Notes on a Terrorism Trial – Preventive Prosecution, “Material Support” and The Role of The Judge after *United States v. Mehanna*

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**Abstract**

The terrorism trial of Tarek Mehanna, primarily for charges of providing “material support” to terrorism, presented elements of a preventive prosecution as well as the problem of applying Holder v. Humanitarian Law Project (HLP) to terrorism-related speech. This Article examines both aspects of the case, with emphasis on the central role of the trial judge. As criminal activity becomes more amorphous, the jury looks to the judge for guidance. His rulings on potentially prejudicial evidence which may show just how much of a “terrorist” the defendant is are the key aspect of this guidance. If the defendant is found guilty, the sentence imposed by the judge can have a profound impact on future preventive prosecutions. Particularly important is the judge’s handling of the Sentencing Guidelines’ “Terrorism Enhancement.”

As for speech issues, there is enough ambiguity in HLP to let lower courts formulate and apply its test differently. HLP emphasizes co-ordination with a foreign terrorist organization before speech can be criminalized. There is now movement toward a concept of one-way coordination that can turn speech prosecutions into a form of general prevention of potential terrorists. All of these issues were central to Mehanna. The Article’s analysis of how the trial court handled them is meant to increase understanding of them, and to highlight the central role of the judge.

I. Introduction – The Concept of Preventive Prosecution

As Jack Goldsmith demonstrates convincingly in his recent book, “Presidential Power and Constraint,”¹ there is a remarkable degree of continuity between the anti-terrorism policies of the Bush administration and that of its
successor.\textsuperscript{2} Much to the chagrin of many of his supporters, President Obama has built on the efforts and policies of President Bush, whatever the former may have said during the 2008 campaign.\textsuperscript{3} The headline-grabbing stories tell of such marquee programs as drone strikes and cyber-warfare.\textsuperscript{4} In this Article, I deal with another, less publicized but equally integral, aspect of the war on terrorism: the tactic of preventive prosecution of potential terrorists, with principal reliance on the criminal statutes forbidding the provision of “material support” to terrorists and terrorist organizations.\textsuperscript{5} According to then-Attorney General Alberto Gonzalez, “[p]revention is the goal of all goals when it comes to terrorism because we simply cannot and will not wait for these particular crimes to occur before taking action.”\textsuperscript{6} The Obama administration goes to great lengths not to appear to have adopted Bush-era policies, but when it comes to preventive prosecution, the difference is hard to find. We are likely to see more of such cases. These controversial prosecutions take place in two forums: the courts of law; and, the court of public opinion. They are high profile, and touch raw societal nerves regarding terrorism. They also raise difficult doctrinal issues.

Relying primarily on 18 U.S.C. §2339A and §2339B – two statutes criminalizing “material support” to terrorists and terrorist organizations,\textsuperscript{7} the government has moved further and further back in the chain of conduct to punish
defendants. The criminal law has, of course, long recognized forms of inchoate conduct such as conspiracy and attempt. Indeed, the terrorism offenses build on these concepts. The principal critique of this endeavor in the terrorism context is that it sometimes reaches beyond potential acts to identify and incapacitate persons who might commit them. This may seem more of a spectrum, than a clear cut line, but the problem is that at one end of the spectrum will be found people who have not done very much. The offenses risk becoming a form of status crime. Moreover, the status will often be ascertained through an individual’s associations and beliefs, thus triggering First Amendment concerns and accusations of a new “McCarthyism.” Arab Americans and Muslim Americans feel that they are singled out because of their religion and political beliefs.

My sense is that the legal system is still feeling its way in the “war on terror,” and that each new answer generates additional questions. In this Article, I address three such questions not widely discussed in the literature, and do so through the lens of a particular trial: the 2011 prosecution of Tarek Mehanna, primarily for material support and related crimes. Rather than look backward through the perspective of appellate decisions, my goal is to learn the lessons of preventive prosecutions from extensive analysis of what actually happened in
one. Mehanna had allegedly sought terrorist training during a brief trip to Yemen, and subsequently engaged in extensive internet activities, particularly translations, that supported Jihad generally, and al-Qaeda in particular. The first question I address is how a trial court should apply the test set forth in *Holder v. Humanitarian Law Project (HLP)*\(^{14}\) for criminalizing advocacy of terrorism. In that case the Supreme Court enunciated a test based on the relationship between the defendant and a foreign terrorist organization—focusing on whether “material support [was] coordinated with or under the direction of a designated foreign terrorist organization.”\(^{15}\) Much of the “support” with which Mehanna was charged took the form of internet activity such as translations, postings, and chats. The trial judge faced the difficult and somewhat novel task of applying *HLP*’s seemingly straightforward test to Mehanna’s amorphous connections with al-Qaeda.

The second question is how to reconcile the command of Federal Rule of Evidence 403\(^{16}\) that the probative value of evidence should not be substantially outweighed by its prejudicial nature with the prejudicial nature of the evidence that is likely to be offered in a material support trial. Such trials inevitably tilt toward the question of what sort of person the defendant is. For example, has he shown support for Jihad in the past? The prosecution will argue vigorously that
such evidence gives context, and shows the defendant’s state of mind.\(^{17}\) In \textit{Mehanna} the government introduced extensive evidence from his computer, praising Osama bin Laden and other “martyrs,”\(^{18}\) and referring to the mutilation of American soldiers.\(^{19}\) Jurors saw a photo of the defendant with friends in a celebratory posture in front of Ground Zero.\(^{20}\)

The Court of Appeals for the Fifth Circuit suggested, in the following statement, a somewhat dismissive attitude toward the problem: “Because this is a case about support for terrorists, it is inescapable, we believe, that there would be some evidence about violence and terrorist activity.”\(^{21}\) Still, Federal Rule of Evidence 403 cautions against \textit{substantial} prejudice.\(^{22}\) Mehanna’s trial featured a great deal of such evidence, forcing the judge to grapple with the question of when substantiality is reached.

The third question is the sentence which a convicted defendant should receive. The defense requested 63-78 months. The United States Probation Department – the entity which plays the key role in most sentencing decisions – filed a report recommending a life sentence. The government recommended 25 years. The trial judge imposed a sentence of seventeen and a half years. One might ask why the disparity, even recognizing the fact that sentences can vary
widely under the advisory Guidelines system now in effect. A close look at the *Mehanna* trial provides the answer. The question before the judge was the role that the so-called “Terrorism Enhancement” in the Guidelines should play in sentencing the defendant. The Enhancement automatically increases both the defendant’s “criminal history” and his “offense level.” These are the two key variables in determining a sentence. The extension provided by the Terrorism Enhancement guarantees a long sentence, life in many cases. The judge might have engaged in the difficult inquiry whether Mehanna met the technical requirements for the type of terrorism crime the Enhancement requires.

Instead, he chose to disregard the Enhancement altogether, characterizing it as a “blunt instrument.”

Once again, *Mehanna* presents a problem that will recur in preventive prosecutions. Congress and the United States Sentencing Commission apparently wanted a blunt instrument on the theory that all terrorism should be treated severely. However, judges, as was the case in *Mehanna*, may question whether some types of “terrorism” are different in kind from others. Indeed, the Terrorism Enhancement issue is part of a larger, continuing controversy about the force of the Guidelines – “advisory” rather than binding since the Supreme
Court’s *Booker* decision – and the extent of judicial discretion to depart from or ignore them.\(^{29}\)

Finally, the Article looks beyond these three questions to consider two additional issues that prosecutions like Mehanna’s raise. The first is the nature of law enforcement techniques that the preventive paradigm inevitably generates. As noted, the concept of prevention should best be viewed as a spectrum. At one end is a focus on specific crimes leading to efforts to identify individuals likely to commit them or already seeking to do so. These efforts are not limited to conventional means such as surveillance and monitoring of communications. According to a recent report, “[s]ince 2009, the federal government has expanded its use of aggressive and often controversial investigations, whereby a confidential enforcement or undercover officer makes contact with a potential terror suspect and assists him in the planning of an attempted terror crime.”\(^{30}\) The resultant prosecutions often lead to cries of entrapment, although “the defense has never been successful in a terrorism prosecution.”\(^{31}\) These efforts have a potentially serious effect on relationships between the government and target communities.
At the other end of the prevention spectrum is a focus on identifying potential terrorists at an early stage, without necessarily any reference to a particular act they might commit. Implementing this view of the preventive paradigm leads to further questions about how to enforce it. Here too, trolling for terrorists can jeopardize relations between law enforcement and the relevant communities.\(^3\) Furthermore, once a potential terrorist has been identified, how should the government proceed? Intensive, ongoing surveillance is an obvious course of action, although it raises questions of individual liberties. Far more problematic is the notion of incapacitation through prosecution.\(^3\) Mehanna was convicted, although an appeal is pending, but his prosecution seems to represent an example of pushing the preventive envelope. How much further the government will go remains to be seen.

Mehanna’s case thus leads to a broader issue: should the basic concept of preventive prosecutions be rethought, and what is the role of the trial judge in such cases? They have generated substantial controversy. As Professor Chesney has stated in the context of 18 U.S.C. §2339 A, “prosecutions taking place at [the] outer boundaries tend to present an exacerbated version of the tensions inherent in anticipatory prosecutions.”\(^3\) The Supreme Court’s decision in HLP seems a clear validation of the importance of prevention through such techniques as the
material support concept. Still, part of the problem with early intervention under preventive precepts is that one cannot always tell if it was warranted.\textsuperscript{35} Take Mehanna. If on appeal his internet work is viewed as protected speech under the HLP test, the government is left essentially with an unsuccessful apparent attempt to seek terrorist training abroad, and a long history of pro-Jihadist statements. Whether this makes him a criminal is open to debate. This Article proceeds on the assumption that prosecutions at this end of the spectrum are likely to continue. Indeed, they might increase if home-grown terrorism is perceived as a serious threat. Thus the role of the trial judge assumes considerable importance in such cases. His rulings, instructions, and decisions on a host of issues will determine how they proceed, and perhaps whether they can be brought at all.

Following this introduction, Part II takes a close look at the Mehanna trial. Reviewing the record in detail gives a good sense of the doctrinal and practical issues that arise in a preventive prosecution. Part III focuses primarily on the application of the HLP test to Mehanna’s internet activities. It also considers the future relationship between 18 U.S.C. §2339A and §2339B. Part IV considers the possibility of prejudicial evidence tainting the jury’s attitude toward the defendant in a preventive prosecution. The risk is real, but perhaps inevitable since such prosecutions focus heavily on the defendant’s person – as well as his
acts – and thus invite examination into his attitudes towards Jihad and terrorism generally. Part V examines the difficult sentencing issues that arise in these cases. The Guidelines Terrorism Enhancement is an effort to capture the particular severity that society attaches to terrorism crimes, but it may lead to a “one size fits all” critique, and to actions such as that of the Mehanna trial judge, who simply refused to consider it. Part VI turns to two of the issues highlighted above: the impact on target communities of the investigative techniques that precede such prosecutions; and, the central role of the trial judge in overseeing them. As noted, these techniques and the resultant prosecutions have the potential to create a backfire effect. Yet no clear alternative seems to have substantial support. There are, of course, proposals for change. They range from creating special “terrorist courts” to reforms of the current approach. In the end, the present approach may represent the only feasible one, particularly in view of the government’s apparent preference for use of the regular criminal justice system in most terrorism cases. In a sense, trial judges in these terrorism cases play the same crucial role that they played in the “institutional” litigation highlighted in earlier academic discussions. Part VI concludes with an evaluation of how the trial judge in Mehanna discharged this function.
As Mehanna’s trial shows, a crucial variable is the manner in which trial judges conduct the proceedings in preventive prosecutions. These prosecutions are high profile events in which the judge’s actions send clear messages both to the government and to different segments of the broader community. Many people will applaud the fact of prosecution, not be concerned with evidentiary “technicalities,” and, at sentencing, want the proverbial “book” thrown at the defendant. Other individuals may consider themselves members of a target community. They want trials that avoid stereotyping and that yield sentences that do not reflect a societal animus towards the group of which they are apart. The trial judge’s actions in an individual trial can have enormous significance. In turn, the cumulative effect of preventive trials could be a central component of the “war on terror.” Thus, it is particularly important to look closely at an actual trial, and to learn the lessons of *Mehanna*.

