction to join a designated foreign terrorist organization as an active member with the specific intent to further the illegal ends of the organization; and
- incorporate a panoply of safeguards into the existing terrorism-support laws, including the adoption of a graduated scale of punishment corresponding to the defendant's *mens rea* in material support cases.

Congress and the Justice Department have begun to attend to the problems associated with the status quo, but existing reform proposals fall short of what is needed to accommodate the demands of prevention in a sustainable manner. In order for the criminal justice system to continue to play an effective role as an alternative to military detention in the sleeper scenario, more substantial changes along the lines suggested in this Article are required. Better to consider them now, moreover, than to await what might follow in the aftermath of another attack.

I. THE ORIGINS AND SCOPE OF THE TERRORISM-SUPPORT LAWS

The material support law is one part of a matrix of terrorism-support laws that have accrued over many years through the painstaking efforts of individuals in the executive and legislative branches intent on putting a stop to the phenomenon of U.S. persons providing support, well-intentioned or otherwise, to foreign terrorist organizations. The history of how these authorities evolved provides indispensable context for understanding their scope and the distinctive quality of their use in post-9/11 terrorism-related cases.

A. *Presidential Emergency Powers*

America's terrorism-support laws have evolved out of the more general category of laws enabling the executive branch to use economic sanctions or embargoes as instruments of foreign policy and national security, a practice traceable to the earliest days of the republic.⁵ The modern form of this practice originated with a World War I-era statute known as the Trading With the Enemy Act (TWEA), which provided the basic legal framework for this practice.⁶ During wartime, TWEA both made it a crime to engage in specified forms of commerce with America's enemies,⁷ and delegated to the President the power to regulate or prohibit a variety of other economic transactions with both enemies and allies.⁸ But this power did not stay confined to wartime for long. In 1933, President Roosevelt purported to invoke TWEA as the authority for his "bank holiday" order,⁹ notwithstanding the fact that the United States was then at peace. Congress promptly ratified his action by amending TWEA to permit the President to exercise delegated powers whenever an "emergency" arose, whether in wartime or not.¹⁰

Subsequent events, particularly those relating to World War II and the Cold War, provided ample occasion for recognition of emergencies and the corresponding imposition of sanctions on foreign states.¹¹ Reacting to a perception that TWEA authority had gotten out of hand, the reform-minded Congress of the mid-1970s attempted to rein in executive emergency powers through a series of measures. The National Emergen-

⁵ See, e.g., An Act Laying an Embargo on all Ships and Vessels in the Ports and Harbors of the United States, 2 Stat. 451 (1807).

⁶ See Trading With the Enemy Act of 1917, Pub. L. No. 65-91, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. app. §§ 1-44 (2000)).

⁷ 50 U.S.C. app. § 3

⁸ *Id.*

⁹ See Proclamation No. 2039, 48 Stat. 1691 (Mar. 6, 1933).

¹⁰ Act of March 9, 1933, Pub. L. No. 73-1, 48 Stat. 1 (1933) (codified as amended at 50 U.S.C. app. §§ 1-44 (2000)).

¹¹ See Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1401 (1989).

cies Act (NEA), for example, peremptorily ended all existing declarations of national emergency, and set forth procedural requirements involving congressional notification and review for new declarations going forward.¹² And in 1977, Congress deleted the portion of TWEA that gave the President broad authority to impose sanctions during peacetime emergencies, replacing it with a somewhat similar but more specifically defined authority when it enacted the International Emergency Economic Powers Act (IEEPA).¹³

IEEPA has a two-step structure. First, in a marginal improvement over the old TWEA approach, it specifies that the President can exercise IEEPA powers only under certain circumstances. Under § 1701(a), the President may use IEEPA powers upon a formal declaration of a national emergency (complying with NEA procedures)¹⁴ stemming from “any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.”¹⁵ Second, IEEPA specifies that upon a properly declared emergency, the President may seize certain assets of foreign states or individuals and may regulate or expressly prohibit a wide array of economic transactions with foreign states or individuals.¹⁶ IEEPA, in short, authorizes the President to impose whole or partial economic embargoes during emergencies.

B. Initial Proposals To Criminalize Assistance to Terrorism

The question soon arose whether IEEPA might be useful in connection with the emerging problem posed by terrorist attacks against U.S. interests. In the context of state-sponsored terrorism—the dominant form in the 1980s—the answer clearly was yes. In 1986, for example, Presi-

¹² See National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1978) (codified as amended at 50 U.S.C. §§ 1601–1651 (2000)). Among other things, NEA requires public disclosure of the declaration of emergency (via publication in the Federal Register) and periodic reporting to Congress regarding activities and spending undertaken pursuant to the emergency.

¹³ See International Emergency Economic Powers Act, 50 U.S.C. § 1705 (2000); see Nina J. Crimm, *High Alert: The Government's War on the Financing of Terrorism and Its Implications for Donors, Domestic Charitable Organizations, and Global Philosophy*, 45 WM. & MARY L. REV. 1341, 1356–57 (2004).

¹⁴ See National Emergencies Act, 50 U.S.C. § 1631 (2000) (requiring a President acting under statutory authorities granted by a declaration of national emergency to specify the source of such authorities).

¹⁵ 50 U.S.C. § 1701(a) (2000).

¹⁶ See 50 U.S.C. § 1702 (2000) (amended 2001). IEEPA carves out limited exceptions to this embargo power, however, for personal communications that do not transfer value, humanitarian donations (to a limited extent), the exchange of informational materials not already subject to restrictions from other laws, and transactions incident to travel. See 50 U.S.C. at § 1702(b) (2000). Willful or attempted violations of IEEPA regulations subject the offender to a maximum sentence of ten years' imprisonment. See 50 U.S.C. § 1705 (2000).

dent Reagan invoked IEEPA on multiple occasions to sanction Libya in connection with its sponsorship of terrorist attacks.¹⁷ The next question was whether IEEPA could also be used to target terrorist organizations or individuals directly.

This issue arose in the early 1980s as part of a broader examination of U.S. criminal laws relating to U.S. citizens providing support to terrorists. This topic initially reached the national agenda as a result of revelations about the activities of former CIA agents Edwin Wilson and Frank Terpil.¹⁸ Wilson had extensive experience smuggling arms and other equipment, and along with Terpil eventually became involved in shipping a variety of dangerous materials to Libya, including plastic explosives. Their activities grew to include the provision of former special forces members to train Libyan commando units. When the FBI became aware of these activities, it was initially unclear whether there were grounds to prosecute the rogue ex-agents.¹⁹ Ultimately Wilson was prosecuted and convicted on a variety of grounds,²⁰ but in the meantime the idea had taken hold that there might be a gap in the coverage of federal law relating to support for terrorism.²¹

The first legislative consequence was the International Security and Development Cooperation Act,²² a 1981 law requiring the Reagan Administration to submit a report to Congress within six months describing and assessing the sufficiency of “all legislation . . . and administrative remedies . . . which can be employed to prevent the involvement, service, or participation by United States citizens in activities in support of terrorism or terrorist leaders.”²³

The administration eventually responded in the form of a letter from Powell A. Moore, Assistant Secretary of State for Congressional Relations.²⁴ The Moore letter began by defining “involvement, service, or par-

¹⁷ See Exec. Order No. 12,543, 3 C.F.R. 181 (1986), reprinted in 50 U.S.C. § 1701 (Supp. I 2001); Exec. Order No. 12,544, 3 C.F.R. 183 (1986), reprinted in 50 U.S.C. § 1701 (Supp. I 2001).

¹⁸ Except as otherwise indicated, this account of Wilson’s story derives from PETER MAAS, *MANHUNT* (1986).

¹⁹ *Antiterrorism and Foreign Mercenary Act: Hearing Before the Subcomm. on Security and Terrorism of the S. Comm. on the Judiciary*, 97th Cong. 2 (1982) [hereinafter *Antiterrorism and Foreign Mercenary Act Hearing*] (statement of Rep. Rinaldo) (describing Rinaldo’s surprise when he learned of Wilson’s activities, and his concern that such activities might not be illegal).

²⁰ See *United States v. Wilson*, 721 F.2d 967 (4th Cir. 1983) (outlining convicted offenses and affirming convictions on charges of violating the Arms Export Control Act).

²¹ See, e.g., *Antiterrorism and Foreign Mercenary Act Hearing*, *supra* note 19, at 2–5 (statements of Rep. Rinaldo and Sens. Denton and Humphrey).

²² International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, 95 Stat. 1519 (1981) (codified as amended in scattered sections of 22 U.S.C.).

²³ *Id.* § 719. Section 719 also expressed Congress’s concern that “the United States should take all steps necessary to ensure that no United States citizen is acting in the service of terrorism or of the proponents of terrorism.” *Id.*

²⁴ See *Antiterrorism and Foreign Mercenary Act Hearing*, *supra* note 19, at 70–77 (letter from Asst. Sec’y for Cong. Relations Powell A. Moore, U.S. Dep’t of State, to Sen.

ticipation” to include—in addition to actual participation in an attack or conspiracy to carry out an attack—the provision of “weapons, training, or other technical assistance with the likelihood that such assistance will be used in a terrorist attack.”²⁵ It then described three clusters of laws that might apply in such circumstances.

The first was the Arms Export Control Act (AECA),²⁶ which delegated authority to the Executive branch to enact regulations concerning the export of military materials and services, including through the use of ex ante licensing procedures.²⁷ Under this authority, the Department of State had promulgated a set of licensing and embargo rules relating to military materials and services—the International Traffic in Arms Regulations (ITAR)²⁸—pursuant to which exports of specified military equipment and services could be denied on national security or foreign policy grounds.²⁹ Moore noted that the administration at that time was considering whether to amend ITAR so that the definition of prohibited “services” might be “broadened to encompass the training of foreign military forces and the participation of U.S. nationals in foreign military activities generally,” thus subjecting such activity to an ex ante licensing requirement backed by criminal and civil penalties.³⁰

Notably, Moore next drew attention to the potential applicability of IEEPA regulations to terrorist organizations. He argued that IEEPA in theory could be used to impose “a virtually total ban on activity supportive of foreign terrorists [or] terrorist groups . . . by persons subject to U.S. jurisdiction.”³¹ But he cautioned that “because IEEPA properly can be used only in extraordinary emergency situations, it does not provide a reliable means to regulate such activities by U.S. citizens under most circumstances.”³²

Charles H. Percy, Chairman of the S. Comm. on Foreign Relations (Sept. 14, 1982) [hereinafter *Moore Letter*].

²⁵ *Id.* at 71.

²⁶ Arms Export Control Act of 1968, 22 U.S.C. §§ 2751–2799 (2000). AECA authority supplanted similar authority once given to the president under § 414 of the Mutual Security Act of 1954. Mutual Security Act of 1954, 22 U.S.C. § 1755 (1958) (repealed 1961). The AECA was one of several laws ultimately used to prosecute Edwin Wilson. *See United States v. Wilson*, 721 F.2d 967 (4th Cir. 1983).

²⁷ *See* 22 U.S.C. § 2751 (2000).

²⁸ 22 C.F.R. § 120.1 (2004).

²⁹ *Id.*

³⁰ *Moore Letter*, *supra* note 24, at 72–73. ITAR subsequently was amended to impose an ex ante licensing requirement on any “[m]ilitary training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad . . . training aid, orientation, training exercise, and military advice.” 22 C.F.R. §§ 120.9(a)(3), 124.1(a) (2004). Note that this prohibition does not address the receipt of training by U.S. persons, in keeping with the concerns of the pre-9/11 era.

³¹ *Moore Letter*, *supra* note 24, at 74.

³² *Id.*

Next, Moore addressed TWEA. He acknowledged that since IEEPA's enactment, the President's authorities under TWEA arose only during time of war.³³ With that caveat, however, he observed that TWEA, when applicable, also could be used "for preventing and combating involvement or participation by U.S. persons in activities in support of international terrorism or terrorist leaders."³⁴

After discussing other, more tangential statutory authorities,³⁵ Moore's letter turned to the subject of what new legislation might be desirable to close remaining gaps.³⁶ Pending legislation in the House (House Bill 5211)³⁷ and Senate (Senate Bill 2255),³⁸ he noted, "appear[ed] to provide a starting point."³⁹

Those bills called for enactment of the Antiterrorism and Foreign Mercenary Act, which among other things would make it a crime

for an American, on behalf of a foreign state, faction, or international terrorist group named by the President in a proclamation, to serve in its armed forces or intelligence agency; provide training to persons so serving; provide any logistical, maintenance or similar support; conduct any research, manufacturing or construction project directly related to its military functions; or recruit any other person to do any of the above.⁴⁰

When the Senate Judiciary Committee's Subcommittee on Security and Terrorism⁴¹ held hearings on the proposal on September 23, 1982, representatives of the Justice and State Departments objected to certain details

³³ See *supra* note 14.

³⁴ *Id.*

³⁵ *Id.* at 74–75 (discussing the Export Administration Act, 50 App. U.S.C. § 2401 (2000), the Hostage Act, 22 U.S.C. § 1732 (2000), and the Neutrality Laws, 18 U.S.C. §§ 951–70 (2000)).

³⁶ The Justice Department, Moore indicated, "believes that while existing laws are workable, there are some gaps which should be closed in order to facilitate a better federal investigative and prosecutive response to the problems caused by international terrorism." *Id.* at 76.

³⁷ H.R. 5211, 97th Cong. (1982).

³⁸ S. 2255, 97th Cong. (1982).

³⁹ *Id.*; see also *Antiterrorism and Foreign Mercenary Act Hearing*, *supra* note 19, at 12–15 (letter from Asst. Att'y Gen. Robert A. McConnell, Office of Legis. Affairs, to Rep. Matthew J. Rinaldo (Feb. 16, 1982)) (indicating that numerous statutory authorities existed for charging Wilson and Terpil in connection with their aid to Libya, but also noting that it might be useful to enact a "regulatory scheme similar to the Arms Export Control Act" to fill any gaps). *Id.* at 15.

⁴⁰ *Antiterrorism and Foreign Mercenary Act Hearing*, *supra* note 19, at 3 (statement of Rep. Thomas Rinaldo) [hereinafter *Rinaldo Statement*].

⁴¹ Some critics were quite disturbed by the establishment of this subcommittee in 1981, questioning the significance of the terrorist threat. See Tom Wicker, *In the Nation: The Great Terrorist Hunt*, N.Y. TIMES, May 5, 1981, at A23 (drawing a connection between this committee and the House Un-American Activities Comm.).

of the legislation but endorsed the bill at a general level.⁴² Nonetheless, no further action was taken on the bill during the 97th Congress.⁴³

In 1984, the Reagan Administration urged Congress to return to this issue in response to the onslaught of bombings and kidnappings in the Middle East that followed in the wake of American intervention in Lebanon. In April, President Reagan transmitted a package of legislative proposals including the Prohibition Against the Training or Support of Terrorist Organizations Act of 1984,⁴⁴ later introduced as Senate Bill 2626⁴⁵ and House Bill 5613.⁴⁶ These bills expanded somewhat on the 1982 initiatives, proposing a ten year maximum sentence for “serv[ing] in, or act[ing] in concert with, the armed forces or any intelligence agency of any foreign government, faction, or international terrorist group” designated as a national security threat by the Secretary of State, or for providing training, support, or services thereto.⁴⁷

In contrast to the qualified support given to the 1982 legislation, the Justice Department fully endorsed this administration-sponsored measure.⁴⁸ But the bills nonetheless drew intense opposition from other quarters.⁴⁹ Senator Howard Metzenbaum, for example, denounced the bill as “a throwback to the McCarthy era,”⁵⁰ suggesting that the bill might apply

⁴² See generally *Antiterrorism and Foreign Mercenary Act Hearing*, *supra* note 19 (statements of Mark Richard, Deputy Asst. Att’y Gen., Crim. Div., Just. Dept., and Jeffrey Smith, Asst. Legal Adviser, Law Enforcement and Intelligence, State Dept.).

⁴³ Representative Rinaldo, sponsor of the House bill, expected as much. See *Rinaldo Statement*, *supra* note 40, at 2 (“Certainly we understand that we are in the waning days of this session. But, if not in this session, at least in the next session . . .”).

⁴⁴ See Ronald Reagan, President’s Message to the Congress Transmitting Proposed Legislation to Combat International Terrorism (Apr. 26, 1984), available at <http://www.reagan.utexas.edu/resource/speeches/1984/42684a.htm>. The President’s message also referenced the proposed revisions to the ITAR regulations, mentioned in the Moore Letter, designed to preclude U.S. persons from providing military training to foreign persons. See *id.*

⁴⁵ S. 2626, 98th Cong. (1984).

⁴⁶ H.R. 5613, 98th Cong. (1984).

⁴⁷ Legislative Initiatives to Curb Domestic and International Terrorism: Hearing Before the Subcomm. on Security and Terrorism of the S. Comm. of the Judiciary, 98th Cong. 28–36 (1985) [hereinafter *Legislative Initiatives*] (text of S. 2626, 98th Cong. (1984)). As Deputy Assistant Attorney General of the Criminal Division at the Justice Department Victoria Toensing explained in her testimony in support of the bill, the legislation not only would make it “a crime for an American to serve as a member of a terrorist group” but also would reach those who “participate in terrorist groups which are not tightly organized” and whose “association may at times be more in the nature of affiliation.” *Id.* at 53 (June 6, 1984) (statement of Victoria Toensing).

⁴⁸ See *id.* at 52 (“S. 2626 is the most important bill in the package.”) (statement of Victoria Toensing).

⁴⁹ See *id.* at 142–55 (statement of Joseph M. Hassett). See also John M. Goshko, *Shultz Seeks Penalty for Aiding Terrorists*, WASH. POST, June 14, 1984, at A7 (describing opposition to the bill from “many members of the House Foreign Affairs Committee”); Stuart Taylor Jr., *Reagan Sends Congress Four Bills Aimed at International Terrorism*, N.Y. TIMES, Apr. 27, 1984, at A1 (describing objections stated by ACLU Chief Legis. Counsel Jerry J. Berman).

⁵⁰ *Legislative Initiatives*, *supra* note 47, at 37.

to speech supporting the lawful aims of a designated group, that it might make fundraising for a designated group illegal, and that it might not be possible to challenge the Secretary's designation.⁵¹ Others questioned the discretion afforded to the Secretary of State in the designation process, and the extent to which the bill might apply to protected expression.⁵² When Secretary of State George Shultz testified before a House committee in June 1984, representatives "peppered [him] with problematic cases What definitions would distinguish between Afghan rebels and Nicaraguan contras on one hand, and Salvadoran rebels on the other?"⁵³ Leading newspapers weighed in on the same point on their editorial pages:⁵⁴

If—use your imagination—a President Mondale were to appoint a Jesse Jackson Secretary of State, is it not possible that the Nicaraguan rebels might be designated terrorists? Wouldn't it be reasonable to conclude that supplying food and military uniforms is a service in support of those terrorists? Such acts are not now criminal, but they might be if the administration's own anti-terrorism bill becomes law without amendment.⁵⁵

Congress eventually passed the other aspects of President Reagan's 1984 antiterrorism initiatives, but the support provision died in committee.⁵⁶ One of the bill's original Senate sponsors, Jeremiah Denton, had come to the conclusion that the bill was "too loosely written" in that it "seemed to

⁵¹ *Id.*; see also *id.* at 38 (warning that the bill might apply to those sympathetic to Irish republicanism or the abolition of apartheid in South Africa). *But see Legislative Initiatives*, *supra* note 47, at 54–55 (statement of Victoria Toensing) (denying that the language covered First Amendment activities, and noting that the designation process paralleled the discretion delegated to the Executive by the Arms Control Export Act, 22 U.S.C. §§ 2751–2799 (2000), the Export Administration Act, 50 App. U.S.C. §§ 2401 et seq. (2000), International Emergency Economic Powers Act, 50 U.S.C. § 1705 (2000), and various other statutes).

⁵² *Legislative Initiatives*, *supra* note 47, at 100–01, 103–04 (statement of Sen. Patrick Leahy).

⁵³ *A Question of Definition*, TIME, June 25, 1984, at 19. The implicitly positive reference to Afghan rebels is, of course, somewhat ironic.

⁵⁴ Much of the following discussion of the legislative history appeared originally in testimony I gave to the Senate Judiciary Committee in May 2004. See *Oversight Hearing: Aiding Terrorists—An Examination of the Material Support Statute, Before S. Judiciary Comm.*, 108th Cong. (May 5, 2004) [hereinafter *Aiding Terrorists Hearing*] (statement of Robert M. Chesney).

⁵⁵ Editorial, *One Man's Freedom Fighter . . .*, WASH. POST, July 20, 1984, at A20. See also Editorial, *Anti-Terrorism (Cont'd.)*, WASH. POST, May 9, 1984, at A30; Editorial, *Bad Legislation*, WASH. POST, May 1, 1984, at A14; Editorial, *Resisting Terror—And Lawlessness*, N.Y. TIMES, Apr. 29, 1984, at E20.

⁵⁶ See Editorial, *A Crime to Aid the Contras?*, WASH. POST, Dec. 18, 1984, at A18; Larry Margasak, *Denton To Push for Law Against Americans Helping Terrorists*, ASSOC. PRESS, May 19, 1985, available at 1985 WL 2861924.

include even speech if you advocated support of, say, the PLO . . . or the IRA.”⁵⁷

Several years later, the support-for-terrorism concept reemerged in the context of immigration law, this time with more success.⁵⁸ Section 212 of the Immigration and Nationality Act⁵⁹ already required exclusion of aliens who had engaged in terrorist activity, but the Immigration Act of 1990 expanded the meaning of “engage in terrorist activity” to include activity the alien knew or reasonably should have known would provide “material support” to a person, group, or government engaged in terrorist activity.⁶⁰ “Material support” in turn was defined to include not only lethal items such as weapons and explosives, but also the provision of safe houses, transportation, communication, funds, false identification, and training.⁶¹

In 1991, two bills were introduced in the Senate—one sponsored by Democrats, the other by Republicans—renewing the attempt to criminalize support for terrorist groups.⁶² Each proposal would have made it a felony to provide material support—defined to include money, weapons, equipment, and personnel—with *knowledge* that the recipient intended to use the support in connection with particular acts of terrorism. The bills received considerable backing from the State Department,⁶³ and eventually became folded into the bipartisan omnibus crime bill proposal for

⁵⁷ Margasak, *supra* note 56. Nonetheless, Senator Denton revived the proposal the next year when he introduced substantially identical language in the International Terrorism Control Act. S. 1940, 99th Cong. (1985); 131 CONG. REC. 36420 (1985). With less fanfare, the proposal again died in committee.

⁵⁸ For the view that measures hostile to civil liberties tend to be enacted in the immigration context before being extended to citizens, see DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 36 (2003). Cf. Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 101 MICH. L. REV. 1408, 1429–30 (2003) (critiquing this view).

⁵⁹ Immigration and Nationality Act, 8 U.S.C. § 1182 (Supp. I 2001).

⁶⁰ Immigration Act of 1990, 8 U.S.C. § 1182(a)(3)(B)(iii) (2000) (current version at 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (Supp. I 2001)).

⁶¹ *Id.*

⁶² The process began when Senator Biden introduced Senate Bill 266, Title II of which criminalized material support. S. 266, 102d Cong. § 2 (1991); 137 CONG. REC. S1159 (1991). House Bill 769 had identical provisions. H.R. 769, 102d Cong. § 2 (1991); 137 CONG. REC. H839 (1991). In March 1991, Senator Biden introduced a new version as Senate Bill 618, Title V of which contained the same material support provision. S. 618, 102d Cong. § 5 (1991). A few days later, Senator Thurmond introduced the administration’s crime bill, Senate Bill 635 (House Bill 1400 in the House), which contained a slightly broader material support provision. S. 635, 102d Cong. § 734 (1991); H.R. 1400, 102d Cong. § 734 (1991). Hearings were held on both bills in April and in June, but the discussion this time did not focus on the support concept. *Violent Crime Control Act of 1991: Hearings Before the S. Comm. on the Judiciary*, 102d Cong. 102–480 (1991). Senator Thurmond’s bill was discharged from consideration by the Judiciary Committee on June 6, the same day that Biden introduced a compromise bill. See S. 1241, 102d Cong. § 5 (1991).

⁶³ See 139 CONG. REC. 17577 (1994) (reprinting letter from Wendy R. Sherman, Asst. Sec’y of State for Legis. Affairs, to Rep. Lee Hamilton, Chairman, Comm. on Foreign Affairs, House of Rep. (May 16, 1994)).

1991.⁶⁴ Despite initial approval by both the Senate and House, however, the Senate could not come to agreement on the conference version and the material support provision died once again.⁶⁵

C. *The First Material Support Law*

But it would soon become law at last. Shortly after the first bombing of the World Trade Center in 1993, the material support concept emerged yet again in a series of bills introduced during the spring and summer of that year.⁶⁶ Finally, bills introduced in the fall of 1993 succeeded in pushing a form of material support ban through to enactment in September 1994.⁶⁷ The result was 18 U.S.C. § 2339A.⁶⁸

Section 2339A is a narrow law, much narrower than the anti-support proposals introduced unsuccessfully in the 1980s. Most notably, it avoids the criticisms associated with empowering the executive branch to identify specific terrorist organizations and individuals to be sanctioned. Instead, it punishes the provision of material support or resources⁶⁹ to any-

⁶⁴ See Biden-Thurmond Violent Crime Control Act of 1991, H.R. 3371, 102d Cong. (1991).

⁶⁵ Senator Thurmond attempted to reintroduce material support legislation in March 1992, but Senate Bill 2305 died in committee. S. 2305, 102d Cong. (1992). For an interesting perspective from this period on the topic of banning terrorist organizations and criminalizing support for them, see Editorial, *When Will the Terror Stop*, BOSTON HERALD, Aug. 15, 1992, at 14 (arguing that “[t]o Americans, the idea of ‘banning’ an organization . . . is anathema,” and asking readers to “[t]ry imagining a decree forbidding [them] to donate, say, to Northern Irish Aid—the Sinn Fein front widely seen as a fundraiser for Irish Republican Army terrorists”).

⁶⁶ At least eight bills containing material support provisions were introduced in this period during the 103rd Congress: H.R. 1301, 103d Cong. (1993); H.R. 2217, 103d Cong. (1993); H.R. 2321, 103d Cong. (1993); S. 1281, 103d Cong. (1993); H.R. 2847, 103d Cong. (1993); H.R. 2872, 103d Cong. (1993); S. 1356, 103d Cong. (1993); S. 1488, 103d Cong. (1993).

⁶⁷ H.R. 3355, 103d Cong. (1993); S. 1607, 103d Cong. (1993). While these bills were pending, in an interesting aside, Representative Lee Hamilton wrote a letter on March 18, 1994, to Secretary of State Warren Christopher asking why no action had been taken to stop two groups designated by Israel to be terrorist organizations—Kach and Kahane Chai—from raising funds in the United States. The State Department responded with a letter from Wendy Sherman on May 16, 1994, describing the efforts by the department over the past several years to enact a material support provision (one that would be consistent with the First Amendment). See 139 CONG. REC. E1519-01 (daily ed. July 21, 1994) (statement of Rep. Hamilton and accompanying reprint of letter from Asst. Sec’y of State Wendy Sherman to Rep. Lee Hamilton (May 16, 1994)).

⁶⁸ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

⁶⁹ As amended, the statute defines “material support or resources” to include the provision of a comprehensive array of items and services that may be grouped into four categories: (1) funding (currency, monetary instruments, financial securities, and financial services); (2) tangible equipment (weapons, lethal substances, explosives, false documentation or identification, communications equipment, and other physical assets, except medicine or religious materials); (3) logistical support (lodging, expert advice or assistance, safehouses, facilities, training and transportation); and (4) personnel. See 18 U.S.C. § 2339A(b) (Supp. II 2002).

one, regardless of the identity of the recipient, so long as the provider “know[s] or intend[s] that [the aid is] to be used in preparation for, or in carrying out, a violation” of any of more than two dozen crimes of violence specified in the statute.⁷⁰ It is, in short, a type of aiding-and-abetting statute.

Because of its limited scope, the enactment of § 2339A did not satisfy those interested in criminalizing all forms of aid to foreign terrorist organizations.⁷¹ Critics of the new law emphasized that it would not prevent the flow of support to terrorist organizations in situations in which the government could not prove the donor intended or knew the aid would facilitate the commission of a particular crime.⁷² A person could donate thousands of dollars to Hamas or Hezbollah, for example, so long as he or she thought the money might be spent on the political or social services those groups provided. As the staff of the 9/11 Commission observed in their monograph on terrorism financing, under this regime “prosecuting a financial supporter of terrorism required tracing donor funds to a particular act of terrorism—a practical impossibility.”⁷³

D. Closing the Loophole

The § 2339A loophole did not last for long. Implicitly recognizing that § 2339A would not effectively embargo foreign terrorist organizations, and apparently unwilling to wait for Congress to take further action, the Clinton Administration turned at last to its IEEPA authority. Approximately four months after § 2339A became law, President Clinton declared a national emergency in connection with efforts by foreign terrorist organizations to sabotage the Middle East peace process.⁷⁴ He then broke new ground under IEEPA by ordering sanctions targeting not a

⁷⁰ 18 U.S.C. § 2339A(a) (Supp. II 2002).

⁷¹ See, e.g., Tommy Baer, *Political Motivations of Murders Make No Difference to Victims*, RICHMOND TIMES-DISPATCH, Nov. 1, 1994 at A11 (arguing that § 2339A does not suffice to cut off funding to terrorist groups); Martin Sieff, *U.S. Aims at Hamas' Pocketbook*, WASH. TIMES, Oct. 26, 1994, at A1 (reporting that the administration was looking into new legislation to deal with domestic fundraising by terrorist organizations under the guise of charity).

⁷² See, e.g., Todd J. Gillman, *FBI Looks Into Islamic Fund Raising: Muslim Officials Deny Supporting Terrorism*, DALLAS MORNING NEWS, Nov. 18, 1994, at 29A (citing unnamed diplomatic and law enforcement sources).

⁷³ STAFF OF NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, MONOGRAPH ON TERRORIST FINANCING 31–32 (2004), available at http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf, [hereinafter MONOGRAPH ON TERRORIST FINANCING]; see also JEFF BREINHOLT, COUNTERTERRORISM ENFORCEMENT: A LAWYER'S GUIDE, Office of Legal Education, Executive Office for United States Attorneys 272, 285–86 (2004) (describing difficulty of using § 2339A, with its “exact intent requirement,” to suppress flow of support from U.S. persons to foreign terrorist organizations).

