Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182

Research Paper: Terrorism and Criminal Prosecutions in the United States

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I. Introduction

I have been asked by the Commission to summarize the manner in which the federal criminal justice system in the United States deals with the problem of terrorism, with an emphasis on matters that might provide a useful comparative perspective on issues within the scope of the Commission's terms of reference. For present purposes, those issues include:

- substantive criminal laws associated with terrorism, with a particular focus on those that contribute to the goal of suppressing support for terrorism (including financial support); and

- procedural issues raised by terrorism prosecutions, including the rules governing the evidentiary use of intelligence information.[2]

II. Substantive Criminal Law

In this section I will discuss recent trends and developments in U.S. substantive criminal law relating to terrorism. I begin by noting the post-9/11 decision to make the prevention of future terrorist attacks a strategic priority for the Department of Justice (and hence for federal prosecutors and the Federal Bureau of Investigation). I then describe the various methods by which prosecutors have implemented that priority. These methods range from relatively traditional prosecutions of defendants linked to particular acts of violence, to the uncharged detention of potential terrorists on the ground that they may have information material to an ongoing grand jury investigation, to the criminalization of terrorism finance and other forms of terrorism support. Because terrorism-support

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2 Since the fall of 2001, the U.S. has elected to categorize at least some acts of terrorism as rising to the level of armed hostilities, and on that basis has at times employed military modes of response in lieu of a domestic criminal justice approach. Nonetheless, the U.S. government has continued to rely on criminal prosecution in at least some cases involving alleged terrorists or their supporters, even where the defendant may be linked to al Qaeda. As a result, both the substantive and procedural aspects of criminal law relating to terrorism have evolved considerably in recent years despite the emphasis the U.S. has also placed on the military model. For a discussion of the nature and scope of the post-9/11 Congressional authorization for the use of military force to prevent terrorism, see Curtis A. Bradley and Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harvard Law Review 2047 (2005).

crimes are of particular relevance to the Commission's terms of reference, I follow the general overview with a section providing extensive data on charging decisions and case outcomes in terrorism-support prosecutions in the years since the 9/11 attacks. I then conclude with a discussion of the limits of the current framework for prosecuting terrorism supporters.

A. The Prevention Paradigm

Terrorism prevention has been a significant goal of federal criminal prosecution in the U.S. since well before the 9/11 attacks, but it is clear that in the aftermath of those attacks prevention was elevated to the highest possible priority. Speaking just one week after the attacks, Attorney General John Ashcroft declared that "[w]e must all recognize that our mission has changed" and that the Justice Department would have to pursue a more "preventive approach to doing business in the U.S. Attorney's Offices together with the FBI than, perhaps, has been the case in the past."[3] In similar fashion, the Justice Department's Performance and Accountability Report for Fiscal Year 2004 stated that its "foremost focus is protecting the homeland from future terrorist attacks,"[4] and one federal prosecutor has observed that "[i]n the post-9/11 context . . . law enforcement has been given a mission by the president and the attorney general to prevent deadly acts before they occur. That is the new paradigm for law enforcement."[5]

More recent policy statements by senior Justice Department officials have reinforced this perspective. Speaking in May 2006, for example, Deputy Attorney General Paul McNulty explained that "we [are] committed to a new strategy of prevention. The 9/11 attacks shifted the law enforcement paradigm from one of predominantly reaction to one of proactive prevention."[6] Under this paradigm, the Justice Department does not "wait for an attack or an imminent threat of attack to investigate or prosecute," but instead does "everything in its power to identify risks to our Nation's security at the earliest stage possible and to respond with forward-leaning – preventative – prosecutions."[7] Attorney General Alberto Gonzales

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3 Attorney General John Ashcroft, Press Briefing (September 18, 2001), *available at* http://www.usdoj.gov/archive/ag/speeches/2001/0918pressbriefing.htm.
4 Office of the Attorney General, Fiscal Year 2004 Performance and Accountability Report.
5 Tempest, R., "In Lodi Terror Case, Intent Was the Clincher," Los Angeles Times (May 1, 2006), at B1.
6 Dep. Atty. Gen. Paul McNulty, Prepared Remarks to the American Enterprise Institute (May 24, 2006), *available at* http://justice.gov/dag/speech/2006/dag_speech_060524.html.
7 *Id.*

echoed this point in August 2006, adding that the decision of when to intervene "must be made on a case-by-case basis by career professionals using their best judgment – keeping in mind that we need to protect sensitive intelligence sources and methods and sometimes rely upon foreign evidence in making a case."[8]

B. A Review of Post-9/11 Prevention Strategies

In practical terms, the Justice Department's emphasis on prevention has resulted in the adoption of a multi-tiered approach that blends both targeted and untargeted prevention strategies.

1. Conventional Targeted Prevention

The first such tier, which I will refer to as "conventional targeted prevention," is the most familiar. Under this heading, alleged terrorists are prosecuted on grounds directly related to particular violent acts (whether completed or merely anticipated). Such prosecutions have long been the bread-and-butter of federal criminal law enforcement related to terrorism, with examples including *United States v. Salemeh*, 152 F.3d 88 (2d Cir. 1988) (affirming convictions in connection with 1993 bombing of the World Trade Center); *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1989) (affirming convictions in connection with the 1993 World Trade Center bombing and a variety of other plots); *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998) (affirming conviction in connection with the 1995 Oklahoma City bombing). This approach has continued to be significant since 9/11, with prominent examples – all resulting in convictions – including the prosecution of Richard Reid in connection with his attempt to destroy a transatlantic flight using a "shoe bomb," *United States v. Reid*, 369 F.3d 619 (1st Cir. 2004); Zacarias Moussoui for his role in connection with the 9/11 attacks themselves, *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004); Gale Nettles for his involvement in a plot to blow up a federal courthouse in Chicago, *United States v. Nettles*, No. 06-1304 (7th Cir. Feb. 12, 2007); and Shahawar Martin Siraj and James Elshafay for their plan to attack a subway station in New York City, *United States v. Siraj*, No. 05-cr-104 (E.D.N.Y. Jan. 4, 2007).

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

2. Untargeted Prevention

Considerable efforts have been made since the 9/11 attacks to improve the capacity of the Federal Bureau of Investigation to carry out its current role as the chief domestic intelligence agency in the U.S., as well as to improve the sharing of intelligence information among the FBI, the Department of Homeland Security, and other government agencies composing the Intelligence Community.[9] According to recent Congressional testimony from John S. Pistole, the FBI's Deputy Director, these efforts have produced considerable changes, including: the integration of the FBI's national security-related programs (including intelligence, counterintelligence, counterterrorism, and weapons of mass destruction) under a single branch (the "National Security Branch"); the creation of "Field Intelligence Groups" in each of the FBI's 56 field offices; a shift from generating intelligence merely as a by-product of case investigations to a focus on needs-driven collection priorities; and new human-resource management policies designed to increase the prestige and attractiveness of intelligence-focused career paths.[10] The creation of the Office of the Director of National Intelligence (with responsibility for management of the entire Intelligence Community) and intelligence-fusion centers such as the National Counterterrorism Center also should be noted in this regard, as should the provisions in the USA PATRIOT Act that clarify the capacity of intelligence and criminal investigators to share information. These efforts have met with considerable skepticism in some quarters,[11] but it does at least appear that the flow of domestic intelligence information has improved since the pre-9/11 era.

Notwithstanding these improvements, however, the government can never be certain that it is aware of—and, hence, able to target—all terrorist threats. Accordingly, the Justice Department continues to employ "untargeted" prevention strategies in addition to pursuing prevention through prosecutions of suspected terrorists based on their completed or anticipated conduct.

The most fundamental form of untargeted prevention, of course, involves passive-defense and target-hardening measures such as the installation

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9 *See, e.g.,* The Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. 108-458, *available at* www.nctc.gov/docs/pl108_458.pdf; U.S. Senate Select Committee on Intelligence, "Open Hearing: Intelligence Reform - - FBI and Homeland Security," Jan. 25, 2007, *prepared remarks available at* http://intelligence.senate.gov/hearings.cfm?hearingId=2480.

10 *See* Statement of John S. Pistole, "Open Hearing," *supra*.

11 *See, e.g.,* Richard A. Posner, Uncertain Shield: The U.S. Intelligence System in the Throes of Reform (2006)

of surveillance and access-restriction equipment at likely targets.[12] But untargeted prevention can be carried out through prosecution as well, and prosecution-oriented methods of untargeted prevention have been particularly significant in the U.S. since 9/11.

a. Systematic Enforcement of Precursor Crimes

The first method of untargeted prevention employed by the Justice Department involves the allocation of investigative and prosecutorial resources in a manner designed to generate a system-wide increase in the enforcement of certain laws. In particular, this approach seeks increased enforcement of laws governing conduct that may be significant to the preparatory activities of potential terrorists, such as the laws relating to immigration fraud, identity fraud, and money laundering.

Such efforts may advance the goal of prevention in several ways. First, the increased difficulty of engaging in necessary precursor conduct without detection or arrest may delay or even render unworkable a particular plot. Second, systematically-increased enforcement of precursor crimes may generate information that in turn can be used to engage in targeted prevention. Third, this approach may result in the unwitting arrest and incapacitation of potential terrorists.

b. Material Support Prosecutions

The second method of untargeted prevention involves enforcement of 18 U.S.C. § 2339B, a federal statute enacted in 1996 which makes it a felony to provide "material support or resources" to any entity that has been formally designated as a "foreign terrorist organization" ("FTO") by the Secretary of State. For purposes of this statute, "material support or resources" is defined to include a vast array of services and items, to wit:

> "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,

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12 *See* Philip B. Heymann, Terrorism, Freedom, and Security: Winning without War (Cambridge, MA: The MIT Press 2003).

> weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials".[13]

Violation of § 2339B can result in a sentence of up to 15 years in most instances; in the event that prosecutors can demonstrate that the support resulted in a death, however, the maximum sentence rises to life.

Significantly, § 2339B on its face does not actually require the government to prove that a defendant intended to facilitate any unlawful conduct by providing such support, let alone that the support resulted in any particular harm. Rather, the statute requires only that the defendant act "knowingly." Courts have debated the proper interpretation of this term, but all seem to agree that it at least requires proof that the defendant knew the actual identity of the recipient of the support (thus protecting from liability a person who provides donations to a charity without knowledge that the money would in fact inure to the benefit of an FTO) and that the defendant knew either that the recipient had been designated as an FTO or at least that the recipient had engaged in conduct that would warrant such a designation.[14] In short, § 2339B is designed to impose a form of strict criminal liability (in the sense that the defendant's particular intentions in providing the support are not relevant in any way) on those who provide resources or assistance to designated groups, thus making the statute analogous to an embargo provision.

In that respect, the impact of § 2339B is similar to that associated with the sanctions that the President is authorized to impose under the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701 *et seq.* IEEPA is a 1970s-era statute that delegates embargo and asset-freeze authority to the President upon the declaration of a national emergency involving threats to U.S. national security, U.S. foreign policy, or the U.S. economy. Presidents since 1995 have used IEEPA authority to impose such penalties on foreign entities and individuals associated

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13 Section 2339B incorporates by reference the definition of "material support or resources" contained in 18 U.S.C. § 2339A(b)(1), a statute that I discuss in more detail in the text that follows.

14 A few trial courts have gone further, insisting that the statute be construed to require proof that the defendant intended to facilitate unlawful conduct. *See, e.g.,* United States v. al-Arian, 329 F. Supp.2d 1294 (M.D. Fla. 2004) (construing § 2339B to require proof that defendant specifically intended to facilitate unlawful conduct). For the contrary view, see Humanitarian Law Project v. Gonzales, 380 F. Supp.2d 1134 (C.D. Cal. 2005) (rejecting *al-Arian*).

with terrorism.[15] Under 50 U.S.C. § 1705, willful[16] violation of an IEEPA order, including most forms of economic exchange or service,[17] subjects the violator to a potential sentence of up to 20 years' imprisonment.

The combination of "material support" prosecutions under § 2339B and IEEPA prosecutions under § 1705 serves the goal of untargeted prevention by reducing the capacity of foreign entities and individuals associated with terrorism to draw resources from the U.S. In theory, this limits (at least marginally) the capacity of such entities to cause harm even without any understanding on the part of the U.S. government as to the individuals or targets that might be involved in a future attack. Thus the defendant in a paradigmatic material support or services case is not actually someone whom the government views as potentially dangerous in their own right, but rather someone whose conduct enhances the capacity of others to cause harm. As I will discuss in more detail below, however, the support laws since 9/11 also have come to be used as tools to pursue the incarceration of persons who may be personally dangerous.

Prior to the 9/11 attacks, prosecutions under § 2339B and § 1705 were relatively rare.[18] Since 9/11, however, they have become commonplace. In the pages that follow, I will provide data regarding the frequency with which such charges have been brought, as well as the pattern of outcomes in such cases.

3. Unconventional Targeted Prevention

The third tier of the Justice Department's prevention strategy, like the first one, focuses on particular individuals thought to be potentially

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15 The first such order was issued by President Clinton in 1995 in connection with threats to the Middle East Peace Process, and included HAMAS, Palestinian Islamic Jihad, and Hezbollah among its designations. *See* Exec. Order No. 12,947 (Jan. 23, 1995).

16 The use of the "willful" standard in § 1705 arguably contrasts with the *mens rea* required by § 2339B (which premises liability on mere knowledge that the recipient group has been designated or engages in the type of conduct that might warrant a designation). If "willful" is construed as requiring only that the defendant purposefully engaged in the "support" conduct at issue, then the scope of liability appears equally strict as between the two statutory regimes. If instead "willful" requires proof of the defendant's specific awareness of the IEEPA restraint, then § 1705 arguably would be somewhat narrower than § 2339B. So far as I know, however, no court has considered or adopted the narrower construction.

17 A handful of exceptions—most notably for the exchange of personal communications not involving the transfer of any thing of value—are described in 50 U.S.C. § 1702(b).

18 Section 2339B, for example, appears to have been charged in just four cases during the five year period following its enactment in 1996 (prior to 9/11). *See* Robert M. Chesney, *The Sleeper Scenario: Terrorism Support Laws and the Demands of Prevention*, 42 Harvard Journal on Legislation 1, 19 (2005).

dangerous in their own right, and in that sense can be described as "targeted." But this tier differs from the first in that it involves strategies pursuant to which the government seeks to incapacitate the potentially dangerous person on grounds that may have little or no relationship to terrorism concerns.

a. Preventive Charging in General

Preventive charging – also described by some as pretextual charging or the "Al Capone" method – is a strategy in which prosecutors pursue whatever criminal charge happens to be available to incapacitate a suspected terrorist, however unrelated to terrorism the charge may be.[19] Put another way, prosecutors in this context are motivated to target an individual primarily if not entirely out of concerns relating to terrorism, but base the prosecution on loosely-related or even entirely unrelated grounds – *e.g.*, obstruction of justice; making false statements to federal investigators; credit card fraud; identity theft – that may just happen to be available as to the suspect (by the same token, enforcement of the immigration laws by the Department of Homeland Security may in some instances be motivated by an underlying concern relating to terrorism, even where the official grounds for removing an alien are not so related).

