

## **Optimizing Criminal Prosecution as a Counterterrorism Tool**

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## Introduction

Prior to the 9/11 attacks, the United States relied primarily on federal criminal prosecution when it sought to incarcerate suspected terrorists for an extended duration.<sup>1</sup> In the aftermath of 9/11, however, the United States buttressed its existing options for long-term detention of terrorism suspects by asserting that some such persons are combatants subject to military detention for the duration of hostilities pursuant to the law of armed conflict, and also by establishing military commissions to oversee war crimes trials for a subset of those individuals.<sup>2</sup> These tools sparked intense controversy. Amid this controversy, however, an important point of consensus has emerged, namely, the need for a criminal justice system maximally capable of trying and disabling suspected terrorists. For opponents of the new military alternatives, the criminal justice system represents the legitimate alternative to illegitimate exercises of presidential power. For proponents, it offers a useful additional set of tools for situations in which military options were unavailable or unpalatable—for citizens arrested domestically, for example, or when foreign governments refuse to transfer people for extra-criminal detention. Whatever the merits of the military alternatives, in other words, all sides in the debate agree that America needs a federal criminal justice system adequate to the task of providing whatever long-term detention capacity may be required in connection with suspected terrorists.

That need has arguably grown more acute as a result of the 2008 election. The incoming Obama administration seems likely to eliminate the military commission system for war crimes trials, and it may substantially reduce reliance on preventive military detention, at least for those individuals captured outside traditional combat zones.<sup>3</sup> The result will be increased pressure on the criminal justice system—pressure that will test its capacity.

The question of whether the system is up to the task has sparked a sharp debate of its own.<sup>4</sup> Some contend that it already suffices to provide whatever long-term detention authority the government requires.<sup>5</sup> Others contend that elimination of the military options will create an intolerable gap in detention capacity, and that the government therefore should create a new, specially-tailored detention system—perhaps along the lines of a national security court—in order to close that gap.<sup>6</sup> Few defend the status quo, though some have cited the results in the first military commission trial as proof of that system’s fairness.<sup>7</sup> And the addition of vigorous *habeas* review to existing military detention practices—resulting in an order for the release of five of the first six detainees to have their cases considered<sup>8</sup>—may yet generate similar arguments regarding preventive military detention as it now stands after years of litigation.<sup>9</sup>

I do not propose to resolve this debate, but instead to focus on the point of consensus—that America needs an optimally functional criminal justice apparatus for counter-terrorism cases—and to discuss how America might move closer to that goal. To do this, I explore first the particular capacities and limitations of the federal criminal justice system as it currently stands. The first two sections of this paper identify with precision both the substantive and procedural considerations that together define the federal criminal justice system’s current capacity for conviction—and hence for long-term detention—in terrorism-related cases, with an emphasis on the scenario in which the government wishes to intervene before harm occurs.<sup>10</sup> This review reveals that federal criminal prosecution is far more prevention-oriented and procedurally flexible than some critics admit. At the same time, however, the review illustrates the specific

ways in which hard-wired aspects of the federal criminal justice system limit its reach in comparison to at least some alternative detention systems.

Many of these limitations flow from constitutional law and will therefore resist any congressional attempt at reform. Others, however, do not, and Congress therefore has room to increase the system's capacity. Optimization, in fact, involves not just expanding substantive criminal law, but also more carefully tailoring existing federal crimes and clarifying ambiguities associated with certain procedural questions. In that spirit, in the paper's third section I suggest a series of steps Congress could take to make the criminal justice system a more useful tool in counterterrorism cases. These include:

- expanding the existing criminal prohibition on the receipt of military-style training;
- expanding the existing War Crimes Act to include attacks by non-citizens directed against civilians or civilian objects during armed conflict;
- calibrating the maximum sentence for providing material support to designated foreign terrorist organizations so that defendants who intend harm face higher maximums, while defendants who acted out of ignorance or foolishness face lesser sentences;
- amending the 1994 law forbidding material support for terrorism so as to confine its use to scenarios actually involving terrorism;
- holding hearings relating to the scope of conspiracy liability as it connects to terrorism in general and the global jihad movement in particular;
- clarifying the scope of the government's obligations to search the files of the intelligence community for exculpatory information that the government must disclose to defendants; and
- amending the Classified Information Procedures Act (CIPA), which guides the handling of classified information in criminal proceedings, to permit the appointment of "standby counsel" to act on a defendant's behalf in hearings in which the defendant has insisted upon his or her right to self-representation.

Adopting these reforms will not enable the criminal justice system to provide a detention option in every circumstance that might be within the reach of the current military detention system or some alternative detention framework. Constitutional restraints ensure that some gap will remain in that respect. Congress can, however, minimize that gap by maximizing the detention capacity of the criminal justice system.

## Substantive Grounds for Prosecution in Terrorism-Related Scenarios

We tend to conceive of substantive criminal law as if it were largely retrospective in nature, focusing on the investigation and punishment of events that already have occurred. Certainly the post-hoc prosecution of harmful conduct lies at the core of the criminal justice system. But the center of gravity in criminal law has been gradually shifting away from that model for some time. Well before 9/11, scholars were commenting on the increasing prominence of harm prevention as a goal for the legal system in general and criminal law in particular.<sup>11</sup> Today, federal criminal law relating to terrorism—particularly, the *prevention* of terrorism—is much broader than some critics have suggested. In fact, the range of circumstances in which federal criminal charges might be available compares reasonably well to the substantive grounds currently used to justify preventive military detention and the charges available in the military commission system.

Where a government wants to recalibrate its criminal laws to enhance prevention, there are at least two variables to consider. First, society can accelerate the point at which criminal liability attaches along the continuum that runs from inclination through to action for a given individual. Second, society can premise liability on associational status, rather than on conduct as such. As prevention becomes a higher priority, then, we might expect to see the law expand along both these dimensions. And if the law already is broad on one or both dimensions, we might expect to see prosecutors employing their discretion in actual cases to fully realize—or perhaps even expand—that potential.

Close examination reveals that federal criminal law relating to terrorism has undergone both forms of change over the past two decades. In the 1990s, for example, Congress enacted two statutes, one in 1994 and the other in 1996, criminalizing “material support” for terrorism—both of which have an unmistakable emphasis on prevention and one of which goes so far as to criminalize active membership in designated foreign terrorist organizations.<sup>12</sup> More recently, Congress has enacted a prohibition on receipt of military-style training from such organizations—irrespective of membership—in direct response to a key aspect of the potentially-dangerous person scenario.<sup>13</sup> Meanwhile, prosecutors have employed an aggressive approach to traditional conspiracy liability, thereby establishing a capacity to prosecute potential terrorists even where they have not affiliated with specific, designated groups, and even in the absence of any specificity as to particular violent acts they might commit. Combined with the aggressive use of the “Al Capone” charging strategy—referring to prosecution of terrorism suspects on entirely unrelated charges that may happen to be available—these concepts provide a wide array of options for prosecutors to act.

The result of these changes is that if one sets aside questions of evidence and procedural safeguards, there are relatively few terrorism-related scenarios in which the government would be interested in detaining an individual but would lack the *substantive grounds* for prosecution. In the pages that follow, I identify some of the most important of these tools as they might apply to a series of prevention-oriented scenarios that tend to arise in the terrorism context.<sup>14</sup> These scenarios include the prosecution of members and supporters of designated foreign terrorist organizations such as al Qaeda; persons who have been trained by such groups; and persons who cannot be linked to a specific group but who nonetheless can be shown to be part of what some

have called the “global jihad movement.”<sup>15</sup> Before discussing the rules applicable in these settings, however, it is important to address the relatively traditional scenario in which the suspect can in fact be linked to a completed (or at least attempted) act of violence.

### ***Suspects Linked to Specific Acts of Violence***

Federal criminal law, not surprisingly, provides a broad range of charging options for the circumstance in which a terrorism suspect has attempted or completed an act of violence. This most obviously is true with respect to such acts when they occur within the United States itself. In that context, an array of offenses may apply depending upon the circumstances. Where prosecutors can prove that a violent act involved some degree of conduct “transcending national boundaries,” for example, the law provides weighty penalties up to and including the death penalty.<sup>16</sup> Prosecutors also might be able to draw on a number of statutes specifically addressing actions ranging from kidnapping, to hijacking, to the unlawful possession and use of explosives.<sup>17</sup>

The more challenging scenario involves harms or attempted harms committed overseas. Where U.S. nationals are involved either as victims or perpetrators of overseas violence, prosecutors again have numerous options. The murder of U.S. nationals outside the United States is punishable by the death penalty, for example, so long as the attorney general (or a designated subordinate) issues a certification that the action was intended to “coerce, intimidate, or retaliate against a government or civilian population.”<sup>18</sup> Where explosives or certain large-caliber firearms are employed, moreover, the inaptly-named “weapons of mass destruction” statute provides the death penalty for violence causing the death of U.S. persons outside the United States.<sup>19</sup> The WMD statute also applies to such acts resulting in death to anyone inside the United States, subject to relatively undemanding federal jurisdictional prerequisites (such as proof that the event had an impact on interstate commerce), and it can even be employed for overseas attacks on non-U.S. nationals so long as the perpetrator is a U.S. national. And if it so happens that the offender is a U.S. national or member of the U.S. armed forces whose conduct constitutes a war crime, the War Crimes Act provides comparable sanctions.<sup>20</sup>

Where neither the perpetrator nor the victims of an overseas attack are U.S. nationals, however, charging options are quite limited. Prosecutors may bring charges against those who have committed violence overseas against “internationally-protected persons” such as diplomats, so long as the defendant later can be found in the United States.<sup>21</sup> Otherwise, however, prosecutors lack options if asked to pursue the perpetrators of a terrorist attack carried out by noncitizens against noncitizens in a foreign country.<sup>22</sup> Federal prosecutors probably could not, for example, prosecute a Saudi citizen for attacking Saudi soldiers or civilians in Saudi Arabia.

The more difficult questions, of course, arise where prosecutors cannot link a prospective defendant to any violent act. Particularly in the context of terrorism, there are persons whom the government may wish to incarcerate because they *might* engage in violent acts in the future, but who have not yet engaged in conduct constituting an attempt. If the criminal justice system provides too little capacity to address that scenario, the case for reliance on military detention or an alternative preventive detention regime would become stronger.<sup>23</sup> A close review of existing

authorities suggests, however, that the preventive scope of federal criminal law in fact is quite expansive, perhaps surprisingly so.

### ***The “Al Capone” Strategy***

As an initial matter, prosecutors at times will have the option of charging a terrorism suspect for violating loosely-related or even entirely-unrelated laws, much as prosecutors once took down Al Capone with charges of tax evasion. This strategy eliminates the need to link the suspect to any particular act of violence or to establish liability based on future dangerousness. Unfortunately, however, prosecutors cannot count on having an “Al Capone” option every time they confront a potential terrorist.

The option of charging a defendant with a collateral or unrelated offense arises in one of two ways. First, it can become available by chance, as when the investigation of a terrorism suspect happens to unearth evidence of credit card or immigration fraud—or, perhaps more likely, when an investigation of non-terrorism offenses becomes complicated by information indicating a person’s potential involvement in terrorism. Second, the government can put to terrorism suspects the choice of cooperating with investigators or else facing prosecution for collateral offenses, so long as the government is willing to make its investigation overt. False or misleading statements made to government investigators are felonies,<sup>24</sup> for example, as are efforts to mislead grand juries.<sup>25</sup> Combined with the sentencing enhancements available for terrorism-related offenses, such investigative charges can be an effective tool to provide incarceration options for persons suspected of terrorism who are not forthcoming about their activities.<sup>26</sup>

### ***Members and Supporters of Designated Groups***

The government will not always have collateral charging options available to it in connection with potential terrorists. Where the suspect does not appear to have committed an unrelated offense, and where the suspect either has not misled investigators or has not been put in a position to do so, prosecutors must instead intervene—if at all—on the basis of charges relating more directly to terrorism.