II. The Mehanna Trial – An Overview

A) Overview and Statutory Background

The trial of Tarek Mehanna was long – 35 days – and contentious. The defense moved for a mistrial on numerous occasions. The very fact of prosecution, and the result – a guilty verdict on all counts charged, resulting in
imposition of a seventeen and one-half year sentence – have been intensely controversial. The case has been cited as an example of the “Islamophobia that still grips the US...,” 39 and “stink[ing] of a lynch-mob mentality.” 40 It has also been cited as an example of juries’ inherent bias in terrorism cases. 41 Writing in the New York Times, a witness for the (unsuccessful) defense lambasted the prosecution as “a frightening and unnecessary attempt to expand the kinds of religious and political speech that government can criminalize.” 42

The Boston Globe seemed to want to have things both ways. It named the United States Attorney for Massachusetts “Bostonian of the Year.” 43 The glowing article highlighted the fact that “Ortiz [the United States Attorney] won a noteworthy case against Tarek Mehanna of Sudbury, convicted of supporting al-Qaeda and plotting to kill U.S. soldiers in Iraq.” 44 Yet shortly thereafter a Globe political columnist wrote that the verdict and sentence “should be lamented...” 45 The columnist quoted a “leading civil libertarian” to the effect that “I could make a translation of ‘Mein Kampf,’ and it would not mean that I should be arrested for having urged the killing of Jews and Gypsies.” 46 The columnist argued that “[a]fter Mehanna, it might.” 47
Many of the criticisms choose to downplay and ignore, or may even reflect an unawareness of, the fact that the government’s complex case rested on several statutes and theories.\textsuperscript{48} In this part, I will concentrate on describing what I regard as the core of the trial: the evidence supporting conviction under two key material support statutes – 18 U.S.C. §2339A and §2339B. Thus it is necessary to analyze in depth the doctrinal problems under these statutes which \textit{Mehanna} raises.\textsuperscript{49}

Both statutes penalize providing material support, a term which is defined broadly to include such matters as “any property, tangible or intangible, or service...financial services...personnel (one or more individuals who may be or include oneself), and transportation...”\textsuperscript{50} §2339A – “Providing Material Support to Terrorists” – criminalizes providing support “knowing or intending that it is to be used in preparation for, or in carrying out” a number of specified crimes such as killing, destruction of property, etc. or “in preparation for, or in carrying out, the concealment of an escape from the commission of such an act...”\textsuperscript{51} The scope of §2339A appears broad, given the large number of predicate offenses, but the statute also appears to be constrained by the presence of some form of \textit{mens rea} requirement.\textsuperscript{52} §2339B, on the other hand, is not tied to any specified offense, but to the knowing provision of material support to a “foreign terrorist
organization.”\textsuperscript{53} The organization must be one that has been so designated by the Secretary of State pursuant to a separate statutory procedure,\textsuperscript{54} although the defendant need not know about this designation if he knows that the organization engages in “terrorist activity” or “terrorism.”\textsuperscript{55} Thus, in summarizing the statutory scheme at play in \textit{Mehanna}, it can be said that §2339A focuses on links between an individual and specified \textit{crimes}, while §2339B focuses on links between an individual and specified \textit{organizations}.\textsuperscript{56}

What of Mehanna and his possible provision of material support? The government argued that two separate courses of conduct satisfied the statutes.\textsuperscript{57} The first was a trip to Yemen in February, 2004 to seek terrorist training. The government contended that this was the agreed upon purpose between Mehanna and two friends, thus constituting a conspiracy.\textsuperscript{58} The group did not find any terrorist training camps, thus receiving no training, and Mehanna returned within two weeks. Nonetheless, the government argued that the event could be fit under both statutes. As for §2339A, what took place was at least a conspiracy or attempt to furnish personnel (included in the definition of material support\textsuperscript{59}) aimed at the ultimate commission of two of the predicate crimes: killing, etc. abroad,\textsuperscript{60} and killing Americans abroad. The defendants would use this training to commit these down the road crimes. The fact that they did not
actually receive the training did not nullify the reasons why they sought it.

§2339B could be satisfied as well if they planned to make themselves available to al-Qaeda. Of course, if the prosecution could not prove that Mehanna and friends went to Yemen for training in the first place, both statutory arguments would presumably fail for lack of *mens rea*. The Yemen charge – whatever its merits and doctrinal problems – is simply not a matter of speech at all.

The second course of conduct charged is all about speech, however: mainly whether Mehanna’s activities in translating and disseminating pro-Jihadist materials were political speech protected by the First Amendment. After returning from the failed Yemen trip, Mehanna, according to the government, sought to advance the cause of Jihad through proclaiming its message. He did this primarily by using the internet, drawing on his computer skills and knowledge of Arabic. Thus, for example, he translated Jihadist materials, and posted them on a website that advocated this position.

On the surface, both material support statutes are satisfied. The defendant is making available a resource as defined in the statute-whether viewed as “training,” “expert advice or assistance,” or “personnel.” He could be seen as making it available under §2339A either to commit the crimes himself, or to
further the cause of those who would ultimately commit the crimes, or, under §2339B to a foreign terrorist organization – in this case al-Qaeda, an organization that the defendant apparently wished to help.63

At this point, however, the First Amendment enters with full force, since speech in praise of terrorism or a terrorist organization seems clearly political speech that poses no danger of imminent action.64 The Supreme Court wrestled with the problem of speech as material support in the 2010 case of Holder v. Humanitarian Law Project (HLP).65 The subtleties of HLP are dealt with in the next part.66 For present purposes it is enough to note that the Court attempted to draw the line between protected and unprotected speech by declaring that the latter could be prosecuted if done in coordination with or under the direction of a foreign terrorist organization.67 Applying the HLP test narrows the inquiry considerably, as well as shifting its focus by asking not whether the defendant engaged in presumably protected speech, but by focusing on the relationship between the defendant (and his speech) and a foreign terrorist organization. The criticisms of Mehanna as criminalizing free speech such as translations of ‘Mein Kampf’ or advocacy of unpopular causes look like rearguard attacks on HLP – if not unawareness of its holding. It may be that critics of HLP are so entrenched in their opposition to the case that they not only miss the fact the Supreme Court
drew a line in a good faith attempt to reconcile the First Amendment with the unique demands of counter-terrorism, but also that the line has teeth. Meeting the HLP test was perhaps the prosecution’s biggest hurdle in *Mehanna*.

**B) The Trial Itself**

This sub-part examines the evidence introduced, mainly that which supported the prosecution’s theory that the two courses of conduct described above each constituted material support. Separate consideration will be given to the extensive, more general evidence of Mehanna’s support for Jihad. Part IV examines the question whether this evidence, including its cumulative nature, constituted prejudice in violation of Federal Rule of Evidence 403 to the point that a reversal is warranted. For the moment, I wish mainly to outline this evidence, while tentatively raising the question whether the three distinct groups of evidence – Yemen, the internet, general sympathies – could have had a mutually reinforcing effect. Could it be the case, for example, that the jury was not completely satisfied that the government’s specific case on the trip to Yemen as material support met the standard of “beyond a reasonable doubt,” but that the other two groups of evidence pushed that count over the line?

1. Yemen.
The trip to Yemen seems the most straightforward. The prosecution contended that Mehanna and two friends sought terrorist training, examined the possibilities, chose Yemen as the best location, and went there as the best possibility, but were unable to find any camps. One of the co-conspirators – Kareem Abuzahra – gave extensive testimony on the events leading up to and culminating in the trip. Although he returned shortly after arriving, his testimony bore out the prosecution’s theory of the purpose of the trip. In particular, Abuzahra made the key point that the conspirators agreed that they would use as a cover story the contention that the trip was a search for schools to study Islamic theology and the Arabic language.

Unfortunately for the prosecution, Abuzahra was a less than ideal witness. He testified under a grant of immunity, always a fertile ground for cross-examination. Abuzahra admitted that he practiced lying, and answered yes to the following question: “If you did not believe that it was in your best interest to tell the truth to the FBI, you would lie, right?” Defense counsel did an excellent job of portraying him as an inveterate liar who would distort the truth to obtain a benefit.
However, the prosecution had other witnesses who testified, although in less complete fashion, that Mehanna went to Yemen to find a terrorist training camp. There was also testimony that after returning from Yemen, Mehanna admitted failure to find what he sought. The prosecution also introduced a letter to a prospective bride who had expressed strong support for Jihad. Mehanna’s response stated, in part, “just so you are aware of how serious I am...know that a short while back I went for an interview and was rejected by that company and sent back because I had no references to vouch for me and they don’t just hire anyone off the street.” In sum, the prosecution put forth evidence that, if believed, supported its view of the trip to Yemen.

2) The “speech” material

Mehanna was a prolific user of the internet, taking advantage of his computer skills and his knowledge of Arabic. He translated documents, and posted them, and communicated arguably pro-Jihadist sentiments to his friends via email. The material support theory runs something like this: terrorist groups such as al-Qaeda need and use propaganda. Disseminating Jihadist documents and views helps spread the word. It can also serve as a form of recruitment. Mehanna thus potentially violated §2339B by rendering support to a foreign
terrorist organization. His actions could be viewed as meeting the statutory definition of material support as “service,” “personnel,” or “expert advice or assistance” (at least in the case of the translations). The same activities could also be viewed as a violation of §2339A. The “support” (to unspecified terrorists) could ultimately lead to crimes such as killing, etc. abroad and killing Americans. The §2339A counts specifically name these crimes and include the speech – as well as the attempt to acquire training – as criminal activity that constitutes support.80

The government faced two major problems in arguing that this aspect of Mehanna’s activities – as opposed to the trip to Yemen – was illegal material support. The first was the question whether what he “said” was any form of support to any terrorists, organized or not. An apt illustration is the contrasting views of the document “39 Ways to Serve and Participate in Jihad,” a document which Mehanna had translated. The prosecution’s expert described it as an “influential” training manual in the following terms:

It is one of the most well-known training manuals that are out there, instructional guides for individuals that are self-radicalizing or self-recruiting to follow in order to get an idea of what they can do to help support al Qa’ida’s mission. It’s an official document produced by al Qa’ida. It’s not just produced by some random person.

This is Esa al-Awshin, the—
He’s—not only is he an official leader of al Qa’ida, but, more importantly, he’s essentially the leader of their media wing, or was the leader of their media wing before his demise.81

On the other hand, defense experts ridiculed the notion that “39 Ways” is a training manual.82 The problem for the prosecution is that the “Ways” run the gamut from “Have Enmity Toward the Disbelievers” to “Learn to Swim and Ride Horses.”83 It is, of course, possible that the jury was not swayed by “39 Ways” but found enough exhortation to Jihad in Mehanna’s other public utterances to find “material support.”84

The government’s second problem stems from the Supreme Court’s HLP decision.85 In the context of §2339B, the Court held that normally protected speech could be prosecuted as material support only if coordinated with or under the direction of a designated foreign terrorist organization. In Part III, I examine how this test, or a somewhat less burdensome one that can be derived from the Court’s opinion, might apply to Mehanna.86 Here I will focus on the evidence attempting to satisfy the test in its relatively strict form. The government relied heavily on Mehanna’s work for the British Jihadist website Tibyan Publications, on which he served at one point as a moderator. The government expert testified that there was a close relationship between Tibyan and al-Qaeda.87 His testimony as to a possible Tibyan-based relationship between Mehanna and al-Qaeda was at
best indirect. He did, however, note the importance to al-Qaeda of individuals with skills like the defendant’s and the utility to al-Qaeda of coordinating propagandists through online networking.

The government’s best evidence on this issue was an apparent request from al-Qaeda to Tibyan for a particular translation, with the suggestion that Mehanna do the translation. However, there is no indication that he ever did so, although there was other testimony about his Tibyan connection and references by the website to his work. The defendant also seemed to think of himself as a form of media wing of al-Qaeda. Still, if the HLP test is to be strictly applied, this aspect of the government’s case seems its weakest.

3) The Jihadist evidence

Much of the evidence presented related more or less directly to the two courses of conduct alleged and their culpability under the material support statutes. However, a large portion of the trial was devoted to the presentation by the prosecution of what might be considered a third category of evidence: examples of Mehanna’s Jihadist sympathies. The prosecution told the jury at the outset that:
You’re going to see, and you’re going to hear, a lot of the evidence about what the defendant was saying out of his own mouth, but also what the defendant was consuming, what he was reading, what he was watching. Because all this goes into what he was thinking at that time. This case is not about – it’s not illegal to watch something on the television. It is illegal, however, to watch something in order to cultivate your desire, your ideology, your plots to kill American soldiers, or to help those, as in this case, who were.⁹²

The prosecution insisted that these materials would help prove the defendant’s “intent” when he went to Yemen or translated materials.⁹³ The jurors were told that such evidence “will help you assess what the defendant did as well as what was in his state of mind, what he was thinking as he was engaging in this conduct.”⁹⁴ Of course, mens rea is relevant to most crimes, and is particularly important when the defense puts forward plausible alternative explanations for the conduct at issue. Here, for example the trip to Yemen was presented as a search for schooling, and the internet activities were presented as part of a scholarly dialogue, or independent expression of political views. It is hard not to wonder whether the mountain of evidence about Mehanna the person was de facto proof of a crime beyond those charged: that of being a terrorist sympathizer, a potential junior varsity Jihadist. Part IV of this Article examines this evidence in light of the crimes charged and the possibility of prejudice in violation of Federal Rule of Evidence 403.⁹⁵ The goal at this stage is
somewhat narrower: to present as complete a picture as possible of the evidence before the jury in order to lay a background for analysis of the important doctrinal and policy issues that the *Mehanna* trial presents.

What I will refer to as the Jihadist evidence was obtained through a multiplicity of methods: a search under the Foreign Intelligence Surveillance Act of the defendant’s home and computer, intercepted emails, wiretapping, bugging, and witnesses wearing wires, as well as live testimony, particularly of co-conspirators. Much of the internet materials were available through relatively conventional searches. The range of this evidence was broad indeed. It ran the gamut from praise of the Mujahideen to glorification of September 11th and of Osama bin Laden. Some of it was inflammatory, such as descriptions of beheadings and Mehanna’s repeated reference to killing American soldiers as “Texas BBQ.”

C) Preliminary Assessment

Overall, how should one assess the jury’s verdict under a standard such as viewing the evidence in the light most favorable to the prosecution? The strongest part of its case seems that related to the trip to Yemen. The government presented a witness (a co-conspirator) who essentially supported its
entire case. Although his credibility might have seemed shaky, the jury apparently chose to believe him. Moreover, there was some corroboration, and the education-religious studies argument of the defense did not play well. For example, if this was his purpose, why did Mehanna return so quickly from a country where such opportunities were available? The fact that terrorist training opportunities were not available plays into the prosecution’s hand as an explanation.

