

Center on Law and Security, New York University School of Law



# Terrorist Trial Report Card: September 11, 2001-September 11, 2009

January 2010

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# Acknowledgments

## **Executive Director of the Center on Law and Security / Editor in Chief**

Karen J. Greenberg

## **Director of Research/Writer**

Francesca Laguardia

## **Editor**

Jeff Grossman

## **Research**

Jessica Alvarez, Gayle Argon, Daniel Peter Burgess, Laura C. Carey, Andrea Lee Clowes, Casey Doherty, Meredith J. Fortin, Alice Goldman, Matt Golubjatnikov, Isabelle Kinsolving, Tracy A. Lundquist, Adam Maltz, Robert Miller, Lea Newfarmer, Robert E. O’Leary, Jason Porta, Meredythe M. Ryan, Dominic A. Saglibene, Alexandra Ross Schwartz, Moses Sternstein, Nancy Sul, and Jonathan Weinblatt

## **Designer**

Wendy Bedenbaugh

## **Senior Fellow for Legal Affairs**

Joshua L. Dratel

## **Faculty Co-Directors of the Center on Law and Security**

David Golove, Stephen Holmes, Richard H. Pildes, and Samuel J. Rascoff

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## **The Center on Law and Security**

New York University School of Law

110 West Third Street • New York, NY 10012 • 212-992-8854 • [cls@exchange.law.nyu.edu](mailto:cls@exchange.law.nyu.edu)

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# The Terrorist Trial Report Card, 2001-2009

Studying the full eight years of post-9/11 federal terrorism prosecutions, the Center on Law and Security has assembled a massive relational database, a resource that exists nowhere else. Periodically we have reached into the growing data set and pulled out snapshots of the most illuminating trends. This year's *Terrorist Trial Report Card* reveals much about the government's changing legal strategies, the varied biographies of the defendants, and the nature of the threat.

As the number of prosecutions approaches 1,000, federal prosecutors have shifted strategies and courts have honed their ability to try alleged terrorists. An early practice of making high-profile arrests while prosecuting few terrorism charges eroded public trust and muddied assessments of the nature and scale of the threat after 9/11. Our research shows that in recent years there has been a strong trend, little noticed in the public debate, towards a more effective use of the criminal justice system. Despite procedural and substantive challenges, the gap between public allegations of terrorism and the existence of charges of terrorism in court has narrowed considerably. An increasing percentage of convictions involve the more serious charges and a growing percentage of those accused of terrorism are convicted. Overall, the Justice Department has adopted a more disciplined approach, promising less in its public pronouncements and delivering more in the courtroom.

## Prosecutions

### *The Number of Cases*

To conduct this study, the Center searched deeply in the public record for information about cases in which arrests were announced or disclosed in the news media. When the spotlight moved away, we continued to follow those cases to their conclusions – cataloging, among many other things, the variety of charges, the rates of conviction and acquittal, and the sentences. The number of cases demonstrates the seriousness with which the Department of Justice pursued them. Although the Bush administration's National Defense Strategy of 2005 referred to courts as part of a “strategy of the weak,” the high number of cases suggests that Department of Justice was an important player in President Bush's war on terror. All told, there have been 828 such prosecutions, making up 337 cases against 804 individuals in these eight years.

### *The Initial Response to 9/11*

*The number of arrests outpaced the quality of the charges and subsequent prosecutions immediately after 9/11.* The vigor with which the DoJ conducted its prosecutions often did not live up to initial accusations of terrorism. The DoJ struggled to institute a strategy of prevention (in which lesser charges are used as a means of taking those considered dangerous off the streets) and often failed to secure the kinds of convictions they initially envisioned. In the first year following the attacks, fewer than one in 10 of the announced terrorism arrests were tested as such in court, and the number remained under two in five the following year. Prosecutors most often sought lesser or unrelated indictments.

### *The Evolving Record*

While the DoJ continues to pursue a strategy of prevention, the emphasis has shifted to trying accused terrorists as terrorists. More and more, the allegations made in public have eventually been charged and proven in court. In 2001/2002, 8% of defendants labeled as terrorists in the media were charged under terrorism statutes, and of those 38% were convicted of terrorism. In 2006/2007, those numbers increased to 47% charged and 84% convicted.

*The overall conviction rate for prosecutions involving terrorism charges rate now stands at 89%.*

At the same time, the number of cases has leveled off to a yearly average of fewer than 30, in contrast to the 127 cases indicted in the year immediately following 9/11.

### *Critiques and findings*

Throughout the course of these trials, human rights and civil liberties advocates have criticized the DoJ's approach as contrary to basic norms of justice and due process. Trends drawn from the Center's database shed light on several of the more controversial practices.

One such concern has focused on the material support statutes, which some contend are overbroad and unconstitutionally vague, sweeping up people who had no idea that their activities were used to support terrorism. That concern has had some judicial support, including in a case now pending before the Supreme Court (formerly *Humanitarian Law Project v. Reno*, now called *Humanitarian Law Project v. Holder*). No case as yet has been dismissed on these grounds. The Center found that in 68% percent of prosecutions involving material support charges the government claimed that the defendant had a particular target in mind. In half of the remaining material support prosecutions, the government claimed that the defendant had traveled to a terrorist training camp.

The reliability of the government's evidence has also proven controversial. In the Lodi case of 2005 (*U.S. v. Hayat*), for example, questions remained even after conviction about the way in which the interrogator led the defendant to confess that he had trained abroad in a terrorist camp. In the Albany case of 2004 (*U.S. v. Aref*), critics claimed that the use of an informant amounted to entrapment – the defendant repeatedly told the FBI informant in taped conversations that he did not want to participate in jihad, only to be tempted to launder money when he was down on his luck.

The use of the preventive approach to trial and the reliance upon classified information – including the mechanisms provided for by the Classified Information Procedures Act – have been sources of further concern. If information is classified, how can the public trust the allegations made behind closed doors? How can defendants challenge the authenticity of claims against them if the government provides only summary information? Alternatively, can the legal system address the requirements of CIPA and still adequately protect national security?

Another debate involves the conditions of pretrial confinement. In a number of cases – such as those against Syed Hashmi and Mohammed Warsame – the DoJ has imposed special administrative measures (or “SAMs”) that amount to solitary confinement. So, too, SAMs for post-conviction prisoners remain a concern.

In some instances, the use of deportation proceedings following acquittals has brought harsh criticism. Lyglenson Lemorin, acquitted of his alleged role in the Liberty City Seven plot, was subjected to deportation proceedings nonetheless. We were able to find indications of deportation proceedings in nine, or 13%, of the resolved prosecutions that did not result in conviction. In several instances, however, it appears that defendants agreed to deportation as part of a plea bargain.

Our research suggests that the techniques employed by prosecutors in terrorism-associated cases – notably the use of informants and lesser charges – do not differ markedly from those employed in prosecuting serious drug charges and organized crime. High-profile terrorism cases, in effect, have drawn greater attention to longstanding but little-noticed criticisms of well-established prosecutorial tactics.

### **The Terrorist Threat**

Over time, as information became available, the Center has added categories and content to its database, including, for example, the nature of the alleged targets, the terrorist organizations linked to alleged plots, and the weapons used or planned for use in each case. The database was thus transformed from a tool for assessing legal proceedings alone to a repository of substantive information about terrorism and terrorists themselves – their origins, their aims, their access to dangerous materials, their methods of training, and their affiliations. Among the findings:

- Of the defendants whose citizenship we were able to identify, the largest contingent is from the U.S.
- We were able to identify an alleged affiliation with a terrorist group for fewer than half of the defendants. For those whom we did, the most common affiliation was not with a radical Islamist organization but with the Revolutionary Armed Forces of Colombia, or FARC, a group of Marxist guerillas formed in 1964. Al Qaeda links, the second-most frequently alleged, were cited for only 11% of the individual defendants.
- No specific target was alleged in 63% of prosecutions of alleged international terrorists. Of those that did involve a specific target, 67% were aimed overseas and 16% were aimed at military installations, equipment, or personnel.
- Five percent of defendants were charged under the weapons of mass destruction statute (a figure that does not include other charges involving explosives or destructive devices).

### **Conclusions**

Many of the Center’s factual findings are relevant to ongoing controversies about the best way to respond to terrorist threats. Some of the most important trends have not been identified before; other data, though previously available, have not been widely noted in congressional and public debate.

#### **Main Conclusion:**

Since 9/11, the Department of Justice’s understanding of terrorism cases has grown exponentially in terms of its patience in building a case, its understanding of the threats posed by terrorists, and its willingness

to focus on terrorism and other serious charges. The early practice of making high-profile arrests, while prosecuting few terrorism charges – which brought into question the capacity of the DoJ to try terrorism-related crimes – has largely been addressed.

Other conclusions follow as well:

- The number of announced arrests has declined and the proportion of indictments and convictions has steadily grown.
- Most prosecutions of international terrorists involved no allegations of specific targets, and where specific targets were alleged, the targets were usually outside the U.S.
- The DoJ effected a successful strategy for convincing defendants to cooperate. Three notable examples of cooperators are Iyman Faris, whose cooperation may have ultimately led to six other high-level prosecutions; Mohammed Mansour Jabarah, who provided details on al Qaeda training camps and methods; and Bryant Neal Vinas, who reportedly began cooperating immediately upon arrest, providing information leading to overseas prosecutions and domestic alerts.
- Neither *Miranda* requirements nor the challenges of preserving classified information have proven to be insurmountable obstacles in terrorism cases. The rate of conviction, nearly nine in 10, compares favorably to those involving other serious charges.

The trend lines demonstrate convincingly that federal courts are capable of trying alleged terrorists and securing high rates of conviction. While we can only assess the cases that have been brought, federal prosecution has demonstrably become a powerful tool in many hundreds of cases, not only for incapacitating terrorists but also for intelligence gathering. Much of the government's knowledge of terrorist groups has come from testimony and evidence produced in grand jury investigations, including information provided by cooperators, and in the resulting trials.

Going forward, the government will continue to prosecute alleged terrorists in federal courts. Among these will be some of the Guantanamo detainees. While these cases will no doubt bring new complexities into the discussion, the overwhelming evidence suggests that the structures and procedures, as well as the substantive precedents, provide a strong and effective system of justice for alleged crimes of terrorism.

Karen J. Greenberg



Executive Director, Center on Law and Security  
Editor in Chief

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# The Overall Record

## I. Results of Terrorism-Associated Prosecutions

Resolved Indictments	593	100%
Convictions	523	88.2%
Acquittals and Dismissals:	28	4.7%*
Acquitted	10	1.7%
Dismissed	13	2.2%
Guilty verdict overturned	4	.7%
Not guilty (insanity)	1	.2%
Mistrials	1	0.2%
Charges resolved by plea in another case	2	0.3%
Charges dropped by prosecutors	39	6.6%

\* Figures for acquittals and dismissals total 4.8% due to rounding.

While general conviction rates provide a broad sense of the trajectory of terrorism prosecutions, the significance of these rates is best understood by an examination of the details behind the general statistics. Each category – from conviction to acquittal – reflects government decisions about which charges to bring, with an eye not just towards conviction but towards the protection of the public safety as well. Given the national security context alleged in these prosecutions, the role of targets, of weapons, and of association further demonstrates the complexity of these cases. These analyses also help illuminate the gap between alleged instances of terrorism and actual terrorism-related convictions. Below are explanations of how each of the major categories defining the results of these trials reflects a range of decisions, aimed not just at outcome but at refining the possibilities of trial procedures in matters of terrorism.

### Conviction rate

Conviction rates throughout this report are calculated by dividing the number of convictions by the number of *resolved* indictments. Cases that are still awaiting trial are not included when calculating conviction rates.

Indictments that were dismissed, whether on motion of the prosecution or the defense, are included in the calculation as non-convictions.

## A. Results for All Charges

The Department of Justice (DoJ) has indicted 828 defendants. Trials are still pending against 235 of them, leaving 593 resolved indictments for purposes of analysis. (See chart 1).

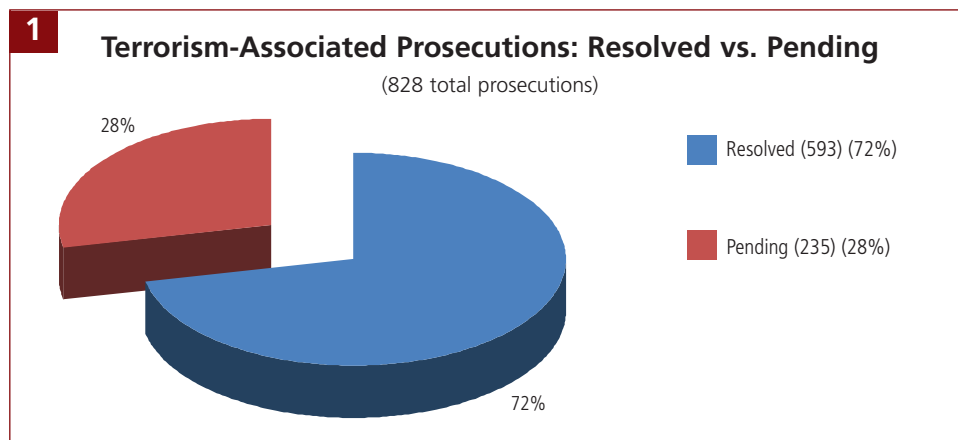
Of these 593, 523 defendants were convicted on some charge either by guilty plea or after trial, resulting in an 88.2% conviction rate.<sup>1</sup>

(See chart 2).

Seventy defendants were not convicted.

Of those who were not convicted:

- The majority of non-convicted defendants (39 defendants, or 6.6% of the total



<sup>1</sup> For more on conviction rates, See, e.g., OFFICE OF THE ATT'Y GEN., U.S. DEP'T OF JUSTICE, THE ACCOMPLISHMENTS OF THE U.S. DEPARTMENT OF JUSTICE 2001-2009, at 14, 38-39, 55, 99 (2009), available at <http://www.usdoj.gov/opa/documents/doj-accomplishments.pdf>; RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 26 (2008), available at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf> (hereinafter *In Pursuit of Justice*).

593 whose indictments have been resolved) had all charges against them dropped by the prosecutor. These defendants and those convicted by guilty plea or after trial account for 94.8% of all prosecutions.

- Ten defendants, or 1.7% of the 593, were acquitted by a judge or jury at trial.
- Guilty verdicts on certain charges against nine defendants were later vacated or reversed by a judge. Four of the nine, or .7%, had guilty verdicts vacated or reversed in their entirety. (The other five had guilty verdicts vacated or reversed on some charges but not all).
- Charges against 13 defendants, or 2.2%, were resolved when the judge in the case dismissed all charges on the defendant's (rather than the prosecutor's) motion.
- Of the remaining four defendants of the 70 who were not convicted, one still has charges pending that originally resulted in a mistrial, and so may be tried again; one was found not guilty by reason of insanity; and two had all charges dismissed based on plea bargains in other cases or by their co-defendants (for an explanation of this circumstance, see p. 46).

Soon after the 9/11 attacks, DoJ began accumulating and at times publishing lists of "terrorism prosecutions." These lists were often later found to be faulty, as they included numerous defendants whom the Department of Justice at some point admitted had no connection to terrorism.<sup>2</sup> Because these lists appear to be untrustworthy, it is worthwhile to look at the resulting conviction rates after these defendants have been factored out.

Removing those cases in which we have not been able to identify an association with terrorism other than inclusion on a DoJ list results in an increased conviction rate.

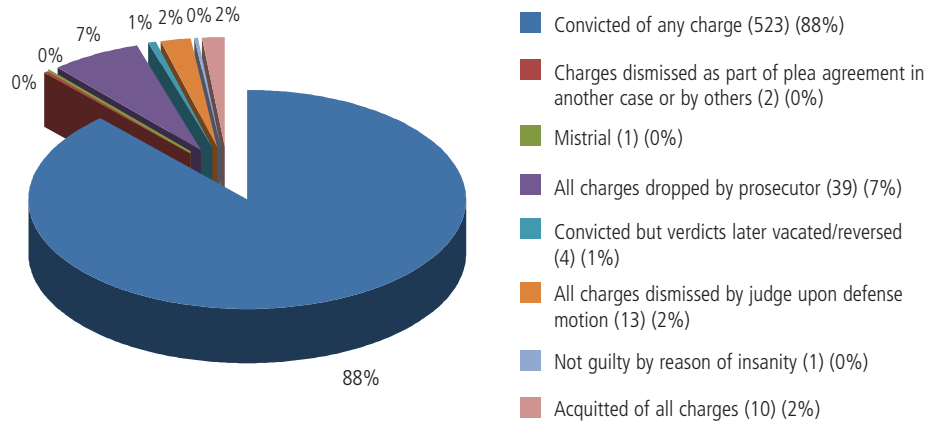
**The conviction rate after list cases have been factored out is 88.3%.**

*(See chart 3).*

## Results of Terrorism-Associated Prosecutions

(593 resolved prosecutions)

2



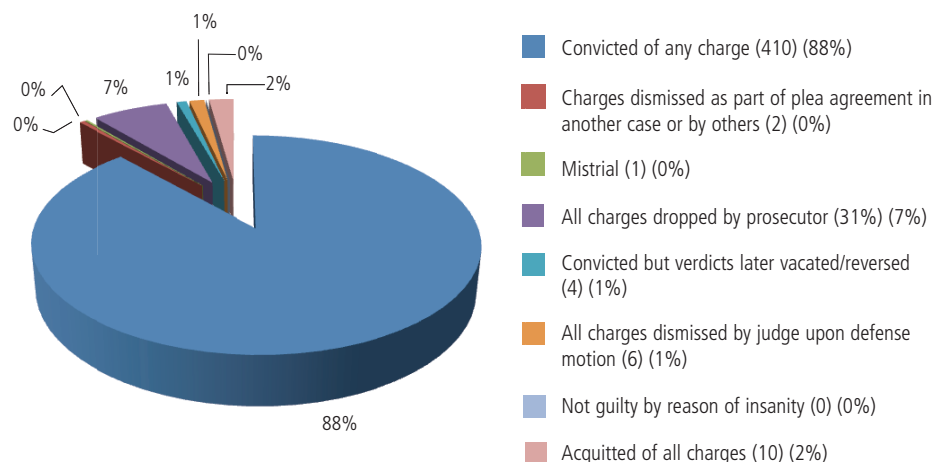
## "List" cases

Soon after the 9/11 attacks, DoJ began accumulating and at times publishing lists of "terrorism prosecutions." These lists included defendants whom the Department of Justice at some point admitted had no connection to terrorism. Similarly, many defendants were referred to as "terrorism defendants" in initial press releases although any association with terrorism was later dropped or disavowed.

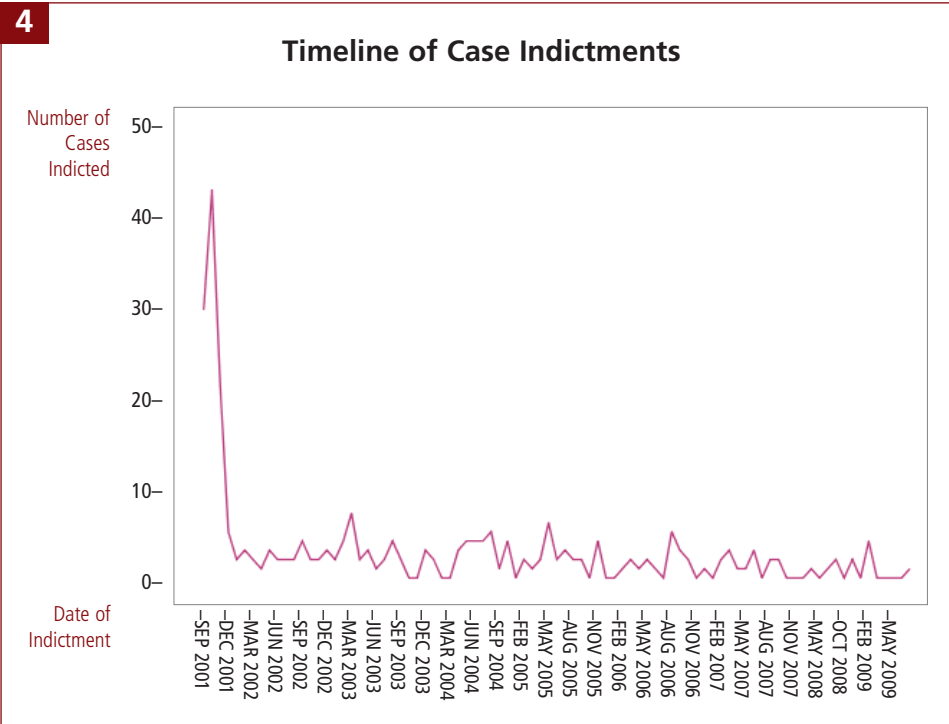
For purposes of certain analyses in this report, these cases, referred to herein as "list" cases, have been removed from the data in order to test trends in cases in which the government more firmly believed that the defendant was related to terrorism in some way.

## Results of Non-List Prosecutions (464 resolved, non-list prosecutions)

3



<sup>2</sup>See Dan Eggen & Julie Tate, *U.S. Campaign Produces Few Convictions on Terrorism Charges*, WASH. POST, June 12, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/11/AR2005061100381.html>.



After removing the list cases, there are 410 convictions, and the conviction rate increases from 88.2% to 88.3%. The only case in which a defendant was found not guilty by reason of insanity drops out of the data set, as do eight instances in which prosecutors chose to drop all charges. Seven instances of judges dismissing all charges upon motion by the defendant also drop out, bringing this percentage down to 1.1%. Otherwise, the numbers remain largely the same.

## B. Chronology of Cases

As can be seen from chart 4, cases allegedly associated with terrorism proliferated immediately following the 9/11 attacks. This quickly evolved, however, into a more restrained level of indictments. The timeline tracks the number of cases (in other words, numbered by dockets, not defendants) since September 11th, 2001. Note that the peak is in November rather than September of 2001. This is due to the time lag before post-9/11 investigations ripened into indictments, and between arrest and indictment.

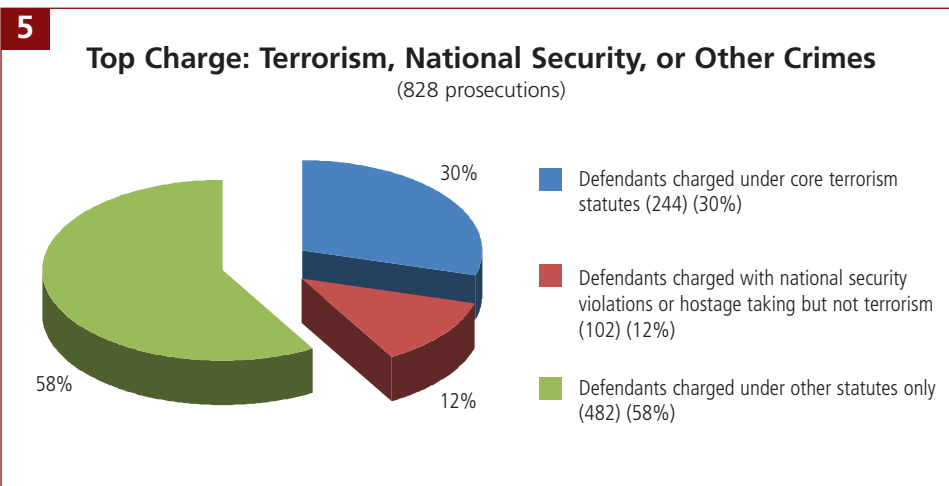
## C. Results for Prosecutions Involving Terrorism or National Security Charges

The Center on Law and Security has traditionally defined “core terrorism statutes” as those falling under the Terrorism title of the United States Code<sup>3</sup> as well as one additional provision routinely used to pursue terrorists, the International Emergency Economic Powers Act (“IEEPA,” found at 50 U.S.C. § 1705). These, however, are not the only criminal statutes that include terrorism as an element. Others that appear at least as relevant are 18 U.S.C. § 1992 (“Terrorist attacks and other violence against railroad carriers and against mass transportation systems on land, on water, or through the air”) and 18 U.S.C. § 1993 (“Terrorist attacks and other acts of violence against mass transportation systems”).

**“Defendants” and “Cases”**

A “defendant” or “prosecution” as used herein means an individual who has been indicted. Defendants may be corporations or organizations (such as FARC or the Benevolence International Foundation). Individuals may be indicted in multiple criminal cases. In those instances, they are counted as separate defendants for each case, so that a single individual may represent multiple defendants. When unique individuals are counted, we have used the terms “individuals” and “individual defendants.”

A “case” as used herein means all charges and defendants under a single docket number. Because a single docket will generally combine all defendants and charges in a criminal case, we present the case count in order to represent the number of plots alleged.



<sup>3</sup>18 U.S.C. § 113B.

Additionally, hostage taking (18 U.S.C. § 1203) and national security violations such as sabotage (“Destruction of national-defense materials, national-defense premises, or national-defense utilities,” 18 U.S.C. § 2155) may not require the prosecution to prove terrorism as an element of the crime, yet may regularly be thought of, in common parlance, as responding to terrorism.

The set of core terrorism statutes analyzed by this edition of the *Terrorist Trial Report Card* has therefore been expanded to include 18 U.S.C. § 1992 and 18 U.S.C. § 1993. Additionally, IEEPA has been categorized under “national security violations and hostage taking,” which is separately tracked herein. A list of all the statutes included in each category can be found in the appendix hereto.

#### i. Prosecutions involving either terrorism or national security charges

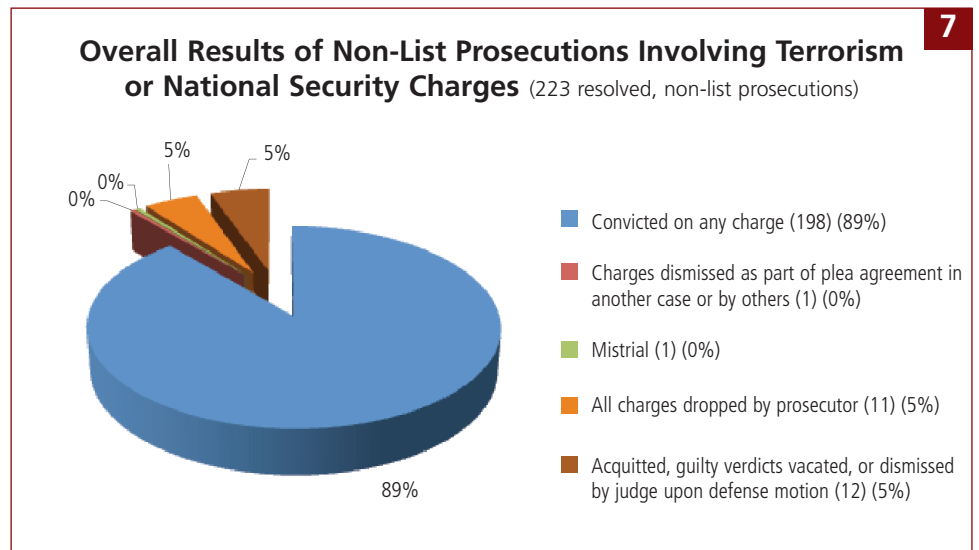
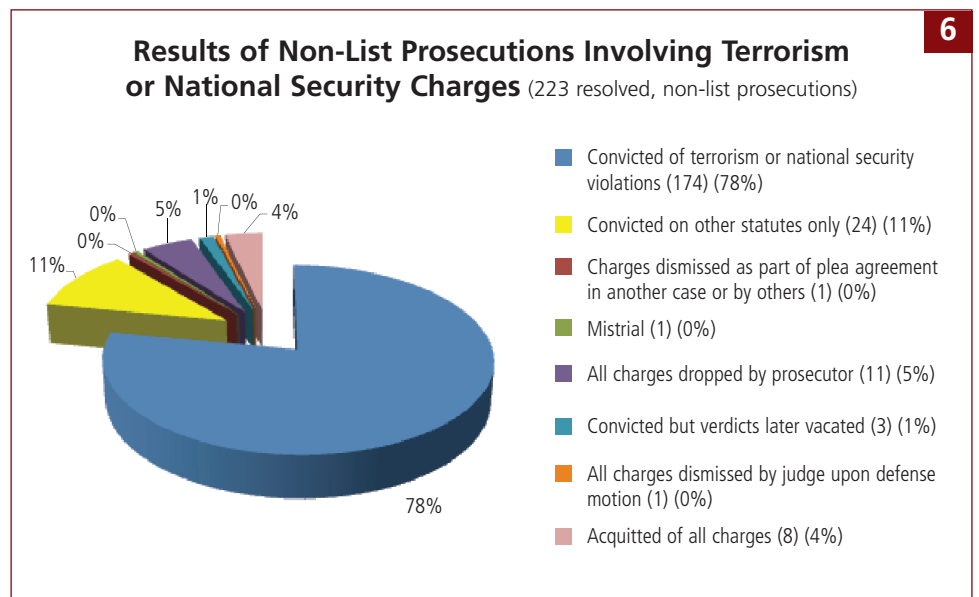
Only 29.5% of indictments contain a charge under one of the core terrorism statutes.

However, the inclusion of national security violations noticeably changes the analysis.

In addition to those defendants charged under a terrorism statute, 102 defendants, or 12.4% of defendants in cases associated with terrorism, have been charged with national security violations or hostage taking but not terrorism.

This brings the total to 41.9% of all indictments in the data set. (See chart 5).

Because national security violations may be considered similar to terrorism charges, some reports have consolidated these two categories.<sup>4</sup> Taken together, terrorism, national security violations, and hostage



taking are the top charges in the cases against 346 defendants. Limiting the data set to those defendants for whom the terrorism association consists of more than a mention on a list or an initial passing reference that is quickly or eventually abandoned, terrorism, national security violations, and hostage taking are the top charges in 338 indictments, or 48.5% of the total. Of these indictments, charges have been resolved against 223 defendants.

The conviction rate in non-list prosecutions involving terrorism,

national security violations or hostage taking charges is 88.8%.

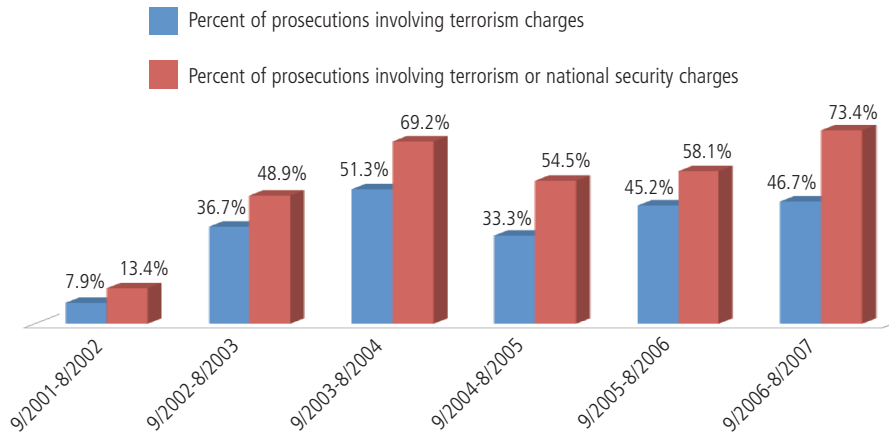
One hundred and seventy-four of these defendants, or 78%, were convicted on either national security, hostage taking, or terrorism charges.

An additional 24 defendants, or 10.8%, were convicted for violations of other statutes. (See charts 6 and 7).

<sup>4</sup> See, e.g., *In Pursuit of Justice*, supra note 1; RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 2009 UPDATE AND RECENT DEVELOPMENTS (2009), available at <http://www.humanrightsfirst.org/pdf/090723-LS-in-pursuit-justice-09-update.pdf> (hereinafter *In Pursuit of Justice Update*).

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### Timeline of Prosecutions Involving Terrorism or National Security Charges



#### Methodological note for charts 8 and 11:

In order to look specifically at the percentage, over time, of terrorism-associated prosecutions in which terrorism is actually charged, the Center looked to the annual percentage and conviction rates – the percentage of cases that charged terrorism, by year, and the resulting conviction rates.

We used the year of indictment rather than disposition because we consider the relevant factor to be the amount of evidence that a prosecutor had before indicting pursuant to a terrorism statute. The relevant time for these purposes is the moment at which the prosecutor chose which crimes to charge. We presume that jury verdicts – as reflected in the resulting conviction rates – can be used to gauge the accuracy of the charges that the prosecutor chose.

We chose to use defendants rather than cases to determine conviction rates because a prosecutor may be correct about some defendants in a case, but not necessarily about all. Our analysis ends in August 2007 because we know of so few subsequent indictments after that date in which the charges have been resolved against defendants. Consequently, this analysis becomes unreliable after that date.

### ii. Prosecutions involving terrorism charges

The percentage of terrorism-associated prosecutions that involve terrorism charges has increased. While only 8% of the prosecutions included terrorism charges in 2001/2002, the number rose to 47% in 2006/2007. (See chart 8).

In prior years, the Center on Law and Security noted that DoJ's conviction rate decreased when prosecutions under terrorism statutes were examined in isolation. This year, however, we see instead that the conviction rate increases slightly. Of the 244 defendants who have been charged under core terrorism statutes, DoJ has resolved charges against 157. Of these 157, 139 defendants were convicted on terrorism or other charges.

**The overall conviction rate for indictments in which charges were brought under core terrorism statutes since 9/11 is 88.6%.<sup>5</sup>**

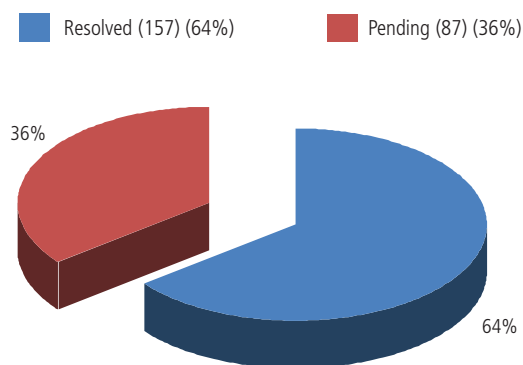
The DoJ exhibits a sharp learning curve in this area, however. A conviction rate that began as low as 78.4% between September 2001 and September 2002 jumped to 92.9% in the 2003/2004 period and reached 93.9% in 2006/2007. This surpasses the average overall felony conviction rate. (See chart 11).

**Of the 157 resolved trials involving terrorism charges, 113, or 72%, of defendants were convicted under a terrorism statute.**

**An additional 26 defendants, or 16.6%, were convicted of other charges. (See chart 10).**

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### Prosecutions Involving Terrorism Charges: Resolved vs. Pending (244 prosecutions)



<sup>5</sup>The overall conviction rate under core terrorism statutes since 9/11 is 88.53%, but in this instance we have rounded up so as not to appear inconsistent with separate rates for terrorism convictions and convictions for other charges only. After rounding, they add to 88.6%.



### *Of those convicted only of other charges:*

- Eight defendants had the terrorism charges against them dismissed as part of a plea bargain in which they pleaded guilty to national security violations.
- Five defendants had the terrorism charges against them dismissed as part of a plea bargain in which they pleaded guilty to other, non-national security charges.
- One defendant was convicted on national security charges while the terrorism charges resulted in a mistrial.
- Three defendants had terrorism charges dropped by the prosecutor but were convicted on national security charges.
- Two defendants had terrorism charges dropped by the prosecutor but were convicted on charges other than terrorism or national security violations.
- Two defendants were convicted on other charges although a judge vacated their original terrorism convictions. One of those two cases involved a conviction on national security charges.
- One defendant was acquitted of terrorism charges but convicted on national security charges.
- Four defendants were acquitted of terrorism charges but convicted of other, non-national security crimes.

The remaining 18 terrorism defendants, or 11.5%, were not convicted.

### *Of those who were not convicted:*

- Seven defendants had all charges dropped by the prosecutor.
- Six defendants were acquitted of all charges.
- One defendant's trial resulted in a mistrial.
- Three defendants had guilty verdicts vacated or overturned.
- One defendant had all charges dismissed by the judge upon defense motion.

## Terrorism Statutes

The term "terrorism statutes" is used herein to mean only those statutes requiring proof of involvement with terrorism (which generally entails either terrorist conduct or knowing or intentional aid to a terrorist organization or in furtherance of a terrorist objective).

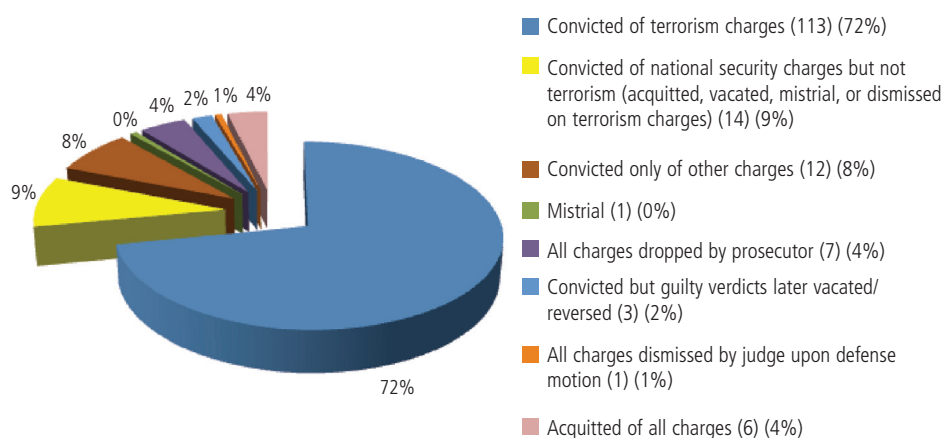
Other statutes generally considered to be associated with terrorism, but not necessarily implicating terrorism or requiring a prosecutor to prove an association with terrorism, have been included in the category of national security violations rather than terrorism.

A list of statutes in each category can be found in the appendix hereto.

10

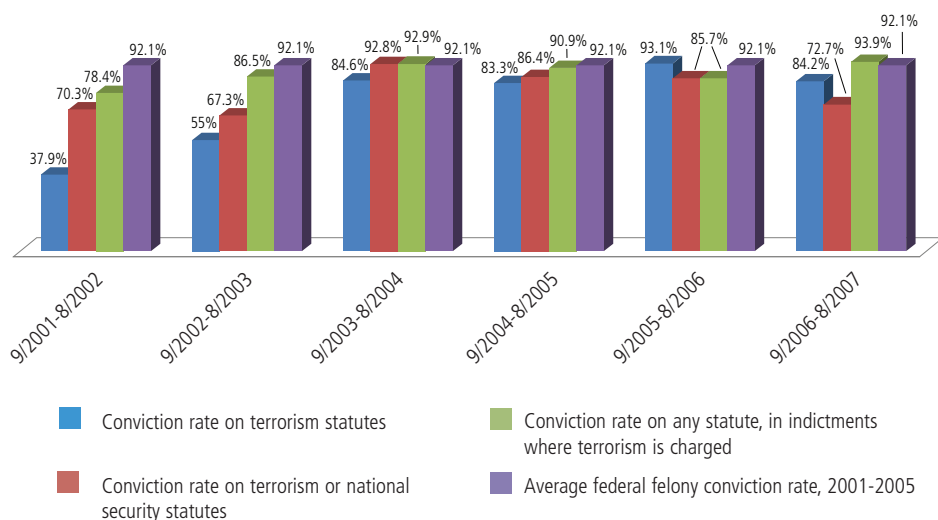
### Results of Prosecutions Involving Terrorism Charges

(157 resolved prosecutions)



11

### Timeline of Conviction Rates for Prosecutions Involving Terrorism Charges



## National Security Statutes

While “terrorism statutes” is limited herein to those requiring proof of an association with a terrorist organization, there are numerous other statutes that are generally considered, in common parlance, to be related to terrorism. These statutes – such as hostage taking (18 U.S.C. § 1203), sabotage (“Destruction of national-defense materials, national-defense premises, or national-defense utilities,” 18 U.S.C. § 2155), and the prohibition on development, possession or use of chemical weapons (18 U.S.C. § 229) – are categorized herein under the category of national security violations.

### iii. Prosecutions involving national security but not terrorism charges

National security violations or hostage taking have been charged against 229 defendants, or 27.7% of the data set. More than half of these cases, however, have also involved charges for violations of terrorism statutes. Of the 229 defendants, 102 of them, or 12.3%, have been charged with national security violations or hostage taking as the top charge.

Of these cases, charges have been resolved against 74 defendants.

The conviction rate for indictments involving national security violations or hostage taking as the top charge is 87.8%.

Fifty-three defendants were convicted on national security charges or hostage taking, resulting in a 71.6% conviction rate on the top charge in these cases.

An additional 12 defendants, or 16.2%, were convicted of other crimes. (See chart 13).

Of those convicted only of other charges:

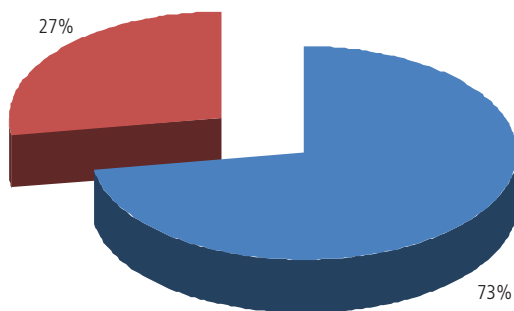
- Three defendants had the national security charges dropped by the prosecutor but were convicted on other charges.
- Two pleaded guilty to other charges.
- One defendant had the national security charges dismissed by a judge but was convicted on other charges.
- One had a guilty verdict vacated, but was convicted on other charges.
- Five defendants were acquitted of national security charges but convicted on other charges.