Whether carried out via criminal prosecution or immigration enforcement, the prevalence and impact of the preventive charging strategy is inherently difficult to assess. By definition, it is not possible in most instances for outsiders to determine that a particular non-terrorism prosecution or immigration proceeding was in fact motivated by terrorism concerns. Even if such a linkage should come to light through leaks or other informal disclosures, moreover, nothing in the resulting prosecution or proceeding would actually test the linkage. Accordingly, it is not possible to quantify this practice, nor to determine its effectiveness. The most we can say in most instances is that, according to statements of Justice Department officials, the preventive charging method does play a significant role in the new prevention paradigm.[20]

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19 *See* Dan Richman & William J. Stuntz, *Al Capone's Revenge, An Essay on the Political Economy of Pretextual Prosecution*, 105 Columbia Law Review 583 (2005).

20 *See, e.g.,* Assistant Attorney General Viet Dinh, *Life After 9/11: Issues Affecting the Courts and the Nation*, 51 University of Kansas Law Review 219, 224 (2003) ("If we suspect you of terrorism, beware. We will stick on you like white on rice. And if you do anything wrong, we will arrest you and remove you from the streets.").

Notwithstanding the difficulties of measurement and assessment, it is possible to understand the reasons why prosecutors might choose to pursue a preventive charge. In some circumstances—perhaps quite frequently—the government's information linking the defendant to terrorism may be intelligence information that cannot be introduced in court because (i) it is not in a form that would be admissible under the Federal Rules of Evidence (*e.g.,* some hearsay scenarios), (ii) revelation of the information would expose (or run an undue risk of exposing) a sensitive source or method of intelligence collection (human, technical, or otherwise), or (iii) the information was provided by a cooperating foreign intelligence service that will not consent to prosecutorial use. In such cases, prosecutors may be unable to obtain a conviction (or perhaps even an indictment) on terrorism-related charges, and yet be sufficiently concerned about the danger posed by the individual to bring unrelated charges for which more substantial and admissible evidence happens to be available.

b. Preventive Charging Based on Terrorism Support

Having said that, there is one context in which the preventive charging approach to terrorism prevention can more readily be identified: terrorism-support prosecutions in which the allegations imply that the government views the defendant not just as a facilitator of terrorism, but perhaps as a potential terrorist in his or her own right. As noted above, § 2339B (the material support statute) and § 1705 (the IEEPA statute) provide ample grounds for prosecution of those who provide aid or assistance to designated foreign terrorist organizations and individuals. In the nature of things, a person whom the government suspects may be personally involved in terrorism may also have committed acts that implicate these anti-support statutes. Thus, even if the government has insufficient evidence to prosecute the suspect for a past act of violence or, more to the point, for an anticipated act of violence, it may yet have the option of pursuing a support charge in the spirit of preventive charging.

How does one distinguish a run-of-the-mill support prosecution from one that may have been motivated in part or entirely by a desire to incapacitate a potentially-dangerous defendant? One possibility – by no means foolproof – is to examine the allegations in terrorism-support cases to identify the subset in which the government claims that the defendant received military-style training or otherwise has past experience with the use of weapons, explosives, and the like. As described in more detail in

Part II.C., below, there are several such cases, and they have resulted in higher median sentences than have what might be described as “pure” support prosecutions. Before turning to that discussion, however, it is necessary to highlight one final preventive strategy.

c. Material Witness Detention

In some circumstances, the government will lack even the preventive charging option. Where the government suspects that an individual is personally dangerous (or otherwise linked to terrorism) but cannot plausibly indict the person, what options remain (aside from the polar alternatives of military detention or taking no action beyond the traditional approach of maintaining surveillance)? One somewhat controversial solution to this dilemma involves the “material witness” detention statute, 18 U.S.C. § 3144.

Section 3144 provides that a warrant may be issued for the arrest and detention of a person upon proof by affidavit that the person’s testimony is “material in a criminal proceeding” and that “it may become impracticable to secure the presence of the person by subpoena.” The statute adds that “[r]elease of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.” To enforce these limitations, Federal Rule of Criminal Procedure 46(h) authorizes federal district judges to supervise the detention of material witnesses within their district and requires the government to make biweekly reports to the supervising judge justifying the continued detention of the individual.

Section 3144 thus aims to preserve testimony, not to provide a mechanism for incapacitating potentially-dangerous persons without charge. Nonetheless, it quickly became apparent after 9/11 that some persons whom the government wished to incapacitate could plausibly be described as potential witnesses who were likely not to honor a subpoena. This suggested that § 3144 could be used pretextually, or at least in dual-fashion, to achieve incapacitation while also preserving evidence. Significantly, moreover, the government interpreted § 3144 as applying not just in connection with pending criminal trials, but also with grand jury investigations. In the U.S. federal criminal justice system, grand juries are bodies of between 16 and 23 citizens whose responsibility is to review the government’s evidence to determine whether an indictment should issue. They sit for an extended period (up to 18 months, with

the possibility of a court-ordered extension), and though they typically perform their screening function for a large number of potential cases during their term, they can and do engage in protracted inquiries into particular cases.

Consider, in light of all this, the impact of § 3144 with respect to an al Qaeda suspect. The chances are excellent that at least one al Qaeda-related grand jury investigation will be underway at any given time, and prosecutors thus could plausibly detain the suspect under § 3144 in connection with that investigation. In practical terms, the government thereby achieves temporary incapacitation via the testimony-preservation mechanism.

Precise figures regarding such pretextual uses of § 3144 are not available, though Human Rights Watch and the American Civil Liberties Union estimated in 2005 that it had been used in this manner with respect to at least 70 suspects during the post-9/11 period.[21] Public awareness of this use of the statute also increased in connection with the mistaken arrest and detention of Brandon Mayfield, a Muslim-American who was incorrectly identified as a suspect in connection with the Madrid train bombing and detained pursuant to § 3144.[22] In any event, the Justice Department has been candid about its use of the statute to achieve prevention, with then-Attorney General Ashcroft stating shortly after the 9/11 attacks that "[a]ggressive detention of . . . material witnesses is vital to preventing, disrupting, or delaying new attacks."[23]

C. Charging Decisions and Case Outcomes in Terrorism Support Prosecutions

The aspects of the Justice Department's multi-tiered strategy that seem to bear most directly on the Commission's terms of reference are those involving terrorism-support crimes. Accordingly, a more thorough exploration of the actual application of the support laws since 9/11 is in order.

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21 Human Rights Watch and the American Civil Liberties Union, Witness to Abuse: Human Rights Abuses under the Material Witness Law Since September 11 (2005), *available at* http://hrw.org/reports/2005/us0605/index.htm.

22 *See*, *e.g.*, Office of the Inspector General, United States Department of Justice, "A Review of the FBI's Handling of the Brandon Mayfield Case" 260-62 (March 2006), *available at* http://www.usdoj.gov/oig/special/s0601/PDF_list.htm.

23 Attorney General John Ashcroft, Press Briefing (October 31, 2005), *available at* http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10_31.htm.

I have identified all prosecutions initiated and made public during the period from September 2001 through July 2007 in which there is at least one charge under either § 2339B or § 1705 (for the § 1705 cases, I have included only those prosecutions involving terrorism-specific sanctions, not those pertaining to other foreign policy issues such as embargoes of Iraq or Libya).[24] To accomplish this, I reviewed a wide variety of databases and media sources to identify possible instances of support prosecutions. For each candidate case, I then used the PACER system (an online docket-access system operated by the Administrative Office of the U.S. Courts) to review docket reports, indictments, and other documents in order to confirm the presence, nature, and current disposition of the support charge(s). The full results are summarized in detail in appendices A and B at the end of this report.

1. Section 1705 Prosecutions: A Closer Look

Consider first the results in cases involving charges under § 1705. The data show that federal prosecutors brought § 1705 charges in terrorism-related cases against 44 individual defendants during the period from September 2001 through July 2007. Including conspiracies and attempts as well as counts involving direct violations of the support laws, these 44 defendants face a total of 220 separate § 1705-related charges.[25] At the time of this writing, 87 of these individual counts have proceeded to disposition, with 54 of these resulting in conviction (41 by jury conviction, 1 by bench trial conviction, and 12 by guilty plea). Twenty of the 33 remaining counts were dismissed in connection with guilty pleas on other charges, while 11 resulted in acquittal by jury, one resulted in a bench trial acquittal, and one resulted in dismissal on the government's own motion after the death of the defendant.

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24 Because IEEPA regulations enforced by § 1705's criminal penalties can include matters unrelated to terrorism, it was necessary to exclude from the data set some § 1705 prosecutions initiated during this period. The same problem does not arise, however, with respect to § 2339B.

25 It should be noted that a full 172 of these counts arise in just a pair of related cases in the Dallas area involving approximately a dozen defendants linked to the fundraising activities of HAMAS within the United States. *See* United States v. Holy Land Foundation, No.04-cr-240 (N.D. Tex.) (superseding indictment); United States v. Elashi, No. 02-cr-52 (N.D. Tex.) (superseding indictment).

Mean and median sentencing data is available for 41 of the § 1705 counts that have resulted in conviction. Table 1 illustrates:

Table 1
Sentencing Data for IEEPA Convictions on a Per-Count Basis, by Type of Offense and Type of Conviction (9/01-7/07)

	Mean	Median
Direct Violation Jury Trial (n=24)	86.67	**84**
Direct Violation Guilty Plea (n=3)	84	**84**
Section 371 Conspiracy[26] Jury Trial (n=3)	60	**60**
Section 371 Conspiracy Guilty Plea (n=1)	57	**57**
OFAC Conspiracy [27] Jury Trial (n=1)	120	**120**
OFAC Conspiracy Guilty Plea (n=4)	81	**90**
OFAC Conspiracy Bench Trial (n=1)	120	**120**
Attempt Jury Trial (n=2)	120	**120**
Attempt Guilty Plea (n=2)	**34.25**	**34.25**

Most of the § 1705 charges described above fall under the heading of "pure" support in the sense that the indictments do not suggest that the government views the defendant as a personal threat to commit a violent act. Military-training allegations or their equivalent appear with respect to 15 of the 44 defendants, however, and for the reasons discussed above it may be useful to distinguish such "training" cases from pure support prosecutions.

The "military training" defendants in § 1705 cases are identified in Table 2, below, along with the identity of the foreign terrorist organization involved in each case, the nature of the § 1705 charge(s) against each such defendant, and the disposition of those charges as of July 2007.

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26 Section 1705 on its face does not provide for conspiracy liability, but prosecutors may charge a conspiracy to violate § 1705 nonetheless by invoking 18 U.S.C. § 371, the general purpose federal conspiracy statute. The maximum sentence under § 371, however, is five years.

27 Prosecutors in some cases have charged a § 1705 conspiracy by referring to regulations issued by the Treasury Department's Office of Foreign Assets Control (OFAC), rather than by referring to § 371. In such cases, prosecutors have obtained sentences in excess of the five-year ceiling imposed by § 371.

Table 2 – Section 1705 Defendants Alleged to Have Sought or Received Military-Style Training or Experience

Defendant	Charge	Recipient	Disposition	Sentence
John Walker Lindh	1705	Al-Qaeda	Dismissed as part of plea	n/a
	1705 (Conspiracy, via 31 CFR 595.205)	Al-Qaeda	Dismissed as part of plea	n/a
	1705	Taliban	Guilty Plea	120 months
	1705 (Conspiracy, via 31 CFR 595.205)	Taliban	Dismissed as part of plea	n/a
Earnest James Ujaama	1705 (Conspiracy, via 31 CFR 545.206(b))	Taliban	Guilty Plea	24 months
Jeffrey Leon Battle	1705 (Conspiracy, via 31 CFR 595.205)	Al-Qaeda	Dismissed as part of plea	n/a
Patrice Lumumba Ford	1705 (Conspiracy, via 31 CFR 595.205)	Al-Qaeda	Dismissed as part of plea	n/a
Ahmed Ibrahim Bilal	1705 (Conspiracy, via 31 CFR 595.205)	Al-Qaeda	Guilty Plea	120 months
Muhammad Ibrahim Bilal	1705 (Conspiracy, via 31 CFR 595.205)	Al-Qaeda	Guilty Plea	96 months
Habis Abdulla Al Saoub	1705 (Conspiracy, via 31 CFR 595.205)	Al-Qaeda	Dismissed on gov't motion (killed in Pakistan in 2003)	n/a
Maher Mofeid Hawash	1705 (Conspiracy, via 31 CFR 595.205)	Al-Qaeda	Guilty Plea	84 months
Faysal Galab	1705	Al-Qaeda Usama bin Laden	Guilty Plea	84 months
Randall Todd Royer	1705 (Conspiracy, via CFR)	Taliban	Dismissed as part of plea	n/a
Masoud Ahmad Khan	1705 (Conspiracy, via CFR)	Taliban	Convicted by bench trial	120 months
Sabri Benkhala	1705 (Conspiracy, via CFR)	Taliban	Acquitted by bench trial	n/a
Ahmed Omar Abu Ali	1705 (**2 counts**)	Al-Qaeda	Convicted by jury	120 months
Kobie Diallo Williams	1705 (Conspiracy, via 18 USC 371)	Taliban	Guilty Plea	Pending
Adnan Mirza	1705 (Conspiracy, via 18 USC 371)	Taliban	Pending	n/a

Perhaps not surprisingly, the subset of support prosecutions involving allegations of training focus exclusively on persons alleged to be involved with al Qaeda or the Taliban (with 9 of the 15 defendants alleged to have provided support to al Qaeda and 7 alleged to have provided support to the Taliban). In contrast, "pure" support prosecutions (*i.e.*, the remainder of support cases) involve a diverse array of groups in addition to al Qaeda

and the Taliban, with a particular emphasis on Palestinian entities such as Palestinian Islamic Jihad and HAMAS.

With respect to charge disposition, the government has had considerable success in the training cases under § 1705. Eighteen of the 19 individual counts in these cases have proceeded to disposition. Ten of the 18 have resulted in convictions (7 guilty pleas, 2 jury convictions, and 1 bench trial conviction), and 6 more were dismissed in connection with guilty pleas on other charges. One count was dismissed in connection with a bench trial, and one other was dismissed upon the death of the defendant. Of the ten counts that resulted in conviction, nine have proceeded to sentencing at this time. The median sentence in those cases is 120 months, and the mean is 98.67. Pure support cases under § 1705 have produced slightly shorter typical sentences. Thirty-two counts have proceeded from conviction to sentencing in those cases, with a median sentence of 80 months, and a mean of 79.8 months.