As for the internet activities, the jury may have believed the government’s expert with respect to their value to al-Qaeda. The weakest aspect of this part of the case seems to be the question of direction or coordination.\textsuperscript{100} It may well be that the extensive evidence concerning Tibyan’s Jihadist leanings and the defendant’s contacts with it was enough to tip the scales.\textsuperscript{101} There is also the possibility that all three groups of evidence, as discussed above, acted in a mutually reinforcing manner. The prosecution argued, for example, that the fact that the defendant urged others to join the cause demonstrated his objectives both with respect to the trip to Yemen and to the translations. There is also the possibility that the jury was prejudiced against a defendant to terrorism charges, either at the outset or as a result of unfair evidence that related more to him than to the charges.\textsuperscript{102} In order to put the \textit{Mehanna} trial in clearer perspective – and
to draw lessons from it for the future – it is important to examine more deeply the doctrinal underpinnings of such trials and the manner in which they should be conducted. Moreover, there is the question of what to do with a defendant found guilty after a trial that passes muster as to its underpinnings and conduct. Here, the trial judge’s extraordinary action in choosing to disregard the “Terrorism Enhancement” portion of the Sentencing Guidelines brings to the fore a subject relatively unexplored in the literature: if terrorists are subject to the criminal law, including the Guidelines, and the conduct that constitutes “terrorism” varies widely, how should the legal system deal with a portion of the Guidelines that decrees that all terrorists are to be treated alike?103

III. Doctrinal Issues in Mehanna

A significant aspect of Mehanna is that, if the verdict is upheld, the government may have succeeded in pushing the doctrinal envelope as to when a material support case can be brought. It thus represents a possible step further back in the chain of conduct toward preventive prosecution in the broad sense of preventing development of terrorists rather than commission of terrorist acts. I view it as a gross oversimplification to treat Mehanna as essentially a First
Amendment case, but will begin with that issue out of deference to the many critics who have treated it as such.104

A) First Amendment Issues and Section §2339B

*Mehanna* is one of the first cases to grapple with applying the test established by the Supreme Court in *HLP* to an actual prosecution. Count One of the *Mehanna* indictment, which alleges a conspiracy to violate §2339B, recites the defendant’s speech activities as one of its bases.105 *HLP* was a pre-enforcement challenge by plaintiffs who wished to render assistance in the form of speech to designated foreign terrorist organizations.106 Over a strong dissent by three justices on First Amendment grounds, the majority held that §2339B could reach such speech even if it, apparently, would otherwise be protected by the First Amendment.107 The Court’s opinion relied heavily on the expertise of the political branches, and their expressed need for prevention, and deferred to Congress’ desire to “delegitimize” foreign terrorist organizations.108

The Court drew an important line, however, between speech that could be illegal material support and that which could not. “Independent advocacy that might be viewed as promoting [a] group’s legitimacy is not covered.”109 What is covered is advocacy that is directly linked to a foreign terrorist organization.
Unfortunately, the Court’s formulations of what constitute such advocacy vary in ways that pose problems for lower courts that must apply *HLP*. The Court first noted that §2339B itself contains an exemption for independent actors, including speakers: “Material support that constitutes ‘personnel’ is defined as knowingly providing a person ‘to work under that terrorist organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization.’”\(^{110}\) The Court appeared to equate the statutorily derived standard with the requirement of the Constitution.\(^{111}\) However, in so doing it reformulated the test as one of material support “*coordinated with or under the direction of a designated foreign terrorist organization.*”\(^ {112}\) The addition of the notion of coordination appears to make the requirement easier to satisfy, since direction is no longer required. This loosening goes further when the opinion states that “Congress has avoided any restriction on independent advocacy, or indeed any activities not *directed to*, coordinated with or controlled by foreign terrorist groups.”\(^ {113}\) An earlier reference to “service” had defined it as “*concerted activity, not independent advocacy.*”\(^ {114}\) Thus, *HLP* leaves considerable wiggle room in determining what the relationship between the defendant and the organization must be.
HLP has been sharply criticized, although not on the ground of uncertainty. Critics have focused on the apparent departure from traditional First Amendment jurisprudence represented by cases such as *Brandenburg v. Ohio*, and even invoked the specter of *Korematsu*. Justice Breyer, in dissent, argued that independent expressions of support might actually help a terrorist organization more than those by persons associated with it. The Court’s result is best defended as placing the organization, rather than the speech, at the center of analysis of a terrorism-related speech issue. The Court was attempting to further Congress’ intent to destroy terrorist organizations by asking whether penalizing the speech would weaken the organization. Thus the government can punish those who manage it, work for it, or seek, in some way, to strengthen it.

Nonetheless, one can understand the Court’s point about focusing on the link as a way of getting at the organization. Ironically, a decision that was denounced as a curtailment of speech can serve to protect it depending on how strongly the lower courts read the requirement of a link. The activities of someone like Mehanna may be viewed as directed to al-Qaeda. Perhaps he even operated in some loose form of coordination with it. But showing direction and control is no easy task. *Mehanna* thus raises the issue of limits on when the government can curtail speech. The case certainly provides an important
opportunity for lower court application of HLP. In what constitutes perhaps the ultimate irony, Georgetown Law Professor David Cole, who argued for the losing side in HLP, has invoked it to argue that Mehanna went beyond HLP’s line. Quoting the Court, Professor Cole argued that prosecuting Mehanna constituted a “restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups.”

It is perhaps too early to tell generally whether the 2010 HLP decision will be read strictly or liberally in establishing a link when one is required to render the defendant’s activities punishable as speech despite possible First Amendment protection. However, two recent Court of Appeals decisions suggest a surprisingly liberal approach. In United States v. Farhane, the Second Circuit upheld the conviction under §2339B of a physician who swore an oath of allegiance to al-Qaeda, promised to be on call to treat wounded members of the organization in Saudia Arabia, and gave his telephone number to an undercover operative posing as a member of al-Qaeda. The oath was worded as a statement of agreement with the organization’s mission. The court stated that “from the totality of these facts a reasonable jury could have concluded that [the defendant] crossed the line from simply professing radical beliefs or joining in a radical organization to attempting a crime, specifically [his] provision of himself to work under the
direction and control of al-Qaeda.” A possible implication of the decision is that unilateral action on the part of a defendant is enough. There was no direction or control from al-Qaeda or coordination with it. Any such reading of HLP would require focusing on the “directed to” language, which was not concerned with the furnishing of personnel, the conduct at issue in Farhane. Similarly, taking an oath played a large role in the recent Eleventh Circuit decision in United States v. Augustin, although there were other acts, such as videotaping an FBI building for an undercover agent.

Readings of HLP which allow punishment of seemingly independent advocacy on the grounds of a unilateral desire to help a foreign terrorist organization may go too far. The Court said it wanted to protect independent advocacy, and appeared to limit criminalization to advocacy that could strengthen a particular organization itself – e.g. by augmenting its resources – as opposed to increasing the level of support for its message. This keeps the constitutional standard in harmony with the congressional purpose, but creates a line that is sometimes hard to draw. “Coordination” may relax the standard of “direction and control” somewhat, but it still requires some relationship with the organization, as opposed to unilateral action.
Against this background Mehanna’s conviction might be viewed as an effort by the government to give HLP a broadening effect. Judge O’Toole’s instructions show a careful consideration of the Supreme Court’s message to lower courts, particularly the importance of protecting independent advocacy, even if the defendant “is advancing the organization’s goals or objectives.” The instruction makes that point and continues: “Rather, for a person to be guilty under this count, [conspiracy to violate §2339B] a person must be acting in coordination with or at the direction of a designated foreign terrorist organization, here, as alleged in Count 1, [al-Qaeda].” Thus, no matter how much speech Mehanna engaged in on his own, such conduct could not, by itself, constitute an offense, although it might serve other purposes such as showing intent.

The defense’s requested instruction may have gone further in requiring that “the person...has a direct connection to the group and be working directly with the group for it to be a violation of the statute.” However, let us assume that Judge O’Toole’s instruction on Count One (conspiracy to violate §2339B) correctly stated the law. In reviewing the conviction – a review in which the evidence is viewed in the light most favorable to the government, the key question would seem to be how far one can stretch the word “coordination.” Mehanna worked with Tibyan, although they eventually had a falling out.
There was some evidence of a relationship between Tibyan and al-Qaeda, and a suggestion that the latter wanted him as a translator for a particular matter.\footnote{134} But the prosecution may be suggesting a broader meaning of coordination. They repeatedly referred to Osama bin Laden’s call for Muslims to take up Jihad and to the actions of the defendant and his associates to respond to that call.\footnote{135} Taken to its extreme, this view of “coordination” would be close to that of a “global Jihad movement” that has emerged under §2339A.\footnote{136} It also comes close to the idea of a one-way coordination discussed above.\footnote{137} However, the prosecution could contend that it should be limited to activity related in some way to al-Qaeda, since its leader issued the call. The prosecution’s expert seems to have had this in mind when he referred to “al-Qaeda adherents.”\footnote{138} As the worldwide terrorism movement becomes more decentralized, with a proliferation of loosely affiliated groups and individuals, this limit may not seem like much of one.

However, §2339B is only triggered by the fact of designation.

As an alternative, the prosecution may view the notion of conspiracy to violate §2339B through speech as a way around that section’s substantive requirements as laid down in \textit{HLP}. Courts have generally been receptive to the idea of conspiracy and not receptive to the defense of impossibility.\footnote{139} In the terrorism context, the concept of material support has been analyzed as closely
related to conspiracy, particularly the techniques which conspiracy affords to reach large numbers of people and people somewhat distant from the ultimate crime.\textsuperscript{140}

But what is the object crime in \textit{Mehanna}? Professor Cole argues that “conspiracy to engage in Jihadist advocacy, in the hopes that it will aid al-Qaeda, without more is simply a conspiracy to engage in independent advocacy. And that is – and could not be – a crime.”\textsuperscript{141} Of course, conspiracy is usually viewed as separate from the object crime.\textsuperscript{142} Assuming that a conspiracy was in place at all relevant times,\textsuperscript{143} the prosecution could argue that Mehanna had to start by acting alone so that he could come to al-Qaeda’s attention, and ultimately achieve a state of coordination with it. This is precisely how he reached his position with Tibyan.

\textbf{In sum, \textit{Mehanna} occupies an important place as an early post-I\textit{HLP} case.} Given the uncertainties on speech alone, it has the potential to reach the Supreme Court. If actors like Mehanna proliferate, and the preventive paradigm remains in effect, the Court is likely to revisit §2339B. In any event, the case itself, and a likely First Circuit decision, bring the problem of applying \textit{HLP} into further relief.
B) First Amendment Issues and §2339A

At least since *HLP*, discussion of the possibility that the material support statutes might permit prosecution of normally protected speech has focused on §2339B.\(^{144}\) A principal issue with that statute is, of course, whether the direction, coordination, or control test separates truly independent advocacy from that which “should” be prosecuted as bolstering terrorist organizations. Assuming that this is a real limit, the question arises whether the government can somehow sidestep it by prosecuting speech under §2339A. This statute requires no connection with a foreign terrorist organization – designated or not – and contains no language about direction or control.\(^{145}\) The broad general reading of §2339A – discussed below in subsection C\(^{146}\) - permits targeting general support for a type of crime against unspecified persons at some unspecified point in the future. The statute represents a possible end run around §2339B’s restrictions. Apparently the *Mehanna* prosecution saw it as an alternative.

Count Two of the indictment states a conspiracy to violate §2339A, based on two of its predicate crimes: conspiracy to kill, maim or injure persons or damage property in a foreign country,\(^{147}\) and, extraterritorial homicide of a United States national.\(^{148}\) The overt acts not only list the trip to Yemen (and associated
acts) in order to acquire the training necessary to commit these crimes. Count Two also lists the speech activities including a video which Mehanna sent “to multiple associates” which “depicts, in detail, the mutilation and abuse of the remains of U.S. personnel in Iraq.” The video contains a preface which shows the image of Usama bin Laden, with an Arabic voiceover in which bin Laden thanked the Iraqi Mujahadeen for their continued attacks on America and its allies, and that “they made all Muslims proud.” The prosecution’s opening statement also emphasized that the speech activities were separate from the Yemen trip. It referred to the defendant’s translation service as aimed at a broad group – both local and people met on the internet – “who also wanted to support the objectives and the goals of al Qa’ida and the terrorists, to kill Americans, to get them out of Iraq and Afghanistan.” The statement described “39 ways” as a training manual to help people do this, and presented Mehanna as a would-be Jihadist who had failed himself, but now wanted to help others.

Of course, an end run around the HLP test would only be an attempted end run around the Constitution. Thus it is helpful to re-examine how HLP went about delineating a narrow area in which the government can prosecute normally protected speech. Although Justice Breyer suggested in dissent that the Court had not applied strict scrutiny, the Court’s opinion can be read as doing so,
particularly its characterization of the government’s role in combating terrorism as “an urgent objective of the highest order.” The Court’s test – “The statute reaches only material support coordinated with or under the direction of a foreign terrorist organization” – was based on its agreement with the government that such organizations play a key role in fomenting terrorism. Whether this remains an accurate view of the nature of terrorism in a more decentralized landscape does not change the fact that the Court’s analysis rested on acceptance of it.