Of the nine defendants who were not convicted on some charge, four had all charges against them dropped by the pros-

12

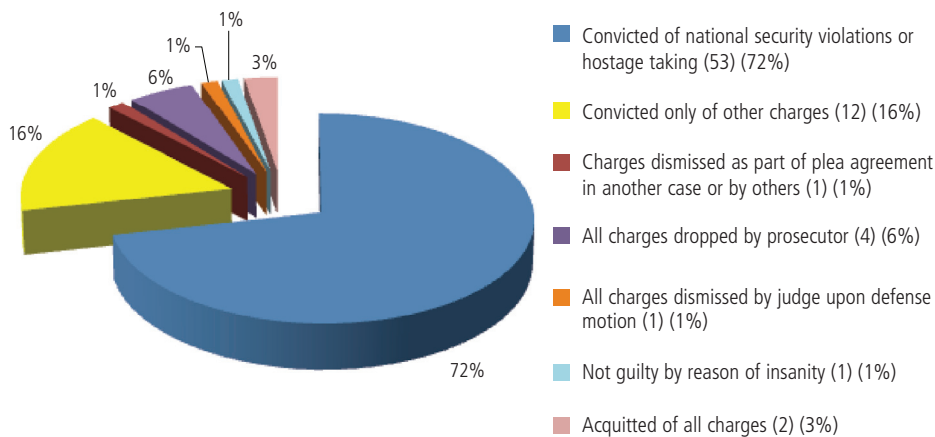
### Prosecutions Involving National Security Violations or Hostage Taking but not Terrorism Charges: Resolved vs. Pending (102 prosecutions)

Resolved (74) (73%)      Pending (28) (27%)



13

### Results of Prosecutions Involving National Security Violations or Hostage Taking but not Terrorism Charges (74 resolved prosecutions)





ecutor. Charges against another were dismissed when he pleaded guilty in another case. One defendant had all charges against him dismissed by the judge upon defense motion, one was found not guilty by reason of insanity, and two were fully acquitted at trial.

## D. Results for Prosecutions Involving neither Terrorism nor National Security Charges

Of the 828 indictments in the data set, 482 of them, or 58.2%, have been for criminal violations that can be characterized as “ordinary.” These include drug crimes, theft, immigration offenses, and numerous other offenses that do not instinctively suggest the defendant is associated with terrorism. Of these, 362 have been resolved.

**Three hundred and nineteen of these defendants have been convicted. This is an 88.1% conviction rate for indictments in which neither terrorism nor national security charges were brought.** (See chart 14).

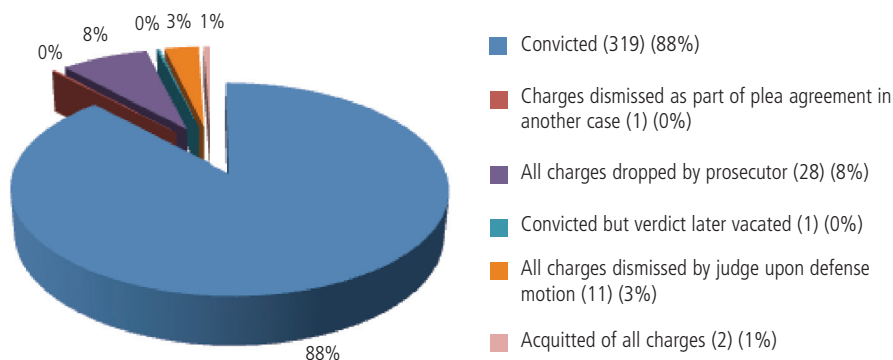
Forty-three of the resolved indictments in these cases did not result in convictions.

*Of those who were not convicted:*

- One indictment was dismissed as part of a plea bargain in another case or with another defendant.
- Twenty-eight indictments were dropped by the prosecutor.
- One indictment was resolved when the jury’s guilty verdict was vacated.
- Eleven indictments were entirely dismissed by a judge upon defense motion.
- Two indictments resulted in acquittals.

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### Results of Prosecutions Involving neither Terrorism nor National Security Charges (362 resolved prosecutions)



### “Top Charges”

The Center on Law and Security has created a hierarchy of categories of charges, based on their likely relationship to terrorism and the potential sentence resulting from conviction. Because a single indictment may include charges under multiple statutes, we have used this hierarchy to determine what we consider to be the top charge in each indictment.

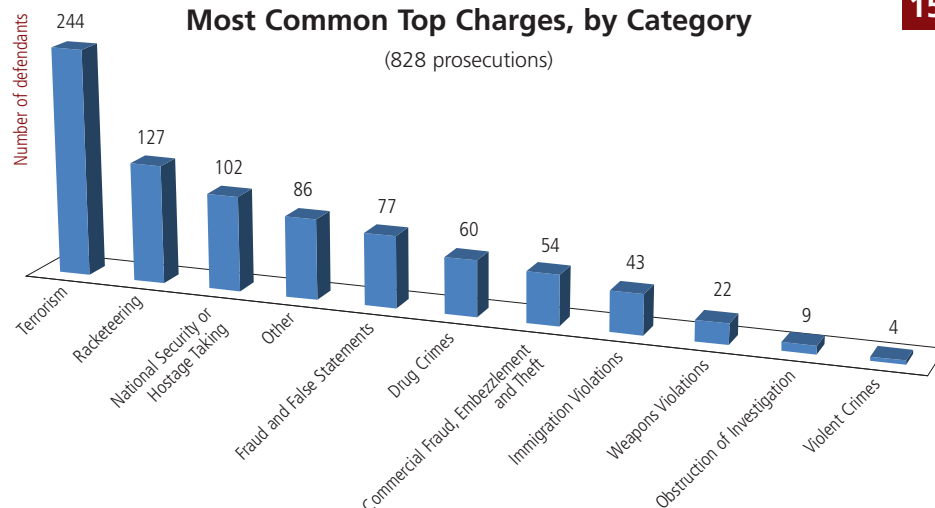
Terrorism statutes are at top of the hierarchy because they require prosecutors to prove specific elements related to terrorism and because conviction results in severe sentences. They are followed by national security violations, and then violent crimes and weapons violations.

Racketeering or commercial fraud charges may be brought in terrorism financing cases or in connection to terrorism financing allegations. Therefore, racketeering immediately follows weapons violations, followed in turn by drug crimes, commercial fraud charges, and then “other” (including violations of UN sanctions, conspiracy, extortion, and child pornography). Finally, those offenses least directly associated with terrorism, and imposing the lowest (but not necessarily insubstantial) sentences, follow as obstruction of investigation, fraud and false statements, and immigration violations.

For a list of the specific statutes comprising each category, see the appendix hereto.

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### Most Common Top Charges, by Category (828 prosecutions)



## Preventive Prosecution

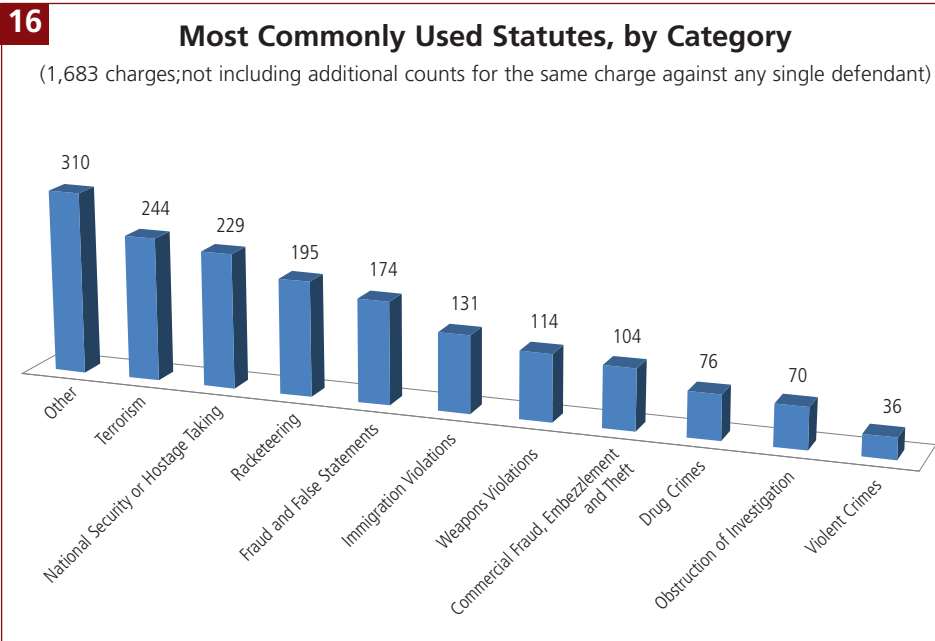
The DOJ has used a broad range of statutes to prosecute defendants whom it has claimed to be associated with terrorism. This has led to criticism, as only 41.8% of indictments alleged to be associated with terrorism have been prosecuted under national security or terrorism statutes. Critics argue that the label of terrorism is being misapplied, since no terrorism association is ever proven in court. Law enforcement officials respond that terrorist plots must often be disrupted and incapacitated before sufficient evidence is gathered to support terrorism or national security charges, and that waiting to gather more evidence would endanger public safety.

## II. Charges Brought

### A. Types of Charges Brought

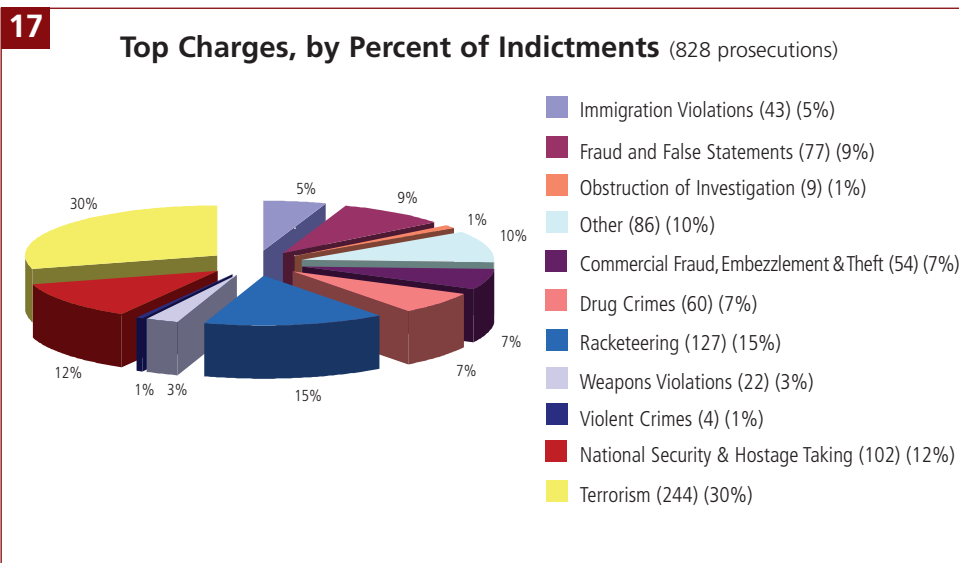
In tracking these cases, we have found that more than 130 different statutes have been used to try alleged terrorists, and these are only the most prominent statutes used in terrorism-associated indictments. The crimes charged range from sham marriages to child pornography to money laundering to the use of weapons of mass destruction. Still, some trends do emerge.

The terrorism statutes, charged in 244 indictments, are the most frequent category of top charge. Because we consider terrorism statutes to be the top charge in any indictment in which they are included, they are the most common top charge while only the second-most commonly used category of statutes (behind “other”). (See charts 15 and 16). Terrorism indictments represent 29.5% of all indictments filed in association with terrorism. Such indictments appear in 30.3% of all cases in the data set and 43.6% of non-list cases.



#### i. Conspiracy

The most commonly charged statutes fall in the category of “other,” which is made up of forfeiture statutes, mailing injurious articles, violations of UN sanctions, extortion and threats, child pornography, and conspiracy. Criminal conspiracy alone would constitute the most commonly charged statute, having been used in 293 indictments.



The comparatively low placement of “other” crimes as a top charge may be attributed to the fact that these charges are almost always brought in combination with other statutes. Of the “other” crimes, only criminal conspiracy and child pornography were brought as the sole charge in any indictment. Criminal conspiracy was charged as the sole charge in 20 instances, or 6.8% of all conspiracy charges brought. Child pornography charges were brought in a single indictment, which was later dropped by the prosecutor.

## ii. Fraud, False Statement, and Immigration Charges

The prevalence of fraud, false statement, and immigration charges may not be surprising. However, the frequency of such charges as the *sole* charges in an indictment may be more so.

We have ranked immigration violations as the lowest in our ranking of charges. Therefore, they are the sole charge in every instance in which they are the top charge in an indictment. This occurs 39 times, meaning that immigration charges are the sole charges in more than 30% of the instances in which they are brought. They are the sole charges in 4.7% of all terrorism-associated indictments.

Similarly, fraud and false statements charges are the sole charges in 62 indictments, or 35.6% of the indictments in which they are brought. They are the sole charges in 7.5% of all terrorism-related indictments.

Together, indictments including only fraud and false statement charges or immigration charges represent 12.2% of all terrorism-associated indictments. (*For more details on these charges, see p. 53.*)

## B. Case Studies: Disruption

The following cases are examples of situations in which the DoJ may have acted in order to disrupt potential threats to public safety, although it is apparent that these allegations and any evidence supporting them are insufficient to determine whether or not an actual plot was disrupted. Allegations and circumstances pointing to possible reasons for the actions of the Department of Justice are detailed below. These cases are listed here *because* they are confusing, in order to illustrate the difficulties in judging terrorism prosecutions, the claims made by prosecutors, and the decision to prosecute in the case of preventive prosecutions.

### *“The Boston Sleeper Cell”*

In 2001, the FBI revealed that it was investigating four men who had worked as cab drivers in Boston. Two of the men were arrested and convicted of U.S. immigration violations – one for a sham marriage and the other for entering the U.S. illegally. Another, Raed Hijazi, was convicted in 2001 for involvement in the “Millennium” plot (designed to occur at the end of 2000, and involving others who were prosecuted and convicted for their participation), which was foiled by an immigration agent at the U.S./Canadian border. A fourth was killed leading a militant strike in Lebanon.

One defendant, Mohamed Elzahabi, was arrested and indicted in 2003 for false statements and immigration violations. He

was eventually found guilty of having participated in a sham marriage in an effort to gain citizenship. Over the course of several days of intense interrogations, Elzahabi apparently admitted to having trained at a terrorist training camp in Afghanistan, where he had known Abu Musab al Zarqawi, as well as having met the three men he was later associated with in Boston. He also admitted to knowing Abu Zubaydah and Khalid Shaikh Mohammed. A polygraph machine, to which Elzahabi was subjected while being interviewed, reportedly indicated that he was being deceptive when asked about plans to attack the United States.

Elzahabi’s case is confusing, as the government’s allegations and suspicions are obviously quite serious, while other indicators point to his innocence. Elzahabi

## Foreign Terrorist Organizations and Specially Designated Global Terrorists

The federal government maintains multiple terrorist designation lists for different purposes. Among these are the lists of Foreign Terrorist Organizations (or “FTOs”) and Specially Designated Global Terrorists (or “SDGTs”).

The State Department’s Office of the Coordinator for Counterterrorism compiles dossiers on groups it believes should be considered FTOs. Only foreign organizations can be included, and their terrorist activity must threaten U.S. national security or U.S. nationals. Groups are formally designated by the Secretary of the State, in consultation with the Secretary of the Treasury and the Attorney General, subject to congressional approval. Once a designation is made and published, the organization listed can object within 30 days and then again after a period of two-year cycles. The listing can be revoked by the Secretary of State or by Congress, or set aside by a judge. As of December 30, 2009, there were 44 FTOs.

18 U.S.C. § 2339B criminalizes the provision of “material support or resources” to an FTO, and funds owned by an FTO in any U.S. financial institution must be reported to the Treasury Department.

The list of Specially Designated Global Terrorists is maintained by the Treasury Department’s Office of Foreign Assets Control. Individuals and entities who meet the enumerated criteria can be designated under Executive Order 13224 by the Secretary of State or the Secretary of the Treasury, in consultation with each other and the Attorney General. Once a person or entity is designated, the Treasury Department moves to block their assets. The list of SDGTs is incorporated into the Treasury’s list of Specially Designated Nationals. The list detailing SDGTs, including alternate names and spellings, runs to 95 pages.

Sources:

“Foreign Terrorist Organizations,” Office of the Coordinator for Counterterrorism, U.S. Dept. of State, July 7, 2009, available at <http://www.state.gov/s/ct/rls/other/des/123085.htm>; “Executive Order 13,224,” Office of the Coordinator for Counterterrorism, U.S. Dept. of State, Sept. 23, 2001, available at <http://www.state.gov/s/ct/rls/other/des/122570.htm>; “What You Need to Know About U.S. Sanctions,” U.S. Dept. of the Treasury Office of Foreign Assets Control, available at <http://www.treas.gov/offices/enforcement/ofac/programs/terror/terror.pdf>.

voluntarily continued strenuous interviews with the FBI for 17 days, and was reportedly willing to become an FBI informant. His plans to obtain citizenship came to law enforcement attention when he himself approached a police officer to ask about background checks in citizenship applications, stating that he needed to get the citizenship quickly because he was leaving for Canada.

Elzahabi was sentenced to time served, and then subjected to deportation proceedings. He has remained in detention while fighting his deportation, claiming he would be tortured if returned to Lebanon. Jailed over the course of his trial, and held in detention as he fights deportation, Elzahabi has been in custody since 2004.

Nabil al Marabh spent 2 1/2 years in custody before being deported to Syria. Originally thought to be a member of al Qaeda, and at one point number 27 on the FBI's list of terror suspects, al Marabh reportedly trained in Afghanistan during the 1990s. An FBI report claimed that he "intended to martyr himself in an attack against the United States."<sup>6</sup>

The DoJ was criticized by some senators who believed that prosecutors should have charged him with the crimes they claimed to have evidence of his having committed. One DoJ spokesman responded to these criticisms by claiming that deportation had been sought instead because trying al Marabh in court would have jeopardized intelligence sources and methods.

Al Marabh was convicted of illegally entering the United States and served an eight-month sentence prior to his deportation. He was then detained, incommunicado, including without access to an attorney, in Syria.

### *Hezbollah Cigarette Smuggling Case*

Thirteen defendants were indicted for racketeering, smuggling, fraud, and other criminal violations involving the smuggling and selling of untaxed cigarettes. Although profits from the scheme were allegedly sent to fund Hezbollah, only one defendant was indicted on terrorism charges. While the charges brought were almost entirely non-violent, prosecutors asserted that one defendant had threatened to kill a witness and that another had received military training in Lebanon. Over seven years, the group allegedly sent more than \$2,000,000 to Hezbollah. All but two of the defendants pleaded guilty to the top charge against them, including the single defendant charged under a terrorism statute. Charges are still pending against the other two defendants.

### *Attiquallah Sayed Ahmadi*

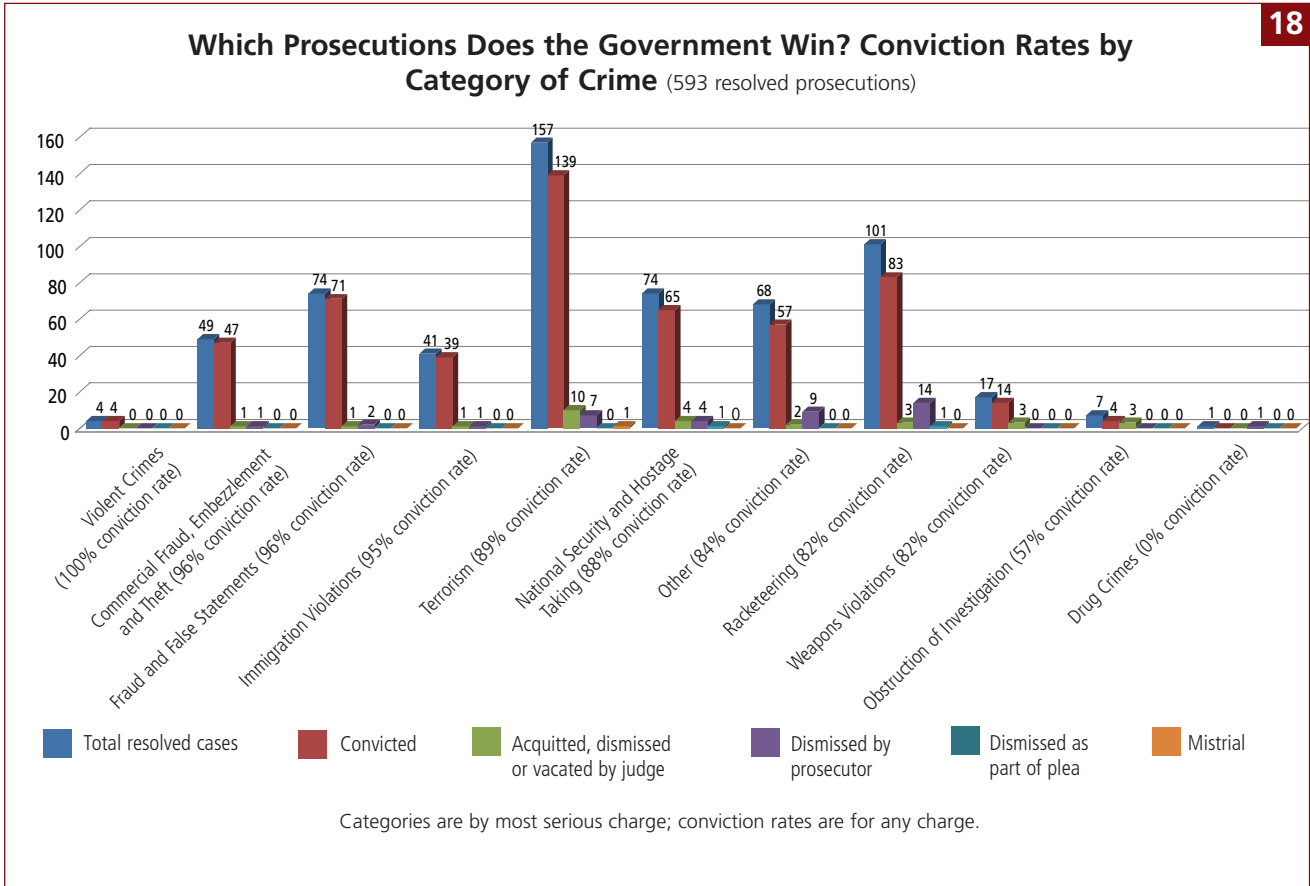
Ahmadi pleaded guilty to possession of a firearm and immigration violations. Upon his arrest, law enforcement officials stated that he had ties to terrorists. However, he was never charged with terrorism, nor were terrorism offenses charged as part of his plea bargain. The terrorism allegations evidently came from Ahmadi's apparent relationship with Gulbuddin Hekmatyar. Hekmatyar, an Afghan rebel who received financial support and arms from the CIA to fight the Soviets during the 1980s, was the target of a CIA missile strike in 2002 and designated a terrorist in 2003. FBI agents found phone numbers for Hekmatyar in Ahmadi's phone book, as well as videotapes of recent interviews given by Hekmatyar, a loaded semiautomatic pistol, a loaded semiautomatic rifle, and 300 rounds of ammunition.

### *Ali Khaled Steitiye*

Ali Khaled Steitiye was alleged to have begun training with Palestinian militant groups when he was eight years old. Law enforcement began investigating him after he lied to a gun dealer in an effort to obtain a gun. Steitiye was pulled over and then arrested when he was found to be in possession of a 9mm handgun and an assault rifle, both of which were loaded. Later, Steitiye became the cause of the investigation into the Portland Seven case, in which seven men were alleged to be part of a Portland, Oregon, training camp – an officer observed a group of Middle Eastern men firing guns into a gravel pit and recognized Steitiye. Steitiye was named as an unindicted co-conspirator in the case, although no terrorism charges were ever brought against him. Steitiye was charged with weapons violations, to which he pleaded guilty.

<sup>6</sup> *Despite Fears of Terror Tie, Suspect Goes Back to Syria*, N.Y. TIMES, June 3, 2004, available at <http://www.nytimes.com/2004/06/03/us/despite-fears-of-terror-tie-suspect-goes-back-to-syria.html>.

### C. Conviction Rate by Type of Charge



**Methodological note:**

Because plea bargaining is so prevalent in the criminal justice system as a whole, and because one goal of prosecutors is to convict on any possible statute and thereby disrupt suspected terrorist activities, chart 18 evaluates the overall results of prosecutions, divided by category of top charge. This allows the prosecutor every opportunity to successfully disrupt the plans and activities of a suspected terrorist, even when evidence of the most serious potential allegations or suspicions may be insufficient to support those charges in court.



## Average Sentences

**Overall:** Minimum sentence: 0

Maximum sentence: 1,920 months, or 160 years

Average sentence: 67.0 months, or 5.6 years

Average sentence for persons charged with terrorism: 236.0 months, or 19.7 years

Average sentence for persons convicted of terrorism: 191.9 months, or 16.0 years

Average sentence for persons charged with national security violations but not terrorism: 124.5 months, or 10.4 years

Average sentence for persons convicted of national security violations and not charged with terrorism: 90.3 months, or 7.5 years

Average sentence for persons not charged with terrorism or national security violations: 14.6 months, or 1.2 years

### Methodological note for above table and charts 19-23:

There are 13 life sentences in the data set, which in the federal system means life without the possibility of parole. For purposes of calculating average sentences in the table above and chart 19, life sentences have been quantified as 30 years. Charts 20-23 include life sentences in the "30 or more years" category.

Federal inmates serving for a maximum term of years (rather than life) generally serve 85% of their sentences.

Sentence totals herein do not include defendants who have been convicted but not yet sentenced or instances in which the sentence is sealed.

## III. Post-Trial Matters

### A. Sentences

#### i. Average sentences

(See table to the left)

#### ii: Sentence lengths

(See charts 19-23)

#### iii. Terrorism sentencing enhancements

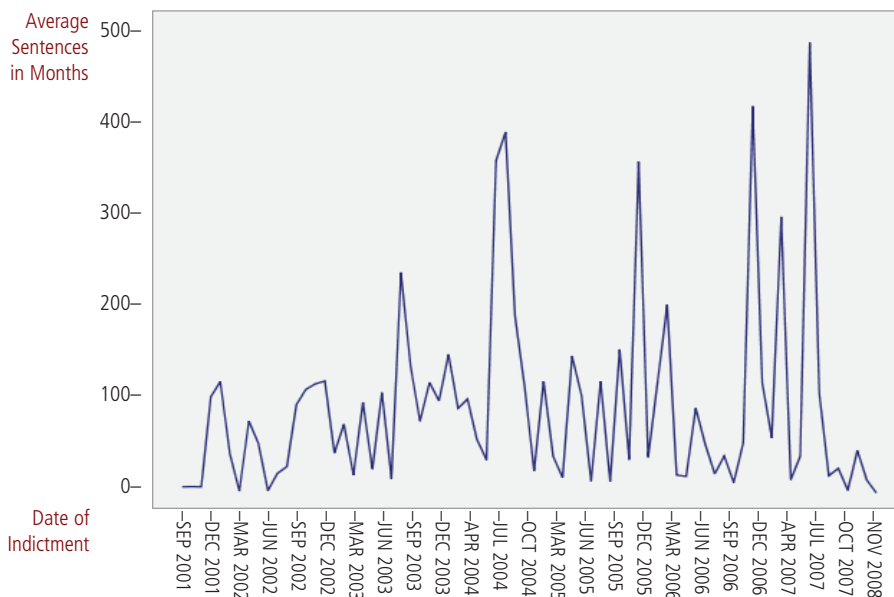
The federal sentencing guidelines allow for a sentence to be increased if the defendant is convicted of "a felony that involved, or was intended to promote, a federal crime of terrorism."<sup>7</sup> We have endeavored to track how often such enhancements have been imposed.

Whether a sentencing enhancement was imposed in a particular case is conclusively discernible only through access to the sentencing transcripts or the judgment filed. For cases prior to the advent of PACER, the federal courts' electronic case filing system, judgments are difficult to find. This includes cases that were resolved prior to 2004 and those commenced before the system became operational. We rarely found accessible judgments during the course of our research, making it almost impossible to assess whether or not sentencing enhancements are being commonly used and in which cases. We were able to find an enhancement in 24 of 750 indictments, but information from practitioners strongly suggests that terrorism enhancements are imposed in a far greater proportion of cases, and almost invariably in material support cases. **Consequently, we do not suggest relying on these numbers, as the sample size is so low.**

Out of these 24 indictments, 20 of them included charges on terrorism or national security grounds. Of the four sentencing enhancements that we found in indictments that included neither terrorism nor national security charges, one indictment was for immigration violations, two were for fraud and false statements, and one was for obstruction of an investigation. (For further discussion, see p. 54).

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### Timeline of Average Sentences



<sup>7</sup> U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2009).

## B. Deportation Proceedings

In order to track how often deportation proceedings have been used as a counterterrorism tool, we have tracked each reference to deportation proceedings for each defendant in the database. We found such references in 125 of the 828 indictments. This number represents a minimum, as we cannot be certain that we have identified all instances in which deportation has been sought (See chart 24. For further discussion, see p.53).

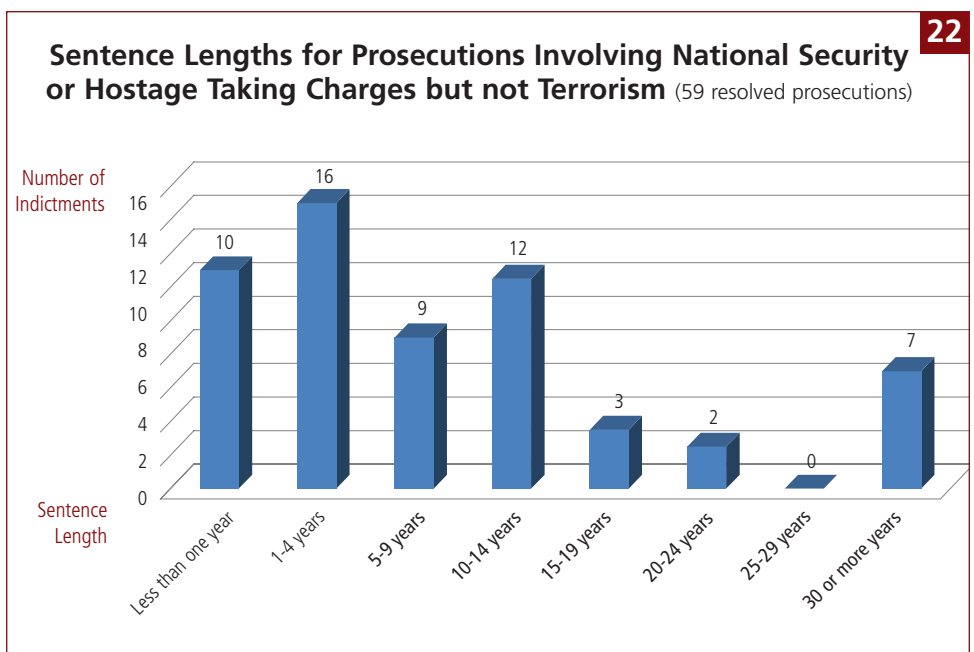
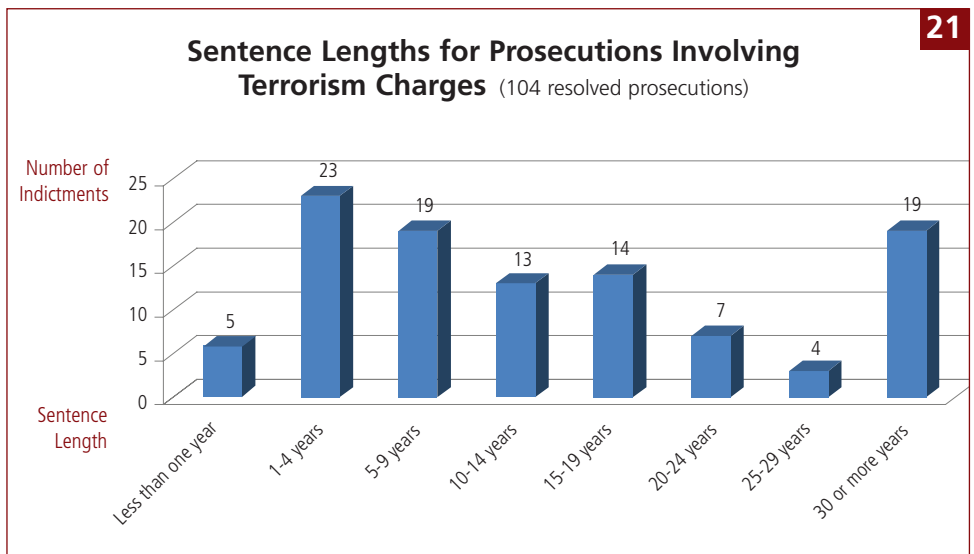
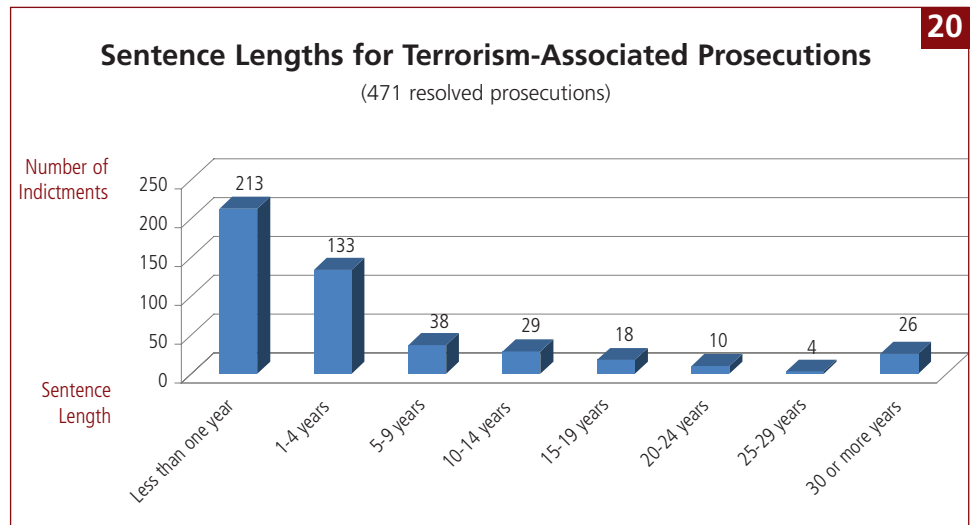
## IV. What We Have Learned about Terrorism in the U.S.

Certain aspects of terrorism in the U.S. are not entirely as they were anticipated when our research began. For example, the data we have collected suggests that only rarely do terror suspects in the U.S. match the fears of possible domestic attacks using weapons of mass destruction. Some of the trends we have found are described below.

### A. Targets

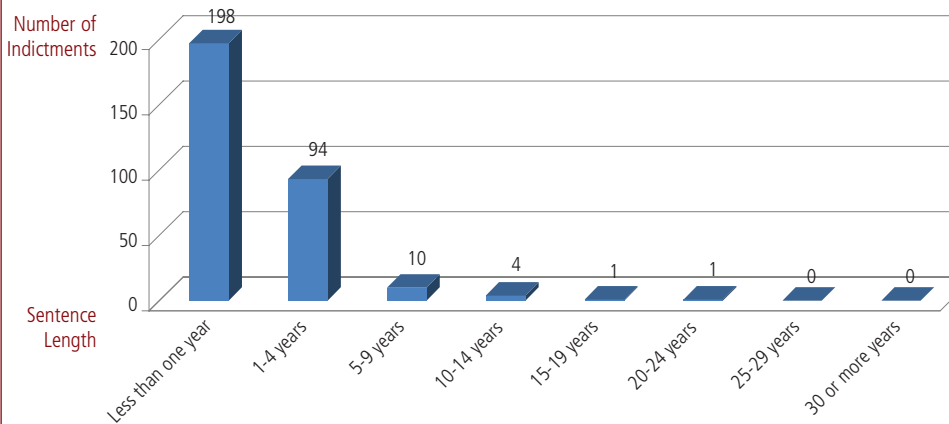
One of the most striking aspects of terrorism prosecutions in the United States is the nature of the alleged targets. We have reviewed the allegations in every publicly available case in order to determine which defendants were involved in plots that had developed to the point of having specific targets and what those targets were. We then categorized the targets as foreign or domestic and as military or civilian.

We have not included alleged domestic terrorists in the analysis here because we have endeavored to determine how often international terrorists have been prosecuted for targeting U.S. citizens within the U.S., either civilian or military. Because domestic terrorists have U.S. targets by definition, including them would have skewed the results in attempting to answer this question.



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### Sentence Lengths for Prosecutions Involving neither Terrorism nor National Security Charges (308 resolved prosecutions)



Our findings suggest that most terrorism defendants in the U.S. are not endeavoring to attack specific targets themselves, and that those who do hope to engage in attacks are more often focused overseas rather than within the U.S.

#### *Methodological note:*

Those plots that involved both overseas and domestic targets were coded as domestic. Similarly, those that involved both military and civilian targets were coded as civilian. For purposes of this analysis, we omitted list-only cases, as described on page 2. For the reasons explained above, we have also omitted domestic terrorists.

Thirteen individuals (Earnest James Ujaama, Soliman Biheiri, Ihsan Elashyi, Ghassan Elashyi, Mousa Abu Marzook, Vijashanthar Patpanathan, Haji Subandi, FARC, Javed Iqbal, Abdul Rehman, Zubair Ahmed, Khaleel Ahmed, and Nouredine Malkki) were each charged in two separate cases, and one (Talal Khalil Chahine) was charged in three, so the data set was further reduced to 650 unique individuals. We then looked to frequencies of the various target types within this group.

The results of this analysis follow.

#### **i. Known vs. unknown targets**

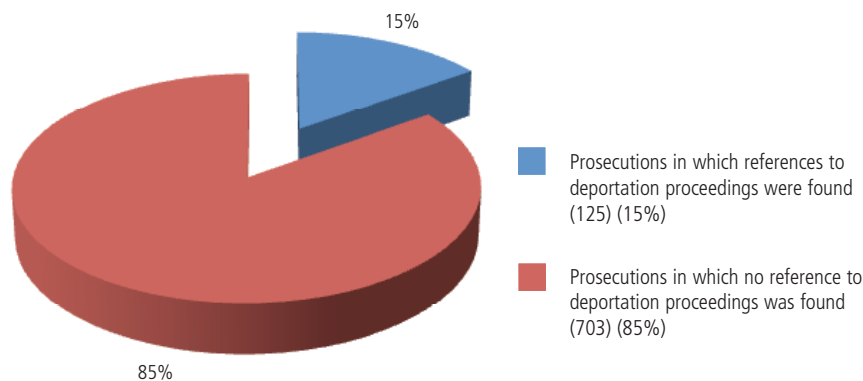
**62.6% of these individuals were NOT alleged to be part of a plot with a specific target. (See chart 25).**

Prosecutions against the 407 individuals who were not alleged to have specific targets include:

- allegations of terrorism financing, through which money is sent overseas to entities alleged to be fronts for terrorist organizations, but without an indication in the public record as to whether the defendants had particular targets in mind or knew of specific locations the organizations might target;

24

### References to Deportation Proceedings (828 prosecutions)



### “Domestic” vs. “International” Terrorists

We have used the term “domestic terrorists” herein to mean defendants who focus their activity on the domestic dimension of causes such as white supremacy, anti-abortion, animal liberation or the environment.

Those alleged to be associated with a foreign or international conflict, whether religiously or purely politically motivated, have been counted as international terrorists.



- cases against individuals who obstructed justice by misleading authorities about their ties to terrorist organizations, the ties of others they knew, or the locations of subjects of counterterrorism investigations; and
- cases against individuals who may have attempted to start training camps, recruit individuals, or otherwise facilitate terrorism.

As far as we can determine, in none of these instances did the government allege an intention to act against a specific target, either foreign or domestic.

**ii. Overseas vs. domestic targets**

Of the individuals with a specific target alleged, 67% were planning to attack targets overseas.