The government’s capacity to prosecute preventively in that setting is most visible where the suspect appears to be acting in coordination with others. Consider first the scenario in which the government can prove that a suspect is a member of a designated foreign terrorist organization (i.e., a foreign entity that has been formally identified by the secretary of state to be involved in terrorism). In that case, the government often—though not always—will have the option of prosecuting the person for his or her membership status alone, without needing to link the defendant to any particular plot.

To achieve this end, prosecutors have a strong tool in the aforementioned 1996 statute that makes it a felony to provide “material support or resources” to any designated foreign terrorist organization, or “DFTO.”<sup>27</sup> The “material support” statute constitutes broad power in two

respects. First, it has a very permissive standard of *mens rea*, or state of mind. The government has no obligation to show that the defendant knew or intended that the support would be used for any particular purpose, let alone to facilitate a crime. Rather, it is enough that the defendant knew the identity of the true recipient of the support, and that the defendant either knew that the group had been designated as a terrorist organization or, more likely, that the group engaged in terrorism. Second, the statute defines the range of conduct constituting forbidden “material support or resources” quite broadly:

the term “material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, *personnel (1 or more individuals who may be or include oneself)*, and transportation, except medicine or religious materials . . . .<sup>28</sup>

These features combine to make this provision particularly useful as a prevention mechanism. Most directly, as the italicized portion of the definition illustrates, a person cannot become “personnel” for a terrorist organization without violating the statute, irrespective of whether the government can link the defendant to any particular plot. In that sense, the provision functions as a membership prohibition, facilitating prevention by predicating liability on associational status alone.<sup>29</sup> Even where prosecutors cannot prove membership in this sense, moreover, the broad range of conduct otherwise forbidden under the material support law frequently will provide grounds for prosecuting persons otherwise associated with such groups—again without reference to whether the government can link the individual to any particular violent plot.<sup>30</sup> Terrorism suspects alleged to have provided Al Qaeda with logistical support such as transferring money or obtaining false identification can be prosecuted in this way, as can those who provide personal services such as serving as a bodyguard for Bin Laden.

At least some forms of support may also trigger criminal liability under the International Emergency Economic Powers Act (“IEEPA”). IEEPA empowers the president, upon declaration of a national emergency, to issue orders prohibiting transactions with specific persons or entities.<sup>31</sup> Violations of such orders are felonies punishable by up to ten years’ imprisonment.<sup>32</sup>

There are, however, limitations on prosecutions of the members and supporters of terrorist groups. First, neither the material support law nor the IEEPA are of any use with respect to persons linked to groups that are not subject to a formal designation by the executive branch or who are not linked to any particular organization at all. This presents a particular problem with respect to persons who are associated with the jihad movement generally but who cannot clearly be linked to a particular, designated organization within that movement. This situation can arise, for example, where a suspect attends a training camp whose sponsorship may be unclear.<sup>33</sup>

Second, prosecutors cannot reach some suspects under these authorities, despite clear connection to a designated group, because of timing difficulties. Al Qaeda, for example, went undesignated as a foreign terrorist organization for purposes of the material support law until October 8, 1999.<sup>34</sup> This fact would preclude a material support charge for a person who admits to having provided support to or being a member of Al Qaeda while attending a training camp in

Afghanistan during the summer of 1999 or earlier. Nor would IEEPA provide an alternative ground for prosecution in this circumstance, since the president did not prohibit transactions with Al Qaeda pursuant to that authority until September 23, 2001.<sup>35</sup> Going forward, these limitations will gradually fade in significance, but given the large number of individuals thought to have been involved in Al Qaeda in the 1990s they will continue to have some bite in some cases. By the same token, of course, members and supporters of any new terrorist organizations that emerge at least initially will not be subject to prosecution under the support statutes in light of this inherent “*ex post facto*” limitation.

A third limitation on support liability is jurisdictional. From 1996 through 2004, the material support law provided liability only for conduct occurring “within the United States or subject to the jurisdiction of the United States.” Depending on how broadly courts might prove willing to construe the concept of “subject to the jurisdiction of the United States,” this might preclude reliance on the material support law for members and supporters of Al Qaeda even *after* that group’s designation in October 1999, at least insofar as such persons were noncitizens outside U.S. territory. *If so, the material support law would not apply to the vast majority of Al Qaeda members who fell into U.S. custody in Afghanistan and elsewhere in the months and years after 9/11*—making it useless, for example, as a tool in dealing with the detainees held at Guantánamo Bay, Cuba. Congress dropped this jurisdictional limitation in late 2004, so this problem too will become less significant over time. For now, however, it remains quite relevant. IEEPA, for its part, still requires that the person or property in question be “subject to the jurisdiction of the United States.”<sup>36</sup>

Finally, both the material support law and IEEPA have been subject to constitutional challenges. On the one hand, courts have not been receptive to claims that the material support prohibition violates First Amendment freedoms of expression and association.<sup>37</sup> Some courts have, however, accepted the argument that at least some components of its definition of material support for terrorism are unconstitutionally vague.<sup>38</sup> Congress attempted to address such concerns in 2004 by amending the definition of certain terms,<sup>39</sup> but the U.S. Court of Appeals for the Ninth Circuit recently concluded that Congress had succeeded only to a limited extent.<sup>40</sup> As a result, it is not clear at this time that prosecutors can rely on the terms “training,” “service,” or “expert advice or assistance” relating to “other specialized knowledge” when contemplating a material support indictment, and similar objections could arise in connection with IEEPA’s analogous provisions. That said, these rulings have not been extended beyond the Ninth Circuit, and even there the critical “personnel” aspect of the material support definition remains viable—meaning that it remains possible throughout the country to prosecute for active membership in a designated foreign terrorist organization.

### **Conspirators**

When material support and IEEPA charges are unavailable for lack of evidence linking the suspect to a designated foreign terrorist organization, prosecutors can fall back on conspiracy liability. Conspiracy, along with attempt, is among our most venerable forms of inchoate criminal liability. Its capacity for prevention lies in the fact that it permits prosecution well before a harmful act is committed or even attempted. Prosecutors can bring charges against an alleged conspirator as soon as he or she forms an agreement to commit some particular offense—



or, under some statutes, as soon as he or she enters into such an agreement and also commits an overt act in furtherance of it.<sup>41</sup> Precisely how early liability attaches in this model, however, is not widely-appreciated. The potential conspirators need not agree to the particular details of the contemplated criminal act: the date, the location, or the means of accomplishing the act. They must agree only to commit a particular *type* of offense before risking prosecution.<sup>42</sup>

Conspiracy liability in this sense provides several advantages to prosecutors. The potential to intervene at an early stage along the continuum between inclination and action makes conspiracy a potentially powerful tool for preventive intervention. The existence of a conspiracy also provides prosecutors with an opportunity to exploit a key exception to the normal ban on hearsay evidence, an exception that allows prosecutors to introduce hearsay statements by co-conspirators; prosecutors need not actually even charge a conspiracy in order to invoke that rule.<sup>43</sup> And though the general purpose federal conspiracy statute provides only a five year maximum sentence,<sup>44</sup> the conspiracy statutes most likely to apply in a terrorism scenario entail much weightier sentences.<sup>45</sup>

On the other hand, the very capacity that makes conspiracy a useful tool for prevention—that is, the ability to prosecute plotters before they have proceeded far in their planning—can give rise to problems of persuasion at trial. The earlier the intervention, the less evidence there will be concerning defendants’ commitment to carrying out their agreement. Consecutive mistrials in the ongoing prosecution of the so-called “Liberty City Seven” illustrate the problem. In that case, a group of men in the Miami area allegedly plotted to bomb the Sears Tower and other locations on behalf of Al Qaeda, and as a result, were prosecuted with a mix of material support and conspiracy charges. According to FBI Deputy Director John Pistole, their plans were “more aspirational than operational,” a characterization born out both in the indictment and the evidence presented at trial.<sup>46</sup> Although the government possessed a considerable amount of audio and video evidence—including recordings of a ceremony in which the defendants pledged loyalty to Al Qaeda—it could not show that the defendants possessed any weapons or explosives or had done much else beyond talk. This opened the door for the defense to claim that the men had not truly intended to harm anyone, but instead had been attempting to con a supposed Al Qaeda representative out of money. Two consecutive trials have ended in a hung jury, along with one acquittal along the way.<sup>47</sup> The government might have avoided this result by delaying its intervention in the alleged plot; waiting might have either revealed that the defendants indeed were not serious about the plot or provided more persuasive evidence of their commitment.

Considerations of proof thus act as an important practical limitation on the broad preventive reach of conspiracy liability. But the government can sometimes overcome that limitation and thus realize conspiracy’s full preventive potential. Witness the successful prosecution of Jose Padilla. The military famously held Padilla for years on the ground that he was an Al Qaeda agent sent back to the United States to carry out violent attacks, including a much-discussed allegation of a “dirty bomb” plot. With Supreme Court review of the merits of his detention pending, the government ultimately transferred Padilla to civilian custody to face criminal prosecution. Notably, however, prosecutors did not allege any facts relating to his plans in returning to the United States or any other post-9/11 conduct. They did not claim that he had become an Al Qaeda member, let alone that he had agreed to carry out any particular type of violent act. The government instead focused entirely on his earlier conduct as a recruit for the

“violent jihad” movement writ large. Prosecutors alleged that Padilla thereby had joined an ongoing conspiracy to commit otherwise-unspecified murders and other violent acts. The defense sought a bill of particulars detailing the nature and scope of this conspiracy. The government’s response confirms the broad conception of conspiracy liability at issue in the case:

The defendants herein were part of a larger radical Islamic fundamentalist movement that waged “violent jihad” by opposing governments, institutions, and individuals that did not share their view of Islam or their goal of reestablishing a Caliphate. As it pertains to this case, these defendants supported violence, including murder, maiming and kidnappings, committed by mujahideen groups operating in various jihad theaters around the world. Specifically, the violent Islamist groups in Egypt, Algeria, Tunisia, Libya, Somalia, Afghanistan, Tajikistan, Chechnya, Bosnia, and Lebanon.

In some of these theaters, such as Afghanistan, Bosnia and Chechnya, and Tajikistan their violence was directed mainly towards existing central government regimes they believed were oppressing Muslims and resisting the establishment of strict Islamic states. Therefore, they engaged in armed confrontations, including murders, maiming, and kidnappings, against Serbian and Croat forces in Bosnia, Russian forces in Chechnya and Tajikistan, and opposing Muslim forces in Afghanistan . . . . In other theaters such as Egypt, Algeria, Libya, Somalia, and Tunisia, they supported the violent Islamist groups and factions committing acts of murder, maiming, and kidnapping against leaders, members, and supporters of what they viewed as apostate regimes, including other Muslims.<sup>48</sup>

In short, the conspiracy at issue in Padilla’s prosecution was the jihad movement itself. And ultimately, the jury convicted Padilla of participating in this conspiracy based on evidence that he traveled to Afghanistan to receive military-style training at a jihadist camp, with the intent to serve the movement in ways to be determined at some later date. The Padilla case thus suggests that federal criminal law permits prosecution not just of formal membership in a particular designated foreign terrorist organization but also of informal “membership” in the jihad movement itself, irrespective of whether the defendant can be linked to any particular organization or plot. And in that respect, the Padilla prosecution provides a striking example of the preventive capacity of existing criminal law. Indeed, the Padilla prosecution raises the question of what limits, if any, cabin the scope of conspiracy liability.

It is not entirely clear what to make of this precedent. The charging strategy the government employed against Padilla may not prove generalizable. Jurors in other cases may prove less receptive to the notion of equating unfocused enlistment in the jihad movement with conspiracy to murder, for example, and the strategy might not succeed if offered in a case unrelated to the jihad movement. But given that conspiracy is not a terrorism-specific concept, there nonetheless is some reason to be concerned that the envelope-pushing interpretation employed in the Padilla case might spill over into other areas of law where the government’s interest in prevention is less pressing.

In any event, even if the Padilla strategy proves to have some staying power as a tool for preventive incarceration, conspiracy liability is of no use in the scenario in which a terrorism

suspect appears to be acting entirely on his own—as a so-called “lone wolf.” I turn now to a discussion of that scenario.