2. Section 2339B Prosecutions: A Closer Look

The results in § 2339B prosecutions over the past several years are comparable to those seen under § 1705, with the exceptions that this category is larger as a whole and that sentences under § 2339B tend to be longer.

The data show that federal prosecutors brought § 2339B charges against 108 individual defendants during the period from September 2001 through July 2007. Including conspiracies and attempts in addition to direct violations, these defendants face a total of 330 separate § 2339B counts.[28] At the time of this writing, 129 of these charges have proceeded to disposition, with 66 resulting in convictions (33 guilty by jury verdict and 33 guilty by plea agreement). Twenty-five other § 2339B counts have been dismissed in connection with pleas of guilty on other charges. Of the 38 other counts, six were dismissed on the defendant's motion, 31 resulted in acquittals, and one resulted in dismissal after the death of the defendant). Sentences are available for 54 of the 66 charges resulting in conviction thusfar. Table 3, below, illustrates the resulting median and mean sentences:

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28 As with the § 1705 data, a substantial percentage of the § 2339B counts (including most of the still-pending counts) stem from the ongoing Holy Land Foundation trial (involving allegations of financial support to HAMAS).

Table 3
Sentencing Data for §2339B Convictions on a Per-Count Basis, by Type of Offense and Type of Conviction (9/01-7/07)

	Mean	Median
Direct Violation Jury Trial (n=4)	165	**150**
Direct Violation Guilty Plea (n=10)	131.10	**120**
Conspiracy Jury Trial (n=9)	173.33	**180**
Conspiracy Guilty Plea (n=12)	82.83	**60.50**
Attempt Jury Trial (n=17)	180	**180**
Attempt Guilty Plea (n=2)	**118.50**	**118.50**

As was the case with the § 1705 data, the § 2339B cases can be divided into cases involving pure support and those involving allegations of military-style training or experience suggestive of personal dangerousness. Such allegations appear with respect to 31 of the 108 individual defendants. Including conspiracies and attempts as well as counts involving direct violations of § 2339B, these 31 defendants face a total of 56 separate § 2339B charges. At the time of this writing, 36 of these individual counts have proceeded to disposition, with 14 of these resulting in conviction (2 by jury conviction and 12 by guilty plea). Twenty of the 22 remaining counts were dismissed in connection with guilty pleas on other charges, while one of the remaining charges resulted in acquittal by bench trial and the other resulted in dismissal on the government's own motion after the death of the defendant. Table 4 illustrates.

Table 4
Section 2339B Defendants Alleged to Have Sought or Received Military-Style Training or Experience

Defendant	Charge	Recipient	Disposition	Sentence
John Walker Lindh	2339B	Al-Qaeda	Dismissed as part of plea	n/a
	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea	n/a
	2339B	Harakat ul-Mujahideen	Dismissed as part of plea	n/a
	2339B (Conspiracy)	Harakat ul-Mujahideen	Dismissed as part of plea	n/a
Earnest James Ujaama	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea	n/a
Jaber Elbaneh	2339B	Al-Qaeda	Pending (not in custody)	n/a
Jeffrey Leon Battle	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea	n/a
Patrice Lumumba Ford	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea	n/a
Ahmed Ibrahim Bilal	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea	n/a
Muhammad Ibrahim Bilal	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea	n/a
Habis Abdulla Al Saoub	2339B (Conspiracy)	Al-Qaeda	Dismissed on gov't motion (killed in Pakistan in 2003)	n/a
Maher Mofeid Hawash	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea	n/a

Defendent	Charge	Recipient	Disposition	Sentence
Yahya Goba	2339B	Al-Qaeda	Guilty Plea	120 months
	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea	n/a
	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea	n/a
Yasein Taher	2339B	Al-Qaeda	Guilty Plea	96 months
	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea	n/a
Faysal Galab	2339B	Al-Qaeda	Dismissed as part of plea	n/a
	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea	n/a
Mukhtar al-Bakri	2339B	Al-Qaeda	Guilty Plea	120 months
	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea	n/a
Sahim Alwan	2339B	Al-Qaeda	Guilty Plea	114 months
	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea	n/a
Cesar Lopez (aka Elkin Alberto Arroyav Ruiz)	2339B	AUC	Guilty Plea	180 months
Tomas Molina Caracas	2339B (Conspiracy)	FARC	Pending (not in custody)	n/a
	2339B (**5 counts**)	FARC	Pending (not in custody)	n/a
Iyman Faris	2339B	Al-Qaeda	Guilty Plea	180 months

Defendent	Charge	Recipient	Disposition	Sentence
	2339B (Conspiracy)	Al-Qaeda	Guilty Plea	60 months
Masoud Ahmad Khan	2339B (Conspiracy)	Al-Qaeda	Acquitted by bench trial	n/a
Mahmoud Youssef Kourani	2339B (Conspiracy)	Hezbollah	Guilty Plea	54 months
Mohammed Abdullah Warsame	2339B	Al-Qaeda	Pending	n/a
	2339B (Conspiracy)	Al-Qaeda	Pending	n/a
Nuradin Abdi	2339B (Conspiracy)	Al-Qaeda	Dismissed as part of plea to other charges	n/a
Ahmed Omar Abu Ali	2339B (Conspiracy)	Al-Qaeda	Convicted by jury	120 months
	2339B	Al-Qaeda	Convicted by jury	120 months
Tarik Ibn Osman Shah	2339B (Conspiracy)	Al-Qaeda	Guilty Plea	Pending
	2339B (Attempt)	Al-Qaeda	Guilty Plea	Pending
Mahmud Faruq Brent	2339B (Conspiracy)	Lashkar-e-Taiba	Guilty Plea	180 months
	2339B (Attempt)	Lashkar-e-Taiba	Dismissed as part of plea to Other Charges	n/a
Oussama Kassir	2339B (Attempt)	Al-Qaeda	Pending (not in custody)	n/a
	2339B (Attempt	Al-Qaeda	Pending (not in custody)	n/a
Defendent	**Charge**	**Recipient**	**Disposition**	**Sentence**

Defendent	Charge	Recipient	Disposition	Sentence
	2339B (Conspiracy)	Al-Qaeda	Pending (not in custody)	n/a
Defendent	**Charge**	**Recipient**	**Disposition**	**Sentence**
	2339B (Conspiracy)	Al-Qaeda	Pending (not in custody)	n/a
Haroon Rashid Aswat	2339B (Conspiracy)	Al-Qaeda	Pending (not in custody)	n/a
	2339B (Attempt)	Al-Qaeda	Pending (not in custody)	n/a
Syed Haris Ahmed	2339B (Conspiracy)	Lashkar-e-Tayyiba	Pending	n/a
	2339B (Attempt)	Lashkar-e-Tayyiba	Pending	n/a
Ehsanul Islam Sadequee	2339B (Conspiracy)	Lashkar-e-Tayyiba	Pending	n/a
	2339B (Attempt)	Lashkar-e-Tayyiba	Pending	n/a
Erick Wotulo	2339B (Conspiracy)	LTTE	Guilty Plea	Pending

Like the training defendants in the § 1705 data set, the § 2339B training defendants (some of whom are in both sets) primarily are alleged to have provided support to extremist groups associated with al Qaeda. There are exceptions to that rule, however, in light of the inclusion in the § 2339B data of a few defendants linked to entities such as FARC, AUC, and LTTE. In any event, the pure-support sub-category under § 2339B also parallels that under § 1705 in its inclusion of a broader base of designated groups (including militant Palestinian groups).

Of the fourteen counts under § 2339B resulting in convictions in training cases, twelve have proceeded to sentencing at this time. When direct violations of § 2339B are considered together with conspiracy convictions, both the median and mean sentences in training cases under § 2339B equal 120 months. When direct violations are considered standing alone, the mean is 128.25 months and the median is 120 months. When conspiracy violations are considered standing alone, the mean is 103.5 months and the median is 90 months.

In contrast to the 14 counts resulting in conviction in training cases, 42 counts have proceeded to conviction in pure-support cases, and each of these has proceeded to sentencing as well. When direct violations, conspiracies, and attempts are considered together, the median sentence is 180 months and the mean is 151.95 months. When these various forms of liability are distinguished, the median remains 180 months in each instance, but the mean varies in an interesting way: 157.5 months for direct violations, 125.88 months for conspiracies, and 173.53 months for attempts. Why the higher mean for attempts, as opposed to direct violations?

The answer lies in the manner in which those convictions were obtained. In brief, all but two of the attempt convictions resulted from jury verdicts rather than guilty pleas. It is well-established that pleading guilty rather than proceeding to trial can have sentencing benefits, and a broader look at the sentencing data tends to reinforce that view. The total set of § 2339B pure support convictions can be divided between 14 counts resulting in guilty pleas, and 28 resulting in jury verdicts. Every single jury verdict resulted in the maximum sentence of 180 months, regardless of whether the § 2339B charge at issue involved direct, conspiracy, or attempt liability. The guilty pleas, in contrast, varied considerably. Some produced 180 month sentences, but others resulted in sentences as low as 29 months. The median sentence for pure support counts resulting in a guilty plea is 64.5 months, while the mean is 95.86 months.

D. The Limits of the Terrorism-Support Criminal Law Framework

The data described above provide evidence for two propositions. First, they are consistent with the claim that the Justice Department has relied on the support statutes not just to reduce the resources available to terrorist groups but also to incapacitate persons whom the government suspects might pose a personal threat of participation in a violent act. Second, they suggest that Justice Department has been relatively successful in this strategy, at least insofar as conviction rates and sentence lengths are concerned, notwithstanding frequent assertions in the media suggesting the contrary.

All that said, the framework of laws facilitating criminal prosecution of terrorism-support has inherent limitations. As described above, § 2339B and § 1705 each depend on the existence of an underlying "designation" that has the effect of imposing an embargo on the designated group or individual. For § 2339B, the predicate designation is supplied by the Secretary of State through a formal bureaucratic process resulting in the designation of "foreign terrorist organizations," and for § 1705 the designation typically is supplied by the Treasury Department (acting in conjunction with other agencies and pursuant to authority delegated from the President) in a somewhat similar process that results in the placement of both foreign groups and individuals on one of several lists.

The first flaw, common to both processes, has to do with the lag between the designation process and either the emergence of new terrorist entities and individuals, or the renaming (or reorganization) of old ones. Simply put, bureaucratic processes cannot be expected to keep up with the pace of change with respect to the groups and individuals that are of most pressing concern from a counterterrorism perspective, despite the best of intentions and efforts. Because the provision of support to an entity is not criminalized until those processes run their course – and because criminalization cannot be made retroactive to past conduct – the support laws can never provide an entirely sufficient ground for suppressing the full range of conduct that may be at issue.

The second flaw is at least as significant. Though the IEEPA designation process enforced via § 1705 does permit the designation of specific individuals, the fact remains that the bulk of the work done by both § 2339B and § 1705 turns on the designation of particular organizations. This approach is consistent with traditional notions of the terrorist

"organization," a rubric that contemplates a relatively discrete and definable set of associations. That model may be a poor fit with current trends, however. The threat of terrorist violence to a growing extent emerges from loosely-defined networks of relatively like-minded individuals and groups sharing common ideological or theological commitments and drawing inspiration and advice from common sources (facilitated by the anonymity and ease provided by the Internet), but lacking relatively concrete institutional affiliations to one another. The more prevalent that model, the less relevance the support laws (being predicated on the identification and designation of discrete entities) will have.

In the U.S., the Justice Department appears to be responding to this prospect through increased reliance on inchoate crime concepts. In particular, the concept of criminal conspiracy has proven particularly useful in permitting preventive prosecution in circumstances that cannot clearly be linked to a designated foreign terrorist organization. In addition, prosecutors have also begun to make extensive use of a second "material support" statute, found in 18 U.S.C. § 2339A. Section 2339A, unlike § 2339B, does not require proof that the defendant rendered support to a designated entity; on the contrary, the identity of the recipient of the support is irrelevant. But § 2339A *does* require that prosecutors prove that the defendant knew or intended that his or her actions would facilitate the commission of one of several dozen violent crimes listed as predicates in that statute (in contrast to § 2339B, which does not require any such linkage). The upshot is that § 2339A charges are more difficult to prove (because of the subjective *mens rea* requirement, which is akin to what one might see with an aiding-and-abetting charge), but at least are available in connection with suspected plots that cannot be attributed to groups or individuals that have already been designated by the executive.[29]

III. Criminal Procedure and Evidentiary Considerations

In this section I discuss a variety of procedural and evidentiary issues that have arisen in terrorism-related cases in the U.S. in recent years, with a particular focus on the issues raised by the litigation use of intelligence information and other forms of classified or secret information. I begin

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29 For a thorough discussion of the rise of conspiracy and § 2339A liability in response to the "network" issue described above, see Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 Southern California Law Review 425 (2007).

with a discussion of the tension between the government's interest in preserving the secrecy of such protected information and the interests of a criminal defendant in being able to present a defense (and, of course, the government and society's interest in fair trial procedures). I then examine the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3 (1980), which is the primary statutory device for managing that tension in U.S. courts. After discussing the requirements, advantages, and limitations of CIPA, I then take up a series of related issues, including questions as to: (i) closing trials to the public; (ii) limiting disclosure of classified information to the defendant's counsel; (iii) the obligation of federal prosecutors to search intelligence agency sources for exculpatory information to be disclosed to the defendant; and (iv) the problems that arise when the defendant's right to compulsory process clashes with the government's interest in maintaining exclusive custody over detainees in military custody.

A. The Tension Between Secrecy and Fairness

The question of how sensitive, protected information can or should be used in connection with criminal prosecutions implicates several competing values and interests. The government, as custodian of the national security, has a compelling interest in preserving the secrecy of at least some information pertinent to that task (*e.g.,* weapon schematics, or information as to the sources or methods by which intelligence agencies covertly obtain intelligence). On the other hand, defendants in criminal prosecutions have a compelling interest in procedural and evidentiary rules that permit them to mount a proper defense, which in some cases may raise questions either as to their right to acquire protected information from the government or as to the government's right to proceed against them with the assistance of such information. At a more general level, society – and, hence, the government – has strong stakes in both the fairness (real *and* perceived) of the criminal justice system and the prevention and punishment of political violence. These tensions are not easily reconciled, but terrorism prosecutions frequently present them nonetheless.

1. The Defendant's (and Society's) Interest in Fair Process

The U.S. Constitution confers a number of procedural and evidentiary rights upon criminal defendants, in recognition of the need to ensure fair process when the state seeks to deprive individuals of their liberty (or,

with the most egregious offenses, of their lives). The Fifth Amendment, for example, provides that no one shall be "deprived of life, liberty, or property, without due process of law." That assurance has been interpreted to include, among other things, an obligation on the party of the government to disclose exculpatory evidence to the accused, and also a right on the part of the accused to a meaningful opportunity to present a complete defense. The Sixth Amendment confers several additional rights on the accused which are pertinent here, including (i) the right "to be confronted with the witnesses against him," (ii) the right "to have compulsory process for obtaining witnesses in his favor," and (iii) the right "to have the Assistance of Counsel for his defence."