*(See chart 26).*

*Methodological note:*

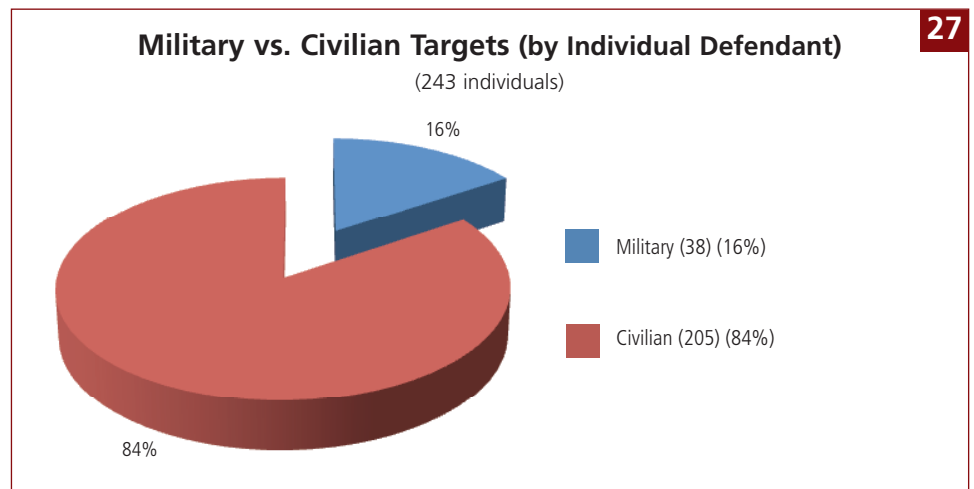
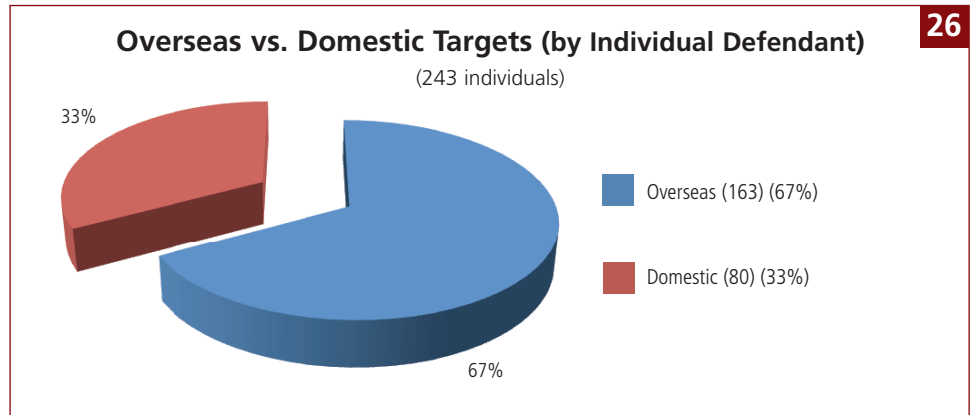
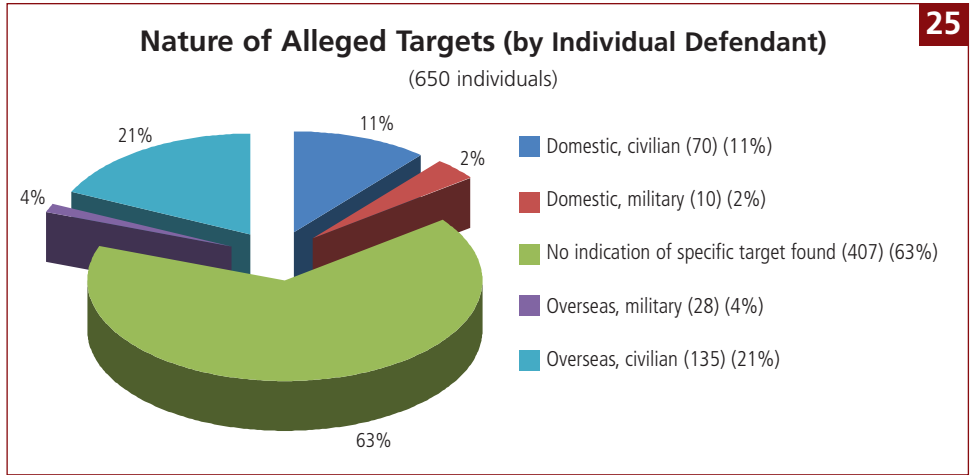
Plots were counted as overseas if they included efforts to harm people or property overseas, whether the intended victims were American or citizens of other countries. Plots to provide support to purely overseas endeavors, either through financing, providing weapons or other materials, or traveling to foreign countries, were also counted as overseas.

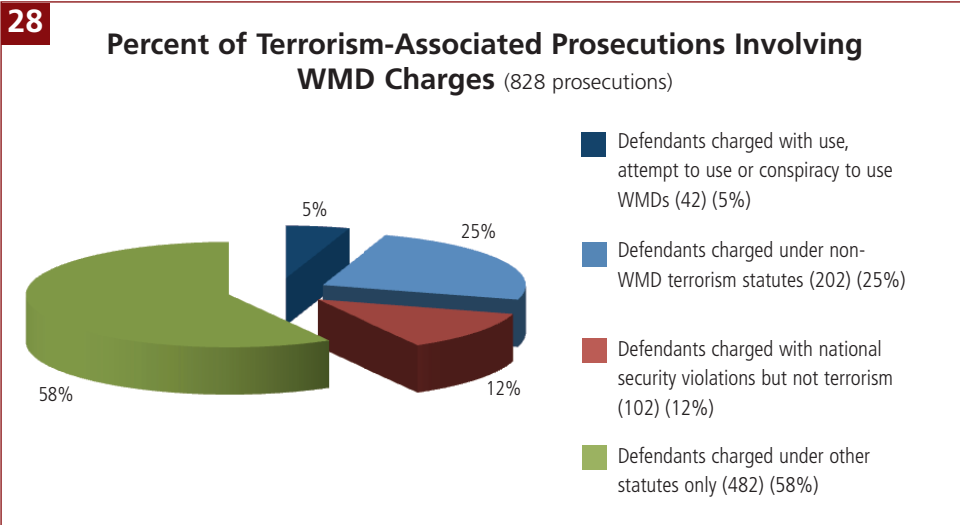
In instances in which an individual sent support to terrorists specifically for overseas battles, or said that he wanted to fight overseas, we assume he accepted that there may be civilian targets. We therefore included these instances in the “overseas, civilian” target group even if no specific target was alleged.

**iii. Military vs. civilian targets**

Of the individuals with a specific target alleged, 15.6% were planning to attack military targets.

*(See chart 27).*

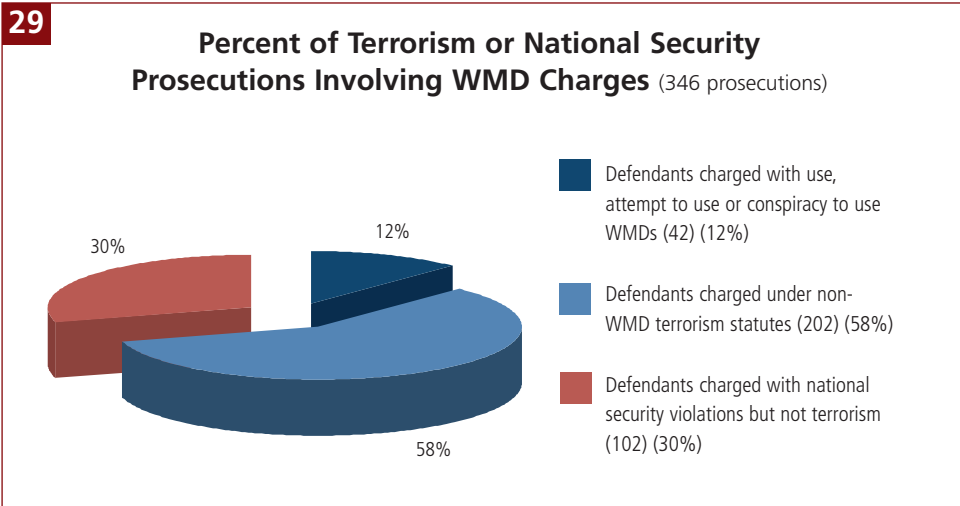




Military targets included personnel and installations. While 15.6% is a minority, it is nonetheless significant, particularly considering that ambiguous instances were categorized herein as civilian.

*Methodological note:*

Targets were categorized as military only when allegations or intercepted discussions referred to military targets specifically, or when charges were filed after an attack had already occurred. In instances in which the details of the intended targets were scarce or ambiguous, the targets were categorized as civilian.



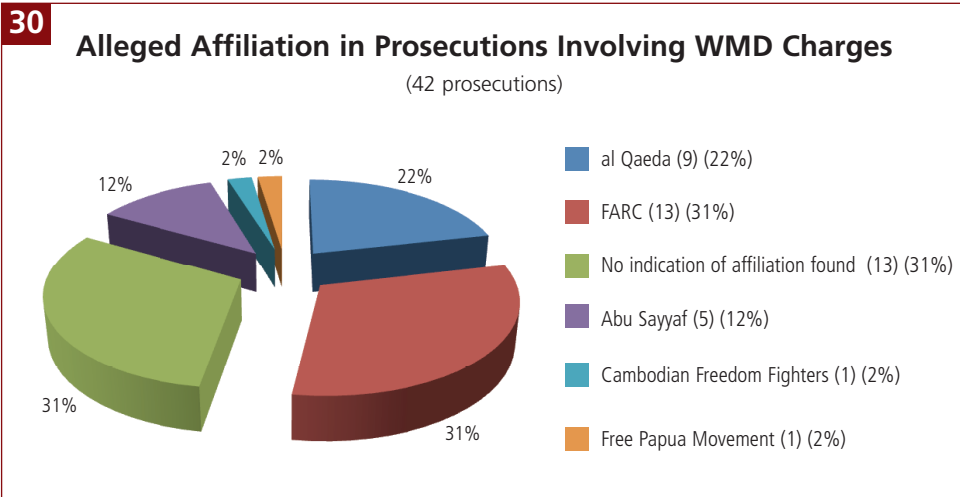
Thus, an instance in which discussions revealed an intent to attack U.S. forces in Afghanistan would be categorized as having an overseas military target. However, a case in which discussions revealed an intent to travel to Afghanistan to learn to build improvised explosive devices (“IEDs”) to support the Taliban would be categorized as having an overseas civilian target, as IEDs may be used against both soldiers and civilians.

**B. Weapons of Mass Destruction**

While the specter of an attack involving nuclear, chemical, radiological or biological weapons is perhaps the most extreme terrorism scenario, the U.S. Code includes a broader definition of “weapons of mass destruction” (or “WMDs”). Under 18 U.S.C. § 2332a, WMDs include “destructive devices,”<sup>8</sup> such as bombs, grenades, other explosives, and poison gasses.

**i. WMD indictments**

Prosecutions alleging violations of § 2332a, involving the use of weapons of mass destruction or an attempt or conspiracy to do so, constitute 5% of all terrorism-associated indictments. They represent 17.2% of the indictments involving terrorism charges and 12.1% of the indictments involving either terrorism or national security charges. (See charts 28 and 29).



<sup>8</sup> 18 U.S.C. § 2332a.

**ii. Alleged terrorist affiliations and targets**

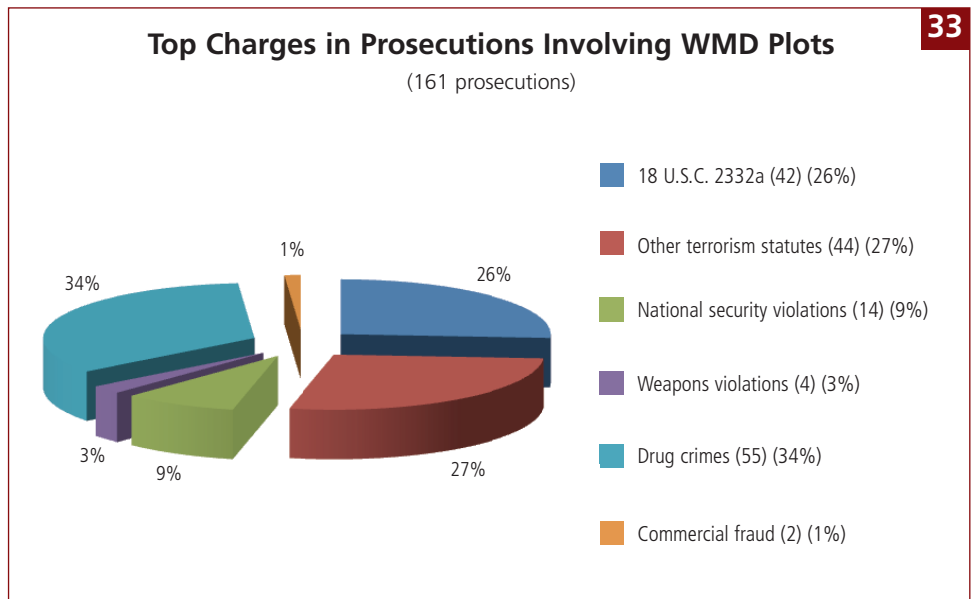
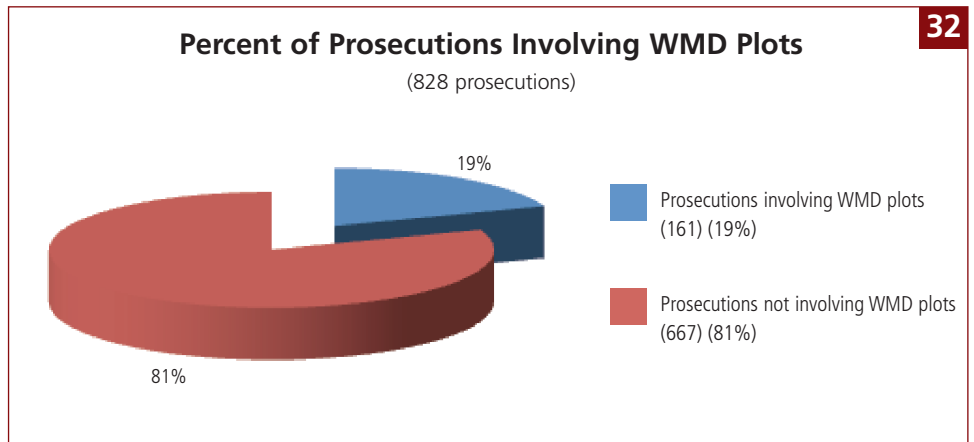
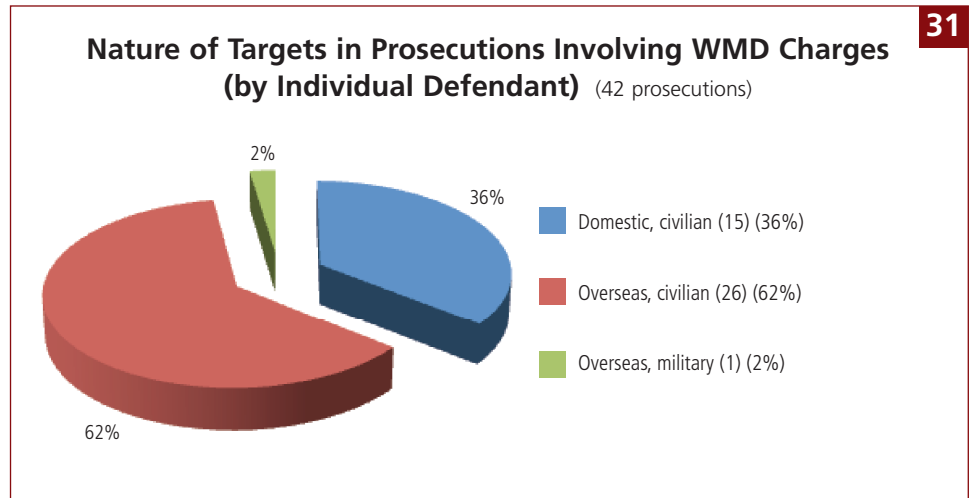
Most indictments under the WMD statute involve neither al Qaeda nor other terrorist organizations normally associated with jihadi terrorism. Nor do most such indictments involve plots alleged to be aimed at targets within the United States. In fact, for many of the defendants charged for violating § 2332a we have not been able to find any indication of an affiliation with a specific, established terrorist organization. More than a quarter of the defendants charged under § 2332a fall into this category. (See chart 30).

Of the WMD indictments with a specific target, a majority were aimed overseas. Of the WMD indictments, 35.7% were alleged to be part of plots against civilians in the United States and 61.9% were alleged to be associated with plots against civilians overseas. Only one WMD indictment, or 2.4% of such indictments, involved military targets, which were also overseas. (See chart 31).

**iii. Alleged plots**

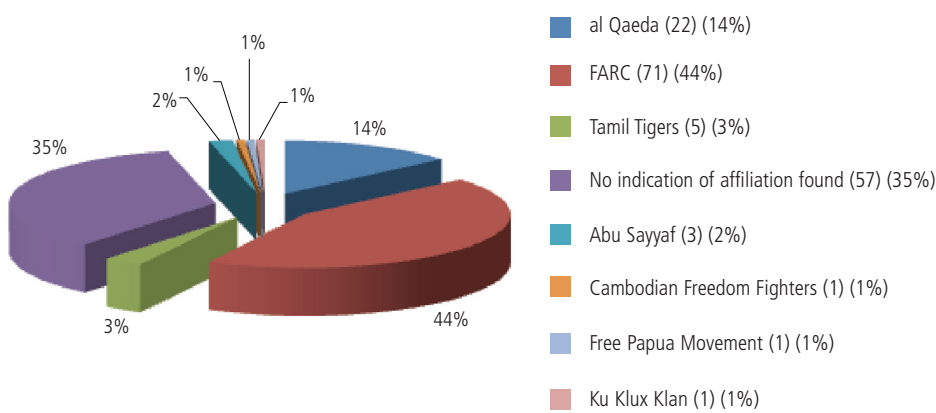
Many defendants accused of plots involving weapons of mass destruction (or explosives that would qualify such) are never charged under § 2332a but are instead prosecuted under other statutes, such as possessing or importing explosive devices.

While only 42 defendants have been indicted for using, or attempting or conspiring to use, weapons of mass destruction, a total of 161 have been indicted in connection with 45 alleged plots to use WMDs. Defendants allegedly involved in plots to use weapons of mass destruction constitute 19.4% of all terrorism-associated indictments. (See chart 32). These include not only the 42 indicted for violating § 2332a, but also defendants indicted for more general terrorism crimes, national security violations, weapons violations, drug crimes, and two defendants indicted for commercial fraud. (See chart 33).



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**Alleged Affiliation in WMD Plots** (161 prosecutions)



These defendants were allegedly involved in plots that involved weapons of mass destruction, and in all but three cases at least one co-defendant was charged with terrorism or national security violations.

Two facts are apparent when looking at the alleged affiliations in indictments for plots involving WMDs: the large proportion of defendants for whom we have not found any indication of an affiliation in the public record, and the inclusion of one member of the Ku Klux Klan.

(See chart 34).

In fact, 4% of the WMD defendants were alleged to be domestic rather than international terrorists, and 17.8% of the plots involving WMDs were alleged to be of domestic origin. (See chart 35).

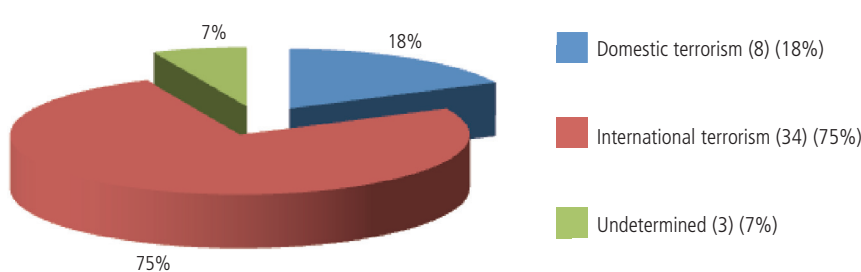
These defendants are generally included in the “no indication of affiliation found” category because they are not associated with designated terrorist organizations.

Of the WMD defendants considered to have domestic targets, 37.2% were alleged to be domestic terrorists. (See chart 37).

Counting by plot rather than by defendant, more than 40% of the WMD plots aimed at domestic targets had domestic origins.

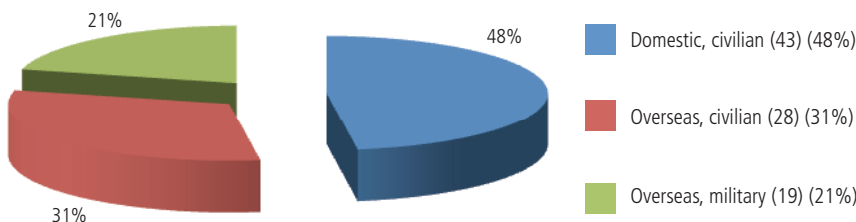
35

**Origins of WMD Plots (by Case)** (45 cases)



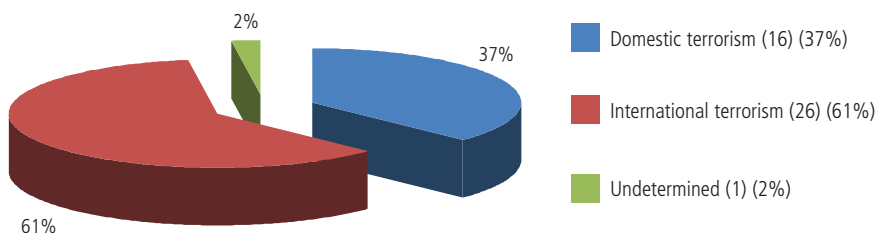
36

**Nature of Targets of WMD Plots where Alleged Target is Known (by Individual Defendant)** (90 prosecutions)



37

**Origins of WMD Plots with Domestic Targets Alleged** (43 prosecutions)



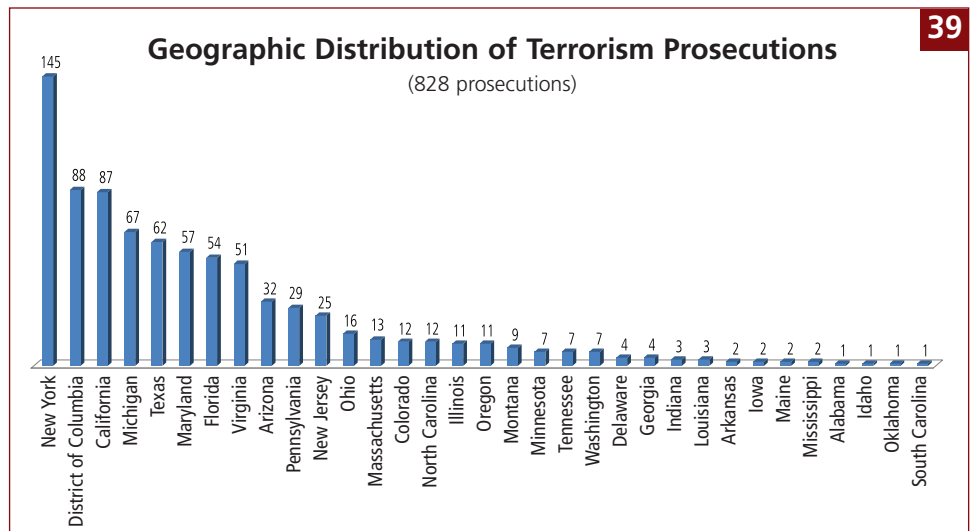
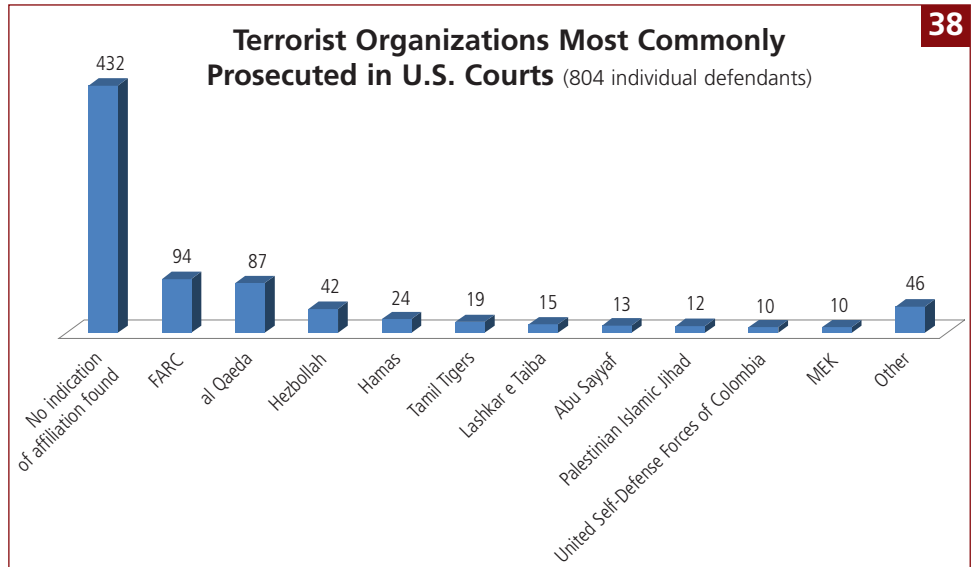
### C. Terrorist Organizations Most Commonly Prosecuted in U.S. Courts

Members of a broad range of terrorist organizations have been prosecuted in U.S. courts. Chart 38 shows the most commonly prosecuted terrorist organizations, as represented by the number of individuals alleged to be affiliated with each group who have been indicted. The large number for whom the Center could find no affiliation in the public record should be noted, however. Because we have counted each individual once even if they have been indicted in multiple cases, the total number comes to 804.



### D. Citizenship of Defendants

The number of nationalities of the defendants associated with terrorism has been similarly broad. At least 47 countries have been represented, although we found no indication of the citizenship of 20% of the defendants through the public record. U.S. citizenship, accounting for almost 35% of the individuals indicted, is the most common.



# Terrorism Prosecution and the Primacy of Prevention since 9/11

By Kenneth L. Wainstein\* \*\*

The Department of Justice (“the Department”) has a long history of using the full weight of the criminal justice system to convict and punish international terrorists who threaten or attack our country. With a deep bench of prosecutors and agents steeped in the art of building and presenting a criminal case in court, the Department has investigated, prosecuted, and convicted some of the world’s most dangerous terrorists, including the 1993 World Trade Center bombers, Sheikh Omar Abdel-Rahman and his co-conspirators in the plot to bomb New York City landmarks, and the terrorists behind the 1998 embassy bombings in Kenya and Tanzania.

The Department does not, however, have a long history of integrating those impressive law enforcement efforts with the intelligence operations directed against the very same terrorists by the Central Intelligence Agency and the rest of the Intelligence Community. Prior to the September 11, 2001, attacks, the collection of intelligence and the investigation and prosecution of criminal cases were largely seen as two related but operationally separate government endeavors. Personnel at the CIA and its sister agencies collected intelligence to detect and prevent terrorist attacks, while criminal investigators and prosecutors gathered evidence to build criminal cases often after the attacks had

occurred. While there was some coordination at the operational level, there was no overarching government-wide counterterrorism strategy that integrated our law enforcement and intelligence approaches against al Qaeda and our other foreign terrorist adversaries.

This bifurcated approach prevailed for decades and led to many of the operational deficiencies that marked the pre-9/11 era.<sup>1</sup> The attacks of September 11, 2001, laid bare those deficiencies and prompted the Justice Department to redefine its mission and role in the nation’s counterterrorism effort.

## A. The Reorientation of the Justice Department’s Counterterrorism Mission after the 9/11 Attacks

This redefinition marked a significant shift in the Department’s focus. While federal prosecutors would continue to bring terrorism cases in court, the prosecution function – which had long been recognized as the ultimate objective of the Department’s criminal investigative efforts – would now be subordinated to the overriding mission of preventing the next terrorist attack. As explained in the Department’s 2001-2006 Strategic Plan, “Prevention is our highest priority . . . . We cannot wait for terrorists to strike to begin investigations and make arrests. The death tolls are too high, the

consequences too great.”<sup>2</sup>

Under this new policy, criminal prosecution would now be simply one means to the end of terrorism prevention, and no longer an end unto itself. It would truly be, as the Foreign Intelligence Surveillance Court of Review explained in its masterful treatment of the legal issues arising at the intersection of law enforcement and intelligence operations, “part of an integrated effort to counter the malign efforts of a foreign power” such as al Qaeda and other international terrorist groups.<sup>3</sup>

## B. The Continued Importance of Criminal Prosecution in the Counterterrorism Effort

Although this reprioritization had important implications, it did not signal an abandonment of prosecution as a means of attacking terrorism. To the contrary, the cases analyzed in this report constitute clear evidence that criminal prosecution remains a vital piece of our counterterrorism strategy. If anything, the focus on prevention has actually resulted in a more frequent filing of terrorism-related charges as a means of disrupting suspected terrorist networks and operations. Reviving Attorney General Robert Kennedy’s “spitting on the sidewalk” approach against organized crime, Attorney General Ashcroft directed his federal prosecutors

\* Kenneth L. Wainstein is a partner in the Washington, D.C., office of O’Melveny & Myers LLP. Previously, he has served, among other positions, as Homeland Security Advisor for President George W. Bush, the first Assistant Attorney General for National Security, United States Attorney, and General Counsel and Chief of Staff for the Federal Bureau of Investigation.

\*\* All references to the specifics of particular investigations or criminal prosecutions are based on – and attributed to – public reporting in the media and not on information about these matters that the author acquired as a result of his government service.

<sup>1</sup> See NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U. S., THE 9/11 COMM’N REPORT: FINAL REP. OF THE NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S. (2004).

<sup>2</sup> U.S. DEP’T OF JUSTICE, STRATEGIC PLAN 2001-2006, 17.

<sup>3</sup> In re Sealed Case, 310 F.3d 717, 744 (FISA Ct. Rev. 2002).



to “use all our weapons within the law and under the Constitution... to prevent terrorist attacks by taking suspected terrorists off the street.”<sup>4</sup>

United States Attorneys’ Offices across the country have responded to this direction, filing hundreds of criminal cases arising out of international terrorism investigations in the years since 9/11. While many of these cases involve charges not directly related to terrorism – such as identity theft, immigration fraud, and false statements – they are brought to accomplish a counterterrorism objective; by apprehending and incapacitating those who fall within the ambit of terrorism investigations, these cases sow the disruption that may derail and prevent the next planned terrorist attack.

Given the Department’s sustained and successful use of criminal charges since 9/11, there is little danger that prosecution will be discarded as a weapon against terrorism. Nonetheless, this reprioritization has caused prosecutors to change their approach to building and prosecuting cases in some fundamental ways. Specifically, it has required prosecutors to factor the needs of the intelligence collectors into their charging and other prosecutorial decision making. With the 9/11 attacks highlighting the country’s desperate need for a more robust and adaptive intelligence capacity, it has become incumbent on prosecutors to look for opportunities to facilitate, and remove obstacles to, effective intelligence collection.

### **C. The Utility of Criminal Prosecution in the Effort to Develop Intelligence**

In one very important way, criminal prosecution inherently promotes intelligence collection, as the prospect of lengthy imprisonment can often persuade those charged with terrorism charges to cooperate and provide actionable intelligence about their operations and associates. For

example, John Walker Lindh, the so-called “American Taliban” who was captured in Afghanistan in 2001 while serving with Taliban forces, ultimately cooperated with intelligence authorities after his guilty plea and provided information about Taliban and al Qaeda operations and training camps in Afghanistan.

### **D. The Adaptation of Prosecution Strategies to Promote and Protect Intelligence Capabilities**

In other ways, however, the process of prosecuting a criminal case can handicap intelligence collection. First, the arrest of a suspect can frustrate intelligence efforts by denying agents a surveillance subject – the defendant himself – and alerting his associates that they may be under investigation. Second, the process of litigating a criminal case – with its attendant discovery process, evidentiary motions and public presentation of evidence at trial – can result in the intentional or unintentional disclosure of sensitive intelligence sources and collection methods.

These two concerns arise wherever law enforcement and the Intelligence Community have shared jurisdiction, and they have arisen with much greater frequency and immediacy given the intense focus on terrorism prevention since 9/11. The Department has responded with a number of procedural and organizational changes that reflect its willingness to address these concerns. At the procedural level, for example, there is now more regular and robust dialogue about charging and evidentiary issues between the prosecutors and the relevant intelligence agency whose sources and/or methods will be affected by a particular prosecution. At the organizational level, the Department established the National Security Division in 2006 and designated the Assistant Attorney General for National Security as the Department’s liaison to the Intelligence

Community, in large part to give intelligence agencies a stronger and more consistent voice in Justice Department deliberations.

The Department’s accommodation of these two concerns is also apparent in two trends that have become more pronounced since the 9/11 attacks. Those trends are: (1) federal prosecutors’ willingness to defer initiating prosecution in order to permit continued intelligence collection; and (2) their willingness to narrow, adapt, and when necessary abandon prosecutions altogether to avoid compromising sensitive intelligence sources and methods.

#### *(1) Deferral of Prosecution in Favor of Intelligence Collection*

Federal prosecutors are quite familiar with the tension between the desire to arrest an investigative subject as soon as the evidence is sufficient and the countervailing interest in continuing the investigation to develop further information. Historically, the information sought by that continued investigation has been further evidence that will enhance the strength of the criminal case. Classic examples are the major organized crime investigations, in which prosecutors have often agonized over when to take the case down, knowing that the arrests would necessarily put an end to productive wiretaps. More recent examples include the two terrorism sting cases revealed this September, in which FBI agents apparently allowed the suspect to remain free until he fully incriminated himself by attempting to launch the supposed terrorist attack, rather than arresting him at an earlier, preparatory stage as they did in several earlier cases.

Less common prior to 9/11 was the decision to delay an arrest, not to develop more evidence for the prosecution, but to allow further collection of actionable intelligence. That calculation occurred less frequently for the simple reason that the fed-

<sup>4</sup> John Ashcroft, U.S. Att’y Gen., Prepared Remarks for the U.S. Mayors Conf. (Oct. 25, 2001).

eral prosecutors who typically determine the timing of arrest in such cases were allowed only limited involvement in intelligence investigations. The Department's procedures for securing Foreign Intelligence Surveillance Act (FISA) search and wiretap authorizations contained certain limitations on the involvement of law enforcement personnel – known collectively as “the wall” – that effectively kept them on the sidelines of intelligence investigations. With the wall in place, criminal investigators and prosecutors were intentionally kept in the dark about an intelligence investigation until the Intelligence Community decided that the time was right for prosecution and that the investigation should be “thrown over the wall” to the prosecutors.

These procedures were discarded with the passage of the USA PATRIOT Act in October 2001 and the *In re Sealed Case*<sup>5</sup> ruling of the Foreign Intelligence Surveillance Court of Review the next year. With “the wall” removed, intelligence and law enforcement investigators can now fully coordinate their efforts and share information about foreign terrorists – an operational sea change that was codified in 2008 when Attorney General Michael B. Mukasey replaced the separate guidelines that had previously governed national security and law enforcement investigations with a consolidated set of Attorney General's Guidelines for Domestic FBI Operations.

This change also freed federal prosecutors to play a much more active role in intelligence investigations. While the agents are surveilling the subject and collecting intelligence during a threat investigation, the prosecutors can now review that intelligence and assess what criminal charges it could support. This real-time charging analysis is critically important, especially in a domestic threat investigation where criminal charges might be the

only way quickly to incapacitate a suspect if he suddenly makes a move toward a terrorist attack.

Contrary to the expectations of some, the earlier involvement of prosecutors in terrorism investigations has not resulted in the earlier initiation of criminal charges. Even when prosecutors develop a chargeable case, they recognize that a prosecution should be deferred so long as the prospect of continued fruitful surveillance and intelligence collection outweighs the need to take the subject off the street.

As FBI officials often explain, the subject of a terrorism investigation is more than simply a potential criminal defendant; he is a window into the terrorism underworld and a means by which vital intelligence can be collected about his network, his confederates, and their plans. As such, there is an opportunity cost whenever the government arrests such a subject and thereby denies itself that “collection platform.”<sup>6</sup>

Because that opportunity cost may loom so large in the effort to prevent the next terrorist attack, the decision to make an arrest and cut short a threat investigation is a subject of careful deliberation. In significant investigations, it is made with the input of all interested agencies and only after a careful balancing of the prospects for continued intelligence collection against the quality of the evidence and the danger posed by leaving the subject at liberty.

The timing of the take-down decision has been second-guessed after every major terrorism arrest since 9/11, including the Lackawanna terrorism case, the prosecution of six Miami men for plotting to bomb the Sears Tower, and the recent arrest of Najibullah Zazi for conspiring to use a weapon of mass destruction in the United States. While we can – and always should – question the soundness of this decision making, we can no longer ques-

tion the willingness of our criminal agents and prosecutors to consider intelligence interests in deciding when and how a case will be taken down.

Given the confidentiality of these internal deliberations and the classified nature of the intelligence activities at issue, it is difficult to cite specific cases where prosecution timing and strategies have been modified to accommodate intelligence interests. For evidence that law enforcement officials truly appreciate those interests, however, one need only look at the current media reports that mention their regret about the intelligence opportunity that was lost when the Najibullah Zazi investigation was apparently compromised and taken down before they had learned the full contours of his terrorist plot.

## *(2) Deferral of Prosecution to Protect Sources and Methods*

Federal prosecutors have also responded to the concern that the litigation of a criminal case might handicap Intelligence Community operations by divulging secrets about our means of intelligence collection. This has been a longstanding problem in the prosecution of national security cases, given the inherent tension between the discovery process and public proceedings of a criminal trial and the sensitivity of the source and method information that typically infuses the evidence in those cases. Over the years, some defense counsel have learned to exploit that tension by aggressively pushing for discovery of sensitive intelligence information in the hope that they can raise the intelligence cost of prosecuting a case to a point where the government deems it no longer worth pursuing – a practice known as “graymail.”

In 1980, Congress passed legislation to address this tension. In the Classified Information Procedures Act (CIPA),

<sup>5</sup> *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002).

<sup>6</sup> Ronald Kessler, *The FBI Turns 100*, NEWSMAX.COM, July 21, 2008 (quoting Arthur Cummings, Executive Assistant Director of the FBI's National Security Branch), available at <http://newsmax.com/RonaldKessler/FBI-100-years-old/2008/07/21/id/324610>.



Congress laid out a procedural mechanism whereby the government can seek the court's permission to withhold particularly sensitive information – or produce a sanitized version thereof – during the discovery process or at trial. It also crafted an analogous mechanism in the Foreign Intelligence Surveillance Act to protect the highly sensitive information in FISA applications when the fruits of a FISA wiretap or search are used in a criminal trial.

These statutory mechanisms, though very helpful to blunt the effects of gray-mail, do not completely protect our sources and methods from being compromised once a prosecution is commenced. As an initial matter, no matter how much protection is afforded by the CIPA and FISA procedures, the mere commencement of a prosecution may be enough to alert terrorists that we have breached their operational security with a source or collection technique. Just as radical jihadist Web sites have responded to alleged aerial strikes in Pakistan and Afghanistan with threats to kill suspected collaborators, we can anticipate a similar sort of witch hunt to potentially threaten any of our well-placed sources whenever criminal charges are made public.

Moreover, the procedures themselves provide less than absolute protection in a number of ways. First, even if the prosecutor has carefully selected charges and evidence that he or she believes will not trigger disclosure of sensitive information, the judge may simply take a different view of the CIPA analysis and conclude that they do. In that case, the government may face the dilemma of disclosing the sensitive information or dismissing the prosecution altogether. Second, there are occasions when the government's need to protect certain types of sensitive information is not addressed by the procedures in CIPA. In that situation, the government must ask the court for a special accommodation, as it

did when it requested – and Judge Gerald Bruce Lee of the Eastern District of Virginia granted – permission for Saudi intelligence security officers to testify with pseudonyms in the prosecution of Ahmed Omar Abu Ali for terrorism and conspiracy to kill President Bush. In the absence of specific statutory authorization for such accommodations, however, it is by no means certain that they will be granted in future cases. Finally, even if the judge ultimately agrees with all of the government's requests, there is always a danger that the process of litigating the CIPA issues may itself provide the defendant or his confederates some measure of insight into the information the government is seeking to protect.

For all these reasons, prosecutors contemplating criminal charges in international terrorism cases sometimes cannot have absolute confidence that they will be able to prosecute a case through to conviction without disclosing sensitive information. As a result, they often have to scale back or tailor the charges in a case to avoid implicating sensitive areas of intelligence. For example, prosecutors reportedly used a variation of this approach when they limited the criminal charges against Jose Padilla to conspiracy and the provision of material support and decided against charging him with the much more serious allegations that the Deputy Attorney General had previously announced, i.e. that Padilla had plotted to explode a “dirty bomb” radiological dispersal device and blow up apartment buildings using natural gas in the United States.<sup>7</sup> According to press reports, they opted to proceed on the more modest charges in order to protect the intelligence sources and methods underlying the evidence behind the more serious bomb-plot allegations.

While selective charging can allow prosecutors to avoid disclosure in certain cases, it is by no means a universal solu-

tion. In those situations in which a scaled-back charging approach is not available, prosecutors occasionally have to go further and leave an otherwise prosecutable case uncharged, underlining again their recognition that the need to protect our intelligence capabilities will often trump the interests of a particular prosecution in the post-9/11 world.

\* \* \* \* \*

The 9/11 attacks brought about a reappraisal of the role of prosecution in the counterterrorism effort. With the mandate to deploy prosecutions for the purpose of terrorism prevention and the authorization in the Patriot Act to do so in coordination with the Intelligence Community, prosecutors suddenly found themselves operating under a new paradigm. The prosecution of a case was no longer the ultimate objective of an investigation; it was now simply one means of advancing the goal of prevention.