The HLP test does not fit the typical situation covered by §2339A: aid given to help in the commission of one of over forty designated predicated crimes. The Court’s focus was a direct one on organizations, rather than an indirect one on down-the-road crimes, regardless of who commits them. It is hard to see the Court formulating an analogous approach to §2339A with its potentially amorphous link to over forty crimes, many of which are often committed by persons other than terrorists. Since the issue is one of support of crimes, as opposed to organizations, there would be a strong pull to utilize a traditional First Amendment approach, with its Brandenburg-based approach to imminence. Under such an approach, a §2339A prosecution of Mehanna’s speech seems
doomed. Still, the government may have planted the seed for a view of material support in the form of speech that avoids the rigors of HLP.

C) §2339A and its limits

Critics of the Mehanna outcome have, as noted, devoted most of their attention to the speech elements. However, several have mentioned, at least in passing, the conviction under Section 2339A for material support in the form of seeking terrorist training in Yemen. They have noted the fact that Mehanna failed to find any such training during his trip.162 This seems a clear suggestion that the result somehow expands the already broad reach of §2339A. In this subsection, I address the question whether Mehanna was another example of the prosecution pushing for a broad reading of the material support statutes. Indeed, it is surprising that the critics have not devoted more attention to this portion of the case and to the breadth of §2339A generally. In their haste to focus on the First Amendment dimensions of the verdict, they may be missing a far more significant aspect of the use of the material support concept to engage in preventive prosecution and to reach potential terrorist conduct in its early stages.

It is necessary to first consider the operation of this statute which Professor Chesney has described as “the most capacious option” available in preventive
prosecutions.\textsuperscript{163} The statute seems on its face to be narrow. It requires essentially the provision of material support or resources, etc. “[k]nowing or intending that they are to be used in preparation for or in carrying out a violation of [a number of predicate crimes]”.\textsuperscript{164} Professor Chesney notes that the 47 predicate offenses are not necessarily uniquely terrorism crimes.\textsuperscript{165} The apparent requirement of specific intent with respect to the use of the resources has often led to the view that §2339A is a relatively narrow statute.\textsuperscript{166} However, this reasonable, textual appraisal of a statute does not reflect the extremely broad uses to which it has been put. Professor Chesney describes the narrow view of §2339A as “a mistaken impression.”\textsuperscript{167} The government’s, so far, successful use of §2339A has built on conspiracy law including the notion that it is enough for a conspiracy to contemplate a type of offense.\textsuperscript{168} As Professor Chesney points out, §2339A is actually “broader than conspiracy liability in several respects.”\textsuperscript{169} He points out that no agreement need be shown, that preparation is enough, and that the broad definition of material support, includes personnel such that “one might violate §2339A by providing one’s self as personnel to others with the goal of assisting in the commission, or simply preparation for the commission of, the predicate offense...”\textsuperscript{170} Thus a general knowledge of the type of offense that might be committed could be enough to trigger liability under the statute. One
district court in a §2339A prosecution made the following response to the defendant’s contention that there was no specific plan or agreement beyond his general interest in a discussion with co-defendants about training, security, and defense tactics; “that doesn’t matter. Ultimate actions and targets – if the government establishes the basic illegal agreement and purpose beyond a reasonable doubt – can be un-or ill-defined and inchoate.”

Professor Chesney devotes considerable attention to the case of United States v. Hayat (the quoted discussion concerns Hayat’s son Hamid). Hamid had taken a trip to Pakistan, during which the government plausibly argued he had received terrorist training. He also held strong views about Jihad and was quoted for example, to the effect that the killing of Daniel Pearl was a good thing. “Was Hamid now a terrorist who intended to carry out attacks upon returning to the United States, or merely a misguided young man seeking adventure abroad without any intent to cause harm to others in the future?”

As for Mehanna, the question then arises whether the fact that he did not find any terrorist training should make a difference under §2339A. If one accepts the broad interpretations given to the statute so far, this fact may not make a difference, at least for purposes for conspiracy and attempt charges.
sought to receive military training which would facilitate his committing a type of
crime, in particular, two of those specified in the statute.\textsuperscript{176} The specific
place/victim are not relevant. The prosecution has satisfied conspiracy
requirements and the trip to Yemen would certainly be a substantial step which
satisfied the normal requirements of an attempt crime.\textsuperscript{177} Failure to receive any
training might negate an actual substantive charge, since Mehanna never
completed the process of providing himself as personnel to any identifiable
person or organization.

The problem with the §2339A charges is that, if one disregards the
“speech” conduct, they raise the question of whether he was prosecuted for
engaging in terrorist conduct, preparing and planning to do so, or wanting to do
so. Was this a case more of incapacitation or prevention? The prosecution
offered some testimony on interest in civilian targets, but any attempts to attack
such targets appear not to have proceeded very far. His case is not like that of
Amawi where the defendant while not having traveled abroad had engaged in a
variety of activities including making available a video on constructing bomb vests
for suicide attacks, and showing great interest in specific military techniques such
as sniper attacks.\textsuperscript{178} Indeed, if Mehanna had not actually gone to Yemen, a
conspiracy prosecution under §2339A might still be possible under present law, as
long as seeking terrorist training was discussed as a goal. He would seem no less
dangerous than he was after the failed trip. This possibility is disturbing if one
envisages prosecutions for little more than discussion and bold talk. These
discussions after all would be about the possibility of going to Yemen, which could
possibly lead to training which could possibly lead to crimes against unknown
individuals. At some point, the limits to conspiracy theory would break down, and
a prosecution of Mehanna only for this crime would seem to run into obstacles
based on principles of due process as well of association and speech. Of course,
Mehanna did go to Yemen. The fact that he did not find training probably does
not take the case out of the reach of §2339A as it has been developed. The
government runs some risk that at some point an appellate court will consider
whether that reach is excessive. *Mehanna* could be the vehicle for such an
examination, but the crucial point would not be whether he received training but
whether it was criminal for him to go as far as he did.

D) §2339B and Yemen

The Yemen-related acts were included in Count One – Charging a
conspiracy to violate §2339B. The language of this statute, as opposed to
§2339A, is restrictive with regard to personnel. It provides as follows: “no person
may be prosecuted under this section in connection with the term ‘personnel’ unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization one or more individuals (who may be or include himself) to work under that terrorist organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction and control. However, in a conspiracy charge, it is possible to argue that Mehanna agreed to seek the necessary link, and that that is enough, at least if it were shown that he believed that any training would have come from al-Qaeda. The prosecution presented the Yemen trip, and related circumstances, to the jury as enough to satisfy all the substantive crimes charged. However, the primary role of the Yemen trip appears to be to satisfy §2339A given the emphasis on future crimes to which the training could lead. The fit with §2339B is questionable.

IV. Prejudicial Evidence – A Special Danger in Preventive Prosecutions:

MS. BASSIL [counsel for Mehanna]: I really think we have finally, I would suggest, tipped the balance on prejudicial over probative and cumulative. To date, we have seen 16 videos. We have had two oral descriptions of beheadings. We have seen one video of someone
with a bomb. We have seen three clips of Diverse Operations in Iraq. We have seen two photographs of the front of a video cassette entitled, "Martyrs of Bosnia." We have seen, I think, two to three pictures of Osama bin Laden, the same of Zarqawi, and a picture of Zawahiri. We've seen two clips of planes crashing into the World Trade Center; three photographs of wounded American soldiers; three photographs of flags, American flags, draped over caskets; and a photo of a United States soldier crying. We've seen endless photos of mujahideens with guns and rocket-propelled grenade launchers.\(^{181}\)

As the above quote suggests, the issue of prejudicial evidence was hotly contested in *Mehanna*. The prosecution justified its extensive use of potentially inflammatory evidence by contending that “[t]hese exhibits help set the background, on canvas, on which the picture of the defendant can be drawn, that is, a man who was motivated by and admired the leaders of Al'Qaida and their successful attacks against the United States and her interests, and who desire [sic] to help fight against and kill American servicemen overseas, whether he could do it himself or convince others to do so.”\(^{182}\) The defense’s objections ranged from accusations of “character assassination”\(^{183}\) to the contention that the prosecution was attempting to utilize prejudice in order to make up for its lack of any solid evidence of coordination with al-Qaeda.\(^{184}\)

The primary focus of this Article thus far has been on the material support statutes and the doctrinal issues they present. I will now turn to the role of the trial judge as the person in control of the trial. The same is true of the following
section dealing with sentencing. Appellate courts are far from absent – especially in the latter context – but the trial judge is front and center in both.

A) The General Framework

As Mehanna illustrates, the issue of prejudicial evidence is likely to be an important one in material support cases, particularly as the preventive approach moves more toward focusing on the defendant as a person, i.e. at the mindset and motives underlying possibly ambiguous conduct. As an initial matter, the question is governed by Federal Rule of Evidence 403 which states that a court “may exclude evidence if its probative value is substantially outweighed by any of the following: unfair prejudice, confusing the issues, misleading the jury...” It is closely linked to the prohibition on character evidence. Rule 404(b) states “[e]vidence of a crime, wrong or other act is not admissible to prove a person’s character in order to show that on a particular occasion that person acted in accordance with the character.” This prohibition might seem crucial in terrorism cases, but the rule then proceeds to dilute its effect by allowing admissibility “for another purpose such as proving motive...” As Mehanna demonstrates, terrorism cases present a fine line between character evidence and showing the underlying state of mind. Beyond that link, Rule 403 reflects a
general concern with jury misdecision. Of course, most evidence is prejudicial to the opposing party, otherwise it would not be offered in the first place. This fact is reflected in the Rule’s prohibition of unfairly prejudicial evidence which substantially outweighs its probative value.

This rule is not toothless, although its uncertain impact is further diluted by substantial deference on the part of appellate courts. It is important to consider what factors appellate courts will consider. Several factors recur in the cases. First, did the trial judge make a conscientious assessment before admitting or excluding evidence? Second, did the trial judge give limiting instructions aimed at mitigating the prejudicial impact of evidence? Third, was alternative, less prejudicial evidence available to prove the same point? Fourth, is there an indication that the jury engaged in a rational decision-making process? Fifth, did the jury selection process help to mitigate any potential prejudice that might arise from the evidence?

These factors are of varying utility, particularly in a terrorism case. Consider the last one. Every pre-trial section process will raise the question of possible prejudice on voir dire, and lead to the seating of jurors who claim they are not prejudiced. Prejudice is easy to den...
Moreover, there is a related risk that Arab-American and Muslim-Americans will not be substantially represented in the jury pool to begin with. As for a rational decision-making process, we rarely know what went on in the secret deliberations, and knowing it might not make a difference once a verdict is in. This factor may come into play when the jury finds the defendant guilty on some counts and innocent on others. It is not helpful in a single count case or one, like Mehanna, in which the defendant is found guilty on all counts.

On the other hand, it may be possible to determine whether the trial judge made a conscientious assessment of the evidence and its effect. An explanation of particular rulings would be an example. Hearing argument before ruling on evidentiary questions would be another. One can also examine the instructions to see if the issue of prejudice was addressed.

Beyond these general considerations, there are other evidentiary aspects of a case that can be examined after the fact. One is the possibility that the evidence became cumulative. One formulation of this principle is that in any given trial there is necessarily a point at which the probative value of additional evidence aimed at proving the same point would be outweighed by the unfair prejudice of additional evidence. An additional method of achieving the goals
of the cumulative evidence rule is invocation of the cumulative error rule. Thus individual instances of prejudicial error might be allowed to stand if, by themselves, their introduction would be harmless error, but, when taken as a whole, the introduction of improper evidence amounts to a violation of due process.\textsuperscript{202} Overall, the appellate role may not seem heavy handed, but – apart from the trial judge’s acute knowledge of its presence – appellate courts will at times reverse a conviction if the record leads to the conclusion that certain conduct so infected the trial as to make the resulting conviction a denial of due process.\textsuperscript{203}

B) Terrorism Trials and Evidentiary Issues

Professor Peter Margulies has pointed out the possibility of latent prejudice in terrorism trials, particularly the possibility of stereotyping at play before the proceeding even begins.\textsuperscript{204} Once the trial is underway, much of the evidence will, not surprisingly, involve terrorism. One can debate whether such evidence really creates new prejudices or even augments existing ones. It is not clear that, say, an email of the defendant praising Osama bin Laden, is going to affect the jury’s decision as to whether the defendant really was a “terrorist” of some sort. An ongoing stream of such emails might, however, have that effect. Thus it seems
correct to apply essentially the same rules concerning prejudicial evidence to terrorism-related trials as is applied to litigation generally.\textsuperscript{205}

C) Terrorism Cases and Prejudicial Evidence

The issue of prejudicial evidence has arisen in numerous terrorism-related cases. In all but one instance, the defendant’s objections have not prevailed. Beyond the fact that the trial judge is virtually always upheld, it is hard to draw much general guidance from appellate opinions. Decisions tend to be highly fact-specific.\textsuperscript{206} This subsection will look briefly at cases in which prejudicial evidence changes were rejected, and then consider \textit{United States v. Al-Moayad}.\textsuperscript{207} In \textit{United States v. Rezaq}\textsuperscript{208} a small number of photos were admitted, including one particularly graphic one. The District of Columbia Circuit declined to find “grave abuse,”\textsuperscript{209} and rejected the argument that “the only conceivable reason for placing [the exhibits] into evidence was to inflame the jury.” Admission of photos of victims was also sustained in \textit{United States v. Salameh}.\textsuperscript{210} The Second Circuit treated the issue as straightforward. The Photos showed victims of the bombing with which the defendant was allegedly associated. The court stated that evidence “regarding the victims was probative of the nature and location of the explosion that killed the victims, which defendant disputed at trial.”\textsuperscript{211} The case
also raises questions as to the utility of stipulation as a means of providing
“alternative evidence.” The defendant was willing to stipulate that the
bombing caused injury and death. Citing Supreme Court precedent, however, the
court stated that “a criminal defendant may not stipulate or admit his way out of
the full evidentiary force of the case as the government chooses to present it.”
In *United States v. Hammoud*, Hezbollah videos were ruled admissible –
including crowds shouting “death to America” – in a case involving material
support to Hezbollah. The ruling of the trial judge that the tapes were direct
and essential to proving motive was upheld. Again, the appellate court viewed
the case as straightforward since the defendant had put in issue his support for
the violent activities of Hezbollah.