2. The Government's (and Society's) Interest in Secrecy

The constitutional status of the government's countervailing interest in secrecy is less certain, but that interest is protected nonetheless.

American scholars have endlessly debated the question of whether there are constitutional grounds for shielding at least some amount of information held by the executive branch from disclosure in various contexts. Whatever the answer to that question may be – whether protection of sensitive information is a matter of constitutional right, statutory grace, or common law tradition – the fact remains that U.S. courts typically are reluctant to compel such disclosures, and even when considering the possibility of doing so will adopt a deferential stance that frequently results in non-disclosure.

This is most apparent in the context of the "state secrets" privilege, which provides that the government cannot be forced in litigation to disclose otherwise-secret information when the judge concludes that such a disclosure would pose a reasonable danger of harming national security.[30] The state secrets privilege is most often discussed in connection with civil litigation against the U.S. government (or in civil suits between private parties in which the government intervenes). When properly invoked in that context, its effect can be draconian from the private party's perspective; plaintiffs at the very least will be unable to discover

30 The leading Supreme Court decision on the topic is *United States v. Reynolds*, 345 U.S. 1 (1953). For the relevant history, see Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, George Washington Law Review (forthcoming 2007), manuscript available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=946676.

or use the information at issue, and frequently find that their suit must be dismissed as a result.[31] In criminal prosecutions, in contrast, the cost of preserving secrecy is placed on the government. As the Supreme Court of the United States held in *Jencks v. United States*, 353 U.S. 657, 672 (1957), the "burden is the Government's . . . to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the government's possession."

The disclose-or-dismiss dynamic presents the government with a Hobson's Choice, one that over time came to be perceived as problematic. By the late 1970s, there was growing concern that enforcement of the laws relating to espionage and to leaks of classified information was unduly hindered by the prospect of "graymail." Graymail refers to the disclose-or-dismiss scenario described above, which may arise because of the strategic maneuvering of the defendant (thus the pejorative nature of the term "graymail") or simply because the dilemma is inherent in the nature of the charge. In any event, concerns about the impact of graymail on the enforceability of various laws led Congress to investigate the issue. The result, described in detail below, was the Classified Information Procedures Act ("CIPA").

B. The Classified Information Procedures Act ("CIPA")

CIPA does not eliminate or substantially modify the balance between secrecy and fairness that is reflected in the disclose-or-dismiss dilemma, though it is often described as if it does. Rather, it is best understood as a mechanism for regulating the process by which judges determine whether the dilemma truly has arisen in a particular case.

1. Seeking Discovery of Classified Information

Consider first the problems that arise when a criminal defendant may be entitled to discover information in the government's possession that happens to be classified. This situation is governed by CIPA § 4. When the government determines that its discovery obligations to the defendant encompass classified information that the government is unwilling to

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31 *See, e.g.,* El-Masri v. Tenet, 437 F. Supp.2d 530 (E.D. Va. 2006) (invoking state secrets privilege to dismiss civil suit arising out of extraordinary rendition of German citizen from Macedonia to Afghanistan).

provide,[32] § 4 authorizes it to submit a written request to the court on an *in camera, ex parte*[33] basis (*i.e.,* without disclosure to the public or the defendant) seeking permission to employ an alternative to outright disclosure. Section 4 describes three such alternatives: (i) disclose only a redacted version of the information (i.e., a version that "delete[s] specified items of classified information"); (ii) provide an unclassified "summary" of the contents of the requested document in lieu of the document itself; or (iii) provide a "statement admitting relevant facts that the classified information would tend to prove."

The task of the court at this point is to determine whether any of these alternatives would suffice to satisfy the defendant's right to discover the protected information. If so, the government pursues the relevant alternative and the issue is resolved. If not, however, the court's options are limited. As a threshold matter, it can offer the government another opportunity to craft a suitable substitution.[34] Failing that, at least some variation of the disclose-or-dismiss dilemma arises. Section 4 does not specify the options that a court has at this stage, but as discussed below, CIPA § 6 does just that. The court may, of course, order dismissal of the indictment. Section 6 adds, however, that the court also should consider whether it might be sufficient to (i) dismiss only specified counts within the indictment; (ii) find "against the United States on any issue as to which the excluded classified information relates"; or (iii) "strik[e] or preclud[e] all or part of the testimony of a witness." Section 6 thus modifies the disclose or dismiss dilemma by providing for the less drastic alternatives of finding against the government or precluding it from offering certain evidence (an option that may have been available to the trial judge even in the absence of CIPA, but that clearly is acknowledged in the statutory framework).[35]

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32 The District of Columbia Circuit—which in the nature of things is more likely than other courts to hear CIPA-related matters—has explained "that classified information is not discoverable on a mere showing of theoretical relevance in the face of the government's classified information privilege, but that the threshold for discovery in this context further requires that a defendant seeking classified information . . . [demonstrate] that [it] is at least 'helpful to the defense.'" United States v. Yunis, 867 F.2d 617, 623 (D.C. Cir. 1989) (citation omitted).

33 The *ex parte* nature of the proceeding by definition precludes use of an adversarial process, a failing that has generated criticism. *See, e.g.,* Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 American Journal of Criminal Law 277, 306-15 (1986).

34 *Cf.* United States v. Libby, No. 05-394 (RBW), 2006 WL 3262446 (D.D.C. Nov. 13, 2006) (finding, under a related CIPA provision, that proposed substitutions were inadequate in connection with the prosecution of Lewis Libby, and ordering that "the government must go back to the drawing board and come forth with a more balanced proposal"), *vacated on other grounds*, 2006 WL 3333059 (Nov. 16, 2006).

35 *Cf.* United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004) (affirming remedy developed by trial judge, by analogy to CIPA, pursuant to which charges would not be dismissed but government would be precluded from seeking death penalty or attempting to prove that defendant was linked to the 9/11 attacks).

2. Anticipating Disclosure of Classified Information

A second CIPA scenario concerns the defendant who already possesses classified information and reasonably expects to disclose it in his or her own defense (a situation that is likely to arise in the case of government employees accused of espionage or leaks of classified information, for example), or who simply has a reasonable expectation that he or she will elicit such information from others during the trial or pretrial processes.

In those circumstances, CIPA § 5 requires the defendant to provide advance, written notice of this prospect both to the government and to the court. The government must then be given a "reasonable opportunity" to make a motion to the court under CIPA § 6. As a threshold matter, the court first must determine whether the information in question would be admissible even in the absence of the classification issue.[36] Assuming that it would be, the § 6 process is quite similar the § 4 process described above.

Again, the primary task of the court is to determine whether substitutions for the classified information – including in particular the use of unclassified summaries or of stipulated admissions of fact – would suffice to satisfy the defendant's rights. Section 6 expressly states that such substitutions should be employed only upon a finding "that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specified classified information." If the court finds that a substitution would not satisfy this standard,[37] the disclose-or-dismiss dilemma again may arise (though as noted above, the court likely will first provide additional opportunities for the government to craft an appropriate substitution).

Section 6 addresses this prospect as follows. If the government accompanied its aforementioned substitution motion with an *in camera, ex parte* affidavit "certifying that disclosure of classified information would

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36 For an example of an opinion finding that the information would not be admissible in any event under the Federal Rules of Evidence, see United States v. Mohamed, 410 F. Supp.2d 913 (S.D. Cal. 2005) (holding that defendant charged with immigration violations would not be permitted to elicit classified information relating to the arresting agent's alleged bias against him on the ground that the probative value of that information would in any event be substantially outweighed by its prejudicial effect and the risk that it would confuse the jury, in violation of Federal Rule of Evidence 403).

37 For examples of opinions finding substitutions to be adequate to satisfy a defendant's constitutional rights, see United States v. Salah, 462 F. Supp.2d 915 (N.D. Ill. Nov. 16, 2006); United States v. Scarfo, 180 F. Supp.2d 572 (D.N.J. 2001).

cause identifiable damage to the national security of the United States, and explaining the basis for the classification of such information," the court now will expressly order the defendant not to disclose the information. The court may then dismiss the indictment outright, however, unless the court finds that one of the aforementioned alternatives – (i) dismissing only specified counts within the indictment; (ii) "finding against the United States on any issue as to which the excluded classified information relates"; and (iii) "striking or precluding all or part of the testimony of a witness" – would be more appropriate.

C. Limiting the Scope of Classified Disclosures

The government's interest in secrecy and the defendant's interest in fair trial procedures also comes into play in a number of other contexts, some of which have relatively little to do with CIPA. Even where the government proves willing to disclose classified information to the defense, for example, there is the further question of whether the government can still keep the information from the larger public. Also, when if ever may the government provide disclosure to the defendant's counsel, but not the defendant?

1. Closing the Court to the Public

As a threshold matter, there is the question of whether disclosure of information to the accused or to defense counsel automatically has the effect of requiring public disclosure as well. The answer is no. Section 8 of CIPA expressly states that various forms of classified information "may be admitted into evidence without change in their classification status," and § 3 further provides for the issuance of protective orders barring defendants from disclosing "any classified information disclosed [to them] by the United States."

United States v. Marzook provides a recent example of this principle in practice. *See* 412 F. Supp.2d 913 (N.D. Ill. 2006). Defendant Muhammad Hamid Khalil Salah was indicted on charges including the provision of material support to HAMAS (it should be noted that Salah was acquitted of this charge in February 2007 after a jury trial). In support, the government intended to elicit evidence of oral and written statements that Salah had made while in Israeli custody in 1993. Salah moved to suppress that evidence, arguing that his statements had been coerced by his interrogators. In response, the government sought to have two

members of the Israel Security Agency ("ISA") testify at the suppression hearing. To make that possible, however, the government requested that the hearing be closed to the public and that the agents be permitted to testify under pseudonyms (*i.e.*, without disclosure of their true identities to anyone, including Salah), in order both to preserve their safety and "the sanctity of the ISA's intelligence gathering methods."

As to the use of pseudonyms, the court noted that the same approach had been approved in other cases for security reasons (citing *United States v. Abu Ali*, 395 F. Supp.2d 338, 344 (E.D. Va. 2005)).[38] The court also emphasized that the agents had always used these particular pseudonyms in their work (including with respect to their contact with Salah in 1993) and hence that Salah as a practical matter would not actually be inhibited in his capacity to conduct cross-examination of them. Accordingly, they were permitted to testify on those terms.

As to the closure of the court to the public during the hearing, the court found ample authority for the proposition that the right of public access "may give way in certain cases to other rights or interests such as . . . the government's interest in inhibiting disclosure of sensitive information." 412 F. Supp.2d at 925 (quoting *Waller v. Georgia*, 467 U.S. 39, 45 (1984). *See also Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (holding that the presumption in favor of public proceedings can be overcome "only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."). In this instance, the need to prevent unnecessary disclosure of classified information as well as the need to protect the safety of the Israeli agents both sufficed to warrant closure of the court.[39]

2. Disclosure to Defense Counsel Only?

May the prosecution disclose information only to a criminal defendant's *attorney*, and not the accused as well? As one court has observed in a terrorism-related case, the "legislative history of the Act suggests that CIPA was primarily drafted to manage the disclosure of classified information in cases in which the defendant was previously in possession of classified

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38 The practice nonetheless appears rare, and remains the subject of controversy. *See* Greg Krikorian, *Anoymous Testimony Pushes Limits: Defense Lawyers Say Justice Isn't Served If They Can't Know the IDs of Israeli Agents*, Los Angeles Times (Dec. 26, 2006), at A1 (discussing objections—ultimately unsuccessful—to the use of anonymous witness procedures in a terrorism finance trial in Dallas, and noting rarity of the procedure).

39 For a similar result, see United States v. Ressam, 221 F. Supp.2d 1252 (W.D. Wash. 2002).

information."[40] That is, the drafters of CIPA had in mind espionage and leak prosecutions in which the primary concern was to avoid disclosure of classified information to the public, not to the defendant (who already would be privy to the information). Terrorism cases, insofar as they derive from foreign intelligence investigations and information obtained from cooperating agencies of other states, tend to implicate information that the government would like to withhold not only from the public but also from the defendant. Insofar as the government is obliged to disclose such information to the defense in light of the considerations described above, the question arises whether it can discharge this obligation by limiting disclosure to defense counsel, excluding the accused himself.

This issue arose in connection with *United States v. bin Laden*, the prosecution of al Qaeda members linked to the 1998 bombings of the U.S. embassies in Kenya and Tanzania. In that case, classified information was made available to the defense during the pretrial discovery process subject to a protective order that required that anyone reviewing the information have a security clearance. At least some of the defense *attorneys* had the requisite clearance, but not surprisingly none of the defendants did. The defendants argued that by denying them the ability to assist their attorneys in assessing the information, their right to the effective assistance of counsel had been violated. The district judge acknowledged that in the ordinary course the defendant should have full access to all information produced in discovery, but observed that this right was subject to exceptions. Citing an array of other contexts in which information is withheld from the defendant but made available to defendant's counsel, often for safety-related reasons, the court rejected the challenge and approved the protective order.

The *bin Laden* decision thus establishes that disclosure to the defense may be limited to defense counsel at least with respect to the discovery process. It does not follow, however, that the defendant could equally be excluded in the context of the presentation of evidence during the trial itself. The *bin Laden* court found it proper to exclude the defendants from the CIPA hearings in that case, not the trial itself.[41]

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40 United States v. bin Laden, No. 98 cr. 1023, 2001 WL 66393 (S.D.N.Y. Jan. 25, 2001).

41 *Cf.* U.S. Department of Justice, Criminal Resource Manual § 2054, part I.C, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm02054.htm.
("The requirement of security clearances [in connection with protective orders that may be issued by the court in cases involving classified information] does not extend to the judge or to the defendant (who would likely be ineligible, anyway)").

D. Exculpatory Information in the Hands of the Intelligence Community

In the 1960s and 1970s, the Supreme Court of the United States determined that the defendant's Fifth Amendment right to a fair trial included a right to complete disclosure of evidence in the possession of the government that would tend to exculpate the accused (*Brady v. Maryland*, 373 U.S. 83, 87 (1963)) or impeach the government's witnesses (*Giglio v. United States*, 405 U.S. 150, 154 (1972)). According to the United States Attorneys' Manual, a Justice Department policy handbook, these obligations extend to "all members of the prosecution team," which is defined to include "federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant." U.S. Attorneys' Manual, § 9-5.001(B)(2).[42] But does this obligation also include the various components of the intelligence community, such as the Central Intelligence Agency, the Defense Intelligence Agency, or the National Security Agency?