The Department's adjustment to this new paradigm since 9/11 is evidenced by its continued impressive record of traditional terrorism cases and its effective use of terrorism-related prosecutions for the purpose of disruption and prevention. It can also be seen in federal prosecutors' willingness to consider the intelligence interests in a case and to modify, defer or abandon those prosecution strategies that may compromise intelligence sources, methods or operations.

Although absolutely necessary, it is nonetheless difficult for prosecutors to forgo prosecution opportunities for the sake of intelligence concerns. It is a testament to their professionalism that they do so on a regular basis, and that they and their agent colleagues embrace those decisions as a vital part of the post-9/11 approach to counterterrorism.

<sup>7</sup>James Comey, Deputy U.S. Att' Gen., Remarks Regarding Jose Padilla (June 1, 2004).

# The Controversies

Since the increase in terrorism prosecutions following the 2001 attacks, there has been an ongoing debate as to whether Article III courts can adequately handle terrorism cases. Among the questions that have been posed is whether or not the constitutional and evidentiary requirements in criminal proceedings can accommodate information gathered by intelligence officials or obtained overseas, especially considering that the information may be classified. The requirements of the Confrontation Clause in the Sixth Amendment and of the Supreme Court's ruling in *Miranda v. Arizona* particularly have been mentioned in this regard. Questions have arisen as to whether the prohibition of hearsay and the requirement that defendants be able to confront their accusers would complicate the introduction of evidence from foreign sources. Another concern involves the possibility that witnesses would be less likely to cooperate with law enforcement officials in terrorism-associated cases than otherwise.

Other concerns have focused on civil liberties issues such as the potentially vague scope of what constitutes “material support” for terrorism and the imposition of special administrative measures on defendants detained prior to conviction.

These issues were often addressed in the 828 prosecutions that the Center has examined. Our analysis suggests that DoJ and the federal criminal courts are coping ably with the hurdles that have confronted them in handling these prosecutions.

## I. Article III Courts, Evidentiary Standards, and Terrorism Cases

### A. Classified Information

Because the evidence against alleged terrorists often comes from intelligence sources or is otherwise classified, the extent to which constitutional and procedural standards limit prosecution has been a source of debate. At its most basic, the question is one of the proper balance between the ability to convict defendants for crimes that have national security implications and the fundamental right of criminal defendants to see and refute the evidence being presented against them.

Some have argued that the need to preserve secrecy means that prosecutors cannot bring charges for the full range of criminal activity they believe a defendant to be guilty of, but instead must limit the indictment to those charges that they can prove without having to introduce sensitive evidence. In some instances, this may mean foregoing prosecution altogether, they say. Others argue that the existing statutory framework amply addresses this issue by allowing prosecutors to protect the aspects of evidence that shouldn't be revealed.

The Classified Information Procedures Act (or “CIPA”),<sup>9</sup> enacted in 1984, codifies a set of rules and procedures regulating how classified information is handled in federal criminal court. Thus far, CIPA – which prevents defendants and lawyers who do not possess security clearances from

accessing classified material – has survived all constitutional challenges. Alternatively, prosecutors retain the ability to avoid relying upon classified information by carefully charging only those crimes that they can prove without resort to any sensitive evidence,<sup>10</sup> which they have done.<sup>11</sup>

To the extent possible, the Center on Law and Security has researched how frequently these tactics have been used and the results. However, certain caveats must accompany the information presented below.

#### i. Caveats

##### a. Sealed documents and sealed cases

We are limited in our analysis to those documents and facts that are available in the public record. Due to the treatment of classified information, it is impossible to assess exhaustively how and when it has been present. Motions regarding the use of procedures described in the Classified Information Procedures Act do not always reference CIPA in their title. For example, initial applications invoking CIPA are often labeled as motions for protective orders. Because protective orders may be issued for many reasons, and are common in cases not involving terrorism at all, we cannot assume that the issuance of a protective order is necessarily accompanied by the presence of classified information.

Reading the orders or motions would clarify whether classified information is being discussed. However, entire documents are often sealed and therefore inaccessible to the public. Because documents may be

<sup>9</sup> 18 U.S.C. app. 3.

<sup>10</sup> See SERRIN TURNER & STEPHEN J. SCHULHOFER, BRENNAN CTR. FOR JUSTICE AT NYU SCHOOL OF LAW, THE SECRECY PROBLEM IN TERRORISM TRIALS (2005), at 35, available at <https://www.policyarchive.org/bitstream/handle/10207/8770/30The%20Secrecy%20Problem%20in%20Terrorism%20Trials.pdf>; *In Pursuit of Justice*, *supra* note 1, at 85.

<sup>11</sup> See *In Pursuit of Justice*, *supra* note 1, at 81-87.

sealed for other reasons, we cannot assume that the order or motion involves a request regarding the use of classified information.

In some instances, documents are sealed such that even their titles are hidden from the public record and reflected on the case dockets only as “sealed,” or such that even the fact of their existence is hidden. In the latter situation, even the document number may disappear from the case docket, leaving a gap in the numbering sequence.

In the most extreme circumstances, entire cases may be sealed. While all federal court proceedings are presumptively public, there are mechanisms that permit parties, under limited circumstances and based upon a specific showing, to request that all or certain proceedings and filings be sealed. This is a feature of many criminal cases involving accomplices whose cooperation the government wants to keep secret as long as possible (to enable an investigation to continue clandestinely). In such instances, the government may consider sending the defendant back out to gather evidence against his or her former co-conspirators, and public revelation of the defendant’s arrest would destroy any such opportunity. The case may be revealed only years later, when the defendant stops cooperating or is about to testify publicly, so that there is no longer any purpose to be served by hiding them. We may not hear of these cases contemporaneously, as the arrest and prosecution of the defendant is kept from public view until the case is resolved, and sometimes not until sentencing is complete.

In other cases, we may learn that a defendant has been arrested and indicted and yet searches of the national electronic database in which federal court records are kept will not retrieve any documents. We can only assume that there are cases for which we neither know of the defendant’s arrest nor have access to any publicly available electronic record of it. These cases are unknowable until they are resolved completely.

## **b. Cases that end before trial**

Aside from the problems presented by the treatment of classified information, many cases end before evidentiary issues arise. Four hundred and five indictments – almost 49% of all terrorism-associated indictments and 68.3% of those that have been resolved – have ended in plea bargains. This means that the cases do not proceed to trial, so that many evidentiary challenges and public disclosures may never be made. These cases are not active long enough to determine whether classified information was involved, nor will there be any record of classified information being present.

## **c. Cases in which prosecutors avoid charges that would require use of classified information**

As noted above, one option for a prosecutor who does not wish to reveal sensitive facts is to indict the defendant only on charges for which there is enough evidence to prove the case without presenting any of the sensitive information or relying on it such that the defendant would be entitled to see it. The prosecutor must avoid not only the sensitive evidence itself but also any other evidence that was obtained only through it. In such a situation, there will be no record that classified information was part of the investigation. (*For possible examples of this strategy, see pp. 29-30.*)

## **d. Coping with our limitations**

In such circumstance it is impossible to quantify what we don’t know. However, considering how fundamental these issues are to the questions surrounding the prosecution of alleged terrorists in criminal courts, we feel that it is useful to analyze the information we do have to the greatest extent possible.

To that end, we have coded and analyzed these issues whenever we found them, and we present our analysis below in the form of statistics wherever we have a sufficient

sample size for them to be relevant. It is our opinion that, while these numbers should be considered only as a bare minimum, knowledge of that minimum adds value to the recognition that procedures such as CIPA exist and can be used, at least hypothetically.

For questions that would require information that cannot be determined – for example, which cases or charges were forgone in order to protect classified information – we present a qualitative rather than quantitative analysis.

## **ii. Protecting classified information: the Classified Information Procedures Act**

The most commonly suggested means of handling classified information is through the use of CIPA, which allows for in camera judicial review of sensitive documents that may or may not be relevant to the case. If the information is found to be relevant, and therefore must be shown to those in the defense who have the requisite security clearance, the judge may allow the government to substitute the classified information with either a redacted version or a summary of the facts contained in the classified material. CIPA specifically requires that the defendant be provided with “substantially the same ability to make his defense”<sup>12</sup> as he would have had with access to the original information. Courts have found that providing access only to a defendant’s attorney and not the defendant himself satisfies that requirement, as well as any constitutional standard.

The evidence at trial – and to which the public and jury, as well as the defendant, have access – consists of the substitutions (or any material the government decides in its discretion to declassify) and not the classified material itself.

In one case – that of Ahmed Omar Abu Ali – a jury was presented, at the prosecution’s request, with classified evidence that neither Abu Ali nor his primary attorney

<sup>12</sup> 18 U.S.C. app. 3 § 6(c).

were permitted to see. Instead, a second lawyer was brought into the case specifically for the purpose of viewing the classified evidence and arguing against its admissibility. On appeal, the Fourth Circuit found that allowing the jury and not Abu Ali to see the evidence constituted error, but that the error was harmless and therefore did not require a new trial.

### **iii. Prevalence of the use of classified or sensitive information: CIPA and FISA**

While use of CIPA is the most direct indication of the presence of classified information in a case, reference to the Foreign Intelligence Surveillance Act (“FISA”) means that classified information was involved in the investigation.

Conversations intercepted via FISA electronic surveillance and materials seized in FISA-authorized “sneak and peek” searches<sup>13</sup> are initially (and sometimes remain) classified. Consequently, both CIPA and FISA indicate the presence of classified information at some point in the investigation or prosecution. We therefore present the frequency that they have appeared as separate statistics.

CIPA and FISA appear to run in pairs, presumably because FISA-generated materials are initially (and can remain) classified information, and as such are potentially the subject of CIPA procedures. The overlap is significant although not complete, as prosecutors generally declassify FISA-generated materials (recordings and seized records) before producing them to the defense as part of pretrial discovery. Thus, FISA may be implicated without the need for CIPA proceedings. Conversely, a case may involve classified information that is not the product of FISA surveillance or searches. In those instances, CIPA will be invoked but not FISA.

CIPA appears in at least 140 of the 828 terrorism-associated indictments. Of those 140 indictments, FISA was also invoked in 83.

FISA appears without any evidence of CIPA in another 43 indictments.

CIPA, FISA or both appear in at least 22.1% of the indictments associated with terrorism. (See chart 40).

Because CIPA and FISA evidence often pertain to an entire case (meaning every defendant indicted together on a single docket), it is also worthwhile to evaluate how often CIPA and FISA have appeared by case rather than by each defendant.

We found evidence of either CIPA or FISA appearing in 60 cases, or 17.8%. CIPA and FISA were both invoked in 25 of those 60. Evidence of CIPA alone was found in an additional 26 cases, and FISA appeared without CIPA in a further nine. (See chart 41).

Unsurprisingly, the percentage of indictments in which either CIPA or FISA appear is greater in connection with indictments charging national security and terrorism offenses. Invocation of either CIPA or FISA appeared in 39.3% of terrorism and national security indictments and 33.3% of terrorism and national security cases. (See charts 42 and 43). What is perhaps surprising, however, is that CIPA or FISA appeared in 47 indictments in which no terrorism or national security charges ultimately were brought, indicating that while FISA surveillance may have uncovered evidence of a crime, either the crime was not a terrorism or national security offense or such charges were not brought for some other reason.

Eleven of the 47 indictments were of defendants whose co-defendants had been charged with terrorism or national security violations although they themselves had not been. For example, Agron Abdullahu was indicted along with five other men for their involvement in an alleged plot to launch an attack on Fort Dix, a U.S. Army base in New Jersey. While Abdullahu himself was charged only with conspiracy to aid illegal aliens in possessing firearms,

all of his co-defendants were charged with violating terrorism statutes.

Two defendants were indicted under general criminal conspiracy charges for conspiring to join the Taliban. Since the conspiracy was to violate national security statutes, they should be considered as belonging to the terrorism or national security group.

The remaining 34 of the 47 indictments represent 11 cases in which either CIPA or FISA appear without terrorism or national security charges being brought against any defendant. Of these indictments, 28 stemmed from allegations of funding terrorist organizations and were charged under statutes relating to racketeering or financial activities, such as tax evasion or fraud and false statements. This group includes 19 indictments constituting a single case. The defendants were allegedly counterfeiting tax stamps on cigarettes and selling counterfeit Viagra, with the profits allegedly being used to fund Hezbollah. Eighteen of these 19 defendants were charged with racketeering. The other defendant was charged with interstate transportation of counterfeit tax stamps.

Of the six remaining indictments, five were for false statements made to law enforcement officials regarding participation in terrorist organizations or activities, often in immigration documents. One indictment was for weapons violations.

### **iv. Results of prosecutions in which either CIPA or FISA appear**

Of the 183 indictments in which either CIPA or FISA appear, only 123 have been resolved. Of these, 110 indictments have ended in convictions, constituting an 89.4% conviction rate. Charges were dropped by prosecutors in another 3.25%, and a single mistrial constituted .8% of the data. Four defendants, or 3.25%, were acquitted. (See chart 44).

Use of CIPA or FISA seems to have a

<sup>13</sup> A “sneak and peek” search pursuant to FISA involves a surreptitious entry and search, with the “seized” materials copied and/or photographed and then returned to preserve the clandestine nature of the search. While the government must notify the suspect within 30 days, the Patriot Act provides for the notice to be delayed under certain circumstances. A judge may authorize consecutive 90-day periods to delay notice upon a showing of good cause. Because of these delays, the subject of a search sometimes will be unaware of it until it is revealed as part of a prosecution.

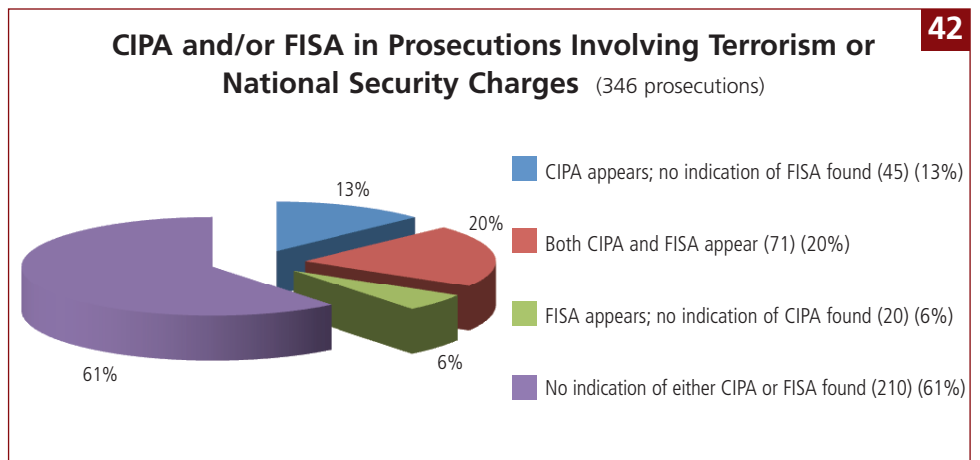
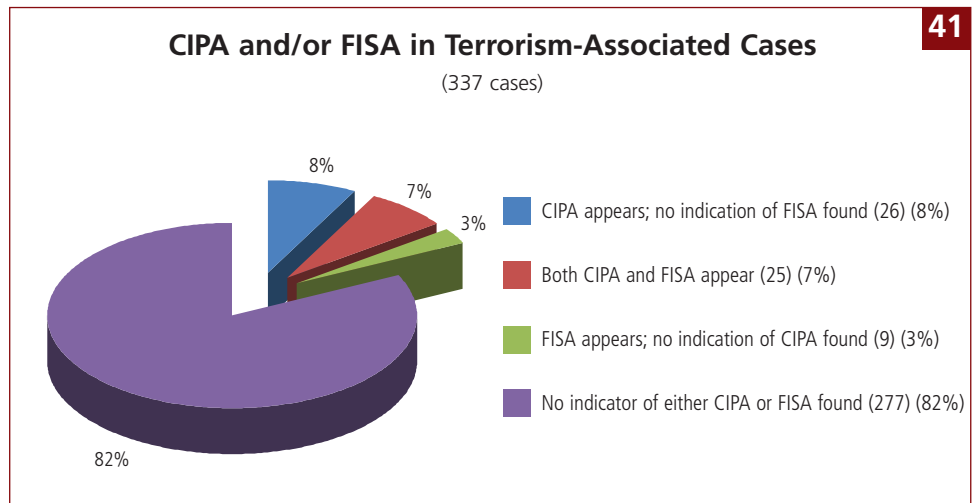
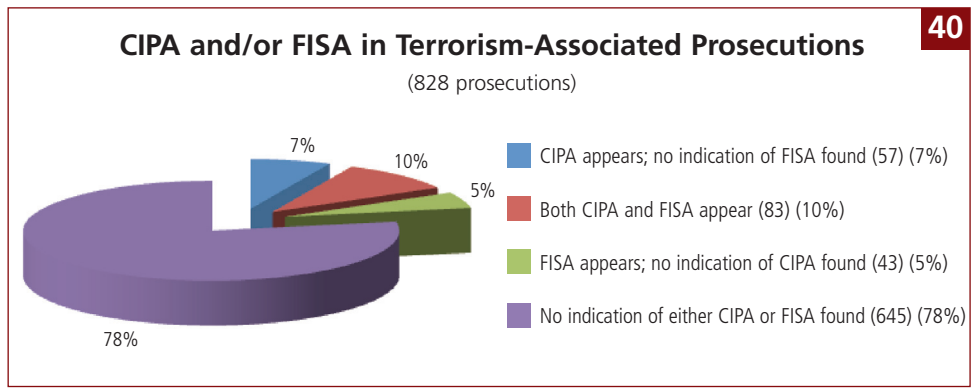


nominal but positive effect on conviction rates in prosecutions of suspected terrorists. Of the 136 indictments on terrorism or national security charges in which evidence of the use of CIPA or FISA was found, 97 have been resolved. Of these 97 indictments, 89 of them, or 91.7%, resulted in convictions. Of these cases, four defendants, or 4.1%, were acquitted of all charges, and none had all charges or guilty verdicts against them dismissed by the judge on the case. (See chart 45). These rates are noticeably higher than the 88.8% conviction rate that is obtained more generally in prosecutions that include terrorism or national security charges, whether or not list cases are included. (See p. 4).

A smaller increase can be seen in conviction rates for the terrorism or national security charges specifically, rather than for any charge in terrorism and national security violation indictments. In such prosecutions generally, the government obtains a 77.9% conviction rate on the national security or terrorism charges (or 78% after factoring out the list-only cases – see p. 4). When the data is limited to those cases in which there is evidence of CIPA or FISA procedures having been used, the conviction rate rises to 79.4%. It does not appear, therefore, that the use of CIPA or FISA procedures has hampered the government’s ability to attain convictions. (But see p. 26 for a discussion of charges that are never brought).

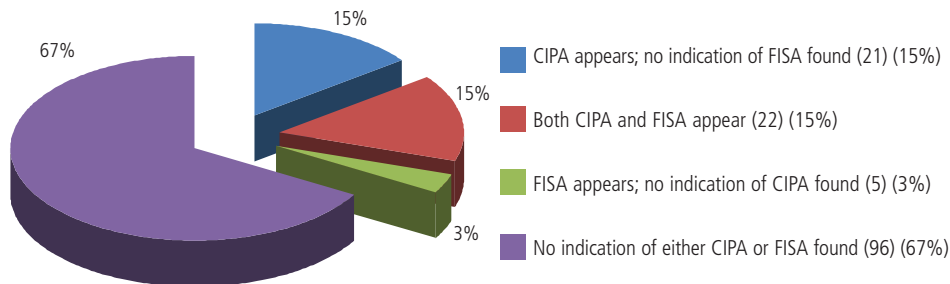
**v. Cases in which charges include neither terrorism nor national security statutes**

It is impossible to determine the number of defendants against whom terrorism or national security charges might have been brought but for a lack of sufficient non-sensitive evidence. In regard to some cases, however, press reports include claims by government officials that significant sensitive information did exist and that such charges were not brought in order to protect it.



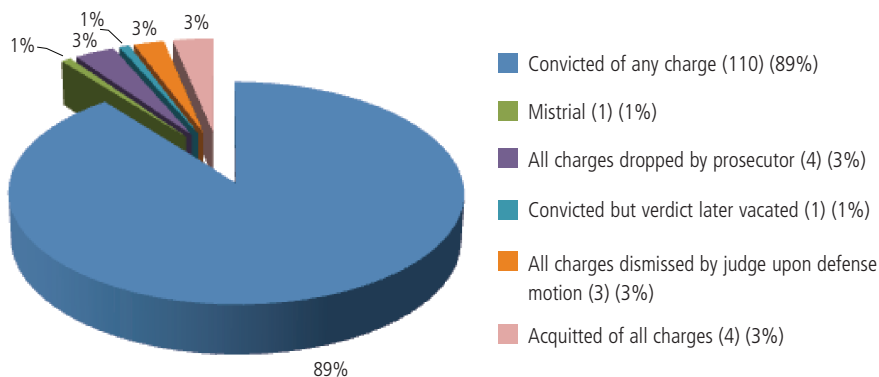
43

### CIPA and/or FISA in Cases Involving Terrorism or National Security Charges (144 cases)



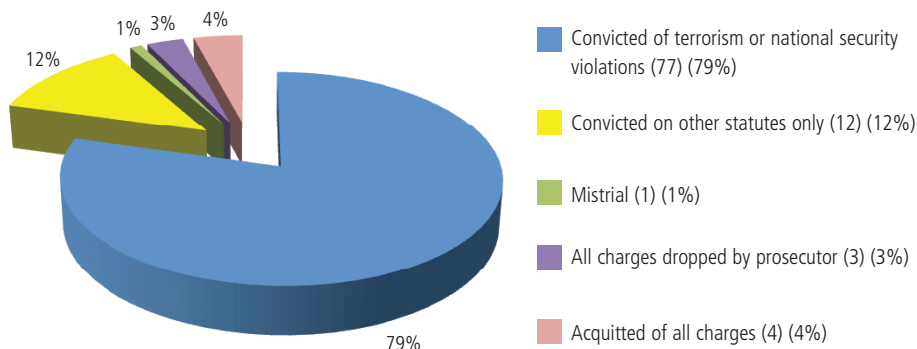
44

### Results of Terrorism-Associated Prosecutions in which CIPA and/or FISA Appear (123 resolved prosecutions)



45

### Results of Prosecutions Involving Terrorism or National Security Charges in which CIPA and/or FISA Appear (97 resolved prosecutions)



The following cases provide two examples.<sup>14</sup>

#### *Soliman Biheiri*

Soliman Biheiri, an Egyptian citizen, founded Bait ul-Mal (or “BMI”), which he said was an investment firm that would make investments based on Islamic principles. Prosecutors alleged that two of the firm’s investors were financial advisors for al Qaeda. They also referred to their belief that the firm was closely connected to the Muslim Brotherhood. Biheiri was also a founding member of Ptech, a Boston-based software firm raided by U.S. law enforcement in 2002. In March 2007, charges were brought against Oussama Abdul Ziade, Ptech’s CEO, for dealing in property of a specially designated global terrorist. Those charges were unsealed in August 2009.

While many allegations were made in the press about Biheiri’s financially assisting terrorist organizations, he was originally indicted for lying on his visa application. He was convicted on those charges and, while serving his 12-month sentence, indicted again for lying to law enforcement about his business dealings with Mousa abu Marzook, a specially designated terrorist as of 1995.<sup>15</sup> Marzook had apparently helped to solicit investors for BMI. Biheiri was again convicted and sentenced to 13 months in prison. He will be deported after his sentence is served.

Prosecutors have claimed that they charged only these limited violations because an indictment on national security grounds would have jeopardized ongoing investigations by revealing sensitive, government-held information. At sentencing, prosecutors were criticized by the judge for the government’s efforts to obtain a sentencing enhancement based on Biheiri’s dealings with Marzook, with whom, the judge said, Biheiri had merely a social relationship.

<sup>14</sup> See also the discussion of Nabil al Marabh, *supra* p. 11.

<sup>15</sup> U.S. DEP’T OF THE TREASURY, ADDITIONAL BACKGROUND INFORMATION ON CHARITIES DESIGNATED UNDER EXECUTIVE ORDER 13224, at 13 (2008), available at <http://www.treas.gov/offices/enforcement/key-issues/protecting/docs/designationsum-.pdf>.

### Jose Padilla

Jose Padilla, a former Chicago gang member, was first apprehended under allegations that he was involved in a plot to detonate a dirty bomb somewhere within the United States. Later, government allegations changed to state that the plot had been to use natural gas to blow up buildings.

After being held as a material witness for a month, Padilla was designated an enemy combatant and held in a military brig in South Carolina. After a three-year legal battle between the government and Padilla's attorneys as to whether he could be held indefinitely as an enemy combatant, Padilla was indicted on terrorism charges. All of the original allegations regarding a plot to detonate explosives of any kind within the U.S. were dropped.

While not revealed during the course of the case, it later became known that significant information about Padilla may have come from a high-value detainee whose interrogation included questionable tactics as part of a CIA interrogation program, the details of which are only now becoming publicly available. Whether the decision not to pursue the dirty bomb allegations was due to fear of revealing this fact and the details of the CIA interrogation program that would be revealed with it, due to questions regarding the reliability of the information, or to the inability to transform that information into admissible evidence, DoJ did not charge any of that conduct. Instead, the indictment was limited to those crimes that could be proven independently of the interrogation – in this case, largely through wiretaps of phone calls between Padilla and his co-defendants.

The strategy proved successful for the government. Padilla was found guilty on all counts, and while his 17-year-and-four-month sentence (justified by the judge in part due to allegations of harsh treatment during the course of his detention) was lower than prosecutors had requested, it was a significant sentence obtained without threatening the release of information the government was intent on keeping secret.

## B. Hearsay, the Confrontation Clause, and Foreign Evidence

Similar to the expressed concerns about introducing classified evidence, the general prohibition of hearsay and the requirements of the Confrontation Clause have been seen by some as limitations on prosecutors' ability to convict terrorists in Article III courts. They argue that the origin of the evidence in these cases may often be gathered from foreign or intelligence sources who will not be available to testify to their truthfulness in court, and therefore that such evidence will be barred.<sup>16</sup> Others counter that these issues are not in fact unique to terrorism cases and are commonly dealt with in the prosecution of transnational crimes.

The use of hearsay evidence has also been an issue in connection with military commission proceedings at Guantanamo Bay.<sup>17</sup>

The results of terrorism-associated prosecutions involving a foreign dimension suggest that these while these questions have arisen, courts have been able to work around them.

### i. Hearsay and the Confrontation Clause

It is worthwhile to remember the purpose of the hearsay rules and Confrontation Clause requirements.

Hearsay is an out-of-court statement used to prove the truth of the matter asserted in that statement.<sup>18</sup> The bar on hearsay was created in order to protect trials from the influence of unreliable testimony. In order to ensure that testimony is as reliable as possible, witnesses must take an oath, be subject to cross-examination, and speak in the presence of the jury. The jury must have the opportunity to determine – via cross-examination and its own observations – whether the witness is being honest and accurately remembers the information he or she is testifying about. Therefore, that witness must testify in court, rather than having their statement repeated by others.

If a witness simply relays information stated by some other individual, the jury is able to evaluate only whether or not the witness *believes* that the individual made the statement and was telling the truth. The jury does not have the opportunity to judge for itself the reliability of the individual, who spoke outside their presence and was not under oath or subject to cross-examination. Therefore, if a witness tries to recount what someone else said, he will be stopped by the judge.

Out-of-court statements may still be allowed if they are offered for some purpose other than to prove the truth of their content.<sup>19</sup> There are also multiple exceptions to the hearsay rule that permit admission of out-of-court statements that historically have demonstrated sufficient indicia of reliability.<sup>20</sup> The question of whether

<sup>16</sup> See Am. Bar Ass'n Standing Comm. on Law and Nat'l Sec., National Strategy Forum, and McCormick Foundation, *Trying Terrorists in Article III Courts: Challenges and Lessons Learned, a Post-Workshop Report*, DUE PROCESS AND TERRORISM SERIES 24 (hereinafter *A.B.A. Report*), available at [http://www.abanet.org/natsecurity/trying\\_terrorists\\_artIII\\_report\\_final.pdf](http://www.abanet.org/natsecurity/trying_terrorists_artIII_report_final.pdf).

<sup>17</sup> See, e.g., William Glaberson, *Despite Plan, Guantánamo Trials Still Problematic*, N.Y. TIMES, May 18, 2009, available at <http://www.nytimes.com/2009/05/19/us/politics/19gitmo.html>; Pete Masciola, *Americans Expect Better: Guantanamo's Flawed Military Commissions*, WASH. POST, Feb. 26, 2009, at PostGlobal, available at [http://newsweek.washingtonpost.com/postglobal/needtoknow/2009/02/americans\\_expect\\_better\\_guanta.html](http://newsweek.washingtonpost.com/postglobal/needtoknow/2009/02/americans_expect_better_guanta.html).

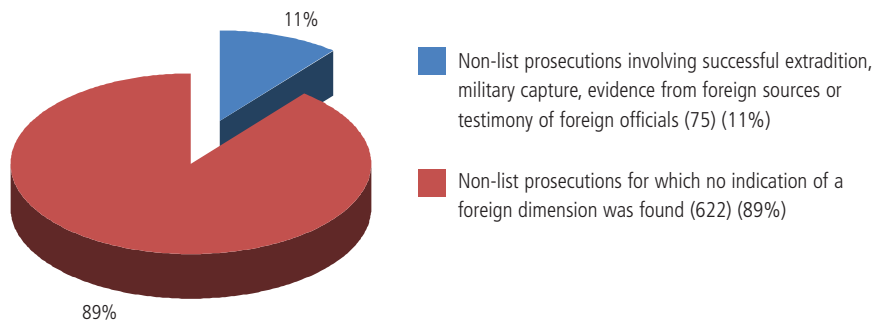
<sup>18</sup> FED. R. EVID. 801.

<sup>19</sup> See FED. R. EVID. 801 advisory committee's notes, 804.

<sup>20</sup> See FED. R. EVID. 803, 804, 807 and accompanying advisory committee notes. Statements considered to have sufficient indicia of reliability include, for example, remarks made immediately after an event, presumably too soon for the speaker to forget or purposefully misrepresent what the event was. See Federal FED. R. EVID. 803 and accompanying advisory committee's notes.

## 46 Foreign Dimension in Terrorism-Associated Prosecutions

(697 non-list prosecutions)

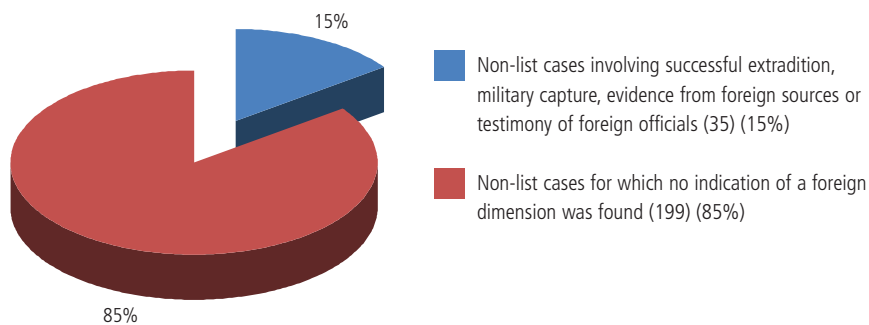


such testimony will be allowed always returns to the issue of whether it can be appropriately relied upon by a jury.

Addressing similar concerns, the Confrontation Clause of the Sixth Amendment requires that “in all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him.”<sup>21</sup> All testimonial statements<sup>22</sup> must be subject to cross-examination by the defendant.<sup>23</sup> According to the Supreme Court, this requirement was based on a constitutional decision that “the crucible of cross-examination”<sup>24</sup> is necessary in order to determine whether statements are trustworthy. “The [Confrontation] Clause thus reflects a judgment, not only about the desirability of reliable evidence ... but about how reliability can best be determined,” wrote Justice Scalia.<sup>25</sup>

## 47 Foreign Dimension in Terrorism-Associated Cases

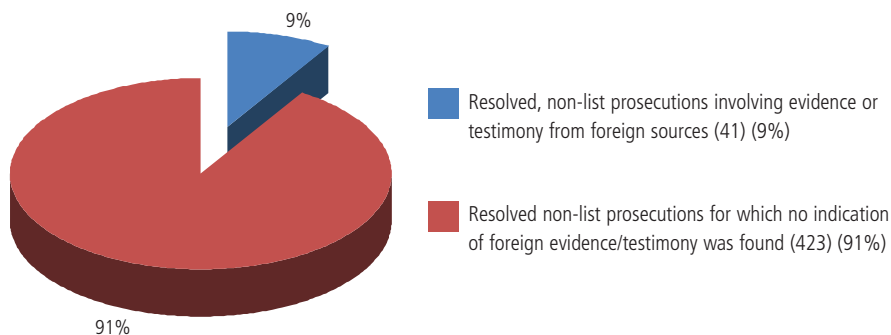
(234 non-list cases)



In the case of hearsay evidence, it may be possible to introduce reliable evidence through a recognized exception to the rule. In respect to the Confrontation Clause requirements, some commentators have suggested that it may be difficult to secure witnesses for trials in which the evidence comes from foreign or intelligence sources.<sup>26</sup> Questions of the possibility and practicability of presenting certain types of evidence are one thing; questions of reliability are another.

## 48 Foreign Evidence/Testimony in Resolved Prosecutions

(464 non-list prosecutions)



### ii. Prosecutions involving a foreign dimension

#### a. Percentage of prosecutions involving a foreign dimension

Seventy-five indictments, representing 10.8% of all non-list indictments in the data set, include some aspect or combination of foreign capture, military capture, evidence from foreign sources, or testimony by foreign officials. This is a non-negligible proportion of terrorism-associated indictments. (See chart 46).

<sup>21</sup> U.S. CONST. amend. VI.

<sup>22</sup> Testimonial statements have been described, for example, as “statements . . . made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Crawford v. Washington*, 541 U.S. 36, 52 (2004) (citing Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3).

<sup>23</sup> *Id.* at 68.

<sup>24</sup> *Id.* at 61.

<sup>25</sup> *Id.*

<sup>26</sup> See *A.B.A. Report*, *supra* note 16, at 16.



These 75 indictments appear in 35, or 15%, of non-list cases. (See chart 47). They do not include the 14 individuals who have been indicted by the U.S. and are being held overseas by countries that have not extradited them to date. Including these 14 individuals increases the proportion to 12.7% of the indictments and 17% of the cases.

Limiting the analysis to indictments that have already been resolved, 56 resolved indictments involved either overseas capture and extradition, military capture, evidence from foreign sources or testimony by a foreign official. None were list-only cases.

Evidence from foreign sources or testimony by foreign officials appears in 41, or 8.8%, of resolved non-list indictments. (See chart 48). This represents 14, or 7.1%, of the non-list cases in which the charges against at least some defendants have been resolved.

We excluded unresolved indictments from this analysis because they may not have developed to a point at which the records would indicate whether evidence or testimony from foreign sources was likely to have been used.

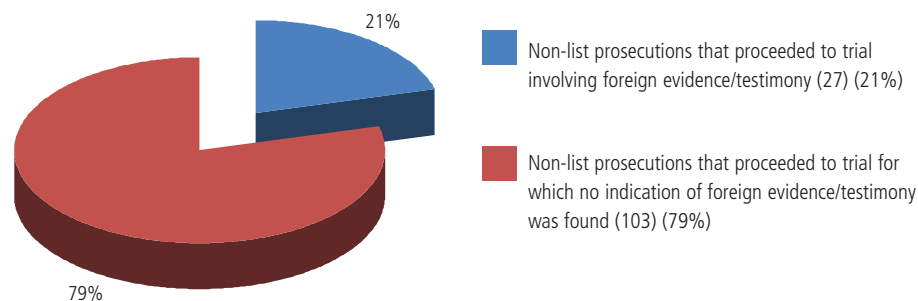
For similar reasons, we again analyzed the data looking at only those indictments that had proceeded to resolution at trial rather than having been resolved before a trial was completed. (For this analysis, we excluded cases in which there was a plea, the prosecutor dropped all charges, or all charges were dismissed by the judge against all defendants). Out of 130 non-list indictments that proceeded to trial, 27, or 20.8%, involved the use of evidence or testimony from foreign sources. (See chart 49).

### b. Results of prosecutions involving a foreign dimension

Of the 56 resolved indictments involving either overseas capture and extradition, military capture, evidence from foreign sources or testimony by a foreign official, 48 of them, or 85.7%, ended in convictions. (See chart 50).

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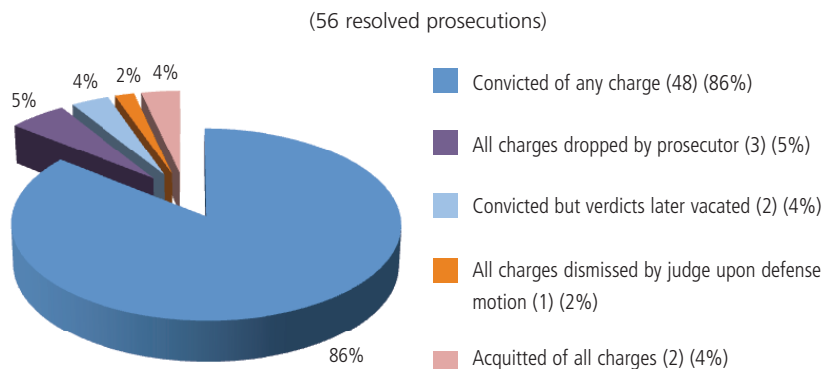
### Foreign Evidence/Testimony in Resolved Prosecutions that Proceeded to Trial\* (130 non-list prosecutions)



\*This excludes cases in which there was a plea, the prosecutor dropped all charges, or all charges were dismissed by the judge against all defendants.

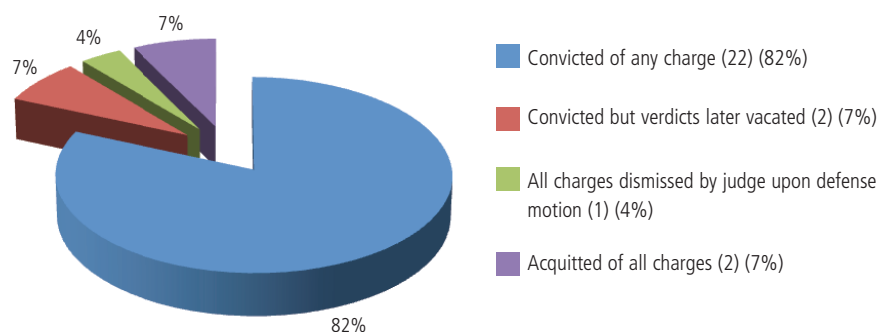
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### Results of Prosecutions Involving a Foreign Dimension (56 resolved prosecutions)



51

### Results of Prosecutions Involving Foreign Evidence/Testimony that Proceeded to Trial\* (27 resolved prosecutions)



\*This excludes cases in which there was a plea, the prosecutor dropped all charges, or all charges were dismissed by the judge against all defendants.

Two of the 56 ended in acquittals, and three ended when prosecutors dropped the charges. One resulted in a dismissal by a judge and two in guilty verdicts that were set aside. However, these latter three instances were not based on difficulties in presenting evidence. Instead, the two guilty verdicts were set aside because evidence related to terrorism was introduced that was subsequently deemed to be irrelevant and prejudicial. In the remaining instance, the judge found the evidence against the defendant to be insufficient to link him to the conspiracy alleged, although his three co-defendants were convicted.

Of the 27 indictments involving evidence or testimony from foreign sources that proceeded to trial, 22, or 81.5%, ended in convictions. Two ended in acquittals. The one indictment that was dismissed by a judge and the two vacated guilty verdicts are included in this set. (*See chart 51*).

Of these cases, five stand out as relevant to the issue of trying alleged terrorists who may have been captured on the battlefield or interrogated under circumstances that seem to risk the prosecutor's ability to try them.

### c. Case studies

#### *Ahmed Omar Abu Ali*

Ahmed Omar Abu Ali was arrested in June 2003 at the University of Medina in Saudi Arabia. He was arrested by Saudi officials and held in Saudi custody. He filed a petition for a writ of habeas corpus in the United States regarding his detention, which he claimed was at the behest and under the supervision of the U.S. government. He was then extradited to the United States and tried here.

A majority of the government's case came from Saudi security officers, who testified from Saudi Arabia via live video such that they were subject to questioning by both prosecutors and Abu Ali's defense counsel. Additionally, the case involved evidence obtained in a foreign country by foreign actors: a videotape was made of his confession to Saudi authorities, which he

claimed was the product of torture (specifically that he was whipped until he confessed). Neither the torture claim nor the fact that he had not been Mirandized in a manner that satisfied U.S. criminal justice standards – both claims denied by the trial court, which was affirmed on appeal – served as barriers to his conviction for his part in an alleged plot to assassinate President Bush.

#### *Khan Mohammed*

Khan Mohammed was indicted while in custody in Afghanistan. He was the fourth individual ever to be charged under 21 U.S.C § 960 — the narco-terrorism statute. The evidence against him largely came from recorded conversations between himself and a confidential source, apparently while both were in Afghanistan. Additional evidence consisted of statements he made while being held at Bagram Air Base. During a series of interrogations, he was apparently never given *Miranda* warnings of any kind. The resulting statements were not suppressed, and he was ultimately convicted.