### *Lone Wolves and Suspects with Uncertain Affiliations*

One does not have to become a member of a terrorist organization to commit an act of political violence. The government is and should be particularly concerned with anyone who has obtained military-style training from a terrorist organization, for example, whether as a member of that group or not. Indeed, it is this scenario—the defendant who appears to have attended a terrorist-operated training camp—that constitutes the single most important category for purposes of the military detention debate. According to one summary of the records produced by the military’s CSRT proceedings at Guantánamo, for example, at least 317 detainees “took military or terrorist training in Afghanistan.”<sup>49</sup> The government quite reasonably views persons who have received such training as potentially dangerous, irrespective of whether or not it can link them to plans for any particular act of violence.

The material support law is not suited to the task of prosecution in this scenario, since it forbids the *provision* rather than the *receipt* of training. In 2004, therefore, Congress enacted a new statute specifically addressing this situation. That law made it a crime to “knowingly receive[] military-type training from or on behalf of” any designated foreign terrorist organization.<sup>50</sup> As with the material support law, the new training law requires no particular showing of intent on the part of the defendant, just knowledge as to the identity and nature of the organization in question.<sup>51</sup> It thus constitutes an ideal tool for preventive prosecution with respect to a particularly important category of terrorism suspects. Or so it might be at some point in the future. For the time being, *ex post facto* considerations ensure that this statute has no application to those whose training occurred prior to December 17, 2004—which is to say virtually the entire population in American custody. Even going forward, moreover, the statute will apply only where the government can attribute the training to a particular group that already has been designated as a terrorist organization by the secretary of state. These hurdles may explain why prosecutors have charged only one defendant under the training statute since its enactment.<sup>52</sup>

This brings us to the most challenging scenario from the point of view of substantive criminal law: the person whom the government cannot link to a designated foreign terrorist organization or to any particular co-conspirators and cannot show to have attempted any particular violent act, but who nonetheless poses a credible threat of committing a terrorist act in the future (perhaps because of the person’s stated or apparent intentions, the person’s receipt of training, or both). How if at all can prosecutors intervene then, assuming that the decision is made to incapacitate rather than surveil the person?

Conventional inchoate liability theories do not extend to this scenario. The situation described above sounds most akin to an attempt scenario, albeit one that has not progressed to the point where attempt liability actually would attach. In the wake of September 11, however, prosecutors have actually developed an inchoate crime theory that *does* reach this situation. Their solution lies in the 1994 material support statute that preceded enactment of the 1996 act discussed

above.<sup>53</sup> The 1994 material support statute is both narrower and broader than the 1996 one. It is broader in that it is not limited to support provided to designated foreign terrorist organizations; it applies *without respect to the identity of the recipient of the support*. It is narrower, however, in that it *does* require proof that the defendant intended or at least knew that the support would be used by the recipient to carry out or facilitate any of several dozen criminal acts identified as predicates in the statute. In short, the 1994 law makes it a crime to provide support to certain *crimes* rather than certain *organizations*.

Notably, the predicate crimes supporting liability under the 1994 law include numerous conspiracy provisions. Thus, even if a defendant is not actually party to a conspiracy, he or she still may be liable under the statute if he or she provided aid to others knowing or intending that they would engage in it. That may seem like a narrow scenario, one that adds relatively little prosecutorial power to what conspiracy liability already provides. In practical terms, however, the 1994 law may prove important insofar as it enables prosecutors to offer jurors a plausible alternative in circumstances where they have difficulty establishing the existence of the conspiracy itself—as in the “lone wolf” scenario described at the outset of this section.<sup>54</sup>

The prosecution of Hamid Hayat provides a striking example of how prosecutors can employ the 1994 law in this fashion. In 2002, a government informant began recording conversations with Hayat, including discussions about going to Pakistan to obtain training to become a *mujahid*. Though plainly sympathetic with the notion, Hayat was noncommittal about actually following through on such plans. Nonetheless, he traveled to Pakistan in 2003, ostensibly for an arranged marriage. The government suspected, however, that he was there at least in part to receive training, and upon his return the FBI took him into custody. A lengthy interrogation session eventually produced a confession that he had attended a jihad training camp of some kind, as well as the following exchange regarding his plans now that he had returned to the United States:

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

Hayat: Uh-huh.

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

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

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

Hayat: They didn't give us no plans.

FBI: Did they give you money?

Hayat: No money.

FBI: Guns?

Hayat: No.

FBI: Targets in the U.S.?

Hayat: You mean like buildings?

FBI: Yeah, buildings. . . . Sacramento or San Francisco?

Hayat: I'll say Los Angeles or San Francisco.

FBI: Financial, commercial?

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

FBI: Hospitals?

Hayat: Maybe, I'm sure. Stores.

FBI: What kind of stores?

Hayat: Food stores.<sup>55</sup>

This confession, combined with recorded conversations and other indications that Hayat held extremist views, constituted the bulk of the evidence against him. Because prosecutors had no evidence regarding the identity of the organization from whom Hayat had received training, he could not be charged under the 1996 material support law, IEEPA, or the training statute. In theory they might have prosecuted him using a broadly-focused conspiracy charge comparable to that employed in the Padilla case, but serious evidentiary problems might have arisen given their lack of evidence regarding the identity and aims of other persons with whom Hayat supposedly was working. Instead, prosecutors charged Hayat under the 1994 material support law (along with other charges involving false statements to investigators). Specifically, the indictment charged that Hayat had provided material support “knowing and intending that the material support and resources were to be used in preparation for, and in carrying out, a violation of Title 18, United States Code, Section 2332b (Acts of Terrorism Transcending National Boundaries).”<sup>56</sup> That is to say, they charged him with making himself available as “personnel” in anticipation of his own future acts of violence in the United States, the details of which were as yet quite indeterminate. The charge thus avoided the difficulty of establishing the elements of a conspiracy, while still enabling prosecutorial intervention at a stage far earlier than would be possible with, say, an attempt allegation. The Hayat case in this sense stands alongside the Padilla prosecution as a high-water mark in post-9/11 efforts to expand the preventive capacity of substantive criminal law relating to terrorism.

Is the 1994 law thus a catch-all prevention statute, capable of reaching the most nebulous of plots even in the absence of a link to a designated foreign terrorist organization? It is tempting to conclude that it is, given the outcome in the Hayat prosecution. There are at least three limitations to bear in mind, however. First, as with the broad approach to conspiracy liability

illustrated by the Padilla prosecution, the broad approach to liability under the 1994 law illustrated by the Hayat prosecution may or may not prove to be generalizable beyond the particular circumstances in that case. That is to say, another jury grappling with that same case, or some future jury dealing with another, might require greater specificity before reaching a guilty verdict. Second, it is important to note that even in the Hayat case prosecutors did have to establish intent on the defendant's part to support an unlawful or violent act, however unclear the details of that act might be. Hayat's confession, whatever else might be said about it, did provide an evidentiary basis for the jury to find that he had such intent. Had he admitted only that he attended a training camp, without more, it is doubtful he would have been convicted. Third, the 1994 law, like its later counterpart, once was subject to a significant jurisdictional prerequisite. Until Congress passed the PATRIOT Act in late 2001, liability under this statute attached only with respect to conduct that occurred "within the United States." For an important cohort of potential defendants—i.e., those who provided support to the jihad movement outside the U.S. prior to late 2001—prosecutors therefore cannot rely on the 1994 law no matter how broadly the courts interpret it. Like other criminal statutes, in other words, it offers a more powerful prospective than retrospective tool.

## Military Detention and Prosecution in Comparative Perspective

The preceding section portrays the substantive detention criteria of federal criminal law relating to terrorism as quite broad, but subject to at least a handful of significant limitations. This raises the question of how those grounds compare to the existing alternatives provided by both the definition of "enemy combatant" employed at Guantánamo to determine who is subject to military detention and the range of charges available for prosecution before military commissions. Again setting aside questions of procedure, the substantive scope of federal criminal law compares reasonably well to both.

The United States has invoked the law of armed conflict in support of two separate detention frameworks in the post-9/11 period. For the vast majority of military detainees, it has relied on the principle that captured combatants may be detained for the duration of hostilities. And for a small subset of these individuals, it also has invoked the authority to prosecute them for war crimes before military commissions. Invocation of both models has proven exceedingly controversial, with a range of critics—including judges, in some instances—concluding that the government in at least some circumstances has exceeded whatever authority it may have to invoke these frameworks. The merits of these criticisms are beyond the scope of this paper. My goal in referencing the military models is merely to provide a point of comparison, with the military alternatives depicted in their best possible light in order to present the sharpest potential contrast with the scope of federal criminal law. Accordingly, let us assume for the sake of argument that the government has correctly stated the scope of its military detention authority.<sup>57</sup>

### *The Military Detention Comparison*

Consider first the range of persons deemed eligible for military detention for the duration of hostilities, separate and apart from any notion of criminal prosecution. In *Hamdi v. Rumsfeld*, the

Supreme Court expressly approved application of this principle at least with respect to Taliban fighters detained while bearing arms in Afghanistan during Operation Enduring Freedom. The government, of course, understands its detention authority to extend beyond that limited circumstance. Thus, according to the rules applied at Guantánamo during Combatant Status Review Tribunals (“CSRTs”), the government may detain for the duration of hostilities the following class of persons:

An “enemy combatant” for purposes of this order shall mean an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.<sup>58</sup>

Unpacking this language reveals three distinct grounds for detention. First, there are *fighters*. That is, irrespective of membership, a person may be detained if he or she personally participates in violent acts in connection with hostilities. Second, there is *membership*. Members of Al Qaida or of the Taliban may be detained, irrespective of their individual conduct. In addition, members of other, unspecified forces also may be detained insofar as their organizations are engaged in hostilities either with the United States or its coalition partners.<sup>59</sup> Third, there are *supporters*. The definition incorporates not just the members of the groups referenced above, but also those who support those groups.

Federal criminal law provides substantive detention criteria that closely tracks these categories, particularly regarding persons linked to Al Qaeda or the Taliban. It compares less well insofar as military detention grounds extend to other organizations that have not been subjected to a formal designation, at least with respect to members and supporters of such groups who have not actually engaged in hostilities themselves.

Consider first the category of *fighters*. Federal criminal law covers much, but not quite all, of this ground. Any person who uses, attempts to use, or conspires to use lethal force against U.S. personnel overseas may be prosecuted.<sup>60</sup> In a traditional armed conflict, of course, such liability would be offset by the right of privileged belligerents to use lethal force without being subject to domestic criminal prosecution. In an insurgency scenario such as those currently underway in Afghanistan and Iraq, however, it is probable (if not entirely certain) that the members of hostile forces will not qualify for the privilege.<sup>61</sup>

Insofar as a defendant allegedly fought against U.S. allies rather than U.S. personnel, however, it is less clear that charges would lie for belligerent acts as such. As noted above, federal criminal law prohibits war crimes by U.S. nationals and military members, and it prohibits the overseas murder of certain internationally-protected persons who are not U.S. citizens, such as foreign diplomats.<sup>62</sup> But in general, it does not prohibit the use of lethal force against other non-citizens overseas unless that use of force in some manner stems from plotting undertaken in the United States.<sup>63</sup>

This brings us to the second category of persons subject to military detention under the government’s current understanding of that authority: those who are *members* of Al Qaeda, the

Taliban, and other hostile forces, without respect to whether the member personally has engaged in hostilities. Again, federal criminal law covers much if not all of this ground. Through the material support statute's personnel provision, the government may prosecute individuals simply for being members of Al Qaeda, though for non-citizens outside the U.S. this authority may come into play only after 2004 depending on whether the facts in a particular case would render the person "subject to the jurisdiction of the United States" at the relevant time. The material support law does not extend to the Taliban at all, as the Taliban has not been designated as a foreign terrorist organization under that statutory framework. IEEPA sanctions, by contrast, do apply to the Taliban, but as explained above, that statute too entails jurisdictional limitations that preclude its use against non-citizens whose conduct occurred entirely overseas.

This leaves the question of whether members of other entities engaged in hostilities against the United States could be prosecuted on that basis alone in federal court.<sup>64</sup> At least some such entities might not be subject to the formal designations that are prerequisites to material support and IEEPA liability, taking those options of the table. This would leave prosecutors to rely instead on conspiracy charges and charges under the 1994 law, subject again to potential problems of extraterritorial jurisdiction.