That question has obvious significance in terrorism-related cases, as counterterrorism policy in the United States has always been an interagency affair to at least some degree, and has become much more so since 9/11.[43] As one scholar has recently observed, "the circuits are split on whether a prosecutor's duty to search for *Brady* material extends to agencies that have no interest in the prosecution, extends only to law enforcement entities, extends only to persons acting under the direction or control of a prosecutor, or extends to *Brady* material outside a prosecutor's jurisdiction."[44]

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42 This section of the U.S. Attorneys' Manual is available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm#9-5.001.

43 CIPA does not address the question of how far the duty to identify and disclose exculpatory information runs beyond prosecutors. It does provide, in § 9A, that prosecutors must brief intelligence agencies when they determine that classified information from such an agency may result in prosecution, and also at subsequent points when necessary to keep that agency fully informed with respect to the prosecution.

44 For an overview, see Mark D. Villaverde, *Structuring the Prosecutor's Duty to Search the Intelligence Community for* Brady *Material*, 88 Cornell Law Review 1471, 1524 (2003). Cases illustrating the uncertainty surrounding this issue include: United States v. Antone, 603 F.2d 566 (5th Cir. 1979) (illustrating the "prosecution team" standard, interpreting the scope of the disclosure duty to extent to agencies under direction of prosecutors or that acted in cooperation with prosecutors in investigating the defendant); United States ex rel. Smith v. Fairman, 769 F.2d 386 (7th Cir. 1985) (same); United States v. Wood, 57 F.3d 733 (9th Cir. 1995) (interpreting "prosecution team" standard so as not to be limited to law enforcement agencies); Smith v. Secretary of New Mexico Department of Corrections, 50 F.3d 801 (10th Cir. 1995) (broad approach to prosecution team standard); United States v. Perdomo, 929 F.2d 967 (3d Cir. 1991) (duty extends to all information that is available to prosecutors, so long as held by some arm of the state); United States v. Romo, 914 F.2d 889 (7th Cir. 1990) (no duty if information not actually in prosecutors' possession).

The policy guidance contained in the U.S. Attorneys' Manual reflects that complexity. Prosecutors are instructed that "[a]s a general rule, a prosecutor should not seek access to IC [*i.e.,* Intelligence Community] files except when, because of the facts of the case, there is an affirmative obligation to do so."[45] According to the Manual, the best reading of the caselaw under *Brady* and *Giglio* is that such an obligation may arise when:

- Alignment: The Intelligence Community component is "aligned" with the prosecution in that it "actively participates" in the criminal investigation or prosecution (by, for example, actions that go beyond the mere provision of leads or tips);

- Specific Requests: Where the defendant specifically requests a search for such material with respect to a particular agency, the prosecution may have an obligation to comply depending on the relationship between the burden of compliance and the basis for suspecting that relevant material would in fact be discovered;

- Defense Contact with the Intelligence Community: Where it appears that the defendant claims to have had contact with a component of the Intelligence Community, a search most likely would be required.

Even in the absence of an affirmative obligation, moreover, the Manual recommends that a search be conducted on prudential grounds in "certain types of cases . . . in which issues relating to national security and/or classified information are likely to be present." Among other things, the Manual suggests that searches should be undertaken on prudential grounds in cases involving "international terrorism."[46]

E. Defendant's Right to Compulsory Process and Overseas Detainees

It is one thing to recognize an obligation (legal or prudential) on the part of prosecutors to search for exculpatory information in the hands of some component of the Intelligence Community. Actually obtaining

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45 U.S. Department of Justice, Criminal Resource Manual § 2052, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm02052.htm.

46 *See id.*

meaningful cooperation from such agencies may prove difficult in practice, however, depending on the particular circumstances. The reality is that such agencies may perceive potential disclosures as a threat to their highest institutional priority (i.e., intelligence collection) over both the short and long terms, particularly insofar as the information in issue relates to collection sources and methods.

This tension generated significant litigation in the prosecution of Zacarias Moussaoui (charged with involvement in the 9/11 attacks). *See United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004). Did Mouassaoui have the right to take discovery from al Qaeda members who had been captured by the U.S. in connection with an ongoing armed conflict[47] and who were being held incommunicado in military or intelligence community custody outside the U.S.?

Moussaoui originally sought to depose at least one such detainee, with an eye toward eliciting exculpatory evidence concerning Moussaoui's role (or lack thereof) in the 9/11 attacks. The trial court initially agreed that he could do so, reasoning that the detainee in question appeared to have knowledge of the 9/11 plot that might tend to exculpate Moussaoui, or at least mitigate his involvement. In light of the security concerns involved, however, the court did not order unrestrained access. Instead, the court ordered that a deposition take place via remote videolink that would not disclose the detainee's location.

The government appealed to the Fourth Circuit Court of Appeals, which vacated the order and remanded with instructions for the trial court to first consider a CIPA-like compromise: the creation of written substitutes for the detainee's testimony. In response to that instruction, the government on remand proposed to produce relevant excerpts from the written reports that had been generated by the ongoing interrogation of the detainee. The district court rejected that approach (reasoning that interrogation summaries were not necessarily reliable), and then reinstated its earlier order requiring a remote, but live, deposition.

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47 I appreciate that there is a body of opinion that contests the claim that an armed conflict can or does exist between the United States and al Qaeda. This report is concerned only with the questions that arise in connection with criminal prosecutions in terrorism-related cases in the United States, however, and for purposes of U.S. law the existence of an armed conflict of at least some description, and in at least some contexts, is conclusively established by the determinations to that effect by both the President and the Congress. *See, e.g.,* Authorization for Use of Military Force (September 18, 2001), available at http://thomas.loc.gov/cgi-bin/query/z?c107:S.J.RES.23.ENR:.

The government indicated in response that it did not intend to comply with that order, leading the court to determine whether and how the government should be sanctioned for refusing to produce the detainees (by this point, the request concerned not one but three detainees) for remote depositions. Ultimately, the district court declined to dismiss the indictment. Instead, it denied the government the ability to seek the death penalty against Moussaoui and, further, precluded the government from introducing any evidence at trial linking Moussaoui to the 9/11 attacks.
The government again appealed to the Fourth Circuit. The resulting opinion began by considering whether a federal court has jurisdiction to compel the production of testimony from a noncitizen held outside the U.S. by the military (the court assumed military rather than intelligence community custody). The court concluded that it would, reasoning that such jurisdiction would depend on the location of the detainee's custodian rather than the detainee himself (and that where the immediate custodian of a detainee is unknown, the inquiry instead would turn on the location of the ultimate custodian, such as the Secretary of Defense). Accordingly, the only question concerned whether Moussaoui in fact had a constitutional right to compel this particular testimony.

On one hand, the Fourth Circuit concluded that Moussaoui's right to compulsory process is fundamental, and that he had made a sufficient showing that the particular testimony sought here would be relevant to his defense. On the other hand, the court noted, that right is not absolute, but in theory could give way to competing considerations. Here, the competing consideration was the possibility of undue interference with the government's warfighting authority. The court observed that the deposition might impose substantial burdens on that authority, on the theory that the deposition might (a) disrupt the interrogation effort, (b) cause other states to doubt U.S. assurances of confidentiality in connection with international cooperation in the counterterrorism effort, and (c) provide comfort to the enemy.

Faced with a clash of compelling interests, the court observed that "the Supreme Court has addressed similar matters on numerous occasions," and that

> "[i]n all cases of this type . . . the Supreme Court has held that the defendant's right to a trial that comports with the Fifth and Sixth Amendments prevails over the governmental privilege. Ultimately, as these cases make clear, the appropriate procedure is for the district court

> to order production of the evidence or witness and leave to the Government the choice of whether to comply with that order." 382 F.3d at 474.

The court then cited CIPA as evidence of Congress' judgment that the Executive interest in protecting classified information ultimately cannot overcome the right of a defendant to present his or her case.

Despite this conclusion, however, the court did not agree with the district court that it was appropriate to put the government to the choice of providing access to the detainees or else face a sanction. On the contrary, the Fourth Circuit concluded that the district court had not been flexible enough in considering the proposed substitutions that the government had offered, and that its concern about reliability of interrogation reports was misplaced (because, the court said, of the interrogators' "profound interest in obtaining accurate information from the witnesses and in reporting that information accurately to those who can use it to prevent acts of terrorism and to capture other al Qaeda operatives"). The Fourth Circuit did agree that the existing version of the substitutions were insufficient,[48] but its bottom line was that these insufficiencies could be cured, and that every effort had to be made to fix them before putting the government to the disclose-or-sanction choice. The Fourth Circuit accordingly remanded the case to the district court with specific instructions to the effect that (a) the exact language found in the interrogation summaries should be used in the substitutions (as opposed to paraphrasing); (b) the process should begin with the defense identifying quotations from the reports that it wished to use, with the prosecution responding either with objections or suggestions for additional language that ought to be included in the interests of completeness; and (c) the district court should exercise discretion to determine when security concerns warrant "non-substantive" changes such as the use of pseudonyms for places or persons mentioned in the statements.

Ultimately, Moussaoui pled guilty, mooting the substitution issue before the parties could act upon these instructions. Nonetheless, the

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48 The court noted, for example, that some exculpatory information may have been missing from one of the substitutions, and that the same document may have contained an inculpatory statement that did not in fact derive from that detainee's interrogation.

extensive litigation on this subject amply demonstrated the difficulty of reconciling the defendant's interest in fairness and the government's interest in secrecy and security. While the particular fact pattern at issue in Moussaoui – involving access to detainees held overseas and subject to long-term interrogation – is not one that necessarily will arise with great frequency, the underlying tensions are much the same as will arise in any case in which classified information and its like are at stake.

IV. Observations and Conclusions

The foregoing discussion provides the basis for a number of observations and conclusions. With respect to the substantive scope of U.S. federal criminal law, the most important point to appreciate is that the Justice Department has multiple strategies for preventive intervention in scenarios involving potential terrorists. These range from the relatively traditional (*e.g.*, conspiracy or attempt prosecutions brought in connection with particular plots) to the relatively unorthodox (*e.g.,* preventive charging and material support prosecutions). And while the traditional approach continues to play an important role, the available data demonstrates fairly clearly that material support prosecutions in particular have become a central and relatively effective part of the overall strategy. The evolving nature of terrorism—in particular, the shift from relatively well-defined membership organizations to looser networks of like-minded individuals—tends to undermine some aspects of the support-law framework, but other aspects of the framework remain capable of addressing the issue.

In light of the tension between the benefit of prosecuting in the preventive context and the costs of undesirable exposure of classified information, the most important of these strategies may be the preventive-charging method. By definition that approach involves prosecution on grounds unrelated to suspicion of terrorism, and hence preventive charging tends to avoid the disclose-or-dismiss dilemma that otherwise might arise insofar as the government's concerns arise out of classified information. It is not possible to say how effective this approach actually has been in practice, because it is not possible to identify with certainty which cases fall under the preventive charging rubric. That said, it is possible to identify the results in cases that were classified by the FBI or other investigating agencies as terrorism-related at the investigative stage, cases that often end up as prosecutions for relatively minor offenses such as social security or immigration fraud; some of these cases no

doubt represent episodes of preventive charging. Notably, though not surprisingly, the average sentence in such cases is much shorter than the average sentences associated with terrorism-related convictions (as seen, for example, in the material support data provided above). This disparity has led to considerable criticism of the Justice Department in some quarters, but may reflect in part the price that must be paid to permit intervention without risking exposure of classified information.[49]

The government does not always prosecute on such unrelated grounds, of course. What happens when the government proceeds on a terrorism-related theory that does make classified information relevant—i.e., when the litigation necessarily takes place in the shadow of the disclose-or-dismiss/sanction dilemma? The CIPA statute creates a useful and efficient framework for litigants and the court to determine when that dilemma has actually arisen in a particular case. It also serves an important function in that it provides statutory endorsement for compromise solutions such as the use of redactions or unclassified summaries in lieu of relevant-but-classified information. Even with CIPA, however, situations will continue to arise when redactions or substitutions will not be sufficient to ensure the fairness of the trial, and thus the dilemma will continue to have bite in at least some cases. Whether this prospect may provide leverage in plea negotiations to defendants in terrorism-related cases is not clear, though it is a factor that should be considered. In any event, as the *Moussaoui* litigation illustrates, courts in that scenario must proceed with considerable caution, taking every opportunity to exhaust the opportunities for compromise before concluding that the disclose-or-dismiss dilemma is truly unavoidable.

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49 Much of the criticism suggests an alternative explanation: that cases have been miscategorized as terrorism-related at the investigative stage. For a review of the data, see United States Department of Justice, Office of the Inspector General, Audit Division, "The Department of Justice's Internal Controls Over Terrorism Reporting," Audit Report 07-20, February 2007, *available at* http://www.usdoj.gov/oig/reports/plus/a0720/final.pdf; Transactional Records Access Clearinghouse, Syracuse University, "Criminal Terrorism Enforcement in the United States During the Five Years Since the 9/11 Attacks," (2006), *available at* http://trac.syr.edu/tracreports/terrorism/169/.