#### *Khaled Abded-Latif Dumeisi*

Khaled Abded-Latif Dumeisi was indicted for acting as an agent of a foreign government and conspiring to commit an offense against the United States. Evidence against him included papers seized during the U.S. invasion of Iraq, from a file maintained by the Iraqi intelligence service. Dumeisi attempted to have the papers suppressed on the basis of the government's inability to establish a proper chain of custody, arguing that the documents could not be properly authenticated. Prosecutors responded by outlining multiple alternate ways in which the documents' authenticity could be established. The papers were ultimately admitted as evidence at trial. Prosecutors were further allowed to offer a witness against Dumeisi who used a pseudonym and appeared in disguise for his own safety. Prosecutors were not, however, allowed to take the deposition of an Iraqi intelligence officer in Baghdad (rather than presenting the witness himself before

the jury) because, the judge said, the government had not made a sufficient effort to bring the potential witness to the United States. Dumeisi was ultimately convicted.

#### *Holy Land Foundation*

The Holy Land Foundation was the largest Islamic charitable organization in the United States. In 2004, the foundation and seven of its officers and directors were indicted for providing funds to Hamas. Prosecutors argued that the funds were going to organizations in the Palestinian Territories that the defendants knew to be linked to Hamas. The defendants denied knowledge of any such links and argued that they had been providing funds to other charitable organizations in Kosovo, Bosnia, Turkey and the U.S., in order to support humanitarian efforts. One of its original founders, however, a political leader of Hamas, was eventually designated a global terrorist, several years after the organization had been founded (and before the 2001 attacks).

During the course of two trials, the first ending in a mistrial, Israeli agents were allowed to testify anonymously, identified only by pseudonyms. Defense attorneys objected that their ability to cross-examine these witnesses was severely hampered by their inability to know who they were, making it difficult to find information that might cause a jury to question their credibility. Eventually, all of the defendants were convicted, other than two who are still fugitives.

#### *John Phillip Walker Lindh*

John Phillip Walker Lindh was captured by U.S. forces in Afghanistan on December 1, 2001. He pleaded guilty to the national security charges against him (terrorism charges were dismissed as part of the plea bargain), so evidence was never presented to a judge for possible suppression. However, both his submission and the government's included interviews of detainees, which evidence both Lindh and the government would have attempted to introduce at trial.

# Proposed Changes to Federal Rule of Criminal Procedure 15: Limitations, Technological Advances, and National Security Cases

By Barry M. Sabin,\* Ryan C. Eney,\*\* and Nabeel A. Yousef\*\*\*

As branches of the United States government continue to struggle to define the contours of constitutional and practical considerations for bringing national security cases in Article III courts, one critical procedure that should be addressed is the manner, means, and use of foreign depositions in United States federal criminal proceedings. The continued reliance upon the federal criminal justice system for addressing alleged terrorism violations has been, and will continue to be, complicated by foreign evidence collection.<sup>1</sup> Foreign depositions have already been used in prominent post-9/11 counterterrorism cases by both the prosecution and the defense.<sup>2</sup> Regarding witness testimony, obstacles can prevent witnesses from traveling to the U.S. and can hinder in-custody defendants from traveling outside the U.S.

to participate in-person at foreign witness depositions. Testimonial presence obstacles have occurred in matters ranging from organized crime cases to international fraud schemes, but these obstacles are more pronounced in national security cases. With twenty-first century technological advances, clear procedures that comport with constitutional safeguards would help practitioners understand how to appropriately and strategically prosecute and defend these high-profile cases, and would promote consistent judgments in them.

Presently, the plain language of Federal Rule of Criminal Procedure 15 (“Rule 15”), which addresses depositions generally, requires the presence of in-custody defendants.<sup>3</sup> In response to the increase in transnational crime, and to

address inconsistent treatment in the courts, the Department of Justice recommended amending Rule 15. The Advisory Committee on Federal Rules of Criminal Procedure in turn proposed amendments to Rule 15 that under certain circumstances would allow depositions outside the U.S. in the defendant’s absence.<sup>4</sup> Under the proposed amendments, the trial court would be required to make several case-specific findings, including that: (1) the witness’s testimony could provide substantial proof of a material fact in a felony prosecution, (2) the witness’s presence at trial or deposition in the United States cannot be obtained, (3) the defendant cannot be present for certain, specified reasons, and (4) the defendant can meaningfully participate in the deposition through reasonable means.<sup>5</sup> If the Supreme Court approves the

\* Barry Sabin is a partner at Latham & Watkins LLP who served as a Department of Justice prosecutor for 18 years.

\*\* Ryan C. Eney is an associate at Latham & Watkins LLP in Washington, D.C., and a graduate of the New York University School of Law.

\*\*\* Nabeel A. Yousef is an associate at Latham & Watkins LLP in Washington, D.C., and a graduate of the University of Pennsylvania School of Law.

<sup>1</sup> In an effort to ease foreign evidence collection, the United States and the European Union (“EU”) have entered into a mutual assistance agreement to allow video conferencing for testimony between EU member states and the United States. *Agreement on Mutual Legal Assistance Between the European Union and the United States of America*, 2003 O.J. (L 181) 34.

<sup>2</sup> See, e.g., *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008) (permitting district court to conduct seven-day, live, two-way video link deposition of Saudi government officials in Saudi Arabia); *United States v. Moussaoui*, 365 F.3d 292, 297 (4th Cir. 2004) (allowing district court depositions of defense witnesses via remote video); *United States v. Ahmed*, 587 F. Supp. 2d 853 (N.D. Ohio 2008) (requiring two-way video testimony to implement the procedures approved by the Fourth Circuit in *Abu Ali*); *United States v. Paracha*, No. 03-1197, 2006 U.S. Dist. LEXIS 1, at \*5 (S.D.N.Y. Jan. 3, 2006) (denying defendant’s request to have witness held at Guantanamo Bay testify at trial because a videotaped deposition of witness from Guantanamo Bay was also available). *Yong Ki Kwon*, a cooperating witness in *United States v. Khan*, 309 F. Supp. 2d 789 (E.D. Va. 2004), later testified in the Australian terrorism prosecution of Faheem Lodhi in Australia court via videolink. Tracy Ong, *Terror Suspect ‘Seen at Pakistani Training Camp.’* THE AUSTRALIAN, Mar. 12, 2007, available at <http://www.theaustralian.news.com.au/story/0,25197,21367251-5006784,00.html>. In 2008, in *United States v. Al Kassar*, the defendant, an alleged arms dealer who was ultimately convicted of conspiring to sell arms to the FARC, among other offenses, successfully moved prior to trial for the ability to take videotaped depositions of a Spanish official. 2008 U.S. Dist. LEXIS 87204 (S.D.N.Y. Oct. 10, 2008).

<sup>3</sup> FED. R. CRIM. P. 15(c)(1).

<sup>4</sup> Following the proposal of the rule by the Advisory Committee on Federal Rules of Criminal Procedure, the Committee on Rules of Practice and Procedure (hereinafter, collectively, the “Committee”) recommended that the Judicial Conference approve the proposed amendment to Rule 15. Both committees are part of the Judicial Conference, which is part of the Judicial Branch, as authorized by Congress in the Rules Enabling Act, 28 U.S.C. §§ 2017-2077, and which prescribes rules of practice, procedure, and evidence, subject to Congress. The Judicial Conference approved the proposed amendment on September 15, 2009, and transmitted it to the Supreme Court with the recommendation that it be adopted by the Court and transmitted to Congress. The Supreme Court must decide whether to transmit it to Congress by May 1, 2010.

<sup>5</sup> The central addition to Rule 15 proposed by the Advisory Committee on Federal Rules of Criminal Procedure is:

(3) Taking Depositions Outside the United States Without the Defendant’s Presence. The deposition of a witness who is outside the United States may be taken without the defendant’s presence if the court makes case-specific findings of all the following:

(A) the witness’s testimony could provide substantial proof of a material fact in a felony prosecution;

(B) there is a substantial likelihood that the witness’s attendance at trial cannot be obtained;

(C) the witness’s presence for a deposition in the United States cannot be obtained;

(D) the defendant cannot be present because:

(i) the country where the witness is located will not permit the defendant to attend the deposition;

(ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness’s location; or

(iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and

(E) the defendant can meaningfully participate in the deposition through reasonable means.

Report from Richard C. Tallman, Chair, Advisory Comm. on Fed. Rules of Criminal Procedure, Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States, to Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure, Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States, at D-13 – D-14 (June 2009) (hereinafter “Committee Report”), available at <http://www.uscourts.gov/rules/jc09-2009/2009-09-Appendix-D.pdf>.

amendment, Congress must act before December 1, 2010, or it will take effect as a matter of law.

This article suggests that Congress should enact legislation to modify Rule 15 to satisfy constitutional and practical concerns.<sup>6</sup> This article's proposed alternate framework relies upon: (1) the Fourth Circuit's opinion in *United States v. Abu Ali*, (2) the development of and reliance upon sophisticated advances in technology, (3) limiting the rule to the national security context by restricting its application to national security cases involving certain enumerated offenses, (4) certifications by the Attorney General of the United States, and (5) required reporting by the Justice Department to the U.S. Congress regarding the frequency that Rule 15 is used and other relevant trends. This framework considers the risk to Sixth Amendment Confrontation Clause rights,<sup>7</sup> and should satisfy anticipated challenges related to the cross-examination of foreign witnesses. A modified Rule 15 would benefit both prosecutors and defendants, as it would create procedures for increased access to witnesses overseas for all parties.

Part I of this article examines the lessons that can be drawn from recent cases on two-way video testimony; Part II discusses recent advances in and inherent problems with video testimony technology; Part III discusses proposed limitations and safeguards for Rule 15; Part IV considers the needs and concerns of both prosecutors and defenders; Part V anticipates the Supreme Court's reaction to amending

Rule 15; and the final Part contains our recommendations and conclusions.

### **Part I: Two-Way Video Testimony in the Courts**

Although the Supreme Court has not directly addressed two-way video testimony, the Court has addressed related Confrontation Clause issues. In 1990, in *Maryland v. Craig*,<sup>8</sup> the Supreme Court allowed an alleged child sex abuse victim to testify via one-way closed-circuit television and applied a test similar to the one in *Ohio v. Roberts*. In *Roberts*, the Court ruled that a preliminary examination of an unavailable witness is admissible at trial on a showing that (1) the witness is unavailable and (2) the previous statement evidences adequate indicia of reliability.<sup>9</sup>

In 2004, in *Crawford v. Washington*, the Supreme Court rejected the use of an out-of-court statement by an unavailable witness.<sup>10</sup> In *Crawford*, the Court altered the second prong of the *Roberts* rule from indicia of reliability to a requirement of an opportunity to cross-examine the witness.<sup>11</sup> A 2009 Supreme Court case expanded the rule from *Crawford*. In *Melendez-Diaz v. Massachusetts*, the trial court admitted certificates concluding that a substance possessed by the defendant was cocaine without requiring the testimony of the forensic analyst who conducted the tests.<sup>12</sup> The Court held that to do so was a violation of the defendant's right to confrontation.<sup>13</sup>

In the lower federal courts, a number of cases have addressed the use of two-

way video testimony in light of the Confrontation Clause of the Sixth Amendment.<sup>14</sup> Two notable appellate cases – the en banc decision of the Eleventh Circuit in *United States v. Yates* and the Fourth Circuit's decision in *United States v. Abu Ali* – have recently dealt with the use of two-way video testimony and have provided a framework that should be incorporated into the amended Rule 15. *Yates* adapted the standard for remote one-way video testimony from *Maryland v. Craig* and applied it to two-way video testimony; the *Abu Ali* court specified procedures under which courts can conduct two-way video deposition testimony that it concluded maintain the defendant's confrontation rights under the Sixth Amendment.

In *Yates*, two witnesses testified via live, two-way video conference from Australia in the defendant's trial for mail fraud and other offenses. The two witnesses were unwilling to travel to the United States and were outside the subpoena powers of the government. The court struck down the use of two-way video testimony at trial; however, it did not preclude the use of such testimony in the future. Instead, the court laid out a framework for the use of two-way video testimony based on the standard set forth in *Maryland v. Craig*. In *Craig*, the Supreme Court held that allowing one-way video testimony at trial did not violate the Confrontation Clause of the Sixth Amendment where the "denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony

<sup>6</sup> Congress has previously modified other proposed amendments transmitted by the Supreme Court. In 1994, Congress modified Federal Rule of Evidence 412 to extend certain evidentiary protections to civil sex offense cases. See FED. R. EVID. 412 advisory committee's note; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 40141, 108 Stat. 1796, 1918-19.

<sup>7</sup> The Confrontation Clause of the Sixth Amendment of the Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. CONST. amend. VI.

<sup>8</sup> 497 U.S. 836 (1990).

<sup>9</sup> 448 U.S. 56 (1980).

<sup>10</sup> 541 U.S. 36 (2004)

<sup>11</sup> *Id.*

<sup>12</sup> 129 S. Ct. 2527 (2009).

<sup>13</sup> *Id.*

<sup>14</sup> See, e.g., *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005) (applying the *Craig* standard and not allowing two-way video testimony); *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999) (allowing two-way video testimony based on analogy to depositions and a broad reading of "exceptional circumstances" in FRCP 15(a). The witness testifying via two-way video testimony was terminally ill and also participating in the witness protection program. The court also attempted to distinguish between one-way and two-way video testimony, but this approach has since been dismissed by Justice Scalia in his statement rejecting the proposed amendment to Federal Rule of Criminal Procedure 26(b)); *United States v. Shabbazz*, 52 M.J. 585 (N-M. Ct. Crim. App. 1999) (holding two-way video testimony inadmissible without guarantees of reliability).



is otherwise assured.”<sup>15</sup> In *Yates*, the U.S. Court of Appeals for the Eleventh Circuit held that in order to allow video testimony, a court must (1) hold an evidentiary hearing and (2) find (a) that the video testimony is necessary to further an important public policy and (b) that the reliability of the testimony is otherwise assured.<sup>16</sup> The court decided that the video testimony at issue did not further an important public policy, holding that “the prosecutor’s need for the video conference testimony to make a case and to expeditiously resolve it are not the type of public policies that are important enough to outweigh the Defendants’ rights, to confront their accusers face-to-face.”<sup>17</sup> Beginning with *Craig* and *Yates*, the courts have entangled the rules for depositions (originating in *Roberts*) and the admissibility of testimony by applying the Supreme Court standard for one-way video testimony to two-way live video testimony.

Although *Yates* discusses the standard for video testimony at trial, the decision speaks directly to the admissibility of video depositions. Similarly, Rule 15 applies to depositions only, but necessarily implicates the admissibility of testimony at a criminal trial. Although the ability to depose a witness and the admissibility of that witness testimony at trial are distinct, courts have tied the two procedures together. The Committee recognized the connection in its report when it wrote, “Members stressed that providing a procedure to take a deposition did not guarantee its later admission . . . .”<sup>18</sup> On the other hand, the Committee should be concerned about providing a deposition procedure that is not sufficiently directed at admissibility. Further, a procedure that effectively says the decision on admissibility should be left to the courts is akin to having no rule at all

because that is the status quo – which is an uncertain landscape in critical need of clarity.

In *Abu Ali*, the Fourth Circuit applied the *Craig/Yates* framework to the national security context. By their nature, national security cases are far more likely to involve transnational prosecutions with witnesses in foreign countries. In this case, Saudi counterterrorism officers living in Saudi Arabia were beyond the subpoena power of the district court and Saudi Arabia would not allow the officers to testify at trial in the United States. Saudi Arabia allowed the counterterrorism officers to be deposed in Saudi Arabia, but the U.S. government would not allow the defendant, Abu Ali, to travel to Saudi Arabia for a number of reasons, including potential security concerns. According to the Fourth Circuit, Abu Ali and the witnesses could see and hear each other contemporaneously at the week-long two-way video link deposition, and the jury later saw and heard both video feeds. The district court required that two of Abu Ali’s defense attorneys attend the deposition in Saudi Arabia, while a third defense attorney remained with Abu Ali in the United States.

In *Abu Ali*, the appellate court upheld the district court’s decision to allow Rule 15 depositions of counterterrorism officers in Saudi Arabia via live, two-way video link. These depositions were admitted into evidence at trial. The court distinguished the case from *Yates* on two grounds: (1) the government charged Abu Ali with national security-related offenses, which implicated a public policy of great importance, and (2) the district court in *Yates* failed to make case-specific findings as to why the witnesses and defendant could not be physically present in the same place.<sup>19</sup> The court found that, under the *Craig* stan-

dard, national security is an important public policy and that certain elements of confrontation from *Craig* ensured the reliability of the testimony – oath, cross-examination, and observation of the witness’s demeanor.

Lessons to consider from *Abu Ali* include that national security, as a public policy of the utmost importance, could serve as a potential limiting factor for Rule 15; elements of confrontation (particularly cross-examination) are critical; and a workable procedural framework is possible, as other courts have since followed *Abu Ali*. Although the procedure from *Abu Ali* is fact-specific, six points from the case are instructive in developing a framework:<sup>20</sup> (1) upon defense counsel’s request, the witness was sworn in using the oath of the Saudi criminal justice system, and the oath was largely similar to the one used in the U.S., (2) defense counsel cross-examined the witness extensively, (3) defense counsel was present in the U.S. with the defendant and abroad with the witness, (4) the defendant, judge, and jury were all able to observe the demeanor of the witness, (5) the jury watched a videotape that showed side-by-side footage of the witnesses testifying and the defendant’s simultaneous reaction to the testimony, and (6) even though there was no contemporaneous phone link between the defendant and his counsel during the witness deposition, the deposition was lengthy and there were frequent breaks for the defendant and his counsel to converse.<sup>21</sup>

Although the Committee writes that the proposed amendment incorporates the requirements of the lower courts, the Committee also justifies the omission of specific procedures by saying that the courts will still need to make a determination on admissibility. Prosecutors and

<sup>15</sup> 497 U.S. at 850.

<sup>16</sup> *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006) (en banc).

<sup>17</sup> *Id.* at 1316.

<sup>18</sup> Committee Report, *supra* note 5, at D-11.

<sup>19</sup> *United States v. Abu Ali*, 528 F.3d 210, 242 (4th Cir. 2008)

<sup>20</sup> *Id.* at 240-242.

<sup>21</sup> Nevertheless, a better practice might include a contemporaneous phone link rather than breaks for the defendant and counsel to communicate

defenders both desire clarity in the proposed rule amendment and, based on Supreme Court precedent and lower courts cases, we submit that the rule on two-way video depositions should come from *Abu Ali*. At least one court has already relied upon the factors articulated in *Abu Ali* in a national security case. In *United States v. Ahmed*, the Northern District of Ohio granted the prosecutors leave to conduct a deposition that shall “occur in a manner that as fully as technologically possible preserves the defendants’ right of confrontation,” and instructed the parties to use the procedures approved in *Abu Ali*.<sup>22</sup> The Committee claims it is following the *Abu Ali* procedures, but the proposed rule, as presently drafted, effectively says the decision should be left to the courts.<sup>23</sup>

## Part II: Video Testimony Technology

Technology to aid in discovery has progressed from telephonic depositions to two-way, live, in-court video testimony, but the issue we now face is whether the technology has developed to the point where it can effectively address the concerns of jurists and other critics. The U.S. Court of Appeals for the Fifth Circuit in 1992 aptly anticipated this concern when it wrote:

No doubt, few defendants regard trial by deposition as an adequate substi-

tute for confronting the witness in the presence of the jury. Only through live cross-examination can the jury fully appreciate the strength or weakness of the witness’ testimony, by closely observing the witness’ demeanor, expressions, and intonations. Videotaped deposition testimony, subject to all of the rigors of cross-examination, is as good a surrogate for live testimony as you will find, but it is still only a substitute.<sup>24</sup>

Or as Justice Scalia cogently stated, “Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.”<sup>25</sup> There is no doubt that virtual presence still lacks some of the elements of physical confrontation. The disadvantages of video testimony are real and they inform our discussion of further Rule 15 considerations. Although two-way video deposition testimony allows for more observation and interaction than possible by telephone or one-way video, even the prevalence of high-definition two-way video technology (known as “telepresence”), which makes remote testimony feel more like in-court testimony, is not an exact substitute for face-to-face confrontation with respect to all human senses.

The proposed amendment’s section 15(c)(3)(E) states that a trial court must find that the defendant can “meaningfully

participate in the deposition through reasonable means.” Although case law intimates that this limiting principle targets two-way video testimony, the rule does not explicitly identify such testimony as its concern. Instead, in using general language such as “meaningfully participate” and “reasonable means,” the Committee is trying to preserve courts’ ability to react to evolving standards for depositions. Courts have allowed depositions via telephone, then one-way video, and now two-way video.<sup>26</sup>

The proposed amendment reflects trends abroad as well as at the state and local level.<sup>27</sup> In May 2008, California passed a law authorizing the use of two-way video testimony by alleged victims of elder abuse too sick or infirm to travel to the courtroom.<sup>28</sup> India, for example, has embarked on a nationwide project to connect jails and courts to a video conferencing system, which some call “tele-justice.”<sup>29</sup> This trend began to spread after India’s highest court determined that two-way video conferencing satisfies the requirement of a defendant’s presence in criminal proceedings.<sup>30</sup> Even more permissive is the United Kingdom, which allows for testimony via live television link with minimal limitations – the rule applies to all criminal cases involving injury or threat of injury to another person when any witness, other than the defendant, is outside the United Kingdom.<sup>31</sup>

<sup>22</sup> Ahmed, 587 F. Supp. 2d at 854.

<sup>23</sup> Committee Report, *supra* note 5.

<sup>24</sup> Aguilar-Ayala v. Ruiz, 973 F.2d 411, 419 (5th Cir. 1992).

<sup>25</sup> Supreme Court on Court Rules, 207 F.R.D. 89, 94 (2002) (statement of Scalia, J.)

<sup>26</sup> See, e.g., United States v. Medjuck, 156 F.3d 916 (9th Cir. 1998) (admitting videotaped depositions of three Canadian witnesses, in which the defendant was able to witness the depositions live via video feed and communicate with his attorneys via a private telephone feed); United States v. McKeeve, 131 F.3d 1 (1st Cir. 1997) (upholding depositions of witnesses in the United Kingdom that the defendant monitored via a live telephone link); United States v. Gifford, 892 F.2d 263 (3d Cir. 1989) (upholding depositions of witnesses in Belgium where the defendant listened over an open telephone line, in which the defendant was also able to confer with his attorney in Belgium via a private telephone line); United States v. Salim, 855 F.2d 944 (2d Cir. 1988) (admitting a deposition conducted in France by a French magistrate without the defendant’s presence, even though the French court would not set up an open telephone line for the defendant to observe the proceedings or allow the deposition to be videotaped). We do not address whether these cases violate *Crawford*, as some of the cases claim to interpret Rule 15 whereas others go through a Sixth Amendment analysis to conclude that the depositions were valid.

<sup>27</sup> In the federal civil context, video testimony technology is used and is governed by Federal Rule of Civil Procedure 43. “For good cause in compelling circumstances and with appropriate safeguards, the court may permit presentation of testimony in open court by contemporaneous transmission from a different location.” FED. R. CIV. P. 43(a).

<sup>28</sup> CAL. PENAL CODE § 1340(b) (West Cumulative Supp. 2009); Cal. State Senate Republican Caucus, *Governor Signs Benoit Elder Abuse Legislation* (May 16, 2008), available at <http://cssrc.us/web/37/news.aspx?id=5009>.

<sup>29</sup> Swati Prasad, *Tele-Justice Bridges India’s Courts and Jails*, BUSINESS WEEK, Feb. 22, 2008, available at

[http://www.businessweek.com/globalbiz/content/feb2008/gb20080222\\_899391.htm?chan=top+news\\_top+news+index\\_global+business](http://www.businessweek.com/globalbiz/content/feb2008/gb20080222_899391.htm?chan=top+news_top+news+index_global+business).

<sup>30</sup> Maharashtra v. Desai, (2003) 4 S.C.C. 601 (India). While India lacks something identical to the Confrontation Clause, the Indian code of criminal procedure requires that “[e]xcept as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.” *Id.*

<sup>31</sup> Criminal Justice Act, 1988, §§ 32(1), 32(2)(a)-(d) (Eng.), available at [http://www.opsi.gov.uk/ACTS/acts1988/ukpga\\_19880033\\_en\\_5#pt3-11g31](http://www.opsi.gov.uk/ACTS/acts1988/ukpga_19880033_en_5#pt3-11g31).



The major criticism of video testimony is that it does not allow human observation by all the senses and must by its nature omit some of the visual picture. As the U.S. Court of Appeals for the Fifth Circuit noted, “Even the advanced technology of our day cannot breathe life into a two-dimensional broadcast.”<sup>32</sup> There is a deep-seated human discomfort with video testimony. To use an example from the film *12 Angry Men*, as noted by one federal district court, a juror in the film observed a witness’s gait while walking to the witness stand to testify.<sup>33</sup> The juror used that observation to determine that the witness was not credible when he said that he ran over in time to see the defendant escaping. It was an observation that a juror would have missed if the only aspect of the witness that the jurors saw was his face.

Another significant concern is psychological: a witness may be more likely to lie to a camera and a jury may be more likely to believe what they see on a television monitor than what they hear from a live person. The U.S. Court of Appeals for the Eighth Circuit summarized this view in a recent case: “The virtual ‘confrontations’ offered by closed-circuit television systems fall short of the face-to-face standard because they do not provide the same truth-inducing effect.”<sup>34</sup> A Massachusetts federal district court allowed two-way video testimony because both parties consented, but focused on the psychological difference between a television screen and a live person.<sup>35</sup> In doing so, the court noted that studies have suggested that video screens necessarily present sanitized versions of reality.

Advances in two-way video technology address at least some of these concerns.

For example, telepresence is a relatively new technology capable of full-duplex, high-definition, immersive video conferencing.<sup>36</sup> The premise behind this new generation of video conferencing is that the experience should emulate as much as possible the experience of sitting across a table from the other party, to the point that some telepresence systems forego a mute button. The picture is 1080p full high-definition, there is little or no sound delay, and it includes the capability to show a document directly to the opposing side in real-time. Telepresence further reduces the distinction between virtual and in-person confrontation. Conversely, video testimony may actually improve other senses by, for example, zooming in on the witness’s face or amplifying sounds. As telepresence becomes more accessible<sup>37</sup> and the technology continues to improve, the drawbacks of two-way video depositions decrease significantly.

### **Part III: National Security Limitations and Additional Safeguards**

In national security cases, critical witnesses for either party may often reside overseas, beyond the United States’ subpoena powers, or be unable or unwilling to travel for a variety of reasons. For example, particularly valuable witnesses are often held in foreign custody in countries unwilling to transport witnesses to the United States. As case law makes clear, national security is a sufficiently important public policy to justify two-way video testimony, but it is a high bar and other policies are likely to fail, as in *Yates*. To limit the rule to the national security context, the proposed

amendment should limit its application to national security cases involving enumerated offenses. Enumerated predicate charges have proven workable, as in 18 U.S.C. 2232b(g)(5)(B)(i), which defines the “[f]ederal crime of terrorism” by listing predicate violations.

The current Rule 15 is effectively a decision-making rule that embodies the constitutional standard.<sup>38</sup> As recent cases illustrate, the Supreme Court has chosen to enforce the Confrontation Clause standard aggressively. Simultaneously, the lower federal courts have made clear that only the most important public policies will satisfy the Confrontation Clause requirements, and that national security meets the threshold. Other public policies have failed to do so. As such, the decision-making Confrontation Clause rule (i.e., Rule 15) should be limited to national security.

The rule could theoretically apply to other public policies, but such an expansion would require a judicial determination that the public policy meets the constitutional threshold. Alternatively, thorough congressional findings may also suffice, but the Supreme Court would likely hold such findings to a high standard.

As presently crafted, amended Rule 15 would permit foreign deposition testimony for all transnational crimes. Unless limitations are placed on this potentially sweeping category of federal crimes, the concerns articulated by the *Yates* court – a lack of specific factual findings and insufficiently important public policies – will be realized. National security has been established as a sufficiently important public policy, but the cases demonstrate that courts put the burden on the government to prove that other policies may satisfy the

<sup>32</sup> *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 419 (5th Cir. 1992).

<sup>33</sup> *United States v. Nippon Paper Indus. Co.*, 17 F. Supp. 2d 38 (D. Mass. 1998).

<sup>34</sup> *United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005).

<sup>35</sup> *Nippon Paper*, 17 F. Supp. 2d 38.

<sup>36</sup> Latham & Watkins LLP recently installed telepresence rooms in several offices in the United States and abroad. The authors have used the telepresence system to interact with foreign offices.

<sup>37</sup> In addition to other companies adopting telepresence technology, Marriott International and Starwood Hotels & Resorts Worldwide recently announced plans to install telepresence at select hotels internationally. Cisco and Tata Communications already have public telepresence rooms around the world. Michael B. Baker, *BTN Research: Rise In Remote Conferencing Prompts Marriott, Starwood*, HOSPITALITY DESIGN (July 28, 2009), available at [http://www.hdmag.com/hospitalitydesign/content\\_display/industry-news/e3i64d7e42a898297d7d9ac3ab846677491](http://www.hdmag.com/hospitalitydesign/content_display/industry-news/e3i64d7e42a898297d7d9ac3ab846677491).

<sup>38</sup> This article makes the distinction between the constitutional standard (the Sixth Amendment) that guides the philosophical underpinnings of confrontation, and the federal rule (derived from Rule 15 and the federal cases) that guides confrontation decisions in practice.

rule. The burden will likely be high, and at the very least fact-specific findings will be required. Thus, it is immediately practical to limit Rule 15 to national security. A narrower rule also mirrors recent use of two-way video testimony in the courts, primarily in national security cases. Other countries have already adopted the predicate offenses approach. For example, Australia, which does not provide a constitutional right to confrontation, recently adopted legislation allowing for the broad use of video testimony in terrorism trials but requires specific crimes to trigger the availability of video testimony.

Congress should consider two additional safeguards to reinforce this policy limitation: Attorney General certification and reporting requirements. These safeguards would address concerns such as the incentive for prosecutors to charge defendants with offenses only tangentially related to national security in order to use two-way video testimony. While the predicate offenses approach reduces this problem significantly, requiring that the Attorney General certify each deposition taken under the new provision would go even further in addressing these concerns. Rule 15 can follow the feasible and practical precedent of other statutes, such as the requirement in 18 U.S.C. 2332(d) that the Attorney General must certify prerequisite facts before prosecution for certain terrorism-related offenses. Requiring Attorney General authorization would decrease the number of video depositions to only those truly needed and would reinforce the requirement at the Department of Justice that the deposition be necessary to further national security, an important public policy. The Committee rejected this approach, however, citing separation of powers questions.<sup>39</sup> Legislation from Congress modifying Rule 15 should satisfy this trepidation.

The second safeguard that Congress should add is reporting requirements related to the proposed amendment to Rule 15. For example, these requirements might include reporting on the number of times the new Rule 15 is used, including how many times the depositions are admitted at trial. Furthermore, the federal defenders and the Department of Justice might be required to provide statistics that inform other transnational-related areas, such as how many times such cases arise, how often those cases use foreign witnesses, and how many times Rule 15 prevents foreign witness testimony. As mentioned above, such statistics may go towards a judicial or congressional determination that expanding Rule 15 would advance an important public policy. As for the use of Rule 15, a reporting requirement may further allay fears of the over-use of video depositions by prosecutors. Requiring regular reports from the Department of Justice is not novel. The Department of Justice already reports to Congress under FISA, FARA, and the PATRIOT ACT, among others.<sup>40</sup>

#### **Part IV: Prosecutor and Defender Perspectives**

At first glance, Rule 15 may seem to be more favorable to government equities. However, defensive use of two-way video testimony may create greater symmetry and provides a meaningful strategic option for defense presentation. Whether the use of two-way video testimony favors the prosecution or defense depends on the circumstances of the specific testimony. It is clear that practitioners prefer a more defined rule. Having a better idea of whether the court will allow video depositions *ex ante* may create efficiencies for prosecutors, perhaps even helping deter-

mine whether to bring charges in the first place, and defenders would be better positioned for strategic planning and perhaps plea bargaining.

Under the current Rule 15, federal prosecutors are facing increasing difficulties in obtaining witness testimony for transnational-related crimes. Some of the major issues prosecutors face when attempting to acquire prosecution testimony or interrogate defense testimony from witnesses overseas include:

#### **Substantive Issues**

- Witness testimony in U.S. proceedings from overseas may face fewer, if any, consequences for perjury than testimony given in-person in a U.S. court. However, cross-examination may address the decreased perjury consequences.<sup>41</sup>

#### **Procedural Issues**

- A witness in another country may not be willing to testify in the United States because the witness is concerned about becoming subject to U.S. civil and criminal lawsuits or simply does not want to travel.
- Prosecutors may not be able to secure the witness's transport to the United States because the witness is not subject to U.S. subpoena powers.
- The U.S. government may not allow the prosecutor (and defense counsel) to bring the witness into the country if the witness is considered a security risk.
- Political considerations may limit the ability of prosecutors to bring the witness to the United States. Obtaining the physical presence of a witness in another coun-

<sup>39</sup>The Committee received assurances from the Department of Justice that it would require Assistant Attorney General approval of subpoenas under the proposed Rule 15. Committee Report, *supra* note 5, at D-11.

<sup>40</sup>*See, e.g.*, Foreign Intelligence Surveillance Act, 50 U.S.C. § 1808; Foreign Agents Registration Act, 22 U.S.C. § 621; USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>41</sup>As an international comparison, the United Kingdom applies its own perjury laws to statements made by witnesses outside the United Kingdom via two-way video. See Criminal Justice Act, 1988, §§ 32(1); 32(2)(a)-(d) (Eng.), available at [http://www.opsi.gov.uk/ACTS/acts1988/ukpga\\_19880033\\_en\\_5#pt3-11g31](http://www.opsi.gov.uk/ACTS/acts1988/ukpga_19880033_en_5#pt3-11g31).

try may require coordinating or arranging with politically unsavory, or even unapproachable, governments and groups.

- A witness brought to the U.S. may refuse to return to the other country, for example by claiming asylum.
- Prosecutors may not be able to confirm the identity of defense witnesses testifying remotely.
- Government prosecutors must obtain extensive approvals before traveling abroad, which makes traveling to remote depositions difficult.

### Technological Issues

- Attorneys are unable to see what is off-camera, so there are concerns about where the defense counsel should sit and whether the witness is being coached.
- Surprising a witness with a document may be impossible where the document must be prepared and sent before the deposition commences. A telepresence setup with a document viewer mitigates this problem.

In recent years, defenders have faced an increasing number of legislative and policy challenges, especially in the national security context. Nevertheless, two-way video testimony is an equally beneficial tool for defense attorneys. Video testimony has also proven itself to be a useful, cost-effective tool in contexts that do not implicate a defendant's Sixth Amendment confrontation rights.<sup>42</sup> For example, in *Moussaoui* the district court allowed depo-

sitions to be taken of defense witnesses via two-way video.<sup>43</sup> Although it did not help the defendant, in *Paracha*, the district court relied in part on the availability of a videotaped deposition of a defense witness held at Guantanamo Bay to deny the defendant's request to have the witness testify at trial.<sup>44</sup>

Some of the major concerns for defense attorneys include:

### Substantive Issues

- The representative of the federal public defenders before the Committee on Rules of Practice and Procedure (the "representative") wrote that the proposed amendment is overbroad because it does not require a showing that the evidence sought is necessary to the government's case, only that it "could" provide proof of a material fact.<sup>45</sup>
- The representative wrote that the proposed amendment fails to require the witness's unavailability because it does not require the government to make good faith efforts to secure the witness's presence.<sup>46</sup>
- The proposed amendment limits itself only to felonies, which means it may contradict the *Yates* court decree that "the prosecutor's need for the video conference testimony to make a case and to expeditiously resolve it are not the type of public policies that are important enough to outweigh the Defendants' rights, to confront their accusers face-to-face."<sup>47</sup> Defense attorneys would argue that the proposed amendment's current restriction to felonies means that prosecutors would try to use

Rule 15 video depositions in a wide range of applications that would violate the Sixth Amendment (e.g. offenses that do not implicate important public policies). Even with national security limits, defenders may be rightly concerned, as video depositions and testimony are enticing – a video deposition may be the only method to secure a witness, but it may also be an inordinately less expensive alternative to in-person confrontation.

- Concerns that defense counsel (and prosecutors) will discourage witnesses from appearing in court, so they can conduct a video deposition instead of in-court testimony, are self-limiting because prosecutors and defenders have a strong preference for in-court testimony.

### Procedural Issues

- Defense attorneys may need real-time interaction with the defendant during the deposition. For example, in *Abu Ali* the defense attorney in the United States was able to speak with the defendant via cell phone during breaks. Ideally, these conversations could occur in real-time as they do at in-person depositions.

### Technological Issues

- The representative argued that the proposed amendment would impair an effective defense because of technological problems. His letter provides the example of a case in Texas in which "the video feed was sporadic, the sound was abysmal, and the secure telephone line worked only intermittently."<sup>48</sup> Telepresence would mitigate this concern.

<sup>42</sup> Even though confrontation rights only apply to criminal defendants, defense attorneys must still consider whether the rules allow video depositions and whether the court will admit the deposition.

<sup>43</sup> *United States v. Moussaoui*, 365 F.3d 292, 297 (4th Cir. 2004). Video was also used for sentencing in *Moussaoui*. Matthew Barakat, *Moussaoui Jury Watches Video Testimony*, S.F. CHRON., Mar. 8, 2006, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2006/03/08/national/a090713S88.DTL>.

<sup>44</sup> *United States v. Paracha*, No. 03-1197, 2006 U.S. Dist. LEXIS 1, at \*5 (S.D.N.Y. Jan. 3, 2006).

<sup>45</sup> Letter from Richard A. Anderson, Fed. Pub. Defender for N.D. Tex., to Peter G. McCabe, Sec'y of the Comm. on Rules of Practice and Procedure, Admin. Office of the U.S. Courts (Feb. 17, 2009), available at [http://www.uscourts.gov/rules/2008\\_Criminal\\_Rules\\_Comments\\_Chart.htm](http://www.uscourts.gov/rules/2008_Criminal_Rules_Comments_Chart.htm) (follow "08-CR-007" hyperlink) (hereinafter "Letter from Richard A. Anderson").

<sup>46</sup> *Id.*

<sup>47</sup> *United States v. Yates*, 438 F.3d 1307, 1316 (11th Cir. 2006) (en banc).

<sup>48</sup> Letter from Richard A. Anderson.

## Part V: The Supreme Court's Response to Remote Testimony

If Rule 15 is approved by the Judicial Committee, it will go before the Supreme Court for approval. Video testimony issues also arose in 2002 when the Court declined to transmit to Congress a proposed amendment to Rule 26(b) of the Federal Rules of Criminal Procedure. That amendment would have allowed two-way video testimony in open court for unavailable witnesses under exceptional circumstances, so long as there were appropriate safeguards. In the Supreme Court's discussion, Justice Scalia said that he would not subject two-way video testimony to a lower standard than that for one-way video testimony established by *Craig*.<sup>49</sup> He criticized the proposed amendment for, among other things, lacking case-specific findings necessary to further an important public policy, as required by *Craig*. Justice Scalia went even further in his opposition to video testimony, expressing doubt that "virtual confrontation" would protect "real" constitutional rights.<sup>50</sup> This article's proposed Rule 15 would differ from the proposed amendment to Rule 26(b) because it would incorporate a standard higher than *Craig* and would provide additional safeguards to defendants because depositions are one step further removed from live, in-court video testimony.

The constitutional landscape has changed since the proposed amendment to Rule 26(b). The main constitutional issue

relevant to video testimony is whether a court may compel the admission of a video deposition at trial without violating a defendant's Sixth Amendment confrontation rights.<sup>51</sup> In 1990, in *Maryland v. Craig*,<sup>52</sup> the Supreme Court applied the test from *Ohio v. Roberts*, that a preliminary examination of an unavailable witness is admissible at trial on a showing that (1) the witness is unavailable and (2) the previous statement evidences adequate indicia of reliability, in allowing an alleged child sex abuse victim to testify via one-way closed-circuit television.<sup>53</sup> In 2004, in *Crawford v. Washington*, the Court altered the second prong of the *Roberts* rule from indicia of reliability to a requirement of an opportunity to cross-examine the witness.<sup>54</sup> It is unclear to what extent the *Crawford* decision supersedes *Craig*. *Craig* concerned the use of one-way video testimony, but it applied the rule from *Roberts*. Although *Crawford* clearly alters the rule from *Roberts*, *Crawford* did not specifically address video testimony. As such, it is unclear whether *Crawford* also applies to the rule in *Craig*. Of note, the majority in *Yates* distinguished between in-court testimony and pre-trial statements when it determined that *Craig*, not *Crawford*, was the proper standard to apply.<sup>55</sup> *Crawford* may be a concern for video testimony insofar as it increases the standard required for the admissibility of out-of-court statements and testimony. Notwithstanding *Crawford*, higher standards and safeguards in Rule 15 satisfy constitutional scrutiny.