⁷⁴ Exec. Order No. 12,947, 3 C.F.R. 319 (1995), reprinted in 50 U.S.C. § 1701 (Supp. I 2001).

state and its citizens but, instead, terrorist organizations and their members.⁷⁵ The order identified twelve groups (including Hamas, Palestinian Islamic Jihad, and Hezbollah) and eighteen individuals associated with them as “Specially Designated Terrorists” (“SDTs”), and delegated to the Secretary of Treasury authority to add to this list in the future, in consultation with other departments, pursuant to certain criteria relating to the use of violence to disrupt the Middle East peace process.⁷⁶

The SDT designations had several consequences. First, the assets of SDTs subject to U.S. jurisdiction were blocked.⁷⁷ Second, all U.S. persons were forbidden from dealing in the SDT’s assets.⁷⁸ Third, all U.S. persons were barred from “making or receiving of any contribution of funds, goods, or services to or for the benefit of [SDTs].”⁷⁹ In support of this last prohibition, IEEPA required that President Clinton issue a finding to the effect that even humanitarian donations to the embargoed foreign entity would impair his ability to respond to the underlying emergency.⁸⁰

The United States had at last imposed what amounted to an embargo on foreign terrorist organizations, approximately thirteen years after the concept first received an airing. But this use of IEEPA was not intended by the Administration to be the final resolution of the problem of domestic support for foreign terrorist organizations.⁸¹ As the Moore Letter had cautioned in 1982, an IEEPA embargo had to be tied to the particular emergency invoked.⁸² To embargo groups that could not plausibly be linked to interference with the Middle East peace process, then, the Administration would have to declare a new emergency or obtain new authority from Congress. Accordingly, at the same time that it issued its January 1995 IEEPA order, the Clinton administration announced plans for new legislation including a measure specifically targeting “fund-raising” within the United States by foreign terrorist groups.⁸³

⁷⁵ *Id.*

⁷⁶ *Id.* § 1(i)–(iii); see Message to the Congress Reporting on Terrorists Who Threaten the Middle East Peace Process, 7/31/95 WEEKLY COMP. PRES. DOC. 1319 (July 31, 1995); see also Senior Administration Official, Background Briefing (Jan. 24, 1995), available at 1995 WL 6617026 (referring to the eighteen individuals).

⁷⁷ Exec. Order No. 12,947, § 1(a), 3 C.F.R. 319 (1995), reprinted in 50 U.S.C. § 1701 (Supp. I 2001).

⁷⁸ *Id.* § 1(b).

⁷⁹ *Id.*

⁸⁰ *Id.* § 3; 50 U.S.C. § 1702(b)(2)(A) (2000).

⁸¹ See Senior Administration Official, Background Briefing, *supra* note 76 (reporting comments and answers provided by a “senior administration official” regarding the need for new legislation in addition to the existing § 2339A authority and the new IEEPA order).

⁸² Moore Letter, *supra* note 24, at 74.

⁸³ See Bill Gertz & J. Jennings Moss, *Clinton Puts U.S. Banking Off-limits to Terrorist Groups*, WASH. TIMES, Jan. 25, 1995, at A3 (citing statements by White House spokesman Michael McCurry). Republicans in the Senate had introduced new antiterrorism legislation early in January, but that proposal did not address the fundraising issue. See S. 3, 104th Cong. § 601–10 (1995).

E. The Second Material Support Law

The Administration's proposal, introduced in the Senate by Senator Biden⁸⁴ and in the House by Representative Schumer⁸⁵ in February 1995, included a proposed congressional finding to the effect that "the provision of funds to organizations that engage in terrorism serves to facilitate their terrorist endeavors regardless of whether the funds, in whole or in part, are intended or claimed to be used for non-violent purposes."⁸⁶ Building on this finding, the bills proposed enactment of 18 U.S.C. § 2339B.⁸⁷

As originally conceived, § 2339B would grant the President IEEPA-style authority to identify foreign terrorist organizations posing a threat to U.S. national security, as well as those individuals who the President determines raise funds for such organizations or act on their behalf.⁸⁸ Once these organizations and individuals were identified, it would become illegal to raise funds for them, provide funds to them, or engage in financial transactions with them.⁸⁹ The Treasury Department would establish a licensing scheme, however, pursuant to which would-be donors or fund-raisers could apply for permission to engage in these activities.⁹⁰ Such licenses would be granted only upon a determination that the aid would "be used exclusively for religious, charitable, literary, or educational purposes" or for other purposes determined by the Secretary to be consistent with the statute, and that procedures were in place to ensure such use.⁹¹ Both the licensee and the would-be recipient, moreover, would be obliged to make available for inspection books and records relating to all sources of funding and expenditure.⁹²

The future of this legislation was impacted significantly by the subsequent bombing of the Alfred P. Murrah building in Oklahoma City, an event that generated an immediate surge in the level of attention paid to terrorism proposals.⁹³ On April 27, 1995, Senate Republicans introduced an alternative antiterrorism bill (Senate Bill 735) combining aspects of the Administration proposal—including the same § 2339B licensing proposal—with an earlier Republican proposal and new proposals for habeas corpus reform.⁹⁴ Within the month, however, Senate Republicans moved

⁸⁴ Omnibus Counterterrorism Act of 1995, S. 390, 104th Cong. (1995).

⁸⁵ Omnibus Counterterrorism Act of 1995, H.R. 896, 104th Cong. (1995).

⁸⁶ S. 390, 104th Cong. § 301 (1995) (proposing 18 U.S.C. § 2339B(a)(1)(G)). Section 301 ultimately became law in Pub. L. 104-132, 110 Stat. 1214 (1996).

⁸⁷ 18 U.S.C. § 2339B (Supp. I 2001).

⁸⁸ See S. 390 § 301 (1995) (proposing 18 U.S.C. § 2339B(c)(1) & (2)).

⁸⁹ See *id.* (proposing 18 U.S.C. § 2339B(d)).

⁹⁰ See *id.* (proposing 18 U.S.C. § 2339B(e)).

⁹¹ See *id.* (proposing 18 U.S.C. § 2339B(e)(3)(A) & (e)(5)).

⁹² See *id.* (proposing 18 U.S.C. § 2339B(e)(4)).

⁹³ See, e.g., Katharine Q. Seelye, *House Committee Passes Anti-Terrorism Measure*, N.Y. TIMES, June 21, 1995, at B6 ("Although the package had been in the works for several months, the April 19 bombing in Oklahoma City has given the bill added urgency.").

⁹⁴ See S. 735, 104th Cong. (1995) (sponsored originally by Sens. Brown, Dole, Gramm,

to amend Senate Bill 735,⁹⁵ replacing the proposed licensing scheme (which included exceptions for charitable and religious donations) with a direct ban on fund-raising.⁹⁶ This change drew criticism for reducing the flexibility available under the Administration proposal,⁹⁷ but nonetheless was incorporated into the bill in early June 1995.⁹⁸

House Republicans, meanwhile, introduced House Bill 1710, which was their own alternative to the administration's proposal.⁹⁹ This bill proposed a version of § 2339B much wider in scope than the versions in previous bills. Rather than focusing exclusively on the fund-raising problem, House Bill 1710 proposed a flat ban on the provision of all forms of "material support or resources" (as defined in 18 U.S.C. § 2339A) to designated foreign terrorist organizations, with no exceptions specified in the statute.¹⁰⁰

Regardless of the version at issue, the proposal to enact § 2339B was controversial and raised an array of now-familiar objections.¹⁰¹ Anthony Lewis wrote in the *New York Times* that the provision would "[p]unish[] Americans for the peaceful expression of their political views" in "gross violation of the First Amendment."¹⁰² Others emphasized concerns about

Hatch, Kyl, Nickles, Simpson, and Thurmond, and later also by Sen. Feinstein); 141 CONG. REC. 14,523 (1995) (statement by Sen. Dole explaining relationship of bill to predecessors). The Republican leadership in the House introduced similar legislation, House Bill 1710, in May 1995. H.R. 1710, 104th Cong. (1995); 141 CONG. REC. H5607 (1995).

⁹⁵ See 141 CONG. REC. 14,600 (1995) (referring to Amendment 1199 in the nature of a substitute).

⁹⁶ See 141 CONG. REC. 14,524–25 (1995) (introducing the amendment, Senator Hatch said he had "worked hard to ensure that this provision will not violate the Constitution or place inappropriate restrictions on cherished first amendment freedoms. In fact, we have made significant changes to the original version of this measure proposed by the Clinton administration. For example . . . we have removed troubling licensing requirements that were in the original bill submitted by the [Clinton] administration.").

⁹⁷ See 141 CONG. REC. 14,532 (1995) (statement of Senator Biden objecting that the new provision "eliminates any opportunity for persons to make donations for proper purposes, in my view increasing the first amendment concerns on that aspect of the bill").

⁹⁸ See 141 CONG. REC. 15,073 (1995) (reporting approval of amendment).

⁹⁹ See H.R. 1710, 104th Cong. (1st Sess. 1995). As the 9/11 Commission noted, the interval between February and May 1995 witnessed not only the Oklahoma City bombing, but also the Aum Shirikyo sarin gas attack on the Tokyo subway. See 9/11 COMM. REP., *supra* note 2, at 100.

¹⁰⁰ See H.R. 1710, 104th Cong. § 102 (1995). As John H. Shenefield of the ABA Standing Committee on Law and National Security observed, "[n]o doubt the problems of policing and enforcement inherent in any such licensing regime persuaded the drafters that it was essentially unworkable." *The Comprehensive Antiterrorism Act of 1995, Hearing Before the House Comm. on the Judiciary*, 104th Cong. § 4 (1995) (statement of John H. Shenefield).

¹⁰¹ Cf. 142 CONG. REC. 4568 (1996) (statement of Rep. Schumer) ("These may be interesting academic exercises for law professors, but we cannot allow these tortured fantasies to paralyze Congress and the Nation.").

¹⁰² Anthony Lewis, *Abroad at Home: "This is America,"* N.Y. TIMES, May 1, 1995, at A17. Critics also noted that such a law, if in force in the 1980s, in theory could have led to criminal punishment for donations to the African National Congress or for providing money to the Irish Republican Army. See *id.*; David Kopel, *Terrifying Terror Legislation?*, WASH. TIMES, Feb. 6, 1996, at A14.

the discretion involved in the designation process.¹⁰³ During hearings in June 1995 before the House Committee for the Judiciary, Gregory Nojeim (legislative counsel for the American Civil Liberties Union) argued that the § 2339B concept was a “fundamentally flawed and unconstitutional approach” that “smack[ed] of McCarthyism at its worst.”¹⁰⁴ Questioning the very existence of “the alleged problem of fund raising for terrorist activity,”¹⁰⁵ Nojeim argued that the licensing exception originally proposed by the administration was “wholly illusory” and that efforts to punish donations intended for humanitarian purposes in any event violated the First Amendment.¹⁰⁶ Notably, however, the House proposal to widen the scope of § 2339B from fundraising to all forms of material support did not generate comparable criticism or discussion.

The opposition to § 2339B and various other controversial aspects of the antiterrorism proposals was bipartisan,¹⁰⁷ and at one point this coalition succeeded in removing § 2339B altogether from the House version of the legislation.¹⁰⁸ But with the informal deadline of the first anniversary of the Oklahoma City bombing fast approaching, Congressional leaders struck an agreement that reinserted the broad material support ban.¹⁰⁹ In the end, 18 U.S.C. § 2339B became law along with the rest of the Anti-terrorism and Effective Death Penalty Act on April 24, 1996,¹¹⁰ in what

¹⁰³ Criticisms along these lines led the administration to withdraw its original position that there could be no judicial review of the decision to designate a group as a foreign terrorist organization. See Kenneth J. Cooper, *Clinton Tempers Anti-Terrorist Bill; Power to Bar Fund-Raising for Designated Groups Is Dropped*, WASH. POST, May 4, 1995, at A28.

¹⁰⁴ *The Comprehensive Antiterrorism Act of 1995, Hearing Before the House Comm. on the Judiciary*, 104th Cong. 322 (1995) (statement of Gregory T. Nojeim, Legis. Counsel for American Civil Liberties Union).

¹⁰⁵ *Id.* at 323.

¹⁰⁶ *Id.* at 321–22 & n.8. Similar sentiments were expressed during the hearings by representatives of the National Association of Arab Americans and the American Muslim Council. See *The Comprehensive Antiterrorism Act of 1995, Hearing Before the House Comm. on the Judiciary*, 104th Cong. 422 (1995) (statement of Khalil E. Jahshan, Executive Dir., National Ass’n of Arab Americans) (arguing that “[c]utting off fundraising to the legitimate non-terrorist and non-violent activities of such groups will deprive Palestinian society of vital services that cannot easily be provided by the Palestinian National Authority or any outside source at this time”); *id.* at 455 (statement of Azizah Y. al-Hibri, National Advisory Board, American Muslim Council) (arguing that “in the absence of convincing proof that the funds are being used to support terrorism, lawful humanitarian activities should not be criminalized”). See also H.R. REP. NO. 104-383, at 176–80 (1995) (reporting criticisms of § 2339B from dissenting members of the House Comm. on the Judiciary).

¹⁰⁷ See, e.g., *Anti-Terrorism Bill Won’t Happen This Year; Lawmakers Say*, WASH. POST, Dec. 19, 1995, at A10 (“The bill . . . has been stalled in the House by a coalition of some of its most liberal and conservative members”).

¹⁰⁸ See 142 CONG. REC. 4603 (1996) (recording passage of the “Barr Amendment,” which removed the authority to designate foreign terrorist organizations).

¹⁰⁹ See Michael Wines, *G.O.P. Has Tentative Deal on Terrorism Bill*, N.Y. TIMES, Apr. 13, 1996, at A10; Helen Dewar, *Hill Negotiators Agree on Anti-Terrorism Bill*, WASH. POST, Apr. 16, 1996, at A7.

¹¹⁰ See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

has been described as the “watershed legislative development of terrorist financing enforcement.”¹¹¹

Section 2339B, as enacted, is both narrower and broader than its predecessor, § 2339A. It is narrower in the sense that § 2339B applies only to aid given to “designated foreign terrorist organizations” publicly identified as such by the Secretary of State, whereas § 2339A theoretically could apply to aid given to anyone.¹¹² Section 2339B is broader than its predecessor, however, in a different sense. Section 2339A forbids aid only when the provider knows or intends it will be used to commit one of the crimes specified in the statute.¹¹³ The new proposal, in contrast, would seem on its face to prohibit the provision of the same kinds of aid under any circumstances irrespective of the provider’s intent or belief about how the recipient will use it.¹¹⁴

F. The Terrorism-Support Laws in Practice Before and After 9/11

Since April 1996, then, the federal government has had a two-track system for cutting off support from U.S. persons to foreign terrorist organizations, one drawing on the material support statutes (§§ 2339A and 2339B) and the other on IIEPA orders.¹¹⁵ But notwithstanding the effort it took to establish them, these powers resulted in very few prosecutions

¹¹¹ *Hearing on Tools to Fight Terrorism Act, Before the Subcomm. on Terrorism, Technology, and Homeland Security, of the S. Judiciary Comm.*, 108th Cong. (2004) (statement of Barry Sabin, Chief of the Counterterrorism Section of the Crim. Div., Dep’t of Just.).

¹¹² See 18 U.S.C. § 2339B(g)(6) (2000) (incorporating by reference 8 U.S.C. § 1189(a)(1) (Supp. I 2002)). The Secretary of State makes the designation, with input from the CIA and other relevant agencies, based on determinations that the organization is “foreign” and engages in “terrorist activity,” and that such activity threatens the security of U.S. nationals or the United States itself. For a good primer on the designation process, see Audrey K. Cronin, Congressional Research Service, *The “FTO List” and Congress: Sanctioning Designated Foreign Terrorist Organizations*, Oct. 21, 2003, available at <http://fpc.state.gov/documents/organization/25996.pdf>.

¹¹³ 18 U.S.C. § 2339A (Supp. II, 2002).

¹¹⁴ As discussed in more detail below, § 2339B’s only mens rea requirement is that the provision be “knowing.” Early drafts of the legislation elaborated to an extent on precisely what it is the defendant must know, whereas the final language simply states that the provision must be “knowing.” See *infra* note 336.

¹¹⁵ There is a military analog to the material support law in the form of Article 104 of the Uniform Code of Military Justice, which punishes one who “(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or (2) without proper authority, knowingly harbors or protects or gives intelligence to or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly.” Uniform Code of Military Justice Art. 104 (codified at 10 U.S.C. § 904 (2000)) (“Aiding the Enemy”). In September 2004, for example, Specialist Ryan G. Anderson was convicted by a court-martial of attempting to violate Article 104 by seeking to provide information to persons he believed to be associated with al Qaeda related to vulnerabilities of U.S. M1-A1 Abrams tanks. See Mike Barber, *Guardsmen Convicted of Trying to Help Al-Qaida*, SEATTLE POST-INTELLIGENCER, Sept. 3, 2004, at A1.

prior to 9/11.¹¹⁶ Section 2339A may have been used on as few as two occasions as a predicate for criminal prosecution, one of which involved a domestic militia rather than a foreign terrorist organization.¹¹⁷ Meanwhile, § 2339B was used on only four occasions, two involving support to Hezbollah¹¹⁸ and two for an Iranian opposition group, the Mujahedin-e Khalq (MEK).¹¹⁹ In each of these instances, moreover, the application of the law was relatively uncontroversial; the defendants were charged with providing funds, equipment, or false identification to designated groups.

Activity under IEEPA similarly was limited. In August 1998, on the recommendation of an interagency committee led by National Security Council staff, President Clinton issued a second IEEPA order that expanded the list of SDTs to include Osama bin Ladin and al Qaeda, among other individuals and groups.¹²⁰ Unfortunately, “few funds were frozen” under IEEPA’s blocking requirements as a consequence of this order because the Treasury Department had few leads relating to al Qaeda or bin Ladin-related assets.¹²¹ In July 1999, President Clinton resolved an internal debate regarding U.S. policy toward the Taliban by exercising his IEEPA powers against them,¹²² thereby seizing substantial funds.¹²³ There appear

¹¹⁶ See MONOGRAPH ON TERRORIST FINANCING, *supra* note 73, at 32 (noting that prior to 9/11 “there was little impetus to focus on prosecuting material support cases or committing resources to train prosecutors and agents to use the new statutory powers. As a result, the prospect of bringing a criminal case charging terrorist financing seemed unrealistic to field agents.”).

¹¹⁷ See *United States v. Looker*, 168 F.3d 484 (4th Cir. 1998) (describing a § 2339A conviction relating to militia activity); *United States v. Haouari*, 2001 WL 1154714 (S.D.N.Y. Sept. 28, 2001) (referring to a § 2339A indictment against two men arising out of the millennium bombing plot involving the Los Angeles International Airport).

¹¹⁸ See David E. Kaplan & Monica M. Ekman, *Homegrown Terrorists: How a Hezbollah Cell Made Millions in Sleepy Charlotte, N.C.*, U.S. NEWS & WORLD REP., Mar. 10, 2003, at 30 (describing prosecution of a cigarette smuggling ring using its proceeds to buy equipment for and to send funds to Hezbollah); John Mitz & Michael Grunwald, *FBI Terror Probes Focus on U.S. Muslims*, WASH. POST, Oct. 31, 1998, at A1 (discussing prosecution of Fawzi Mustapha Assi for sending equipment including night vision goggles and infrared cameras to Hezbollah).

¹¹⁹ See David Rosenzweig, *Man Convicted of Assisting Terrorist Group*, L.A. TIMES, Oct. 27, 1999, at B1 (describing conviction of Bahram Tabatabai in connection with supplying false immigration documents to members of MEK). Interestingly, the issue of MEK’s status has become a considerable foreign policy issue in the aftermath of the Iraq war, as the United States has dealt with the MEK forces quartered in Iraq. Although the United States initially attacked the MEK units and subsequently held them confined to their base, the United States recently declared them to be “protected persons” under the Geneva Conventions, signaling an unwillingness to cooperate with Iranian requests for their rendition. See Douglas Jehl, *U.S. Sees No Basis to Prosecute Iranian Opposition “Terror” Group Being Held in Iraq*, N.Y. TIMES, July 27, 2004, at A8.

¹²⁰ See Exec. Order No. 13,099, 3 C.F.R. 208 (1998), reprinted in 50 U.S.C. § 1701 (Supp. I 2001); 9/11 COMM. REP., *supra* note 2, at 185.

¹²¹ See 9/11 COMM. REP., *supra* note 2, at 185.

¹²² See Exec. Order No. 13,129, 3 C.F.R. 200 (1999), reprinted in 50 U.S.C. § 1701 (Supp. I 2001).

¹²³ See 9/11 COMM. REP., *supra* note 2, at 185 (describing the blockage of “\$34 million in Taliban assets held in U.S. banks,” along with “\$215 million in gold and \$2 million in demand deposits” at the Federal Reserve Bank of New York belonging to the Afghan Cen-

to have been no criminal prosecutions in this period, however, under this or any other IEEPA order.

The attacks on 9/11 ended this pattern of relative inactivity. Prosecutors have made extensive use of the terrorism-support laws since 9/11.¹²⁴ Fifty-six individuals have been charged with violating § 2339B in the three years since 9/11,¹²⁵ thirty-six have been charged under § 2339A,¹²⁶ and thirty-seven have been charged with violating IEEPA regulations.¹²⁷ Within two weeks of the attacks, moreover, President Bush issued an Executive Order declaring a national emergency under IEEPA in connection with the 9/11 attacks and the continuing threat of additional terrorist attacks against the United States.¹²⁸ The order identified fifteen foreign terrorist organizations and twelve individuals as “Specially Designated Global Terrorists” (“SDGTs”) whose assets would now be blocked and as to whom it would now be illegal to provide “funds, goods, or services.”¹²⁹ Like the Clinton order establishing the list of proscribed SDTs in 1995, Bush’s order delegated authority to update the list of proscribed SDGTs pursuant to an inter-agency process.¹³⁰ As a result, a total of twenty-two organizations (each also is a designated foreign terrorist organization for purposes of § 2339B) and 361 individuals were designated as SDGTs by the summer of 2004.¹³¹

Today we have a robust legal framework for the suppression of aid provided by U.S. persons to foreign terrorist organizations. That frame-

tral Bank).

¹²⁴ Statistics on the specific charging decisions federal prosecutors have made in the post-9/11 period are difficult to obtain. To remedy that problem, I have compiled my own data set on charging decisions in the three-year period from 9/11 through the end of September 2004, relying primarily on the actual indictments in these cases. The results of my charge survey are available at <http://www.wfu.edu/~chesner/NationalSecurityLaw/Prosecution%20Charts/TerrorismProsecutionStatistics.htm> [hereinafter Terrorism Prosecution Statistics website].

¹²⁵ This figure derives from the data posted on the Terrorism Prosecution Statistics website. *See id.* at Table 3.2 (noting thirty-two individuals charged); Table 4.2 (three individuals); Table 5.2 (ten individuals); and Table 6.2 (eleven individuals).

¹²⁶ *See id.* at Table 3.2 (noting twenty-one individuals charged); Table 4.2 (four individuals); Table 5.2 (six individuals); and Table 6.2 (two individuals). As one counterterrorism specialist at the Justice Department has observed, § 2339A “will never be as powerful as 8 U.S.C. § 2339B, nor will it generate as many prosecutions.” BREINHOLT, *supra* note 73, at 286.

¹²⁷ *See id.* at Table 3.2 (noting twenty-three individuals charged); Table 4.2 (zero individuals); Table 5.2 (twelve individuals); and Table 6.2 (two individuals). There is some degree of overlap among these charges: Sections 2339A and 2339B have been charged simultaneously in some instances, as have § 2339B and IEEPA. In fact, in a few cases all three statutes have been charged simultaneously. Prosecutors have not used § 2339A and IEEPA alone, however. *See id.*

¹²⁸ Exec. Order No. 13,224, 3 C.F.R. 786 (2001), *reprinted in* 50 U.S.C. § 1701 (Supp. I 2001).

¹²⁹ *Id.* § 2(a).

¹³⁰ *Id.* § 1(b)–1(d).

¹³¹ *See Hearing Before S. Banking, Housing, and Urban Affairs Comm.*, 108th Cong. (Apr. 29, 2004) (statement of R. Richard Newcomb, Dir., Office of Foreign Assets Control, Dep’t of the Treasury).

work is the product of bipartisan efforts by both the executive and legislative branches across a span of two decades to address a problem that seemed to evolve in conjunction with the changing nature of terrorism itself. In the early 1980s, when the availability of state sponsorship meant that terrorist organizations had relatively little need for funds but could benefit from expertise, the original terrorism-support law proposals tended to focus on cutting off that particular form of aid. As state sponsorship withered in subsequent years, the significance of funding increased, and the scope of terrorism-support law proposals reflects this change. Initially these proposals (including that which became § 2339A) sought a middle course between ill-intentioned and well-intended donations. By the time § 2339B was enacted in 1996, however, mounting concerns about the problem of terrorism led to adoption of a broad embargo approach that limited itself neither to purposeful attempts to support violence nor to aid in the form of funding. The question explored in the next Part is whether the current framework is sufficiently broad to provide the Justice Department with a device to take action against potential sleepers in circumstances that might otherwise seem to involve no grounds for prosecution.

II. THE TERRORISM PREVENTION PARADIGM AND INSTITUTIONAL COMPETITION BETWEEN THE DEPARTMENTS OF JUSTICE AND DEFENSE

Policy changes sparked by 9/11 provide necessary context for a discussion of how prosecutors have dealt with the problem of potential sleepers. Two changes in particular stand out. The first is relatively obvious: since 9/11 the Justice Department has prioritized the prevention of future terrorist attacks above other institutional objectives, giving prosecutors significant internal incentive to expand their capacity for prevention. The second is less obvious, but closely related: after 9/11, the Defense Department emerged as an institutional competitor of the Justice Department regarding incapacitation of potential terrorists within the United States. This institutional competition is subject to management by senior policymakers and in many respects may be essentially cooperative, but the existence of the parallel institutional alternatives nonetheless provides an external spur to the Justice Department's prevention efforts, particularly in the context of suspected sleepers.

A. Institutional Competition from the Defense Department

Prior to 9/11, the Defense Department played a limited role in U.S. counterterrorism efforts. According to the 9/11 Commission Report, “[t]he experience of the 1980s had suggested to the military establish-

ment that if it were to have a role in counterterrorism, it would be a traditional military role—to act against state sponsors of terrorism.”¹³² Operations under this rubric in 1986 against Libya and in 1993 against Iraq exemplified and reinforced the understanding that the military’s role should involve “limited retaliation with air power, aimed at deterrence.”¹³³ But this paradigm shifted after 9/11.

Several factors contributed to the change. First, the 9/11 attacks were widely perceived as acts of war, albeit unlawful ones.¹³⁴ Equally significant, most of al Qaeda’s leaders and a substantial portion of its members at that time were entrenched in Afghanistan and could not be reached effectively other than through military force.¹³⁵ This necessity removed any lingering questions that might have arisen about the proper role of military force if, for example, al Qaeda leadership had at the time been dispersed throughout the world in locations amenable to covert or diplomatic measures.

¹³² 9/11 COMM. REP., *supra* note 2, at 97; *see also id.* at 73 (“Legal processes were the primary method for responding to . . . early manifestations of a new type of terrorism.”); *id.* at 348 (“The existing mechanisms for handling terrorist acts had been trial and punishment for acts committed by individuals; sanction, reprisal, deterrence, or war for acts by hostile governments.”).

¹³³ *Id.* at 98; *see also id.* at 121 (describing resistance to proposals emanating from the Office of the Assistant Secretary for Special Operations and Low-Intensity Conflict); *id.* at 130, 136–37, 351 (discussing the institutional memory of the failed Desert One operation in Iran in 1980, and the cautious attitude of senior officers regarding the use of troops in Afghanistan in clandestine actions prior to 9/11, notwithstanding interest from Special Operations officers); Richard H. Shultz, Jr., *Showstoppers*, WEEKLY STANDARD, Jan. 26, 2004, at 18 (arguing, based on a report Dr. Shultz prepared for the Pentagon in 2001, that the defense establishment rebuffed efforts by Special Operations Forces to carry out more offensive operations). Speaking with respect to requests by the Bush Administration in the summer of 2001 for more aggressive options for dealing with Afghanistan, National Security Advisor Condoleezza Rice testified to the 9/11 Commission that “[t]he military didn’t particularly want this mission.” 9/11 COMM. REP., *supra* note 2, at 208. The 9/11 Commission Report also describes a disagreement between officers in the CIA’s bin Ladin unit who were “eager” for covert paramilitary efforts and more senior officials who, conscious of the trouble such operations had generated for the CIA in the past, viewed the task as best left to the military. *Id.* at 351.

¹³⁴ *See, e.g.*, 9/11 COMM. REP., *supra* note 2, at 326 (describing the use of the word “war” to characterize the attacks during the initial conferences of senior national security officials on 9/11); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified as 50 U.S.C. § 1541 (Supp. I 2001)); Counsel to the President Alberto R. Gonzales, Remarks at the Meeting of the American Bar Association Standing Committee on Law and National Security 5 (Feb. 24, 2004), *available at* <http://www.fas.org/irp/news/2004/02/gonzales.pdf> (last visited Nov. 23, 2004) (stating that “our conflict with al Qaeda is clearly a war,” and noting that the United Nations Security Council, NATO, and the signatories to the Rio and ANZUS treaties all recognized that 9/11 triggered America’s right to use military force in self-defense).

¹³⁵ *See* 9/11 COMM. REP., *supra* note 2, at 108–43 (discussing failed efforts during the pre- and post-9/11 period to capture bin Ladin and other al Qaeda leaders through covert means and diplomatic measures, as well as limited attempts to use military force). The 9/11 Commission report captured the impotence of the purely criminal justice approach in this particular context when it cited FBI agents for the proposition that “the FBI and the Justice Department do not have cruise missiles. They declare war by indicting someone.” *Id.* at 82.

Once in Afghanistan under the banner of Operation Enduring Freedom, the U.S. military found itself—and still finds itself at the time this Article went to press—involved in relatively traditional combat operations against Taliban and al Qaeda forces. This meant that the military was engaged in the killing, capture, detention, and interrogation of terrorists as (unlawful) belligerents.¹³⁶ In this traditional combat context, military detention of al Qaeda members was perfectly natural;¹³⁷ it served to prevent captured persons from rejoining the fight and “enabl[ed] the collection of intelligence about the enemy.”¹³⁸

The military role in post-9/11 counterterrorism, however, has not been limited to the traditional combat context of Afghanistan. In addition to al Qaeda members captured in the Afghanistan combat zone, the military has detained an indeterminate number of suspected terrorists captured elsewhere under circumstances less clearly resembling traditional notions of a zone of combat operations.¹³⁹ Several key arrests leading to military detention have been made in Pakistan, including those of Abu Zubaydah, Ramzi Binalshibh, Khalid Shaykh Mohammed, and Mustafa Ahmed al-Hawsawi.¹⁴⁰ In another example, a Pakistani citizen and U.S. permanent

¹³⁶ The CIA’s paramilitary role should not be discounted in this context. Within days of 9/11, President Bush signed a Memorandum of Notification authorizing the CIA to “‘use all necessary means’ to destroy bin Laden and Al Qaeda.” Col. Kathryn Stone, *All Necessary Means—Employing CIA Operatives in a Warfighting Role Alongside Special Operations Forces 2* (2003) (unpublished manuscript, on file with author). This order contrasted, or so it seems from the 9/11 Commission Report, with previous memoranda relating to al Qaeda which emphasized and prioritized the capture rather than the killing of al Qaeda’s leadership. *See 9/11 COMM. REP., supra* note 2, at 90, 110, 112–14, 120, 126, 131–33, 139 (describing a succession of memoranda and plans related to the capture of bin Ladin and others, as well as conflicting recollections and interpretations between White House and CIA officials); *id.* at 115 (discussing diplomatic efforts to have bin Ladin expelled to the U.S. or elsewhere for trial). *But see id.* at 116 (describing consensus at principals’ meeting to strike an al Qaeda meeting in Afghanistan with cruise missiles with the “purpose . . . to kill Bin Ladin and his chief lieutenants” after the 1998 embassy bombings); *id.* at 142 (noting that in 1999 President Clinton “reportedly also authorized a covert action under carefully limited circumstances which, if successful, would have resulted in Bin Ladin’s death.”).