Appendix A
50 U.S.C. § 1705 Prosecutions (9/01-7/07)

Defendant	Docket #	Court	Charge	Support Type	Recipient		Sentence	Training Allegations?	Total Sentence
Ihsan Elashyi	02-CR-33	N.D. Tex.	1705 (**13 counts**)	Computers	Unspecified	Guilty Plea (1 count); Dismissed as part of plea to Other Charges (12 counts)	48 months	no	n/a
Bayan Elashi	02-CR-052	N.D. Tex.	1705 (**10 Counts**)	Money	Mousa Abu Marzook	Convicted by jury	84 months	no	**84 months** - 50:1705 (Conspiracy, via 18:371) (2 counts, though only one relating to terrorism as noted in the "charge" column), 60 months on each count; 50:1705 (17 counts), 84 months on each count; 18:1001(a)(3) (2 counts), 60 months on each count; 18:1957, 84 months; 18:1956 (Conspiracy), 84 months; 18:1956 (9 counts), 84 months on each count; to run concurrently
			1705 (Conspiracy, via 18 USC 371)	Money	Mousa Abu Marzook	Convicted by jury	60 months		
Ghassan Elashi			1705 (**10 Counts**)	Money	Mousa Abu Marzook	Convicted by jury	80 months	no	**80 months** - 50:1705 (Conspiracy, via 18:371) (2 counts, though only one relating to terrorism as noted in the "charge" column), 60 months each count; 50:1705 (11 counts), 80 months each count; 18:1001(a)(3)(Conspiracy), 60 months; 18:1001(a)(3) (2 counts), 80 months and 60 months; 18:1957, 80 months; 18:1956(h), 80 months; 18:1956(a) (9 counts), 80 months each count; to run concurrently

Defendant	Docket #	Court	Charge	Support Type	Recipient		Sentence	Training Allegations?	Total Sentence
			1705 (Conspiracy, via 18 USC 371)	Money	Mousa Abu Marzook	Convicted by jury	60 months		
Basman Elashi			1705 (**10 Counts**)	Money	Mousa Abu Marzook	Acquitted by jury (**9 counts**); Convicted by jury (**1 count**)	80 months	no	**80 months** - 50:1705 (Conspiracy, via 18:371) (2 counts, though only one relating to terrorism as noted in the "charge" column), 60 months each count; 50:1705 (8 counts) 80 months each count; 18:1001(a)(3) (12 counts), 60 months each count; 18:1001(a)(3) (Conspiracy), 60 months; 18:1957, 80 months; 18:1956 (Conspiracy), 80 months; to run concurrently
			1705 (Conspiracy, via 18 USC 371)	Money	Mousa Abu Marzook	Convicted by jury	60 months		
Nadia Elashi			1705 (**10 Counts**)	Money	Mousa Abu Marzook	Pending (not in custody)	n/a	no	n/a
			1705 (Conspiracy, via 18 USC 371)	Money	Mousa Abu Marzook	Pending (not in custody)	n/a		
Mousa Abu Marzook			1705 (**10 Counts**)	Money	Mousa Abu Marzook	Pending (not in custody)	n/a	no	n/a
			1705 (Conspiracy, via 18 USC 371)	Money	Mousa Abu Marzook	Pending (not in custody)	n/a		
Infocom Corporation			1705 (**10 Counts**)	Money	Mousa Abu Marzook	Convicted by jury	n/a	no	n/a

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
			1705 (Conspiracy, via 18 USC 371)	Money	Mousa Abu Marzook	Convicted by jury	n/a		
John Walker Lindh	02-CR-37	E.D. Va.	1705	Personnel	Al-Qaeda	Dismissed as part of plea	n/a	yes (military training and attempt to fight)	**240 months** - 18:844(h)(2), 120 months; 50:1705 (Conspiracy, via 31 CFR 595.205), 120 months; to run consecutively
			1705 (Conspiracy, via 31 CFR 595.205)	Personnel	Al-Qaeda	Dismissed as part of plea	n/a		
			1705	Personnel	Taliban	Guilty Plea	120 months		
			1705 (Conspiracy, via 31 CFR 595.205)	Personnel	Taliban	Dismissed as part of plea	n/a		
Earnest James Ujaama	02-CR-283	W.D. Wash.	1705 (Conspiracy, via 31 CFR 545.206(b))	Fundraising Currency Computer Services	Taliban	Guilty Plea	24 months	yes (military training)	**24 months** - 50:1705 (Conspiracy, via 31 CFR 545.206(b)), 24 months
Jeffrey Leon Battle	02-CR-399	D. Or.	1705 (Conspiracy, via 31 CFR 595.205)	Personnel Recruiting Money	Al-Qaeda	Dismissed as part of plea	n/a	yes (military training and attempt to fight)	**216 months** - 18:2384, 216 months
Patrice Lumumba Ford			1705 (Conspiracy, via 31 CFR 595.205)	Personnel Recruiting Money	Al-Qaeda	Dismissed as part of plea	n/a	yes (military training and attempt to fight)	**216 months** - 18:2384, 216 months
Ahmed Ibrahim Bilal			1705 (Conspiracy, via 31 CFR 595.205)	Personnel Recruiting Money	Al-Qaeda	Guilty Plea	120 months	yes (military training and attempt to fight)	**120 months** - 50:1705 (Conspiracy, via 31 CFR 595.205, 120 months; 18:924(c), (o), 120 months; to run concurrently

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Muhammad Ibrahim Bilal			1705 (Conspiracy, via 31 CFR 595.205)	Personnel Recruiting Money	Al-Qaeda	Guilty Plea	96 months	yes (military training and attempt to fight)	**96 months** - 50:1705 (Conspiracy, via 31 CFR 595.205), 96 months; 18:924(c), (o), 96 months; to run concurrently
Habis Abdulla Al Saoub			1705 (Conspiracy, via 31 CFR 595.205)	Personnel Recruiting Money	Al-Qaeda	Dismissed on gov't motion (killed in Pakistan in 2003)	n/a	yes (military training and attempt to fight)	n/a
October Martinique Lewis			1705 (Conspiracy, via 31 CFR 595.205)	Personnel Recruiting Money	Al-Qaeda	Dismissed as part of plea	n/a	no	**36 months** - 18:1956 (6 counts), 36 months each count; to run concurrently
Maher Mofeid Hawash			1705 (Conspiracy, via 31 CFR 595.205)	Personnel Recruiting Money	Al-Qaeda	Guilty Plea	84 months	yes (military training and attempt to fight)	**84 months** - 50:1705 (Conspiracy, via 31 CFR 595.205), 84 months
Faysal Galab	02-CR-214	W.D.N.Y.	1705	Purchasing Uniforms Attending Training Camps	Al-Qaeda Usama bin Laden	Guilty Plea	84 months	yes (military training)	**84 months** - 50:1705, 84 months
Sami Amin al-Arian	03-CR-77	M.D. Fla.	1705 (Conspiracy, via 18 USC 371)	Money Fundraising Recruitment Expertise	PIJ, Abd al Aziz Awda, Fathi Shiqaqi, Ramadan A. Shallah	Hung Jury; guilty plea	57 months	no	**57 months** - 50:1705 (Conspiracy, via 18: 371), 57 months

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Ramadan Abdullah Shallah			1705 (Conspiracy, via 18 U.S.C. 371)	Money Fundraising Recruitment Expertise	PIJ, Abd al Aziz Awda, Fathi Shiqaqi, Ramadan A. Shallah	Pending (not in custody)	n/a	no	n/a
Bashir Musa Mohammed Nafi			1705 (Conspiracy, via 18 U.S.C. 371)	Money Fundraising Recruitment Expertise	PIJ, Abd al Aziz Awda, Fathi Shiqaqi, Ramadan A. Shallah	Pending (not in custody)	n/a	no	n/a
Sameeh Hammoudeh			1705 (Conspiracy, via 18 U.S.C. 371)	Money Fundraising Recruitment Expertise	PIJ, Abd al Aziz Awda, Fathi Shiqaqi, Ramadan A. Shallah	Acquitted by jury	n/a	no	n/a
Ghassan Zayed Ballut			1705 (Conspiracy, via 18 U.S.C. 371)	Money Fundraising Recruitment Expertise	PIJ, Abd al Aziz Awda, Fathi Shiqaqi, Ramadan A. Shallah	Acquitted by jury	n/a	no	n/a
Mazen Al-Najjar			1705 (Conspiracy, via 18 USC 371)	Money Fundraising Recruitment Expertise	PIJ, Abd al Aziz Awda, Fathi Shiqaqi, Ramadan A. Shallah	Pending (not in custody)	n/a	no	n/a
Randall Todd Royer	03-CR-296	E.D. Va.	1705 (Conspiracy, via CFR)	Personnel	Taliban	Dismissed as part of plea	n/a	yes (military training)	**240 months** - 18:924(c)(2) and 18:3238, 120 months; 18:844(h)(2) and 18:3238, 120 months; to run consecutively

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Masoud Ahmad Khan			1705 (Conspiracy, via CFR)	Personnel	Taliban	Convicted by bench trial	120 months	yes (military training)	**Life** - 18:371 (Conspiracy to violate inter alia, 18:960, 18:2390), 60 months; 18:2384, 120 months; 50:1705, 120 months, 18:2339A (Conspiracy), 120 months; 18:924(o), 120 months; 18:924(c) (three counts), 120 months, 300 months, and life in prison; first five counts concurrent, other counts to follow consecutively
Sabri Benkhala			1705 (Conspiracy, via CFR)	Personnel	Taliban	Acquitted by bench trial	n/a	yes (military training)	n/a
Uzair Paracha	03-CR-1197	S.D.N.Y.	1705	Financial Services Document Fraud	Al-Qaeda	Convicted by jury	120 months	no	**360 months** - 18:2339B (Conspiracy), 180 months; 18:2339B, 180 months; 50:1705 (Conspiracy, via 31 CFR 595.205), 120 months; 50:1705, 120 months; 18:1028(a)(7), (b)(4), 300 months; last ten years of first four counts to run concurrently with 18:1028 count, final 15 years of 18:1028 count to run consecutively to that
			1705 (Conspiracy, via 31 CFR 595.205)	Financial Services Document Fraud	Al-Qaeda	Convicted by jury	120 months		
Mohammed Junaid Babar	04-CR-528	S.D.N.Y.	1705	Night-Vision Equipment	Al-Qaeda	Guilty Plea	Unknown	no	Unknown

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Holy Land Found'n for Relief and Development	04-CR-240	N.D. Tex.	1705 (Conspiracy, via 31 CFR 595.205)	Money	HAMAS	Pending	n/a	no	n/a
			1705 (**12 Counts**)	Money	HAMAS	Pending	n/a		
Shukri Abu Baker			1705 (Conspiracy, via 31 CFR 595.205)	Money	HAMAS	Pending	n/a	no	n/a
			1705 (**12 Counts**)	Money	HAMAS	Pending	n/a		
Mohammed El-Mezain			1705 (Conspiracy, via 31 CFR 595.205)	Money	HAMAS	Pending	n/a	no	n/a
			1705 (**12 Counts**)	Money	HAMAS	Pending	n/a		
Ghassan Elashi			1705 (Conspiracy, via 31 CFR 595.205)	Money	HAMAS	Pending	n/a	no	n/a
			1705 (**12 Counts**)	Money	HAMAS	Pending	n/a		
Haitham Maghawri			1705 (Conspiracy, via 31 CFR 595.205)	Money	HAMAS	Pending (not in custody)	n/a	no	n/a
			1705 (**12 Counts**)	Money	HAMAS	Pending (not in custody)	n/a		
Akram Mishal			1705 (Conspiracy, via 31 CFR 595.205)	Money	HAMAS	Pending (not in custody)	n/a	no	n/a
			1705 (**12 Counts**)	Money	HAMAS	Pending (not in custody)	n/a		

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Mufid Abdulqader			1705 (Conspiracy, via 31 CFR 595.205)	Money	HAMAS	Pending	n/a	no	n/a
			1705 (**12 Counts**)	Money	HAMAS	Pending	n/a		
Abdulrahman Odeh			1705 (Conspiracy, via 31 CFR 595.205)	Money	HAMAS	Pending	n/a	no	n/a
			1705 (**12 Counts**)	Money	HAMAS	Pending	n/a		
Ali al-Timimi	04-CR-385	E.D. Va.	1705 (Attempt)	Personnel	Taliban	Convicted by jury	120 months	no	**Life** - 18:924(n), 121 months; 18:373, 121 months; 18:2384, 121 months; 50:1705, 120 months; 50:1705 and 18:2, 120 months; 18:371, 60 months; 18:924(c), 360 months; 18:924(c), Life; 18:844(h)(2) (2 counts), 120 months and 240 months; first 6 counts concurrent, all other counts to be served consecutively after 121 months
			1705 and 2 (Inducing attempt)	Personnel	Taliban	Convicted by jury	120 months		
Mark Robert Walker	04-CR-2701	W.D. Tex.	1705 (attempt) (**2 counts**)	Night-Vision Equipment Bullet-Proof Vests	Al-Ittihad Al-Islamiya	Guilty Plea; other count dismissed as part of plea	8 1/2 months (**1 count**)	no	**8.5 months** - 50:1705, 8.5 months

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Ahmed Omar Abu Ali	05-CR-53	E.D. Va.	1705 (**2 counts**)	Personnel Money	Al-Qaeda	Convicted by jury	120 months	yes (military and explosives training)	**360 months** - 18:2339B (Conspiracy), 120 months; 18:2339B, 120 months; 18:2339A (Conspiracy), 120 months; 18:2339A, 120 months; 50:1705 (2 counts), 120 months each count; 18:1752(d), 120 months; 49:46502, 240 months; 18:32, 240 months; first seven counts concurrent, followed by the final two counts concurrent to each other
Naji Antoine Abi Khalil	05-CR-200 04-CR-573	E.D. Ark. S.D.N.Y	1705 (Attempt)	Night-Vision Equipment	Hezbollah	Guilty Plea	60 months	no	**60 months** - 18:2339B, 57 months; 50:1705(all types, all counts) 60 months on each; to run concurrently
Mustafa Kamel Mustafa	04-CR-356	S.D.N.Y.	1705 (Conspiracy, via 31 CFR 545.206(b))	Fundraising Personnel Computer Services Money	Taliban	Pending (not in custody)	n/a	no	n/a
Syed Hashmi	06-CR-442	S.D.N.Y.	1705 (Conspiracy, via 31 CFR 595.205)	Military Equipment	Al-Qaeda	Pending	n/a	no	n/a
			1705	Military Equipment	Al-Qaeda	Pending	n/a		
Kobie Diallo Williams	06-CR-421	S.D. Tex.	1705 (Conspiracy, via 18 USC 371)	Money Personnel	Taliban	Guilty Plea	Pending	yes (firearms training)	n/a
Adnan Mirza			1705 (Conspiracy, via 18 USC 371)	Money Personnel	Taliban	Pending	n/a	yes (firearms training)	n/a

Appendix B
18 U.S.C. § 2339B Prosecutions (9/01-7/07)

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Ahmed Abdel Sattar	02-CR-395	S.D.N.Y.	2339B	Personnel, Communications, Expertise	Egyptian Islamic Group	Dismissed on Defendant's Motion	n/a	no	**288 months** - 18:371, 60 months; 18:956(a)(1), (a)(2)(A), 288 months; 18:373, 240 months; to run concurrently
			2339B (Conspiracy)	Personnel, Communications, Expertise	Egyptian Islamic Group	Dismissed on Defendant's Motion	n/a		
Yassir Al-Sirri			2339B	Personnel, Communications, Expertise	Egyptian Islamic Group	Pending (not in custody)	n/a		n/a
			2339B (Conspiracy)	Personnel, Communications, Expertise	Egyptian Islamic Group	Pending (not in custody)	n/a		
Lynne Stewart			2339B	Personnel, Communications, Expertise	Egyptian Islamic Group	Dismissed on Defendant's Motion	n/a	no	**28 months** - 18:2339A (Conspiracy, via 18:371), 28 months; 18:2339A, 28 months; 18:1001 (2 counts), 28 months each count; to run concurrently
			2339B (Conspiracy)	Personnel, Communications, Expertise	Egyptian Islamic Group	Dismissed on Defendant's Motion	n/a		
Mohammed Yousry			2339B	Personnel	Egyptian Islamic Group	Dismissed on Defendant's Motion	n/a	no	**20 months** - 18:371, 20 months; 18:2339A (Conspiracy, via 18:371), 20 months; 18:2339A, 20 months; to run concurrently
			23339B (Conspiracy)	Personnel	Egyptian Islamic Group	Dismissed on Defendant's Motion	n/a		