Finally, there is the matter of those who have *supported* the entities encompassed by the government's enemy combatant definition but who are not actually members of the group (or at least cannot be shown to be such) and who have not engaged in fighting themselves. Notoriously, a government attorney once argued that the definition of "enemy combatant" would encompass not just those who *knowingly* provide support to Al Qaeda, but even a "little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [that] really is a front to finance Al-Qaeda activities."<sup>65</sup> On that view, there simply is no *mens rea* requirement for support in the military detention context, whereas the material support law at least requires proof that the defendant knew the true identity of the recipient of the support, as well as either the fact of designation itself or that the entity engages in terrorism. Criminal prohibitions on support in this limited respect are narrower than the government's asserted authority to detain militarily on support grounds. But setting aside the innocent donor scenario, the criminal prohibition against support covers the most important scenarios encompassed by the "enemy combatant" definition—support rendered to Al Qaeda and the Taliban—though it does not necessarily extend to other groups that may engage in hostilities against the United States or its allies. If such groups already have been subjected to formal designations, then the overlap is complete. At least some such groups, however, likely will not have been designated by the time the person the government wishes to prosecute has rendered support.

### ***The Military Commission Comparison***

Detention for the duration of hostilities is not the only form of military detention authority the government has invoked since 9/11 in the terrorism setting. The government has invoked a separate strand of detention power under the laws of armed conflict insofar as it seeks to prosecute a subset of detainees for war crimes before military commissions. On close inspection, federal criminal law relating to terrorism compares well to the charges available in that system.



According to the Military Commissions Act of 2006 (“MCA”), commissions may try unlawful enemy combatants for a range of widely-recognized war crimes, including murder of protected persons, attacking civilians or civilian objects, and denial of quarter.<sup>66</sup> These offenses overlap with federal criminal law insofar as U.S. nationals and internationally-protected persons are involved; however, insofar as they reach attacks by non-citizens on non-citizens in overseas locations, the MCA appears to reach beyond federal criminal law. (Recall that the federal War Crimes Act applies only to U.S. nationals and members of the U.S. military.)

The MCA also lists a handful of offenses comparable to the “preventive” prosecution statutes discussed above, though whether these offenses can be prosecuted by military commission remains a point of sharp legal controversy. In particular, the MCA provides liability both for conspiracy and for the provision of material support. And these charges have played an important role in some of the early commission proceedings, including the prosecutions of Salim Hamdan and David Hicks. At first blush they appear to provide the government with charging options it might not have in federal criminal court, given that the civilian material support law did not apply to overseas conduct of non-citizens until late 2004. Ultimately, however, the government may not be able to resort to such charges in the military commission system at all. Critics allege that neither conspiracy nor material support constituted war crimes prior to enactment of the MCA, and that to apply them as war crimes in connection with conduct that predated the MCA would violate the norm against *ex post facto* prosecution.<sup>67</sup> It remains to be determined whether such challenges will succeed, but the important point for now is that no such concerns plague conspiracy and material support liability in the federal criminal justice system. Federal criminal law, in this sense, may ultimately outstrip the scope of the substantive offenses prosecutable by military commission.

### ***Summary***

The foregoing survey suggests that the federal criminal justice system entails broad grounds for prosecution in terrorism-related cases, including prevention-oriented scenarios. A combination of laws including conspiracy statutes and multiple material support provisions gives prosecutors a number of options for preventive intervention. These charging options cover most of the situations that would support military detention on the government’s current understanding of its authority, as well as many (though not all) charges that might be brought before a military commission. That said, the scope of federal criminal law relating to terrorism does have its limits:

- it provides relatively little coverage for violence directed by non-citizens against non-citizens overseas;
- it does not reach the members and supporters of non-designated groups who are not personally linked to violence or other unlawful activity, at least not without resort to a broad conception of conspiracy; and

- most significantly, *ex post facto* considerations may preclude application of the two material support laws to non-citizen Al Qaeda members and supporters who operated outside the United States prior to 2001 (for the 1994 material support law) or 2004 (for the 1996 material support law).

At the same time, some of the features that render the scope of federal criminal law so broad in other respects—particularly the version of conspiracy liability employed successfully in the Padilla prosecution—give rise to concerns that federal criminal law may become *too* expansive in response to the demands of terrorism prevention, or at least that expansive liability theories that may be justified in the context of terrorism prevention might spread to other areas of the law where the justifications are less clear.

This assessment suggests that critics of the federal criminal justice system overstate the case insofar as they suggest that federal crimes primarily are retrospective in nature and not well-tailored to the imperatives of terrorism prevention. On the other hand, the limitations identified above do help explain why the government may have believed that it lacked adequate charging options for some individuals whose relevant conduct occurred prior to the 9/11 attacks.

## **Procedural Safeguards in Terrorism-Related Prosecutions**

Substantive detention grounds are only one factor in the calculus that defines the capacity of a detention system. Another major consideration is the framework of procedural safeguards through which a system determines whether the detention grounds have been satisfied in a given instance. To observe that federal criminal law provides broad grounds for prosecution in terrorism-related cases thus does not provide a complete picture of how federal criminal prosecution might compare to military detention or to proposed alternative frameworks.

According to conventional wisdom, the procedural safeguards in the federal criminal justice system are considerably stricter than those employed in the military systems noted above, and at least somewhat stricter than whatever rules might be employed in an alternative preventive detention regime. Critics of enhanced reliance on federal criminal justice view this as a compelling reason to think twice before placing greater weight on the prosecutorial option. From that point of view, the robust procedural safeguards of federal criminal prosecution create an undue risk that the government will be unable to incapacitate suspects in circumstances in which it should be able to do so. Proponents of a prosecutorial model disagree, arguing that the procedural concerns these critics have voiced are unwarranted.

In the pages that follow, I survey some of the main procedural questions that critics of enhanced reliance on the criminal justice system have highlighted. I do not propose to rehearse this debate in its full detail. A short survey of the key disputes suffices to show that at least some of the purported procedural obstacles to prosecution are not quite as insuperable as some critics have suggested. On the other hand, the survey also shows that procedural rules do limit the criminal justice system in ways that do not apply to alternative detention systems, particularly the military detention system. This does not invalidate the argument that the government should rely more

heavily or even exclusively on criminal prosecution, of course. But it does enable us to identify the particular procedural safeguards that are most consequential in distinguishing the criminal justice system from existing and proposed alternatives.

The survey below focuses on the issues discussed in a comprehensive and influential “white paper” that former federal prosecutors Richard Zabel and James Benjamin wrote in 2008 on behalf of Human Rights Watch.<sup>68</sup> The paper is both fair-minded and well-researched. In it, the authors provide a survey of the procedural questions that critics have suggested might preclude use of the criminal justice system in connection with the prosecution of suspected terrorists. Zabel and Benjamin conclude that these obstacles by and large are overstated, but they are careful to flag a handful of issues that are not so easily dismissed, and they also are careful to note that military detention and military prosecution remain appropriate for at least some captures that occur in connection with combat operations. I relay their key conclusions in the pages below, distinguishing those issues as to which critics’ concerns appear overstated and those in which the concerns are warranted. I also elaborate on points that warrant further discussion.

### *Comparatively Innocuous Procedural Safeguards*

Zabel and Benjamin lay to rest many procedural concerns with relative ease. The first question they address, for example, is whether federal courts would have difficulty asserting jurisdiction over suspects who came into U.S. custody through unorthodox means, such as capture overseas by U.S. or allied military forces or security services, followed by rendition rather than extradition to the United States.<sup>69</sup> Citing the *Ker-Frisbie* doctrine, they conclude that defendants most likely would not succeed in objecting to jurisdiction based on the irregular circumstances of capture, even in the event that the defendant alleges abusive treatment during an earlier stage of detention.<sup>70</sup> This appears correct, indicating that questions of jurisdiction ought not to play a significant role in the debate.

Likewise, the authors present a strong—though not necessarily indisputable—argument that *Miranda* concerns are overstated. The concern on this score is that the privilege against self-incrimination will preclude the use of inculpatory statements defendants might make to soldiers and other government agents who may capture or interrogate them overseas.<sup>71</sup> Zabel and Benjamin contend that “it is likely that the courts would recognize an exception to *Miranda* under the ‘public safety’ exception first articulated in *New York v. Quarles*,<sup>72</sup> or, more generally, based on the argument that civilian law-enforcement principles such as *Miranda* simply do not apply in battlefield conditions.”<sup>73</sup> Thus, they note, the Second Circuit in *United States v. Khalil* relied on *Quarles* to sustain the admissibility of incriminating statements made by a terrorism defendant whom police had interrogated, without *Miranda* warnings, concerning bombs found at the scene of his arrest.<sup>74</sup> Zabel and Benjamin dispatch other potential procedural problems, such as concerns related to the right to a speedy trial, in similar fashion.<sup>75</sup>

But not every procedural question raised by proposals to rely more extensively on criminal prosecution in terrorism-related cases can be dismissed so readily.

### *Comparatively Significant Procedural Safeguards*

At least three sets of procedural safeguards associated with criminal prosecution combine to produce a gap between the reach of the criminal justice system and the reach of some existing and proposed alternatives to it. First, the rules associated with a criminal defendant's ability to access classified information can, in limited circumstances, disrupt the government's capacity to prosecute. That risk is largely mitigated by statute, but it has not been entirely eliminated and poses a particular problem insofar as the question arises in connection with the government's disclosure obligations. Second, it is likely that a substantial proportion of the intelligence that the government has derived (and will continue to derive) from the interrogation of captured individuals cannot be used in a criminal prosecution, even if we assume for the sake of argument that the interrogation was non-abusive. Third, the requirement of proof beyond a reasonable doubt by definition ensures that criminal prosecution will not be an option in the circumstance in which the government has some lesser degree of proof linking a suspect to terrorism.

None of this is to say that it is desirable or appropriate to maintain or establish a system that differs on these particular dimensions. Rather, the point is simply to demonstrate that alternative mechanisms—certainly including the current approach to military detention, and potentially including proposed national security courts—have broader reach than the criminal justice system does in significant part due to these particular procedural distinctions. And critically, these criminal justice safeguards are hard-wired to a considerable extent, as they derive from constitutional sources.

### *The Disclosure Dilemma*

Consider first the battery of issues associated with the government's interest in preserving the secrecy of classified information, an interest that often runs in tension with the defendant's interest in a fair trial and, at times, prosecutors' interest in being able to access and use all possible inculpatory information. Zabel and Benjamin conclude that current statutes—particularly the Foreign Intelligence Surveillance Act (“FISA”) and the Classified Information Procedures Act (“CIPA”)—largely suffice to reconcile these competing interests as a general proposition, subject to a few potentially significant caveats.<sup>76</sup>

With respect to FISA, the key question is the government's ability to employ in a federal prosecution the fruits of surveillance undertaken as a matter of intelligence collection (pursuant to a FISA warrant) as opposed to surveillance conducted under the authority of the ordinary criminal investigation warrant application process (i.e., a “Title III warrant”). Zabel and Benjamin note that post-9/11 developments including the USA PATRIOT Act and a related ruling by the Foreign Intelligence Surveillance Court of Review aim to ensure the government's freedom to employ such surveillance in criminal cases even where its primary purpose at the time of the surveillance was criminal prosecution, so long as foreign intelligence collection was a *significant* purpose of the surveillance.<sup>77</sup> They also note, however, that one district court recently held that this standard violates the Fourth Amendment, reasoning that a Title III warrant is required as a constitutional matter in any circumstance in which the government's primary

purpose is criminal prosecution.<sup>78</sup> That opinion may yet be overturned on appeal, but in the event that it proves to have staying power, it may reduce the range of circumstances in which the government can use intelligence it possesses in support of criminal prosecution.