¹³⁷ *See, e.g.,* CHRIS MACKEY & GREG MILLER, *THE INTERROGATOR’S WAR: INSIDE THE SECRET WAR AGAINST AL QAEDA* 208 (2004) (describing capture of Abdulsalam al-Aimi in the context of combat in Tora Bora). Significant issues about the propriety of military detention of these individuals did not arise until some were transferred to facilities at Guantanamo Bay, Cuba, where the original linkage between these persons and combat became obscured, and they became intermingled with detainees captured in other contexts.

¹³⁸ Gonzales, *supra* note 134, at 8.

¹³⁹ Military-style lethal force also has been employed in nontraditional contexts on at least one occasion. On November 3, 2002, a CIA-operated Predator unmanned aerial vehicle fired a Hellfire missile that destroyed a car carrying a number of al Qaeda members, killing all on board. *See* Even Thomas & Mark Hosenball, *The Opening Shot*, NEWSWEEK, Nov. 18, 2002, at 48.

¹⁴⁰ *See* David E. Kaplan, *Playing Offense*, U.S. NEWS & WORLD REP., June 2, 2003, at 18 (summarizing the arrests in Pakistan); YOSRI FOUDA & NICK FIELDING, *MASTERMINDS OF TERROR: THE TRUTH BEHIND THE MOST DEVASTATING TERRORIST ATTACK THE WORLD HAS EVER SEEN* 15–21 (2003) (narrating the capture of Binalshibh). Again, the convergence between Defense Department and CIA activity should be noted in this context. *See*

resident Saifullah Paracha (father of Uzair Paracha, indicted in the U.S. on terrorism-related charges) appears to have come into U.S. custody at some point during an international flight to Bangkok, and as of November 2003 was held at Bagram Air Force Base in Afghanistan.¹⁴¹ Likewise, the military obtained custody of Abd al Rahim al Nashiri—mastermind of the failed attack on the *USS The Sullivans* and the successful attacks on the *USS Cole* and the French tanker *Limburg*—after his capture in 2002 by security forces in the United Arab Emirates.¹⁴²

The expansion of military detention beyond the Afghanistan combat zone to non-citizens captured in non-combat contexts abroad has generated relatively little debate within the United States. But another aspect of the expansion of the military detention model has sparked tremendous controversy: military detention of persons captured within the United States. There have been two such detainees since 9/11,¹⁴³ one involving an American citizen (Jose Padilla) which has garnered extensive attention, and the other involving a Qatari man, Ali Saleh al Marri, which has gone relatively unremarked.¹⁴⁴ In contrast to the capture of al Qaeda members in Afghanistan in the context of Operation Enduring Freedom, the detentions of Padilla and al Marri bear close resemblances to civilian law enforcement and little resemblance to combat.¹⁴⁵

Kaplan, *supra*, at 26 (describing CIA detention centers in Jordan, Afghanistan, and Diego Garcia); Editorial, *The CIA's Prisoners*, WASH. POST, July 15, 2004, at A20 (editorializing against alleged CIA practice of holding terrorism suspects abroad in secret interrogation facilities).

¹⁴¹ See HUMAN RIGHTS FIRST, ENDING SECRET DETENTIONS 9 (2004) (describing Saifullah Paracha's detention); *United States v. Paracha*, No. 03 CR. 1197, 2004 WL 1900336 at *1 (S.D.N.Y. Aug. 24, 2004) (denial of motion to suppress) (describing relationship between Saifullah and Uzair Paracha); see also 9/11 COMM. REP., *supra* note 2, at 153 (describing capture of Abd al Rahim al Nashiri in the United Arab Emirates in November 2002); MACKAY & MILLER, *supra* note 137, at 331–40 (describing interrogation of “Hadi,” a young man brought to Afghanistan after being “captured in a choreographed U.S.-Indonesian snatch [in Indonesia]”).

¹⁴² See 9/11 COMM. REP., *supra* note 2, at 153.

¹⁴³ A third military detainee in the U.S.—Yaser Esam Hamdi—was captured in Afghanistan and only later transferred here. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2635–36 (2004). Hamdi has since been released. See Jerry Markon, *U.S. to Free Hamdi, Send Him Home*, WASH. POST, Sept. 23, 2004, at A1.

¹⁴⁴ Al-Marri initially was prosecuted on a variety of fraud charges in New York and Illinois (prosecutors alleged that he engaged in credit card fraud for the benefit of al Qaeda), but just before trial was designated an enemy combatant and transferred to the Consolidated Naval Brig in Charleston, where he remains today. See *Al-Marri v. Bush*, 274 F. Supp. 2d 1003 (C.D. Ill. 2003) (dismissing habeas petition for improper venue), *aff'd*, 360 F.3d 707 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 34 (2004); Patricia Hurtado, *Qatari Linked to al-Qaida*, NEWSDAY, Jan. 14, 2003, at A26 (describing the al Qaeda allegation). Al-Marri has since re-filed his petition in the proper court. See *Al-Marri v. Hanft*, No. 2:04CV57, Petition for a Writ of Certiorari (D.S.C. July 8, 2004), *docket sheet available through* <http://www.scd.uscourts.gov/Noteworthy/AlMarri/docket.asp>.

¹⁴⁵ Indeed, Padilla originally was arrested by the FBI on a material witness warrant, assigned counsel, and held for several weeks at the Metropolitan Correctional Center in Manhattan. See *infra* note 205 and accompanying text. Al-Marri was also arrested under ordinary, civilian circumstances in December 2001. See Hurtado, *supra* note 144 (referring

Their cases mark the emergence of institutional competition between the Justice and Defense Departments with respect to the incapacitation of potential terrorists within the United States.¹⁴⁶ This competition could have ended in the summer of 2004 when the Supreme Court considered the constitutionality of the military's detention of Jose Padilla.¹⁴⁷ A panel of the Second Circuit had held that the administration lacked authority to use the military to detain Padilla in light of his U.S. citizenship.¹⁴⁸ The Court vacated the Second Circuit's decision, but not on grounds that clarified the propriety of the military's role in detaining potential terrorists within the United States. Instead, the Court ruled that Padilla's habeas petition ought to have been filed in a different district, and declined to address the merits.¹⁴⁹ Padilla has now re-filed in the proper district,¹⁵⁰ but judging from his own past experience at least two years will pass before a definitive Supreme Court decision on the merits.¹⁵¹

to December 2001 arrest).

¹⁴⁶ By referring to the overlap between Justice and Defense Department responsibilities as "institutional competition," this Article does not mean to imply that the senior officials in each bureaucracy necessarily view one another in adversarial terms or that they do not engage in cooperative behavior when cases arise in that shared area. There is political science literature addressing the effects of competition when government agencies have overlapping jurisdictions and mandates. See, e.g., Richard S. Higgins et al., *Dual Enforcement of the Antitrust Laws*, in PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION 154 (Robert J. Mackay et al., eds., 1987) (analyzing impact of institutional competition between the Federal Trade Commission and the Justice Department Antitrust Division); COMPETITION AMONG INSTITUTIONS (Luder Gerken, ed.) (1995) (surveying institutional competition in other fields).

¹⁴⁷ See *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

¹⁴⁸ See *Padilla v. Rumsfeld*, 352 F.3d 695, 699 (2d Cir. 2003).

¹⁴⁹ See *Padilla*, 124 S. Ct. at 2715 and 2724 (declining to reach the merits and stating that Padilla should have filed in South Carolina, not New York). Those willing to cross-count the four-vote dissent in *Padilla* and Justice Scalia's dissent in its companion case, *Hamdi*, might argue that a majority of the Supreme Court take the view that the military lacks authority to detain a U.S. citizen captured in the United States in Padilla's circumstances. In the text of *Padilla*, the dissent remains noncommittal as to whether Padilla "is entitled to immediate release." *Padilla*, 124 S. Ct. at 2735 (Stevens, J., dissenting). A much-discussed footnote at that point contains a statement in the first person to the effect that the author, Justice Stevens, agrees with the Second Circuit panel majority that the Non-Detention Act precludes Padilla's detention notwithstanding the September 18, 2001 Authorization for Use of Military Force. *Id.* at 2735 n.8. To the extent that one can presume that this first-person footnote reflects the views of all four dissenting justices, one might then derive a fifth vote by looking to Justice Scalia's dissent in *Hamdi*. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2660 (2004) (Scalia, J., dissenting) (arguing that the government may use criminal prosecution or seek suspension of the writ, but may not otherwise use military detention with respect to a citizen). Particularly in light of the uncertainty surrounding footnote eight in the *Padilla* dissent, however, it would be exceedingly rash to presume five votes on the merits in Padilla's favor.

¹⁵⁰ See *Padilla v. Hanft*, No. 2-04-2221-26-AJ (D.S.C. habeas petition filed July 2, 2004), available at <http://www.scd.uscourts.gov/Padilla/Images/00000001.pdf>.

¹⁵¹ Padilla's amended habeas petition was filed in the United States District Court for the Southern District of New York on June 19, 2002. See *Rumsfeld v. Padilla*, No. 03-127, Petition for a Writ of Certiorari at 3.a. The District Judge's final ruling on the petition came on March 11, 2003. See *id.* at 3.c. The Second Circuit reversed the District Court on December 18, 2003. See *Padilla v. Rumsfeld*, 352 F.3d 695, rev'd 124 S. Ct. 2711. The

In the interim (and perhaps afterward), institutional competition between the Justice and Defense Departments with respect to the incapacitation of potential terrorists will continue. The playing field in this competition, however, is uneven. From the perspective of a policymaker interested in prevention, the military option has significant advantages over the incumbent criminal justice approach. The law of armed conflict presupposes the right of a belligerent to detain the enemy's personnel for the duration of hostilities,¹⁵² whereas criminal law permits extended detention only upon trial and conviction.¹⁵³ Moreover, military detention since 9/11 has been far less transparent than criminal detention, allowing for interrogation without the presence of an attorney and providing decidedly fewer procedural safeguards and rights for the individual detained. Military detention also has not required the public disclosure of classified information. The military option, in short, vests the government with considerably more control and freedom of action than the criminal justice alternative.¹⁵⁴

So long as the military detention alternative remains available, then, policymakers who decide to take action against a potential terrorist in the United States will be tempted to resort to it if the Justice Department cannot provide a plausible alternative. What alternative can federal prosecutors offer? This question draws our attention to the second major impact of 9/11 on U.S. counterterrorism law and policy: the Justice Department's adoption of a terrorism-prevention paradigm.

B. Prevention as the Highest Priority of the Justice Department

The second significant change in U.S. counterterrorism policy wrought by 9/11 concerns a change in priorities within the Justice Department (and, by extension, the FBI). Whereas in the past the priority with respect to terrorism was to prosecute suspected terrorists in a traditional manner,¹⁵⁵ the

Supreme Court granted certiorari on February 20, 2004, held oral argument on April 28, 2004, and issued its ruling on June 28, 2004—two years and nine days after the filing of the amended petition. *See* *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

¹⁵² *See* *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640 (2004).

¹⁵³ *But see* *Kansas v. Hendricks*, 521 U.S. 346 (1997) (permitting preventive detention of sexually violent predators).

¹⁵⁴ The ongoing proceedings in the prosecution of Zacarias Moussaoui undoubtedly have reinforced policymakers' concerns about the adequacy of the criminal justice system when dealing with potential terrorists. *See* Susan Schmidt, *Prosecution of Moussaoui Nears a Crossroad*, WASH. POST, Jan. 21, 2003, at A8 (describing the possibility that Moussaoui would be transferred to military custody in light of persistent problems arising out of his desire to depose al Qaeda members in military custody).

¹⁵⁵ The pre-9/11 approach was traditional and post hoc-oriented in the sense that most law enforcement actions relating to terrorism tended to focus on completed acts or attempts and conspiracies to commit specific acts. *See, e.g.,* *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003) (affirming convictions related to 1993 World Trade Center bombing and plot to blow up airliners over the Pacific); *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999) (affirming convictions in prosecutions relating to plot to destroy bridges and

overriding priority of the Department since 9/11 is to prevent attacks before they occur using all available tools.¹⁵⁶

The precise moment when this shift occurred may have been captured in Bob Woodward's account of policymaking within the Bush Administration in the days and weeks immediately following 9/11.¹⁵⁷ Woodward describes a meeting of the National Security Council shortly after the attack, during which new FBI Director Robert Mueller mentioned the need to take care that evidence not be tainted in the event of subsequent arrests and prosecutions. This reference to the traditional role of federal law enforcement prompted Attorney General John Ashcroft to interrupt. Woodward provides the following account: "Let's stop the discussion right here, [Ashcroft] said. The chief mission of U.S. law enforcement . . . is to stop another attack and apprehend any accomplices or terrorists before they hit us again. If we can't bring them to trial, so be it."¹⁵⁸

That moment symbolized a dramatic change in priorities not only for the FBI but for the Justice Department as a whole.¹⁵⁹ As Ashcroft explained to the Senate Judiciary Committee a few weeks later, "[o]ur fight against terrorism is not merely [or] primarily a criminal justice endeavor[.] [I]t has to be a defensive and preventi[ve] endeavor [w]e must prevent first; prosecute second."¹⁶⁰ It is one thing to declare prevention to be

tunnels in New York and to assassinate the President of Egypt). *See also* 9/11 COMM. REP., *supra* note 2, at 72 (describing the post-1993 "impression that the law enforcement system was well-equipped to cope with terrorism"). But it should be acknowledged that law enforcement leaders did recognize the need to attempt to prevent terrorism as well as punish it after it occurred. *See, e.g., id.* at 76 (noting that FBI Director Louis Freeh "urged agents not to wait for terrorist acts to occur before taking action"); *id.* at 78 (discussing prevention emphasis under Director Mueller).

¹⁵⁶ For an authoritative and comprehensive overview of the Justice Department's approach to counterterrorism enforcement, see BREINHOLT, *supra* note 73.

¹⁵⁷ *See* BOB WOODWARD, BUSH AT WAR 42 (2002).

¹⁵⁸ *Id.* Woodward's narrative of this particular exchange conspicuously lacks quotation marks, in contrast to other, quoted, passages in the book. This would seem to indicate that his account is a reconstruction either from notes or the partial recollection of a participant in the meeting.

¹⁵⁹ *See Dep't of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 310 (2001) (statement of John Ashcroft, Attorney General) (testifying that "[f]rom that moment, at the command of the President of the United States, I began to mobilize the resources of the Department of Justice toward one single, overarching and overriding objective: to save innocent lives from further acts of terrorism"). President Bush reiterated the prevention mandate at a National Security Council meeting held in the Cabinet Room on the morning of September 17. *See* WOODWARD, *supra* note 157, at 97 (reporting that the "new policy would stress preemption of future attacks, instead of investigation, gathering evidence and prosecution").

¹⁶⁰ *Homeland Defense: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 9 (2001) (statement of John Ashcroft, Attorney General). *See also* Assistant Attorney General for the Office of Legal Policy Viet Dinh, Life After 9/11: Issues Affecting the Courts and the Nation, Panel Discussion at U. of Kan. L. Sch., discussing the "massive legislative, administrative, and executive reorganization of our legal authorities and the way we do business, with one overriding goal: to prevent another terrorist attack and to disrupt terrorist activities before they can be effectuated into another mass, catastrophic attack," in 51 U.

an overriding priority, but quite another to operationalize that concept. What precisely has the Justice Department done to translate these words into action, and do any of these changes provide policymakers with a plausible alternative to military detention of potential sleepers within the United States? These questions require a survey of the multi-tiered law enforcement strategy¹⁶¹ adopted by the Justice Department in response to the prevention imperative.

1. Tier One: Inchoate Crime Prosecution

The first tier of the prevention strategy involves traditional inchoate crime prosecutions. Under this heading, the Justice Department relies on the laws of attempt and conspiracy to prosecute defendants who can be linked to plans to commit specific terrorist acts. Such prosecutions occurred before 9/11,¹⁶² of course, and they remain an important component of the Justice Department's prevention strategy today.¹⁶³ The sleeper scenario, however, often will not be amenable to this solution; the essence of the sleeper dilemma is that the suspect cannot be linked to plans to commit a particular harmful act.

2. Tier Two: Diffused Prevention

The second tier of the prevention strategy addresses the opposite end of the threat spectrum. In contrast to the scenario where the government suspects a particular individual in connection with a specific plan of attack, there are times when the government is aware of a terrorist threat at a general level but has no particular suspect in mind. It is inherently difficult for the Justice Department to act in its law enforcement capacity in that context.¹⁶⁴ Nonetheless, it is possible to use law enforcement measures to

KAN. L. REV. 219, 223 (2003).

¹⁶¹ The Justice Department's law enforcement function is one of two that pertain to the prevention mission. The other is the Department's role (primarily exercised through the FBI) in gathering and analyzing intelligence in the domestic arena. For an overview of this role, see 9/11 COMM. REP., *supra* note 2, at 74–82. See also *Oversight Hearing on the Recommendations of the 9/11 Commission Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 108th Cong. (Aug. 23, 2004) (statements of Christopher Kojm, Deputy Exec. Dir., National Committee on Terrorist Attacks upon the United States; John S. Pistole, Exec. Asst. Dir., Counterterrorism Div., FBI; John O. Brennan, Dir., Terrorist Threat Integration Center).

¹⁶² See, e.g., *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999).

¹⁶³ See, e.g., *United States v. Reid*, 369 F.3d 619 (1st Cir. 2004) (describing conviction of Richard Reid for attempting to destroy a transatlantic flight with a bomb hidden in his shoe).

¹⁶⁴ The government as a whole can of course engage in target-hardening measures (jersey barriers, metal detectors, and the like) as a form of passive defense in that scenario. See PHILIP B. HEYMANN, *TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR* 49–53 (2003).

interfere at a systemic level with the ability of terrorist organizations or individuals to commit harmful acts.¹⁶⁵

One such method involves enhanced enforcement on a systemic basis of laws that relate to the logistical prerequisites for terrorist activity.¹⁶⁶ To the extent that a terrorist threat emanates from overseas, for example, strict enforcement of immigration laws may hinder the capacity of terrorists to enter or remain in the country even in the absence of individualized suspicion.¹⁶⁷ By the same token, aggressive enforcement of document and identity card fraud laws may make operations more difficult,¹⁶⁸ as may similar enforcement of laws relating to financial transfers.¹⁶⁹ The net impact could generate logistical chokepoints capable of derailing or at least delaying undiscovered plots.¹⁷⁰

In addition to raising the transaction costs for would-be terrorists, the Justice Department also can attack the logistical prerequisites of terrorist

¹⁶⁵ See PHILIP B. HEYMANN, *TERRORISM AND AMERICA: A COMMONSENSE STRATEGY FOR A DEMOCRATIC SOCIETY* 80, 82–83 (1998) (discussing “untargeted” prevention methods).

¹⁶⁶ See, e.g., *Hearing Before S. Fin. Comm.*, 108th Cong. (June 15, 2004) (statement of Patrick P. O’Carroll, Acting Inspector Gen., Soc. Sec. Admin.) (describing connection of social security number fraud to terrorism).

¹⁶⁷ Consider, for example, the unlawful immigration status of several of the 9/11 hijackers. According to a monograph produced by the staff of the 9/11 Commission, at least two and perhaps as many as eleven of the hijackers used doctored passports to gain entry into the country; one of the pilots, Ziah Jarrah, reentered the United States six times after violating the conditions of his visa by attending flight school; another pilot, Hani Hanjour, entered the United States on a student visa but never appeared at the school; and ringleader Mohammed Atta and two other hijackers at various times overstayed their visas as well. See STAFF REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, 9/11 AND TERRORIST TRAVEL 138–39 (2004), available at <http://www.9-11commission.gov>; see also 9/11 COMM. REP., *supra* note 2, at 384 (concluding that “the routine operations of our immigration laws—that is, aspects of those laws not specifically aimed at protecting against terrorism” provided at least some hurdles for al Qaeda’s operational planning).

¹⁶⁸ See, e.g., Richard Raysman & Peter Brown, *New Legal Weapons to Fight Online Identity Theft*, N.Y.L.J., Aug. 10, 2004, at 3 (describing enactment of Identity Theft Penalty Enhancement Act).

¹⁶⁹ In January 2004, for example, a joint investigation by the Department of Homeland Security, Immigration and Customs Enforcement, the Drug Enforcement Agency, the IRS, and an FBI Joint Terrorism Task Force led to charges against a group of men operating an “illegal money transmitting business” between Lackwanna, New York, and Yemen. See *United States v. Mohamed Albanna*, (W.D.N.Y.) (indictment) (on file with author).

¹⁷⁰ Some critics have derided the government’s efforts in this area, implying that they amount to a waste of resources. See, e.g., *Moving of Goalposts Increases U.S. Terror Prosecutions Tenfold*, CANADIAN PRESS, Feb. 13, 2003 (quoting one Senator as asking “whether too many resources are being tied up on minor cases that have nothing to do with terrorism”). Such criticisms miss the point of the diffused prevention strategy. By the same token, however, prosecutions undertaken with only this indirect link to terrorism should not be categorized alongside cases that do have a direct connection for purposes of government statistics, lest there be confusion as to the nuanced nature of prosecutorial efforts. Cf. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (“TRAC”), CRIMINAL TERRORISM ENFORCEMENT SINCE THE 9/11/01 ATTACKS, Dec. 8, 2003 (criticizing case classification practices employed by federal prosecutors on ground that the inclusion of diffused prevention prosecutions under terrorism headings creates a misleading impression), available at <http://trac.syr.edu/tracreports/terrorism/report031208.html>.

activity by using the terrorism-support laws discussed above, particularly 18 U.S.C. § 2339B, to prosecute those who provide logistical assistance to identified terrorist groups or individuals, even when that aid is given with no specific goal (or with an innocent goal) in mind.¹⁷¹ As noted above, prosecutions under this heading have been frequent since 9/11.¹⁷² Although few if any foreign terrorist organizations would entirely lose their capacity to cause harm as a result of losing access to money, equipment, or other resources obtained from American supporters, any decrease in that capacity helps to prevent at least some harm.

The diffused prevention strategies make it considerably more difficult for terrorist organizations to employ sleepers. Resources become more scarce. Would-be sleepers who are not citizens have more difficulty entering and remaining in the country. It becomes harder to obtain false identification or access to sensitive locations or materials. But these indirect impacts will not suffice on their own to address the sleeper scenario; other strategies are required in order for the Justice Department to take more direct action.

3. Tier Three: Potentially Dangerous Persons

The third tier of the Justice Department strategy relates most directly to the prevention imperative because it speaks to the problem posed by potentially dangerous persons who have been specifically identified, but who cannot be prosecuted using a traditional inchoate crime charge. The Department has emphasized two methods of incapacitating such persons: preventive charging and material witness detention. Both have advantages, as well as significant limitations. As argued below, prosecutors have turned to terrorism-support laws to plug the resulting gap.

a. Preventive Charging

In October 2001, Attorney General John Ashcroft issued a stark declaration:

¹⁷¹ See *supra* note 115.

¹⁷² See Terrorism Prosecution Statistics website, *supra* note 124; see also Peter Margulies, *Making "Regime Change" Multilateral: The War on Terror and Transitions to Democracy*, 32 DENV. J. INT'L L. & POL'Y 389, 409 (2004):

Regulating capital flows prompts greater transparency in fund-raising and accounting, denting the secrecy and deception central to violent organizations. Regulation of capital flows can encourage transnational communities that support such organizations to become more vigilant, asking probing questions about the activities funded by their contributions. When organizations cannot furnish satisfactory answers, underwriting communities may start new organizations that promote nonviolent reform.

Let the terrorists among us be warned: If you overstay your visa—even by one day—we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage¹⁷³

Assistant Attorney General Viet Dinh later elaborated that “[w]e do not engage in preventive detention. In this respect, our detention differs significantly from that of other countries, even our European partners What we do here is perhaps best described as preventative prosecution.”¹⁷⁴ Combined with the similar use of immigration charges, this law enforcement strategy can be described as “preventive charging.”¹⁷⁵

The preventive charging strategy is innocuous in the abstract.¹⁷⁶ It recognizes the fortuitous circumstance that some persons suspected of involvement in terrorism happen also to have violated unrelated criminal or immigration laws, and calls for the exercise of prosecutorial discretion to enforce these laws against these individuals.¹⁷⁷ As Justice Department officials have pointed out, it is much the same strategy reflected in Attor-

¹⁷³ Attorney Gen. John Ashcroft, Address to the U.S. Conference of Mayors (Oct. 25, 2001) (transcript available at 2001 WL 1288394). See also OFFICE OF THE INSPECTOR GENERAL, UNITED STATES DEPARTMENT OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 13 (2003) (describing statements by then Assistant Attorney General Michael Chertoff, who told OIG investigators that it was Justice Department policy to “use whatever means legally available,” whether involving immigration or criminal charges, to thwart potential threats).

¹⁷⁴ See Dinh, *supra* note 160, at 224; see also *id.* at 224–25 (“If we suspect you of terrorism, beware. We will stick on you like white on rice. And if you do anything wrong, we will arrest you and remove you from the streets.”). See also *Dep’t of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, *supra* note 159, at 310 (statement of John Ashcroft).

¹⁷⁵ In practice, the preventative charging strategy dovetails with the diffused prevention strategy described previously. Both methods tend to focus on enforcement of the same laws, particularly document fraud, identity theft, and immigration laws. From an outsider’s perspective, it often will not be possible to determine which of the two descriptions best applies to a particular prosecution.

¹⁷⁶ For a thorough discussion of the general phenomenon of “pretextual prosecutions,” see Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge, An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. (forthcoming April 2005) (manuscript on file with author). Richman and Stuntz recognize that such prosecutions “are a widely accepted feature of our criminal justice system . . . widely, albeit not quite universally, understood to be both legally and ethically permissible.” *Id.* at 3. They argue, however, that such prosecutions involve hidden social costs in the sense that pretextual prosecutions prevent outside observers and supervisors from accurately assessing the quantity and nature of enforcement activity. See *id.* at 3, 18, 20, 40, 63. Notwithstanding this criticism, Richman and Stuntz acknowledge that “there may be no realistic alternative” to the “Al Capone approach” in the particular context of terrorism. See *id.* at 45.

¹⁷⁷ See UNITED STATES DEPARTMENT OF JUSTICE, REPORT FROM THE FIELD: THE USA PATRIOT ACT AT WORK 10 (July 2004) [hereinafter REPORT FROM THE FIELD], at 9 (“The Department aims to use its prosecutorial discretion—investigating, prosecuting, and punishing crimes that in the past might have been overlooked—in order to incapacitate suspected terrorists and thereby prevent terrorist attacks.”).

ney General Robert F. Kennedy's famous declaration that he would prosecute mobsters for spitting on the sidewalk.¹⁷⁸ Indeed, this strategy played an important role in terrorism-related prosecutions even prior to 9/11.¹⁷⁹

In its practical application, however, the preventive charging strategy has generated controversy. This is true especially with respect to the manner in which the strategy was executed against non-citizens in the immediate aftermath of 9/11.¹⁸⁰ According to a report issued by the Justice Department's Office of the Inspector General, 762 non-citizens were detained for immigration violations in connection with the post-9/11 investigation.¹⁸¹ These were legitimate immigration charges (with one possible exception),¹⁸² and in this context it was not unreasonable to marshal scarce enforcement resources in this manner.¹⁸³ But however reasonable these enforcement actions were in theory, their actual execution raised issues ranging from the problematic (e.g., significant delays in the processing of the detainees, combined with a no-bond mandate and an over-arching policy of holding non-citizens until affirmatively cleared by the FBI)¹⁸⁴ to the criminal (e.g., abuse of the detainees by prison guards).¹⁸⁵ Had

¹⁷⁸ See Attorney Gen. John Ashcroft, Press Conference (Oct. 31, 2001) [hereinafter Ashcroft Press Conference] (available at http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks10_31.htm). During World War II, Attorney General Frank Murphy made a similar declaration concerning communists in the United States, stating that "every possible effort is being made to indict any Communist who has violated the criminal laws in any respect." William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States*, 2001 S. CT. REV. 375, 402 (2001) (citing HAROLD ICKES, *THE SECRET DIARY OF HAROLD ICKES* 97 (1953)).

¹⁷⁹ In its comprehensive monograph on terrorism financing, the staff of the 9/11 Commission observed that rather than bring charges directly related to terrorism in the pre-9/11 era, "[i]t was far easier for agents to find a minor charge on which to convict a suspect, thereby ultimately immobilizing and disrupting the operation." See MONOGRAPH ON TERRORIST FINANCING, *supra* note 73, at 32. For a specific example, consider the fact that Zacarias Moussaoui was detained on immigration charges on August 16, 2001, after his flight instructor reported suspicions about him and some FBI officials concluded that he might be a terrorist. See 9/11 COMM. REP., *supra* note 2, at 247, 273.

¹⁸⁰ See OFFICE OF THE INSPECTOR GENERAL, *supra* note 173, at 13.

¹⁸¹ Twenty-four of these detainees already were in INS custody at the time. See *id.*

¹⁸² The OIG Report concludes that the immigration detainees "were held on valid immigration charges," although it noted one instance in which a detainee for whom there was no valid charge was held for seventy two hours before being released. See *id.* at 15 & n.22; see also *id.* at 5 ("It is . . . important to note that nearly all of the 762 aliens we examined violated immigration laws, either by overstaying their visas, by entering the country illegally, or some other immigration violation").

¹⁸³ Officials at the time were aware that the 9/11 attacks were al Qaeda operations carried out by non-citizens and had every reason to believe that more attacks might be pending. See 9/11 COMM. REP., *supra* note 2, at 6 (describing awareness of government officials of hijacker identities based on information supplied by flight attendants).

¹⁸⁴ On average, it took the FBI eighty days to issue a clearance letter (the median wait was sixty-nine days, and for more than a quarter of the detainees the wait exceeded three months). See OFFICE OF THE INSPECTOR GENERAL, *supra* note 173, at 51. The maximum wait was 244 days. See *id.* For a discussion of the no-bond mandate, see Margaret Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149 (2004); see also OFFICE OF THE INSPECTOR GENERAL, *supra* note 173, at 25.

¹⁸⁵ These abuses are chronicled in a series of investigative reports by the Inspector

the detainees been processed with dispatch, and particularly had they been treated properly, the episode would not have given such a black eye to the preventive charging concept.