## Conclusion

Two-way video testimony has been and will continue to be critical to prosecutors, defense counsel, and judges in national security cases. In light of recent technological advances – particularly the development of telepresence – two-way video testimony related to enumerated and certified national security offenses can satisfy Confrontation Clause concerns by following the procedure developed in *Abu Ali*. In addition to certification requirements, reporting requirements would act as a further safeguard. As the joint opinion in *Abu Ali* noted, "the criminal justice system is not without those attributes of adaptation that will permit it to function in the post-9/11 world. These adaptations, however, need not and must not come at the expense of the requirement that an accused receive a fundamentally fair trial."<sup>56</sup> Properly limited and buttressed to protect defendants' rights, two-way video deposition testimony in national security cases is just such an adaptation.

<sup>49</sup> Supreme Court on Court Rules, 207 F.R.D. 89, 94 (2002) (statement of Scalia, J.)

<sup>50</sup> *Id.*

<sup>51</sup> This article does not address potential constitutional and statutory issues concerning the scope of the proposed amendment as it relates to the Rules Enabling Act.

<sup>52</sup> 497 U.S. 836 (1990).

<sup>53</sup> 448 U.S. 56 (1980).

<sup>54</sup> 541 U.S. 36 (2004).

<sup>55</sup> *Yates*, 438 F.3d at 1314 n.4. Both dissenting opinions argued that *Crawford* was the appropriate standard to apply.

<sup>56</sup> *United States v. Abu Ali*, 528 F.3d 210, 221 (4th Cir. 2008).



## C. *Miranda*

In *Miranda v. Arizona*,<sup>27</sup> the Supreme Court held that, in order to protect the Fifth Amendment privilege against self-incrimination, any criminal suspect in law enforcement custody must be warned before making any statement that “he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed.”<sup>28</sup> If the suspect requests an attorney, all interrogation must stop until an attorney can be present.<sup>29</sup>

The *Miranda* requirements have been pointed to as an additional difficulty in bringing terrorists to justice. While the prospect of reading the *Miranda* warning to those captured on the battlefield does seem practically unrealistic, that may not be a bar to their prosecution. Non-Mirandized statements may still be admissible if they were not the result of coercion and deemed reliable.

The two cases that have addressed the question of Mirandizing terrorism suspects overseas have each concluded that a lower standard is required in such circumstances, and that modifications to the *Miranda* requirements may be made.<sup>30</sup> Legal scholars and practitioners have further hypothesized that the most sensational situation – that of battlefield capture and interrogation – is likely to fall under the exception to *Miranda* provided in *New York v. Quarles*,<sup>31</sup> in which the Supreme Court determined that *Miranda* warnings are unnecessary in situations requiring law enforcement to obtain information immediately in the interest of public safety.<sup>32</sup> Neither of the two cases that addressed *Miranda* in the terrorism context involved battlefield captures, and such a situation would likely

strengthen the government’s arguments for foregoing or reducing the *Miranda* requirements.

While it is true that one case in the Terrorist Trial Database was dismissed based on evidence that the self-incriminating statements that had supported the prosecution had been coerced, this followed a five-week evidentiary hearing that included the testimony of “two psychiatrists, two forensic pathologists, a dermatologist, and an internist with expertise in the treatment of torture survivors.”<sup>33</sup> The hearing evidently resulted in a determination that the defendants’ claims that they had been beaten into confessing were supported by both physical and psychiatric evidence. Upon such a finding, the reliability of the evidence is brought into question, returning the court to the issues presented by hearsay.

## D. Cooperating Witnesses

The prosecution of alleged terrorists is often compared to that of high-level organized crime and drug suspects. A key distinction in addition to the purported evidentiary difficulties discussed above is in the availability of one vital law enforcement tool: cooperators. The role of cooperators has been essential to the prosecution of major organized crime figures.

In respect to prosecuting alleged terrorists, it has been theorized that cooperators would not be found. This assumption has been based on the idea that terrorists have been radicalized to such a degree that they would never turn on their compatriots and provide information to law enforcement. Also, the religious commitment and group solidarity among terrorist operatives has been considered a barrier to the factors that ordinarily motivate defendants to cooperate: the genuine prospect, absent

cooperation, of long prison sentences, stiff financial penalties, and the impact on family members and business interests. In addition, unfamiliarity with the U.S. justice system among those apprehended overseas or in the U.S. for only a short period has been thought of as an obstacle to the traditional motivation to cooperate.

Analysis of the defendants in the Terrorist Trial Database shows that this assumption has not been entirely borne out.

### i. The difference between “informants” and “cooperators”

The distinction between “informants” and “cooperators” is often misunderstood, understandably so as the terms often overlap. The distinction is important, however, in assessing whether radicalization will prevent law enforcement from learning about the organization and function of terror cells and networks.

In the technical parlance of the criminal justice system, the difference between an informant and a cooperator largely depends on whether or not a formal agreement of cooperation has been signed. Such an agreement recognizes a contract between the cooperator and the government: in exchange for leniency, which may consist of a reduced sentence or some of the charges being dropped, the cooperator agrees to plead guilty, to provide the government with an accurate and complete record of his criminal conduct and that of others, and to testify upon request.

These agreements are often unavailable in the public record, however, making this an unreliable standard for distinction. Also, it does not squarely address the question of whether terrorism is more difficult to pursue and prosecute than other criminal activities.

<sup>27</sup> 384 U.S. 436 (1966).

<sup>28</sup> *Id.* at 479.

<sup>29</sup> *Id.* at 474.

<sup>30</sup> See *In re Terrorist Bombings of the U.S. Embassies in E. Africa*, 552 F.3d 177, 205 (2d Cir. 2008); *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008). For a discussion of the issues presented in these cases and their resolutions, see *In Pursuit of Justice Update*, *supra* note 4, at 29-33.

<sup>31</sup> 467 U.S. 649 (1984).

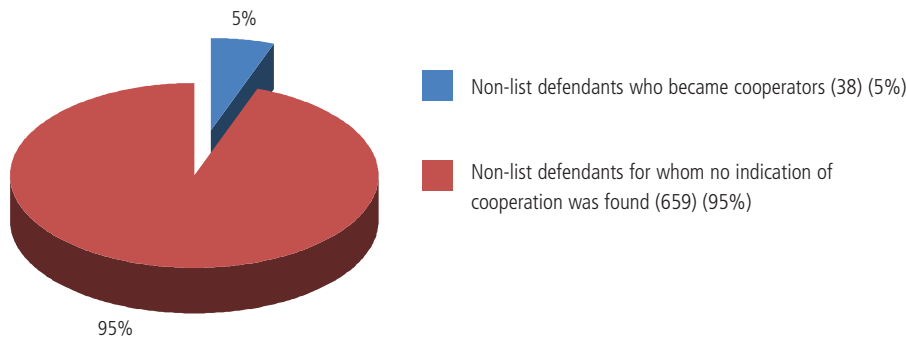
<sup>32</sup> See, e.g., *In Pursuit of Justice Update*, *supra* note 4, at 29 (2009); *A.B.A. Report*, *supra* note 16, at 21-22; Jack L. Goldsmith & Neal Katyal, *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007, available at <http://www.nytimes.com/2007/07/11/opinion/11katyal.html>.

<sup>33</sup> Bruce Zagaris, *U.S. Court Suppresses “Involuntary” Rwanda Confessions*, INT’L ENFORCEMENT L. REP., Nov. 2006.

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### Defendants Who Became Cooperators

(697 non-list defendants)



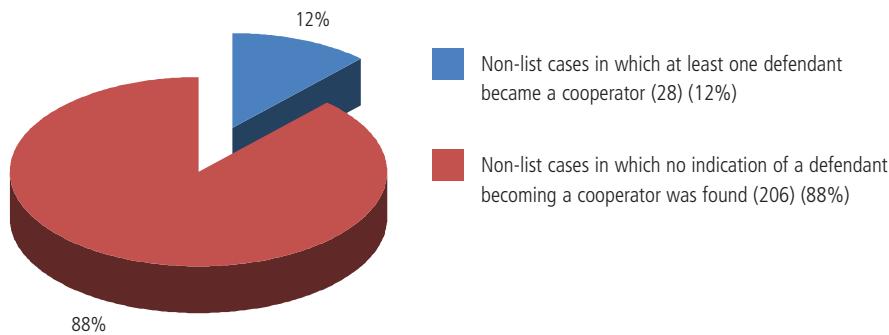
For purposes of this report, we have adopted a more colloquial framework. We have distinguished cooperators from informants based on whether or not they “flipped” – that is, whether they conspired with terrorists at one point but were induced to cooperate with law enforcement. If so, they are referred to herein as cooperators. We have used the term “informants” to refer to people who never intended to aid their alleged terrorist companions.

An informant may be described as anyone who offers information to law enforcement, although the term is most often used to mean people who defendants mistakenly thought were working with rather than against them. Informants are often compensated, either financially or through reduced sentences for convictions on other charges. For example, a drug dealer may make a deal with prosecutors to be introduced to a group that law enforcement officers are trying to infiltrate and to pretend to participate in the group’s criminal scheme. In reality, though, he will report on every step of that scheme (perhaps while wearing a recording device) and will later testify against the group in court. Informants often introduce undercover agents to the operation so that the agents can gather evidence more professionally and effectively. Undercover police officers may also serve as informants.

53

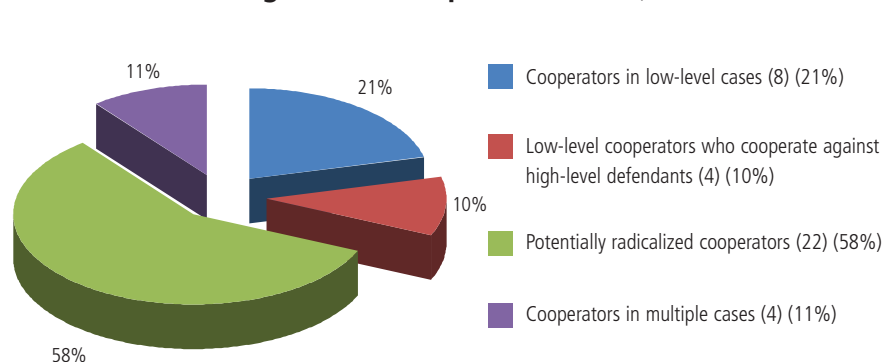
### Cases in which Defendants Became Cooperators

(234 non-list cases)



54

### Categories of Cooperators (38 cooperators)



Unlike informants, cooperators at some point genuinely wanted to help the defendants whom they later provide information about or testify against. Rather than pretending to enter the criminal plan while actually helping law enforcement from the outset, cooperators start with a sincere intention to help commit the crime. Only after being apprehended do they provide information about their former partners. Most cooperators already face criminal charges, and cooperation offers their best chance of leniency. Some decide to cooperate while an investigation is ongoing, which makes them prime tools for the government because their cooperation can be better concealed at that point.



The Terrorist Trial Database includes many cases known to involve informants. We assume that the cases we are aware of do not represent the full number but rather only those in which the use of an informant was indicated in an accessible indictment, in other accessible court documents, or in media reports. Cooperators have been found less often by law enforcement in the pursuit and prosecution of terrorism defendants. These individuals – in some cases people who are believed to have been radicalized, in others simply corrupt business partners – are essential not only for ongoing prosecutions but also in understanding the changing structure of terrorist networks and possibly in discovering the details of impending threats.

## ii. Cooperators

There are 38 known cooperators in the Terrorist Trial Database.<sup>34</sup> While this is a small percentage of the entire dataset (4.6% of all defendants, and 5.5% of the non-list defendants), they appear in 12% of non-list cases. (See charts 52 and 53). Therefore, while there have been few cooperators, they have appeared in a substantial number of the most serious terrorism cases, suggesting that cooperators are being used successfully in efforts to counter the threat of terrorism.

These 38 cooperators represent 28 cases, because several cases included multiple cooperators. In the Portland Seven case, for example, seven defendants were accused of attempting to start a terrorist training camp in Oregon. Four of them pleaded guilty and agreed to implicate their co-defendants. These defendants had been sufficiently radicalized to travel near the Pakistan border in an attempt to join the fight in Afghanistan.

## Cooperators in the Terrorism Trials Database fall into four categories.

(See chart 54).

### Cooperators in Low-Level Cases

The first category is comprised of defendants in low-level cases who cooperate by informing on their co-defendants in the same cases. The government has either not claimed that they actively sought terrorist involvement (for instance, they may have been involved for purely financial purposes) or seems to have accepted that their terrorist involvement was minor. Thus, there is reason to conclude that these cooperators were probably not radicalized. We assume that the level of aid provided to law enforcement by these cooperators is also minor. Eight individuals fall into this category.

#### *Case Study: William Hatfield*

William Hatfield was the accountant for Rafil Dhafir, who claimed over a million dollars in tax deductions for an organization Dhafir claimed was charitable. The organization, Help the Needy, had never applied for tax-exempt status and was attempting to distribute money in Iraq without the license required by the International Emergency Economic Powers Act. No terrorism charges were brought, yet the case was one of several cases highlighted in 2005 by then-Attorney General Alberto Gonzales as a success in the war on terror. It was frequently described as a counterterrorism case. Additionally, the charity allegedly sent money to and received money from other charities linked to terrorism, and Dhafir allegedly claimed tax exemptions for those two non-exempt charities as well. Hatfield cooperated with the government and testified about Dhafir's financial dealings and knowledge at trial.

## Low-Level Cooperators Who Cooperate Against High-Level Defendants

The second category of cooperators consists of those who come out of low-level cases but cooperate against those whom the government has judged to be high-level defendants. Those who meet these criteria reinforce the fact that relevant information can be gained from non-radicalized, and therefore more easily attainable, cooperators. Four individuals fall into this category. Hussein al Attas provides a classic example. A former roommate and friend of Zacarias Moussaoui's, Moussaoui apparently tried and failed to recruit him. Prosecutors apparently considered al Attas not to have been radicalized – evidenced by the fact that that he was never charged with terrorism and was instead indicted only for false statements. He became a cooperator, pleaded guilty, and testified at Moussaoui's trial.

### Potentially Radicalized Cooperators

The third category of cooperators consists of defendants whom government allegations suggest may have been radicalized but who chose to cooperate nonetheless. The four defendants who pleaded guilty and cooperated against their co-defendants in the Portland Seven case described above fall into this category.<sup>35</sup> As far as we know, these defendants cooperated only against their own co-defendants, so the level of help in analyzing the broader structure of terrorism they provided was fairly conventional (as most cooperators provide information limited to their co-defendants and co-conspirators). However, it is important to note that even some defendants who had progressed to a point where government officials might consider them to have become radicalized were induced or willing to become cooperators. Twenty-two individuals fall into this category.

<sup>34</sup> There have been a number of cooperators who began cooperating pre-2001, and are therefore not included in our analysis, but who have continued to provide information to law enforcement post-2001.

<sup>35</sup> One cooperator, Mohamed Shorbagi, cooperated in two high-profile terrorism cases – the Holy Land Foundation trial and the trial of Muhammad Salah and Abdelhaleem Ashqar – but is included in this category because the information was, as far as we know, limited to cases against defendants with whom he had direct dealings. The cooperators in the fourth category seem to have offered much more structural and wide-ranging information.

## Cooperators in Multiple Cases

The fourth category consists of those defendants who have cooperated in multiple cases. These defendants came from cases in which government allegations make it extremely likely that they were considered to have been radicalized. Moreover, they have the structural information that law enforcement needs to increase the understanding of terrorism in the United States and to prevent attacks. The cases of these individuals are described below.

### *Mohammed Mansour Jabarah*

Mohammed Mansour Jabarah was allegedly central to a plan to blow up the Australian, Israeli, and U.S. embassies in Singapore in 2001. An al Qaeda explosives expert who confessed to being an intermediary between al Qaeda and Jemaah Islamiya, and an emissary of Khalid Shaikh Mohammed, he pleaded guilty to acts of terrorism in a 2002 agreement that was kept secret at the time. He then began working as an informant for the FBI. During his time as a cooperator, he provided information about the funding for the bombings in Bali and the location of al Qaeda's main explosives training camp, among other details. The case remained secret until he ceased cooperating and his handlers believed that he began plotting to kill them. As a result, the government rescinded the cooperation agreement. Jabarah has been held in solitary confinement since, and was given a life sentence.

### *Iyman Faris*

Iyman Faris was arrested in March 2003 and prosecuted for his role in a plot to use gas cutters to attack the Brooklyn Bridge. Faris allegedly travelled to Pakistan, met Osama bin Laden, and told al Qaeda operatives about possible uses of various types of aircraft. *Time* magazine reported in June 2003<sup>36</sup> that FBI agents had convinced

him to cooperate, which he did for the first several months after he was arrested. Information he provided reportedly led to the arrest of Nuradin Abdi, who allegedly plotted to blow up an Ohio shopping mall. Further reports link Abdi to:

- Christopher Paul, who was reportedly part of the same group as Abdi and Faris, and who pleaded guilty to 18 U.S.C. § 2332a (the use or attempted use, or conspiracy to use, weapons of mass destruction);
- Babar Ahmad, who allegedly ran several Web sites supporting al Qaeda recruitment and financing;
- Hassan Abujihaad, a sailor in the U.S. Navy who allegedly revealed classified information to Babar Ahmad, and who was convicted of national security violations;
- Syed Talha Ahsan, who allegedly ran the Web sites with Ahmad; and
- Derrick Shareef, who was indicted for a plot to use hand grenades in a mall.

### *Mohamed Junaid Babar*

A Pakistani-born American citizen who had lived in New York since the age of two, Mohamed Junaid Babar pleaded guilty to material support charges that he had provided money, night-vision goggles, waterproof socks, and other supplies to a high-level al Qaeda operative in Waziristan; aided in the training of terrorists, including two involved in the British Crevice (fertilizer) plot and one involved in the London 7/7 plot; and purchased ammonium nitrate that he knew was for use in an attack on London. Babar testified against defendants in London and Canada in the trial of the Crevice and 7/7 plots. He was also instrumental in the case against defendant Syed Fahad Hashmi, whom he alleged was also implicated in one of the London plots. In order to keep his cooperation confidential, Babar's indictment, guilty plea, and cooperation were not made public until 2007.

### *Bryant Neal Vinas*

Bryant Neal Vinas was born and raised in New York; he was an altar boy and a Boy Scout. Brought up Catholic, Vinas converted to Islam when he was 20. Over the following three years, from 2004-2007, he apparently became more radical, studying al Qaeda Web sites and eventually traveling to Pakistan to train to become a suicide bomber. He was turned down for the assignment because, he was told, he did not have sufficient religious training. In 2008, Vinas allegedly became an official member of al Qaeda, attending training camps and studying explosives. He gave al Qaeda leaders information about the Long Island Rail Road and the amount of police serving the train system. He was also allegedly involved in firing rockets at U.S. targets in Afghanistan. Upon capture, Vinas reportedly began cooperating immediately, providing information that has led to several overseas arrests and prosecutions, as well as to an alert in November 2008 about attacks on commuter trains.

There are only four of these cases of which we are currently aware. However, as the cases above make clear, the indictments against and agreements with cooperators are generally made public only once they have finished cooperating, ceased cooperating, or are about to testify. In 2003, then-Attorney General John Ashcroft told Congress of the existence of at least 15 such individuals.

## iii. Informants

Informants play a similarly important role. Their testimony and/or willingness to wear recording devices allows law enforcement officials to monitor threats and to win convictions in eventual prosecutions.

We have found informants in 30.1% of the non-list indictments and 26.5% of non-list cases. Informants appear most often in higher-level cases. (*See charts 55 and 56*).

While informants are used throughout the legal system, they are a complicated cate-

<sup>36</sup> Daniel Eisenberg, Elaine Shannon, Michael Wiesskopf, and Jenifer Joseph, *The Triple Life of a Qaeda Man*, TIME, June 30, 2003, available at <http://www.time.com/time/magazine/article/0,9171,1005104,00.html>.

gory. Their use inevitably generates questions regarding their credibility. This is because informants are compensated for finding crimes (either financially or through reduced sentences or charges), making some believe that they have an improper motive to cause those crimes, or at least the appearance of criminality. Accusations of entrapment and questions of reliability therefore always follow the use of an informant.

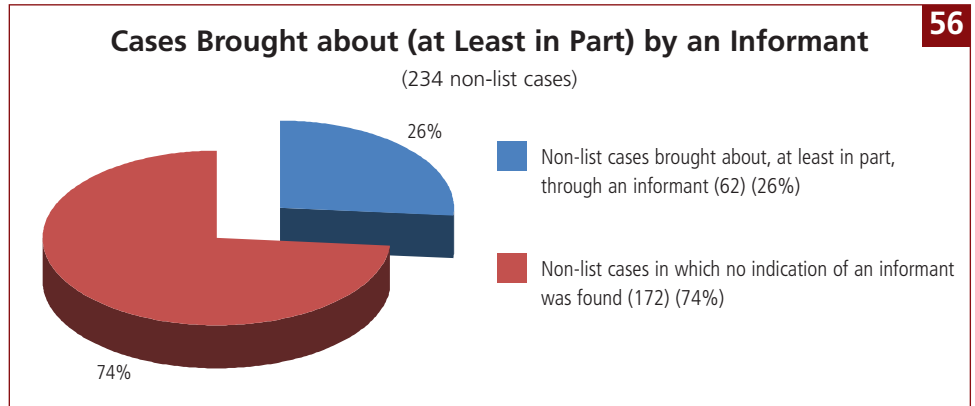
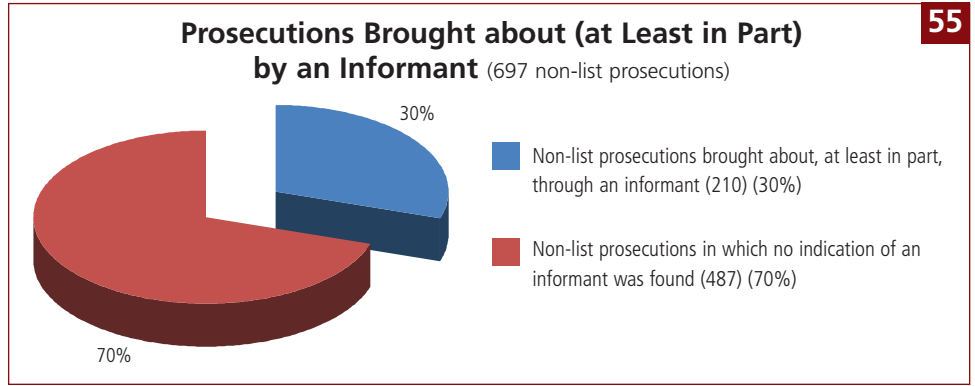
The cases below are some of the most egregious examples of the questions that may be raised in cases that use informants.

*Hamid and Umer Hayat (Lodi, CA)*

Hamid Hayat was charged, convicted, and sentenced to 24 years in prison for providing material support to terrorists by attending a terrorist training camp in Pakistan. Umer Hayat, Hamid’s father, pleaded guilty to a false statements charge regarding his knowledge of his son’s participation at the camp. The case began when an FBI informant, Naseem Khan, befriended Hamid and began talking about jihad with him. Khan taped numerous conversations with Hamid. When the case was prosecuted, it was plagued with questions not only regarding Khan’s credibility (prosecutors admitted that some statements he made could not be supported by other evidence, and he was paid over \$200,000 by the FBI), but also as to whether it was Khan’s urging that had convinced Hamid to attend the camp. Khan was taped telling Hamid that Hamid should “be a man” and “do something,” and criticizing Hamid for not having attended training camps in Pakistan already.

*Youssef Hmimssa and the Detroit Sleeper Cell Case*

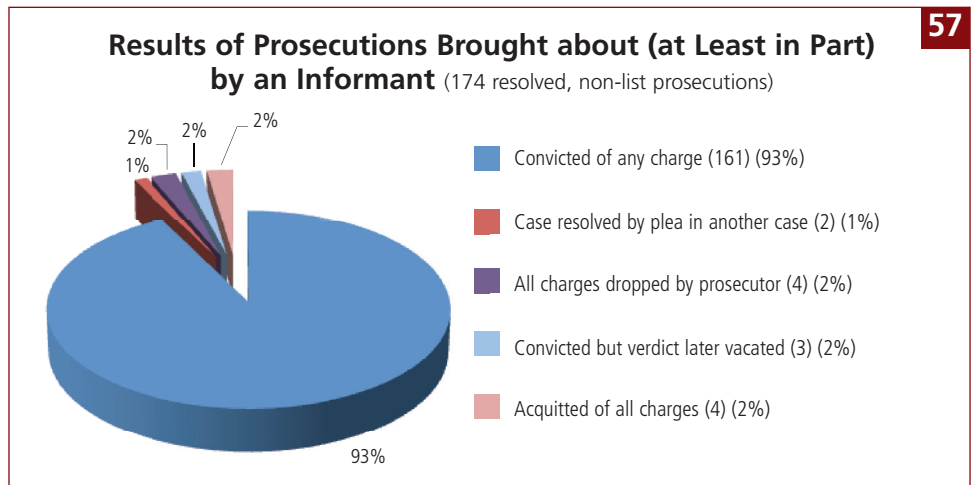
Farouk Ali-Haimoud, Abdel Ilah Elmardoudi, Ahmed Hannan, Youssef Hmimssa, and Karim Koubriti were indicted for their alleged plans to recruit individuals for terrorist causes, to arrange for terrorists to enter the United States, to arrange for false identification, and to obtain weapons for overseas terrorist causes.



### Indictments resolved by pleas by co-defendants or in other cases

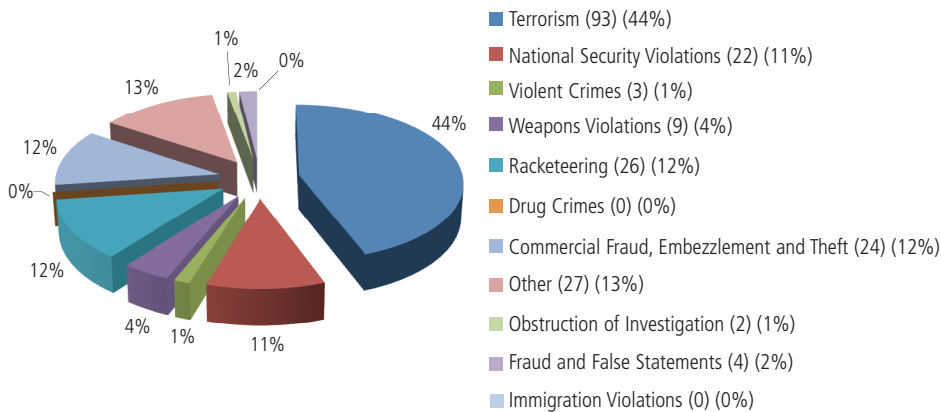
In some instances, defendants may arrange that charges against individuals other than themselves will be dismissed as part of their plea agreement. While we can imagine circumstances in which this would occur between relatives, it more likely refers herein to situations in which a corporation has been indicted along with its founder or executive officers. In such circumstances, the guilty plea of a corporate officer may provide for charges against the corporation itself to be dismissed.

In other instances, a defendant may be indicted in two or more separate cases. Prosecutors may offer to dismiss the charges in one case in exchange for a guilty plea in the other.



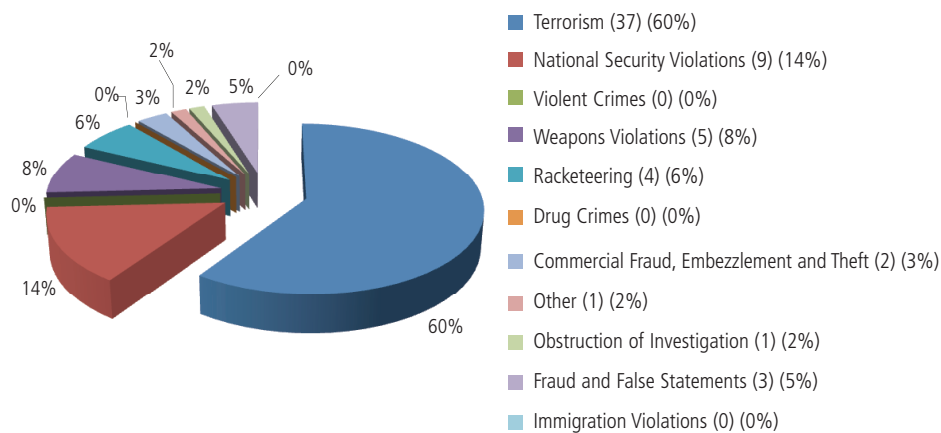
58

### Top Charges in Prosecutions Brought about (at Least in Part) by an Informant (210 non-list prosecutions)



59

### Top Charges in Cases Brought about (at Least in Part) by an Informant (62 non-list cases)



Their plans allegedly involved attacks on an American air base in Turkey. An apartment shared by three of the defendants was raided in a search for Nabil al Marabh (*see p. 11 for more about Nabil al Marabh*). In that raid, law enforcement authorities found sketches alleged to be of the targets, videotapes of casinos in Las Vegas, and audio tapes of terrorist speeches.

Youssef Hmimssa pleaded guilty and agreed to testify against his co-defendants. The case resulted in several terrorism convictions. However, those convictions were the subject of a DoJ investigation that produced a report detailing improper conduct by the prosecutor (including failure to disclose impeaching information regarding Hmimssa) and recommending that the convictions be vacated. As a result, the trial judge vacated the convictions on that ground among others, including the fact that U.S. and international officials disagreed about what the sketches on which the case was built actually represented. The prosecutor, who engaged in a public controversy with Attorney General Ashcroft over the handling of the case, was himself prosecuted for his alleged misconduct in the case but was acquitted.

*Mohammed al Anssi, Mohammed Ali al Moayad, and Mohammed Moshen Zayed*

Mohammed Ali al Moayad and Mohammed Moshen Zayed were indicted for allegedly providing material support to Hamas and al Qaeda. The case was largely based on the testimony and actions of a government informant, Mohammed al Anssi. Al Anssi had traveled to Yemen in 2002 at the behest of the FBI, claiming that he knew of a wealthy American looking to donate money to terrorists. In 2003, al Moayad and Zayed traveled to Germany to meet with the American. In their taped conversations, no direct references to terrorists were made, but prosecutors claimed that the conversation was in code. Al Anssi further testified that al Moayad claimed to have met Osama bin Laden, but could not say when the meeting had occurred. Al Moayad and Zayed were both taped saying



they had known bin Laden “before all these crises happened.”

Al Anssi had approached the FBI to become an informant soon after September 11, 2001. He volunteered that he knew al Moayad was sending money to terrorist groups at that time. However, al Anssi was allegedly desperate for money, and when he approached the FBI he requested U.S. citizenship and payment for his services. He ultimately received \$100,000. In 2004, shortly before the trial began, al Anssi set himself on fire in front of the White House in an effort to force the FBI to pay him more money. The government dropped him from its witness list, but he was called by the defense instead.

Al Moayad and Zayed were convicted and sentenced to 900 months and 540 months, respectively. The convictions were vacated, however, because of errors in admitting certain items as evidence at trial, including al Anssi’s notes (which were inconsistent with his testimony), testimony of a Scottish bus bombing victim (the defendants were not charged with any association with that bombing, although it was committed by Hamas), and other evidence deemed by the appellate judge to be unduly prejudicial and not sufficiently connected to the defendants. Rather than retrying the case, the defendants pleaded guilty and agreed to be deported in exchange for sentences of time served.

## II. Civil Liberties Concerns

In terrorism prosecutions, the issue of civil liberties has been a major concern, both in procedural areas and in substantive ones. In the exercise of broad interpretations of law and process in the name of national security, the tension between liberty – rights – and security has found its clearest expression. Below is a sampling of the problematic areas that have characterized the treatment of terrorism suspects. History demonstrates that these concerns are not solely restricted to terrorism trials; rather, the terrorism cases have brought attention to practices used in other areas of the criminal justice system. Current cases suggest, however, that there has been a discernible learning curve in cases involving terrorism, resulting in a reduction in the reliance upon special measures alongside an insistence by DoJ that such tactics are necessary to the practice of trying terrorists.

### A. Material Support

#### i. The meaning of material support

Since the creation of the material support statutes (18 U.S.C. §§ 2339, 2339A, 2339B, 2339C, and 2339D), the majority of which preceded the 9/11 attacks, those concerned with civil liberties, including human rights advocacy groups, have been concerned about their potentially overbroad and vague application. Sections 2339A and 2339B, which existed pre-9/11 (but have been amended in part since), in particular have been heavily criticized.

Section 2339A outlaws providing, attempting or conspiring to provide material support or resources for the commission of a specifically enumerated list of crimes that generally implicate terrorist conduct (for example, conspiracy to murder or kidnap persons overseas).

Section 2339B outlaws providing, attempting or conspiring to provide material support or resources to a designated foreign terrorist organization. (*For more information about the designation of foreign terrorist organizations, see the text box on p. 10*).

Dating back to the 1990s, civil liberties complaints regarding these statutes concentrated on the concern that “material support” might be any type of support at all – including humanitarian aid and legal advice. However, § 2339A largely avoided this problem by limiting its reach to support given with the intent of aiding in the commission of an enumerated crime of terrorism. The civil liberties concerns increased with the subsequent enactment of § 2339B, which did not require knowledge that the support would aid the commission of terrorist acts or an intent for it to do so. The rationale for the breadth of § 2339B was that terrorist organizations are for practical purposes indivisible, so that even if certain terrorist organizations provide social and other services, money directed toward social services makes other funds available for use in terrorism operations.

Over the course of more than a decade, the number and type of activities included within the definition of material support have steadily increased.<sup>37</sup> With the increase in prosecutions following the 2001 attacks, cases began to arise challenging the constitutionality of the statutes for being too vague, as well as on First Amendment and overbreadth grounds. In *Humanitarian Law Project v. Reno*,<sup>38</sup> a civil case, the plaintiffs sought a determination as to whether their non-violent conduct fell within the statute’s proscriptions. The Ninth Circuit held that the statutory definitions of “training” and “personnel” were unconstitutionally vague. That case became the foundation for a number of others challenging the statutes. The Supreme Court has agreed<sup>39</sup> to hear both

<sup>37</sup> For a history of the material support statutes, see Andrew Peterson, *Addressing Tomorrow’s Terrorists*, 2 J. NAT’L SEC. L. & POL’Y 297 (2008), available at [http://www.jnspl.com/read/vol2no2/03\\_Peterson\\_vol2no2.asp](http://www.jnspl.com/read/vol2no2/03_Peterson_vol2no2.asp).

<sup>38</sup> 205 F.3d 1130 (9th Cir. 2000), *vacated in part*, 393 F.3d 902 (9th Cir. 2004) (remanding for consideration in light of the Intelligence Reform and Terrorism Prevention Act of 2004).

<sup>39</sup> 130 S. Ct. 49 (2009).

sides' appeals from the most recent Court of Appeals decision in *Humanitarian Law*, and a decision is expected by June 2010.

None of the challenges to the material support statutes in criminal cases have been successful in invalidating the statute, although in some instances courts have circumscribed the statute's ambit. In response to *Humanitarian Law* and other cases, Congress modified the definitions of §§ 2339A and B. Some amendments were designed to tighten the definition of "material support" and protect First Amendment activity while others sought to expand the definition explicitly. For example, "training," "personnel," and "expert advice and assistance" were specifically defined. The knowledge requirement in § 2339B was modified so that a defendant must "have knowledge that the organization is a designated terrorist organization ..., [or] that the organization has engaged or engages in terrorist activity ..., or that the organization has engaged or engages in terrorism" for a violation to exist.<sup>40</sup>

Challenges to the statutes have continued. Some of the government's uses of the statutes have been limited by courts, although none to the extent that any cases have been dismissed.<sup>41</sup>

## ii. When does the Department of Justice pursue material support charges?

These civil liberties concerns demonstrate a need to analyze the situations in which material support charges are brought. Are the fears described by those who challenge the statutes – that charges may be brought against defendants who reasonably do not consider themselves to be aiding terrorism – borne out by the cases that have been instituted thus far?

The Department of Justice has pursued

charges under §§ 2339A or B in 170 terrorism-associated indictments, comprising 73 cases. In each of these indictments, the government has alleged, and there has appeared to be evidence, that the defendant either knew or should have known that his or her support would aid terrorist activity or a designated FTO. A question remains, however, about defendants who may not have known that the support they were providing would go to terrorism rather than to humanitarian aid or non-violent social services.

Addressing this question begins by determining how many of these indictments involve alleged plots with specific targets. If specific targets were part of the allegations, we may assume that the defendants knew their support would be used for terrorist activity. Such indictments account for 68.2% of the indictments and 67.1% of the cases that allege material support for terrorism. (*See charts 60 and 61*).

What characteristics can be drawn from the remaining instances – those that do not allege a plot with specific targets? The most common explanatory factor seems to be the presence of classified or foreign intelligence information. CIPA or FISA appear in at least 12 of the 24 non-target cases, or 50%. (*See chart 62*). This statistic is even more telling considering that we have found indications of CIPA or FISA being used in 31, or only 42.5%, of all §§ 2339A or B cases. Thus, the use of CIPA and FISA appears to be more frequent in §§ 2339A or B cases that do not include allegations regarding a plot with specific targets. (*See chart 63*).

A second strong correlative factor is that of a foreign dimension to the case, particularly evidence that at least one of the defendants attended a terrorist training camp abroad or had previously been personally involved in terrorist activities.

Nine of the 24 non-target cases involved individuals who had been part of foreign militias or who had traveled to a terrorist training camp in order to engage in activities there. Three more cases involved individuals who had at some point traveled to terrorist training camps for what could have been for reasons other than training. (One defendant, for example, was allegedly photographed at a training camp, yet there were no specific allegations that he was trained there). Another four cases involved foreign capture, foreign evidence or testimony from foreign sources (these aspects also overlapped with the training aspect in some cases). Altogether, a foreign dimension was found in a 66.7% of non-target §§ 2339A or B cases. (*See chart 64*).

Unlike classified information, a connection to foreign activities or sources seems to be a prevalent factor in all §§ 2339A or B cases. A foreign or militant dimension was found in 64.4% of all cases including such charges (*see chart 65*), and in seven of the twelve §§ 2339A or B cases in which neither classified information nor a specific target were present.

Of the five §§ 2339A or B cases that did not involve a specific target, a foreign dimension, or classified information, two involved defendants who were caught in sting operations involving the sale of explosives or missiles and who were told (by a government informant) that the weapons would be used by terrorists. One case involved defendants who believed they were manufacturing false identification documents for terrorists. Of the final two cases, one involved indictments for providing broadcasting services to Hezbollah, and the last involved allegations of providing funding to training camps in Pakistan and Afghanistan.

It is difficult, then, to gauge accurately

<sup>40</sup> Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603, 118 Stat. 3638, 3762-64 (2004). For an indication that the amendments were passed in response to unfavorable judicial discussion, *see A Review of the Tools to Fight Terrorism Act: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2004) (joint prepared statement of Assistant Att'y Gen. Daniel J. Bryant and Counterterrorism Section Chief Barry Sabin).

<sup>41</sup> *See, e.g., United States v. Warsame*, 537 F. Supp. 2d 1005, 1020 (D. Minn. 2008) ("[A]llegations that Warsame remained in communications with Al Qaeda, without more, are insufficient to survive a vagueness challenge and may be deemed inadmissible as evidence of guilt at trial on this basis. Similarly, allegations that Warsame taught English in an Al Qaeda clinic, without more specific facts tying that conduct to terrorist activity, are not sufficient to survive a vagueness challenge with respect to 'training.'" (allowing the statute and overall charges against Warsame to stand on other grounds).



what elements lead a prosecutor to charge material support for terrorism rather than some lesser or different charge. However, the aspect of military training does appear relevant. Two cases exemplify this issue.

There have been several cases against defendants alleged to have been funding Hezbollah by counterfeiting cigarette tax stamps. This purely financial scheme does not include direct targets, and, as represented in the media, these cases involved almost identical allegations – the use of counterfeit tax stamps to sell cigarettes illegally, with the profits sent to fund Hezbollah. However, terrorism charges were brought in one case (*U.S. v. Akhdar*) while racketeering charges were the most serious in another (*U.S. v. Haydous*).

One of the defendants in the case in which terrorism charges were brought was believed to have been involved in military activities on behalf of Hezbollah in Lebanon. Following the trend, material support was charged in that case.

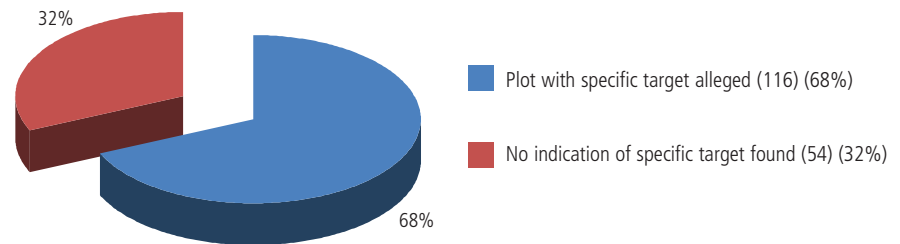
While the presence of a target, classified information, or a foreign aspect seems to explain a large portion of the cases, they certainly do not explain all.