Perhaps closer to *Mehanna* than the above cases is *United States v.
Benkahla*. On appeal of a false statement conviction, the defendant argued
that admission of “several dozen videos, photographs, and documents (how many
exactly is in dispute) went well beyond what was necessary to establish
materiality and became a vehicle for placing irrelevant and prejudicial statements
and events before the jury.” The Fourth Circuit’s opinion upholding admission
is particularly significant because of its statement that the trial judge “could well
conclude that lengthy testimony about various aspects of radical Islam was
appropriate, and indeed necessary, for the jury to understand the evidence and determine the facts.”220 The defendant’s mindset surfaced again in United States v. El-Mezain.221 In a case that turned on whether charitable contributions ultimately went to Hamas, a range of evidence about Hamas’ violent activities was admitted. The Fifth Circuit concluded that the evidence “provided meaningful context and explanation.”222 It also expressed the following view that may serve as the closest thing we have to a general statement of the law in this area: “because this was a case about supporting terrorists, it is inescapable, we believe, that there would be some evidence about violence and terrorist activity.”223

United States v. Al-Moayad224 appears to be the only terrorism case in which a defendant’s conviction was reversed on the ground of a violation of Rule 403. It involved allegations of material support violations225 in which the key event was a meeting between the defendants and an undercover agent at which the defendants agreed to receive money and return a portion to Hamas. The defendants alleged numerous Rule 403 errors, including a picture of a bus bombing by Hamas, and a wedding speech by a Hamas official citing the bombing. The Second Circuit found this evidence to be excessively prejudicial.226 The court stated that “the record reflects that the district court did consider the balance
between [testimony about the bombing’s] probative value and possible prejudicial effect before allowing [the witness] to take the stand. However, we must conclude that, given the highly charged and emotional nature of the testimony and the minimal evidentiary value, the court’s decision was arbitrary.”

The case is of uncertain precedential value. The evidence about Hamas was only one of several evidentiary rulings challenged on appeal. The issue of willingness to stipulate brought into play the possibility of alternative methods of proof. The appellate court was clearly convinced that the trial judge had not made a conscientious assessment of the evidence. It even invoked the cumulative error doctrine in holding that due to the large number of incorrect rulings “the district court’s errors deprived the Defendants of a fair trial.”

Although unstated, an appellate court’s overall appraisal of how the trial judge handled a terrorism case, inherently prone to prejudice, will often play a key role in its review of particular evidentiary rulings.

D) *Mehanna* as a Candidate for 403 Reversal – Judging the Judge

Critics have focused on the First Amendment aspects of *Mehanna* while virtually ignoring the potentially serious claim of prejudice. One might expect civil
libertarians to see in the latter a greater long run danger to the values they espouse than application of the HLP test with its insistence on protecting independent advocacy.\textsuperscript{231} Indeed, while First Amendment issues surfaced frequently during the trial, far more attention was devoted to the admissibility of possibly prejudicial evidence, particularly during, sometimes lengthy, exchanges between opposing counsel and the judge.\textsuperscript{232} The reason why Rule 403 is a serious consideration in any review of the trial is that the government spent an extraordinary amount of time offering various forms of evidence about Jihad and the defendant’s ongoing interest in it. The judge let most of this material in, although expressing some concern about redaction to “minimize unfair prejudice.”\textsuperscript{233} The defense objected to numerous rulings on the grounds of prejudice. The prosecution repeatedly countered that such evidence was necessary to provide context and to show Mehanna’s state of mind.\textsuperscript{234} Given the apparent thrust of the law – tilting toward admissibility, but suggesting that at some point the limits of Rule 403 are reached – how might this issue come out when the trial is reviewed?

This may be Mehanna’s strongest argument. Although quantity by itself may not be a ground for reversal, unless the cumulative evidence rule is triggered, the amount of potentially prejudicial evidence in Mehanna could serve to
distinguish it from terrorism cases in which trial judges’ rulings have stood.\textsuperscript{235} Rule 403 might have some bite in this instance. Judge O’Toole’s instructions did not place any particular emphasis on the problem of prejudicial evidence. The defense’s apparent willingness to stipulate on some issues might be seen as an alternative, less prejudicial method of proof.\textsuperscript{236} The jury’s unanimous verdict does not indicate differentiated considerations of the issues in the case, but it may simply demonstrate that it thought Mehanna was guilty on all of the counts. This factor seems of limited value in determining whether prejudicial evidence had any effect.

On the other hand, Judge O’Toole did review proposed exhibits and similar evidence beforehand, and indicated concern for the problem of prejudice.\textsuperscript{237} Perhaps most significant are the lengthy exchanges referred to above. These sidebar conferences – a form of mini-oral argument – even included a discussion of \textit{Al-Moayad}.\textsuperscript{238} In considering the question of cumulative evidence the judge expressed the view that the shear amount of it might be a point in the prosecution’s favor.\textsuperscript{239} It is hard to argue that his overall handling of the evidence did not reflect a conscientious appraisal of it,\textsuperscript{240} or that his handling of the overall trial did not reflect a conscientious effort at managing a complex and sensitive prosecution.
Even if one concludes that an appellate court might let the matter rest, the amount of negative, stereotypical evidence introduced in Mehanna illustrates a key problem with preventive prosecutions: this tactic makes it easier for critics to say that Mehanna was really convicted for being a Muslim who held objectionable views.\textsuperscript{241} Let us assume that the legal system will see more of these prosecutions, and that they will be highly public, as Mehanna’s was. Perhaps the judge, a key “gatekeeper” in the entire process,\textsuperscript{242} has a special responsibility to prevent latent prejudices from dominating the trial.

V. Sentencing Issues in Preventive Prosecutions.

The sentencing decision is perhaps the most visible one that any judge makes in any trial. This is particularly true in terrorism trials that have earmarks of preventive prosecution.\textsuperscript{243} The case is high profile and controversial by nature. Some people will feel that it never should have been brought.\textsuperscript{244} Others will demand a stiff sentence to punish the defendant’s conduct and to incapacitate him.\textsuperscript{245} The inherent difficulties faced by the judge are enhanced by the extraordinary uncertainty underlying federal sentencing law and the presence of a substantial “Terrorism Enhancement” in the United States Sentencing Guidelines.\textsuperscript{246}

The adoption of the Guidelines in 1987 “revolutionized federal sentencing.”\textsuperscript{247} Prior to this event federal judges had “largely uncontrolled discretion,”\textsuperscript{248} and there was no appellate review of sentencing discussions. The Guidelines were mainly a response to dissatisfaction with sentencing disparity. They were the product of extensive work by the United States Sentencing Commission, based on “the premise that treating similar offenses and similar offenders alike forms the basis of a just and rational sentencing policy.”\textsuperscript{249} The result of this work was an extremely complex set of Guidelines – binding on trial courts and subject to appellate review – that attempted to reconcile the irreconcilable by first creating a numerical mechanical system for computing sentences and then permitting a number of adjustments that would “individualize” the sentence.\textsuperscript{250}

However, in the 2005 case of \textit{United States v. Booker}\textsuperscript{251} the Supreme Court, by a majority of five to four, held the Guidelines system unconstitutional. The Court found a violation of the Sixth Amendment in the fact that the Guideline sentence could rest, in part, on facts found by a judge using the preponderance of the evidence standard, rather than a jury governed by reasonable doubt.\textsuperscript{252} A
different majority held that this did not render the Guidelines null and void.\textsuperscript{253} Instead, the best way to preserve the intent of Congress as expressed in the 1984 Sentencing Act was to keep the Guidelines in place but to treat them as advisory.\textsuperscript{254} The majority also made it clear that trial courts were to give substantial consideration to the goals of the act expressed in 18 U.S.C. §3553(a) — imposing sentences that “reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational and vocational training and medical care.”\textsuperscript{255}

Not surprisingly, chaos ensued at both the trial and appellate levels. Some judges took the view that sticking as closely to the Guidelines as possible would enhance goals of uniformity and fairness.\textsuperscript{256} Others took a more nuanced approach, leading to the creation of a form of “common law of sentencing.”\textsuperscript{257} The holding(s) in \textit{Booker} also created uncertainty about the respective roles of appellate and trial courts. Appellate review remained in place.\textsuperscript{258} Yet the courts from which appeals would be taken now possessed greater discretion than they had when the Guidelines were mandatory. Writing for the remedial majority, Justice Breyer stated “Without the ‘mandatory’ provision, the act nonetheless requires judges to take account of the Guidelines together with other sentencing

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goals.” This indicates appellate judges would have something to review, and a potentially significant role. Yet Justice Breyer went on to state that the sentencing factors as well as past practice “imply a practical standard of review already familiar to appellate courts: review for ‘unreasonable[ness].’”

Two years after Booker the Supreme Court addressed the issue of appellate review, and came down firmly on the side of district court discretion. In Kimbrough v. United States the trial judge had expressed disagreement with the intent of the crack cocaine Guidelines and sentenced the defendant to a lower range than they called for. The Second Circuit vacated the sentence on the ground that a sentence outside the Guideline range is per se unreasonable when based on a disagreement with the Guidelines approach to a particular issue. The Supreme Court in turn reversed. The Court noted the Guidelines’ now-advisory status, and repeated the importance of broader §3553(a) concerns as well. The companion decision in Gall v. United States elaborated on the procedure that district court judges must follow to ensure that a sentence is not reversed, even if the appellate court would have reached a difference result. The judge must begin by correctly calculating the applicable Guidelines range. After hearing argument from both sides, the judge must consider the §3553(a) factors. He may not presume that the Guidelines range is reasonable, but must
engage in an individualized assessment. A non-Guidelines sentence requires justification. Meaningful appellate review may come next, but judges who follow the procedure will survive it. In *Gall* itself, the Court reversed the Eighth Circuit’s vacation of a sentence on the ground that a variance from the Guidelines must be supported by extraordinary circumstances. The net result of the 2007 cases is to emphasize the nonbinding status of the Guidelines, even though trial judges must start with them, and to place substantial sentencing discretion in these judges as long as they follow the proper steps and can ground their decisions in §3553(a).

B) Sentencing in Terrorism-Related cases and the Shadow of the Terrorism Enhancement.

An examination of recent terrorism cases suggests that appellate courts continue to scrutinize terrorism sentences carefully, and are even willing to increase sentences imposed after trial. For example, in *United States v. Jayyousi* the Eleventh Circuit invoked *Gall*, which it read as involving a two step process. The “first step,” which the court labeled as mechanical included most of what the Supreme Court seemed to require in *Gall*. The second step was described as “concerning the substantive reasonableness of the sentence.” This rather
probing review led to the conclusion that one of the defendants’ sentences should be vacated and adjusted upward on remand.273

Other courts of appeals have required adjustment, sometimes upward adjustment.274 A frequent ground for reversal arises when the trial court has compared the defendant’s case to other terrorism cases, and imposed a similar sentence. If the appellate court finds that specific comparisons were utilized, but that the cases were not in fact similar, it has vacated the sentence. In United States v. Abu Ali275 the court vacated a downward deviation from the Guidelines sentence. It found that the defendant’s plans for terrorism on a massive and significant scale, even though not carried out, rendered inappropriate a comparison with cases such as those of John Walker Lindh,276 Timothy McVeigh, and Terry Nichols.277 General unreasonableness and inapt comparisons play a major role in appellate review of terrorism-related sentences. However, hanging over all these cases is the shadow of the Guidelines “Terrorism Enhancement.”

The Federal Sentencing Guidelines Manual provides as follows:278

(a) If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism [the punishment is increased].”279 The “Application Notes” define a “federal crime of terrorism” by reference to 18 U.S.C.
§2332b(g)(5).\textsuperscript{280} That statute’s definition is in two parts: first, the crime must be “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct . . . .”\textsuperscript{281} Second, the offense must be one of a list of crimes, often but not necessarily, connected to terrorism, similar to the kinds of crimes in §2339A.\textsuperscript{282} The result of application of the Enhancement is quite severe. In the technical terms of the Guidelines it increases the “offense level” by 12 and the “criminal history” category to VI, the highest possible category.\textsuperscript{283} In practical terms it is likely to mean life imprisonment. The Enhancement was added by the Commission in 1994 at the direction of Congress.\textsuperscript{284}

The Enhancement is controversial. One critic has described it as stretching “far beyond its roots in international terrorism, giving it far-reaching power, and leading to devastating consequences.”\textsuperscript{285} The same critic calls it “draconian.”\textsuperscript{286} The principal contention is that it leads to disproportionate sentences by treating a wide range of crimes alike.\textsuperscript{287} It can be seen as reflecting a monolithic perception of terrorism, rather than a nuanced perception of different crimes and differences of severity within a punishable crime. On the other hand, it has been defended on precisely this ground: terrorism is terrorism, regardless of the form it takes, and is a unique form of crime that requires unique treatment. The remarks
of Judge Walker on a particular sentencing decision give a good sense of this position:

Congress and the Sentencing Commission plainly intended for the punishment of crimes of terrorism to be significantly enhanced without regard to whether, due to events beyond the defendant’s control, the defendant’s conduct failed to achieve its intended deadly consequences. Such intent is plain from the many criminal statutes and Guidelines unrelated to terrorism that specifically account for the level or absence of injury, while the material support statute and Terrorism Enhancement do not. 288

According to Judge Walker, “Courts routinely, and unflinchingly apply the Terrorism Enhancement in the absence of proven harm.” 289 Nonetheless, an interesting controversy has arisen as to whether the defendant must have violated one of the crimes and also acted in a way “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.” 290 The Application Note’s reference to §2332b(g)(5) and that statute’s apparent requirement of a finding of both commission of a specific crime and that it was done for the quoted purpose suggest that the sentencing court must make two separate findings. However, courts have differed over whether to collapse the two on the ground that commission of the underlying felony is all that is required, since the commission of such felonies will per se affect, etc. a government. 291 Interpreting this statute’s
application may represent more of the typical question of law than most sentencing questions. However, as with the admission of evidence – the sentencing judge is captain of the ship. Judge O’Toole’s actions in Mehanna demonstrate just how powerful this position is.