A degree of controversy also arose in connection with the statistical footprint of the preventive charging and diffused prevention strategies. As noted above, both of these approaches further the goal of preventing terrorism through enhanced enforcement of relatively minor laws such as document fraud and immigration statutes (the former does this in a targeted manner, the latter on a systemic basis). To the extent that the Justice Department has in fact adopted these strategies, we can expect to see a relatively large number of prosecutions that result in relatively short sentences—as compared to the quantity and consequences of indictments charging terrorist offenses directly. And this is just what the data demonstrates. A series of widely publicized reports by the Transactional Records Access Clearinghouse at Syracuse University compiling Justice Department data reveals a sharp increase in the number of post-9/11 prosecutions classified as terrorism-related, contemporaneous with a sharp drop in the average length of sentence in such cases.¹⁸⁶ Notably, the former INS and the Social Security Administration are among the most active referring agencies in these cases, as one would expect when document and immigration fraud enforcement were on the rise.¹⁸⁷

The government's inclusion of the preventive charging and diffused prevention cases under the general rubric of terrorism for purposes of data-tracking, however, proved controversial. Some perceived the practice as an attempt to give an inflated impression of government successes in the war on terrorism, or at least as a practice that ran that particular risk

General of the Justice Department, beginning with OFFICE OF THE INSPECTOR GENERAL, *supra* note 173, at 142–56, 177–80; and continuing with OFFICE OF THE INSPECTOR GENERAL, U.S. DEPT. OF JUST., THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003); OFFICE OF THE INSPECTOR GENERAL, U.S. DEPT. OF JUST., SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES' ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK (2003); and OFFICE OF THE INSPECTOR GENERAL, U.S. DEPT. OF JUST., ANALYSIS OF THE SECOND RESPONSE BY THE DEPT. OF JUST. TO RECOMMENDATIONS IN THE OFFICE OF THE INSPECTOR GENERAL'S JUNE 2003 REPORT ON THE TREATMENT OF SEPTEMBER 11 DETAINEES (2004).

¹⁸⁶ See TRAC, *supra* note 170; TRAC Special Report, "Criminal Enforcement Against Terrorists" (June 17, 2002), *available at* <http://trac.syr.edu/tracreports/terrorism/supp.html>; TRAC Special Report, "Criminal Enforcement Against Terrorists and Spies in the Year After the 9/11 Attacks" (Feb. 13, 2003), *available at* <http://trac.syr.edu/tracreports/terrorism/fy2002.html>; TRAC Special Report, "Criminal Enforcement Against Terrorists" (Dec. 2001), *available at* <http://trac.syr.edu/tracreports/terrorism/report011203.html>.

¹⁸⁷ TRAC Special Report, "Criminal Enforcement Against Terrorists" (June 17, 2002), *available at* <http://trac.syr.edu/tracreports/terrorism/supp.html>; TRAC Special Report, "Criminal Enforcement Against Terrorists and Spies in the Year After the 9/11 Attacks" (Feb. 13, 2003), *available at* <http://trac.syr.edu/tracreports/terrorism/fy2002.html>; TRAC Special Report, "Criminal Enforcement Against Terrorists" (Dec. 2001), *available at* <http://trac.syr.edu/tracreports/terrorism/report011203.html>.

whether intended or not.¹⁸⁸ This criticism fairly points out that there is a substantial difference between a prosecution for conspiracy to commit some terrorist act and a prosecution for undifferentiated document fraud that contributes to the diffused prevention strategy. It would be a mistake, however, to interpret the relatively low sentences indicated by the data as showing that terrorism prevention efforts are off-track or misguided. Prosecutions of relatively minor crimes ought not to be classified as if they were major terrorism cases, to be sure, but they do nonetheless make a contribution to the overall prevention effort.¹⁸⁹

Notwithstanding the problems discussed above, the preventive charging strategy offers policymakers a relatively straightforward basis for employing criminal law enforcement to incapacitate suspected sleepers within the United States. But preventive charging depends in the first instance on the target's commission of a collateral criminal act or immigration violation. Where a suspect has not engaged in such conduct—and al Qaeda tradecraft encourages operatives to avoid this to the extent possible¹⁹⁰—the preventive charging strategy is simply unavailable.

b. Material Witness Detention

When preventive charges cannot be brought, the sleeper scenario puts policymakers in a dilemma. FBI Director Mueller captured the problem when he noted that “[o]ur biggest problem is we have people we think are terrorists. They are supporters of al Qaeda They may have sworn jihad, they may be here in the United States legitimately and they have committed no crime.”¹⁹¹ In such a case, Mueller explained, the question

¹⁸⁸ See, e.g., Nora Demleitner, *How Many Terrorists Are There? The Escalation In So-Called Terrorism Prosecutions*, 16 FED. SENT. REP. 38 (2003). Such criticisms were enhanced by contemporaneous accounts of questionable case classification decisions by particular U.S. Attorneys' Offices. See, e.g., U.S. GEN. ACCOUNTING OFFICE, *Report to the Hon. Dan Burton, House of Representatives, Justice Department: Better Management Oversight and Internal Controls Needed to Ensure Accuracy of Terrorism-Related Statistics* (Jan. 2003). The same data, on the other hand, has also led some to criticize certain prosecutors for insufficient zeal in pursuing diffused prevention or preventive charges in this manner. See, e.g., Stephen Dyer, *Is Ohio Failing the War on Terror? Feds Declining to Prosecute 4 of 5 Criminal Immigration Cases, 1999–2003 Data Show*, AKRON BEACON J., Sept. 12, 2004.

¹⁸⁹ Cf. Statement of Mark Corallo, Dir. of Public Affairs, Regarding TRAC Study, U.S. Dep't of Just. (Dec. 7, 2003) (arguing that criticisms based on the TRAC data fail to account for the important role played by preventive charges based on relatively minor crimes), at http://www.usdoj.gov/opa/pr/2003/December/03_opa_670.htm.

¹⁹⁰ See generally U.S. Dep't of Just., *Al Qaeda Training Manual*, at <http://www.usdoj.gov/ag/trainingmanual.htm>. This manual was discovered during a police raid in Manchester, England, and contains instructions on al Qaeda tradecraft. *Id.*, at http://www.usdoj.gov/ag/manualpart1_1.pdf.

¹⁹¹ *FBI Chief*, *supra* note 1. See also COLE, *supra* note 58, at 36 (“The hardest cases, from the government's perspective, are those individuals whom it suspects but cannot charge with either an immigration or a criminal infraction.”).

arises as to what we should “do for the next five years? Do we surveil them? Some action has to be taken.”¹⁹²

Notably, Director Mueller did not mention the military detention alternative in describing the dilemma. But it is the elephant in the room. Where the Justice Department cannot provide a risk-averse policymaker with any alternative, that policymaker will be left to balance the risk, uncertainty, and expense associated with continuing surveillance against the temptations of the military detention option.

The Justice Department has, however, found what amounts to a short-term solution to the problem: the statute authorizing the detention of “material witnesses” for purposes of securing their testimony in a criminal case.¹⁹³ This power has been part of federal law since the First Judiciary Act of 1789,¹⁹⁴ and exists today in the form of 18 U.S.C. § 3144.¹⁹⁵ Section 3144, better known as the Material Witness Statute, provides that a warrant may be issued for the arrest and detention of a person upon proof by affidavit that the person’s testimony is “material in a criminal proceeding” and that “it may become impracticable to secure the presence of the person by subpoena.”¹⁹⁶ The statute adds that “[r]elease of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.”¹⁹⁷ To enforce this provision, Federal Rule of Criminal Procedure 46(h) authorizes federal district judges to supervise the detention of material witnesses within their district and requires the government to make biweekly reports to the supervising judge justifying the continued detention of the individual.¹⁹⁸

Although the statute clearly intended to serve a testimony-preserving function, it has not escaped the government’s notice that those suspected of involvement with terrorism often may have testimony material to a criminal proceeding, and additionally that material witness detention happens to incapacitate the witness for the duration of the detention. Indeed, in late October 2001, Attorney General Ashcroft emphasized that “[a]ggressive detention of lawbreakers and material witnesses is vital to preventing, disrupting, or delaying new attacks [since i]t is difficult for a person

¹⁹² *FBI Chief*, *supra* note 1; *see also* COLE, *supra* note 58, at 36 (describing the FBI’s surveillance of one potential terrorist).

¹⁹³ For an overview of material witness detention, see Roberto Iraola, *Terrorism, Grand Juries, and the Federal Material Witness Statute*, 34 ST. MARY’S L. J. 401 (2003); Stacey M. Studnicki & John P. Apol, *Witness Detention and Intimidation: The History and Future of Material Witness Law*, 76 ST. JOHN’S L. REV. 483 (2002).

¹⁹⁴ Act of Sept. 24, 1789, ch. 20, § 30, 1 Stat. 73, 88–90 (1789).

¹⁹⁵ 18 U.S.C. § 3144 (2000).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *See* FED. R. CRIM. P. 46(h).

in jail or under detention to murder innocent people or to aid or abet in terrorism.¹⁹⁹

The practice of using material witness detention for non-testimonial purposes has, however, been sharply criticized as a distortion of statutory intent.²⁰⁰ These criticisms gained momentum after the much-publicized use of a material witness warrant to detain an Oregon lawyer named Brandon Mayfield in connection with the March 2004 Madrid bombings on grounds that shortly proved to be mistaken.²⁰¹

Regardless of the merits of these criticisms, the material witness statute is not a long-term solution to the problem posed by potential sleepers. The basic problem is that the incapacitation provided by material witness detention is quite temporary, all the more so if the government in fact has little or no actual interest in the person's testimony. Indeed, depending on the judge involved and the circumstances of the investigation, material witness detention in a particular instance might provide very little in the way of incapacitation. Indeed, the real utility of the material witness statute for prevention purposes may be its role as a time-buying device; while the "witness" is detained, the government gains time to develop the foundation for preventive charges or perhaps even a traditional inchoate crime charge.²⁰² When no such charge is forthcoming, however, the sleeper dilemma is bound to reemerge once again.

¹⁹⁹ Ashcroft Press Conference, *supra* note 178. See also Viet Dinh, *Freedom and Security After September 11*, 25 HARV. J.L. & PUB. POL'Y 399, 402 (2001) (noting role of material witness detentions). It is not known precisely how often the government has made use of the material witness statute in terrorism investigations since 9/11, and even less is known regarding the underlying circumstances when the statute was used. According to the *Washington Post*, by November 2002 at least forty-four individuals had been detained on material witness warrants in connection with grand jury investigations. Of these, the *Post* reported, approximately half were actually asked to provide testimony. See Steve Fainaru & Margot Williams, *Material Witness Law Has Many in Limbo; Nearly Half Held in War on Terror Haven't Testified*, WASH. POST, Nov. 24, 2002, at A1. More recently, the *New York Times* reported that fifty-seven persons have been held in connection with terrorism investigations on a material witness warrant. See Adam Liptak, *For Post-9/11 Material Witness, It Is a Terror of a Different Kind*, N.Y. TIMES, Aug. 19, 2004, at A1.

²⁰⁰ See, e.g., Studnicki & Apol, *supra* note 193; Laurie L. Levenson, *Detention, Material Witnesses, & the War on Terrorism*, 35 LOY. L.A. L. REV. 1217 (2002). Critics also argue that material witness detention provides an opportunity for interrogation and indirect coercion, and when exercised in connection with grand jury proceedings, permits all of the above to be done with considerable secrecy. See, e.g., COLE, *supra* note 58, at 35–39.

²⁰¹ For an overview of Mayfield's detention, including a detailed discussion of the fingerprint evidence that led to his arrest, see Jennifer L. Mnookin (Editorial), *The Achilles' Heel of Fingerprints*, WASH. POST, May 29, 2004, at A27. See also Dan Eggan, *Justice to Probe FBI Role in Lawyer's Arrest; Faulty Fingerprint Analysis Linked American to Madrid Terrorist Bombings*, WASH. POST, Sept. 14, 2004. See generally Liptak, *supra* note 199 (criticizing the material witness statute).

²⁰² See, e.g., John Riley, *Held Without Charge; Material Witness Law Puts Detainees in Legal Limbo*, NEWSDAY, Sept. 18, 2002, at A6 (pointing out that Zacarias Moussaoui was held as material witness under his indictment in connection with 9/11); 9/11 COMM. REP., *supra* note 2, at 220 & n.31 (describing use of material witness statute to detain Mohdar Abdullah—a Yemen citizen in San Diego who assisted two 9/11 hijackers in obtaining driver's licenses and filling out flight school applications—followed by immigration

c. A Third Alternative Emerges

When there is no basis for a preventive or inchoate crime charge, and when material witness detention fails, the Justice Department would seem to be out of ammunition. In that circumstance, the temptation to resort to military detention is at its strongest. But it appears that prosecutors may yet be able to offer policymakers a criminal justice alternative in at least some circumstances involving potential sleepers, thanks to a creative reading of the terrorism-support laws. A review of how the government responded to two recent cases illustrates how prosecutors have found a new way to use the support laws to take action against persons who have trained with, or become members of, foreign terrorist organizations.

i. Jose Padilla and Military Detention

The fate of Jose Padilla, as described through the lens of the government's allegations against him,²⁰³ illustrates the temptations of the military detention alternative. Jose Padilla, an American citizen born in Brooklyn, was in Saudi Arabia in early 2000 when he met a man who discussed the possibility of traveling to Afghanistan for jihad training. Padilla made the trip that summer, enrolling in the basic training course at al Qaeda's al Farooq facility.²⁰⁴ There he trained with a variety of weapons and explosives, studied tactics, and engaged in physical exercises and religious studies. He also met for the first time with the late Mohammed Atef, al Qaeda's senior "military" operative. Padilla spent several months after graduation in the fall of 2000 as part of a Taliban unit posted somewhere to the north of Kabul, but also stayed in touch with Atef. Eventually, in the summer of 2001, Padilla and Atef began discussing options for operations Padilla could carry out in America, including a plot to cause a natural gas explosion in an apartment building. Padilla received additional explosives training, but ultimately the plot was abandoned prior to the 9/11 attacks.

After U.S. air strikes killed Atef in November 2001, Padilla made his way to Pakistan, along with other al Qaeda members. There he met with Abu Zubaydah, another senior al Qaeda figure, and proposed what would

charges that led to his deportation in May 2004); *id.* at 272 ("Both Hazmi and Midhar could have been held for immigration violations or as material witnesses in the *Cole* bombing case. Investigation or interrogation of them, and investigation of their travel and financial activities, could have yielded evidence of connections to other participants in the September 11 plot. The simple fact of their detention could have derailed the plan.").

²⁰³ Except as otherwise indicated, this account derives from the summary of declassified information relating to Padilla released by the Departments of Defense and Justice on June 1, 2004, available at <http://news.findlaw.com/hdocs/docs/padilla/pad52804dodsum.html>.

²⁰⁴ For a remarkable overview of day-to-day life in an Afghanistan training camp pre-9/11, see David Rohde & C. J. Chivers, *The Jihad Files: Life in bin Laden's Army*, N.Y. TIMES, Mar. 17, 2002, at 1.

later become notorious as the “dirty bomb” plot. Later, however, al Qaeda leader Khalid Shaykh Muhammed persuaded Padilla to revert to the apartment building plot as a more plausible operation. He and an accomplice were provided \$15,000, travel documents, a phone, and e-mail protocols to facilitate the operation.

On May 8, 2002, FBI agents detained Padilla as he disembarked at Chicago O’Hare from an international flight. After some initial questioning, they arrested him pursuant to a material witness warrant issued in connection with the Southern District of New York grand jury investigation into the 9/11 attacks. He was taken to Manhattan, and by May 14, 2002 was incarcerated on the high security floor of the Metropolitan Correctional Center.²⁰⁵ On the 15th, Padilla appeared before Chief Judge Michael Mukasey of the Southern District of New York, and received appointed counsel. His attorney, meeting frequently with Padilla during this period, promptly moved to have the material witness warrant vacated on the ground that such warrants could not be used in connection with a grand jury proceeding rather than a trial.²⁰⁶

According to Padilla’s attorney, a ruling on the motion was expected at a conference scheduled for June 11, 2002. But the conference never came. On June 9, 2002, President Bush declared Padilla an enemy combatant and ordered Secretary of Defense Donald Rumsfeld to take him into custody immediately. On this basis, Padilla was taken to the Consolidated Naval Brig in Charleston, South Carolina, where he remains in military custody as of the fall of 2004.²⁰⁷

The precise details of the interagency process leading to the decision to switch Padilla from civilian to military custody have not been disclosed, although White House Counsel Alberto Gonzales has described at a general level the means by which such decisions are made.²⁰⁸ First, representatives from agencies including the Department of Justice, the Department of Defense, and the CIA develop options ranging from “criminal prosecution, [to] detention as a material witness, [to] detention as an

²⁰⁵ See Donna Newman, *The Jose Padilla Story*, 48 N.Y.L. SCH. L. REV. 39, 41 (2004) (providing the date and location of Padilla’s incarceration).

²⁰⁶ The Second Circuit has since rejected this argument in another case. See *United States v. Awadallah*, 349 F.3d 42 (2003).

²⁰⁷ In the summer of 2004, rumors began to circulate that Padilla might soon be indicted by a grand jury in the Miami area in connection with the existing case against a former Padilla associate named Adham Amin Hassoun. See Dan Christensen & Vanessa Blum, *U.S. May Indict Terror Suspect Held as Enemy*, LEGAL TIMES, July 5, 2004, at 13. At the time of this writing, no such indictment has been made public. On September 16, 2004, however, federal prosecutors indicted a pair of individuals on material support charges relating to their fundraising and recruiting activities on behalf of al Qaeda; the unindicted co-conspirator described in the indictment is widely thought to be Padilla. See Press Release, Dep’t of Just., Two Defendants Charged in Florida with Providing Material Support to Terrorists (Sept. 16, 2004), available at http://www.usdoj.gov/opa/pr/2004/September/04_crm_625.htm; Dan Eggan, *2 Indicted on Charges Related to Terrorism; Financial Support of al Qaeda Alleged*, WASH. POST, Sept. 17, 2004, at A3.

²⁰⁸ See Gonzales, *supra* note 134, at 13.

enemy combatant.”²⁰⁹ Policymakers then assess the prospects for each option, taking account of factors such as the person’s “threat potential and value as a possible intelligence source,” or whether prosecution would require disclosure of intelligence sources.²¹⁰ When this review suggests that “criminal prosecution and detention as a material witness are, on balance, less-than-ideal options as long-term solutions to the situation,” the government then focuses on “whether an individual might qualify for designation as an enemy combatant.”²¹¹

In Padilla’s case, two factors appear to have been particularly influential in the decision to remove him from the criminal justice system. First, the government’s interest in interrogating Padilla without the interference of his lawyer may have become a belated priority.²¹² Second, and more clearly, the government believed it might soon be forced to release Padilla because of the classified nature of the government’s grounds for suspecting him. Deputy Attorney General James Comey, then-United States Attorney for the Southern District of New York, has stated that “at that time” he could not bring a criminal prosecution against Padilla “without jeopardizing intelligence sources,” and that “it would have been derelict to allow him to come into the country and to hope to follow him.”²¹³

The Padilla example would seem to illustrate the outer bounds of the Justice Department’s capacity to use law enforcement for prevention in the sleeper scenario. But it does not, actually. Without fanfare, prosecutors have developed a new strategy for dealing with potential sleepers, one that provides a surprisingly robust alternative to military detention.

ii. Lackawanna and Material Support Charges

This new strategy has been used most clearly in connection with the prosecution of a group of seven Yemeni-American men from Lackawanna,

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* Judge Gonzales went on to describe an interagency assessment process involving the Office of Legal Counsel, the Director of Central Intelligence, the Secretary of Defense, the Attorney General, and the White House Counsel, all of whom collaborate in presenting the President with information to make the enemy combatant designation determination. *See id.* at 13–15.

²¹² *Cf.* Deputy Att’y Gen. James Comey, Press Conference Concerning Jose Padilla (June 1, 2004) (transcript *available at* 2004 WL 1195419 (F.D.C.H.)) (“Had we tried to make a case against Jose Padilla through our criminal justice system . . . he would very likely have followed his lawyer’s advice and said nothing, which would have been his constitutional right.”).

²¹³ *Id.* Comey also noted that “[t]he challenge of the Padilla case, for me as the United States attorney, was the absence of a hammer. If I can’t credibly threaten criminal charges, no lawyer in the world is going to tell their client to talk to me, because a good lawyer would know, what I’m sure Mr. Padilla’s lawyers knew, that if you just clam up, they can’t do anything with this.” *Id.* The government has not ruled out a subsequent criminal prosecution of Padilla, although it recognizes that it could not use any of the information derived from its military interrogation for that purpose. *See id.*

New York. Their story, even more so than that of Jose Padilla, epitomizes the dilemma generated by the sleeper scenario.²¹⁴

The Lackawanna story begins with Kamal Derwish, an American citizen born in Buffalo but raised in Saudi Arabia. In the 1990s, Derwish trained at an al Qaeda camp in Afghanistan and fought in Bosnia. The Saudi government jailed him when he returned home in 1997, but released him within a year. Derwish next appeared in the close-knit Yemen-American community just outside Buffalo, in Lackawanna, New York, where he made an immediate impression. He gave frequent talks at the mosque and held informal gatherings for young men at his apartment, during which he would discuss jihad and the obligation to defend oppressed Muslims elsewhere in the world.

This message was reinforced in April 2001 with the arrival of Juma al Dosari, a traveling imam who had fought alongside Derwish in Bosnia and had also trained in al Qaeda camps in Afghanistan. Al Dosari delivered a fiery sermon at the mosque and then reinforced Derwish's call to arms during smaller gatherings with the young men in Derwish's circle. The combined effort seems to have had the desired effect. In May, seven men from the group informed family and friends that they were going to Pakistan to pursue Islamic studies with the group Tablighi Jamaat. This was merely a cover story, however. The men actually were destined for Afghanistan, where they planned to receive military training at al Farooq, the same al Qaeda facility at which Jose Padilla had trained just one year earlier.

They arrived in Pakistan in two groups, and under Derwish's care they progressed onward to Afghanistan. After encountering Osama bin Ladin at a guesthouse there, the men enrolled in the basic training course at al Farooq. Again like Padilla, their daily schedule consisted of prayers and a combination of training in firearms, explosives, and tactics. Bin Ladin at one point addressed the entire camp to announce the alliance between al Qaeda and Ayman al Zawahiri's Egyptian Islamic Jihad organization, a speech that included passionate denunciations of America and Israel and an assurance that dozens of men were prepared to "become martyrs for the cause."²¹⁵ At least one of the Lackawanna men appears to have become sufficiently disturbed by this speech to leave the camp shortly afterward. Three other men from the group left just a week shy of completing the six-week course, and three remained until the end. By the end

²¹⁴ Except where otherwise indicated, the following account derives from the joint investigation conducted by the *New York Times* and the PBS documentary program *Frontline*. See Matthew Purdy & Lowell Bergman, *Where the Trail Led: Between Evidence and Suspicion; Unclear Danger: Inside the Lackawanna Terror Case*, N.Y. TIMES, Oct. 12, 2003, at 1; *Frontline: Chasing the Sleeper Cell*, (PBS television broadcast), available at <http://www.pbs.org/wgbh/pages/frontline/shows/sleeper> (last visited Nov. 23, 2004).

²¹⁵ Press Release, U.S. Dep't of Just., Defendant Yahya Goba Pleads Guilty to Providing Material Support to al Qaeda (Mar. 25, 2003) (quoting from plea agreement of defendant Yahya Goba), available at 2003 WL 1524584.

of June, all but one of the men had returned to their homes in Lackawanna, while Jaber Elbaneh remained abroad along with Derwish.

The FBI, meanwhile, had received an anonymous letter describing Derwish's recruiting activities in Lackawanna and identifying the men who had traveled to Afghanistan to receive training. Ed Needham, the agent in Buffalo responsible for counterterrorism, followed up by contacting one of the men, Sahim Alwan, upon Alwan's return from Afghanistan. Alwan stuck to the cover story regarding religious training in Pakistan, but did not wholly convince Needham. Nonetheless, the investigation made little progress until the spring of 2002, when two developments cast a sinister light on the Lackawanna situation. First, the government obtained communications intercepts establishing Derwish's connection to senior al Qaeda operatives (including Khallad bin Atash, a figure associated with the organization and planning of the 9/11 attacks), increasing suspicion that Derwish had recruited the Lackawanna men as a sleeper cell. Second, the Defense Department captured Juma al Dosari along the Afghan-Pakistan border and learned of his activities in Lackawanna while interrogating him at Guantanamo Bay. Government officials now considered this a sleeper cell.

From that point forward, the possible Lackawanna sleeper cell held the attention not only of FBI Director Mueller, but of President Bush himself. Director Mueller received twice-daily written reports of the status of the investigation, and frequently discussed the issue with the President during his daily briefing.

The problem was that the men simply gave no indication of planning to cause any harm, other than having surreptitiously attended al Farooq. Intensive physical and electronic surveillance showed the men to be engaged in ordinary lives. Meanwhile, the burdens of incessant surveillance continued to mount,²¹⁶ as did the level of apprehension caused by increasing concerns about an al Qaeda strike on or near the first anniversary of 9/11. Policymakers were on the horns of the dilemma necessarily posed by the sleeper scenario.

Were they on their way to committing mass murder? Were they a bunch of harmless guys who had blundered unwittingly into a terrorist training camp while on a religious quest without ever intending to become terrorists? Nobody really knows. If we throw all such suspects into military brigades, we risk becoming more like a police state. If we let those who cannot be prosecuted roam free, some might pull off catastrophes dwarfing 9/11.²¹⁷

²¹⁶ Cf. *FBI Chief*, *supra* note 1 (describing the burdens imposed by FBI's use of round-the-clock surveillance teams to monitor potential terrorists).

²¹⁷ Stuart Taylor, Jr., *The Fragility of Our Freedoms in a Time of Terror*, NAT'L J., May

Some FBI officials felt that, for the moment, it was too soon to act. But CIA officials thought that the FBI focused too closely on the narrow question of whether the men could be linked to a crime and thus missed the broader issue of whether the men posed a danger. CIA analysts were disturbed in particular by an e-mail sent by one of the suspects—Mukhtar al Bakri—from Bahrain, where he had traveled to get married. In a message titled “Big Meal,” Bakri wrote:

How are you my beloved, God willing you are fine. I would like to remind you of obeying God and keeping him in your heart because the next meal will be very huge. No one will be able to withstand it except those with faith. There are people here who had visions and their visions were explained that this thing will be very strong. No one will be able to bear it.²¹⁸

The CIA analysts eventually produced a report concluding not only that the men constituted a sleeper cell, but that the cell was the most dangerous threat in the United States. Faced with this assessment, senior policymakers asked whether the FBI could guarantee that the men would not be able to cause harm while under surveillance. The FBI responded that it could not give an absolute guarantee, although it was ninety-nine percent sure that it could prevent any harm from occurring. In the words of Dale Watson, then Chief of the FBI’s Counterterrorism Division, “under the rules that we were playing under at the time, that [was] not acceptable. So a conscious decision was made, ‘Let’s get ’em out of here.’”²¹⁹

It remained to be determined, though, just *how* to incapacitate the potential sleepers. Should they be arrested by the FBI as criminals or detained by the military as unlawful belligerents? The jurisdictional question went to the heart of the new institutional competition between the Justice and Defense Departments, which at this point found literal expression at the highest level of government.²²⁰ Secretary of Defense Rumsfeld, supported by Vice President Cheney, urged the President to classify the men as enemy combatants subject to immediate detention by the military.²²¹ Attorney General Ashcroft warned against that approach, insisting

5, 2004.

²¹⁸ See *Frontline*, *supra* note 214. Notably, al Bakri later admitted that he was in fact referring to an explosion, albeit one about which he had no personal knowledge. He explained to investigators that while in a mosque in Saudi Arabia he heard of “people having visions of an explosion that only those with faith could withstand.” Purdy & Bergman, *supra* note 214.

²¹⁹ Purdy & Bergman, *supra* note 214.

²²⁰ See Michael Isikoff & Daniel Klaidman, *The Road to the Brig: After 9/11, Justice and Defense Fought Over How to Deal With Suspected Terrorists. How a New System was Hatched*, NEWSWEEK, Apr. 26, 2004, at 26.

²²¹ *Id.*

that the men could be dealt with instead through the criminal justice system.²²² In the end, Ashcroft prevailed.²²³

One might fairly ask how the Justice Department found a way to act in this context. The men could not be linked to any particular plan, so a traditional inchoate crime prosecution was out of the question. There is no indication that the Justice Department was tempted to employ material witness detention either. Nor did there seem to be grounds for a preventive charge, since the men were citizens and did not appear to have committed any collateral crimes.

Or had they? The men clearly had received training from al Qaeda and at least arguably had provided themselves to al Qaeda as personnel. Perhaps, then, the men could be prosecuted for violating the terrorism-support laws ordinarily used as a method of diffused prevention.²²⁴ Specifically, prosecutors could argue that by *receiving* training and by providing *themselves* as personnel, the men had provided “material support or resources” to al Qaeda, in violation of 18 U.S.C. § 2339B.²²⁵ The government had made a similar argument previously with the so-called “American Taliban,” John Walker Lindh, based on his training at al Farooq during the same period.²²⁶ In the Lindh case there had been grounds for other charges as well,²²⁷ but here the material support law would have to stand alone as the sole ground for prosecution.

Just days after the first anniversary of 9/11, the Justice Department announced the discovery and arrest of the “sleeper cell.”²²⁸ Eventually, five

²²² *Id.*

²²³ *Id.*

²²⁴ *Cf.* Peter Margulies, *Judging Terror in the “Zone of Twilight”: Exigency, Institutional Equity, and Procedure after September 11*, 84 B.U. L. REV. 383, 418–19, 439 & n.276 (2004) (identifying material support prosecutions as an alternative to enemy combatant designation).

²²⁵ *See, e.g.*, BREINHOLT, *supra* note 73, at 284 (describing prosecutions “premised on the notion that, by providing their own bodies to [foreign terrorist organizations, defendants] are both providing personnel to an FTO (in violation of 18 U.S.C. § 2339B) and illegally providing services to an SDGT (in violation of IEEPA, 50 U.S.C. §§ 1701–1707)); *Hearing Before House Comm. on Judiciary*, 108th Cong. 41 (2003) (statement of John Ashcroft, Att’y Gen.) (“We think that going and joining the operation is providing material support.”); *Oversight Hearing: Aiding Terrorists—An Examination of the Material Support Statute: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (May 5, 2004) (statement of Chris Wray, Asst. Att’y General) (“In our view . . . the definition of material support includes personnel, in the form of one’s own personal services.”); *id.* (describing the fact that “[t]ens of thousands have attended training camps,” and concluding that the “material support statute enables prosecutors to take such persons off the streets and into court”).

²²⁶ *See* Purdy & Bergman, *supra* note 214 (“Prosecutors had determined that the suspects’ presence in the camp was enough to charge them with providing ‘material support’ to a terrorist organization. This was based mainly on one previous case—the prosecution of John Walker Lindh, the American who joined the Taliban.”).

²²⁷ *See* *United States v. Lindh*, 212 F. Supp. 2d 541, 545–47 (E.D. Va. 2002) (describing allegations and charges against Lindh).

²²⁸ At a press conference, Deputy Attorney General Larry Thompson said that “United States law enforcement has identified, investigated, and disrupted a Qaeda-trained terrorist

of the six Lackawanna men who returned to the United States in the summer of 2001 would plead guilty on the material support charge, while the sixth pled guilty to a related violation.²²⁹

iii. Terrorism-Support Charges After 9/11

The Lackawanna case has not been the only occasion in which the material support law provided the Justice Department with a basis to take action against a suspected sleeper when other options seemed to be lacking, nor has it been the last occasion on which policymakers debated whether to pursue military detention or detention through the civilian criminal justice system.²³⁰

The Justice Department has emphasized that the material support law provides an important capacity to act in the sleeper scenario. As As-

cell on American soil.” Deputy Att’y Gen. Larry D. Thompson, Press Conference (Sept. 14, 2002), available at <http://www.usdoj.gov/dag/speech/2002/091402dagremarks.htm> (last visited Nov. 23, 2004).