Sections 2339A and 2339B – either separately or in combination – are charged in 69.7% of all indictments brought under a terrorism statute and in 71.6% of all cases charging terrorism offenses. Section 2339B itself is charged in 42.6% of all indictments alleging terrorism violations. It is worth noting, however, that § 2339B is rarely charged alone. Rather, it has generally been accompanied by alleged violations of terrorism, national security, weapons, or racketeering statutes.

In 11 indictments, comprising four cases, 2339B was charged either alone or in association with lesser statutes. Those cases did not allege any plot involving an attack. While such indictments are rare, they illuminate the concerns that are raised by the broad phrasing of the material support statute. The two examples described below illustrate the problem.

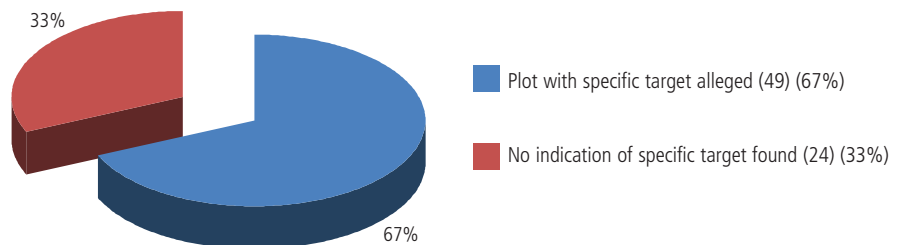
### Prosecutions Involving 2339A/B (Material Support) Charges with a Specific Target Alleged (170 prosecutions)

60



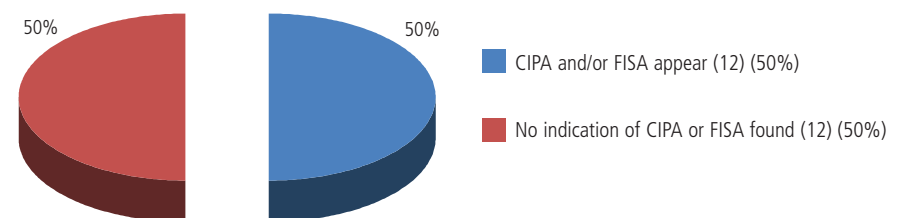
### Cases Involving 2339A/B (Material Support) Charges with a Specific Target Alleged (73 cases)

61



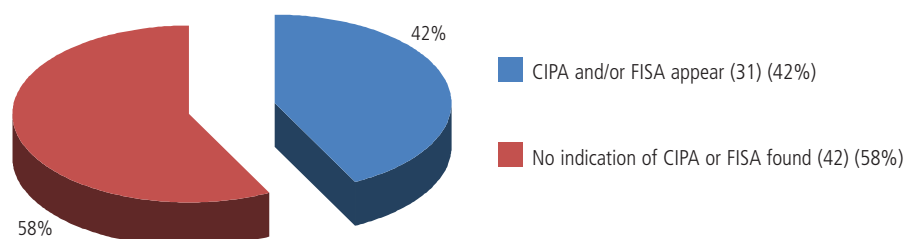
### CIPA/FISA in Cases Involving 2339A/B (Material Support) Charges without a Specific Target Alleged (24 cases)

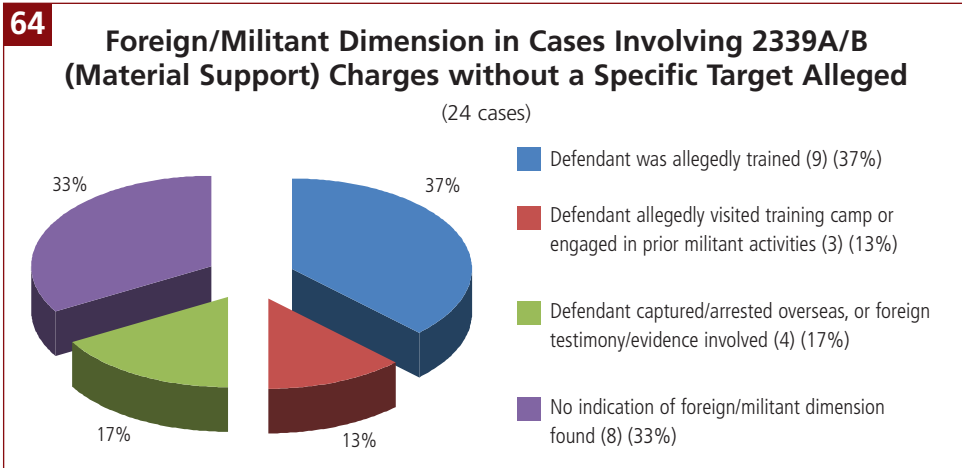
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### CIPA/FISA in Cases Involving 2339A/B (Material Support) Charges (73 cases)

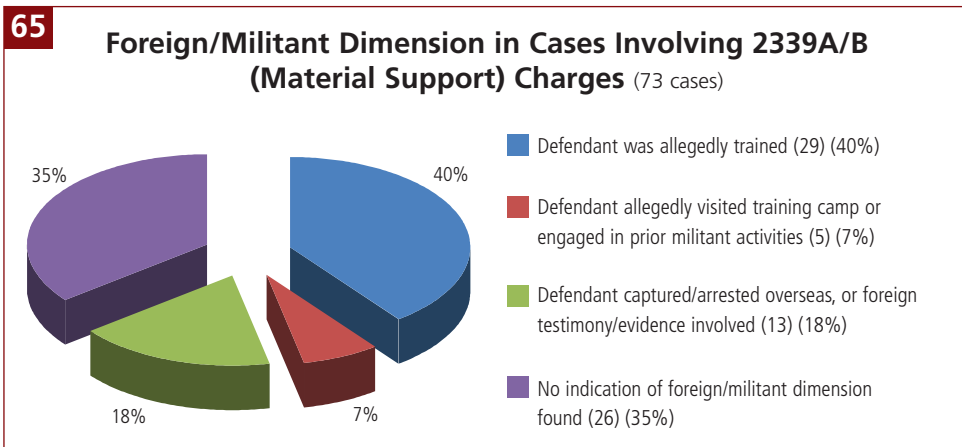
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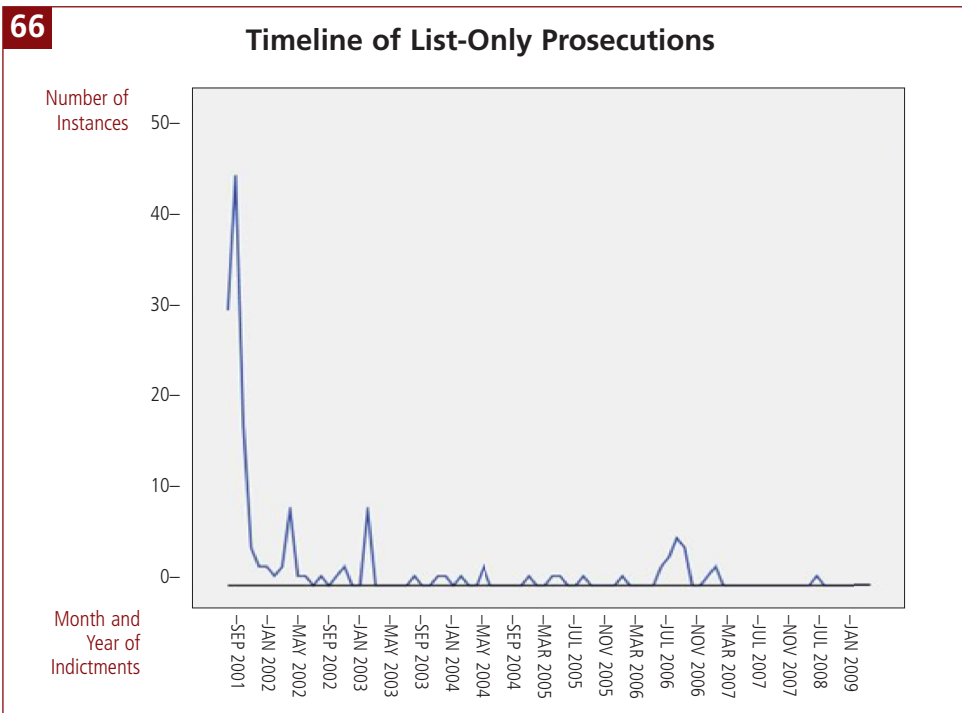
*Rafiq Sabir*

Rafiq Sabir was indicted along with three co-defendants: Tarik Shah, Mahmud Brent, and Abdulrahman Farhane. Shah was a martial arts expert who expressed an interest in training mujahedeen in martial arts at a center in Queens. Brent was recorded stating that he had attended a training camp and that he wanted to live a mujahedeen’s life. Farhane had conversations with an FBI informant in which he discussed sending money to jihadist fighters. However, the extent of Sabir’s involvement was his offer to provide medical services and training to fighters in Afghanistan – medical services arguably standing outside of the appropriate purview of government prohibitions.<sup>42</sup> Sabir was convicted after trial of the material support allegations against him.



*Saleh Elahwal and Javed Iqbal*

Saleh Elahwal and Javed Iqbal were charged with material support for conspiring to carry the programming of al Manar, Hezbollah’s Lebanese broadcasting arm, in the U.S. via satellite. They eventually admitted, when they pleaded guilty, that they knew Hezbollah was a designated terrorist organization at the time they entered into a contract with al Manar. Initially, they argued that their prosecution violated the First Amendment and that several U.S. media entities (and others available in the U.S.) broadcast al Manar but were not prosecuted. The trial court denied that motion and their guilty pleas foreclosed any appeal on the issue.



**B. Special Administrative Measures**

A second practice that has raised concern among human rights advocates is the imposition of special administrative measures (or “SAMs”) upon defendants detained before trial who are alleged to be terrorists. Under SAMs, defendants are customarily held in solitary confinement

<sup>42</sup>“Medicine” and “religious materials” are the only two codified exemptions in the material support statutes. See 18 U.S.C. § 2339A (b) (1). In the Sabir prosecution, the trial court ruled that providing medical services, i.e., attending to wounded, did not fall within the “medicine” exemption. See United States v. Sabir, 474 F. Supp.2d 492, 496 (S.D.N.Y. 2007).

without ordinary access to exercise, showers, commissary items, visits or telephone or written contact with family. Opportunities for such visits are extremely limited. The defendants are forbidden to talk to other inmates and sometimes even prison guards, and their communication with the outside world, other than their lawyers and immediate family (with the latter monitored) are effectively eliminated. Reading material and access to television, radio, and other media are also restricted. Access to the Internet or computers generally is forbidden.

Special administrative measures were created initially by a judge seeking to prevent a leader of the Latin Kings from orchestrating criminal activities, including murders, from prison. The SAMs were codified by executive regulation in 1996, and are imposed by the executive branch, via prosecutors, without the need for judicial approval. Formal imposition of SAMs on a detained defendant involves the attorney general directing the Bureau of Prisons in writing that such measures are necessary. The SAMs are then renewable annually if there is “a substantial risk that the inmate’s communications or contacts with other persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons.”<sup>43</sup>

While the nature of the SAMs have drawn their own criticism, further comment has been directed at the fact that SAMs can be imposed prior to any determination of the defendant’s guilt. One defendant was subject to SAMs for five and half years while awaiting trial. Moreover, judicial imprimatur is not required before SAMs are imposed. SAMs have been challenged in court, both before trial and after, without success beyond certain modifications designed to facilitate attorney/client communication.

SAMs are not used solely in cases associated with terrorism. Recently released numbers suggest that more than 40 federal inmates are currently subject to SAMs, but that only 30 are imprisoned in relation to terrorism. Six of these inmates are awaiting trial, of which four are being held on terrorism charges.<sup>44</sup>

### C. Premature Allegations

Since the Center on Law and Security began monitoring the prosecution of alleged terrorists, among the primary concerns has been whether an overzealous DoJ has been detaining individuals and describing cases as terrorism prosecutions that later turn out to be unconnected to terrorism. The Center can now report improvement, as instances seem to be decreasing over time. It seems that a preliminary period of possible overreaching by DoJ has ended.

These concerns were increased when preliminary analysis confirmed that less than one-third of all defendants who had been referred to as terrorism defendants in the media were charged with violating terrorism statutes.<sup>45</sup> These allegations led to a level of “trial by media,” through which these individuals were labeled as terrorists in their communities, many of them deported, and their businesses closed without any charge being leveled – much less any jury finding – that they had been involved in terrorism of any kind. When terrorism charges were alleged, early analysis found exceptionally low conviction rates, especially compared to conviction rates for most federal felony prosecutions. The conviction rate on terrorism charges hovered between 72% and 77%, compared to conviction rates for most felony categories that range in percentage from the high 80s to the low 90s.<sup>46</sup>

More recent analysis shows that this issue is steadily decreasing as a concern.

It is clear from this chronology that the low prosecution and conviction rates in the overall analyses of prosecutions for terrorism crimes are skewed by the overreaction in the first few years after the attacks of 2001.

The conviction rates show a clear upward trend over time for both terrorism and national security charges, and charges overall (*see chart 11*). However, it is important to remember that very few indictments returned since January 2007 have been resolved. For instance, only nine of the 26 defendants indicted on terrorism charges in 2007 have had their cases concluded; 17 are still pending trial.

Moreover, DoJ describes fewer and fewer prosecutions as being associated with terrorism absent any evidence of a terrorist connection. In the immediate aftermath of the 9/11 attacks, many individuals were arrested amidst publicity claiming they were believed to be terrorists, although it later turned out that no terrorist association existed. Even in 2003 and 2004, lists were released by the Department of Justice with names of “terrorism defendants,” many of whom were cleared of all terrorist association even by DoJ itself, either before or after the publication of the lists.<sup>47</sup>

Chart 66 shows the number of such instances, referred to herein as “list” cases (*see the text box on p. 2*). Cases were included this subset if at some point they were described as being terrorism-associated despite there never being a connection with terrorism evident in the public record. Cases were excluded from this category if, beyond the initial label, there were any allegations that the defendant was or had been associated with terrorism, even if those allegations were unproven.

<sup>43</sup> 28 C.F.R. § 501.3(c) (2001).

<sup>44</sup> Kareem Fahim, *Restrictive Terms of Prisoner’s Confinement Add Fuel to Debate*, N.Y. TIMES, Feb. 4, 2009, available at <http://www.nytimes.com/2009/02/05/nyregion/05hashmi.html>.

<sup>45</sup> *Terrorist Trial Report Card: U.S. Edition* (Ctr. on Law and Sec. at NYU Sch. of Law), at 2, 3, available at <http://www.lawandsecurity.org/publications/TTRCComplete.pdf>.

<sup>46</sup> *Terrorist Trial Report Card: September 2008* (Ctr. on Law and Sec. at NYU Sch. of Law), at 2, available at <http://www.lawandsecurity.org/publications/Sept08TTRCFinal1.pdf>.

<sup>47</sup> Eggen & Tate, *supra* note 2.

## D. Immigration, Fraud and False Statement, or Obstruction of Justice Charges

A further concern has been raised by the types of statutes that have been used to prosecute so-called “terrorism defendants.” For reasons articulated and examined above (see pp. 9-11), charges cover the full range of possible crimes, and include immigration violation and obstruction of justice charges. This has led to questions as to whether these defendants would have been prosecuted for what seem to be minor violations had they not been under suspicion for terrorist involvement that was itself never proven. Concerns have been raised particularly about instances in which false statements or obstruction of investigation charges were brought after the defendants had been acquitted of terrorism.

The Department of Justice has demonstrated clear improvement here as well. Although many immigration, fraud, false statements, and obstruction charges are still being prosecuted, these cases constitute a diminishing proportion of those claimed to be associated with terrorism. (See chart 67). This alleviates some of the concerns regarding the tendency of allowing defendants to be labeled as terrorists and subjecting them to the consequent repercussions without attempting to prove the terrorism allegations in court. (For more details about fraud, false statement, or immigration violations as the top charges in terrorism-associated prosecutions, see p. 10).

## E. Deportation Proceedings

The indictments for immigration violations discussed in the section above has often led to the use of deportation proceedings in order to remove potentially threatening individuals from the U.S. This has been criticized on the same basis as the use of the immigration statutes themselves – that individuals are deported because the government suspects them of an involvement with terrorism that is never proven. However, these cases have been criticized on additional grounds as well. In some instances, the government has initiated deportation proceedings after defendants have been acquitted by juries. The cases of Lyglenson Lemorin and Youssef Samir Megahed have been particularly criticized in this regard.

Lemorin was a defendant in the Liberty City Seven case, in which the defendants were arrested and tried for an alleged plot to attack several U.S. landmarks, including the Sears Tower. The case was tried three times, as the first two trials ended in a combination of acquittals and hung juries. At the third trial, five of the seven original defendants were convicted. Lemorin, however, was acquitted of all charges at the first trial, apparently in part because he had moved away from the other defendants and had stopped communicating with them by the time the arrests were made. Yet the government immediately moved to deport him, a decision that was widely criticized as an effort to take a second bite at the apple.

Ahmed Abdellatif Sherif Mohamed and Youssef Megahed were pulled over for speeding in South Carolina. When the car was searched, deputies found homemade fireworks and a laptop computer containing videos of rockets being fired in the Middle East. Mohamed, who was driving and who owned the laptop, claimed that they were going to the beach to launch the fireworks for his birthday. He later pleaded guilty to violating a terrorism statute. No

terrorism charges were brought against Megahed, who was using the computer when the two were pulled over. At trial, he was acquitted of both transporting explosives and possessing a firearm or destructive device. Three days after he was acquitted, Megahed was arrested, charged civilly with immigration violations, and subjected to deportation proceedings.

Interestingly, the deportation proceedings regarding both Lyglenson Lemorin and Youssef Megahed were heard by the same immigration judge. He ruled in 2008 that Lemorin should be deported, but ruled in August 2009 that Megahed should not be. Lemorin remains in custody, serving his sentence from the criminal case while appealing the deportation ruling.

The use of deportation proceedings also seems to have decreased, with the exception of a single month in 2007. (See chart 68. For more information about deportation proceedings, see p. 14). This spike appears to be due to two large money-laundering cases resulting from a single investigation into money laundering (and terrorism financing) in the United States.

Other than Lemorin Megahed, we found references to deportation proceedings in only seven resolved indictments that had not ended in convictions. Of these seven, four criminal proceedings concluded when all charges were dropped by the prosecutors, suggesting the presence of agreements that the defendants would not fight deportation if the charges were dismissed.<sup>48</sup> Charges against one defendant ended in an acquittal on terrorism charges and a mistrial on others, creating a similar impression that prosecutors forwent retrial in return for an agreement by the defendant not to fight deportation. Charges against another defendant were dismissed by the judge. The remaining defendant had a guilty verdict against him vacated, and was then deported.

These nine instances constitute 13 percent of all resolved indictments that did not end

<sup>48</sup> Because it is a civil proceeding, deportation involves a lower standard of proof than that for a criminal prosecution. Thus, a defendant may bargain away deportation (a forum in which he is less likely to succeed) in return for accommodations in a concurrent criminal case.



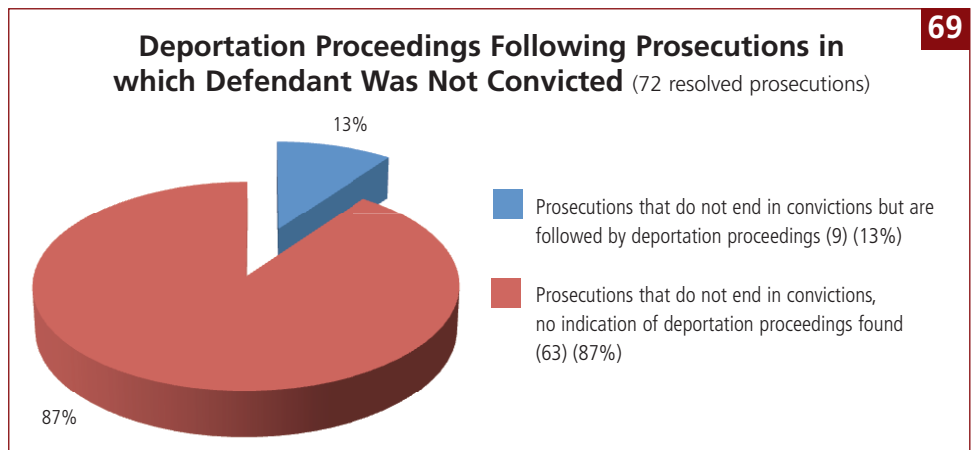
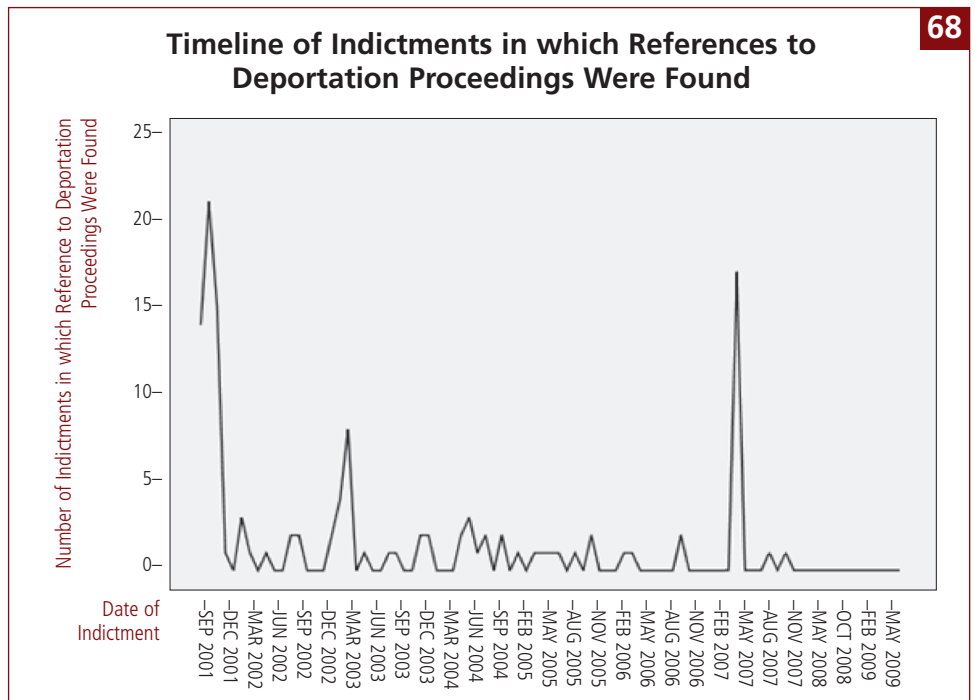
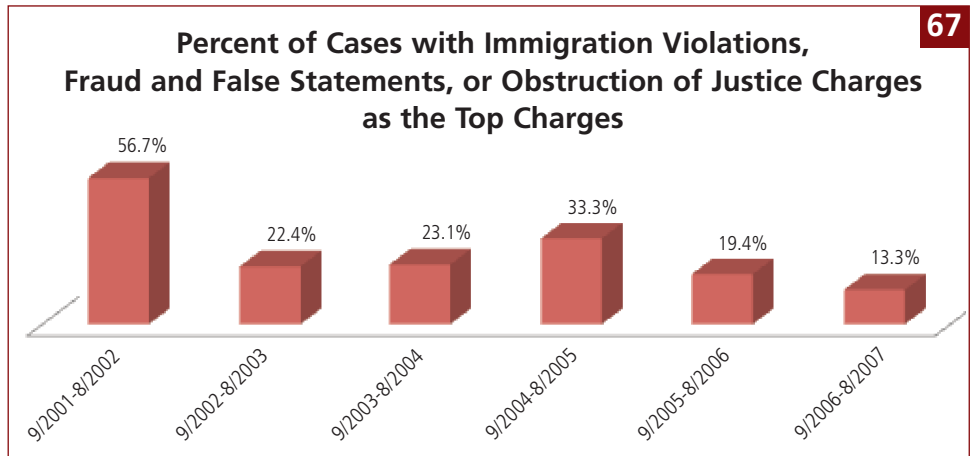
in convictions. (See chart 69). Each of these seven defendants was indicted in either 2003 or 2004.

## F. Terrorism Sentencing Enhancements

Sentencing enhancements applicable in terrorism cases provide prosecutors a mechanism to punish defendants for an association with terrorism that has not been proven before a jury. As such, they have been challenged in cases in which the connection to terrorism has not been conclusive from either the charges or the evidence. Section 3A1.4 of the United States Sentencing Guidelines provides a sentencing increase for anyone convicted of any felony “that involved, or was intended to promote, a federal crime of terrorism.”<sup>49</sup> The case of Sabri Benkhala illustrates the questions that have been raised.

Benkhala was charged under the International Emergency Economic Powers Act for activities that he allegedly undertook while at a terrorist training camp in Pakistan. He was acquitted of all charges that involved terrorism, apparently due to a lack of evidence that the camp was actually used for terrorist training while he was there (rather than for a civil insurgency in Kashmir run by persons not designated or considered terrorists by the U.S. government). After he was acquitted, the government subpoenaed him to a grand jury, questioned him, and ultimately charged him with perjury in connection with his grand jury testimony regarding his time, or lack thereof, at the camp. He was convicted of the perjury charges.

Benkhala’s perjury conviction would normally have subjected him to a Guidelines range of 32-41 months (approximately three years) in prison.<sup>50</sup> Requesting that the judge apply the terrorism sentencing enhancement, the government requested a Guidelines range of 210-262 months



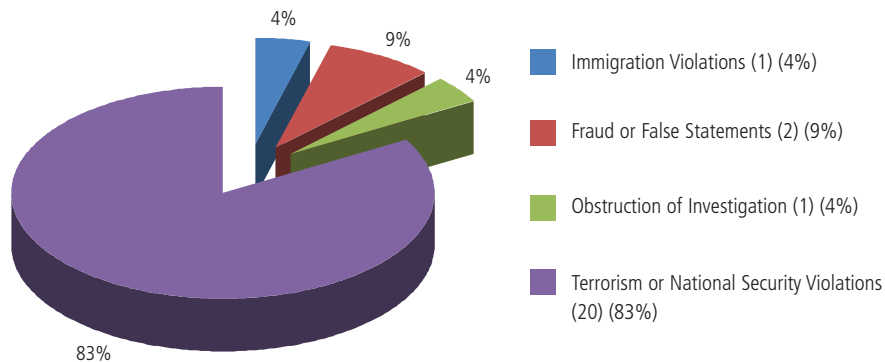
<sup>49</sup> U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2009).

<sup>50</sup> Federal sentencing is “determinate” – if a jail sentence is imposed, the court sets a specific amount of time. The Guidelines ranges are designed to provide judges upward and downward boundaries for each particular Guidelines offense level.

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### Top Charges in Prosecutions Resulting in a Terrorism Sentencing Enhancement

(24 prosecutions in which a terrorism sentencing enhancement was found)



(approximately 17-22 years). The government argued for this range based on a application note to the Guidelines that states that “obstructing an investigation of a federal crime of terrorism shall be considered to have involved, or to have been intended to promote, that federal crime of terrorism.”<sup>51</sup>

Finding that Benkahala’s perjury had in fact obstructed an investigation of a federal crime of terrorism, but that full application of the enhancement would “substantially over-represent[] the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes,” the judge settled on a range of 121-151 months (approximately 10-12 years), still 3-4 times the normal length of a perjury conviction but five years less than the bottom of the range urged by the government.<sup>52</sup>

That 20 of the 24 indictments in which we were able to find an enhancement included charges on terrorism or national security grounds suggests that the Benkahala problem is perhaps less common than originally feared, although not irrelevant.

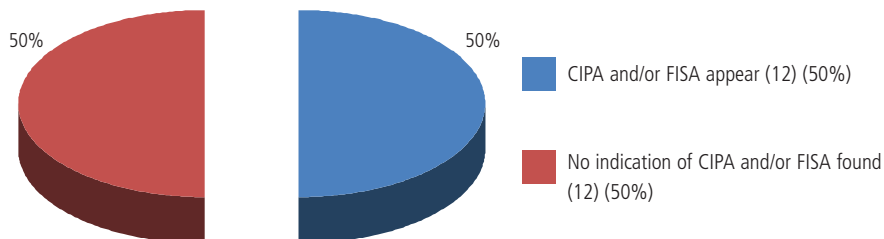
Of the four sentencing enhancements that we found in indictments that included neither terrorism nor national security charges, one indictment was for immigration violations, two were for fraud and false statements, and one was for obstruction of an investigation. (See chart 70). CIPA or FISA appeared in 12 of the 24 indictments, or 50%. (See chart 71). Fourteen indictments, or 58.3%, did not allege a plot involving a specific target. (See chart 72).

As mentioned previously, our sample size may be too small to present an accurate picture. (For more details about terrorism sentencing enhancements, see p. 13).

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### Classified Information in Prosecutions Resulting in a Terrorism Sentencing Enhancement

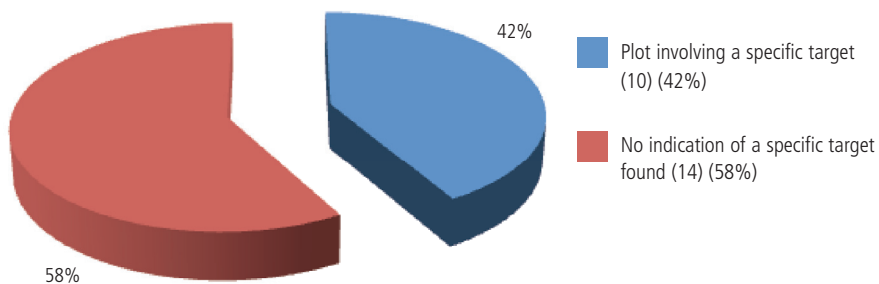
(24 prosecutions in which a terrorism sentencing enhancement was found)



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### Specific Targets Alleged in Prosecutions Resulting in a Terrorism Sentencing Enhancement

(24 prosecutions in which a terrorism sentencing enhancement was found)



<sup>51</sup> U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 cmt. 2 (2009).

<sup>52</sup> United States v. Benkahla, 501 F. Supp.2d 748 (2007) (quoting U.S. Sentencing Guidelines Manual § 4A1.3).



## G. Extradition

Besides the pure civil liberties concerns raised in these cases, international standards and opinions regarding the rights and liberties of terrorism suspects in U.S. courts have at times made it difficult for prosecutors to pursue suspects arrested and/or detained in other countries. Regarding defendants whom the U.S. seeks to extradite, the government has encountered a surprising level of reluctance from those countries due to their disapproval of certain U.S. detention practices. The practices at issue include special administrative measures, the death penalty and other sentences, post-conviction prison conditions, and the perceived possibility of detention at Guantanamo Bay.

### i. Guantanamo and military commissions

Several defendants have fought extradition to the United States (in the courts of the countries in which they have been detained) on the ground that, were they extradited, they might be sent to the Guantanamo Bay detention facility and/or subjected to military commissions. Defendants argue that these conditions and proceedings would violate their human rights.

One such a case is that of Babar Ahmad, who was indicted in the U.S. for allegedly using the Internet to recruit fighters for terrorist organizations in Chechnya and Afghanistan. A citizen of the United Kingdom, Ahmad has fought his extradition in the courts in the UK. He was originally successful, obtaining a ruling by the High Court of the United Kingdom that his extradition would violate the European Convention on Human Rights. However, after the United States offered diplomatic assurances that Ahmad would not face a military commission and would not be subject to capital punishment if convicted,

the court reversed itself. Ahmad is still fighting his extradition, and has brought his objections to the European Court of Human Rights.<sup>53</sup>

Similarly, before Oussama Kassir was extradited from the Czech Republic, the High Court of Prague required diplomatic assurances that he would not be sent to Guantanamo Bay. Kassir was charged (and ultimately convicted) for violating terrorism statutes as a result of his alleged participation in an attempt to create a terrorist training camp in Bly, Oregon. He had been trained in Pakistan and had taught men in Seattle how to assemble AK-47s and modify them to launch grenades.

### ii. The death penalty and conditions in U.S. prisons

In other cases, the concerns raised by defendants in other countries have been in regard to their potential treatment in U.S. prisons and the prospect of capital punishment. Monzer al Kassar was indicted for allegedly agreeing to provide machine guns, grenade launchers, and surface-to-air missiles to individuals he believed to be attempting to purchase weapons on behalf of the FARC, in a plot he believed would involve the deaths of U.S. officials and employees in Colombia. His extradition from Spain to the United States was conditioned on an agreement that the U.S. would not pursue the death penalty (even though it was not a capital case) or life without parole upon his conviction. Al Kassar was convicted, and his sentences, on multiple counts, are to run concurrently for a total of 30 years.

Wesam al Delaema provides perhaps the most extreme example of the conditions the U.S. has had to agree to in order to prosecute suspected terrorists. Al Delaema was the first Iraqi insurgent to be prosecuted in U.S. courts. Charged with violating a terrorism statute, he was extradited from the Netherlands only on the condition that

he be allowed to serve his sentence there if convicted. The agreement further required that he would be neither labeled an enemy combatant nor tried by military commission, and, according to his attorney in the Netherlands, that Dutch courts would be able to review and possibly modify his sentence upon his return.

### iii. Cases in which defendants are not extradited

Even with the demonstrated willingness of the United States to give diplomatic assurances, many defendants have not been extradited. While the government has succeeded in gaining an order of extradition, the case against Babar Ahmad continues to in European courts, as does that of his alleged co-plotter Syed Talha Ahsan.

In some cases, other countries simply do not believe the United States has sufficient evidence to demand the extradition of a suspect. Liban Hussein was designated a specially designated global terrorist because of his association with al Barakaat, a Somali company that the U.S. government believes to have funded al Qaeda. Hussein was indicted in the U.S. for transferring money without proper licensing. Canada refused to extradite him, believing the evidence connecting him to terrorists was insubstantial. Hussein cut off ties with al Barakaat, and the U.S. eventually removed him from the list of specially designated global terrorists.

Lofti Raissi was the first defendant charged in connection with the attacks of September 11, 2001. He was a pilot who had allegedly attended flight school with some of the hijackers, and had been using a false social security number. Originally reported to be al Qaeda's lead flight trainer, he was eventually indicted for helping a friend fraudulently obtain political asylum. Efforts by the United States to extradite him from the UK foundered after he was found innocent by a UK court.

<sup>53</sup> Two defendants indicted in 1998 in connection with the August 7, 1998, al Qaeda bombings of the U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, and in custody in the UK since then, are still engaged in litigation over their extradition to the U.S. See Craig Whitlock, *Britain Pays to Keep Suspects from U.S. Hands*, WASH. POST, May 2, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/01/AR2009050102919.html>.

# Excerpt from “The Courts and Terrorism: Transatlantic Observations” Conference

Center on Law and Security, NYU School of Law, April 15, 2009

Prof. Stephen J. Schulhofer\*

I’ll try to sketch some reservations about [preventive] detention, which I think are fundamental.

First of all, it is true that the United States has many forms of detention for dangerous individuals. But the Supreme Court has never said that dangerousness alone is sufficient, and there are fundamental reasons why, within the U.S. at least, dangerousness alone has never been a sufficient basis for preventive detention. We have detention based on dangerousness plus mental illness. We have detention based on danger of sexual violence plus mental abnormality. We have dangerousness plus deportability. We have detention of a criminal defendant based on dangerousness plus the fact that a criminal trial is imminent on the merits of the allegations. But until now, the Supreme Court has never upheld a regime that permitted detention based on dangerousness alone. My guess is that the present Supreme Court would probably uphold a regime of detention targeted at terrorists – whether they should or not is a separate debate – but much would depend on the details. For example, one touted advantage of administrative detention is that it would replace the strict criminal burden of proof with a much lower standard, like preponderance of the evidence. The present Supreme Court is not going to uphold a preventive detention regime based solely on proof by a preponderance of the evidence; the Court would require proof at least by clear and convincing evidence. That is just one of several areas where there will be constitutional limits on what can be done in this area. But I prefer to focus less on constitutional

limits or questions of power, and more on the pros and cons as a matter of policy.

The argument for preventive detention is based primarily on the assumption that we need to deal with people who are highly dangerous but technically unconvictable. The assumption is that a preventive detention regime can escape the high barriers to criminal conviction, but would still provide robust safeguards to avoid miscarriages of justice. So you get the best of both worlds. That sounds plausible, but when you try to get more concrete about what these systems would look like, contradictions start to appear.

One place to start would be to ask why this terrorist suspect is technically unconvictable. The weasel word there, “technically,” implies that we all know this person is incredibly dangerous, but pesky little rules will somehow keep the true facts from being considered in court. This is something you hear repeatedly from talking heads on cable news, as well as from reputable and experienced people like law professor Jack Goldsmith, who said in March 2009 that guilty defendants often go free because of legal technicalities in criminal trials. So what are those legal technicalities? One is that evidence may have been obtained by torture. If there is no other reliable evidence, this defendant is unconvictable. That is true. But what makes us so sure then that the person is dangerous if the key evidence came from torture? Obviously the suspect cannot be convicted, but he also shouldn’t face detention because the allegations against him are not based on reliable evidence. The same point applies less dramatically when we talk about hearsay evidence from

an unidentified secret informant abroad who said something to an intelligence agent, neither of whom can be named or cross-examined. The same basic point applies – how do we know that the allegations are true? The reason that these suspects are “technically” unconvictable is because the evidence against them isn’t reliable.

What about the cases where we do have convincing evidence that proves the person is dangerous? At that point I would turn back to the other half of this equation. If the evidence is really reliable and convincing, why is it that the person is unconvictable? The situation that most often poses this kind of problem is when very reliable physical evidence has been obtained in violation of the Fourth Amendment and therefore cannot be considered in a criminal trial. Despite media myths, it is actually very rare for a defendant to go free because of a Fourth Amendment violation. But more decisive and unambiguous is the fact that the Fourth Amendment simply does not apply outside United States borders. The Fourth Amendment can indeed pose a problem of genuinely guilty but unconvictable people, but that problem doesn’t exist at all in the case of reliable evidence seized on a battlefield, or evidence seized in a safe house in Pakistan, or other seizures of that nature.

There are many other concerns raised about criminal trials and why we can’t rely on them to convict truly dangerous people. I will address three of the most important issues: the problem of authenticating evidence, the problem of classified information, and the claim that criminal offenses

\* Stephen J. Schulhofer is the Robert B. McKay Professor of Law at the NYU School of Law.

are too narrow because they focus on completed harms rather than on catching people before they act. You hear this last point constantly: “We need a preventive approach because, in an age of weapons of mass destruction, we cannot afford to wait until crimes occur. We have to lock people up before they can put their plans into effect.” Luckily we already have a regime for locking people up before they can put their plans into effect. That regime is called federal criminal law.

I wonder what criminal defense attorneys must think when they hear people say that criminal law is backward looking, that it has no power to get a dangerous suspect off the streets before he actually blows somebody up. They probably wish they could practice in that world. No federal prosecutor and no criminal defense attorney believes any such thing. In the United States, unlike in the UK, we’ve long had a law of conspiracy and material support that reaches far back into the early stages of planning. Also, in the United States, again unlike in the UK, wiretap evidence is admissible in criminal trials, so there is no unusual problem of proof in these cases.

Another set of problems has to do with rules that require proof of how evidence was found and how a reliable chain of custody was maintained, in order to assure that the evidence presented is really authentic. Here too, the media have portrayed criminal trials as a dense obstacle course, with innumerable opportunities for guilty defendants to game the system and escape responsibility for their crimes. Anyone accepting these accounts must wonder why any defendant would ever plead guilty (in fact, 90% of them do) and how we manage to convict the overwhelming majority of defendants who choose to stand trial. The truth is that authentication rules are applied in a very flexible, common sense way, and they have never posed an obstacle to conviction in an international terrorism case.

Unlike the other evidentiary problems I’ve mentioned, the concern about classified information is legitimate and genuinely difficult. The question is whether the

CIPA framework allows us to adequately address this concern. I say that it does. CIPA solves the problem.

Is it a perfect fit? Of course not. Could it be improved? Of course it could. Judges have had to adapt CIPA, to craft case management rules that aren’t literally in CIPA but are analogous to it. All of that could be fine-tuned and codified by legislation. But the CIPA approach solves the problem – with two exceptions. First, is it easy? No. CIPA is very difficult to work with, and rightfully so. Under CIPA, judges must be very careful not to compromise national security, not to compromise the adversarial process, and not to compromise the defendant’s ability to put on a defense. Managing those three imperatives and respecting all three of them at the same time is a demanding chore. But there is no way to simplify that job unless we are willing to jettison one of these commitments. And that option is not sustainable. All of these commitments are essential components of a detention system that is both just and effective, with recognizable legitimacy and some mechanism to prevent an intolerable number of false positives.

Second, what if the evidence really is material for the defense but is too sensitive to disclose and the judge cannot craft a reasonable CIPA substitute? That problem has not happened yet, and it is unlikely to arise, given CIPA’s flexibility. But those of us who favor reliance on conventional criminal trials must in fairness acknowledge that some day this problem could conceivably come up. My own judgment is that it’s not very prudent to craft an entirely new detention regime just to anticipate a speculative, remote possibility that has never arisen. More important, even if we do create a substitute regime, the problem wouldn’t go away. You would still have to decide how to handle the situation, regardless of what you call the proceeding in which it arises. You would have evidence that goes to the heart of a defendant’s ability to contest the charges against him, but is too sensitive to disclose, so sensitive that we cannot allow the defendant any opportunity to challenge its reliability.