C) Mehanna’s Sentence and the Judge’s Methodology.

He was faced with highly conflicting views. The defense recommended a sentence of 63-78 months. The prosecution recommended 25 years. The United States Parole Commission – the agency charged with applying the Guidelines to individual cases and advising judges on the appropriate sentence – recommended life. Judge O’Toole’s methodology involved a complex, three step procedure.

He first calculated a Guidelines sentence using the standard concept of base offense level, and upward and downward adjustments based on such factors as the defendant’s role in the offense. He applied the first half of the Terrorism Enhancement – the 12 level increase in the base offense, but refused to apply the criminal history increase, which he referred to as “off the charts.” He thus arrived at an initial sentence, which he regarded as a starting point.
He next heard from the parties, each of whom emphasized the high profile nature of the case, and each of whom emphasized 18 U.S.C. §3553(a). The government in this situation has perhaps the easier task, since it can build on the guilty verdict. Thus the prosecution could invoke factors such as protecting the public. The defense emphasized issues of speech, and invoked a number of cases in which downward departures had occurred. The defendant then gave a dramatic presentation of his views, in which he defended them vigorously. He emphasized the need for Muslims to defend other Muslims under attack. This remarkable, at times defiant, speech, was hardly a plea for leniency.

The proceedings then entered a third phase in which the judge viewed the primary source of guidance as §3553(a), not the Guidelines. He singled out “the nature and circumstances of the offense” and “the need to provide for just punishment of like offenses” as key. He went out of his way to express the view that Mehanna’s “speech” activities were more than independent advocacy, stating that “the jury has answered that question,” and that “to think otherwise one would have to disregard a good deal of the trial evidence.” He also, like the prosecution, noted that one “object of criminal prosecution is simply to incapacitate a defendant from committing another offense by reason of incarceration.” This object is reflected in §3553(a).
Judge O’Toole next engaged in an in-depth criticism of the Terrorism Enhancement. He viewed the automatic adjustment of the offense level of any “terrorism” case as arbitrary, since it applied without regard to the facts of a particular case. He viewed this as “contrary to and subversive of the mission of the Guidelines which is to address with some particularity the facts of each case.” He reserved his harshest criticism for the automatic increase in criminal history category to the highest one, dismissing it as a “fiction.” Mehanna, for example, had no criminal history. Finally, he placed considerable reliance on a study the court’s probation officer had conducted of sentences under §2339A, §2339B and §956 in cases decided during the last three fiscal years. In the end, he arrived at a form of “non-Guidelines guidelines” sentence of 210 months, with seven years of supervised release.

Judge O’Toole played a more forceful role in sentencing than in any other aspect of the trial. To some extent this posture is inevitable, given the post-Booker role of federal judges in sentencing. An open question is whether his sentencing methodology will hold up if challenged on appeal. The government lodged an objection the moment the sentence was handed down. The defense will presumably appeal the sentence as well. But if the circuit court reverses the convictions it might not reach the sentencing issue. Assuming the issue is
contested, the government would seem to have the stronger set of arguments.318

There are three possible vulnerabilities of which the first can probably be quickly dismissed. That would be the argument that the trial judge did not “properly”319 calculate the initial, working sentence, since he threw out part of the Terrorism Enhancement, which is part of the Guidelines. Since he indicated from the outset that he would disregard it, this criticism exalts form over substance.

A more serious critique is that the judge engaged in an improper comparison of Mehanna with other terrorism cases.320 Appellate courts have reversed trial court sentencing decisions based on the use of such comparisons.321 However, the reversals seem mainly to have been based on improper comparisons to cases that differed in one or more significant ways from the case under review.322 Judge O’Toole appeared to attempt to avoid this misstep by utilizing a comparison of a sample of cases that were similar in terms of the offense charged.323 The “sample,” was admittedly small, but the use of the comparison may survive. As Judge O’Toole implied, his field comparison seems in line with the search for uniformity which the Guidelines reflect.324

The third, and most serious, vulnerability of the methodology is its complete rejection of the Terrorism Enhancement. The Enhancement, although
not a statute, was created at the express direction of Congress. Still, like the other Guidelines, it was promulgated by the Commission, and should not have the binding force of a statute. The Supreme Court has never ruled on the Enhancement. Lower courts differ. Furthermore, it is hard to argue with Judge O’Toole’s point that assigning the highest possible criminal history to a defendant with no criminal history does not accord either with the language of §3553(a) or the broader goals of sentencing. Although apparently ignored by the press and critics, this aspect of Mehanna may turn out to be the most controversial. Judge O’Toole thus made a significant contribution to the debate about the role of the criminal justice system in terrorism prosecutions, especially preventive ones. The Enhancement is based on a one-size-fits-all approach that may not be sensitive to the differentiation among “terrorists” that Mehanna brings to the fore.

VI. Mehanna in Retrospect – The Islamic Community, the Government, and the Courts.

Whatever happens in Mehanna’s case, we are likely to see more such prosecutions. The preventive philosophy not going away. Of course, there has to be a real crime – in the sense of accusation of violation of a law on the books – somewhere in the picture. Incapacitation by itself is not a valid goal. But given
the existing broad construction of, for example, §2339A, this does not seem to be a major obstacle for the government. Indeed, we may well see an increase in prosecutions at the incapacitative end of the spectrum – Mehanna without the speech, as it were. In this section, with Mehanna very much in mind, I wish to discuss two important issues that this prospect raises: the interactions between law enforcement and the Muslim community; and, the role of the trial judge in the prosecutions that the preventive philosophy leads to. These prosecutions are not just high profile – both in the Muslim community and the citizenry at large. They are the crucible in which many underlying societal conflicts and tensions are fought out. How America treats its Muslim community – with its many diverse elements and tendencies – and how that community responds during a period of intense national security consciousness – is one of the central issues of our time. As in times past, the courts will play a central role.

This is one of many reasons why the Mehanna trial is so important, and why we can learn so much from it. Some may see it as a “sport” – an aberrant event produced by the convergence of unusual circumstances. It is just as likely that Mehanna represents a glimpse of the future. Having pushed the envelope and proven that they can win – at least in the initial trial – why should prosecutors
stop now? And why should law enforcement officials and other policymakers whose decisions lead to prosecutions step back from further success?

I. Law Enforcement and the Target Community Reaction.

A) Law Enforcement.

One of the things that is striking about the *Mehanna* prosecution is how much work went into it, and what a thorough picture of the defendant investigative techniques produced. As discussed in Section II, these included a search of the defendant’s home and computer, monitoring of telephone and other communications, use of friends turned informants (complete with wires), and an investigation that stretched back to 2001. While these efforts were directed at one individual and his cohorts, much national attention has focused on community-wide penetration and surveillance. The Associated Press’ examination of the counter-terrorism efforts of the New York City Police Department has probably received the most attention. According to one summary, the examination uncovered “a vast domestic spying operation targeting Muslims for surveillance, mapping and infiltration.” This summary of the expose – which has also been criticized - refers to “human mapping” of mosques, cafes, bookstores, and other hangouts within “communities of
interest.”333 The FBI, of course, has its own national efforts, often co-ordinated with local police.334 The NYPD’s efforts in New Jersey produced a rare public spat between the FBI and a local police department. The FBI agent in charge of its Newark division said that the NYPD’s intelligence efforts had jeopardized relationships the FBI had developed.335 “We’re starting to see cooperation pulled back,” he stated. “People are concerned that they’re being followed, they’re concerned that they can’t trust law enforcement, and it’s having a negative impact.”336

B) Target Community Response

It is, of course, true that invasive law enforcement tactics can backfire, drying up the very sources whose co-operation is needed.337 However, the “law enforcement” problem cuts far more deeply into the fabric of American society. The post 9/11 controversy over relations between Muslim-Americans and the broader American polity comes at a crucial time in relations between the two, according to Professor Peter Skerry.338 Skerry views true “engagement” as impossible as long as both sides refuse to recognize fundamental roadblocks. He refers, for example, to Muslim-Americans’ “reluctance to confront the
implications of the Islamism that has been a part of their milieu and that their leaders continued to invoke, however ritualistically or unreflectively.”\textsuperscript{339}

The invasive law enforcement tactics described above play directly into the hands of Muslims who do not want engagement. Some invoke the civil rights analogy, as Mehanna did in his eloquent, albeit unrepentant, remarks at sentencing.\textsuperscript{340} American Muslims sense that they are a distrusted minority – a suspicion borne out by the fact that “[n]ational polling data from the past five years suggest that a majority of Americans have categorically negative views of Islam and their Muslim co-citizens.”\textsuperscript{341} and that the actions of public officials, especially those in law enforcement, reflect that view. Terrorism plays a central role in this discourse or non-discourse. Writing in the Nation, Moustafa Bayaoumi laments the fact that “[t]he myth that American Muslims haven’t spoken out against terrorism...continues to haunt the community, even though they do so loudly and repeatedly.\textsuperscript{342} Prosecutions like that of Mehanna not only reinforce the sense of discrimination, they may foment the very terrorism they are meant to stop. Professor Sahar Aziz has called Mehanna’s conviction “a victory for terrorists abroad who win hearts and minds when the American government bends over backwards to prosecute Muslims in America with little regard for the Constitution.”\textsuperscript{343} American civil libertarians have spoken out on the \textit{Mehanna}
case, but mainly on its First Amendment aspects. The Director of the Massachusetts Civil Liberties Union has referred to the case as showing that “[t]here is a Muslim exception to the First Amendment.” Mehanna thus appears as the tip of a very large iceberg. It is fitting that a court case is so central. As so often happens in America, the courts will play a major role in a major national issue and, as in the institutional reform cases, the trial judge will be front and center as the debate over preventive prosecution plays out. Law enforcement officials may well set the process in motion, but the judge is “gatekeeper” at the crucial moment: the trial.

C) The Central Role of the Judge.

Much of this Article has dealt with the actions of Federal District Court Judge George O’Toole in the course of the Mehanna trial. In this subsection I build on those actions in formulating a broad outline of the role of the judge in preventive prosecutions.

1) The Sentence

The analysis begins at the end, at the trial level, at least - the imposition of sentence. It is one of the most high profile moments in a high profile event, rivaled only by the verdict. That belongs to the jury, but the judge, particularly in
the post-\textit{Gall-Kimbrough} era, controls the sentence.\footnote{346} A judge can hide behind the Guidelines, or decide the matter largely on his own. Preventive prosecutions, no matter how close they come to incapacitative, trigger the Terrorism Enhancement.\footnote{347} In rejecting the Enhancement, Judge O’Toole also rejected one possible philosophy on terrorism: that it represents an essentially monolithic entity that must always be treated with the utmost severity. This approach seems close to the premise underlying preventive prosecutions: that at any time and in any form terrorism must be stopped. The logic of this position leads not only to the Enhancement, but can go so far as to suggest that a failed prosecution may still have value if it incapacitates.\footnote{348}

Rejection of this view seems to represent an important value of the criminal law: the gradation of offenses. We do not treat a purse-snatcher like a rapist. The Enhancement reflects a different view: a terrorist is a terrorist. Yet it should not be forgotten that Judge O’Toole sentenced Mehanna to 17 and one half years with supervised release. This outcome suggests that the system can differentiate among terrorists generally, as well as among those whose actions fall on different points of the prevention spectrum. Perhaps it is not a defeat for the preventive paradigm, but a necessary refinement of it.
2) Evidentiary Rulings

Less dramatic, but crucial, especially if viewed cumulatively, are rulings on what evidence the government can introduce. Particularly as we move toward the incapacitation end of the spectrum, these rulings will guide the extent to which the government can rely on evidence about the person. No prosecution will reach the point where there is no alleged crime, thus forcing the government to rely on evidence about the person alone. However, the less apparent it is that a case involves even the prevention of an act of terrorism, the more the jury will look to the judge as a guide. Guidance can be explicit – in the form of instructions – or implicit – in the form of rulings. Judge O’Toole went quite far in letting in evidence about Mehanna the person for purposes of “context” and “state of mind.” These rulings can be seen as support for those who want to emphasize the nature of the defendant – the “terrorist wannabe”\textsuperscript{349} – as long as the government can adduce some arguable crime. Certainly, such rulings emphasize the power of the judge to shape the jury’s perception of the defendant and how the trial should resolve his fate.