²²⁹ See REPORT FROM THE FIELD, *supra* note 177, at 3. The seventh man, Jaber El-baneh, may be in custody in Yemen. See *Man Allegedly Linked to “Lackawanna Six” Held*, L.A. TIMES, Jan. 30, 2004, at A9. Derwish, who never returned to the United States, was killed in November 2002 when a CIA-operated Predator unmanned aerial vehicle fired a Hellfire missile into his car in Yemen. See Thomas, *supra* note 139.

²³⁰ See Isikoff and Klaidman, *supra* note 220, at 26. Administration officials also debated whether to designate as enemy combatants a group of would-be jihadists in Portland, Oregon, who ultimately were prosecuted for seditious conspiracy, and whether Zacarias Moussaoui should be prosecuted as a 9/11 co-conspirator or, instead, held in military custody with an eye toward trial by military commission. See *id.* (referring to the defendants in *United States v. Battle*, No. 02-399 (D. Or.) (prosecution for seditious conspiracy)); STEVEN BRILL, AFTER 237–38, 266–67 (2003) (describing successful effort by senior Justice Department officials to retain civilian jurisdiction over Moussaoui). White House Legal Counsel Alberto Gonzales, moreover, “has acknowledged as well that the Administration would have designated more American citizens as enemy combatants if the Justice Department had not been serving as a brake on the Administration.” Benjamin Wittes, *Enemy Americans*, ATLANTIC MONTHLY, July/Aug. 2004, at 132. Conversely, there also are examples of this debate in which the government has, for the moment, elected the military detention route (including but not limited to the Padilla case). One such example involves Juma al-Dosari, the al Qaeda recruiter who seems to have “closed the deal” in recruiting the Lackawanna men to Afghanistan. See *Frontline*, *supra* note 214 (reporting that “the Justice Department and the Pentagon are discussing whether Juma al Dosari’s case should be handled as a criminal matter in the civilian courts or by a military tribunal”). Another possibility is Saifullah Paracha. See HUMAN RIGHTS FIRST, *supra* note 141, at 9; *United States v. Paracha*, No. 03 Cr. 1197, 2004 WL 1900336, at *1 (S.D.N.Y. Aug. 24, 2004) (describing criminal prosecution of Saifullah Paracha’s son Uzair Paracha, and noting that the FBI believed Uzair “and his father might have information relating to” al Qaeda). Cf. Michael Isikoff & Mark Hosenball, *Terror Watch: The Enemy Within; How the Pentagon Considered Extending Its Controversial “Enemy Combatant” Label in a Bid to Prove Links Between Iraq and Al Qaeda*, NEWSWEEK WEB EXCLUSIVE, Apr. 21, 2004, available at 2004 WL 72544033 (reporting that Deputy Secretary of Defense Paul Wolfowitz urged the President to declare Ramzi Yousef—the convicted mastermind of the 1993 World Trade Center bombing—an enemy combatant in order to subject him to military interrogation regarding allegations of his links to Iraq, and that the proposal died after attorneys in the Office of Legal Counsel concluded that Yousef would not qualify for such treatment).

sistant Attorney General Christopher Wray recently testified, “it is very difficult to know exactly when these sleeper agents may go operational.”²³¹ The material support laws, he said, “enable prosecutors to take such persons off the streets.”²³² But it is difficult to parse out the role of the material support law in the specific context of potential sleepers from its equally important role in other terrorism-related cases involving persons who are not themselves potentially dangerous.²³³

In the three-year period from September 11, 2001, to September 2004, there have been at least forty-seven terrorism-related prosecutions involving a total of 130 individual defendants.²³⁴ These prosecutions, however, are by no means all alike. On the contrary, the underlying fact patterns suggest these cases can be grouped into distinct clusters including: (1) pure support scenarios in which the defendants do not appear to constitute a *personal* threat of harm, however much their actions may contribute to harm caused by others;²³⁵ (2) classic inchoate crime scenarios in which the defendants have attempted or conspired to commit harm;²³⁶ (3) a variation on the previous scenario in which the defendants conspired to travel abroad to engage in combat against U.S. armed forces or those of our allies;²³⁷ and (4) potential sleepers.²³⁸

Material support charges under 18 U.S.C. § 2339B have been brought against fifty-six of these individuals, accounting for 43.1% of all the defendants.²³⁹ Material support charges under § 2339B have played a particularly significant role in the pure support category. Indeed, such charges have been brought against thirty-two out of sixty-nine individuals in this category.²⁴⁰ Prosecutors also have used § 2339B against three of the nineteen defendants in the traditional inchoate crime category (in addition to more conventional charges),²⁴¹ and against ten of the twenty-one defendants in the would-be combatant category.²⁴²

²³¹ *Aiding Terrorists Hearing*, *supra* note 54 (statement of Christopher Wray, Asst. Att’y Gen.); *see also id.* at 5 (testimony of Daniel Bryant, Asst. Att’y Gen.) (“[T]he material support statutes are a valuable tool for prosecutors seeking to bring charges against and incapacitate terrorists before they are able to cause death and destruction.”).

²³² *See Aiding Terrorists Hearing*, *supra* note 54 (statement of Christopher Wray).

²³³ *See Aiding Terrorists Hearing*, *supra* note 54 (testimony of Daniel Bryant) (“The chronology of a terrorist plot is a continuum from idea, to planning, to preparation, to execution and attack. The material support statutes help us strike earlier on that continuum—we would much rather catch terrorists with their hands on a check than on a bomb.”).

²³⁴ *See Terrorism Prosecution Statistics Website*, *supra* note 54, at Table 1.

²³⁵ *See id.* at Table 3.1.

²³⁶ *See id.* at Table 4.1.

²³⁷ *See id.* at Table 5.1.

²³⁸ *See id.* at Table 6.1.

²³⁹ *See supra* note 125.

²⁴⁰ *See Terrorism Prosecution Statistics Website*, *supra* note 124, at Table 3.2.

²⁴¹ *See id.* at Table 4.2.

²⁴² *See id.* at Table 5.2.

What about the sleeper scenario? Prosecutors have brought charges against twenty individual defendants—including the seven Lackawanna men—in circumstances that can be characterized as involving a potential sleeper cell.²⁴³ Eleven of them have been charged with violating § 2339B.²⁴⁴ But even within this category we find variation.

In some instances—accounting for three of these eleven defendants—the nature of the support charge looks quite similar to the nature of the support charges one sees in the ordinary “pure support” cases; that is, the government charges that the defendant provided logistical support of some kind to a designated organization.²⁴⁵ In these relatively uncontroversial instances, it is fair to say that the material support charge functions as a basis for preventive charging against a potential sleeper.

The same cannot be said, however, for the six original Lackawanna defendants. As described above, the material support charges against them rested not on the claim that they provided some traditional form of logistical support but, instead, that they provided themselves as personnel to and received training from al Qaeda.

That leaves two sleeper defendants unaddressed. The material support charges against at least one, Mohammed Warsame, seem at this point to be similar in kind to the approach taken in the Lackawanna and Lindh cases.²⁴⁶ The government has charged Warsame with providing material support to al Qaeda under circumstances where it appears that the charge may rely on his attendance at an Afghani training camp.²⁴⁷ And the creative approach to material support may also play a role in the prosecution of the other unaddressed sleeper defendant, former Ohio truck driver Iyman Faris, who pled guilty to providing al Qaeda material support based on a series of actions that included some logistical assistance (such as research into a plot to cut the cables on the Brooklyn Bridge) in addition to Faris’s involvement with an al Qaeda training camp.²⁴⁸

d. Summary

Senior policymakers unwilling to tolerate the risks and burdens associated with indefinite surveillance of potential sleepers may insist upon

²⁴³ See *id.* at Table 6.1.

²⁴⁴ See *id.* at Table 6.2.

²⁴⁵ See *id.* at Table 6.1 (describing the Ujaama, Mustafa, and Elbaneh prosecutions).

²⁴⁶ Although the Lindh case falls under the heading of would-be-combatant rather than potential sleeper, the fact remains that the government used the material support law and IEEPA in his case in much the same manner that it did against the Lackawanna defendants.

²⁴⁷ See Terrorism Prosecution Statistics Website, *supra* note 124, at Table 6.1.

²⁴⁸ See *United States v. Faris*, 107 Fed. Appx. 308, 311–13 (4th Cir. 2004) (unpublished opinion affirming denial of motion to withdraw plea agreement). Faris admits visiting but denies receiving training from an al Qaeda camp. See *id.* at 312. Not coincidentally, one of the other instances in which we know that the Justice and Defense Departments disputed custody of a potential sleeper involved Faris. See Isikoff & Klaidman, *supra* note 220 at 26.

action to incapacitate the suspects in such cases. When they do, they must choose between criminal justice and military modes of detention. In many instances, policymakers will have a clear criminal law enforcement option available to them. At times, however, the Justice Department may be unable to mount a plausible inchoate crime prosecution to link the suspect to a collateral violation of criminal or immigration law, or to make reliable use of the material witness detention statute. In the few instances when this situation has arisen since 9/11, prosecutors have closed this gap through creative use of the material support law.

Should we be concerned? One can ask that question from a civil liberties perspective, wondering if the material support law unduly infringes constitutional rights. One can also ask it from a national security perspective, inquiring whether the support-law framework truly suffices to address the ever-evolving nature of the terrorist threat. The following Part explores the question from both angles.

III. CRITIQUING THE JUSTICE DEPARTMENT'S CURRENT APPROACH TO INCAPACITATING SLEEPERS FROM BOTH THE CIVIL LIBERTIES AND NATIONAL SECURITY PERSPECTIVES

The use of § 2339B (and potentially IEEPA as well) to enable prosecutors to incapacitate potential sleepers raises both civil liberties and national security concerns.²⁴⁹ On one hand, critics of the material support law have raised a range of constitutional and statutory objections to it. Some of these objections—that it denies due process, that it violates expressive and associational rights, and that it is vague and overbroad—are raised without respect to the novel application of the statute in the sleeper scenario. Other objections—that the statutory language does not extend to persons who provide themselves as personnel or trainees, and that if it does the law raises additional due process concerns relating to its mens rea element—are specific to the sleeper context. Many of these concerns are overstated, but not all of them.

On the other hand, the material support law also can be criticized from a national security perspective on the ground that it fails to provide a sufficient basis to prosecute potential sleepers. First, neither it nor any other current provision in U.S. law sufficiently addresses the conduct that tends to generate concern about potential sleepers: U.S. persons traveling to foreign countries to obtain military-style training. Second, the evolving nature of the terrorist threat tends to erode the utility of § 2339B because that statute depends on the ability of prosecutors to link a defendant to an organization already identified and designated by the Secretary

²⁴⁹ The following discussion focuses on the material support law, 18 U.S.C. § 2339B, because that statute plays the primary role in sleeper prosecutions and in terrorism-related cases in general. Most if not all of the criticisms, however, apply equally to IEEPA.

of State. Although previously identified organizations will continue to pose a significant threat in the future, since 9/11 a new generation of decentralized networks has emerged in which previously unknown and transient groups and individuals with loose or even no affiliation to already-designated organizations constitute a growing part of the threat environment.

Regardless of one's perspective, then, there are several reasons to believe that reliance on the material support law—though a creative short-term fix—does not provide the Justice Department with a dependable long-term solution to the problem of potential sleepers.

A. *Criticizing the Material Support Law from the Civil Liberties Perspective*

Civil liberties criticisms of the material support law come in several varieties. Some take issue with the law at a general level, irrespective of how it has been applied in the sleeper cases. Others are specific to the creative, new use of the law in sleeper cases. All of them, however, have a bearing on the sustainability of the Justice Department's current effort to establish a plausible, but tolerable, alternative to military detention for domestic terror threats.

1. *Due Process and the Designation Process*

The procedures pursuant to which the government identifies groups as foreign terrorist organizations subject to the material support law have generated considerable controversy.²⁵⁰ Those procedures, like the material support statute itself, originated in the Antiterrorism and Effective Death Penalty Act of 1996.²⁵¹ They authorize the Secretary of State to designate a group as a "foreign terrorist organization" upon three findings: (1) that the group is a "foreign organization,"²⁵² (2) that the group "engages in terrorist activity . . . or terrorism" or at least has the capacity and intent to do so,²⁵³ and (3) that the group's terrorist activity threatens the security

²⁵⁰ See, e.g., COLE, *supra* note 58; Randolph N. Jonakait, *A Double Due Process Denial: The Crime of Providing Material Support or Resources to Designated Foreign Terrorist Organizations*, 48 N.Y.L. SCH. L. REV. 125, 140–66 (2003–2004) (arguing that the designation process associated with the material support law denies due process to designated organizations and to those charged with providing them with material support).

²⁵¹ Pub. L. 104-132, Title III, subtitle A, § 302(a), 110 Stat. 1248 (enacting 8 U.S.C. § 1189).

²⁵² 8 U.S.C. § 1189(a)(1)(A) (Supp. I 2001). The phrase "foreign organization" is not defined.

²⁵³ *Id.* § 1189(a)(1)(B). The statute defines "terrorist activity" or "terrorism" to include illegal activity involving hijacking or sabotage of a conveyance; capture of a person to compel a person or government to take or abstain from an action as a condition of release; violent attack upon an internationally protected person; assassination; the use of biological, chemical, or nuclear weapons; the use of explosives or firearms not for monetary gain

of U.S. nationals or U.S. national security.²⁵⁴ The Secretary of State may rely on classified information in making the designation, and is directed by the statute to produce an administrative record supporting the determination.²⁵⁵

The statute also requires the Secretary of State to provide seven days advance notice to Congressional leaders of an impending designation,²⁵⁶ but does not provide for advance notice to the designated organization. The group instead learns of the designation under this scheme, if at all, through its publication in the Federal Register.²⁵⁷ Publication in the Federal Register triggers a thirty-day window within which the organization can petition for review of the designation in the United States Court of Appeals for the District of Columbia Circuit.²⁵⁸ That review considers whether the designation was: (1) arbitrary; (2) unconstitutional; (3) ultra vires; (4) “lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court” on an ex parte, in camera basis; or (5) inconsistent with the statutory procedures.²⁵⁹

In 1997, two designated foreign terrorist organizations—the People’s Mojahedin Organization of Iran (PMOI)²⁶⁰ and the Liberation Tigers of Tamil Eelam (LTTE)—initiated the first challenges to this statutory scheme.²⁶¹ Both organizations argued that the designation process denied them due process of law in violation of the Fifth Amendment because it effectively outlawed them without giving them advance notice and an opportunity to be heard.²⁶² In its opinion, the D.C. Circuit avoided the constitutional issue by observing that neither PMOI nor LTTE at that time had any presence in the United States and, hence, lacked any due process rights.²⁶³

Undaunted, PMOI returned to the D.C. Circuit in 1999 after it was re-designated as a foreign terrorist organization upon expiration of the two-

but with the intent to cause harm to persons or substantial harm to property; or the threat, attempt, or conspiracy to do any of these things. *See id.* (incorporating by reference 8 U.S.C. § 1182(a)(3)(B) (Supp. I 2001) and 22 U.S.C. § 2656f(d)(2) (2000)).

²⁵⁴ 8 U.S.C. § 1189(a)(1)(C). The phrase “national security” includes the “national defense, foreign relations, or economic interests of the United States.” 8 U.S.C. § 1182(c)(2).

²⁵⁵ *See* 8 U.S.C. § 1182(a)(3).

²⁵⁶ *See id.* § 1182(a)(2)(A)(i).

²⁵⁷ *See id.* § 1182(a)(2)(A)(ii).

²⁵⁸ *See id.* § 1182(b)(1).

²⁵⁹ *See id.* § 1182(b)(3).

²⁶⁰ PMOI also is known as the Mujahedin-e Khalq or MEK. *See* People’s Mojahedin Org. of Iran v. Dep’t of State, 182 F.3d 17, 20 n.3 (D.C. Cir. 1999) [hereinafter *PMOI I*].

²⁶¹ *See id.* (dealing jointly with both organizations’ petitions).

²⁶² *See id.* at 22.

²⁶³ *See id.* The Court determined that the groups thus had only those rights granted to them by the statute itself, and that the Secretary had complied with the statutory procedures. *See id.* at 23–25; *see also* 32 County Sovereignty Comm. v. Dep’t of State, 292 F.3d 797 (D.C. Cir. 2002) (reaffirming the *PMOI I* ruling in the context of Northern Irish organizations lacking presence in the United States).

year term of the original designation.²⁶⁴ This time, it was joined by the National Council of Resistance of Iran (NCRI), which the Secretary of State had designated as an alias of PMOI. NCRI, it turned out, had office space and a bank account in the United States, and thus the court was obliged to confront the due process issue directly.²⁶⁵ First, the Court concluded that the designation process deprived designated organizations of a protected property interest insofar as it resulted in the blocking of all the organization's assets on deposit with any U.S. financial institution.²⁶⁶ It then proceeded to the questions of when and what process is due in connection with the designation decision.²⁶⁷

Applying the *Mathews v. Eldridge* formula, which takes into account the nature of both the individual and the government interests at stake, the risk that existing procedures will result in an erroneous deprivation, and the prospect that additional or other procedures will reduce that risk, the Court held that organizations with a presence in the United States are entitled by due process in most circumstances to advance notice of the impending designation and an opportunity to respond to the administrative record by presenting at least written material to rebut the assertion of terrorist activity.²⁶⁸ The Court specified that the government need not disclose to the organization any classified material underlying the designation, however, and that, upon an appropriate showing of need, the designation could still be carried out without advance notice.²⁶⁹

Although the Court thus concluded that PMOI and NCRI had been designated in violation of their due process rights,²⁷⁰ it did not revoke their designation.²⁷¹ Instead, it remanded the matter to the Secretary with

²⁶⁴ See *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001) [hereinafter *NCRI*].

²⁶⁵ See *id.* at 201–03.

²⁶⁶ See *id.* at 204–05 (the blocking results from 18 U.S.C. § 2339B(a)(2)).

²⁶⁷ See *id.* at 205–09.

²⁶⁸ *Id.* at 208–09.

²⁶⁹ *Id.*

²⁷⁰ This determination precipitated a new line of defense for a group of individual criminal defendants in California charged in 2001 with violating the material support law by providing financing and financial services to PMOI/MEK. See *United States v. Rahmani*, 209 F. Supp. 2d 1045 (C.D. Cal. 2002). After the *NCRI* decision, the *Rahmani* defendants successfully argued that the support prosecution could not continue if based upon an unconstitutional designation process. See *id.* at 1053–55. The government has appealed that determination, and in the meantime two district courts confronted with similar arguments by material support defendants have rejected the reasoning in *Rahmani*. See *United States v. Sattar*, 272 F. Supp. 2d 348, 363–68 (S.D.N.Y. 2003) (emphasizing that “it is for [the designated organization and] not the defendants to raise [the organization’s] due process concerns”); *United States v. al-Arian*, 308 F. Supp. 2d 1322, 1346 (M.D. Fla. 2004) (holding that defendants lacked standing to attack collaterally the designation of Palestinian Islamic Jihad).

²⁷¹ *NCRI*, 251 F.3d at 209. Cf. 8 U.S.C. § 1189(b)(4) (Supp. I 2001) (providing that a designation remains effective despite a review petition until the D.C. Circuit issues a “final order setting aside the designation”).

instructions to permit the petitioners to challenge the determination.²⁷² This the Secretary did, and after reviewing the material submitted by PMOI, the organization was re-designated again.²⁷³ PMOI once more petitioned for review, just as NCRI would petition again soon thereafter, but the D.C. Circuit has consistently upheld the designation process against their due process challenges since the Secretary of State adopted the new procedures.²⁷⁴

One commentator has cautioned that it is not actually known whether the Secretary of State has employed the notice procedures required by the D.C. Circuit in the context of organizations other than PMOI/NCRI.²⁷⁵ A recent example from the analogous context of IEEPA designations, however, provides at least some reason to believe that he has.

As noted previously, the President has twice acted under IEEPA to promulgate executive orders establishing analogous designation procedures for terrorist organizations and individuals, first in 1995 in response to terrorist interference with the Middle East peace process and again in 2001 in response to the 9/11 attacks.²⁷⁶ Like the material support procedures, the IEEPA designation procedures, which identify group and individuals as Specially Designated Terrorists (SDT's) and Specially Designated Global Terrorists (SDGT's) subject to blocking and embargo, do not on their face require ex ante notice and an opportunity to be heard.²⁷⁷ Accordingly, in 2001, when the government designated the Holy Land Foundation for Relief and Development (HLF) an SDGT based on its ties to Hamas, it did not provide the group with ex ante notice. Shortly thereafter, however, the D.C. Circuit issued its *NCRI* holding that ex ante procedures were required as a default rule in the material support context. Apparently recognizing that the rationale of *NCRI* applied equally to the IEEPA context, the government notified HLF not long thereafter that it

²⁷² *NCRI*, 251 F.3d at 209. The Court concluded by noting its expectation that the Secretary would follow similar procedures in other cases in the future. *See id.*

²⁷³ *See People's Mojahedin Organization of Iran v. Dep't of State*, 327 F.3d 1238, 1241 (D.C. Cir. 2003) [hereinafter *PMOI II*].

²⁷⁴ *See id.* at 1242–43; *Nat'l Council of Resistance of Iran v. Dep't of State*, 373 F.3d 152, 158 (D.C. Cir. 2004).

²⁷⁵ *See Jonakait*, *supra* note 250, at 147–48.

²⁷⁶ *See supra* notes 75 and 128 and accompanying text.

²⁷⁷ *See* 50 U.S.C. § 1701 (Supp. I 2001). Indeed, the Seventh Circuit recently held that an organization with a clear presence in the United States was not constitutionally entitled to such procedures before it was subject to designation and asset seizure in connection with its alleged funding for terrorist organizations: "Although pre-seizure hearing is the constitutional norm, postponement is acceptable in emergencies. Risks of error rise when hearings are deferred, but these risks must be balanced against the potential for loss of life if assets should be put to violent use." *Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748, 754 (7th Cir. 2002) (citations omitted). This holding is consistent with the *PMOI II* decision in which the D.C. Circuit pointed out that pre-designation notice need not be given upon a showing of necessity by the government. *See PMOI II*, 327 F.3d at 1242.

had decided to reopen the designation process, giving HLF thirty-one days to respond and present contrary evidence.²⁷⁸

Ultimately, the government affirmed its designation of HLF as an SDGT, but the episode indicates that the D.C. Circuit's holding has had an impact beyond the confines of the PMOI/NCRI case.²⁷⁹ On the other hand, the fact remains that neither the material support statute nor its IEEPA analogue on their face require the procedural safeguards identified by the D.C. Circuit as necessary to satisfy due process for organizations with a U.S. presence in circumstances not requiring delayed notification.

2. Freedom of Expressive Association

First Amendment objections to the material support law have been at least as frequent as due process complaints, but have met with less success in the courts.²⁸⁰ The first such challenge occurred in the spring of 1998, not long after Secretary of State Albright promulgated the first batch of foreign terrorist organization designations in 1997.²⁸¹ In *Humanitarian Law Project v. Reno*, a coalition of eleven organizations and three individuals brought a declaratory judgment action in a California district court arguing, among other things, that the material support law violated their First Amendment right of expressive association.²⁸² In particular, the plaintiffs argued that the law impermissibly infringed freedom of association because it criminalized the donation of financial or material aid to

²⁷⁸ See *Holy Land Found. for Relief and Dev. v. Ashcroft*, 333 F.3d 156, 163–64 (D.C. Cir. 2003) (upholding the constitutionality of this procedure in that case).

²⁷⁹ Some critics have argued that even with ex ante notice and an opportunity to respond, organizations are denied due process because they are not permitted access to the classified information underlying the determination and because of the loose standards governing the Secretary's determination of whether a group threatens U.S. national security. See, e.g., David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 10 (2003) (describing Secretary's authority as "a virtual blank check"). The D.C. Circuit has held that the government "need not disclose the classified information to be presented *in camera* and *ex parte* to the court under the statute," reasoning that secrecy of such information "is within the privilege and prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect." *NCRI*, 251 F.3d 192, 208–09 (D.C. Cir. 2001). The D.C. Circuit also has held that the determination of whether a group's activities pose a threat to U.S. national security is not justiciable. See *PMOI I*, 182 F.3d 17, 23 (D.C. Cir. 1999); *PMOI II*, 327 F.3d at 1244. Other courts have so held as to the question of whether the group engages in terrorist activity. *United States v. Rahmani*, 209 F. Supp. 2d 1045, 1051–52 (C.D. Cal. 2002).

²⁸⁰ I have written previously in some detail about First Amendment challenges to the material support law. The details of my views on that subject, consistent with the analysis in this section, are set forth in Chesney, *supra* note 58.

²⁸¹ Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650–51 (Oct. 8, 1997) (designating a total of thirty organizations).

²⁸² *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176, 1184 (C.D. Cal. 1998) [hereinafter *HLP I*].

designated groups even when intended to facilitate only the humanitarian or political ends of such groups.²⁸³

Ruling on the plaintiffs' motion for a preliminary injunction, the district court agreed that the material support law impacted expressive association (at least insofar as financial contributions were concerned)²⁸⁴ but rejected the claim that this impact was unconstitutional.²⁸⁵ This determination turned primarily on the court's finding that the material support law is a content-neutral statute that impacted the plaintiffs' First Amendment interests only incidentally; Congress prohibits material support to designated organizations not to silence their lawful expression but to decrease their capacity to harm U.S. nationals or the national security interests of the United States.²⁸⁶ The court accordingly applied intermediate scrutiny in its review of the statute, concluding that (1) Congress had authority to promulgate the law; (2) the government purpose involved is substantial and unrelated to suppressing expression; and (3) the statute is sufficiently tailored.²⁸⁷

A panel of the Ninth Circuit affirmed this holding on identical grounds.²⁸⁸ Writing for the panel, Judge Kozinski emphasized that the material support law "does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group."²⁸⁹ Instead, the law "prohibits . . . the act of giving material support, and there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives required to carry out their grisly missions."²⁹⁰ Likewise, Judge Kozinski wrote, there is no "right to provide resources with which terrorists can buy weapons or explosives."²⁹¹ In a subsequent appeal during the course of the same litiga-

²⁸³ *Id.* at 1186. The plaintiffs desired in particular to provide various forms of aid—including financial contributions, educational materials, and training related to international law—to members of the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE). *See id.* at 1180–84. For a thorough discussion of First Amendment issues arising at the intersection of material support, speech, and the attorney-client relationship, see Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 MD. L. REV. 173, 201–03 (2003).

²⁸⁴ *See HLP I*, 9 F. Supp. 2d at 1186 (noting that "Plaintiffs' ability to provide false documentation or identification, weapons, lethal substances, or explosives to the PKK or LTTE is not protected by the right to freedom of association").

²⁸⁵ *See id.* at 1196–97. A week later, the district court reinforced its opinion in *HLP I* with findings of fact and conclusions of law. *See Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1205 (C.D. Cal. 1998).

²⁸⁶ *See id.* at 1188.

²⁸⁷ *See id.* at 1192–97.

²⁸⁸ *See Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000) [hereinafter *HLP II*].

²⁸⁹ *Id.* at 1133.

²⁹⁰ *Id.*

²⁹¹ *Id.* In support of its conclusion, the Ninth Circuit drew parallels between the material support law's impact on the ability of U.S. persons to interact with designated foreign terrorist organizations and laws having a similar impact with respect to foreign states, noting that such laws had been upheld routinely against similar challenges. *See id.* at 1135

tion, moreover, another panel of the Ninth Circuit reaffirmed these conclusions.²⁹²

A number of other courts have followed suit. Most notably, the Fourth Circuit, sitting en banc, agreed with the Ninth Circuit in *United States v. Hammoud* that intermediate scrutiny applied to and was satisfied by § 2339B in the context of an expressive association challenge by a defendant convicted of providing funds to Hezbollah.²⁹³ Similarly, in *United States v. Lindh*,²⁹⁴ the court quoted extensively from the Ninth Circuit's first *Humanitarian Law Project* holding in the course of rejecting John Walker Lindh's freedom of association challenge.²⁹⁵ Like the Ninth Circuit, the *Lindh* court drew parallels to decisions rejecting First Amendment challenges to foreign state embargoes in the course of upholding the material support law against a First Amendment challenge.²⁹⁶ When the Seventh Circuit considered a comparable First Amendment challenge in the context of a civil lawsuit premised on a violation of the material support law, it adopted the Ninth Circuit's analysis upholding the constitutionality of the statute.²⁹⁷ In like fashion, the D.C. Circuit has rejected the argument that IEEPA designations violate the First Amendment.²⁹⁸

(citing *Regan v. Wald*, 468 U.S. 222, 244 (1984) (upholding restrictions on travel to Cuba against Fifth Amendment challenge); *Zemel v. Rusk*, 381 U.S. 1, 16–17 (1965) (same); *DKT Mem'l Fund Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 295 (D.C. Cir. 1989) (rejecting First Amendment challenge to abortion funding policy); *Palestine Info. Office v. Shultz*, 853 F.2d 932, 941 (D.C. Cir. 1988) (rejecting First Amendment challenge to order closing office of foreign organization); *Teague v. Regional Comm'r of Customs*, 404 F.2d 441, 445 (2d Cir. 1968) (upholding foreign exchange restrictions targeting hostile nations against First Amendment challenge). The Ninth Circuit also rejected the argument that the statute's exceptions for the provision of medicine and religious materials fatally undermined the government's claim that the support ban must be sweeping and comprehensive to be effective. See *HLP II*, 205 F.3d at 1136 & n.4 (“Congress is entitled to strike such delicate balances without giving up its ability to prohibit other types [of] assistance which would promote terrorism.”).

²⁹² See *Humanitarian Law Project v. Ashcroft*, 352 F.3d 382, 403 (9th Cir. 2003) [hereinafter *HLP III*], rehearing in banc granted, vacated by 382 F.3d 1154 (9th Cir. 2004).

²⁹³ 381 F.3d 316, 329 (4th Cir. 2004) (en banc).

²⁹⁴ 212 F. Supp. 2d 541 (E.D. Va. 2002).

²⁹⁵ See *id.* at 571–72.

²⁹⁶ See *id.* at 570 & nn.72–73 (citing, among others *Regan*, 468 U.S. at 242–43; *Zemel*, 381 U.S. at 16; *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431 (9th Cir. 1996) (rejecting First Amendment challenge to the Cuban travel ban); *Walsh v. Brady*, 927 F.2d 1229 (D.C. Cir. 1991) (denying First Amendment challenge to prohibition against payments to Cuba); *Veterans and Reservists for Peace in Vietnam v. Reg'l Comm'r of Customs*, 459 F.2d 676 (3d Cir. 1972) (upholding Trading with the Enemy Act and Foreign Assets Control Regulations against First Amendment attack). See also Chesney, *supra* note 58, at 1143–45 (discussing the embargo-material support analogy).

²⁹⁷ See *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1026–27 (7th Cir. 2002).

²⁹⁸ See *Holy Land Found. for Relief and Dev. v. Ashcroft*, 333 F.3d 156, 166 (D.C. Cir. 2003) (“Again, we hold as other courts have that there is no First Amendment right nor any other constitutional right to support terrorists, and that the record supports no conclusion that the designation or blocking violated any constitutional right of the HLF.”).