The other statute emphasized by Zabel and Benjamin is CIPA, which creates a framework in which judges grapple with the tension between the government's interest in maintaining the secrecy of classified information and a defendant's constitutional right to make use of such information already in his or her possession or to obtain such information from the government.<sup>79</sup> Zabel and Benjamin argue that judges have had considerable success employing CIPA in prosecutions involving sensitive national security information. They do note, however, that the CIPA system faces special hurdles where a defendant insists on representing himself, as CIPA depends in part on the government's ability to share classified information with a security-cleared attorney acting on behalf of the defendant—but not with the defendant himself.<sup>80</sup>

Zabel and Benjamin's discussion of CIPA leads directly into a discussion of the questions that arise in connection with a criminal defendant's disclosure rights under two important Supreme Court cases. *Brady v. Maryland* established that criminal defendants have a constitutional right to the timely disclosure of exculpatory information,<sup>81</sup> and *Giglio v. United States* held that this rule extends to information that the defendant could use to impeach the government's witnesses.<sup>82</sup> In criminal cases implicating national security, the question arises as to just how broadly these disclosure obligations run throughout the government. Plainly they apply to the information in possession of prosecutors and criminal investigators involved in preparing the case. But do they also apply to components of the intelligence community such as the CIA, DIA, or NSA?<sup>83</sup>

The Supreme Court held in *Kyles v. Whitley* “that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.”<sup>84</sup> This implies *some* limit to the search-and-disclose obligation, but does little to flesh out the precise nature of that limit. Lower courts have gone into more detail, however, employing a “close alignment” test in which the obligation extends to the “prosecution team” and, according to some courts, to other agencies insofar as they actually participated in the preparation of the prosecution's case.<sup>85</sup> Thus, during the Padilla prosecution,<sup>86</sup> the court directed disclosure not just from the prosecution team but also from “any other agencies ‘that have cooperated intimately from the outset of [the] investigation’ and the files of any other agencies where the prosecutor gains access to [evidence] in preparing his case for trial.”<sup>87</sup>

Given the uncertain scope of *Brady* and *Giglio* obligations in this context, it is difficult to say with confidence whether other courts would reach a similar conclusion when faced with this issue.<sup>88</sup> Some might direct more limited discovery, while others might direct something more expansive. Wherever they draw the line, however, we can anticipate that terrorism prosecutions routinely will give rise to similar issues in the future, all the more so if we elect to rely more extensively on criminal prosecution. And this raises an important but often-overlooked question: is there a risk that growing awareness of potential disclosure obligations will cause some in the intelligence community to grow more reluctant to share intelligence with federal criminal investigators and prosecutors?

CIPA, to be sure, provides a mechanism for mediating the impact of disclosure obligations on the government's legitimate interests in secrecy. The statute ensures that judges will exhaust all opportunities to reconcile the government's interest with the defendant's rights, including the creation of sanitized substitutes and stipulations, before compelling the government to choose between disclosing the information or else facing penalties that might include dismissal of the indictment. Notwithstanding CIPA, however, it remains possible that the government will in some cases be forced to make just that choice. And the prospect of this result (or perhaps even just the prospect of CIPA litigation generally) might reduce the willingness of the intelligence community to cooperate with prosecutors on the front end of the criminal investigative process—thus expanding the gap between the full range of information that the government might possess supporting incapacitation of a terrorism suspect and the subset of that information available for use in court.<sup>89</sup> Certainly, it is possible that this problem will not materialize; indeed, one might argue that it also is possible that the intelligence community actually will grow more willing to share information with prosecutors as they come to trust CIPA. The important point, however, is that we cannot dismiss the possibility of decreased cooperation out of hand.<sup>90</sup>

### *The Confrontation Dilemma*

A second cluster of procedural issues that may generate substantial hurdles in connection with terrorism prosecutions involves admissibility questions under the Federal Rules of Evidence and the Confrontation Clause. On this issue, Zabel and Benjamin note that critics can point to few, if any, examples of actual terrorism prosecutions derailed by adverse evidentiary rulings.<sup>91</sup> This may well be true, but the important question is whether there exist cases that could not be brought in the first place in light of the likelihood of such rulings. Prosecutorial discretion takes place in the shadow of procedural and evidentiary rules, after all, and thus it is possible that some cases were not pursued as a consequence of foreseeable evidence-admissibility concerns.

In any event, Zabel and Benjamin conclude that none of the three categories of potential problems under this heading should prove especially problematic. Those categories, in their formulation, include: “(a) authentication and chain of custody requirements; (b) the difficulties of putting on witnesses from all over the world, some of whom may be serving active duty in the armed forces during a trial; and (c) the hearsay rule.”<sup>92</sup> With respect to authentication, Zabel and Benjamin correctly point out that the Federal Rules of Evidence are more flexible than often is assumed, with the ultimate question being whether the proponent of the evidence has provided the judge with “sufficient” evidence to establish that the item is what the proponent claims it to be.<sup>93</sup> Strict chains of custody are of course helpful in satisfying this standard but not actually required. And for what it is worth, courts in terrorism cases have been willing to permit chain-of-custody witnesses to testify without revealing their true identities.<sup>94</sup> Similarly, Zabel and Benjamin conclude that technology, including two-way videoconferencing, can overcome the problem of witnesses being unavailable because they are engaged in military operations overseas or otherwise cannot or should not be compelled to travel to the United States.<sup>95</sup>

This leaves the question of hearsay statements—those made out of court yet offered for their truth. The government may wish to introduce out-of-court statements in a terrorism prosecution for either of two reasons. First, it may wish to use them for the sake of convenience where the

declarant is engaged in combat or other government operations overseas at the time of trial. Second, it may wish to introduce hearsay out of necessity in circumstances in which the statement was made by a detainee during custodial interrogation or a source who cooperated with the government. In these latter scenarios, the declarant may no longer be in U.S. custody, may be unwilling to repeat the statement if given the opportunity to testify, or may no longer be available to authorities at all. Depending on the circumstances of the interrogation, though, the government might also prefer the out-of-court statement approach in order to limit the defendant's ability to impeach his own testimony in cross-examination directed at the circumstances of his interrogation. Particularly in light of prisoner abuse concerns, then, the question of whether and when courts should admit out-of-court statements in terrorism cases takes on special significance and controversy.

Are such statements admissible? As a default matter, the Federal Rules of Evidence requires exclusion of out-of-court statements when offered for their truth.<sup>96</sup> Yet the default rule is riddled with exceptions, leading Zabel and Benjamin to conclude that it would not constitute a significant obstacle to the admission of such evidence. They note in particular that it does not apply to (i) declarations against interest, that is, out-of-court statements that may put the speaker at greater legal risk;<sup>97</sup> (ii) statements by co-conspirators made in the course of and in furtherance of the conspiracy;<sup>98</sup> (iii) and statements made by the defendant himself<sup>99</sup> In short, the authors conclude, concerns about hearsay are largely unwarranted.<sup>100</sup>

This assessment is probably correct insofar as a defendant's *own* statements are concerned; the rules, after all, define a defendant's own statements to be "non-hearsay" exempt from the default rule.<sup>101</sup> But the picture is more complicated with respect to statements by made *others*, particularly where such statements are made in the course of custodial interrogations. Such statements by definition do not come within the scope of the exception covering the defendant's statements. They also do not constitute co-conspirator statements, because the statement does not further the conspiracy and because the timing requirement cannot be met once a conspirator has been taken into custody. In a few instances such statements *might* qualify as statements against interest. But courts generally will parse narratives that inculpate another person so as to ensure that this exception admits only those portions of a narrative that inculpate the *declarant*, not a third party. And judges will make this inquiry bearing in mind the possibility that the declarant may in fact be attempting to curry favor or otherwise improve his own lot by casting blame on another.<sup>102</sup> The hearsay rule thus may indeed be an obstacle to the admission of much intelligence gleaned from interrogation—even non-coercive, non-abusive interrogation.

Even if prosecutors can overcome the hearsay rule by means of one exception or another, however, it does not follow that a court will admit the statement in question. The Sixth Amendment's Confrontation Clause, which guarantees a defendant the right to confront witnesses against him, constitutes a separate and potentially insurmountable obstacle even where a hearsay exception applies.<sup>103</sup> The Confrontation Clause forbids admission of any out-of-court statement where (i) the declarant was not subject to cross-examination at the time of the statement and cannot be cross-examined with reference to it now, and (ii) the statement is "testimonial" in nature, meaning that the declarant reasonably could foresee its use by the government as evidence in a criminal case.<sup>104</sup> Most if not all interrogation scenarios result in the production of testimonial statements, and so the critical question in such circumstances is

whether the government can produce the declarant for cross-examination at trial. This may be possible in many instances, but presumably it will not be possible in some non-trivial number of cases. Unlike the hearsay rule, moreover, exceptions to the Confrontation Clause are quite limited. In its most recent opinion on the subject, the Supreme Court identified exceptions only for the “dying declaration” scenario and the forfeiture-by-wrongdoing scenario, in which the defendant intentionally procured the declarant’s unavailability.<sup>105</sup> Neither of these scenarios will likely arise with any particular frequency in connection with efforts to admit the fruits of interrogations during criminal prosecutions related to terrorism. For good or ill then, the Confrontation Clause ensures that there will be some cases in which the government cannot translate presumably reliable intelligence available to it into admissible evidence.<sup>106</sup>

### ***The Burden of Proof***

A final procedural distinction worth emphasizing is the requirement of proof beyond a reasonable doubt in criminal cases. This is a constitutionally-required aspect of the criminal justice system, not subject to legislative amendment.<sup>107</sup> By definition, it excludes conviction in circumstances in which the government can muster only proof by a preponderance of the evidence or even proof by clear and convincing evidence. The military commission system employs the same standard,<sup>108</sup> meaning that there is no gap between these two systems along this dimension. But military detention, at least as employed in connection with enemy combatants held at Guantánamo, requires only proof sufficient to satisfy the preponderance standard—even when courts engage in *habeas corpus* review of the factual predicate for such detentions.<sup>109</sup> Moreover, most schemes for administrative detention or a national security court seem to envision detention on the basis of a showing less than proof beyond a reasonable doubt. From that perspective, the military detention system necessarily entails a broader capacity for detention than does the criminal prosecution alternative.<sup>110</sup>

## **Implications and Recommendations**

The foregoing survey suggests that many common assumptions in the current detention policy debate are mistaken. The procedures employed in criminal prosecutions pose less severe problems than critics often supposed. They also offer not quite as much flexibility as their proponents claim, particularly given the potential impact of disclosure obligations, evidentiary rules, and the burden of proof. We can say much the same concerning the substantive detention criteria. Contrary to conventional wisdom, the substantive detention grounds currently provided by federal criminal law are quite expansive and prevention-oriented. It is simply a mistake to conceive of federal criminal prosecution as limited to the post hoc prosecution of persons who already have committed harmful acts. Particularly as a result of broad interpretations of the concepts of conspiracy and material support, federal prosecutors have a range of prevention-oriented charging options available to them in terrorism-related cases. These grounds come close to approximating the detention criteria currently employed in the military detention system, while being both broader and narrower than the grounds currently available for war crimes trials before military commissions. Or at least they do now; prior to 2004, the two material support



statutes were much narrower in terms of their extraterritorial jurisdiction. In any event, there continue to be reasons to believe that existing criminal laws are both too narrow and too broad—insufficiently tailored, in short—in certain respects.

Regardless of whether criminal prosecutors will be asked to carry a greater part of the responsibility for incapacitating terrorists in the future, Congress should do what it can to improve the tailoring of the criminal justice system in light of the concerns noted above.<sup>111</sup> In particular, Congress should adopt the following package of reforms, which offsets expansions of substantive criminal liability in some areas with restrictions in others, and which also addresses those procedural concerns which are capable of adjustment and which do not present difficult questions regarding the fundamental fairness of the criminal justice model.

The first key reform is to expand the prohibition on the receipt of military-style training. As I explained above, current law prohibits the receipt of military-style training from any designated foreign terrorist organization. This is a useful statute, but it is too narrow. It will often prove impossible for prosecutors to establish the precise sponsorship of a training camp. In other instances, the training will have come from militant groups that have not yet been through the formal designation process. Congress should expand this prohibition by eliminating the designation requirement. In its place, the law should instead prohibit the receipt of weapons or explosives training from any non-governmental entity outside the United States, subject to an affirmative defense that the defendant intended to use the skills thus acquired solely for purposes that would be lawful if conducted in the United States (such as hunting in the case of firearms, or mining in the case of explosives). If on the books at the time, such a law would have provided a well-tailored charge for both the Padilla and Hayat scenarios.