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
John Walker Lindh	02-CR-37	E.D. Va.	2339B	Personnel	Al-Qaeda	Dismissed as part of plea	n/a	yes (military training and attempt to fight)	**240 months** - 18:844(h)(2), 120 months; 50:1705 (Conspiracy, via 31 CFR 595.205), 120 months; to run consecutively
			2339B (Conspiracy)	Personnel	Al-Qaeda	Dismissed as part of plea	n/a		
			2339B	Personnel	Harakat ul-Mujahideen	Dismissed as part of plea	n/a		
			2339B (Conspiracy)	Personnel	Harakat ul-Mujahideen	Dismissed as part of plea	n/a		
Earnest James Ujaama	02-CR-283	W.D. Wash.	2339B (Conspiracy)	Training, Facilities, Computer Services, Personnel	Al-Qaeda	Dismissed as part of plea	n/a	yes (military training)	**24 months** - 50:1705 (Conspiracy, via 31 CFR 545.206(b)), 24 months
Jaber Elbaneh	02-MJ-111	W.D.N.Y.	2339B	Personnel	Al-Qaeda	Pending (not in custody)	n/a	yes (military training)	n/a
Jeffrey Leon Battle	02-CR-399	D. Or.	2339B (Conspiracy)	Personnel, Recruiting, Money	Al-Qaeda	Dismissed as part of plea	n/a	yes (military training and attempt to fight)	**216 months** - 18:2384, 216 months
Patrice Lumumba Ford			2339B (Conspiracy)	Personnel, Recruiting, Money	Al-Qaeda	Dismissed as part of plea	n/a	yes (military training and attempt to fight)	**216 months** - 18:2384, 216 months
Ahmed Ibrahim Bilal			2339B (Conspiracy)	Personnel, Recruiting, Money	Al-Qaeda	Dismissed as part of plea	n/a	yes (military training and attempt to fight)	**120 months** - 50:1705 (Conspiracy, via 31 CFR 595.205, 120 months; 18:924(c), (o), 120 months; to run concurrently
Muhammad Ibrahim Bilal			2339B (Conspiracy)	Personnel, Recruiting, Money	Al-Qaeda	Dismissed as part of plea	n/a	yes (military training and attempt to fight)	**96 months** - 50:1705 (Conspiracy, via 31 CFR 595.205), 96 months; 18:924(c), (o), 96 months; to run concurrently

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Habis Abdulla Al Saoub			2339B (Conspiracy)	Personnel, Recruiting, Money	Al-Qaeda	Dismissed on gov't motion (killed in Pakistan in 2003)	n/a	yes (military training and attempt to fight)	n/a
October Martinique Lewis			2339B (Conspiracy)	Personnel, Recruiting, Money	Al-Qaeda	Dismissed as part of plea	n/a	no	**36 months** - 18:1956 (6 counts), 36 months each count; to run concurrently
Maher Mofeid Hawash			2339B (Conspiracy)	Personnel, Recruiting, Money	Al-Qaeda	Dismissed as part of plea	n/a	yes (military training and attempt to fight)	**84 months** - 50:1705 (Conspiracy, via 31 CFR 595.205), 84 months
Yahya Goba	02-CR-214	W.D.N.Y.	2339B	Personnel	Al-Qaeda	Guilty Plea	120 months	yes (military training)	**120 months** - 18:2339B, 120 months
			2339B (Conspiracy)	Personnel	Al-Qaeda	Dismissed as part of plea	n/a		
Shafal Mosed			2339B	Personnel	Al-Qaeda	Guilty Plea	96 months	yes (military training)	**96 months** - 18:2339B, 96 months
			2339B (Conspiracy)	Personnel	Al-Qaeda	Dismissed as part of plea	n/a		
Yasein Taher			2339B	Personnel	Al-Qaeda	Guilty Plea	96 months	yes (military training)	**96 months** - 18:2339B, 96 months
			2339B (Conspiracy)	Personnel	Al-Qaeda	Dismissed as part of plea	n/a		
Faysal Galab			2339B	Personnel	Al-Qaeda	Dismissed as part of plea	n/a	yes (military training)	**84 months** - 50:1705, 84 months
			2339B (Conspiracy)	Personnel	Al-Qaeda	Dismissed as part of plea	n/a		
Mukhtar al-Bakri			2339B	Personnel	Al-Qaeda	Guilty Plea	120 months	yes (military training)	120 months - 18:2339B, 120 months
			2339B (Conspiracy)	Personnel	Al-Qaeda	Dismissed as part of plea	n/a		

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Sahim Alwan			2339B	Personnel	Al-Qaeda	Guilty Plea	114 months	yes (military training)	**114 months** - 18:2339B, 114 months
			2339B (Conspiracy)	Personnel	Al-Qaeda	Dismissed as part of plea	n/a		
Syed Mustajab Shah	02-CR-2912	S.D. Cal.	2339B (Conspiracy)	Missiles	Al-Qaeda	Guilty Plea	180 months	no	**225 months** - 21:846, 841(a), 225 months; 18:2339B, 180 months; to run concurrently
Muhammed Abid Afridi			2339B (Conspiracy)	Missiles	Al-Qaeda	Guilty Plea	57 months	no	**57 months** - 21:846, 841(a), 57 months; 18:2339B, 57 months; to run concurrently
Ilyas Ali			2339B (Conspiracy)	Missiles	Al-Qaeda	Guilty Plea	57 months	no	**57 months** - 21:846, 841(a), 57 months; 18:2339B, 57 months; to run concurrently
Carlos Ali Romero Varela	02-CR-714	S.D. Tex.	2339B	Weapons	AUC	Guilty Plea	Pending	no	Pending
Uwe Jensen			2339B	Weapons	AUC	Guilty Plea	168 months	no	**168 months** - 18:2339B, 168 months; 21:846 (Conspiracy), 168 months; to run concurrently
Cesar Lopez (aka Elkin Alberto Arroyav Ruiz)			2339B	Weapons	AUC	Guilty Plea	180 months	yes (military training)	**180 months** - 18:2339B, 180 months
"Commandante Emilio" (aka Edgar Fernando Blanco Puerta)			2339B	Weapons	AUC	Guilty Plea	180 months	no	**Life** - 18:2339B, 180 months; 21:846 (Conspiracy), Life; to run concurrently
Javier Conrado Alvarez Correa			2339B	Weapons	AUC	Pending (not in custody)	n/a	no	n/a
Diego Alberto Ruiz Arroyave			2339B	Weapons	AUC	Pending (not in custody)	n/a	no	n/a
Hassan Moussa Makki	03-CR-80079	E.D. Mich.	2339B	Money	Hezbollah	Guilty Plea	57 months	no	**57 months** - 18:2339B, 57 months; 18:1962, 57 months; to run concurrently

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Sami Omar al-Hussayen	03-CR-48	D. Idaho	2339B (Conspiracy)	Expertise, Comm Equip, Money, Recruitment	HAMAS	Acquitted by jury	n/a	no	n/a
Sami Amin al-Arian	03-CR-77	M.D. Fla.	2339B (Conspiracy)	Money, Fundraising, Recruitment, Expertise	PIJ	Hung Jury; Dismissed as part of plea	n/a	no	**57 months** - 50:1705 (Conspiracy, via 18: 371), 57 months
			2339B (**3 counts**)	Money	PIJ	Acquitted by jury	n/a	no	
Ramadan Abdullah Shallah			2339B (Conspiracy)	Money, Fundraising, Recruitment, Expertise	PIJ	Pending (not in custody)	n/a	no	n/a
Bashir Musa Mohammed Nafi			2339B (Conspiracy)	Money, Fundraising, Recruitment, Expertise	PIJ	Pending (not in custody)	n/a	no	n/a
Sameeh Hammoudeh			2339B (Conspiracy)	Money, Fundraising, Recruitment, Expertise	PIJ	Acquitted by jury	n/a	no	n/a
Abd al Aziz Awda			2339B (Conspiracy)	Money, Fundraising, Recruitment, Expertise	PIJ	Pending (not in custody)	n/a	no	n/a
Ghassan Zayed Ballut			2339B (Conspiracy)	Money, Fundraising, Recruitment, Expertise	PIJ	Acquitted by jury	n/a	no	n/a
			2339B (**9 counts**)	Money	PIJ	Acquitted by jury (9 counts)	n/a		
Hatim Naji Fariz			2339B (Conspiracy)	Money, Fundraising, Recruitment, Expertise	PIJ	Hung Jury; Dismissed as part of plea	n/a	no	**37 months** - 50:1705 (Conspiracy, via 18:371), 37 months
			2339B (**11 counts**)	Money	PIJ	Acquitted by Jury (11 counts)	n/a		
Mazen Al-Najjar			2339B (Conspiracy)	Money, Fundraising, Recruitment, Expertise	PIJ	Pending (not in custody)	n/a	no	n/a

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Tomas Molina Caracas	03-CR-20261	S.D. Fla.	2339B (Conspiracy)	Weapons	FARC	Pending (not in custody)	n/a	yes (FARC Commander)	n/a
			2339B (**5 counts**)	Weapons	FARC	Pending (not in custody)	n/a		
Jose Luis Aybar-Cancho			2339B (Conspiracy)	Weapons	FARC	Pending (not in custody)	n/a	no	n/a
			2339B (**5 counts**)	Weapons	FARC	Pending (not in custody)	n/a		
Luis Frank Aybar-Cancho			2339B (Conspiracy)	Weapons	FARC	Pending (not in custody)	n/a	no	n/a
			2339B (**5 counts**)	Weapons	FARC	Pending (not in custody)	n/a		
Iyman Faris	03-CR-189	E.D. Va.	2339B	Personnel, Expertise	Al-Qaeda	Guilty Plea	180 months	yes (military training)	**240 months** - 18:2339B (Conspiracy), 60 months; 18:2339B, 120 months; to run consecutively
			2339B (Conspiracy)	Personnel, Expertise	Al-Qaeda	Guilty Plea	60 months		
Fanny Cecilia Barrera-De Amaris	03-CR-182	S.D. Tex.	2339B (Conspiracy)	Weapons	AUC	Guilty Plea	61 months	no	**61 months** - 18:2339B (Conspiracy), 61 months
Carlos Adolfo Romero Panchano			2339B (Conspiracy)	Weapons	AUC	Guilty Plea	36 months	no	**36 months** - 18:2339B (Conspiracy), 36 months)
Randall Todd Royer	03-CR-296	E.D. Va.	2339B (Conspiracy)	Personnel	Al-Qaeda	Dismissed as part of plea	n/a	yes (military training)	**240 months** - 18:924(c)(2) and 18:3238, 120 months; 18:844(h)(2) and 18:3238, 120 months; to run consecutively

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Masoud Ahmad Khan			2339B (Conspiracy)	Personnel	Al-Qaeda	Acquitted by bench trial	n/a	yes (military training)	**Life** - 18:371 (Conspiracy to violate inter alia, 18:960, 18:2390), 60 months; 18:2384, 120 months; 50:1705, 120 months, 18:2339A (Conspiracy), 120 months; 18:924(o), 120 months; 18:924(c) (three counts), 120 months, 300 months, and life in prison; first five counts concurrent, other counts to follow consecutively
Adriana Gladys Mora	03-CR-352	S.D. Tex.	2339B (Conspiracy)	Weapons	AUC	Guilty Plea	120 months	no	**120 months** - 18:2339B (Conspiracy), 120 months; 21:841 (Conspiracy), 120 months; to run concurrently
Uzair Paracha	03-CR-1197	S.D.N.Y.	2339B (Conspiracy)	Financial Services, Document Fraud	Al-Qaeda	Convicted by jury	180 months	no	**360 months** - 18:2339B (Conspiracy), 180 months; 18:2339B, 180 months; 50:1705 (Conspiracy, via 31 CFR 595.205), 120 months; 50:1705, 120 months; 18:1028(a)(7), (b)(4), 300 months; last ten years of first four counts to run concurrently with 18:1028 count, final 15 years of 18:1028 count to run consecutively to that
			2339B	Financial Services, Document Fraud	Al-Qaeda	Convicted by jury	180 months		
Muhammad Hamid Khalil Salah	03-CR-978	N.D. Ill.	2339B	Money, Personnel	HAMAS	Acquitted by jury	n/a	no	**21 months** - 18:1503, 21 months

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Mohammed Ali Hasan al-Moayad	03-CR-1322	E.D.N.Y.	2339B	Money	Al-Qaeda	Acquitted by jury	n/a	no	**900 months** - 18:2339B (all types, all counts), 180 months on each count; to run consecutively
			2339B (Attempt)	Money	Al-Qaeda	Convicted by jury	180 months		
			2339B (Conspiracy)	Money	Al-Qaeda	Convicted by jury	180 months		
			2339B	Money	HAMAS	Convicted by jury	180 months		
			2339B (Attempt)	Money	HAMAS	Convicted by jury	180 months		
			2339B (Conspiracy)	Money	HAMAS	Convicted by jury	180 months		
Mohammed Moshen Yahya Zayed			2339B (Attempt)	Money	Al-Qaeda	Acquitted by jury	n/a	no	**540 months** - 18:2339B (all types, all counts), 180 months on each count; to run consecutively
			2339B (Conspiracy)	Money	Al-Qaeda	Convicted by jury	180 months		
			2339B (Attempt)	Money	HAMAS	Convicted by jury	180 months		
			2339B (Conspiracy)	Money	HAMAS	Convicted by jury	180 months		
Mahmoud Youssef Kourani	03-CR-81030	E.D. Mich.	2339B (Conspiracy)	Money, Personnel	Hezbollah	Guilty Plea	54 months	yes (military training)	**54 months** - 18:2339B (Conspiracy), 54 months
Mohammed Abdullah Warsame	04-CR-029	D. Minn.	2339B	Unknown	Al-Qaeda	Pending	n/a	yes (military training)	n/a
			2339B (Conspiracy)	Unknown	Al-Qaeda	Pending	n/a		

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Mohammed Junaid Babar	04-CR-528	S.D.N.Y.	2339B (**2 counts**)	Night-Vision Equipment	Al-Qaeda	Guilty Plea	Unknown	no	Unknown
Nuradin Abdi	04-CR-88	S.D. Ohio	2339B (Conspiracy)	Training	Al-Qaeda	Dismissed as part of plea to other charges	n/a	yes (military training)	n/a
Holy Land Found'n for Relief and Development	04-CR-240	N.D. Tex.	2339B (Conspiracy)	Money	HAMAS	Pending	n/a	no	n/a
			2339B (**11 Counts**)	Money	HAMAS	Pending	n/a		
Shukri Abu Baker			2339B (Conspiracy)	Money	HAMAS	Pending	n/a	no	n/a
			2339B (**12 Counts**)	Money	HAMAS	Pending	n/a		
Mohammed El-Mezain			2339B (Conspiracy)	Money	HAMAS	Pending	n/a	no	n/a
			2339B (**12 Counts**)	Money	HAMAS	Pending	n/a		
Ghassan Elashi			2339B (Conspiracy)	Money	HAMAS	Pending	n/a	no	n/a
			2339B (**12 Counts**)	Money	HAMAS	Pending	n/a		
Haitham Maghawri			2339B (Conspiracy)	Money	HAMAS	Pending (not in custody)	n/a	no	n/a
			2339B (**12 Counts**)	Money	HAMAS	Pending (not in custody)	n/a		
Akram Mishal			2339B (Conspiracy)	Money	HAMAS	Pending (not in custody)	n/a	no	n/a
			2339B (**12 Counts**)	Money	HAMAS	Pending (not in custody)	n/a		
Mufid Abdulqader			2339B (Conspiracy)	Money	HAMAS	Pending	n/a	no	n/a
			2339B (**12 Counts**)	Money	HAMAS	Pending	n/a		