The material support law thus has weathered First Amendment challenges with relatively little difficulty. It has encountered considerable problems, however, in a closely related area: the vagueness doctrine.

3. *Vagueness or Overbreadth?*

“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.”²⁹⁹ Put another way, a statute must describe prohibited conduct with sufficient clarity so as to give a person of “ordinary intelligence a reasonable opportunity to know what is prohibited.”³⁰⁰ And where the statute’s prohibition might encompass constitutionally protected conduct—such as expression or expressive association—the combination of due process and First Amendment concerns requires courts to apply the doctrine with extra care.³⁰¹

How does the material support law stack up against these principles? In particular, how do the various terms that constitute the definition of “material support or resources” fare? This question has arisen in a series of cases around the country over the past three years, producing a sharp split of authority. A number of courts, led by the Ninth Circuit, have concluded that certain of these terms are unconstitutionally vague in light of the possibility that they could be construed to encompass constitutionally protected conduct such as advocacy. These are important concerns, but they do not properly sound in vagueness. They are instead the sort of concerns meant to be addressed by a closely related but distinct doctrine: overbreadth. And when analyzed under that rubric, the material support law passes constitutional muster. Genuine vagueness concerns do arise, however, insofar as the terms “training” and “personnel” are interpreted to apply to a person who receives training or provides himself as personnel.

a. *The Advocacy Concern*

In the same opinion in which it rejected the plaintiffs’ expressive association argument in *Humanitarian Law Project*, the Ninth Circuit accepted the plaintiffs’ alternative argument that the terms “personnel” and “training” in the Antiterrorism and Effective Death Penalty Act of 1996 are unconstitutionally vague.³⁰² With respect to the former, the Court con-

²⁹⁹ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

³⁰⁰ *Id.* at 108; *see also* *United States v. Harriss*, 347 U.S. 612, 618 (1954).

³⁰¹ *See* *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (“If . . . the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.”); *Grayned*, 408 U.S. at 109; *United States v. Robel*, 389 U.S. 258, 275 (1967) (Brennan, J., concurring) (“The area of permissible indefiniteness narrows . . . when the regulation invokes criminal sanctions and potentially affects fundamental rights.”).

³⁰² In response to the Ninth Circuit’s vagueness concerns, the government argued that a reasonable person would understand the term “personnel” to apply only to a person subject

cluded that a reasonable person might be uncertain of the scope of the term because its plain meaning “blurs the line between protected expression and unprotected conduct.”³⁰³ In this view, a person advocating for or promoting a terrorist organization could be seen as supplying personnel.³⁰⁴ By the same token, the term “training” might be thought to include protected expression such as “teaching international law to members of designated organizations.”³⁰⁵ When the issue arose again in the context of a subsequent appeal in that case, another Ninth Circuit panel reaffirmed these holdings on the same grounds.³⁰⁶ And when the district court in related litigation considered a vagueness challenge to the portion of the material support definition referring to “expert advice or assistance,” it held that this phrase too “could be construed to include unequivocally pure speech and advocacy protected by the First Amendment.”³⁰⁷

Whether § 2339B might encompass protected advocacy is, of course, an important concern. But the vagueness doctrine is not the proper vehicle for examining whether that concern requires invalidation of the statute. Insofar as one is concerned that the statute might encompass protected advocacy, the question is not the clarity of the definition of material support, but rather, its scope. This concern implicates the doctrine of overbreadth, not vagueness.³⁰⁸

to the direction and control of the organization, thus excluding the plaintiffs. *See HLP II*, 205 F.3d 1130, 1137–38 (9th Cir. 2000); *see also* U.S. DEP’T OF JUST., U.S. ATT’Y’S MANUAL, § 9-91.100 (June 2001) (construing “personnel” in that way). The Ninth Circuit declined to agree, however, arguing that it could not adopt this reading without distorting the plain meaning of the text. *See HLP II*, 205 F.3d at 1137–38. That argument is unpersuasive; the court certainly could have adopted such a reasonable reading of “personnel” if the judges had been so inclined, and indeed had an obligation to do so in order to avoid holding the statute unconstitutional. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 299–300 (2001) (stating the constitutional avoidance doctrine of statutory interpretation). Confusingly, the vagueness debate in other courts has continued to focus unhelpfully on the propriety of adopting the government’s direction-or-control limitation without recognition that the advocacy concern sounds more properly in overbreadth. *See, e.g.*, *United States v. Sattar*, 272 F. Supp. 2d 348, 359 (S.D.N.Y. 2003) (better known as the Lynne Stewart prosecution) (agreeing with the Ninth Circuit that the “direction-or-control” concept could not be read into “personnel,” at least insofar as that term is used with respect to § 2339B). Other cases, however, have taken a different view. *See United States v. Sattar*, 314 F. Supp. 2d 279, 299–301 (S.D.N.Y. 2004) (holding that “personnel” in the context of § 2339A is not unconstitutionally vague due to § 2339A’s heightened mens rea requirement); *United States v. Lindh*, 212 F. Supp. 2d 541, 573–74 (E.D. Va. 2002) (adopting the government’s “direction-or-control” reading of “personnel” and rejecting *Humanitarian Law Project* in the case against John Walker Lindh); *United States v. Goba*, 220 F. Supp. 2d 182, 194 (W.D.N.Y. 2002) (magistrate judge ruling on the personnel issue in connection with a pretrial motion in the Lackawanna case chose to follow the *Lindh* court rather than the Ninth Circuit).

³⁰³ *HLP II*, 205 F.3d at 1137.

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 1138.

³⁰⁶ *See HLP III*, 352 F.3d 382, 403–05 (9th Cir. 2003).

³⁰⁷ *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185, 1198–1200 (C.D. Cal. 2004) [hereinafter *HLP IV*] (quoting *HLP III*, 352 F.3d at 404).

³⁰⁸ *See Aiding Terrorists Hearing*, *supra* note 54, at 10–11 (statement of Paul Rosenzweig, Senior Legal Research Fellow, Ctr. for Legal & Judicial Studies, Heritage

Whereas vagueness doctrine polices the clarity and precision of statutory language to ensure reasonable notice to the affected population and to constrain the discretion of enforcing officials, overbreadth doctrine polices the potential chilling effect of insufficiently tailored laws irrespective of their clarity.³⁰⁹ In particular, overbreadth doctrine polices the scenario in which a statute may be applied constitutionally in some instances, but would be unconstitutional in a substantial percentage of other scenarios in which it could be applied.³¹⁰ This precisely describes the issue that arises when one argues that the material support definition might be understood to encompass advocacy or other activity protected by the First Amendment. In substance, that argument consists of the claim that the statute might apply to a range of regulable or proscribable conduct but nonetheless should be struck down because it also extends to protected activity. The potential problem, in other words, is not that the definition of “material support or resources” may be too unclear, but rather that it may be too sweeping.

Because overbreadth doctrine is “strong medicine,” it is proportionally difficult to invoke.³¹¹ In recognition that “there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct,” a law should be invalidated on this basis only when its unconstitutional application is “substantial . . . relative to the scope of the law’s plainly legitimate applications.”³¹² The party objecting to the law, moreover, has the burden of demonstrating this substantial overbreadth.³¹³

Not surprisingly, in light of these obstacles, overt overbreadth challenges to the material support law have all failed. Most recently, for example, the Fourth Circuit, sitting en banc, held that a defendant convicted of providing \$3,500 to Hezbollah had “utterly failed to demonstrate . . . that any overbreadth is substantial in relation to the legitimate reach of § 2339B.”³¹⁴ Similarly, the district court in the *Humanitarian Law Project* litigation declined to find that the statute was overbroad when expressly

Found.) (concluding that the Ninth Circuit has conflated the vagueness and overbreadth doctrines).

³⁰⁹ *Cf. Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

³¹⁰ *See id.* at 118–20.

³¹¹ *Id.*

³¹² *Id.* (emphasis in original).

³¹³ *See id.* at 122.

³¹⁴ *United States v. Hammoud*, 381 F.3d 316, 381 (4th Cir. 2004) (en banc); *see also United States v. Lindh*, 212 F. Supp. 2d 541, 572 (E.D. Va. 2002) (rejecting an overbreadth challenge both to § 2339B and to executive orders promulgated pursuant to IEEPA). Note that the decisions rejecting overbreadth challenges resonate with the answer courts uniformly have given to the closely related determination of whether the statute is sufficiently tailored to withstand intermediate scrutiny for purposes of ordinary First Amendment analysis.

confronted with an overbreadth argument.³¹⁵ These holdings are correct; the wide range of circumstances in which the statute constitutionally could be applied—including the provision of guns, funds, and equipment—make it difficult to see how the proportion of potentially improper applications could be substantial.³¹⁶

Stripped of the advocacy-driven concern more properly addressed by the overbreadth analysis, the vagueness argument against the material support law loses most of its vigor.³¹⁷ But not all of it. Creative attempts by the government to apply the material support law to various circumstances can create genuine problems of foreseeability. For example, when prosecutors argued that the phrase “communications equipment” could be applied to criminalize the use of communications equipment as opposed to the physical transfer of such equipment, a district judge held the interpretation barred on vagueness grounds.³¹⁸ And so the question arises whether the creative use of the terms “personnel” and “training” in potential sleeper prosecutions would raise similar concerns.

b. Vagueness and Sleeper Prosecutions

Could a reasonable person have anticipated that the term “training” would be applied not only to those who provided the group with training but also to those who received training from the group?³¹⁹ And could a reasonable person have anticipated that the term “personnel” would be applied to those who provide themselves as personnel to a group? If the

³¹⁵ See *HLP IV*, 309 F. Supp. 2d 1185, 1201–03 (C.D. Cal. 2004).

³¹⁶ It does not follow that the government thus can use the material support law to run roughshod over First Amendment interests. If the government were to attempt a prosecution under the material support law based on advocacy falling short of the *Brandenburg* standard, for example, the defendant would be able to invoke his or her First Amendment rights to defeat the attempt. Cf. Patrick Orr, *Sami Al-Hussayen Not Guilty of Aiding Terrorist Groups*, IDAHO STATESMAN, June 11, 2004, at 1 (describing prosecution and acquittal of Saudi student on charges of providing material support to designated foreign terrorist organizations by operating a jihadist website through which they engaged in recruiting and fundraising); Harvey Silverglate, *Opinion, Free Speech in an Age of Terror*, BOSTON GLOBE, June 28, 2004, at A11 (arguing that prosecution of Saudi student Sami Omar Al-Hussayen raised free speech concerns). The overbreadth analysis merely establishes that the law should not be struck down on its face in other circumstances.

³¹⁷ Cf. *Hammoud*, 381 F.3d at 330–31 (rejecting vagueness challenge to the term “currency” in the material support definition). The foregoing discussion applies with equal force to the analogous provisions of the IEEPA framework. See, e.g., *Lindh*, 212 F. Supp. 2d at 573–75 (rejecting vagueness challenge to the IEEPA ban on providing “services” to the Taliban).

³¹⁸ See *United States v. Sattar*, 272 F. Supp. 2d 348, 358 (S.D.N.Y. 2004) (“The defendants were not put on notice that merely using communications equipment in furtherance of [a designated organization’s] goals constituted criminal conduct.”) (emphasis added).

³¹⁹ The first question was implicit in the original *Humanitarian Law Project* lawsuit, although the second question was not (the plaintiffs did wish to provide training, not receive it). See *HLP I*, 9 F. Supp. 2d 1176, 1204 (C.D. Cal. 1998).

answer to either question is no, then the strategy of using the material support law to incapacitate potential sleepers will require revision.

Consider the training issue first. It is understandable that the government would wish to incapacitate those who have received training at, for example, al Farooq in Afghanistan. The fact that a person has received training from al Qaeda in the use of firearms or explosives makes them unusually capable of inflicting harm, and further suggests an unusual willingness to inflict such harm against U.S. interests. Indeed, for these reasons the potential sleeper cases since 9/11 for the most part have focused on persons who have received training from al Qaeda camps.³²⁰

It bears emphasizing, however, that § 2339B on its face punishes only a person who “knowingly provides material support or resources” to a designated organization.³²¹ Read plainly, this language describes a dynamic in which the defendant is providing value to the proscribed group, not vice-versa.³²² Section 2339B thus plainly would punish the knowing provision of training to a designated group.³²³ Indeed, this was a significant part of the motivation for the original proposal for criminalizing terrorism support (prompted by revelations about Edwin Wilson, Frank Terpil, and the training they provided to Libyan agents).³²⁴ But it is difficult to see how a reasonable person would have anticipated that this language also makes it a crime to receive training from a designated group.³²⁵ A defendant charged with rendering material support by receiving training from a designated organization accordingly should have a persuasive argument that these laws are unconstitutionally vague as applied in that circumstance—not because the receipt of training could not be criminalized, but because the material support law fails to do so with sufficient clarity to satisfy due process.³²⁶

³²⁰ See Terrorism Prosecution Statistics Website, *supra* note 124.

³²¹ 18 U.S.C. § 2339B(a)(1) (Supp. I 2001).

³²² Cf. Terry Frieden, *Three Sentenced in Virginia “Jihad” Case* (Nov. 7, 2003), available at <http://www.cnn.com/2003/LAW/11/07/virginia.jihad/index.html> (describing sentencing decision by Judge Leonie Brinkema rejecting an enhancement for “providing military services,” reasoning that the defendants were “absorbing resources, not providing them” in connection with military-style training).

³²³ The prosecution of Mohamad Elzahabi, resting in part on his role as a sniper instructor at an al Qaeda training camp, would seem to fall within this category. See Margaret Zack, *Terror-Probe Figure Pleads Not Guilty; Lawyer Likens Lying Charges to Stewart Case*, MINNEAPOLIS-ST. PAUL STAR-TRIB., July 10, 2004, at 1B (describing allegations). Because Elzahabi at that time may not have been a person subject to U.S. jurisdiction, however, it may not be possible to apply the material support law to him. The law’s extra-territorial applicability in these circumstances warrants further consideration. Compare 18 U.S.C. § 2339B(a)(1) (referring to persons “within the United States or subject to the jurisdiction of the United States”) with 18 U.S.C. § 2339A(a) (Supp. II 2002) (containing no similar limitation).

³²⁴ See *supra* notes 18–43 and accompanying text.

³²⁵ Much the same thing can be said of the IEEPA-based ban on providing “services” to designated SDT’s or SDGT’s such as the Taliban, to the extent that this language is used to encompass the receipt of training.

³²⁶ Thus far, no court has squarely confronted the vagueness issue raised by the appli-

The use of the material support law (or executive orders under IEEPA) to prosecute those who provide themselves as “personnel” to a designated group raises a more difficult question for vagueness doctrine. Like training, personnel can be both provided and received. And if the government somehow brought a prosecution based on the defendant’s receipt of personnel from a designated group, a vagueness issue comparable to the one described above with respect to training would arise. But the government’s post-9/11 use of “personnel” has not functioned in this way. Potential sleepers are prosecuted not for receiving personnel, but for providing personnel. The vagueness question thus focuses on whether reasonable persons could have foreseen that providing personnel would include self-provision.

This question is further complicated by the legislative history of the material support statute. As discussed above, the decades-long effort to create a material support law had stalled repeatedly in the face of First Amendment concerns, including concerns about freedom of association. More specifically, the House Report accompanying the material support law stated unequivocally that the statute “does not attempt to restrict a person’s right to join an organization.”³²⁷ Assuming that this statement accurately reflects congressional intent, how could the law be understood to make it a crime to provide one’s self as personnel to a designated group?

The district court in *Lindh* sought to resolve this tension by distinguishing the broad category of “members” of an organization from what it took to be the subset of that category involving “personnel.” The distinction, the court explained, was that “personnel” referred to the subset of members actually subject to the direction-or-control of the organization or otherwise in an employment-like relationship with it.³²⁸ By way of example, the court asserted that “one can become a member of a political party without also becoming part of its ‘personnel’” and “one can visit an organization’s training center, or actively espouse its cause, without thereby becoming ‘personnel.’”³²⁹

The key analogy here is the political party one.³³⁰ It certainly is possible to distinguish, for example, between the body of people who are mem-

cation of “training” to trainees rather than trainers. The closest treatment of the issue occurred in connection with John Walker Lindh’s motion to dismiss the indictment in his case, including in particular the charges that he violated § 2339B by providing material support (including training) to two designated terrorist organizations—al Qaeda and Haraqat ul-Mujahideen (HUM)—and that he violated executive orders issued pursuant to IEEPA by providing “services” to al Qaeda and the Taliban. *See United States v. Lindh*, 212 F. Supp. 2d 541, 573–76 (E.D. Va. 2002). Lindh did not challenge the term “training” on vagueness grounds, but did argue that the indictment failed to actually allege that he had provided training to al Qaeda or HUM. *See id.* at 573–74, 76. The court rejected this argument as premature. *See id.* at 576–78.

³²⁷ H.R. REP. NO. 104-383, at 43–45 (1995).

³²⁸ *Lindh*, 212 F. Supp. 2d at 572.

³²⁹ *See id.*

³³⁰ The other comparison is not helpful. No doubt it is true that those who visit a group’s

bers of a political party and those directed, controlled, or employed thereby. More importantly, a law that regulated the activities of actual employees of a political party would not necessarily be understood by a reasonable person to apply also to the party's general membership.

But is this a good analogy for terrorist organizations? In some instances it would seem to be an exceptionally good one. Several designated foreign terrorist organizations function also as political parties with membership rolls distinct from their personnel.³³¹ Others lack this quality, however, including al Qaeda.³³²

These variations dilute the impact of the political party analogy, leaving uncertainty as to the merits of the vagueness argument regarding the self-provision of personnel. So long as that uncertainty remains, it will cast a shadow over the Justice Department's use of the material support statute in sleeper cases.³³³ Even if Congress had clearly articulated its intent to prohibit persons from supplying themselves as personnel to a designated organization, further questions relating to the statute's mens rea element remain to be addressed.

4. *Due Process and Mens Rea*

The material support law's mens rea element raises a pair of interrelated issues: (1) how should the element be interpreted, and (2) what constitutional restraints arise when § 2339B is used to prohibit persons from providing themselves as personnel?

With respect to a defendant's mental state, § 2339B on its face requires nothing more than proof that the person "*knowingly* provide[d] material support or resources" to a designated organization.³³⁴ This knowledge requirement has itself been the cause of some confusion.³³⁵ Is it enough if the defendant knew the identity of the recipient? Must the defendant also know that the recipient engages in terrorist activity? Must the defendant

training camp or espouse a group's cause do not automatically become "personnel" as a result, but it equally is true that they do not thereby become "members" either.

³³¹ Hezbollah in particular comes to mind. For a thorough overview of Hezbollah's origins and evolution, see Adam Shatz, *In Search of Hezbollah (Part I)*, N.Y. REV. BOOKS, Apr. 29, 2004, at 41; Adam Shatz, *In Search of Hezbollah (Part II)*, N.Y. REV. BOOKS, May 13, 2004, at 26.

³³² Cf. Robert Killebrew, *Al Qaeda, the Next Chapter*, WASH. POST, Aug. 8, 2004, at B1 (predicting that al Qaeda will develop political and social services fronts in the coming years, following in the path of prior movements that initially focused on the commission of terrorist acts).

³³³ Cf. Michael Chertoff, *Why Is this Ball in Our Court?*, WALL ST. J., June 17, 2004, at A18 (arguing, in connection with the effort to balance liberty and security in dealing with terrorism, that "[a] murky legal climate only obscures our options, and hamstringing our forces").

³³⁴ See 18 U.S.C. § 2339B(a) (Supp. I 2001).

³³⁵ See, e.g., *United States v. Al-Arian*, 329 F. Supp. 2d 1294, 1304 n.24 (M.D. Fla. 2004) (describing dispute over this element).

further know that the Secretary of State has formally designated the group as a foreign terrorist organization?

The legislative history on this point is unclear. Earlier drafts of the legislation that became § 2339B in the House contained a second knowledge requirement, punishing the “knowing provision” of material support only where the support goes to an organization “which the person *knows or should have known* is a terrorist organization” or, in another variation, “which the person *knows or has reasonable cause to believe* is a terrorist organization.”³³⁶ Neither formulation survived the conference process that produced the final text of § 2339B, however, and there are no statements from the conferees explaining why they were dropped.

The courts have begun to address this uncertainty. Most notably, the Ninth Circuit spoke to this issue recently in its second opinion in the *Humanitarian Law Project* litigation. It concluded that the knowledge requirement of § 2339B can be satisfied either by proving that “the donor had knowledge that the organization was designated by the Secretary as a foreign terrorist organization or that the donor had knowledge of the organization’s unlawful activities that caused it to be so designated.”³³⁷ The government has expressed some concerns about how the latter option might be interpreted, but has signaled its general willingness to live with this approach.³³⁸

But what about the defendant’s intent, as opposed to the defendant’s knowledge? The statute is silent on this point. Should an intent requirement nonetheless be read into the law as a matter of statutory interpretation? Must an intent element be read into the law in order to avoid constitutional concerns?

a. Statutory Interpretation and Anticipatory Crimes

The Supreme Court’s 1952 decision in *Morissette v. United States*³³⁹ provides a helpful framework for considering whether an intent requirement ought to be read into § 2339B (or related IEEPA regulations) as a

³³⁶ Compare H.R. 1710, 104th Cong. § 102 (as introduced in the House on May 25, 1995) (proscribing knowing provision of material support to any designated organization) (emphasis added), with H.R. 1710, 104th Cong. § 102 (as reported in the House by the Comm. on the Judiciary on Dec. 5, 1995) (same), and with H.R. 2703, 104th Cong., § 102 (as introduced) (same), and 142 CONG. REC. H2137-93 (1996) (describing amendment by Rep. Hyde to change “should have known” to “reasonable cause to believe”).

³³⁷ *HLP III*, 352 F.3d 382, 403 (9th Cir. 2003).

³³⁸ See *Aiding Terrorists Hearing*, *supra* note 54 (testimony of Daniel Bryant, Asst. Att’y Gen.). The Justice Department has cautioned that the second option identified by the Ninth Circuit—proof of the defendant’s knowledge of the organization’s unlawful activities causing it to be so designated—might be construed to mean that the government would have to prove the defendant was aware of information in the classified portions of the record upon which the Secretary bases his or her decision. The government has asked the Ninth Circuit to amend its opinion to eliminate such a construction. See *id.*

³³⁹ 342 U.S. 246 (1952).

matter of statutory interpretation. *Morissette* concerned a federal statute criminalizing “embezzle[ment], steal[ing], purloin[ing] or knowingly convert[ing]” government property,³⁴⁰ and in particular addressed the defendant’s argument that an intent requirement should be read into the text of this law.³⁴¹ The Supreme Court agreed that it should.³⁴²

The Court’s opinion, by Justice Jackson, began by discussing the importance historically attached to intent requirements for criminal prohibitions at common law.³⁴³ It also identified a more recent and contrary trend, however, involving crimes that “depend on no mental element but consist only of forbidden acts or omissions.”³⁴⁴ Jackson attributed this new species of intent-less crime to the impact of industrialization, urbanization, and the mass market, noting that the confluence of these factors has “engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.”³⁴⁵ Such “public welfare offenses” often involve situations of “neglect” rather than “positive aggressions or invasions.”³⁴⁶ Justice Jackson explained that “[m]any violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it” Since the harm that results in these instances exists regardless of the actor’s intent, Jackson wrote, it follows that legislation application to public welfare offenses need not require proof of intent.³⁴⁷

Jackson went out of his way to emphasize that there is not a “precise line or . . . comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not.”³⁴⁸ It sufficed to say, for purposes of the charge against *Morissette*, that the federal statute relating to theft of government property sufficiently resembled crimes for which intent traditionally had been required so as to require such an element to be read into the federal statute as well.³⁴⁹

Morissette was decided in 1952. Since that time, the trend in favor of statutes involving a reduced or absent intent requirement has accelerated considerably, reflecting what Professor Carol Steiker has described as the shift from the “punitive state” to the “preventive state.”³⁵⁰ This develop-

³⁴⁰ 18 U.S.C. § 641 (2000) (amended 2004).

³⁴¹ *Morissette*, 342 U.S. at 246.

³⁴² *Id.* at 263–64, 273.

³⁴³ *Id.* at 250–52.

³⁴⁴ *Id.* at 252–53.

³⁴⁵ *Id.* at 254.

³⁴⁶ *Id.* at 255.

³⁴⁷ *Id.* at 256; see also *id.* at 259–60 (citing *United States v. Dotterweich*, 320 U.S. 277, 280–81 (1943), for the proposition that “[i]n the interest of the larger good,” some regulatory laws “put[] the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger”).

³⁴⁸ *Morissette*, 342 U.S. at 260.

³⁴⁹ *Id.* at 261–67.

³⁵⁰ Carol Steiker, *Foreword: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMI-

ment goes hand-in-hand with the recognition of ever-greater numbers of “anticipatory” crimes—statutes that criminalize conduct not because it is harmful in itself, but because it is a useful proxy for the occurrence of future harm.³⁵¹ Examples abound. It is a crime for a dealer or manufacturer to sell a gun to a minor, for example, irrespective of the provider’s intent.³⁵² It is a crime to drive a car while intoxicated, irrespective of the driver’s intent.³⁵³ It is a crime to engage in transactions with a foreign country subject to an embargo, irrespective of intent.³⁵⁴ And by the same token, both § 2339B and corresponding IEEPA orders make it a crime to engage in transactions with a designated foreign terrorist organization, irrespective of intent.

To the extent that an anticipatory law involves lengthy prison sentences, however, it breaks with the model traditionally associated with public welfare offenses. In *Morissette*, Justice Jackson emphasized that the concerns generated by the lack of an intent element in public welfare crimes were offset to a degree by the fact that the penalties associated with such crimes “are relatively small, and conviction does no grave damage to an offender’s reputation.”³⁵⁵

Seen in this light, § 2339B has elements of both types of crime. It resembles the public welfare/anticipatory crime model insofar as it punishes activity that is not harmful in itself but instead threatens to lead to future harm. On the other hand, its penalties are harsh. A conviction under § 2339B not only tars the offender with involvement in terrorism but subjects the individual to a maximum fifteen-year sentence (or life, if the government can demonstrate that a death resulted from the support).³⁵⁶ Similarly, an IEEPA violation exposes an individual defendant to a maximum ten-year sentence.³⁵⁷ Penalties of this magnitude do not coexist comfortably with the absence of an intent requirement.³⁵⁸

If this were the end of the inquiry, the question of whether an intent requirement should be read into § 2339B as a matter of statutory inter-

NOLOGY 771, 773–74 (1998); see also Stuart P. Green, *Six Senses of Strict Liability: A Plea for Formalism*, in *APPRAISING STRICT LIABILITY* (A. P. Simester, ed.) (Oxford) (forthcoming).

³⁵¹ See Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 Nw. U. L. REV. 1, 54–58 (2003).

³⁵² 18 U.S.C. § 922(b)(1) (2000).

³⁵³ See, e.g., FLA. STAT. ANN. § 316.193 (West 2004).

³⁵⁴ See, e.g., *Farrakhan v. Reagan*, 669 F. Supp. 506 (D.D.C. 1987) (upholding executive order imposing embargo on Libya pursuant to IEEPA).

³⁵⁵ *Morissette*, 342 U.S. at 246.

³⁵⁶ See 18 U.S.C. § 2339B(a)(1) (Supp. I 2001).

³⁵⁷ See 50 U.S.C. § 1705(b) (2000). Note that incarceration is available where the violation was willful, whereas an unintended violation of the statute triggers civil sanctions instead. See *id.* (setting a maximum civil penalty of \$10,000). Intent to violate the statute differs, of course, from intent to cause some particular harm or result by doing so.

³⁵⁸ See *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 71–72 (1994) (emphasizing the statute’s ten-year maximum sentence in connection with determination that it amounted to a traditional rather than a public welfare-type crime).

pretation under the *Morissette* framework would be a close one. But the legislative history of the statute precludes such a reading.³⁵⁹

As discussed in the survey of the material support law's origins, § 2339B was enacted in part out of dissatisfaction with the limits imposed by the intent requirement of its older sibling, § 2339A.³⁶⁰ It was, moreover, enacted with express congressional findings to the effect that any support provided to terrorist organizations, however well intentioned, would tend to increase the capacity of such groups to cause harm to U.S. nationals or to the national security of the United States. The bills that eventually created § 2339B, including the original administration bill which was focused solely on the issue of fundraising, contained similar proposed findings. There were, to be sure, efforts in the House to amend the language of the prohibition to clarify § 2339B's knowledge requirement, and there were complaints that the law lacked an exception for aid rendered for humanitarian purposes. But there is little question that the concept behind § 2339B was to embargo foreign terrorist organizations without respect to the good intentions of would-be donors. A contrary intent cannot plausibly be attributed to Congress.

b. Constitutional Avoidance

The *Morissette* rule, however, is not the only basis upon which a court might conclude that an intent requirement must be read into § 2339B. The canon of statutory interpretation requiring avoidance of constructions that would render a law unconstitutional can produce the same outcome. And it has, actually, in at least one instance.

The district judge overseeing the prosecution of a group of Florida men linked to Palestinian Islamic Jihad invoked this canon of construction to impose a specific intent requirement on both § 2339B and IEEPA in all their various applications.³⁶¹ Specifically, the Court in *United States v. Al-Arian* held that a specific intent requirement must be read into the statute in order to avoid four separate constitutional problems.³⁶² Three of these concerns—vagueness, advocacy, and associational—have been discussed previously. They are not recapped here, except to note that the *Al-Arian* holding provides further evidence of the uncertainty surrounding the use of the material support law (and IEEPA regulations) in light of these constitutional issues.

³⁵⁹ Cf. *Morissette*, 342 U.S. at 263–70 (searching the legislative history of the theft statute for indications that Congress wished it to have no intent element); *X-Citement Video*, 513 U.S. at 73–78 (emphasizing lack of clear congressional desire to exclude an intent requirement).

³⁶⁰ See *supra* Part I.

³⁶¹ See *United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1338–40 (M.D. Fla. 2004); *United States v. Al-Arian*, 329 F. Supp. 2d 1294 (M.D. Fla. Aug. 4, 2004) (denying motion for reconsideration).

³⁶² *Al-Arian*, 308 F. Supp. 2d at 1338–39.

The *Al-Arian* decision raises a fourth issue, however, that has not previously been discussed. Must a specific intent requirement be read into the support law in order to avoid violating due process principles relating to personal guilt? The *Al-Arian* court thought so. In support, it cited the Supreme Court's 1961 decision in *Scales v. United States*, a landmark in the development of both due process and expressive association.³⁶³

i. Scales v. United States

The most direct way to suppress a dangerous organization (if not necessarily the most effectual) is to proscribe it outright, including by making membership in the organization a crime. But such measures carry profound constitutional implications, as they impinge on both expressive association and due process concerns relating to personal guilt. During the Cold War, the Supreme Court had occasion to address these concerns in *Scales v. United States*.³⁶⁴

Junius Scales was a regional chairman of the Communist Party (for North and South Carolina) when he was arrested on charges of violating the Smith Act. The Smith Act, officially titled the Alien Registration Act of 1940, contained an array of measures designed to suppress communist party activity in the United States.³⁶⁵ In relevant part, it provided:

Whoever organizes . . . any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of [the federal or state governments] by force or violence; or becomes or is a *member of, or affiliates with*, any such society, group, or assembly of persons, knowing the purposes thereof [commits a felony subject to a twenty year sentence].³⁶⁶

Scales was the first person convicted under the Smith Act's membership provision. After the Fourth Circuit affirmed his conviction,³⁶⁷ he petitioned successfully for certiorari. Years would pass before the Supreme Court at last passed on the merits of the case,³⁶⁸ and ultimately it too affirmed the conviction. In the course of doing so, however, the Court established the modern constitutional parameters for criminalizing association.