Second, Congress should expand the War Crimes Act to include attacks on civilians committed by non-citizens during armed conflict. Currently, federal prosecutors could not act with respect to a non-U.S. national alleged to have committed certain war crimes against non-U.S. nationals overseas, including attacks intentionally targeting civilians or civilian objects. Yet as things stand now, such actions *would* be covered by the War Crimes Act if committed by a U.S. national or a member of the U.S. armed forces. While closing that gap might raise difficult questions with respect to the extraterritorial jurisdiction of federal criminal law,<sup>112</sup> it would enable federal prosecutors to target terrorists who have not yet moved to attack Americans but present a high risk of doing so and have already attacked civilians of other nationalities.

Third, Congress should calibrate the maximum sentence for providing material support to a designated foreign terrorist organization with reference to the defendant's *mens rea*. This proposal constitutes both a retraction and an expansion of the existing material support law. The current maximum sentence for a material support violation—15 years—is arguably too severe for a defendant as to whom the government can prove no ill intent. Yet it is arguably too lenient where the government can prove a murderous motive. Recalibrating the maximum sentence would enhance punishment for the worst offenders while blunting constitutional objections in other cases, objections that stem from the potential mismatch between the severity of available punishments and the actual significance of a defendant's conduct.

Fourth, Congress should add a certification requirement to the 1994 material support law to ensure that its broad scope does not spill over into areas unrelated to terrorism. This survey illustrates just how broad the preventive scope of certain federal criminal laws has become, particularly with respect to material support liability under the 1994 law and conspiracy liability in general. This expansion may well be warranted in circumstances involving political violence, but neither the 1994 material support law nor some conspiracy statutes are currently limited to the terrorism context.<sup>113</sup> Thus, at least in theory, the robust approaches to inchoate criminal liability seen in *Padilla* and *Hayat* could be applied to less exotic circumstances, such as narcotics rings, street gangs, or other forms of organized crime. Such migration may or may not make good policy sense, but in any event that is a choice legislators ought to consider. Unless and until they affirmatively decide to permit that migration, then, Congress should act to prevent it by adding a certification provision to the 1994 law comparable to that found in its 1996 counterpart: the law should require a senior Justice Department official to state in writing that the alleged conduct was intended to intimidate or coerce a government or civilian population. Congress might even consider making this an actual element of the offense. Either approach would reduce if not eliminate the risk of prosecutors deploying this statute in circumstances unrelated to terrorism, thus cabining to terrorism cases the impact of the broad, prevention-oriented approach illustrated by prosecutions such as the *Hayat* case.

Fifth, Congress should study and hold hearings on the scope of conspiracy liability. The 1994 material support law is not the only form of criminal liability that has proven in recent years to be much broader and more prevention-oriented than commonly assumed. The same is true of conspiracy liability, as illustrated by the *Padilla* prosecution. It is not entirely clear, however, how best to respond to that insight. The unusual aspect of the conspiracy theory employed in *Padilla* was its lack of focus: prosecutors identified the entire global jihad movement—not just Al Qaeda or some specific group of individuals—as a single violent crime conspiracy. This raises a series of difficult questions. Is it in fact a problem to frame conspiracies that broadly? If so, does this approach actually add value in the terrorism context, such that it ought to be preserved at least in that setting? And if so, are there good reasons not to extend it to other criminal contexts? If not, is it possible to craft legislation that would confine this approach to the terrorism setting? None of the answers to these questions are clear. They warrant serious consideration by Congress.

Sixth, Congress should define the scope of the government's search and disclosure obligations in cases involving classified information. The procedural dilemmas noted above would be less acute if Congress clarified the scope of the government's obligation to search for and disclose exculpatory and impeachment information that might be in the hands of some within the intelligence community. To be sure, such legislation would not necessarily be the final word on this issue. If Congress were to define the scope of this obligation as extending only to a single prosecutor's desk, for example, there is little doubt that courts would reject that proposed limitation as unconstitutional. In the far murkier circumstances associated with the files of agencies other than prosecutors and criminal investigators, however, courts might well conform to a fair-minded legislative effort to codify and elaborate the meaning of the "closely-aligned" test and the "prosecution team" concept. This, in turn, might help reduce the risk that the intelligence community on the margins might resist cooperating with criminal investigators and prosecutors.

Finally, Congress should amend CIPA to address the situation in which the defendant insists on self-representation. Zabel and Benjamin point out that CIPA does not expressly address the awkward situations that can arise when a defendant seeks to represent himself in a case involving classified information disputes.<sup>114</sup> They note that this issue arose in the Zacarias Moussaoui litigation, and that Judge Leonie Brinkema resolved it by providing Moussaoui's standby counsel with access to the materials in question but did not allow Moussaoui himself access.<sup>115</sup> It remains to be determined whether this solution will pass constitutional muster—the issue is among many currently on appeal as a result of that prosecution—but assuming that it does, Congress should consider amending CIPA to account for this situation in a systematic way.

I have suggested in this paper that some critics of the criminal justice system's capacity to neutralize terrorism suspects have overstated their case with respect to both the substantive detention grounds and the procedural safeguards of that system. I have also suggested, however, that some proponents of the criminal prosecution solution fail to give adequate weight to the limitations that system entails.

My analysis, standing alone, cannot answer the question of whether we can live with a system that relies primarily on criminal prosecution or whether we should instead either maintain the status quo or develop an alternative detention mechanism.<sup>116</sup> As Matthew Waxman has argued, determining the best path forward for detention policy requires in the first instance a thorough grasp of the strategic goals the U.S. government seeks to achieve through detention.<sup>117</sup> Those goals might imply an emphasis on the short-term benefits of preventive incapacitation in the broadest possible set of circumstances, or instead on the long-term benefits of legitimacy and sustainability that might follow from a system that instead places great weight on procedural safeguards designed to minimize the occurrence of false positives; indeed, they might imply an emphasis on both considerations. Ultimately, it is question of policy that must be made under conditions of great uncertainty with respect to the positive and negative consequences that will follow from a particular choice. At the very least, however, that question should be informed by a thorough grasp of the substantive and procedural limitations of the criminal justice system both as it currently stands and as it might be amended.

What's more, since virtually everyone agrees that we ought to use the criminal justice system where we can use it effectively, Congress can and should take the modest steps suggested above to optimize its capacity to respond to the problem of terrorism. Criminal prosecution is certain to remain a pillar of counterterrorism policy whatever choice may ultimately be made regarding the use of alternative detention systems. It may as well be as strong a pillar as we can build.

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## NOTES

<sup>1</sup> See RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., *HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN FEDERAL COURT* (2008), at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>.

<sup>2</sup> See generally Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008).

<sup>3</sup> See Peter Finn, *Guantánamo Closure Called Obama Priority*, WASH. POST, Nov. 12, 2008, at A1 (discussing the incoming administration's interest in shuttering Guantánamo); Steven Lee Myers, *Bush Decides to Keep Guantánamo Open*, N.Y. TIMES, Oct. 20, 2008 (same). The Obama administration will almost certainly continue to

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employ some form of military detention at least with respect to persons captured by the United States in connection with ongoing combat operations. Cf. ZABEL & BENJAMIN, *supra* note 1, at 2 (observing that “As part of ongoing military operations, soldiers and sailors will capture and detain enemy fighters, without punishing them, in order to disable them from fighting against the United States. This is both lawful and fundamental to the effective prosecution of war, and it does not generally implicate the criminal justice system.”).

<sup>4</sup> See William Glaberson, *Post-Guantánamo: A New Detention Law?*, N.Y. TIMES, Nov. 14, 2008 (surveying the debate).

<sup>5</sup> See, e.g., Human Rights First, *How to Close Guantánamo: Blueprint for the Next Administration* (Aug. 2008) (arguing that federal criminal prosecution provides an adequate basis for incapacitating terrorism suspects, and recommending on that basis that military detainees at Guantánamo either be prosecuted in federal court or else transferred to other countries or simply released), <http://www.humanrightsfirst.org/pdf/080818-USLS-gitmo-blueprint.pdf>; Sarah E. Mendelson, *Closing Guantánamo: From Bumper Sticker to Blueprint* (July 15, 2008) (draft) (same), [http://www.csis.org/media/csis/pubs/080715\\_draft\\_csis\\_wg\\_gtmo.pdf](http://www.csis.org/media/csis/pubs/080715_draft_csis_wg_gtmo.pdf); Steven I. Vladeck, *A Critique of National Security Courts* (The Constitution Project & the Coalition to Defend Checks and Balances, June 2008) (disputing the view that Article III courts are not adequate venues for prosecution), at 2, available at [http://www.constitutionproject.org/pdf/Critique\\_of\\_the\\_National\\_Security\\_Courts.pdf](http://www.constitutionproject.org/pdf/Critique_of_the_National_Security_Courts.pdf); Stephen J. Schulhofer, *Prosecuting Suspected Terrorists: The Role of the Civilian Courts*, ADVANCE: THE JOURNAL OF THE ACS ISSUE GROUPS 63-64 (2008) (asserting that “terrorism suspects can and should be indicted and tried for their alleged crimes in the ordinary civilian court system”), available at <http://www.acslaw.org/files/Prosecuting-Suspected-Terrorists.pdf>. The most thorough analysis of the substantive and procedural aspects of the federal criminal justice system as it relates to terrorism is the report that Richard B. Zabel and James J. Benjamin, Jr. produced for Human Rights First, titled *In Pursuit of Justice: Prosecuting Terrorism Cases in Federal Court*. See *supra* note 1. Zabel and Benjamin conclude that the “system is reasonably well-equipped to handle most international terrorism cases.” *Id.* at 2. Zabel and Benjamin are careful to note, however, that the military detention of persons captured in “ongoing military operations . . . is both lawful and fundamental to the effective prosecution of war . . .” *Id.* The report thus is best understood as rebutting the claim that a “national security court” should “displace the criminal justice system,” but not as a challenge to the use of military detention in at least some circumstances. *Id.*

<sup>6</sup> See, e.g., Andrew C. McCarthy & Alykhan Velshi, *We Need a National Security Court* (American Enterprise Institute) (arguing that rules of process disfavor reliance on criminal prosecution of terrorists), available at [http://www.defenddemocracy.org/usr\\_doc/NationalSecurityCourt.doc](http://www.defenddemocracy.org/usr_doc/NationalSecurityCourt.doc); BENJAMIN WITTES, *LAW AND THE LONG WAR* 157-60, 169-73 (2008) (describing an array of procedural obstacles that can arise in connection with criminal prosecution of terrorism suspects who may be too dangerous to release); Michael B. Mukasey, *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007 (questioning the utility of criminal prosecution as a mechanism to incapacitate terrorists); Jack L. Goldsmith & Neal Katyal, *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007 (arguing that “[c]riminal prosecution should still take place where they can,” but that “they are not always feasible”); Amos N. Guiora, *Military Commissions and National Security Courts After Guantánamo*, 103 NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY 199, 203-204 (2008) (“Because they lack specialization in the intelligence arena, Article III courts are improper venues for trying suspected terrorists.”). Glenn M. Sulmasy, *The Legal Landscape After Hamdan: The Creation of Homeland Security Courts*, 13 NEW ENG. J. INT’L & COMP. L. 1 (2006); A. John Radsan, *A Better Model for Interrogating High-Level Terrorists*, 79 TEMP. L. REV. 1227, 1276-82 (2006).

<sup>7</sup> See, e.g., William Glaberson, *Bin Laden Driver Sentenced to Short Term*, N.Y. TIMES, Aug. 7, 2008 (describing the debate regarding the implications of the split sentence and verdict for the fairness of the system).

<sup>8</sup> See *Boumediene v. Bush*, \_\_\_ F. Supp.2d \_\_\_ (D.D.C. Nov. 20, 2008) (determining that the government lacked sufficient evidence to detain all but one of six detainees captured originally in Bosnia).