Changing the name of the proceeding doesn’t allow you to escape the dilemma of deciding whether you are going to permit a deprivation of liberty in this situation or not.

In sum, any detention regime has three prerequisites that are incontestable and essentially uncontroversial: it has to provide for a genuine adversarial system, it has to permit the defense to confront and challenge the evidence, and it has to provide maximum feasible transparency for the public. Unlike the defendant, the public does not have to see everything. But the public must have confidence that a trusted independent process, in other words the Article III judiciary, is deciding what’s being concealed and what’s not. It’s perfectly acceptable to limit transparency for the general public, so long as the limitations remain tightly controlled by a process fully independent of the Executive Branch.

Now, once you respect these conditions, and no detention system will be sustainable otherwise, what are you gaining in comparison to the traditional criminal process? In theory, there may be a little bit more flexibility but it is misleading to contrast the cumbersome, messy, imperfect, federal criminal trial with some idealized version of a nonexistent system. Whatever theoretical gains a detention regime might offer, it would involve two very big costs. From a purely pragmatic point of view, intelligence gathering and every other step of the counterterrorism process is going to suffer as soon as we start tinkering with well-settled conceptions of due process that are well-understood and well-accepted by the general public. The second point concerns the theoretical benefits that might be gained. If we have learned anything from the military commissions fiasco, it’s that a new system is going to have bugs and will take years to implement. Drafting legislation for a new detention system and getting it enacted in Congress will not be a walk in the park. Nor will it be a smooth and simple matter for courts to begin working with it. So I think we should be very reluctant to create any alternative to ordinary criminal process.

# Guide to Terms and Methodology

## I. The Data set

Since 2004, the Center has been tracking the post-9/11 terrorism-associated prosecutions in Article III courts. For purposes of our research, we have defined “terrorism associated” to mean any prosecution described by a government official as having disrupted a terrorist plot, being part of the war on terror or furthering other counterterrorist efforts, as well as prosecutions of individuals who have been officially described as terrorists or as having supported terrorism.

The Center has relied on the public record for its data. We used PACER (Public Access to Court Electronic Records) – the unified electronic-document filing system for all federal courts – to follow litigation developments. Through the media, we followed claims made by prosecutors, defense attorneys, and interested observers.

Each of our researchers was assigned a set of cases to monitor. They then compiled summaries of the procedural developments over the course of each case and each new fact mentioned in the press. These summaries have been updated in cycles of approximately three months and weekly whenever feasible.

Our analysis began as the summaries accumulated. We read all of the case files to identify trends and specific points of interest to follow. Once an issue was identified, we returned to the case files in an effort to ensure that we included every instance of relevant facts.

Some aspects of terrorism prosecutions are a challenge to quantify. For example, questions may be subject to too many variables to correlate, or information may be unavailable in the public record. In these

instances, we offer qualitative analysis where appropriate.

## II. Definitions

### *Indictments, defendants, and cases:*

Because several defendants may be charged in a single case and an individual defendant may be charged in multiple cases, it is important to clarify in each circumstance whether the analysis reflects individual defendants, indictments, or cases.

- Indictments are counted separately for each individual defendant in each particular case. Except where otherwise noted, the number of “indictments,” “defendants,” and “prosecutions” refer to this figure. There are 828 indictments in the data set.
- All defendants indicted together under a single docket number are considered to belong to the same case. There are 337 cases in the data set.
- In some instances, a given individual has been indicted in several cases. Because we have generally tracked by indictment rather than by unique individual, they have been counted separately for each indictment in determining the total number of defendants. For the purposes of certain analyses, it was more appropriate to count them only once. Such was the case in determining how many people alleged to be affiliated with various terrorist organizations have been prosecuted, for example. We have noted the analyses in which we have counted “individual defendants.” There are 804 individual defendants in the data set.

### *Top charges:*

One of the primary questions the Center has addressed is the extent to which terrorism allegations are ultimately supported by convictions. A second fundamental issue is the extent of the DoJ’s success; whether it obtains convictions on the most serious charges brought against a defendant or agrees to accept a guilty plea to a lesser charge with the prospect of a shorter sentence.

More than 130 statutes have been used to prosecute the defendants in the Terrorist Trials Database. Any given defendant may face charges under several statutes. For example, charges in a single prosecution may include immigration violations, making false statements, obstructing an investigation, racketeering, and terrorism, or any other combination of applicable available statutes.

In order to address these questions, the Center created a hierarchy of categories of charges. This hierarchy was determined based on a given statute’s likely relationship to terrorism and the sentence resulting from a conviction. Terrorism statutes are therefore at the top of the hierarchy, both because they require prosecutors to prove that specific elements relating to terrorism exist in the case, and because they generate severe sentences upon conviction. They are followed by national security violations, and then violent crimes and weapons violations. Racketeering or commercial fraud charges may be brought in terrorism financing cases or in connection to terrorism financing allegations. Therefore, racketeering immediately follows weapons violations, followed in turn by drug crimes, commercial fraud, and then “other.” Finally, those offenses least directly associated with terrorism, and imposing the lowest (but not necessarily insubstantial) sentences, follow as obstruc-



tion of investigation, fraud and false statements, and immigration violations.

A list of the categories and the individual statutes included in each can be found in the appendix hereto.

#### *Terrorism statutes:*

Determining what would constitute a terrorism statute or a federal crime of terrorism was one of the most important decisions made in preparing this report, and we have used a narrower set of statutes than other organizations have in their analyses.

For the Center, the purpose of distinguishing between terrorism statutes and others is to evaluate how often prosecutors bring charges of terrorist intent or association before a jury, and how often that jury believes the terrorist intent or association actually existed. Therefore, we use the term “terrorism statutes” to refer only to those statutes requiring proof of involvement with terrorism (which generally entails either terrorist conduct or knowing or intentional aid to a terrorist organization, or in furtherance of a terrorist objective).

We have included under national security violations those statutes generally considered to be related to terrorism but not inherently implicating terrorism or requiring a prosecutor to prove an association with terrorism. The categories of terrorism and national security violations are often considered together throughout this report. We have specified the categories included in each analysis to avoid confusion.

#### *Conviction rates:*

In all calculations of conviction rates and other trial results, we included only those defendants whose prosecutions have been resolved. We did not include prosecutions in which charges were still pending.

#### *“List cases”:*

In the years immediately following the September 11th attacks, the Department of Justice released several lists of individuals who had been prosecuted in what were allegedly terrorism-associated prosecutions. However, many of these prosecutions turned out to have no connection to terrorism.<sup>1</sup> The terrorism association was in some cases disavowed by the Department of Justice entirely; in other cases no reasons were offered as to why the case had been labeled as a prosecution associated with efforts against terrorists or terrorism in the United States.

For purposes of this report, it is at times important to distinguish between those cases in which *some* allegations of a terrorism association were made by the Department of Justice or other government officials, and cases in which the only terrorism allegation was use of the word “terrorism” in a preliminary public announcement or inclusion on one of the DoJ lists. We use the term “list cases” to describe those cases in which the label of terrorism association was initially applied absent supporting allegations or description, no supporting allegations or description of the association followed, and, most importantly, the label was eventually dropped by government officials.

### **III. Variables in the data set**

The database was set up to code for the following basic attributes of individual prosecutions: names, charges, results, citizenship where available, alleged affiliated terrorist organization where available, federal district in which the case was instituted, arrest date when available, charge date, disposition (dismissal, guilty plea, trial, acquittal or conviction), sentence, and/or fine, reference to deportation, and docket number.

Aided by statistical analysis software, cases were further coded for issues identified over the course of analysis. These issues included:

#### *Training:*

Allegations, whether made in formal charges or merely in the press, that a defendant had trained at a terrorist or militant training camp were coded under the “training” variable.

#### *Weapons of mass destruction:*

As defined in 18 U.S.C. § 2332a, a weapon of mass destruction may be any destructive device, including bombs, grenades, other explosives and poison gases. Any kind of participation in a terrorist plot involving a WMD (committing, conspiring to commit, or attempting to commit such an act) may be punished under § 2332a. However, an indictment may allege such a plot as a violation of some other statute – for example, 18 U.S.C. § 842, concerning the importation, manufacture, distribution, and storage of explosive materials – without alleging a violation of § 2332a itself. Therefore, while a search for all cases involving § 2332a would reveal cases in which the statute itself was utilized, a separate variable was created to indicate cases in which such allegations had been made, whether or not they were formally charged pursuant to § 2332a.

#### *Plots:*

A system of plot identification numbers was created in order to group together individuals who had been indicted under separate docket numbers but who were part of a single plot or course of conduct. For instance, one large case involved a scheme in which specialized driver’s licenses for transporting hazardous materials were fraudulently obtained. Rather than indicting the case as a single prosecution with over a dozen defendants, each defen-

<sup>1</sup> See Dan Eggen & Julie Tate, *U.S. Campaign Produces Few Convictions on Terrorism Charges*, WASH. POST, June 12, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/11/AR2005061100381.html>.



dant was indicted separately, entailing separate docket numbers for each. The plot identification numbers were used to avoid confusion resulting from such circumstances.

*Classified information:*

Many questions of particular interest herein involve how classified information has been handled in these cases, and whether that has presented intractable difficulties. By their nature, proceedings involving classified information are themselves classified, and their contents, and sometimes the fact they occurred at all, are never part of the public record. There is no way, therefore, of compiling a comprehensive data set for classified information.

The most effective means of determining when classified information is at issue in a case is to identify whether the provisions of the Classified Information Procedures Act (“CIPA”) have been invoked by either party. As a result, we coded those cases in which the public docket indicated the presence of CIPA proceedings. Secondly, cases in which the Foreign Intelligence Surveillance Act (“FISA”) appears often involve classified information and material, although not necessarily so. In most cases, recordings or other materials generated by FISA wiretaps or searches are declassified when they are provided to the defense. We coded CIPA and FISA separately in order to be able to make some basic judgments about the overlap between them.

*Informants and cooperators:*

Informants and cooperators<sup>2</sup> were coded separately. Informants were tracked by case, to identify all defendants involved in cases in which an informant was used. Cooperators were tracked individually.

*Special Administrative Measures (“SAMs”):*

In the case of SAMs research, our data came not only from PACER and the press, but also from an informal survey of legal practitioners whom we knew to have handled terrorism-associated cases.

*Target type:*

Alleged targets of terrorism-associated plots, and instances of plots in which no indication of any target was found in the public record, were divided into five categories: domestic/civilian, domestic/military, overseas/civilian, overseas/military, and no indication of a target found. A plot was considered to have had a target if allegations were made, in an indictment or in the media, that it conceived of attacks against specific institutions, organizations, installations, or people. Plots without a target include, for example, most terror financing cases.

Plots that involved both overseas and domestic targets were coded as domestic. Those that involved both military and civilian targets were coded as civilian.

*“International” vs. “domestic” terrorism:*

We coded those defendants who allegedly focused their activity on the domestic dimension of causes such as white supremacy, anti-abortion, animal liberation or the environment as domestic terrorists. Those alleged to be associated with a foreign or international conflict, whether religiously or purely politically motivated, have been counted as international terrorists.

*Prosecutions with a foreign dimension:*

Preliminary analysis of the summaries called for several separate variables tracking each way in which such interactions could occur. These included foreign capture, both with and without extradition, military capture, foreign evidence, and for-

eign testimony. Use of separate dummy variables was necessary, rather than use of a single variable with multiple assigned values, as any combination of these various interactions could occur.

Both foreign capture variables refer to capture overseas by non-U.S. authorities. The foreign evidence variable includes evidence obtained overseas by the U.S. military or non-U.S. authorities. The capture and evidence variables represent instances in which normal criminal law-enforcement procedures likely were not followed, for a variety of reasons. The foreign testimony variable represents instances in which testimony was obtained from witnesses who were not U.S. citizens, residents, or located in the U.S., whether they travelled to the U.S. to testify or other measures were taken to enable their testimony.<sup>3</sup>

*Terrorism sentencing enhancements:*

Prosecutions were considered to have included a terrorism sentencing enhancement if we found indications showing that the terrorism enhancement provided by § 3A1.4 of the U.S. Sentencing Guidelines was used. Unfortunately, prior to 2005 and the advent of electronic filing in federal cases, sentencing judgments were often neither publicly filed nor available, which severely limited the set in which this issue could be evaluated. Nor do all judgments reflect the Guidelines analysis. This has been especially true since the Supreme Court held in 2005 that the Guidelines are advisory rather than determinative. However, the results that are available are presented to provide some, albeit extremely limited, snapshot of the impact of the Guidelines’ terrorism enhancement at sentencing.

<sup>2</sup> For a detailed description of the difference between “informants” and “cooperators” as used herein, see pages 42-44.

<sup>3</sup> For an analysis of the issues surrounding video depositions of witnesses abroad, see pages 34-41.

*Extradition issues:*

Prosecutions were considered to have involved extradition issues when either the defendant successfully delayed his or her extradition based on civil or human rights concerns or the extraditing country placed limitations on their treatment by the U.S.

**IV. Limitations and potential error**

While Center researchers and staff endeavored to ensure that every case was entered accurately and that all relevant facts were found and included, some oversights inevitably occurred, as they do in the course of any large research project or data set. There are also further difficulties specific to a project such as this one, which examines criminal prosecutions in a particularly sensitive area.

First and foremost are those related to sealed documents and cases. While PACER generally makes legal documents available to the public, many terrorism-associated cases contain sealed documents in some form. In certain instances, it is difficult even to recognize that a particular sealed document exists. While *all* documents filed in a case – whether sealed, or even classified – should be reflected on the public docket (without disclosing the content or making the document available), often clerk’s offices and judge’s chambers are unfamiliar with such protocols and do not list such filings on the public docket. Also, many filings, such as letters, are not accepted by the electronic filing system and are therefore transmitted directly to judges, who do not forward them to the clerk’s office for docketing. Thus, it is difficult to state with confidence that the public docket reflects all of the substantive litigation in a case, particularly in terrorism-associated cases, which customarily involve a higher volume of at least sealed, if not classified, filings and proceedings.

In some cases, it may be apparent from missing docket numbers or from knowledge that an indictment has been filed, or simply from knowing how cases proceed, that documents are missing from the public record.

Additionally, the PACER system provides access only to those documents filed since electronic filing was instituted in the federal courts. As a result, documents filed prior to 2004 are not electronically available. This is also true of many documents filed after 2004 but in cases that began before then. Therefore, documents before November 2004 were often difficult to obtain. In these circumstances, we searched for the documents through other public sources, and often found them on Web sites other than the PACER system, such as those set up to advocate for particular defendants or those of organizations following national security issues. When the documents could not be found, or could not be opened, this difficulty was noted in the case summaries we have compiled.

## Other Reports

The *Terrorist Trial Report Card* series is not the only publication, or series of publications, to evaluate the prosecution of terrorism cases in the federal criminal courts since September 11, 2001. Several reports have addressed these questions over the past eight years. Their analyses are extremely helpful, yet leave gaps that the Center on Law and Security hopes to fill.

Two reports issued by the Department of Justice summarize the department's efforts to prosecute terrorism suspects. The earlier of the two, issued in 2006, is a frequently cited white paper<sup>1</sup> that addresses terrorism prosecutions specifically. It identifies those cases that the government considers to be especially important and describes the DoJ's response to the post-2001 threat. The more recent report is broader, and looks at the DoJ's record generally. It includes a discussion of key terrorism prosecutions and prosecutorial strategies being used to combat terrorism.<sup>2</sup>

Serrin Turner and Stephen J. Schulhofer, in a report issued by the Brennan Center for Justice at the NYU School of Law in 2005, analyze the legal issues related to the need for secrecy in terrorism trials.<sup>3</sup> Their research incorporates interviews with defense attorneys, prosecutors, and past and present DoJ, FBI, and CIA officials. They conclude that the federal court system is capable of accommodating classified evidence while also providing fair trials, and suggest that new congressional legislation may be appropriate.

The American Bar Association Standing Committee on Law and National Security convened a series of workshops designed to address the questions related to terrorism prosecutions that have arisen. These workshops were followed by reports outlining the concerns raised and the potential solutions discussed.<sup>4</sup>

Combining quantitative and qualitative analysis, Human Rights First published a report analyzing terrorism prosecutions in 2008, with an update in 2009.<sup>5</sup> These two reports conclude that federal criminal courts are able to handle terrorism prosecutions, and have been doing so effectively.

Finally, the Transactional Records Access Clearinghouse at Syracuse University (TRAC) has offered a series of reports on terrorism prosecutions in the federal courts.<sup>6</sup> Their data comes primarily from information gathered through Freedom of Information Act requests to the Executive Office for United States Attorneys (EOUSA), a division of the DoJ. Among the statistics they have analyzed are the number of cases referred to prosecutors by investigative agencies, whether or not they were acted upon, and the ultimate result.<sup>7</sup> A report issued in September 2009 specifically focused on inconsistencies between federal agencies in quantifying terrorism cases.<sup>8</sup>

Each of these reports provides essential information, yet leaves further questions yet to be answered. The Center on Law and Security has endeavored herein to provide a greater level of detail, from the civil liberties perspective as well as the security perspective, from a quantitative perspective as well as a qualitative one.

The Center anticipates that questions will remain, and hopes that the information herein will generate new avenues of inquiry. Chiefly, the Center hopes that this report will further the ongoing conversation by providing more specific and more detailed information than has been available until now.

<sup>1</sup> U.S. DEP'T. OF JUSTICE, COUNTERTERRORISM SECTION, COUNTERTERRORISM WHITE PAPER (2006), available at <http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf>.

<sup>2</sup> OFFICE OF THE ATT'Y GEN., U.S. DEP'T. OF JUSTICE, THE ACCOMPLISHMENTS OF THE U.S. DEP'T. OF JUSTICE: 2001-2009, available at <http://www.usdoj.gov/opa/documents/doj-accomplishments.pdf>.

<sup>3</sup> SERRIN TURNER & STEPHEN J. SCHULHOFER, BRENNAN CTR. FOR JUSTICE AT NYU SCHOOL OF LAW, THE SECRECY PROBLEM IN TERRORISM TRIALS (2005), available at <https://www.policyarchive.org/bitstream/handle/10207/8770/30The%20Secrecy%20Problem%20in%20Terrorism%20Trials.pdf>.

<sup>4</sup> AM. BAR ASS'N STANDING COMMITTEE ON LAW AND NAT'L SECURITY, NATIONAL STRATEGY FORUM, AND MCCORMICK/TRIBUNE FOUNDATION, DUE PROCESS AND TERRORISM: A POST-WORKSHOP REPORT (2007), available at [http://www.abanet.org/natsecurity/publications/due\\_process\\_and\\_aba\\_stcolns\\_nsf\\_mtf.pdf](http://www.abanet.org/natsecurity/publications/due_process_and_aba_stcolns_nsf_mtf.pdf); AM. BAR ASS'N STANDING COMMITTEE ON LAW AND NAT'L SECURITY, NATIONAL STRATEGY FORUM, AND MCCORMICK FOUNDATION, TRYING TERRORISTS IN ARTICLE III COURTS: CHALLENGES AND LESSONS LEARNED; A POST-WORKSHOP REPORT (2009), available at [http://www.abanet.org/natsecurity/trying\\_terrorists\\_artIII\\_report\\_final.pdf](http://www.abanet.org/natsecurity/trying_terrorists_artIII_report_final.pdf).

<sup>5</sup> RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS (2008), available at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>; RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS; 2009 UPDATE AND RECENT DEVELOPMENTS (2009), available at <http://www.humanrightsfirst.org/pdf/090723-LS-in-pursuit-justice-09-update.pdf>.

<sup>6</sup> TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, A SPECIAL TRAC REPORT: CRIMINAL ENFORCEMENT AGAINST TERRORISTS (2001), available at <http://trac.syr.edu/tracreports/terrorism/report011203.html>; TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, CRIMINAL ENFORCEMENT AGAINST TERRORISTS: A TRAC SPECIAL REPORT SUPPLEMENT (June 2002), available at <http://trac.syr.edu/tracreports/terrorism/supp.html>; TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, CRIMINAL ENFORCEMENT AGAINST TERRORISTS: A TRAC SPECIAL REPORT SUPPLEMENT (Sept. 2002), available at [http://trac.syr.edu/tracreports/terrorism/supp\\_apr.html](http://trac.syr.edu/tracreports/terrorism/supp_apr.html); TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, CRIMINAL ENFORCEMENT AGAINST TERRORISTS AND SPIES IN THE YEAR AFTER THE 9/11 ATTACKS (Feb. 2003), available at <http://trac.syr.edu/tracreports/terrorism/fy2002.html>; TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, CRIMINAL TERRORISM ENFORCEMENT SINCE THE 9/11/01 ATTACKS: A TRAC SPECIAL REPORT (Dec. 2003), available at <http://trac.syr.edu/tracreports/terrorism/report031208.html>; TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, CRIMINAL TERRORISM ENFORCEMENT IN THE UNITED STATES DURING THE FIVE YEARS SINCE THE 9/11/01 ATTACKS (2006), available at <http://trac.syr.edu/tracreports/terrorism/169/>; TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, TERRORISM ENFORCEMENT: INTERNATIONAL, DOMESTIC AND FINANCIAL (2007), available at <http://trac.syr.edu/tracreports/terrorism/177/>.

<sup>7</sup> See, e.g., TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, CRIMINAL TERRORISM ENFORCEMENT SINCE THE 9/11/01 ATTACKS: A TRAC SPECIAL REPORT (Dec. 2003), available at <http://trac.syr.edu/tracreports/terrorism/report031208.html>.

<sup>8</sup> TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, WHO IS A TERRORIST? GOVERNMENT FAILURE TO DEFINE TERRORISM UNDERMINES ENFORCEMENT, PUTS CIVIL LIBERTIES AT RISK (2009), available at <http://trac.syr.edu/tracreports/terrorism/215/>.

## Appendix: Table of Statutes, by Category *(for an explanation of categories, see p. 59.)*

### COMMERCIAL FRAUD, EMBEZZLEMENT, AND THEFT

7 U.S.C. § 2024	Agriculture -- Food stamp program: Violations and enforcement
18 U.S.C. § 471	Crimes and criminal procedure -- Crimes -- Counterfeiting and forgery: Obligations or securities of United States
18 U.S.C. § 473	Crimes and criminal procedure -- Crimes -- Counterfeiting and forgery: Dealing in counterfeit obligations or securities
18 U.S.C. § 513	Crimes and criminal procedure -- Crimes -- Counterfeiting and forgery: Securities of the States and private entities
18 U.S.C. § 542	Crimes and criminal procedure -- Crimes -- Customs: Entry of goods by means of false statements
18 U.S.C. § 545	Crimes and criminal procedure -- Crimes -- Customs: Smuggling goods into the United States
18 U.S.C. § 641	Crimes and criminal procedure -- Crimes -- Embezzlement and theft: Public money, property or records
18 U.S.C. § 659	Crimes and criminal procedure -- Crimes -- Embezzlement and theft: Interstate or foreign shipments by carrier; State prosecutions
18 U.S.C. § 1014	Crimes and criminal procedure -- Crimes -- Fraud and false statements: Loan and credit applications generally; renewals and discounts; crop insurance
18 U.S.C. § 1341	Crimes and criminal procedure -- Crimes -- Mail fraud and other fraud offenses: Frauds and swindles
18 U.S.C. § 1343	Crimes and criminal procedure -- Crimes -- Mail fraud and other fraud offenses: Fraud by wire, radio, or television
18 U.S.C. § 1344	Crimes and criminal procedure -- Crimes -- Mail fraud and other fraud offenses: Bank fraud
18 U.S.C. § 1347	Crimes and criminal procedure -- Crimes -- Mail fraud and other fraud offenses: Health care fraud
18 U.S.C. § 1349	Crimes and criminal procedure -- Crimes -- Mail fraud and other fraud offenses: Attempt and conspiracy
18 U.S.C. § 1365	Crimes and criminal procedure -- Crimes -- Malicious mischief: Tampering with consumer products
18 U.S.C. § 2314	Crimes and Criminal Procedure -- Crimes -- Stolen property: Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting
18 U.S.C. § 2315	Crimes and Criminal Procedure -- Crimes -- Stolen property: Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps
18 U.S.C. § 2320	Crimes and Criminal Procedure -- Crimes -- Stolen property: Trafficking in counterfeit goods or services
18 U.S.C. § 2342	Crimes and Criminal Procedure -- Crimes -- Trafficking in contraband cigarettes and smokeless tobacco: Unlawful acts
42 U.S.C. § 408	Public health and welfare -- Social Security Act -- Federal old age, survivors, and disability insurance benefits: Penalties
47 U.S.C. § 223	Telegraphs, telephones, and radiotelegraphs -- Wire or radio communication -- Common carriers -- Common carrier regulation: Obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications

### DRUG CRIMES

21 U.S.C. § 841	Food and Drugs -- Drug abuse prevention and control -- Control and enforcement -- Offenses and penalties: Prohibited acts A
21 U.S.C. § 844	Food and Drugs -- Drug abuse prevention and control -- Control and enforcement -- Offenses and penalties: Penalty for simple possession
21 U.S.C. § 846	Food and Drugs -- Drug abuse prevention and control -- Control and enforcement -- Offenses and penalties: Attempt and conspiracy
21 U.S.C. § 853	Food and Drugs -- Drug abuse prevention and control -- Control and enforcement -- Offenses and penalties: Criminal forfeitures
21 U.S.C. § 952	Food and Drugs -- Drug abuse prevention and control -- Import and export: Importation of controlled substances
21 U.S.C. § 959	Food and Drugs -- Drug abuse prevention and control -- Import and export: Possession, manufacture or distribution of controlled substance
21 U.S.C. § 960	Food and Drugs -- Drug abuse prevention and control -- Import and export: Prohibited acts A
21 U.S.C. § 963	Food and Drugs -- Drug abuse prevention and control -- Import and export: Attempt and conspiracy

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**FRAUD AND FALSE STATEMENTS**


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- 18 U.S.C. § 1001 Crimes and criminal procedure -- Crimes -- Fraud and false statements: Statements or entries generally
- 18 U.S.C. § 1028 Crimes and criminal procedure -- Crimes -- Fraud and false statements: Fraud and related activity in connection with identification documents, authentication features, and information
- 18 U.S.C. § 1029 Crimes and criminal procedure -- Crimes -- Fraud and false statements: Fraud and related activity in connection with access devices
- 18 U.S.C. § 1030 Crimes and criminal procedure -- Crimes -- Fraud and false statements: Fraud and related activity in connection with computers
- 26 U.S.C. § 7201 Internal Revenue Code -- Procedure and administration -- Crimes, other offenses, and forfeiture -- Crimes -- General provisions: Attempt to evade or defeat tax
- 26 U.S.C. § 7202 Internal Revenue Code -- Procedure and administration -- Crimes, other offenses, and forfeiture -- Crimes -- General provisions: Willful failure to collect or pay over tax
- 26 U.S.C. § 7203 Internal Revenue Code -- Procedure and administration -- Crimes, other offenses, and forfeiture -- Crimes -- General provisions: Willful failure to file return, supply information, or pay tax
- 26 U.S.C. § 7206 Internal Revenue Code -- Procedure and administration -- Crimes, other offenses, and forfeiture -- Crimes: General provisions: Fraud and false statements
- 26 U.S.C. § 7212 Internal Revenue Code -- Procedure and administration -- Crimes, other offenses, and forfeiture -- Crimes -- General provisions: Attempts to interfere with administration of Internal Revenue laws
- 31 U.S.C. § 5313 Money and finance -- Money -- Monetary transactions -- Records and reports on monetary instruments transactions: Reports on domestic coins and currency transactions
- 31 U.S.C. § 5316 Money and finance -- Money -- Monetary transactions -- Records and reports on monetary instruments transactions: Reports on exporting and importing monetary instruments
- 31 U.S.C. § 5324 Money and finance -- Money -- Monetary transactions -- Records and reports on monetary instruments transactions: Structuring transactions to evade reporting requirement prohibited
- 31 U.S.C. § 5332 Money and finance -- Money -- Monetary transactions -- Records and reports on monetary instruments transactions: Bulk cash smuggling into or out of the United States

**IMMIGRATION VIOLATIONS**


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- 8 U.S.C. § 1253 Aliens and nationality -- Immigration and nationality -- Immigration adjustment and change of status: Penalties related to removal
- 8 U.S.C. § 1305 Aliens and nationality -- Immigration and nationality -- Immigration -- Registration of aliens: Notices of change of address
- 8 U.S.C. § 1306 Aliens and nationality -- Immigration and nationality -- Immigration -- Registration of aliens: Penalties
- 8 U.S.C. § 1324 Aliens and nationality -- Immigration and nationality -- Immigration -- General penalty provisions: Bringing in and harboring certain aliens
- 8 U.S.C. § 1325 Aliens and nationality -- Immigration and nationality -- Immigration -- General penalty provisions: Improper entry by an alien
- 8 U.S.C. § 1326 Aliens and nationality -- Immigration and nationality -- Immigration -- General penalty provisions: Reentry of removed aliens
- 18 U.S.C. § 911 Crimes and criminal procedure -- Crimes -- False personation: Citizen of the United States
- 18 U.S.C. § 1015 Crimes and criminal procedure -- Crimes -- Fraud and false statements: Naturalization, citizenship or alien registry
- 18 U.S.C. § 1425 Crimes and criminal procedure -- Crimes -- Nationality and citizenship: Procurement of citizenship or naturalization unlawfully
- 18 U.S.C. § 1542 Crimes and criminal procedure -- Crimes -- Passports and visas: False statement in application and use of passport
- 18 U.S.C. § 1543 Crimes and criminal procedure -- Crimes -- Passports and visas: Forgery or false use of passport
- 18 U.S.C. § 1544 Crimes and criminal procedure -- Crimes -- Passports and visas: Misuse of passport
- 18 U.S.C. § 1546 Crimes and criminal procedure -- Crimes -- Passports and visas: Fraud and misuse of visas, permits, and other documents



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**NATIONAL SECURITY VIOLATIONS AND HOSTAGE TAKING**


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18 U.S.C. § 32	Crimes and criminal procedure -- Crimes -- Aircraft and motor vehicles: Destruction of aircraft or aircraft facilities
18 U.S.C. § 43	Crimes and criminal procedure -- Crimes -- Animals, birds, fish, and plants: Force, violence, and threats involving animal enterprises
18 U.S.C. § 175	Crimes and criminal procedure -- Crimes -- Biological weapons: Prohibitions with respect to biological weapons
18 U.S.C. § 229	Crimes and criminal procedure -- Crimes -- Chemical weapons: Prohibited activities
18 U.S.C. § 793	Crimes and criminal procedure -- Crimes -- Espionage and censorship: Gathering, transmitting, or losing defense information
18 U.S.C. § 841	Crimes and criminal procedure -- Crimes -- Importation, manufacture, distribution and storage of explosive materials: Definitions
18 U.S.C. § 842	Crimes and criminal procedure -- Crimes -- Importation, manufacture, distribution and storage of explosive materials: Unlawful acts
18 U.S.C. § 844	Crimes and criminal procedure -- Crimes -- Importation, manufacture, distribution and storage of explosive materials: Penalties
18 U.S.C. § 871	Crimes and criminal procedure -- Crimes -- Extortion and threats: Threats against President and successors to the presidency
18 U.S.C. § 951	Crimes and criminal procedure -- Crimes -- Foreign relations: Agents of foreign governments
18 U.S.C. § 956	Crimes and criminal procedure -- Crimes -- Foreign relations: Conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country
18 U.S.C. § 960	Crimes and criminal procedure -- Crimes -- Foreign relations: Expedition against friendly nation
18 U.S.C. § 1114	Crimes and criminal procedure -- Crimes -- Homicide: Protection of officers and employees of the United States
18 U.S.C. § 1203	Crimes and criminal procedure -- Crimes -- Kidnapping: Hostage taking
18 U.S.C. § 1751	Crimes and criminal procedure -- Crimes -- Presidential and presidential staff assassination, kidnapping, and assault: Penalties
18 U.S.C. § 2155	Crimes and criminal procedure -- Crimes -- Sabotage: Destruction of national-defense materials, national-defense premises, or national-defense utilities
18 U.S.C. § 2381	Crimes and criminal procedure -- Crimes -- Treason, sedition, and subversive activities: Treason
18 U.S.C. § 2383	Crimes and criminal procedure -- Crimes -- Treason, sedition, and subversive activities: Rebellion or insurrection
18 U.S.C. § 2384	Crimes and criminal procedure -- Crimes -- Treason, sedition, and subversive activities: Seditious conspiracy
22 U.S.C. § 2778	Foreign relations and intercourse -- Arms export control -- Military export controls: Control of arms exports and imports
49 U.S.C. § 46306	Transportation -- Aviation programs -- Air commerce and safety -- Enforcement and penalties -- Penalties: Registration violations involving aircraft not providing air transportation
49 U.S.C. § 46314	Transportation -- Aviation programs -- Air commerce and safety -- Enforcement and penalties -- Penalties: Entering aircraft or airport area in violation of security requirements
49 U.S.C. § 46502	Transportation -- Aviation programs -- Air commerce and safety -- Enforcement and penalties -- Special aircraft jurisdiction of the U.S.: Aircraft piracy
49 U.S.C. § 46504	Transportation -- Aviation programs -- Air commerce and safety -- Enforcement and penalties -- Special aircraft jurisdiction of the U.S.: Interference with flight crew members and attendants
49 U.S.C. § 46505	Transportation -- Aviation programs -- Air commerce and safety -- Enforcement and penalties -- Special aircraft jurisdiction of the U.S.: Carrying a weapon or explosive on an aircraft
49 U.S.C. § 46506	Transportation -- Aviation programs -- Air commerce and safety -- Enforcement and penalties -- Special aircraft jurisdiction of the U.S.: Application of certain criminal laws to acts on aircraft
50 U.S.C. § 1702	War and national defense -- International emergency economic powers: Presidential authorities
50 U.S.C. § 1705	War and national defense -- International emergency economic powers: Penalties

**OBSTRUCTION**

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18 U.S.C. § 4	Crimes and criminal procedure -- Crimes -- General provisions: Misprision of felony
18 U.S.C. § 201	Crimes and criminal procedure -- Crimes -- Bribery, graft, and conflicts of interest: Bribery of public officials and witnesses
18 U.S.C. § 401	Crimes and criminal procedure -- Crimes -- Contempts: Power of court
18 U.S.C. § 1038	Crimes and criminal procedure -- Crimes -- Fraud and false statements: False information and hoaxes
18 U.S.C. § 1073	Crimes and criminal procedure -- Crimes -- Fugitives from justice: Flight to avoid prosecution or giving testimony
18 U.S.C. § 1503	Crimes and criminal procedure -- Crimes -- Obstruction of justice: Influencing or injuring officer or juror generally
18 U.S.C. § 1505	Crimes and criminal procedure -- Crimes -- Obstruction of justice: Obstruction of proceedings before departments, agencies, and committees
18 U.S.C. § 1512	Crimes and criminal procedure -- Crimes -- Obstruction of justice: Tampering with a witness, victim, or an informant
18 U.S.C. § 1621	Crimes and criminal procedure -- Crimes -- Perjury: Perjury generally
18 U.S.C. § 1623	Crimes and criminal procedure -- Crimes -- Perjury: False declarations before grand jury or court

**OTHER**

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18 U.S.C. § 2	Crimes and criminal procedure -- Crimes -- General provisions: Principals
18 U.S.C. § 371	Crimes and criminal procedure -- Crimes -- Conspiracy: Conspiracy to commit offense or to defraud United States
18 U.S.C. § 876	Crimes and criminal procedure -- Crimes -- Extortion and threats: Mailing threatening communications
18 U.S.C. § 981	Crimes and criminal procedure -- Crimes -- Forfeiture: Civil forfeiture
18 U.S.C. § 982	Crimes and criminal procedure -- Crimes -- Forfeiture: Criminal forfeiture
18 U.S.C. § 1716	Crimes and criminal procedure -- Crimes -- Postal service: Injurious articles as nonmailable
18 U.S.C. § 2252	Crimes and criminal procedure -- Crimes -- Sexual exploitation and other abuse of children: Certain activities relating to material involving the sexual exploitation of minors
18 U.S.C. § 3238	Crimes and criminal procedure -- Criminal procedure -- Jurisdiction and venue: Offenses not committed in any district
22 U.S.C. § 287C	Foreign relations and intercourse -- International bureaus, congresses, etc. -- United Nations educational, scientific, and cultural organization: Economic and communication sanctions pursuant to United Nations Security Council Resolution

**RACKETEERING**

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18 U.S.C. § 1951	Crimes and criminal procedure -- Crimes -- Racketeering: Interference with commerce by threats or violence
18 U.S.C. § 1952	Crimes and criminal procedure -- Crimes -- Racketeering: Interstate and foreign travel or transportation in aid of racketeering enterprises
18 U.S.C. § 1956	Crimes and criminal procedure -- Crimes -- Racketeering: Laundering of monetary instruments
18 U.S.C. § 1957	Crimes and criminal procedure -- Crimes -- Racketeering: Engaging in monetary transactions in property derived from specified unlawful activity
18 U.S.C. § 1960	Crimes and criminal procedure -- Crimes -- Racketeering: Prohibition of unlicensed money transmitting businesses
18 U.S.C. § 1962	Crimes and criminal procedure -- Crimes -- Racketeer influenced and corrupt organizations: Prohibited activities

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**TERRORISM**


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- 18 U.S.C. § 1992 Crimes and criminal procedure -- Crimes -- Railroad carriers and mass transportation systems on land, on water, or through the air: Terrorist attacks and other violence against railroad carriers and against mass transportation systems on land, on water, or through the air
- 18 U.S.C. § 1993 Crimes and criminal procedure -- Crimes -- Railroad carriers and mass transportation systems on land, on water, or through the air: Terrorist attacks and other acts of violence against mass transportation systems (repealed)
- 18 U.S.C. § 2332 Crimes and criminal procedure -- Crimes -- Terrorism: Criminal penalties
- 18 U.S.C. § 2332a Crimes and criminal procedure -- Crimes -- Terrorism: Use of weapons of mass destruction
- 18 U.S.C. § 2332b Crimes and criminal procedure -- Crimes -- Terrorism: Acts of terrorism transcending national boundaries
- 18 U.S.C. § 2332f Crimes and criminal procedure -- Crimes -- Terrorism: Bombings of places of public use, government facilities, public transportation systems and infrastructure facilities
- 18 U.S.C. § 2332g Crimes and criminal procedure -- Crimes -- Terrorism: Missile systems designed to destroy aircraft
- 18 U.S.C. § 2339 Crimes and criminal procedure -- Crimes -- Terrorism: Harboring or concealing terrorists
- 18 U.S.C. § 2339A Crimes and criminal procedure -- Crimes -- Terrorism: Providing material support to terrorists
- 18 U.S.C. § 2339B Crimes and criminal procedure -- Crimes -- Terrorism: Providing material support or resources to designated foreign terrorist organizations
- 18 U.S.C. § 2339C Crimes and criminal procedure -- Crimes -- Terrorism: Prohibitions against the financing of terrorism
- 18 U.S.C. § 2339D Crimes and criminal procedure -- Crimes -- Terrorism: Receiving military-type training from a foreign terrorist organization

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**VIOLENT CRIMES**


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- 18 U.S.C. § 37 Crimes and criminal procedure -- Crimes -- Aircraft and motor vehicles: Violence at international airports
- 18 U.S.C. § 111 Crimes and criminal procedure -- Crimes -- Assault: Assaulting, resisting, or impeding certain officers or employees
- 18 U.S.C. § 373 Crimes and criminal procedure -- Crimes -- Conspiracy: Solicitation to commit a crime of violence
- 18 U.S.C. § 751 Crimes and criminal procedure -- Crimes -- Escape and rescue: Prisoners in custody of institution or officer
- 18 U.S.C. § 1111 Crimes and criminal procedure -- Crimes -- Homicide: Murder
- 18 U.S.C. § 1117 Crimes and criminal procedure -- Crimes -- Homicide: Conspiracy to commit murder
- 18 U.S.C. § 2261 Crimes and criminal procedure -- Crimes -- Domestic violence and stalking: Interstate domestic violence

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**WEAPONS VIOLATIONS**


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- 18 U.S.C. § 922 Crimes and criminal procedure -- Crimes -- Firearms: Unlawful acts
- 18 U.S.C. § 924 Crimes and criminal procedure -- Crimes -- Firearms: Penalties
- 26 U.S.C. § 5841 Internal Revenue Code -- Alcohol, tobacco, and certain other excise taxes -- Machine guns, destructive devices, and certain other firearms -- General Provisions and Exemptions -- General Provisions: Registration of firearms
- 26 U.S.C. § 5861 Internal Revenue Code -- Alcohol, tobacco, and certain other excise taxes -- Machine guns, destructive devices, and certain other firearms -- Prohibited acts: Prohibited acts