3) Doctrinal Issues
Finally, there is the question of how the judge handles uncertain doctrinal issues – both in his evidentiary rulings and in his instructions. *Mehanna* presented a number of uncertainties, such as how much interaction with a terrorist organization is needed to satisfy *HLP*, and whether §2339A should really be applied as loosely as it seems to be, so that any amorphous crime, somewhere down the road, satisfies the requirement of a link and thus the statute’s apparent *mens rea* requirement. Judge O’Toole appeared to treat these as matters of settled law in his instructions. The fact that he let in a lot of evidence on what Mehanna did and said has the virtue of leaving the appellate court(s) room to maneuver if there is to be change or amplification of the applicable law. A trial judge might be more aggressive in framing the issues, for example, in explaining to the jury the possible meanings of “coordination” in a §2339B count. However, he probably thought that the jury could work with what the Supreme Court gave them, and that any refinement would come from a higher court anyway. He denied the defense’s request for an instruction that would, in effect, have ruled out one way “coordination,” perhaps leaving some latitude in defining that term. Such an approach certainly does not hurt the preventive paradigm, as the result in *Mehanna* bears out. Assuming no major change on appeal, prosecutors who
favor that paradigm can work effectively within existing law until and unless some court restricts it. The Federal District Court for Massachusetts was not that court.

I do not mean any criticism of Judge O’Toole. He kept tight control over a contentious 35 day trial, during which emotions frequently reached the boiling point. His sentence displeased the government; his evidentiary rulings displeased the defense. His doctrinal approach took the law as he found it, leaving any changes to higher courts. His overall handling of the trial seems to have led to a victory for those who espouse aggressive use of the preventive approach. Nothing in it stops them. Given the importance of the trial judge’s role, this is no small victory.

Conclusion

*Mehanna* is an important case. In a prosecution based largely on statutes forbidding provision of “material support” to terrorists and terrorism-related crimes the defendant was found guilty. The trial put to the test principles of preventive prosecution as well as the ability of the government to prosecute terrorism-related speech in light of the Supreme Court decision in *Holder v. Humanitarian Law Project (HLP)*. A close examination of the trial yields valuable insights on both issues as well as broader questions raised by the “war on terror”
and the use of the criminal justice system to fight it. This examination leads to the conclusion that in a trial like Mehanna’s, three facets assume critical importance: the judge’s approach to application of the HLP test; the judge’s rulings about how much evidence concerning the defendant as a Jihadist sympathist should be admitted; and, if conviction results, the judge’s approach to sentencing in a terrorism case.

With respect to the first, the judge in Mehanna took a cautious approach, essentially restating what appears to be existing law. With respect to the HLP test on criminalizing speech, the judge may have left the door open for a broad interpretation of when a defendant’s speech is sufficiently linked to a terrorist organization that it can be criminalized. As for evidentiary rulings, the judge allowed introduction of a large amount of potentially inflammatory evidence, apparently accepting the prosecution’s view that the value of establishing “context” and “state of mind” outweighed the risk of prejudice. As for sentencing, the judge took a middle ground approach, imposing a substantial sentence, but refusing to apply the Sentencing Guidelines’ “Terrorism Enhancement.” His sentencing decision can be seen as a rejection of a rigid approach to terrorism-related crimes, but also acceptance of a nuanced approach which contains room for the concept of prevention.
Overall, a close look at the trial demonstrates the central role that the judge will play in any preventive prosecution. As the defendant’s conduct moves away from actual acts of terrorism, and specific preparations for them, the jury will look to the judge for guidance. In *Mehanna*, the judge conducted the trial with a firm hand, but in a manner, and with a result, that leaves room for the controversial notion of preventive prosecution.


A note on chronology is in order. This Article was completed on August 6, 2012, subject to minor editorial changes. An earlier version was presented at a Boston College Law School Faculty Colloquium on June 27, 2012. The due date for the defense’s appeal was August 13, 2012. It has since been extended to October 30, 2012. I chose to complete, and began the mailing of, the Article prior to the initial due date of the appeal. I wanted to preserve my focus on the trial phase of the *Mehanna* case and also to underscore the fact that the framework and themes of the Article are largely my own. Obviously, in writing it I drew extensively on the work of other scholars, particularly the pioneering efforts of Professors Chesney and Margulies. Any citations to appellate materials were added during the editorial process.

3 *See Goldsmith, supra* note 1, at 4–5.
8 2 WAYNE L. LAFAVE, SUBST. CRIM. L. § 12.1 (2d ed. 2011); 2 LaFave, *supra*, at §11.5.
9 *See generally* Chesney, *supra* note 6.
10 *See id.* at 446–47.
11 1 LaFave, *supra* note 8, at §3.5.
15 See id. Although the Court’s formulations of the necessary relationship vary somewhat, its key point was to
distinguish advocacy that might be reached from independent advocacy.
16 Fed. R. Evid. 403.
17 See, e.g., Transcript of Record at 3-42, United States v. Mehanna, No. 09-10017-GAO (D. Mass. 2011 ). When
citing to the transcript, the first number corresponds to the day of the trial while the proceeding numbers
correspond to the page or range of pages being cited.
18 Id. at 3-39.
19 Id. at 10-58-60.
20 Id. at 18, at 3-39.
21 United States v. El-Mezain, 664 F.3d 467, 511 (5th Cir. 2011).
22 Fed. R. Evid. 403.
23 United States v. Booker, 543 U.S. 220 (2005). United States v. Booker held that the Guidelines can only be
2006) (Discussing impact of Booker).
25 Id.
26 18 U.S.C. 2332b(g)(5) (1996). The statute defines “Federal Crime of Terrorism” as an offense that is calculated to
influence or affect the conduct of government by intimidation or coercion, or to retaliate against government
conduct.
28 Booker, 543 U.S. 220 at 245.
30 Terrorist Trial Report Card: Sept. 11, 2000-Sept. 11, 2011, CTR. ON LAW & SEC., N.Y. UNIV. SCH. OF LAW, at 26
(2011)(Footnote omitted). A recent event in Spain indicates the difficulty of determining exactly where on the
spectrum individuals stand. Raphael Minder, 3 Men Arrested in Spain are Suspected of Having Links to Al-Qaeda,
31 Id.
32 See infra text at notes 336-40.
33 Robert M. Chesney, The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention, 42 HARV. J. ON
LEGIS. 1, 27 (2005). The following quote is illustrative: “Let’s stop the discussion right here, [Ashcroft] said. The chief
mission of U.S. law enforcement... is to stop another attack and apprehend any accomplices or terrorists before
they hit us again. If we can’t bring them to trial, so be it.” See id. at fn 158 (discussing origin of quote).
34 Chesney, supra note 6, at 429.
35 Id. at 491-92.
36 E.g. STEPHEN DYCUS ET AL., COUNTERTERRORISM LAW 673-76 (2d ed. 2012) (Discussing proposals for a “National
Security Court”).
38 Transcript of Record, supra note 17, at 10-56, 10-62, 10-99.
40 Id.
41 Peter Schworm, Mehanna Conviction Stirs Outcry on Rights: Critics contend evidence lacking, THE BOSTON GLOBE,
44 Id. at 16.
45 Joan Vennochi, Tarek Mehanna case puts First Amendment on trial, THE BOSTON GLOBE, April 19, 2012,
http://articles.boston.com/2012-04-19/opinion/31362541_1_internet-posts-terrorism-training-tarek-mehanna
46 Id.
47 Id.
To my knowledge no critic has come forth with a defense of lying to federal investigators in violation of 18 U.S.C. §1001. It can perhaps be argued that Mehanna ushers in a period of even more intrusive law enforcement tactics as the government seeks out potential terrorists within the Islamic community. These tactics will generate interactions which, in turn, generate false statements. Mehanna can thus be viewed as part of a slippery slope toward “entrapment” in a broad, lay sense of the word.

See infra Section II.A. I will not discuss the false statement charges or the count under 18 U.S.C. §956. This statute makes it a crime to conspire within the United States “to commit at any place outside the United States an act which would constitute the offense of murder, kidnapping, or maiming if committed in the special maritime or territorial jurisdiction of the United States.” §956 is a frequent predicate offense under §2339A. In Mehanna’s case this charge, while contained in a separate count, seems largely subsumed under the §2339A charge.

18 U.S.C §2339A(b)(1); 18 U.S.C. §2339B(h) (Stating that no person may be prosecuted under this section in connection with the term “personnel” unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction and control).

18 U.S.C §2339A(a).

Terrorist Trial Report Card: Sept. 11, 2000-Sept. 11, 2011, CTR. ON LAW & SEC., N.Y. UNIV. SCH. OF LAW, at 21 (2011); but see Chesney, supra note 6, at 425.


18 U.S.C. §2339B(a)(1) (Stating “Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d) (2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989”).

With the emergence of forms of loosely organized terrorist organizations, the distinction may become somewhat blurred.


Both material support statutes as well as §956 contain a conspiracy provision. The indictment also based a separate count on 18 U.S.C. §371, the general conspiracy statute. This conspiracy appears directed solely at the issue of false statements.


See Transcript of Record, supra note 17, at 35-65.

See Chesney, supra note 6, at 448 (Discussing doctrinal problems under §2339A).

If viewed as personnel, this support would encounter the requirements of §2339B(h) of direction or control.

Brandenburg v. Ohio, 395 U.S. 444 (1969) (Holding that it is unconstitutional to punish political speech that is in no danger of imminent action).


See infra Section III.A-D.

Humanitarian Law Project, 130 S. Ct. at 2726-27.

Second Superseding Indictment, supra note 57, at 1, 11.

Fed. R. Evid. 403.

Transcript of Record, supra note 17, at 3-29.

Id. at 23-10-49.

Id. at 22-112-114.
Legal issues of whether it makes no difference that he didn’t get training are discussed in Section III. With respect to the Yemen facts the defense’s strategy consisted mainly of discrediting the prosecution’s witnesses and advancing the plausibility of the schooling reason for the trip.

See infra Section III.A-B.

Transcript of Record, supra note 17, at 27-44.

Id. at 31-48, 32-101.


Transcript of Record, supra note 17, at 27-12-18.


See infra Section III.A-D (Discussing speech issues and the addition of “coordination” to the Holder test).

Transcript of Record, supra note 17, at 27-47. Indeed, the prosecution was able to slip in a question and answer about “co-ordination with al-Qaeda.”

Id.

Id. at 27-50.

Id. at 13-19-22.

Id. at 21-136.

Id. at 3-38-39.

Transcript of Record, supra note 17, at 3-38.

Id. at 3-41.

See infra Section IV.A-B.

See e.g., Transcript of Record, supra note 17, at 4-11-29 (describing search of home).

Postings on some websites were password protected. See, e.g., id. at 6-83-84.

Id. at 8-23. Defendant referred to bin Laden as his “real father.”

Id. at 22-68.

See infra Section III.B-D.

See, e.g., Transcript of Record, supra note 17, at 12-80-82; see also David Cole, supra note 83.


U.S. Sentencing Guidelines Manual §3A1.4 (2009); see also infra Section V.B (Discussing the “Terrorism Enhancement”).

According to Nancy Murray of the Massachusetts branch of the American Civil Liberties Union, this case is being used by the government to really narrow First Amendment activity in dangerous new ways. Adam Serwer, Does Posting Jihadist Material Make Tarek Mehanna a Terrorist?, MOTHER JONES, Dec. 16, 2011. According to Carol Rose of the same organization, “it’s official. There is a Muslim exception to the First Amendment.” Vennochi, supra note 46.

Second Superseding Indictment, supra note 57, at 1-10.


See Id. at 2733 (Breyer, J., Dissenting on the grounds that the material support statute unconstitutionally infringes on free speech); but see id. at 2724 (Holding that the statute does not infringe on free speech because it punishes the action of giving material support, not speech).

See Humanitarian Law Project, 130 S. Ct. at 2725.

Id. at 2726.

Id. at 2721(quoting 2339B(h)).

Id. at 2726.
112 Id.
113 Id. at 3728.
114 Id. at 2721.
117 Humanitarian Law Project, 130 S. Ct. at 2737.
118 Paradoxically, the Court held that “the statute does not penalize mere association with a foreign terrorist organization.” Id. at 2730.
119 Cole, supra note 83.
120 United States v. Farhane, 634 F.3d 127 (2d Cir. 2011).
121 Id. at 132-34.
122 Id. at 150.
123 Id. at 175 (Dearie, J., dissenting).
124 United States v. Augustin, 661 F.3d 1105 (11th Cir. 2011).
125 Id. at 1114.
127 The importance of independent advocacy probably rules out the possibility of an “attempt” crime when the support is given to an undercover agent, regardless of the general law on attempt and impossibility. See, e.g., 2 LAFAVE, supra note 8, at §11.5.
128 Transcript of Record, supra note 17, at 35-24.
129 Id.
132 United States v. El-Mezain, 664 F.3d 467, 540 (5th Cir. 2011).
133 Transcript of Record, supra note 17, at 6-46.
134 See, e.g., id. at 3-48-49, 12-73.
135 Id. at 3-37, 3-48.
136 See Chesney, supra note 6, at 427-28.
137 See supra Section III.A (Discussing one way coordination in Farhane and Augustin).
138 Transcript of Record, supra note 17, at 26-135, 27-31.
139 LaFave, supra note 8, at §12.1.
140 Chesney, supra note 6, at 447-49; LaFave, supra note 8, at § 12.1.
142 LaFave, supra note 8, at § 12.1.
143 It is not entirely clear when the conspiracy should be viewed as having ended.
144 E.g. Said, supra note 115.
146 See Infra Section III.C.
149 Transcript of Record, supra note 17, at 1-16.
150 Second Superseding Indictment, supra note 57, at 9.
\[\text{[113.2.5]}\]

It seems likely that the Court would wait for Congress to act in making a serious change in the nature of the organizations subject to §2339B and the accompanying designation process.