<sup>9</sup> I have argued elsewhere that the poor fit between the assumptions underlying the law of armed conflict and the particular characteristics of Al Qaeda have given rise to an ad hoc convergence process in which the procedural aspects of military detention (and possibly also the substantive aspects) have gravitated toward those normally associated with the criminal prosecution model (while the criminal prosecution model as applied to terrorism has experienced similar pressure to gravitate toward the features of the traditional military detention model). See Chesney & Goldsmith, *supra* note 2. The latest developments in connection with *habeas* review of military detention decisions tend to confirm that descriptive account.

<sup>10</sup> Detention capacity is not the only variable one may use to compare existing and proposed systems, of course, but it is a central one. Examples of other relevant considerations include the opportunities each system presents for gathering intelligence, and also each system’s perceived domestic and international legitimacy (factors impacting their long-term sustainability and the extent to which other states will cooperate with them). Ultimately, of course,

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the question of which considerations matter depends on the strategic goals to be achieved by counterterrorism policy. See Matthew C. Waxman, *Administrative Detention and the Questions of Why, Whom and How: Integrating Strategy with Legal Innovation* (Brookings 2008) (discussing the importance of linking legal policy to strategic goals).

<sup>11</sup> See, e.g., Carol S. Steiker, *Foreward: The Limits of the Preventive State*, 88 J. Crim. L. & Criminology 771, 771-76 (1998). The theoretical benefit of the preventive turn in criminal law is straightforward: far better, from the point of view of the victim and of society, if harms are prevented altogether rather than just punished after the fact. On the other hand, the very nature of preventive intervention involves uncertainty as to whether the harmful act ever actually would have occurred, and thus we normally cannot be sure whether any given instance of preventive prosecution in fact realizes a harm-prevention benefit. That is the dilemma of the preventive state, and it is inherent in all forms of inchoate criminal liability. This dilemma is not a new phenomenon. The criminal law has long provided inchoate criminal liability through concepts such as attempt, conspiracy, and solicitation. But as the bounds of those concepts are pushed, and as new inchoate crime concepts are introduced, the dilemma sharpens.

<sup>12</sup> See 18 U.S.C. § 2339A and 18 U.S.C. § 2339B.

<sup>13</sup> 18 U.S.C. § 2339D (2004).

<sup>14</sup> For a more in-depth review of additional criminal statutes not discussed in detail below, see Zabel & Benjamin, *supra* note 1, at 43-51 (discussing, *inter alia*, seditious conspiracy and treason prosecutions).

<sup>15</sup> MARC SAGEMAN, UNDERSTANDING TERROR NETWORKS (2004).

<sup>16</sup> 18 U.S.C. § 2332b(a).

<sup>17</sup> For a list of dozens of such statutes, see Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 SO. CAL. L. REV. 425, 495-98 (2007). For discussion of terrorism defendants prosecuted under these provisions, see Zabel & Benjamin, *supra* note 1, at 39-42 (discussing §§ 2332, 2332a, and 2332b prosecutions).

<sup>18</sup> 18 U.S.C. § 2332(d).

<sup>19</sup> 18 U.S.C. § 2332a. The reference to “WMD” in the language of the statute is misleading to laypersons. The statute defines weapons of mass destruction to include “destructive devices” as defined in 18 U.S.C § 921. That statute includes bombs, grenades, rockets, missiles, mines, and any projectile-firing weapon with a bore greater than ½ inch. See 18 U.S.C. § 921(a)(4). It also is worth noting that a number of federal crimes can be tried on an extraterritorial basis when they occur within the U.S. government’s “special aircraft jurisdiction” or “special maritime and territorial jurisdiction.”

<sup>20</sup> 18 U.S.C. § 2441.

<sup>21</sup> 18 U.S.C. § 1116.

<sup>22</sup> The Torture Act provides a limited exception. That statute – 18 U.S.C. § 2340A – provides universal jurisdiction to prosecute those who commit or attempt torture, regardless of the citizenships involved, so long as the person can be found in the United States.

<sup>23</sup> *Ex post facto* considerations would preclude a solution in which we simply enact new, more capacious criminal laws, though we certainly might want to enact such laws in that situation in order to make it possible over time to move away from non-criminal measures.

<sup>24</sup> See 18 U.S.C. § 1001(a) (prohibiting efforts to conceal material facts).

<sup>25</sup> See, e.g., 18 U.S.C. § 1623 (prohibiting false statements to grand jury); 18 U.S.C. § 1503 (criminalizing efforts to influence grand jury proceedings through corruption, threats, or intimidation).

<sup>26</sup> Cf. *United States v. Benkahla*, \_\_\_ F.3d \_\_\_, 2008 WL 2486741 (4<sup>th</sup> Cir. June 23, 2008) (affirming conviction of terrorism-suspect for making false statements to FBI investigators and to two grand juries and for obstruction justice, and affirming application of the terrorism-sentencing enhancement).

<sup>27</sup> 18 U.S.C. § 2339B.

<sup>28</sup> 18 U.S.C. § 2339A(b) (*italics added*) (incorporated by reference in 18 U.S.C. § 2339B(g)(4)).

<sup>29</sup> The Supreme Court in 1953 approved the criminalization of associational status, subject to a constitutional requirement that the government prove that the defendant intended to further the unlawful ends of an organization and that the defendant’s membership was active rather than merely nominal. See *Scales v. United States*, 367 U.S. 203, 226-27 (1961).

<sup>30</sup> Insofar as groups such as Al Qaeda eschew formal membership structures, this capacity proves all the more important.

<sup>31</sup> See 50 U.S.C. § 1702.

<sup>32</sup> 50 U.S.C. § 1705. *But see* *Al Haramain Islamic Foundation, Inc. v. Dep’t of Treasury*, \_\_\_ F. Supp.2d \_\_\_ (D. Or. Nov. 6, 2008) (holding that the government denied due process to an entity subject to an IIEPA blocking order (by

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failing to provide adequate notice before the designation), and that the phrase “material support” as used in an executive order implementing IIEPA authority after the 9/11 attacks is unconstitutionally vague).

<sup>33</sup> For a discussion of the organizational complexities of the global jihad movement, see Chesney, *supra* note 15, at 437-46.

<sup>34</sup> See <http://www.state.gov/s/ct/rls/rpt/fto/2682.htm>.

<sup>35</sup> See E.O. 13224, available at <http://www.treasury.gov/offices/enforcement/ofac/programs/terror/terror.pdf>.

<sup>36</sup> 50 U.S.C. § 1702(a).

<sup>37</sup> See, e.g., *United States v. Hammoud*, \_\_\_ F.3d \_\_\_ (4<sup>th</sup> Cir. 200\_) (rejecting such arguments).

<sup>38</sup> See, e.g., *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122 (9<sup>th</sup> Cir. 2007), *pet. for r’hearing en banc pending* (2008).

<sup>39</sup> 18 U.S.C. § 2339A(b)(2), (3).

<sup>40</sup> See *Humanitarian Law Project*, *supra* (rejecting challenge to the terms “personnel” and “expert advice or assistance” (as it refers to “scientific” and “technical” knowledge), but accepting challenge to terms “training,” “service,” and “expert advice or assistance” (as it refers to “other specialized knowledge”).

<sup>41</sup> For a general overview of conspiracy law, see Neal K. Katyal, *Conspiracy Theory*, 112 *Yale L. J.* 1307 (2003).

<sup>42</sup> See Chesney, *supra* note \_\_\_, at 449-56.

<sup>43</sup> See Federal Rule of Evidence 801(d)(2)(E). Statements that would qualify under this rule almost certainly would overcome Confrontation Clause objections to admissibility on the ground that they are not “testimonial.”

<sup>44</sup> See 18 U.S.C. § 371.

<sup>45</sup> See, e.g., 18 U.S.C. § 956(a)(2)(A) (imposing maximum sentence of life for conspiracies to murder or kidnap individuals outside the United States); 18 U.S.C. § 2332b(c)(1)(F) (punishing conspiracies to commit violence transcending national boundaries with the same maximum sentence as would apply had the act been completed).

<sup>46</sup> Press Conference, Alberto Gonzales, U.S. Att’y Gen., and John Pistole, FBI Deputy Dir. (June 23, 2006), available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/23/AR2006062300942.html>.

<sup>47</sup> See Julianne Gage, 2<sup>nd</sup> *Mistrial in “Liberty City 7” Case*, WASH. POST, Apr. 17, 2008, at A2.

<sup>48</sup> Letter from Russell R. Killinger, Assistant United States Attorney, to Kenneth Swartz and Jeanne Baker (July 7, 2006) (attached to Defendant Hassoun’s Motion for Clarification of Court’s Ruling as to What Government Must Particularize Regarding the “Manner and Means” of the Conspiracy, *United States v. Hassoun*, 04-cr-60001 (S.D. Fla. July 25, 2006)).

<sup>49</sup> See Wittes, *supra* note 6, at 81.

<sup>50</sup> See 18 U.S.C. § 2339D. The “term ‘military-type training’ includes 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 . . .” 18 U.S.C. § 2339D(c)(1). Given the detail of this definition, it is unlikely that the “training” term in § 2339D will be struck down on vagueness grounds, as has occurred with the “training” term employed with respect to § 2339B.

<sup>51</sup> See 18 U.S.C. § 2339D(a).

<sup>52</sup> See *United States v. Maldonado*, No. 07-cr-124 (S.D. Tex.) (alleging receipt of training from Al Qaeda while in Mogadishu, Somalia). Maldonado pled guilty to the § 2339D charge in 2007, sparing the government the need to prove that he knew at the time that he was receiving training from Al Qaeda.

<sup>53</sup> 18 U.S.C. § 2339A.

<sup>54</sup> There are obstacles with § 2339A to bear in mind. First, because § 2339A employs the same definition of “material support or resources” as does § 2339B, § 2339A prosecutions may be vulnerable to vagueness challenges with respect to definitional terms such as “service.” Second, prior to an amendment in late 2001, § 2339A applied only to material support that is provided *inside* the United States, meaning that the statute may have little or no application to those who attended foreign training camps or otherwise became involved in terrorist plots prior to 9/11.

<sup>55</sup> Mark Arax, *The Agent Who Might Have Saved Hamid Hayat*, L.A. Times Mag., May 28, 2006; Rone Tempest, *In Lodi Terror Case, Intent Was the Clincher*, L.A. Times, May 1, 2006, at B1.

<sup>56</sup> First Superseding Indictment, *United States v. Hamid Hayat*, No. 05-cr-240 (E.D. Cal. 2005).

<sup>57</sup> Cf. *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4<sup>th</sup> Cir. 2008) (en banc) (confirming authority to detain a suspected Al Qaeda agent captured in the United States, but offering a variety of accounts for the scope of that authority).

<sup>58</sup> Combatant Status Review Tribunal Process § B (attached to memorandum from Gordon England, Sec of the U.S. Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at

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Guantánamo Bay Naval Base, Cuba (July 29, 2004), available at [www.defenselink.mil/news/Jul2004/d20040730comb.pdf](http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf).

<sup>59</sup> The question of whether persons may be detained based on affiliation with groups other than Al Qaeda or the Taliban as such is at issue in *Parhat v. Gates*, currently pending in the D.C. Circuit Court of Appeals.

<sup>60</sup> See 18 U.S.C. § 2332. If the defendant uses explosives in the act, he also faces prosecution under 18 U.S.C. § 2332a. Charges in that scenario may also lie under §2339A, insofar as the fighter's role is more in the nature of support.

<sup>61</sup> Cf. *United States v. Lindh*, 212 F.Supp.2d 541, 552-58 (E.D. Va. 2002) (rejecting the claim of combatant's privilege by a Taliban member).

<sup>62</sup> See 18 U.S.C. § 1116 (prohibiting such murders).

<sup>63</sup> Cf. 18 U.S.C. § 956(a) (prohibiting conspiracies in the United States to engage in violence overseas).