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Abdulrahman Odeh			2339B (Conspiracy)	Money	HAMAS	Pending	n/a	no	n/a
			2339B (**12 Counts**)	Money	HAMAS	Pending	n/a		
Yassin Muhiddin Aref	04-CR-402	N.D.N.Y.	2339B (Conspiracy)	Missiles	Jaish-e-Mohammed	Convicted by jury	180 months	no	**180 months** - 18:1956(a)(3)(B) (2 counts) and 18:1956(h), 151 months; 18:2339A and B (Conspiracy), 180 months; 18:2339A and 18:2339B (2 counts of each), 180 months; 18:1001, 6 months; all counts to run concurrent
			2339B (Attempt) (**7 counts**)	Financial Services	Jaish-e-Mohammed	Convicted by jury	180 months		
Mohammed Mosharref Hossain			2339B (Conspiracy)	Missiles	Jaish-e-Mohammed	Convicted by jury	180 months	no	**180 months** - 18:1956(h) and 18:1956(a)(3)(B) (11 counts), 151 months each count; 18:2339A (all types all counts), 180 months each count; 18:2339B (all types, all counts), 180 months each count); all counts to run concurrent
			2339B (Attempt) (**7 counts**)	Financial Services	Jaish-e-Mohammed	Convicted by jury	180 months		
Carlos E. Gamarra-Murillo	04-CR-349	M.D. Fla.	2339B (Attempt)	Weapons	FARC	Guilty Plea	180 months	no	**300 months** - 22:2778(a), (b)(1)(A)(ii)(I)-(III), (c) and 22 CFR 121.1, 123.1, 127.1, 127.3, 129.1-129.3, 120 months; 18:2339B(Attempt), 180 months; to run consecutively

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Ahmed Omar Abu Ali	05-CR-53	E.D. Va.	2339B (Conspiracy)	Personnel	Al-Qaeda	Convicted by jury	120 months	yes (military and explosives training)	**360 months** - 18:2339B (Conspiracy), 120 months; 18:2339B, 120 months; 18:2339A (Conspiracy), 120 months; 18:2339A, 120 months; 50:1705 (2 counts), 120 months each count; 18:1752(d), 120 months; 49:46502, 240 months; 18:32, 240 months; first seven counts concurrent, followed by the final two counts concurrent to each other
			2339B	Personnel	Al-Qaeda	Convicted by jury	120 months		
Lamont Ranson	05-CR-16	S.D. Miss.	2339B (Conspiracy)	Fake ID's	Abu Sayyaf	Guilty Plea	29 months	no	**29 months** - 18:2339B (Conspiracy), 29 months
			2339B (Attempt)	Fake ID's	Abu Sayyaf	Dismissed as part of plea to Other Charges	n/a		
Cedric Carpenter			2339B (Conspiracy)	Fake ID's	Abu Sayyaf	Guilty Plea	68 months	no	**68 months** - 18:2339B, 68 months; 18:922(g)(1), 60 months; to run concurrently
			2339B (Attempt)	Fake ID's	Abu Sayyaf	Dismissed as part of plea to Other Charges	n/a		
Tarik Ibn Osman Shah	05-CR-673	S.D.N.Y.	2339B (Conspiracy)	Training, Medical Expertise, Personnel	Al-Qaeda	Guilty Plea	Pending	yes (jihad camp trainer)	Pending
			2339B (Attempt)	Training, Medical Expertise, Personnel	Al-Qaeda	Guilty Plea	Pending		

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Rafiq Sabir			2339B (Conspiracy)	Training, Medical Expertise, Personnel	Al-Qaeda	Convicted by jury	Pending	no	Pending
			2339B (Attempt)	Training, Medical Expertise, Personnel	Al-Qaeda	Convicted by jury	Pending		
Mahmud Faruq Brent			2339B (Conspiracy)	Personnel	Lashkar-e-Taiba	Guilty Plea	180 months	yes (military training)	180 months - 18:2339B (Conspiracy), 180 months
			2339B (Attempt)	Personnel	Lashkar-e-Taiba	Dismissed as part of plea to Other Charges	n/a		
Naji Antoine Abi Khalil	05-CR-200 04-CR-573	E.D. Ark. S.D.N.Y	2339B (Attempt)	Night-Vision Equipment	Hezbollah	Guilty Plea	57 months	no	**60 months** - 18:2339B, 57 months; 50:1705(all types, all counts) 60 months on each; to run concurrently
Arwah Jaber	05-CR-50030	W.D. Ark.	2339B (Attempt)	Personnel	PIJ	Acquitted by jury	n/a	no	**15 months** - 42:408(a)(7)(B) (2 counts), 15 months; 18:1015(a), 15 months; 18:1542, 15 months; 18:1425, 15 months; all to run concurrently
Mustafa Kamel Mustafa	04-CR-356	S.D.N.Y.	2339B	Training	Al-Qaeda	Pending (not in custody)	n/a	no	n/a
			2339B (Conspiracy)	Training	Al-Qaeda	Pending (not in custody)	n/a		
			2339B (Attempt)	Unspecified	Al-Qaeda	Pending (not in custody)	n/a		
			2339B (Conspiracy)	Money	Al-Qaeda	Pending (not in custody)	n/a		
Oussama Kassir			2339B (Attempt)	Training	Al-Qaeda	Pending (not in custody)	n/a	yes (military training)	n/a

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
			2339B (Attempt	Computer Services	Al-Qaeda	Pending (not in custody)	n/a		
			2339B (Conspiracy)	Training, Personnel	Al-Qaeda	Pending (not in custody)	n/a		
			2339B (Conspiracy)	Computer Services	Al-Qaeda	Pending (not in custody)	n/a		
Haroon Rashid Aswat			2339B (Conspiracy)	Training, Personnel	Al-Qaeda	Pending (not in custody)	n/a	yes (military training)	n/a
			2339B (Attempt)	Training, Personnel	Al-Qaeda	Pending (not in custody)	n/a		
Ali Asad Chandia	05-CR-401	E.D. Va.	2339B (Conspiracy)	Equipment, Computer Services	Lashkar-e-Taiba	Convicted by jury	180 months	no	**180 months** - 18:2339A (Conspiracy), 60 months; 18:2339B (Conspiracy), 180 months; 18:2339B, 180 months; all concurrent
			2339B	Equipment, Computer Services	Lashkar-e-Taiba	Convicted by jury	180 months		
Mohammed Ajmal Khan			2339B (Conspiracy)	Equipment	Lashkar-e-Taiba	Pending (not in custody)	n/a	no	n/a
			2339B	Equipment	Lashkar-e-Taiba	Pending (not in custody)	n/a		
Adam Gadahn	05-CR-254	C.D. Cal.	2339B	Personnel, Services	Al-Qaeda	Pending (not in Custody)	n/a	no	n/a
Michael Curtis Reynolds	05-CR-493	M.D. Pa.	2339B (Attempt)	Property, Services, Personnel, Training, Expert Advice	Al-Qaeda	Convicted by jury	Pending	no	n/a

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Victor Daniel Salamanca	06-CR-20001	S.D. Fla.	2339B (Conspiracy)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending (not in custody)	n/a	no	n/a
			2339B (Attempt) (**5 counts**)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending (not in custody)	n/a		
Luis Alfredo Daza Morales			2339B (Conspiracy)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending	n/a	no	n/a
			2339B (Attempt) (**3 counts**)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending	n/a		
Jalal Sadaat Moheisen			2339B (Conspiracy)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending	n/a	no	n/a
			2339B (Attempt) (**3 counts**)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending	n/a		
Jose Tito Libio Ulloa Melo			2339B (Conspiracy)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending	n/a	no	n/a
			2339B (Attempt) (**3 counts**)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending	n/a		

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Julio Cesar Lopez			2339B (Conspiracy)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending	n/a	no	n/a
			2339B (Attempt)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending	n/a		
Bernardo Valdes Londono			2339B (Conspiracy)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending (Not in Custody)	n/a	no	n/a
			2339B (Attempt)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending (Not in Custody)	n/a		
Carmen Maria Ponton Caro			2339B (Conspiracy)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending	n/a	no	n/a
			2339B (Attempt) (**3 counts**)	Financial Services, Fake ID's, Weapons, Personnel, Transportation	FARC	Pending	n/a		
Syed Haris Ahmed	06-CR-147	N.D. Ga.	2339B (Conspiracy)	Personnel	Lashkar-e-Tayyiba	Pending	n/a	yes (military training)	n/a
			2339B (Attempt)	Personnel	Lashkar-e-Tayyiba	Pending	n/a		
Ehsanul Islam Sadequee			2339B (Conspiracy)	Personnel	Lashkar-e-Tayyiba	Pending	n/a	yes (military training)	n/a
			2339B (Attempt)	Personnel	Lashkar-e-Tayyiba	Pending	n/a		

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Syed Hashmi	06-CR-442	S.D.N.Y.	2339B (Conspiracy)	Military Equipment, Currency	Al-Qaeda	Pending	n/a	no	n/a
			2339B	Military Equipment, Currency	Al-Qaeda	Pending	n/a		
Mohamed Shorbagi	06-CR-62	N.D. Ga.	2339B (Conspiracy)	Money	HAMAS	Guilty Plea	92 months	no	**92 months** - 18:2339B (Conspiracy, 92 months)
Sathajhan Sarachandran	06-CR-615	E.D.N.Y.	2339B (Conspiracy)	Training, Expert Advice, Weapons, Personnel	LTTE	Pending	n/a	no	n/a
			2339B (Attempt)	Training, Expert Advice, Weapons, Personnel	LTTE	Pending	n/a		
Piratheepan Nadarajah			2339B (Conspiracy)	Training, Expert Advice, Weapons, Personnel	LTTE	Pending (Not in Custody)	n/a	no	n/a
			2339B (Attempt)	Training, Expert Advice, Weapons, Personnel	LTTE	Pending (Not in Custody)	n/a		
Sahilal Sabaratnam			2339B (Conspiracy)	Training, Expert Advice, Weapons, Personnel	LTTE	Pending	n/a	no	n/a
			2339B (Attempt)	Training, Expert Advice, Weapons, Personnel	LTTE	Pending	n/a		
Thiruthanikan Thanigasalam			2339B (Conspiracy)	Training, Expert Advice, Weapons, Personnel	LTTE	Pending	n/a	no	n/a

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
			2339B (Attempt)	Training, Expert Advice, Weapons, Personnel	LTTE	Pending	n/a		
Nadarasa Yogrrasa			2339B (Conspiracy)	Training, Expert Advice, Weapons, Personnel	LTTE	Pending	n/a	no	n/a
			2339B (Attempt)	Training, Expert Advice, Weapons, Personnel	LTTE	Pending	n/a		
Haniffa bin Osman	06-CR-416	D. Md.	2339B (Conspiracy)	Weapons	LTTE	Guilty Plea	Pending	no	Pending
Haji Subandi			2339B (Conspiracy)	Weapons	LTTE	Guilty Plea	Pending	no	Pending
Erick Wotulo			2339B (Conspiracy)	Weapons	LTTE	Guilty Plea	Pending	yes (former military officer in Indonesian armed forces)	Pending
			2339B (Conspiracy)	Weapons	LTTE	Guilty Plea	Pending	no	Pending
Zeinab Taleb-Jedi	06-CR-652	E.D.N.Y.	2339B	Personnel	Mujahedin-e Khalq	Pending	n/a	no	n/a
Javed Iqbal	06-CR-1054	S.D.N.Y.	2339B (Conspiracy) (**2 counts**)	Expert Advice, Facilities, Comm Equip	Hizbollah	Pending	n/a	no	n/a
			2339B (**2 counts**)	Expert Advice, Facilities, Comm Equip	Hizbollah	Pending	n/a		
Saleh Elahwal			2339B (Conspiracy) (**2 counts**)	Expert Advice, Facilities, Comm Equip	Hizbollah	Pending	n/a	no	n/a
			2339B (**2 counts**)	Expert Advice, Facilities, Comm Equip	Hizbollah	Pending	n/a		

Defendant	Docket #	Court	Charge	Support Type	Recipient	Disposition	Sentence	Training Allegations?	Total Sentence
Maria Corredor Ibague (aka Boyaco)	06-CR-344	D.D.C.	2339B (Conspiracy)	Weapons, Ammunition, Comm Equip	FARC	Pending (Not in Custody)	n/a	no	n/a
			2339B	Weapons, Ammunition, Comm Equip	FARC	Pending (Not in Custody)	n/a		
Edilma Morales Loaiza (aka La Negra)			2339B (Conspiracy)	Weapons, Ammunition, Comm Equip	FARC	Pending (Not in Custody)	n/a	no	n/a
			2339B	Weapons, Ammunition, Comm Equip	FARC	Pending (Not in Custody)	n/a		
Karunakaran Kandasamy	07-MJ-507	E.D.N.Y.	2339B	Fundraising, Property, Personnel	LTTE	Pending	n/a	no	n/a

Robert Chesney

Bobby Chesney is an associate professor at Wake Forest University School of Law specializing in national security law. His scholarship focuses on the difficulty of calibrating a reasonable and effective legal response to the threat posed by terrorism, with reference both to international and domestic legal frameworks. He has published articles on topics including the post-9/11 application of federal criminal laws relating to terrorism, the detention and repatriation of Guantanamo detainees, and the impact of the state secrets privilege on national security litigation. His latest article (co-authored with Jack Goldsmith and forthcoming in Stanford Law Review) compares post-9/11 developments in the criminal justice system to related developments in the military detention system, and discusses prospects for reform of the latter. In the classroom, Professor Chesney teaches constitutional law, national security law, evidence, and civil procedure, as well as a seminar examining legal issues associated with terrorism.

Professor Chesney is a past chair of the Section on National Security Law of the Association of American Law Schools; an associate member of the Intelligence Science Board (an advisory body serving the Office of the Director of National Intelligence); the book review editor of the Journal of National Security Law and Policy; the founder and moderator of "nationalsecuritylaw," (a listserv for professors and professionals); and the former editor of the American Bar Association Standing Committee on Law and National Security's *National Security Law Report*. He has received law of war training as a civilian guest of the Judge Advocate General's Legal Center and School, and has visited the detention facility at Guantanamo on two occasions. Professor Chesney is a member of the American Law Institute.