Justice Harlan's majority opinion began by emphasizing that the trial judge had instructed the jury that it must find that Scales "[1] was an 'active' member of the Party, and not merely 'a nominal, passive, inactive or

³⁶³ *Al-Arian*, 329 F. Supp. 2d at 1299–1300.

³⁶⁴ 367 U.S. 203 (1961).

³⁶⁵ 18 U.S.C. § 2385 (2000).

³⁶⁶ *Id.* (emphasis added).

³⁶⁷ *Scales v. United States*, 260 F.2d 21, 46 (4th Cir. 1958).

³⁶⁸ *See Scales*, 367 U.S. at 206 n.2 (describing convoluted procedural history).

purely technical' member, [2] with knowledge of the Party's illegal advocacy and [3] a specific intent to bring about violent overthrow 'as speedily as circumstances would permit.'"³⁶⁹ Justice Harlan conceded that the requirements of "active" membership and "specific intent" did not appear in the text of the statute, but wrote that these glosses could and should be read into it.³⁷⁰

Having thus affirmed the trial judge's narrowing construction of the statute,³⁷¹ Justice Harlan then turned to whether punishing active membership violated due process. "In our jurisprudence guilt is personal," Harlan began,

and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.³⁷²

Emphasizing the "active member" and "specific intent" elements, Harlan concluded that Scales's relationship to the Communist Party sufficed to satisfy this concern.³⁷³ Harlan recognized that this relationship was less direct and substantial than that of a conspirator to a conspiracy, but wrote that this distinction was tolerable for due process purposes so long as the "active member" and "specific intent" requirements were met.³⁷⁴

Harlan next deemed the membership provision consistent with the First Amendment. Though, he conceded that a "blanket prohibition on association with a group having both legal and illegal aims" would present "a real danger that legitimate political expression or association would be

³⁶⁹ *Id.* at 220.

³⁷⁰ *Id.* at 220–23. Note the inconsistency between this approach to statutory interpretation and the Ninth Circuit's refusal in *HLP II* to adopt the government's proposed limitation on the meaning of "personnel." See *HLP II*, 205 F.3d 1130, 1137–38 (9th Cir. 2000).

³⁷¹ Similarly, the Court rejected a vagueness challenge to the term "active membership," explaining that there is a clear distinction between "active" and "nominal" membership. 367 U.S. at 223–24.

³⁷² *Id.* at 224–25.

³⁷³ *Id.* at 226–27 (writing that "we can perceive no reason why one who actively and knowingly works in the ranks" of an organization engaged in criminal activity, who also "intend[s] to contribute to the success of those [activities]" ought to be "any more immune from prosecution than he to whom the organization has assigned the task of carrying out the substantive criminal act").

³⁷⁴ *Id.* at 228 (holding that due process concerns relating to personal guilt "are duly met when the statute is found to reach only 'active' members having also a guilty knowledge and intent." Harlan went on to write that such a statute "therefore prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action.").

impaired,”³⁷⁵ he again cited the “active membership” and “specific intent” requirements in concluding that the law avoided that danger. “Thus the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute,” he wrote.³⁷⁶ Such a member “lacks the requisite specific intent to bring about the overthrow of the government as speedily as circumstances would permit.”³⁷⁷ Justice Harlan concluded that “[s]uch a person may be foolish, deluded, or perhaps merely optimistic, but he is not by this statute made a criminal.”³⁷⁸

Scales thus identified two constitutionally required elements that must be present in order to criminalize membership itself. The government must prove that the defendant was not merely a passive but an active member of the organization, and it must prove that the defendant not only knew of but also specifically intended to facilitate the organization’s unlawful ends.

ii. Scales and Terrorism-Support Legislation

How do § 2339B and IEEPA fare under *Scales*? Insofar as these laws are interpreted to criminalize affiliation with a designated organization, they squarely implicate the *Scales* precedent. In that limited circumstance, both an active membership and a specific intent requirement should be read into them.

No obstacles preclude a court from adopting such a reading. These laws do not speak expressly in terms of “active membership,” of course, but then again neither did the Smith Act membership provision at issue in *Scales* itself. If anything, the term “personnel” comes closer on its face to the “active” member concept than does the bare term “member” used in the Smith Act. The government’s direction-or-control understanding of the term further reinforces that connection. Courts can and should interpret § 2339B and the IEEPA regulations to reach only active membership in this sense.

Similarly, with regard to mens rea, neither § 2339B nor the IEEPA regulations on their face require an intent greater than knowledge.³⁷⁹ This limitation was not fatal in *Scales*; the Supreme Court did not hesitate there to read a specific intent requirement into the statute in order for it to comply with the demands of due process and associational concerns. Courts can and should do much the same with § 2339B and IEEPA regulations when they are applied to punish membership alone.

³⁷⁵ *Id.* at 229.

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 230 (internal citation omitted).

³⁷⁸ *Id.*

³⁷⁹ There has been some recent debate about precisely what it is that the material support defendant is supposed to know. *See supra* note 338.

In other circumstances—when, for example, these laws are used to punish the provision of money, equipment, or professional services—it is much more difficult to make the case that *Scales* controls. Nonetheless, the district court overseeing the *Al-Arian* prosecution has taken this position.

The court in *Al-Arian* reasoned that *Scales*' due process holding is concerned not with membership prohibitions per se but with any prohibition—whether targeting status or conduct—that subjects one person to criminal liability based on concerns about the conduct of others. Justice Harlan had introduced his due process analysis, after all, with the statement that “imposition of punishment on a status *or on conduct*” based only on the relationship of that status or conduct to other illegal activity triggered the personal guilt concern.³⁸⁰ In the view of the *Al-Arian* court, § 2339B and IEEPA are precisely that kind of law even when applied to fundraising and the like.

This stretches *Scales* too far. The Supreme Court did not in that case establish a bright line rule to be applied to all crimes that are not *malum in se*. On the contrary, Justice Harlan wrote that the personal guilt issue required “an analysis of the relationship between the fact of membership and the underlying substantive illegal conduct, in order to determine whether that relationship is indeed too tenuous to permit its use as the basis for criminal liability.”³⁸¹ In the context of the Smith Act membership provision, the answer was “no,” at least so long as courts understood the statute to include a specific intent requirement. It does not follow, however, that the same answer applies automatically to all laws that aim to suppress conduct that could lead to harmful consequences from other sources.

With respect to the non-membership applications of the support statutes, *Scales* suggests that courts must consider the nature of the relationship between the banned activity—providing funding, equipment, etc.—along with the harm that might be inflicted by the recipient organizations. In particular, courts must ask whether that relationship is sufficiently strong if based just on the donor's knowledge of the identity of the recipient and its unlawful activities, or if instead the relationship must also be supported by proof of the donor's intent to further the unlawful ends of the organization.

Because a relationship based on the provision of money, equipment and services differs in kind from a relationship based exclusively on mere membership, courts are not obliged to impose an intent requirement outside the latter context. As noted previously, the legislation creating § 2339B

³⁸⁰ 367 U.S. at 224–25 (emphasis added). It is possible too that Justice Harlan meant the same thing when he referred both to “conduct” and “status”: becoming a member, and being a member. *Cf. id.* at 227 (referring to the “act” of “becom[ing] a member of an illegal organization”) (internal quotation marks omitted).

³⁸¹ *Id.* at 226.

expressly stated a congressional finding that all forms of aid—but especially financial aid—given to foreign terrorist organizations enhanced their capacity to cause harm, irrespective of the donor’s intent;³⁸² from this perspective, even facially innocuous aid can facilitate the group’s capacity to do violence by enhancing the group’s standing or popularity. Contrast this with the observation by Justice Harlan in *Scales* that membership alone might do “nothing more than signify[] [the member’s] assent to [the group’s] purposes and activities on one hand, and providing, on the other, only the sort of moral encouragement which comes from the knowledge that others believe in what the organization is doing.”³⁸³ The distinction suggests that while specific intent is required to satisfy due process where nothing more than membership is present, lesser mental states (such as knowledge) might suffice for laws that premise liability on conduct that makes a more affirmative contribution to the ultimate harm. These are fine but consequential distinctions, and they were not given their due by the *Al-Arian* court.

The *Al-Arian* approach would, in practice, open a significant loophole for foreign terrorist organizations to obtain funding and other forms of aid from U.S. persons. True, an intent requirement would pose little additional obstacle where the support took the form of weapons or explosives.³⁸⁴ But what about the vast category of “dual use” support, including money? Consider the scenario in which an American citizen, deeply concerned about the plight of Palestinians in the Gaza Strip, decides to write a check for \$10,000 to a fundraiser working on behalf of Hamas. The donor is told that the money will be used exclusively for the support of orphans, and receives assurances that the money will not be spent in connection with violent activities of any kind. The donor adamantly opposes violence, and believes that his support of Hamas will help that organization focus more on social services than on the use of violence. Is the donation legal? Under *Al-Arian*, the result depends on whether the donor specifically intended to facilitate the illegal ends of the organization. On these facts, the donor had no such intent and could not be prosecuted.

The *Al-Arian* court was sensitive to this hypothetical, and responded to it by suggesting that it had in mind something less demanding than a specific intent requirement. The court argued that in the above hypothetical, the jury could infer the requisite intent if the government proved the donor understood that money is fungible and that the organization would be free to use the money as it saw fit.³⁸⁵ This suggests a mens rea element closer to recklessness than to specific intent.

³⁸² See *supra* note 86. Through its support for and enactment of this legislation, and its comparable use of IEEPA powers, we can attribute similar views to the executive branch.

³⁸³ *Scales*, 367 U.S. at 227.

³⁸⁴ See *Al-Arian*, 308 F. Supp. 2d 1322, 1339 (M.D. Fla. 2004).

³⁸⁵ *Id.*

A recklessness standard interferes less with the purpose behind § 2339B and IEEPA than would a true specific intent standard, but still makes possible the good faith provision of support to foreign terrorist organizations in some circumstances despite the congressional finding that such organizations are “so tainted by their criminal conduct that *any* contribution to such an organization facilitates that conduct.”³⁸⁶ The *Al-Arian* court points out that juries can “peer through . . . facades” such as an ill-intentioned donor who tries to disguise the purpose of the funding through a misleading statement on the memo line of a check.³⁸⁷ Where the deceit is on the part of the organization and not the donor, however, the jury would be obliged to acquit the donor, and funds could flow to the terrorist group.

The distinction in culpability among the intentional, reckless, and deceived donors is not irrelevant. But it suggests the need for differential punishments, not for outright toleration of good faith support for foreign terrorist organizations.³⁸⁸

B. Criticizing Reliance on the Material Support Law from the National Security Perspective

The foregoing survey of civil liberties criticisms generated by the material support law suggests that the current statutory structure may be overly aggressive in some respects, particularly as applied in the potential sleeper cases. Tailoring problems, can run in both directions, however, and in this instance they do. The current framework can also be criticized from a national security perspective.

1. Foreign Military Training

When an individual obtains training in firearms or explosives, that individual’s capacity to cause harm increases. And depending on the identity of the provider, the fact that the individual sought out such training may provide additional reason to suspect that the individual actually will use those skills in harmful ways. Training in weapons and explosives, in short, can serve as a proxy for future dangerousness. This is precisely why the government views those who have trained in al Qaeda camps as potential sleepers who must be incapacitated.³⁸⁹

³⁸⁶ *Id.* at 1339 (quoting Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214) (emphasis added).

³⁸⁷ *Al-Arian*, 308 F. Supp. 2d at 1339.

³⁸⁸ The rationale of *Al-Arian* would seem also to require a similar mens rea requirement to be read into laws and regulations imposing embargoes on foreign states. See Chesney, *supra* note 58, at 1444 & n.149 (arguing that there is no meaningful distinction between foreign terrorist organizations and foreign states for purposes of embargoes or transactional restraints).

³⁸⁹ The vast majority of training camp attendees, of course, were not subject to U.S. ju-

Existing laws, unfortunately, fail to address adequately the situation where a U.S. person obtains lethal training abroad. As just noted, the material support law's "training" provision cannot constitutionally be applied to those who received rather than provided training. Likewise, substantial uncertainty surrounds the concept of reaching such persons through the "personnel" alternative under the material support law.

This coverage gap is not a product of historical reluctance to regulate the military activity of U.S. persons abroad. On the contrary, federal criminal law has regulated participation by U.S. persons in foreign military activity from the early days of the republic. Motivated in large part by America's relatively weak position in the international system, at the time it was enacted the Neutrality Act of 1794 contained a provision expressly forbidding anyone within the United States from "enlist[ing]" in a military capacity with a "foreign prince, state, colony, district, or people" irrespective of the enlistee's intent.³⁹⁰ There are a number of other statutes of like vintage limiting the ability of U.S. persons to engage in private military activities,³⁹¹ but the Neutrality Act provision comes closest to approximating the scenario in which U.S. persons travel abroad to, for instance, Afghanistan to learn combat skills from designated foreign terrorist organizations.

It does not come close enough, however, to provide a sound basis for dealing with the problem of potential sleepers who obtain military skills abroad. First, the statute fails to address the receipt of training in circumstances falling short of enlistment. Second, the statute's focus on traditional armed forces is antiquated. The Neutrality Act is a creature of the Westphalian era, a time when private military force posed relatively little threat compared to the capacities of governments. We live in a much different world today. In an era marked by the capacity and willingness of private transnational organizations to inflict vast casualties on civilian populations, there is no longer a sound basis for limiting our regulation of foreign military training to that obtained from states.

2. *The Erosion of the Foreign Terrorist Organization Model*

Unfortunately, the material support law's capacity to make up for this coverage gap is eroding. Like some other components of U.S. counterter-

risdiction at the time of their training. Or were they? *See infra* note 452 (discussing the potential for the material support and training provisions to be applied to persons who were not in the United States at the time that the conduct in question occurred).

³⁹⁰ *See* 18 U.S.C. § 959(a) (2000).

³⁹¹ *See, e.g.*, 18 U.S.C. § 958 (2000) (prohibiting U.S. citizens from accepting a military commission from a foreign state to serve against another state with which the United States is at peace); 18 U.S.C. § 960 (2000) (prohibiting U.S. persons from initiating military expeditions against states with which the U.S. is at peace); 18 U.S.C. § 2390 (2000) (prohibiting anyone within U.S. jurisdiction from enlisting to serve in armed hostilities against the United States).

rorism law,³⁹² the utility of the material support law depends on the government's ability to link a suspect to a known group already designated as a foreign terrorist organization. This focus is understandable. For the past twenty years, actual organizations with identifiable leaders, hierarchies, and members—from Hezbollah to the Real I.R.A. to al Qaeda—have dominated our perception of terrorism. Focusing on the problem of terrorism in organizational terms has helped us craft tools such as the material support law that originally were well-calibrated to the nature of the problem.

A number of problems flow from a statutory structure that relies on the formal, *ex ante* identification of foreign terrorist organizations. First, occasions will arise in which a person provides material support to a foreign terrorist organization before the Secretary of State formally designates the group, triggering criminal penalties.³⁹³ Second, notwithstanding efforts to account for aliases in the designation process, targeted organizations may resort to name-changes and related subterfuges in an effort to circumvent the impact of a designation.³⁹⁴ But the most pressing concern is less obvious than these.

As we try to determine how to deal effectively with terrorism in the 21st century, it is critical that we recognize that the source of the threat is evolving. Familiar organizations such as al Qaeda will remain a potent threat, to be sure, but the next generation of terrorism seems likely to emanate just as often from unfamiliar and transient groups that do not maintain a discrete identity for the length of time required to allow our organization-focused laws to have some effect.³⁹⁵ Making matters worse, the next generation of terrorist threats also is likely to include decentralized networks of like-minded but loosely affiliated individuals who come together sporadically and on an ad-hoc basis.³⁹⁶ Indeed, this may

³⁹² See, e.g., 8 U.S.C. § 1182(a)(3)(B)(i)(IV)(aa) (2000) (requiring exclusion of aliens who represent foreign terrorist organizations); *id.* § 1182(a)(3)(B)(i)(V) (excluding members of foreign terrorist organizations).

³⁹³ Consider, for example, the fact that the Secretary of State did not designate Jama'at al-Tawhid wa'al-Jihad (the organization associated with Abu Musab al Zarqawi in Iraq) until October 15, 2004, notwithstanding the fact that the group's activities in Iraq had been the cause of serious concerns and extensive media coverage for many months prior to the designation. See Richard Boucher, State Dep't Spokesman, Press Statement, *Foreign Terrorist Organization: Designation of Jama'at al-Tawhid wa'al-Jihad and Aliases*, Oct. 15, 2004 at <http://www.state.gov/r/pa/prs/ps/2004/37130.htm>.

³⁹⁴ See, e.g., JESSICA STERN, TERROR IN THE NAME OF GOD: WHY RELIGIOUS MILITANTS KILL 108 (2003) (describing efforts by the Pakistani group Lashkr e Taiba to "change[] its formal name to Pasban-e-Ahle Hadith after it was banned in Pakistan and America").

³⁹⁵ See, e.g., *Debasing the Base: Rounding Up al-Qaeda*, ECONOMIST, Aug. 5, 2004, at 35 (describing attempt to assassinate Pakistan's prime minister-designate by a "previously unknown group calling itself the Islambouli Brigades of al-Qaeda"). For an overview of the emerging problem of unaffiliated terrorism, see M. E. Bowman, *Some-Time, Part-Time, and One-Time Terrorism*, 13 INTELLIGENCER: J. U.S. INTELLIGENCE STUD. 13 (2003).

³⁹⁶ See Bruce Hoffman, *Al Qaeda, Trends in Terrorism, and Future Potentialities: An Assessment*, 26 STUD. IN CONFLICT & TERRORISM 429, 439 (2004) (describing the increasing significance of lone wolves and small cells); Lawrence Wright, *The Terror Web*, NEW

already be an accurate description of many threats that we currently face.³⁹⁷

Just as the U.S. once had to adjust its counterterrorism laws and policies from a focus on state-sponsored terrorism to accommodate the emergence of a second generation of relatively independent transnational organizations,³⁹⁸ so too it must now adjust to account for the third generation threat posed by less identifiable groups and networks.³⁹⁹ In a limited sense, the U.S. is the victim of its own success with respect to this emerging problem. At the time of 9/11, al Qaeda was a hierarchical organization led by a shura council (in which bin Ladin held the top position), along with a series of subcommittees focused on matters such as operational planning, financing, and propaganda, and a body of operatives and agents filling out the organization.⁴⁰⁰ Efforts by the U.S. and its allies after 9/11 to crush al Qaeda—particularly but not only in connection with Operation Enduring Freedom in Afghanistan—had considerable effect, but al Qaeda has not been destroyed. On the contrary, it seems not only to have regenerated some of its prior functionality,⁴⁰¹ but also to have spawned or

YORKER, Aug. 2, 2004, at 40, 44–45 (describing layers of networks associated to varying degrees with al Qaeda). Even such notable al Qaeda-related figures as Ramzi Yousef and his uncle Khalid Sheikh Mohammed were “not necessarily formal members” of the organization. 9/11 COMM. REP., *supra* note 2, at 59, 145–50; *see also id.* at 67 (noting that a “looser circle of adherents might give money to al Qaeda or train in its camps but remained essentially independent”).

³⁹⁷ *See Terrorist Financing: Hearing before the Senate Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. (2003) (statement of Matthew A. Levitt, Senior Fellow in Terrorism Studies, Wash. Inst. for Near East Policy) (“Too often people insist on pigeonholing terrorists as members of one group or another, as if such operatives carry membership cards in their wallets. In reality, much of the ‘network of networks’ that characterizes today’s terrorist threat is informal and unstructured.”). As Bruce Hoffman of RAND explains, “[t]he traditional way of understanding terrorism and looking at terrorists based on organizational definitions and attributes in some cases is no longer relevant.” Hoffman, *supra* note 396, at 439.

³⁹⁸ *See* 9/11 COMM. REP., *supra* note 2, at 92 (noting that terrorism in the 1970s and 1980s tended to focus on regional conflicts, with most organizations either having a state sponsor or themselves aspiring to statehood); *id.* at 108 (“Although the 1995 National Intelligence Estimate had warned of a new type of terrorism, many officials continued to think of terrorists as agents of states . . . or as domestic criminals . . .”).

³⁹⁹ This Article does not mean to suggest that the Intelligence Community (as opposed to current counterterrorism statutes) lacks sensitivity to this phenomenon. On the contrary, as early as the summer of 1995 the Intelligence Community produced a National Intelligence Estimate in 1995 warning that the most significant terrorist threats facing the U.S. emanated from “transient groupings of individuals” who had only “loose affiliations.” *See* 9/11 COMM. REP., *supra* note 2, at 341 & n.2 (quoting from CENTRAL INTELLIGENCE AGENCY, NATIONAL INTELLIGENCE COUNCIL, THE FOREIGN TERRORIST THREAT IN THE UNITED STATES v, vii–viii, 10–11, 13, 18 (1995)).

⁴⁰⁰ *See id.* at 56, 67 (describing the organizational structure of al Qaeda).

⁴⁰¹ *See, e.g.*, Interview by Renee Montagne with Bruce Hoffman, NPR: Morning Edition (Aug 11, 2004) (discussing Hoffman’s view that al Qaeda lost around seventy-five percent of its leadership after 9/11, but continues to function and even to “replenish its ranks”), available at 2004 WL 56914247; *see also* Dan Eggan & John Lancaster, *Al Qaeda Showing New Life; U.S. Surprised by Signs of Regrouping*, WASH. POST, Aug. 14, 2004, at A1.

at least encouraged a variety of transient imitators and collaborators.⁴⁰² Al Qaeda today poses a threat in its inspirational capacity as an icon for the global militant jihadist movement, in addition to the more direct threat it poses in its own right.⁴⁰³

Counterterrorism law and policy can and should account for the emergence of the threat posed by transient groups and decentralized networks, in addition to the old threat posed by the traditional core of al Qaeda.⁴⁰⁴ But the existing framework of terrorism-support laws, calibrated as it is toward linking individuals to already-identified-and-designated organizations, unfortunately is not well-calibrated for the new task.⁴⁰⁵ As a result of this coverage gap, there will be circumstances in which policymakers simply lack plausible, long-term criminal justice alternatives to military detention.

IV. LEGISLATIVE REFORM OF COUNTERTERRORISM LAW

In the aftermath of the 9/11 Commission Report, the attention of lawmakers, the media, and the public is riveted on proposals to reform laws and policies relating to the gathering and analysis of intelligence. This is, unquestionably, a timely and critically important task. But three years removed from the exigencies of 9/11, the time also is ripe to devote attention to the role played by criminal law in counterterrorism efforts and to the possibility of legislative reform.⁴⁰⁶

⁴⁰² See *Special Report: Plots, Alarms, Arrests—Chasing al-Qaeda*, ECONOMIST, Aug. 12, 2004, at 22, 24 (arguing that “in its second coming, as the battle-standard and the ideology for a generation of militant Muslim youth, al-Qaeda is scoring nightmarish success”); Dan Egan and John Lancaster, *Al Qaeda Showing New Life; U.S. Surprised by Signs of Regrouping*, WASH. POST, Aug. 14, 2004, at A1 (describing al Qaeda “breakaway cells” emerging after 9/11); see also Interview by Mary Louise Kelly with George Tenet, NPR: Morning Edition (Mar. 18, 2004) (“The steady growth of Osama bin Laden’s anti-American sentiment through the wider Sunni extremist movement and the broad dissemination of al-Qaeda’s destructive expertise ensure that a serious threat will remain for the foreseeable future with or without al-Qaeda in the picture.”), available at 2004 WL 56912017.

⁴⁰³ Cf. Xavier Raufer, *Al Qaeda: A Different Diagnosis*, 26 STUD. IN CONFLICT & TERRORISM 391 (2003) (arguing for a conception of al Qaeda not as a discrete organization but instead as a decentralized network).

⁴⁰⁴ See David Johnston & David E. Sanger, *New Generation of Leaders Is Emerging for Al Qaeda*, N.Y. TIMES, Aug. 10, 2004 (noting that “new evidence suggests that Al Qaeda has retained some elements of its previous centralized command and communications structure,” contrary to the view adopted by many experts after Operation Enduring Freedom who argued that “the group had been dispersed and had been trying to re-form in a loosely affiliated collection of extremist groups”).

⁴⁰⁵ The inability of FBI agents to obtain a FISA order prior to 9/11 in connection with Zacarias Moussaoui—because of uncertainty that his links to certain Chechen rebels sufficed to establish a tie to a “foreign power”—may illustrate another manifestation of this same problem. See 9/11 COMM. REP., *supra* note 2, at 274.

⁴⁰⁶ Cf. Michael Chertoff, *Law, Loyalty, and Terror*, WEEKLY STANDARD, Dec. 1, 2003 (writing about the uncertainty regarding rules for detention of enemy combatants, Judge Chertoff noted that “[t]wo years into the war on terror, it is time to move beyond case-by-

Judge Michael Chertoff, who helped orchestrate the Bush administration's response to 9/11 in his capacity as Assistant Attorney General in charge of the Criminal Division, made this point recently with respect to the difficult issues raised by the problem of potential terrorists within the United States.⁴⁰⁷ Judge Chertoff noted that the "traditional way to incapacitate dangerous individuals" is through the criminal justice system, and that the use of "traditional battlefield rules" as an alternative to system even within the United States raises difficult issues.⁴⁰⁸ Emphasizing that the passage of time has given us both breathing room and perspective since 9/11, Judge Chertoff called for Congress and the Administration to begin to engage these issues more assertively by "systematically sketch[ing] the legal framework for the demands of this new kind of war."⁴⁰⁹

In this spirit, this Article concludes with a battery of legislative proposals designed to address both the civil liberty and national security criticisms raised by the Justice Department's post-9/11 strategy for dealing with sleepers. Specifically, the Article proposes a trio of statutory reforms:

- Congress should regulate or even wholly prohibit the act of receiving training in the use of weapons or explosives outside the United States.
- Congress should expressly confront the membership issue, making it a crime to become an active member of a designated foreign terrorist organization where the government can prove that the defendant had the specific intent to facilitate the organization's unlawful purposes.
- Congress should revise § 2339B and IEEPA substantially. To begin with, it should codify the D.C. Circuit's holdings with respect to the designation process; it should make clear that protected advocacy or expression cannot be the basis for prosecution (although it might be an investigative predicate); and it should clarify the type of knowledge required for prosecution. But Congress also should undertake more substantial reforms. One option would be to trisect these laws, linking a hierarchy of mens rea requirements to corresponding levels of maximum punishment. Alternatively, Congress should reformulate these provisions into ex ante licensing schemes (somewhat along the lines originally proposed for § 2339B).

These proposals all have their own weaknesses, and certainly will not resolve the underlying tension between the criminal justice and military detention alternatives within the United States. Regardless of how the grounds for prosecution may be extended or contracted, for example, the

case development.").

⁴⁰⁷ Chertoff, *supra* note 333, at 18.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.* Judge Chertoff also asks whether we should "set up specialized courts to deal with terrorist detentions" like those of the English and French legal systems. *Id.*

constitutional safeguards of the criminal justice process will ensure that when policymakers view interrogation as the overriding priority they will be inclined to elect an option other than prosecution.⁴¹⁰ And there will remain instances when the government simply cannot prosecute because the information upon which it relies cannot be disclosed without exposing sources or methods of collection.⁴¹¹ Indeed, in light of these realities the question will continue to arise whether the United States should adopt a special purpose legal regime for terrorism cases blending some of the safeguards of the criminal justice system with some of the flexibility of the military alternative.⁴¹² In the absence of such a system, however, and with these caveats in mind, the criminal law proposals outlined below would provide a substantial improvement over the status quo from both a civil liberties and a national security perspective. And certainly we are better off considering such measures now than in the heated aftermath of the next attack.

A. An Ex Ante Licensing Regime for Foreign Military Training

Congress should immediately close the loophole that permits U.S. persons to obtain training in the use of weapons and explosives⁴¹³ while

⁴¹⁰ See Gonzales, *supra* note 134, at 13. The government's overriding interest in preventive intelligence gathering in some circumstances suggests the need to give thought to hybrid approaches that embody some of the transparency and accountability of the criminal justice system while at the same time permitting extensive interrogation for non-prosecutorial purposes.

⁴¹¹ See *id.* ("We could have abundant information that an individual has committed a crime—such as material support for terrorism—but the information may come from an extremely sensitive and valuable intelligence source. To use that information in a criminal prosecution would mean compromising that intelligence source and potentially putting more American lives at risk."). Cf. Chertoff, *supra* note 333, at 18 (noting that "[i]ntelligence information, especially foreign intelligence, is highly sensitive—almost always hearsay inadmissible in criminal courts. Indeed, foreign sources routinely pass us intelligence that they not only will never permit to be aired in open court, but advise us they will publicly deny if ever exposed."); see also 9/11 COMM. REP., *supra* note 2, at 127 (discussing the fact that al Qaeda leaders ceased using certain means of communication after a leak to the *Washington Times* that may have revealed that the National Security Agency was listening to their communications). The uncertainties surrounding the prosecution of Zacarias Moussaoui testify to the difficulties that can arise, although the Fourth Circuit's most recent ruling in that proceeding suggests that it may yet be possible in that case to reconcile the government's interest in preserving the interrogation environment for certain high value al Qaeda detainees with Moussaoui's interest in obtaining exculpatory testimony from them. See *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004) (holding that Moussaoui's Sixth Amendment right to compulsory process could be reconciled with the government's national security interest in not producing certain witnesses held as combatants by substituting written summaries of statements made by those witnesses).

⁴¹² For an example of such a proposal, see Paul Rosenzweig and James J. Carafano, *Preventive Detention and Actionable Intelligence*, Heritage Foundation Legal Memorandum No. 13 (Sept. 16, 2004), at <http://www.heritage.org/research/HomelandDefense/lm13/cfm>.

⁴¹³ Reaching beyond weapons and explosives training to other types of training carried on at al Qaeda-style camps would tend to raise difficult definitional issues; a statute fo-

abroad.⁴¹⁴ The fact that a person has obtained such training frequently lies at the heart of government concerns about potential sleepers,⁴¹⁵ and adoption of a training ban with significant penalties would provide a firm basis for using the criminal justice system in such cases. In the Lackawanna case, for example, there would have been no need to reach for controversial interpretations of the material support law's "training" and "personnel" provisions in order to initiate a successful prosecution; the men could have been prosecuted simply on the basis of their activities at the al Farooq camp. Likewise, such a law would have provided a clear foundation for prosecuting Jose Padilla and many other individuals who had received training at foreign terrorist camps.⁴¹⁶ Focusing on the receipt of training, moreover, avoids the difficulties associated with proving membership in an era in which the terrorist threat often will emanate from "groups or individuals who may not be formal members but were trained at Al Qaeda's camps and are willing to work as freelancers."⁴¹⁷

The current training loophole could be closed in a number of ways. First, Congress could craft a provision modeled on the existing material support law structure, banning the knowing receipt of training in arms or explosives from a designated foreign terrorist organization. This ap-

cused on the relatively clear categories of weapons and explosives, on the other hand, is likely to encompass almost any of the trainees that would be of interest as terrorism suspects.