<sup>64</sup> On this point, it should be noted that it is not clear that courts will permit the government to employ an interpretation of the scope of military detention that extends to groups lacking a sufficient nexus to Al Qaeda or the Taliban. In *Parhat v. Gates*, for example, it appears that the D.C. Circuit Court of Appeals, exercising its CSRT review authority pursuant to the Military Commissions Act of 2006, may have called into question whether membership in the East Turkestan Islamic Movement (a Chinese Uighur organization with links to the global jihad movement) sufficed to justify detention. See *Parhat v. Gates*, No. 06-1397 (D.C. Cir. June 23, 2008) (requiring the government to release or transfer Parhat, or else hold a new CSRT consistent with the court's classified conclusions).

<sup>65</sup> In re Guantánamo Detainee Cases, 355 F.Supp.2d 443, 475 (D.D.C. 2005), *rev'd sub nom.* *Boumediene v. Bush*, 476 F.3d 981 (2007), *rev'd*, 128 S. Ct. 2229 (June 12, 2008).

<sup>66</sup> See 10 U.S.C. § 950v(b). Cf. Rome Statute of the International Criminal Court Art. 8(2)(a)(i) (willful killing of protected persons), Art. 8(2)(b)(i, ii) (attacks on civilians and civilian objects), Art. 8(2)(b)(vi) (denial of quarter).

<sup>67</sup> Cf. *United States v. Hamdan*, On Reconsideration Ruling on Motion to Dismiss for Lack of Jurisdiction 8-9 (Mil. Com. Dec. 19, 2007) (rejecting *ex post facto* claim on the ground that the detainee was not protected by Constitution's Ex Post Facto clause), available at p. 1290 of the document collection posted at <http://www.defenselink.mil/news/Dec2007/Hamdan%20VOL%20I%20December%205%20and%206%202007%20Session.pdf>. See also *id.* (July 2008) (affirming holding as to Ex Post Facto clause in the aftermath of the Supreme Court's *Boumediene* decision).

<sup>68</sup> See Zabel & Benjamin, *supra* note 1.

<sup>69</sup> See *id.* at 61-64.

<sup>70</sup> See *id.* at 61.

<sup>71</sup> See *id.* at 101-05.

<sup>72</sup> 467 U.S. 649 (1984).

<sup>73</sup> *Id.* at 103.

<sup>74</sup> See *id.* at 103-04 (citing 214 F.3d 111 (2d Cir. 2000)). Zabel and Benjamin also note that a similar question was presented in connection with the prosecution of John Walker Lindh (who had been interrogated in Afghanistan without being Mirandized for two days), but that Lindh pled guilty before the court ruled on the admissibility of those statements. See *id.* at 104-05.

<sup>75</sup> See *id.* at 111-13. But see Gregory S. McNeal, *Beyond Guantánamo: Obstacles and Options*, 103 NORTHWESTERN U. L. REV. COL. 29, 45-46 (2008) (discussing speedy trial concerns).

<sup>76</sup> See *id.* at 77-90.

<sup>77</sup> See *id.* at 81.

<sup>78</sup> See *id.* (citing *Mayfield v. United States*, 504 F. Supp.2d 1023, 1042-43 (D. Or. 2007)).

<sup>79</sup> See Pub. L. No. 96-456, 94 Stat. 2025, 2025-31 (1980) (codified at 18 U.S.C. app. 3).

<sup>80</sup> See Zabel & Benjamin, *supra* note 1, at 89. See also Schulhofer, *supra* note 5, at 64-67.

<sup>81</sup> 373 U.S. 83 (1963).

<sup>82</sup> 405 U.S. 150 (1972).

<sup>83</sup> See generally Jonathan M. Fredman, *Intelligence Agencies, Law Enforcement, and the Prosecution Team*, 16 YALE L. & POL. REV. 331 (1998) (surveying the issue).

<sup>84</sup> 514 U.S. 419, 437 (1995).

<sup>85</sup> See Zabel & Benjamin, *supra* note 1, at 96-98 (citing *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992) (adopting a "closely aligned" standard); *United States v. Pelullo*, 399 F.3d 197, 217-18 (3d Cir. 2005) (articulating a "prosecution team" test) (requiring disclosure as to the prosecution team and in connection with other

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agencies that “have cooperated intimately from the outset” of the criminal investigation or from which prosecutors had acquired evidence to be used in the case)).

<sup>86</sup> *Id.* at 98.

<sup>87</sup> *See id.* (citing *United States v. Padilla*, No. 04-cr-60001 (S.D. Fla. May 19, 2006) (Dkt. No. 346)). It may be worth noting the federal district judges conducting *habeas* review of military detention decisions have recently begun to grapple with this same issue. At the time of this writing, only one judge had issued a ruling on the subject, concluding that the government has an obligation to disclose exculpatory information that the Justice Department encounters in the course of preparing the government’s factual returns or in preparing for the *habeas* hearing itself. *See Boumediene v. Bush*, No. 04-1166 (D.D.C. Aug. 27, 2008) (case management order), at 1.E, available at [https://ecf.dcd.uscourts.gov/cgi-bin/show\\_public\\_doc?2004cv1166-142](https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2004cv1166-142). That ruling may well generate an appeal, inconsistent decisions by other judges facing the same issue, reconsideration by the judge in that particular case, or all of the above. *Cf.* Lyle Denniston, *Update: Bismullah Effect Spreading?*, SCOTUSBlog, <http://www.scotusblog.com/wp/update-bismullah-effect-spreading/> (Aug. 29, 2008) (observing that the judge who made the ruling may yet reconsider it in light of a contemporaneous motion by detainees in that case).

<sup>88</sup> *See* Fredman, *supra* note 86.

<sup>89</sup> That gap will exist in any event due to the fact that some intelligence information cannot be employed in court because of promises made to the sources of that information (such as a foreign intelligence service), or because of the impact of the Federal Rules of Evidence or the Confrontation Clause. *See infra*.

<sup>90</sup> Zabel and Benjamin do not directly address the problem of resistance from the intelligence community, though they do note that prosecutors in the *Moussaoui* litigation were obliged to notify the court after Moussaoui’s conviction and sentencing that they had learned, belatedly, that the CIA had made recordings of the interrogation of key witnesses, and that those recordings subsequently had been destroyed. *See supra* note 1. They also note that “in practice, it is not always easy to conduct a thorough *Brady* search in a large-scale investigation in which agencies such as the CIA or the Defense Department may have worked closely with prosecutors. Although these agencies have reportedly become more responsive to the needs of the justice system over time, their sometimes complicated recordkeeping systems and far-flung operations can present obstacles to an efficient *Brady* review.” *Id.*

<sup>91</sup> *See id.* at 107.

<sup>92</sup> *Id.*

<sup>93</sup> *See id.* at 107-08. *See also* Federal Rule of Evidence 901(a).

<sup>94</sup> Zabel & Benjamin, *supra* note 1 at 108 (citing developments in the Padilla prosecution).

<sup>95</sup> *See id.* at 108-09. Zabel and Benjamin note that a number of circuits have upheld such procedures against challenge under the Confrontation Clause, but that one—the Eighth Circuit in *United States v. Bordeaux*, 400 F.3d 548, 552-55 (2005)—has taken the contrary view. *See id.* at 109.

<sup>96</sup> *See* Federal Rule of Evidence 802.

<sup>97</sup> *See* Federal Rule of Evidence 804(b)(3).

<sup>98</sup> *See* Federal Rule of Evidence 801(d)(2)(E).

<sup>99</sup> *See* Federal Rule of Evidence 801(d)(2)(A).

<sup>100</sup> *See id.* at 109-10.

<sup>101</sup> *See* Federal Rules of Evidence 801(d)(2)(A)

<sup>102</sup> *See* *Williamson v. United States*, 512 U.S. 594 (1994).

<sup>103</sup> *Cf.* *Schulhofer*, *supra* note 5, at 69 (“No matter how exceptional the circumstances, it seems doubtful that constitutionally acceptable procedures could be devised for presenting classified evidence at a criminal trial without fully disclosing it to the defendant.”).

<sup>104</sup> *See* *Crawford v. Washington*, 541 U.S. 36 (2004); *Davis v. Washington*, 547 U.S. 813 (2006).

<sup>105</sup> *See* *Giles v. California*, 128 S. Ct. 2678 (2008). The Court held that exceptions exist only insofar as they would have been recognized at the time of the founding in the late 1780s. *See id.* In theory, then, the court eventually may recognize additional exceptions, though there is no particular reason to believe that any such exception would prove particularly relevant in the context of statements made to interrogators.

<sup>106</sup> This question likely will be resolved differently in the context of *habeas corpus* review of military detention decisions. Neither the Federal Rules of Evidence nor the Confrontation Clause necessarily are applicable in that context, and the only judge to rule on the topic as of the time of this writing has concluded that “[h]earsay evidence that is relevant and material to the lawfulness of petitioner’s detention may be admissible. The opposing party will have an opportunity to challenge the credibility and weight accorded any hearsay evidence.” *See* Boumediene Case Management Order, *supra* note 90, at II.D.



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<sup>107</sup> See *In re Winship*, 397 U.S. 358 (1970) (holding that the beyond-a-reasonable-doubt standard is required as a matter of due process).

<sup>108</sup> See 10 U.S.C. § 9491(c)(1) (added by Military Commissions Act of 2006).

<sup>109</sup> See, e.g., *In re Guantánamo Bay Detainee Litigation*, Misc. No. 08-442, 4 (D.D.C. Nov. 6, 2008) (case management order) (“The government bears the burden of proving by a preponderance of the evidence that the petitioner’s detention is lawful.”).

<sup>110</sup> Which is not to say that the government easily will prevail in justifying its use of the military detention power during *habeas* review. In the very first ruling on the merits in a Guantánamo *habeas* proceeding, Judge Leon determined that the government had failed to meet the preponderance standard (despite permissive evidentiary procedures enabling the government to make use of hearsay and to limit disclosure to cleared counsel and not the petitioners themselves) as to five of six petitioners. See *Boumediene*, 579 F.Supp.2d 191 (D.D.C. 2008).

<sup>111</sup> Of course, some of the limitations discussed above already have been addressed through changes such as the removal of jurisdictional limitations on § 2339A in 2001 and § 2339B in 2004, and in light of *ex post facto* considerations there simply is not anything that can be done to close the gaps that remain with respect to conduct that predates those changes. Not all limitations are subject to that qualification, however.

<sup>112</sup> The same can be said for amending § 2339D in the manner suggested above. In that regard, it is worth noting that §§ 2339A, 2339B, and 2339D all currently apply extraterritorially without respect to the citizenship of the defendant. Section 2339B(d)(1)(C) provides, for example, that jurisdiction exists whenever “an offenders is brought into or found in the United States, even if the required conduct for the offense occurs outside the United States.” See also 18 U.S.C. § 2339D(b)(3) (same).

<sup>113</sup> One of the most frequently charged conspiracy statutes is 18 U.S.C. § 956(a), which makes it a felony to conspire, while within the United States, to travel abroad to commit murder or other violent crimes. The statute was the basis for the core conspiracy charge in *Padilla*, for example, but by its terms could apply just as well to non-political violence.

<sup>114</sup> See *Zabel & Benjamin*, *supra* note 1, at 89.

<sup>115</sup> See *id.*

<sup>116</sup> Many other considerations bear on the question, such as post-conviction release. Although some of the violent crime statutes discussed above provide for life sentences or even the death penalty, the more exotic, prevention-oriented statutes such as § 2339B and IEEPA most certainly do not. Material support defendants, for example, typically receive ten-year sentences, while IEEPA defendants receive eight-year sentences. See *Chesney*, *supra* note 1. Even Jose Padilla, convicted of a violent-crime conspiracy, received only 17 years and four months. And though it is tempting to treat Padilla’s sentence as exceptional because the judge clearly acted in part out of concern for his experience being held as a military detainee for several years, this may actually be a scenario that recurs often in the most important cases. In any event, the important point is that a criminal conviction does not produce a sentence designed to be coextensive with the period during which the defendant may remain dangerous in the future, even if such considerations do enter into the sentencing analysis to some degree. As a result, a criminal sentence may run much shorter—or much longer—than it would were harm-prevention the only consideration. Evaluations of the adequacy of criminal prosecution accordingly should address not just the substantive and procedural rules relating to the baseline determination of guilt, but also the magnitude of the sentences likely to be produced.

<sup>117</sup> See *Waxman*, *supra* note 2.