151 See infra Section III.C (Discussing the operation of §2339A and the possibility of uncertain criminal activity at some future point).


153 Chesney, supra note 6, at 474.


155 Chesney, supra note 6, at 479. He also points out the importance of the fact that the statute goes on to criminalize provision of material support “in preparation for or in carrying out the concealment of an escape from the commission of any such violation…” id. at 479.


157 Chesney, supra note 6, at 478 (Stating “This may reflect the fact that most conspiracy prosecutions are not truly preventive in nature and thus provide little occasion for inquiries into this aspect of the agreement element; typically, defendants already have completed (or at least attempted) to carry out the objective of the conspiracy before they are prosecuted, leaving relatively few questions about the particular details of the agreement.”).

158 LaFave, supra note 29, at §12.1(c).

159 Chesney, supra note 6, at 479.

160 id. at 479 (“The subtle distinction . . . has the practical effect of reaching beyond the offensives themselves to encompass anticipatory activity intended to culminate in offense conduct. Thus, one might describe § 2339A as prohibiting the provision of support with intent to facilitate either a violation of a predicate statute or activity preliminary to such a violation.”).


163 id. (Professor Chesney seized this as a typical dilemma in preventive prosecution, i.e., “whether Hamid was prepared to take up arms in the name of the global Jihad movement was less clear…”); id. (Indeed Professor Chesney views as one of the main problems with §2339A the fact that the global Jihad movement can, in effect, substitute for §2339B’s requirement of a specific organization).

164 Chesney, supra note 6, at 488. Professor Chesney goes on to present a particularly trenchant critique of the use of §2339A in the Hayat case. Professor Chesney has also indicated a preference for the use of 18 U.S.C. 2339D, which makes it a crime to “knowingly receive[] military-type training from or on behalf of any organization.

Second Superseding Indictment, supra note 57, at 11, 19. Note that because of the presence of identified co-conspirators, a connection to the global Jihad movement is not necessary to prove any conspiracy, although there remains the question whether the fact that a person is somehow part of this movement and that Jihadists commit the predicate crimes is potentially enough to satisfy §2339A.


177 LaFave, supra note 8, at § 11.5.

178 United States v. Amawi, No. 3:06CR719, 2009 WL 1373155, at 1*-2* (N.D. Ohio May 15, 2009); see also Koubriti v. Convertino, 593 F.3d 459, 463 (6th Cir. 2010). This was a Bivens action arising out of a terrorism prosecution. During the course of that §2339A prosecution, the evidence showed substantial activity on the part of the then defendant, including “casing” of prospective targets and acts viewed as consistent with terrorism such as document and credit fraud and attempting to obtain commercial truck licenses for transporting hazardous material.

179 18 U.S.C. §2339B(h) (2009). This provision is a primary source of the broader constitutional test for the punishment of speech as material support found in HLP. It does not apply to other forms of material support such as service, and is found in §2339B but not §2339A.

180 Transcript of Record, supra note 17, at 35-65.

181 Id. at 21-7.

182 Id. at 35-42.

183 Id. at 22-103. The defense also accused the prosecution of trying to “poison the jury.” Id. at 10-54.

184 Id. at 10-7, 10-53.

185 Fed. R. Evid. 403. “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”

186 Fed. R. Evid. 404(b).

187 Fed. R. Evid. 404(b)(2).


189 1 WIGMORE, EVIDENCE § 10a at 684 (TILLERS REV. 1983).

190 See, e.g., United States v. El-Meziain, 664 F.3d 467, 511 (5th Cir. 2011).

191 United States v. Old Chief, 519 U.S. 172, 180 (1997); El-Meziain, 664 F.3d at 507-508; Unites States v. Abu-Jihaad, 630 F.3d 102, 131 (2d Cir. 2010).

192 Al-Moayad, 545 F.3d at 159-60; United States v. Awadallah, 436 F.3d 125, 131 (2d Cir. 2006); Salameh, 152 F.3d at 111.

193 Abu-Jihaad, 630 F.3d at 133; Al-Moayad, 545 F.3d at 161-62; Awadallah, 436 F.3d at 134.

194 Old Chief, 519 U.S. at 182-84; Al-Moayad, 545 F.3d at 160-61; Awadallah, 436 F.3d at 132. Stipulation plays a role in the provision of alternative evidence, but its role varies from case to case.

195 United States v. Benkahla, 530 F.3d 300, 310 (4th Cir. 2008); United States v. Chandia, 514 F.3d 365, 375 (4th Cir. 2008).

196 United States v. Jayyousi, 657 F.3d 1085, 1114 (11th Cir. 2011); Abu-Jihaad, 630 F.3d at 134.

197 Peter Margulies, Guantanamo by Other Means: Conspiracy Prosecutions and Law Enforcement Dilemmas After September 11, 43 GONZ. L. REV. 513 (2008).

198 See Transcript of Disposition, supra note 27, at 12. For example, the defense counsel informed Judge O’Toole that a juror would like to speak to him during the sentencing hearing; he refused to hear from the juror.

199 United States v. Benkahla, 530 F.3d 300, 310 (4th Cir. 2008); United States v. Chandia, 514 F.3d 365, 375 (4th Cir. 2008).

200 See United States v. Al-Moayad, 545 F.3d 139, 159-60 (2d Cir. 2008); United States v. Awadallah, 436 F.3d 125, 131 (2d Cir. 2006); United States v. Salameh, 152 F.3d 88, 111 (2d Cir. 1998).

201 See Wigmore, supra note 189, §10a at 685.
Placing terrorism-related cases in the general criminal justice system would seem to imply an acceptance of that system’s rules. Otherwise there is a danger of creating a subset of the criminal justice system with harsher rules for one class of cases, and perhaps, an additional risk that those rules could, in turn, affect the broader system. For example, it is hard to articulate a quantitative standard for prejudice. If one existed it would certainly be relevant to the *Mehanna* case.

*Al-Moayad*, 545 F.3d.


*Id.* at 1137.

United States v. Salameh, 152 F.3d 88 (2d Cir. 1998).

*Id.* at 122.

See *supra* Section IV.A.


United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004).

*Id.* at 340-41. “The segments played by the Government included speeches by Hizballah leaders praising men who had martyred themselves and crowds shouting “Death to America” and “Death to Israel.” Another tape depicted a group swearing to become martyrs “to shake the grounds under our enemies, America and Israel.” Most significantly, some of the tapes depicted Hizballah military operations and encouraged donations from those who could not participate directly in Hizballah operations.”

*Id.* at 342.

*Id.*

United States v. Benkahla, 530 F.3d 300 (4th Cir. 2008).

*Id.* at 309.

*Id.* at 310.

United States v. El-Mezain, 664 F.3d 467 (5th Cir. 2011).

*Id.* at 511.

*Id.*

United States v. Al-Moayad, 545 F.3d 139 (2d Cir. 2008).

The defendants were convicted of conspiring to provide material support to designated terrorist organizations Hamas and al-Qaeda, and attempting to provide material support to Hamas under 18 U.S.C. § 2339B. Al-Moayad was also convicted of attempting to provide material support to al-Qaeda and providing material support to Hamas under 18 U.S.C. §2339B.

See *Al-Moayad*, 545 F.3d at 172, 178.

*Id.* at 160.

See *El-Mezain*, 664 F.3d at 510-11(Distinguishing Al-Moayad on the facts); see also Transcript of Record, *supra* note 17, at 21-8-10.

*Al-Moayad*, 545 F.3d at 160-61.

*Al-Moayad*, 545 F.3d at 159.

The outer boundaries of §2339A also deserve consideration in mainstream – as opposed to academic – commenting, although they lack the sound byte quality of invocations of *Mein Kampf*.

Transcript of Record, *supra* note 17, at 21-7, 21-11 (Discussing *inter alia* the Al-Moayad case and the defendant’s references to killing American soldiers as “Texas BBQ.”).

*Id.* at 21-10.

*Id.* at 10-50, 10-54, 10-90.

See, e.g., United States v. Chandia, 514 F.3d 365, 375 (4th Cir. 2008) (Holding that a potentially prejudicial video was harmless because it took up only three minutes of time at trial).

Transcript of Record, *supra* note 17, at 10-61-62; see also Transcript of Record, *supra* note 17, at 3-67-69.
Mehanna, supra note 197, at 553-54.

See infra Section VI.A.


U.S. Sentencing Guidelines Manual §3A1.4 (2009) (“If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32 . . . In each such case, the defendant’s criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.”).

ABRAMS & BEALE, supra note 23, at 838.

Id.

Id. at 842.

Id. at 843.


Id. at 226.

Booker, 543 U.S. at 245 (Breyer, J., Dissenting).

Id.

18 U.S.C. §3553(a); Id. at 260.

ABRAMS & BEALE, supra note 23, at 873.

See generally id. at 870-73.

Booker, 543 U.S. 220 at 260 (Breyer, J., Dissenting).

Id. at 259.

Id. at 261; Abrams & Beale, supra note 23, at 889.


21 U.S.C. §841 (2010); Id. at 91.


Kimbrough, 552 U.S. at 91.

Id.


Id. at 51.

Id. at 49. “Most importantly, both the exceptional circumstances requirement and the rigid mathematical formulation reflect a practice—common among courts that have adopted ‘proportional review’—of applying a heightened standard of review to sentences outside the Guidelines range. This is inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions—whether inside or outside the Guidelines range.”

United States v. Jayyousi, 637 F.3d 1085 (11th Cir. 2011).

Id. at 1116.

Id.

Id. at 1119.

Id. at 1117-19.

See, e.g., United States v. Ressam, 679 F.3d 1069 (9th Cir.2012); United States v. Abu Ali, 528 F.3d 210 (4th Cir. 2008).
The court found that Abu-Ali’s case was similar to the McVeigh and Nichols cases because his threats to assassinate the President and his plans to kill American civilians would have caused extraordinary harm. The court reasoned that requiring a completed act before giving out large sentences would impose too high a standard for giving lengthy sentences.


See infra Section V.C.


Id. at 259.

Id. at 264-65. The court found that Abu-Ali’s case was similar to the McVeigh and Nichols cases because his threats to assassinate the President and his plans to kill American civilians would have caused extraordinary harm. The court reasoned that requiring a completed act before giving out large sentences would impose too high a standard for giving lengthy sentences.

Abrams & Beale, supra note 23, at 842-46 (Describing the operation of these two aspects of the Guidelines).

Stewart, 590 F.3d at 175 (Walker, J., Dissenting).

Id. at 176; but see United States v. El-Mezain, 664 F.3d 467 (5th Cir. 2011) (Applying the Terrorism Enhancement to a case in which the defendants raised money for Hamas); United States v. Jayyousi, 657 F.3d 1085 (11th Cir. 2011) (Applying the Enhancement in a case in which the defendant claimed he was merely giving aid to suppressed Muslims).

Stewart, 590 F.3d at 137-38 (2d. Cir. 2009).

Compare United States v. Abu Ali, 528 F.3d 210, 262 (4th Cir. 2008) (Holding that the Terrorism Enhancement is applicable because the defendant’s acts necessarily encompassed the requisite intent), with United States v. Chandia, 514 F.3d 365, 375 (4th Cir. 2008) (Holding that the Terrorism Enhancement is inapplicable when there has not been a factual finding of the requisite intent).


Id. at 11-12.

Transcript of Disposition, supra note 27, at 8-12.

Id. at 9-12.

Id. at 11-12.

See, e.g., id. at 22, 45.

Id. at 13-47.

Id. at 31.

Transcript of Disposition, supra note 27, at 43.

Id. at 47-59.

Id. at 57.

Id. 61-75.

Id. 61.

Id. 62-64.

Transcript of Disposition, supra note 27, at 64.

Id. at 66.

Id.

Id. at 69-70.

Id. at 69.
The defense would hardly support the Terrorism Enhancement, and would have an uphill fight, post Gall and Kimbraugh, in challenging a sentence that appears to have followed those cases and is less than the prosecution recommended.


Government’s Sentencing Memorandum, supra note 293, at 12; Transcript of Disposition, supra note 27, at 26-27.

E.g., United States v. Ressam, 679 F.3d 1069, 1091 (9th Cir.2012).

E.g. United States v. Abu Ali, 528 F.3d 210, 262 (4th Cir. 2008).

Transcript of Disposition, supra note 27, at 70-72.

Id. at 73.


Transcript of Disposition, supra note 27, at 69.

See supra Section III.C. The same considerations apply to 18 U.S.C §956.

See supra Section II.B.3.


Ramzi Kassem, Praying While Muslim: How the NYPD’s Covert Intelligence Operation has Criminalized an Entire Community, THE NATION, July 2, 2012, at 25.

See Silber, supra note 330.

Kassem, supra note 331.


Id.


See Peter Skerry, The Muslim-American Muddle, NATIONAL AFFAIRS, Fall 2011, at 14.

Id.

Transcript of Disposition, supra note 27, at 47-60.

Huq, supra note 337, at 350 (footnote omitted)(Discussing the affects of private discrimination).


See Aziz, supra note 244.

Vennoci, supra note 46; see March, supra note 42. It seems fair to say that the critics have not made a significant contribution to the broader questions raised by the case.

The jury’s role may be less central. The more incapacitative a prosecution becomes, the less the likelihood of major contested facts. In Mehanna, for example, the only contested important fact was the motive for his trip to Yemen.


Chesney, supra note 33, at 19.

Witte, supra note 141.
350 Defendant’s Request for Special Verdict Form, supra note 131.
351 Transcript of Disposition, supra note 27, at 60.