⁴¹⁴ In testimony to the Senate Judiciary Committee, Assistant Attorney Gen. Daniel Bryant explained that under current law, "training to commit terror, under certain circumstances, may not be a crime, which just stands logic on its head." *Aiding Terrorists Hearing*, *supra* note 54 (testimony of Daniel Bryant). Bryant also observed that under current law, "usually, we would go in the direction of showing that the person provided himself as personnel" in order to pursue a material support charge. *Id.*

⁴¹⁵ See, e.g., *Aiding Terrorists Hearing*, *supra* note 54 (question by Sen. Hatch describing his concern with potential sleepers in the United States in terms of persons who have received training at terrorist camps abroad).

⁴¹⁶ See Glenn R. Simpson, *Man Says He Told of Hijacking Plot in 2000*, WALL ST. J., June 4, 2004, at A4 (indicating that FBI released Niaz Khan for lack of grounds to hold him in 2000 despite fact that he confessed to receiving hijacking training at a camp in Pakistan); 9/11 COMM. REP., *supra* note 2, at 73 (indicating that Ahmed Ajaj, one of the 1993 World Trade Center bombing conspirators, left his home in Texas in 1992 to learn to make explosives at a camp near the Afghanistan-Pakistan border); *id.* at 177, 180 (indicating that Ahmed Ressam, who planned to attack Los Angeles International Airport at the millennium before his fortuitous arrest, received training at an Afghan camp, although his connection to al Qaeda was informal); *id.* at 180 (indicating that the cell arrested in Jordan prior to the millennium also trained in Afghanistan); *id.* at 226 & n.60 (describing allegations that two men who associated with future hijacker Hani Hanjour in Arizona in the 1990s also trained in Afghanistan); David E. Kaplan, *Anticipating the Unfathomable*, U.S. NEWS & WORLD REP., June 7, 2004, at 24 (describing government interest in Adam Yahiyeh Gadahn, a.k.a. Adam Pearlman, a Californian who traveled to Pakistan in 1998 and eventually undertook military training at an al Qaeda camp in Afghanistan). The 9/11 hijackers and their associates, of course, also were veterans of the Afghan camps. See, e.g., 9/11 COMM. REP., *supra* note 2, at 156–57 (Midhar, Hazmi, Khallad, Abu Bara); *id.* at 164–66 (Atta, Jarrah, Binalshibh); *id.* at 226 (Hanjour); *id.* at 232–35 (describing the training of the "muscle" hijackers); *id.* at 275 (Moussaoui).

⁴¹⁷ STERN, *supra* note 394, at 254.

proach has the virtue of making clear that the ban would not apply to innocuous activity such as receiving advice in the context of hunting or shooting at a gun club. But it also has a significant weakness in that it depends on establishing that an already-designated organization provided the training. Prosecutors often will be unable to identify the specific sponsoring organization, and even when they can, in the future the sponsoring organizations may not yet have been designated (particularly in light of the trend toward long-term decentralization).⁴¹⁸ Tying the training ban to the designation process accordingly would result in an unduly narrow prohibition.

At the other end of the spectrum, Congress might consider a flat prohibition barring all firearms and explosives training outside the United States regardless of the circumstances.⁴¹⁹ Standing alone, this blunderbuss approach merely reverses the virtues and vices of the designation-linked approach; it would ensure coverage of unanticipated providers, but at the same time would sweep in a wide array of innocuous activity. If paired with a carefully crafted intent requirement, however, the flat ban might strike a better balance.

The difficulty lies in defining the requisite intent. Requiring proof of intent to use the training in connection with a specific unlawful act would in most circumstances preclude prosecution in light of the practical impossibility of establishing such a specific linkage. Intent would instead have to be defined in more general terms, such as intent to take up arms against the United States. Alternatively, intent could be an affirmative defense pursuant to which defendants could avoid liability by establishing that they obtained the training solely for sporting or professional reasons.

As opposed to the flat ban approach, Congress could instead adopt an *ex ante* licensing scheme closely regulating, but not always prohibit-

⁴¹⁸ See, e.g., MONOGRAPH ON TERRORIST FINANCING, *supra* note 73, at 32 (observing that criminal prosecutions for terrorism financing related to al Qaeda “could not be considered” prior to the belated designation of al Qaeda in 1999); 9/11 COMM. REP., *supra* note 2, at 66–67 (indicating that the al Qaeda camps in Afghanistan were but one part of a “broad infrastructure of such facilities in Afghanistan made available to the global network of Islamist movements”).

⁴¹⁹ In this respect, the proposal tracks approaches already enacted by a number of other states. See, e.g., Antiterrorism Act, 2004, c. 104, (Austl.) (“An Act to amend the law relating to foreign incursions and recruitment, terrorism offences and proceeds of crime, and for related purposes”), at paragraph 20 (replacing Section 102.5 of the Criminal Code with a ban on receipt of training from terrorist organizations), available at <http://scaleplus.law.gov.au/html/comact/browse/TOCN2004.htm> (last visited Nov. 23, 2004); Criminal Code, R.S.C., ch. C-46, § 83.18(3)(a) (2004) (Can.) (defining support for a terrorist group to include “receiving . . . training”). The United States would be wise to press its allies to follow suit. The difficulties Germany has had prosecuting suspected 9/11 plotter Mounir Motassadeq, for example, might have been lessened if he could have at least been prosecuted for receiving weapons training in Afghanistan. Cf. Shannon Smiley, *Al Qaeda Figures Say 9/11 Defendant Was Unaware of Plot, U.S. Tells Court*, WASH. POST, Aug. 12, 2004, at A14 (describing the poor prospects for the prosecution during the Motassadeq retrial, and noting that the defendant had trained in Afghanistan).

ing, the ability of U.S. persons to obtain weapons and explosives training abroad. Under this approach, a would-be trainee would be obliged to apply for a license—explaining the purpose of the training and the identity and location of the provider—before obtaining the training. The government agency administering the regime would determine whether the proposed training posed a threat to the security of U.S. nationals or to U.S. national security (much as the Secretary of State must do in connection with the terrorist organization designation process). The process could be streamlined by generating lists of pre-approved providers for legitimate purposes (such as scientific exchange or business purposes) and of pre-denied providers (such as any designated foreign terrorist organization or certain hostile foreign governments).

The concept of an *ex ante* licensing scheme for these purposes is by no means a new or unprecedented concept. On the contrary, as noted previously during the survey of the origins of the terrorism-support laws, the Reagan Administration in the early 1980s considered promulgating a similar regulatory scheme. Specifically, it considered amending the International Traffic in Arms Regulations (“ITAR”) to govern not only the export of certain military equipment and services but also to bar the unlicensed “participation of U.S. nationals in foreign military activities generally.”⁴²⁰ In the end, the regulations were amended only to limit the ability of U.S. persons to provide, not receive, military training.⁴²¹ This narrow approach may have been consistent with the scope of ITAR, but it left open a significant gap in the law that Congress can and should now close.

Although providing more flexibility than the flat ban proposal discussed above, the licensing approach still might be criticized on the ground that it too could encompass innocuous conduct. One can easily imagine circumstances, after all, where a person travels abroad without expecting to participate in activities that might be characterized as firearms training but nonetheless ends up on a hunting trip or at a sports club with a firing range. Although prosecutorial discretion should come in to play at this point, one might wish to see more concrete limitations included in the statutory scheme to account for this possibility. One option, similar to that mentioned above, would be to provide defendants with an affirmative defense based on their innocuous intent in such cases.

One way or another, the training scenario must be addressed. A vast number of would-be jihadists—including many U.S. persons—cycled through foreign military camps operated by al Qaeda and other anti-Western organizations in the 1990s.⁴²² The training that has already occurred can-

⁴²⁰ See *supra* notes 30, 44. Given the limitations of IEEPA authority and the concerns about possible abuse of that power, it would be best not to precisely follow the model of the Reagan proposal. Instead, Congress should enact new legislation specifically authorizing the *ex ante* licensing regime.

⁴²¹ See *supra* notes 30, 44.

⁴²² See, e.g., Craig Whitlock, *Moroccans Gain Prominence in Terror Groups*, WASH.

not be undone, but such training continues in many countries notwithstanding U.S. efforts in Afghanistan and elsewhere.⁴²³ The single most useful step Congress can take in reforming our criminal counterterrorism laws is to close this loophole as soon as possible.⁴²⁴

B. *Confronting the Membership Issue Within Constitutional Bounds*

The licensing scheme or ban on weapons and explosives training will resolve the vagueness problem that arises when prosecutors use the material support law's "training" provision in a sleeper case. But what about the problems caused by prosecutors' use of the "personnel" provision? This practice may not be unconstitutionally vague, but it does implicate the landmark holding in *Scales v. United States* that the government may not prosecute on the basis of membership alone except upon a showing that the defendant was an active member of the organization and was aware of and intended to further the illegal ends of the organization.⁴²⁵

In light of *Scales*—which requires courts to read these saving elements into any ban on mere membership—one could argue that there is no need for a formal amendment of the support laws to address the associational and due process concerns raised by the government's post-9/11 use of the "personnel" concept. But a clarifying amendment nonetheless would provide several advantages. First, if membership in terrorist organizations is to be criminalized, we should confront and debate the issue directly. Second, a carefully crafted amendment would help to avoid a situation in which a court might go beyond the minimums set forth in *Scales* to impose a more demanding mens rea requirement (such as requiring proof of a specific intent to facilitate a particular unlawful act). Third, addressing the membership issue separately from the other aspects of the material support definition would help to avoid a situation in

Post, Oct. 14, 2004, at A01 (reporting that the "Moroccan government has acknowledged it does not know the whereabouts of about 400 of its citizens who allegedly trained at al Qaeda camps in Afghanistan, Bosnia and Chechnya, some of whom are now thought by the Moroccan authorities to be in Europe").

⁴²³ See, e.g., Associated Press Wire, *Al Qaeda-Run Camps Found in Saudi Arabia*, *Official Says*, Jan. 16, 2004 (describing discovery of al Qaeda-operated training camps in Saudi Arabian desert); *Raid on al Qaeda Meet Kills 40; Uzbeks and Arabs Said to Be at "Training Facility"*, CNN, Sept. 9, 2004 (describing attack on training camp discovered by Pakistani military in the Waziristan region), available at <http://www.cnn.com/2004/WORLD/asiapcf/09/09/pakistan.alqaeda/index.html>; STERN, *supra* note 394, at 81 (reporting claims that al Qaeda members had received training in Indonesia at camps operated either by Laskar Jihad or Laskar Jundullah); *id.* at 107–08 (describing claim by the group originally known as Lashkar e Taiba that it "train[s] forty thousand youth[s] per year at its schools and military training camps" in Pakistan).

⁴²⁴ The author does not mean to suggest that the threat arises only in connection with U.S. persons who have received such training, although the relative freedom U.S. persons enjoy to operate within the U.S. does distinguish them from their non-citizen and non-resident counterparts.

⁴²⁵ *Scales v. United States*, 260 F.2d 21, 24 (4th Cir. 1958).

which a court might imply a mens rea requirement not only in the context of the “personnel” provision but also in the context of other parts of the material support definition dealing with guns, funds, and the like.

Congress accordingly should enact a stand-alone provision overtly prohibiting membership in designated foreign terrorist organizations, expressly subject to the *Scales* requirements of active membership (or membership subject to the organization’s direction or control), knowledge of the group’s illegal ends, and specific intent to further those illegal ends. And having done this, for clarity’s sake it should then amend the material support definition to exclude prosecution on the basis of self-provision of personnel.

The specific intent requirement will ensure that in the context of an organization engaged in both legal and illegal activities, membership prosecutions cannot succeed unless the government can prove the person’s intent to further those illegal activities. Not all terrorist organizations have such a hybrid nature, however, and the greater an organization’s emphasis on illegal activities, the easier it becomes to prosecute its members on that basis alone. It would, for example, be a simple matter to convict Zacarias Moussaoui or Richard Reid under a membership law in light of their frequent assertions of membership in al Qaeda and desire to facilitate al Qaeda’s atrocities.⁴²⁶

The emergence of third-generation terrorism in the form of decentralized terrorism networks and ad hoc groupings promises to erode the utility of any provision focused on a suspect’s formal ties to a previously identified-and-designated organization. But the more traditional organizations will remain a significant, if not preponderate, aspect of the threat for the near term, and prosecutors accordingly will continue to have occasions to employ the “personnel” provision of the material support law in a reflexive manner. Congress should reform this practice as soon as possible to place it on a firmer—and constitutionally less-objectionable—ground.

C. Replacing § 2339B with an Ex Ante Licensing Regime

Former Assistant Attorney General Viet Dinh recently observed that “we can all agree that there are certain core activities that constitute material support for terrorists, which should be prohibited, and others which

⁴²⁶ See, e.g., Transcript of Arraignment and Motions Hearing at 26–27, *United States v. Moussaoui*, 2002 U.S. Dist. LEXIS 16566 (E.D. Va.) (Cr. No. 01-455-A) (plea hearing) (Moussaoui stated, “I am a member of al Qaeda . . . I pledge bayat [fealty] to Osama bin Laden.”), available at http://www.washingtonpost.com/wp-srv/nation/transcripts/text_moussaoui.htm; Slobogin, *supra* note 351, at 46 (quoting Moussaoui’s declaration that he would “be delighted to come back one day to blow myself into your new W.T.C. if ever you rebuild it”) (citations omitted); Richard Reid, Statement at Sentencing (Jan. 31, 2003) (transcript available in *Reid at Sentencing*, L.A. TIMES, Jan. 31, 2003, at A20) (declaring his allegiance to bin Laden and that he is “at war with your country”).

would not be prohibited.”⁴²⁷ The trick, he noted, is to ensure that Congress does not “throw out the baby with the bath water” if and when it undertakes to revise the statute.⁴²⁸

Section 2339B can in fact be reformed without sacrificing the compelling government interests that generated the law in the first place. Establishing separate statutes to address the receipt of training and the self-provision of personnel along the lines described above, and thus removing the incentive to attempt to apply § 2339B to those scenarios, is a good first step. But many of the concerns previously identified still remain to be addressed even after those changes are made.

First, with respect to due process and the designation process, Congress should amend § 2339B and IEEPA to codify the D.C. Circuit’s due process holdings.⁴²⁹ Specifically, Congress should establish that as a default rule the government must give advance notice of the pending designation to those potential designees who have a presence within the United States, along with a reasonable opportunity to adduce rebuttal evidence before the designation takes effect. The statute should include, however, a procedure whereby the administration can make an *ex parte*, *in camera* application to the D.C. Circuit for permission to make a no-notice designation upon a showing that advance notice will harm the national security interests of the United States.⁴³⁰

The blend of vagueness and overbreadth concerns that have troubled a number of courts present a more difficult issue. At the very least, Congress should take the simple step of amending the definition of material support or resources to state expressly that advocacy or expression protected by the First Amendment cannot constitute a violation of § 2339B.⁴³¹ Such activity may provide a predicate for an investigation, but by definition it would be unconstitutional to prosecute on this basis, and there can be no harm in saying so in the statutes themselves.⁴³²

⁴²⁷ *USA Patriot Act Author Supports Some Modifications of Controversial Law*, VOICE OF AMERICA PRESS RELEASES & DOCUMENTS, Jan. 29, 2004, available at 2004 WL 2025680 (reporting comments made by Dinh during panel discussion).

⁴²⁸ *Id.*

⁴²⁹ See *supra* Part III.A.1.

⁴³⁰ The risk that a to-be-designated organization might take harmful steps if aware in advance of pending government action is not speculative. In September 2004, the Justice Department initiated an investigation to determine whether a government employee leaked word to the *New York Times* of the imminent designation and contemporaneous search to seize assets of the Global Relief Foundation under IEEPA, and whether a *Times* reporter’s subsequent call to a Global Relief representative “may have led to the destruction of documents there the night before the government’s raid.” Susan Schmidt, *Reporter’s Files Subpoenaed; New Leak Probe Concerns 2001 Raid on Islamic Charity*, WASH. POST, Sept. 10, 2004, at A16.

⁴³¹ IEEPA should be amended in corresponding fashion.

⁴³² See *Aiding Terrorists Hearing*, *supra* note 54 (testimony of Daniel Bryant) (suggesting that Congress enact such a First Amendment carve-out, explaining that “[s]uch a provision would have no effect on current prosecution policy, which does not target conduct protected by the First Amendment . . .”).

As a third measure, Congress should take steps to strike a better balance between the need to wholly embargo foreign terrorist organizations and the qualms raised when the net of criminal liability reaches moral innocents. There are at least two ways of doing this.

First, Congress could amend § 2339B and IEEPA to calibrate punishment to the defendant's particular mens rea, as follows: (1) If the government can demonstrate that the defendant acted with intent to facilitate the illegal ends of the recipient, harsh punishment should result. The existing statutory maximums—fifteen years under § 2339B,⁴³³ ten under IEEPA⁴³⁴—would seem to suffice for this purpose, although Congress should also consider adding specialized conditions of post-release supervision for this category of offenders. (2) If the government demonstrates instead that the defendant acted recklessly but without intent—for example, by writing a check to Hamas in good, but foolish, faith—then a lesser penalty would be appropriate. For example, Congress could impose a maximum sentence of five years under both § 2339B and IEEPA for such conduct. (3) Finally, if the government cannot demonstrate recklessness, let alone intent, the penalty should be relatively smaller still. Maximum sentences in the one-year range, along with fines, would be appropriate in this context.

Undergirding these changes, Congress should clarify that the knowledge element common to all these variations means: (1) that the defendant must be aware of the identity of the recipient; and (2) that the defendant must either (a) know of the recipient's designated status or (b) have reasonable cause to know of the recipient's use of violence in furtherance of its aims.

As an alternative to the calibrated mens rea/punishment trisection, Congress instead could revive the licensing approach originally proposed for § 2339B. Specifically, Congress could treat foreign terrorist organizations precisely as hostile foreign states have been treated in the past. Once designated, they would become subject to a comprehensive ex ante licensing scheme precluding U.S. persons from engaging in any transactions or providing any goods or services to them except upon advance notice to and approval from the implementing agency. That agency could streamline the process by generating lists of automatically prohibited assets (e.g., just about anything lethal); for anything else, the agency would make a determination as to whether the proposed activity would pose a risk to U.S. national security.

Such a system concededly would not be expected to grant many licenses, but the point is that in the right circumstances it could do so—unlike the blanket prohibitions of the existing statutes. If the *Humanitarian Law Project* plaintiffs wished to send instructional material on the ad-

⁴³³ 18 U.S.C. § 2339B(a)(1) (Supp. 2001).

⁴³⁴ 50 U.S.C. § 1705(b) (2000).

vantages of non-violent methods to the Kurdistan Workers' Party, for example, they could be permitted to do so without fear of subsequent prosecution.

Either way, some combination of the above-described reforms would do much to eliminate the judicial concerns which have rendered § 2339B and IEEPA unstable bases for prosecution in several federal jurisdictions. Even if one believes that some or all of these negative holdings were mistaken, it makes more sense to address quickly the underlying concerns they represent when that can be done without sacrificing the effectiveness of the support laws.

D. Recent Legislative Activity

Congress is not oblivious to the need for some kind of legislative reform in these areas. In May 2004, the Senate Judiciary Committee held a hearing to assess the significance of the material support law to the overall counterterrorism effort, and also to assess the impact of the various judicial opinions critical of it.⁴³⁵ Representatives of the Justice Department and FBI testified about the use of § 2339B, along with both critics and defenders of the statute.⁴³⁶ Not long thereafter, in July 2004, Republicans in the Senate and House introduced new legislation aiming to address at least some of the concerns discussed above.

Senate Bill 2679, the Tools to Fight Terrorism Act, would amend the material support law in several ways.⁴³⁷ It would, for example, resolve the uncertainty surrounding the use of the word “knowingly” in § 2339B by explaining that one violates § 2339B only if he or she has knowledge that a particular organization: “(i) is a terrorist organization; (ii) has engaged or engages in terrorist activity . . . or (iii) terrorism [as those terms are defined elsewhere].”⁴³⁸

The more notable changes, however, address the “personnel” and “training” concepts upon which prosecutors have relied in the sleeper scenario.⁴³⁹ The bill proposes, for example, to clarify the meaning of “per-

⁴³⁵ *Aiding Terrorists Hearing*, *supra* note 54.

⁴³⁶ *See id.* (the witnesses included Chris Wray, Asst. Att’y Gen. (Criminal Division); Daniel Bryant, Asst. Att’y Gen. (Office of Legal Policy); Gary Bald, Asst. Dir. of the FBI; Professor David Cole of the Georgetown Law Center; Paul Rosenzweig of the Heritage Found.; and the author).

⁴³⁷ In the fall of 2004, Speaker of the House Dennis Hastert introduced an intelligence community reform bill that also contained criminal law measures identical to those appearing in Senate Bill 2679 and House Bill 4942. *See* S. 2679, 108th Cong. (2004); H.R. 10, 108th Cong. Tit. II, subtit. C, §§ 2041–44 (2004). As of this writing, it appears that efforts by the House and Senate conferees to reconcile these bills will fail, and that the proposals will not become law unless and until the 109th Congress takes them up. *See* Mary Curtius, *9/11 Panel Reforms Appear to Be Sunk*, CHI. TRIB., Oct. 31, 2004, at 11.

⁴³⁸ S. 2679, 108th Cong. § 114(c)(2) (2004).

⁴³⁹ In this respect, the new bills replicate a proposal introduced in the House in July 2003 by Rep. Mark Green of Wisconsin. *See* Material Support to Terrorism Prohibition

sonnel.” It does this in two stages. Initially, it would clarify that the reference to “personnel” in the material support definition refers to “1 or more individuals who may be or include oneself.”⁴⁴⁰ More importantly, it also would add a new paragraph to § 2339B providing that any prosecution based on the term “personnel” must refer to the provision of

individuals (who may be or include that person) to work under [the] organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Any person who acts entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction or control.⁴⁴¹

These changes clearly are a response to the vagueness holdings of the Ninth Circuit and other courts.⁴⁴² They would eliminate any uncertainty as to whether the personnel provision could apply to one who provides himself, and as to whether courts should read the term so as not to encompass independent action. But those changes standing alone would not address the more fundamental obstacle posed by *Scales*; § 2339B would remain vulnerable to a due process argument. These changes thus are a step in the right direction, but do not go nearly far enough to stabilize and preserve the capacity of the Justice Department to act on active membership grounds.

The bill’s treatment of the training concept also is incomplete, but this time the problem is one of insufficient reach rather than overreach. The changes under this heading again begin with the definition of the term. Under Senate Bill 2679, “training” would be expressly defined for purposes of material support as “instruction or teaching designed to impart a specific skill, rather than general knowledge.”⁴⁴³ This approach seems at first blush to abandon the attempt to make the receipt of training criminal. But the bill goes on in another section to address the training issue in a manner quite similar to what is proposed above.

Specifically, the bill would create a new federal criminal law: 18 U.S.C. § 2339E, “Receiving Military-Type Training from a Foreign Terrorist Or-

Enhancement Act of 2003, H.R. 2858, 108th Cong. (2003).

⁴⁴⁰ S. 2679, 108th Cong. § 114(b).

⁴⁴¹ *Id.* at § 114(e).

⁴⁴² *See supra* Part III.A.3.

⁴⁴³ *Id.* at § 114(b). The bill also defines “expert advice or assistance,” presumably in reaction to the recent adverse decision by the district court in the *Humanitarian Law Project* litigation. *See HLP IV*, 309 F. Supp. 2d 1185, 1201–03 (C.D. Cal. 2004). Borrowing from the Federal Rules of Evidence, it defines “expert advice or assistance” to mean “advice or assistance derived from scientific, technical, or other specialized knowledge.” S. 2679, 108th Cong., § 114(b); *see also* Fed. R. Evid. 702.

ganization.”⁴⁴⁴ In a nutshell, § 2339E would make it a crime punishable by ten years’ imprisonment to knowingly⁴⁴⁵ receive “military-type” training from a designated foreign terrorist organization, with such training understood to mean “training in means or methods that can cause death or serious bodily injury, destroy or damage property, or disrupt services to critical infrastructure, or training on the use, storage, production, or assembly of any explosive, firearm or other weapon, including any weapon of mass destruction.”⁴⁴⁶

At the same time, § 2339E would make excludable and deportable aliens who have received such training.⁴⁴⁷ The immigration portion of the law would be retroactive, but bowing to ex post facto concerns, the criminal portion would not be.⁴⁴⁸

Barry Sabin, chief of the Counterterrorism Section of the Justice Department’s Criminal Division, recently emphasized the significance the department attaches to this proposal during congressional testimony.⁴⁴⁹ He noted with respect to al Qaeda members in particular that it is much “easier for us to prove and charge” that the suspect attended a training camp than it is to show, for example, that the suspect transferred funds or provided other tangible forms of support.⁴⁵⁰ In the absence of an overt training ban, however, the department has relied on the material support law to provide this capacity.⁴⁵¹

The § 2339E training proposal is on the right track. Indeed, the problem with the proposal is not that such conduct should remain legal but, instead, that the proposal fails to reach far enough. As argued in the previous section, a ban limited to training received from a designated organization fails to account for the scenario in which training is had from a relatively new, as-yet undesignated organization, or from a sponsor whose identity is difficult, if not impossible, to determine. As noted previously, it is increasingly likely that the primary threat will arise from such decentralized sources in the coming years, and a flat prohibition of unlicensed military-type training from any source may be one of the only

⁴⁴⁴ S. 2679, 108th Cong. § 115.

⁴⁴⁵ “Knowingly” is defined to require knowledge of the fact of designation or of the fact that the organization engages or has engaged in terrorist activity or terrorism. *See supra* notes 386–388 and accompanying text.

⁴⁴⁶ S. 2679, 108th Cong. § 115 (2004) (proposing 18 U.S.C. § 2339E(c)(1)). This definition raises a fascinating issue: Would it apply to a scenario in which the defendant is taught computer hacking methods that could be used to disrupt municipal and other systems that fall under the heading of “critical infrastructure”?

⁴⁴⁷ *Id.* (proposing 18 U.S.C. §§ 2339E(b), 2339E(d)).

⁴⁴⁸ *Id.* (proposing 18 U.S.C. § 2339E(e)).

⁴⁴⁹ *The 9/11 Comm’n Rep.: Identifying and Preventing Terrorist Financing: Hearing Before the House Fin. Servs. Comm.*, 108th Cong. (2004) (testimony of Barry Sabin, Chief of the Counterterrorism Section, Criminal Div., Dep’t of Justice).

⁴⁵⁰ *Id.*

⁴⁵¹ *See id.* (Sabin explained that, “to get technical,” the department currently sought to reach such activity by viewing it as “within the meaning of material support under 2339(b).”).

ways the criminal law can come to grips with that phenomenon in the context of potential sleepers.⁴⁵²

Judging from the experience of past antiterrorism bills, Senate Bill 2679 most likely is only the opening move in a protracted process of adjusting the substance of federal criminal law to better address the problem of terrorism. The end result may look quite different. It may be more protective of civil liberties, or less. Whether the U.S. experiences another 9/11 in the interim will impact that determination. The important point for now, though, is that Congress has taken up the issue and seems mindful of at least some of the most pressing concerns.

V. CONCLUSION

The time has come to set slogans aside and engage in serious debate about the specifics of U.S. counterterrorism law and policy. This need is widely recognized with respect to the government's domestic investigative powers⁴⁵³ and capacities for collecting, integrating, and analyzing intelligence both at home and abroad.⁴⁵⁴ But until recently there have been curiously few efforts to examine seriously the role played by federal criminal law with respect to terrorism. That effort is now underway at last.

The attempt to customize federal criminal law with respect to terrorism ought to begin with a firm understanding of the impact of 9/11 on counterterrorism law and policy. The United States by and large was reactive and traditional in its use of criminal law prior to 9/11, aiming for the capture and prosecution of those who already had committed harmful acts or those who could be prosecuted on traditional inchoate crime grounds. After 9/11, this approach gave way to a terrorism prevention paradigm in which the Justice Department prioritized *ex ante* measures using any available legal means. This paradigm resulted in a multi-tiered

⁴⁵² Another sign that someone has thought quite carefully about these issues can be found in the jurisdictional provisions of both § 114 and § 115 of Senate Bill 2679. Under these provisions, both the material support law and the new training law would apply not only to U.S. persons but also to “an offender [who] is brought or found in the United States after the conduct required for the offense occurs, even if such conduct occurs outside the United States.” S. 2679, 108th Cong., § 114(d) (2004); *see also id.* at § 115(a) (same). Clearly, the drafter of this language has considered the fact that the vast majority of trainees will not be U.S. persons at the time of their training, and in fact may not even be captured in the U.S.; this remarkable jurisdictional provision lays the groundwork for an extension of the institutional competition between the criminal justice and military detention models beyond our borders. Whether this extension is sustainable is a question that deserves considerable attention.

⁴⁵³ *See, e.g.*, Susan Schmidt, *Bipartisan Debate on Patriot Act Is Urged; Legal Tools to Fight Terrorism at Issue*, WASH. POST, Nov. 14, 2003, at A11 (describing proposal by former Deputy Attorney General Larry Thompson for a bipartisan panel of experts to assess the expiring provisions of the USA PATRIOT Act, in recognition of the immense amount of rhetoric and partisanship clogging debate on the subject).

⁴⁵⁴ *See, e.g.*, 9/11 COMM. REP., *supra* note 2, at 407–10 (describing needed reforms).

strategy involving traditional and preventive charging, diffused prevention measures, and the use of material witness detentions.

In a simultaneous development, the military's unprecedented embrace of the counterterrorism mission began to spill over into the detention of non-traditional belligerents—including citizens and persons captured in the United States. Particularly in the critical category of potential sleepers, this development generated institutional competition between the military and the Justice Department. This competition accentuated the intense pressure on the Justice Department to establish a capacity to act in sleeper cases.

Ultimately, the Justice Department found that capacity not in new legislation but in the already-existing laws designed to embargo foreign terrorist organizations. Through creative readings of terms such as “personnel” and “training,” prosecutors provided policymakers with an alternative to the all-too-tempting military detention option. The material support law and IEEPA thus came to play a central role in post-9/11 sleeper cases as well as in the broad run of terrorism related cases.

As currently drafted, however, the material support law and IEEPA do not provide an entirely satisfying basis for these prosecutions. They can be criticized effectively on several constitutional grounds, some of which already have led courts to declare portions of these laws unconstitutional. Complicating matters, the existing framework also can be criticized from a national security perspective on the ground that it is incomplete and ill-suited to meet emerging trends in the nature of the terrorist threat.

In an effort to customize federal criminal law to the demands of the post-9/11 environment, this Article proposes a number of legislative reforms which seek to ameliorate civil liberties concerns while accounting more effectively for security considerations. In doing so, the proposals are mindful of the existence of the ever-tempting military detention alternative. Although the solutions proposed are no panaceas, they would improve the capacity of the criminal justice system to provide an effective alternative to military detention when dealing with the sleeper scenario.

Recent developments in Congress suggest that some, although by no means all, of these concerns have begun to receive the serious attention they deserve. Until then, we can expect the Justice Department to do what it can to satisfy the demands of prevention using the laws at hand.

