Commentators have celebrated the recent conviction of Jose Padilla on conspiracy charges as a vindication of the rule of law.1 Unfortunately, this

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1. See Abby Goodnough & Scott Shane, Padilla is Guilty on All Charges in Terror Trial, N.Y. TIMES, Aug. 17, 2007, at A1 (citing Professor Michael Greenberger of the University of Maryland, who asserted that the verdict “demonstrates . . . that the United States is fully capable of prosecuting terrorism while affording defendants the full procedural protections of the Constitution”); cf. Kelly Anne Moore, Op-Ed., Take Al Qaeda to Court, N.Y. TIMES, Aug. 21, 2007, at A19 (arguing that the verdict in the Padilla case demonstrates suitability that a legal system can both safeguard rights and lead to confinement of terrorists). For a more balanced perspective, see Adam Liptak, A New Model of Terror Trial: Tools for Prosecution Seen in Padilla Case, N.Y. TIMES, Aug. 18, 2007,
triumphalism is premature. Padilla’s conviction and the earlier arrests of suspects who allegedly plotted to attack Fort Dix\(^2\) and New York’s Kennedy Airport\(^3\) signal the primacy of the preventive paradigm that the government championed in the aftermath of September 11. The preventive paradigm, along with its centerpiece, the conspiracy charge, challenges the rule of law in significant ways that the celebration overlooks. This Essay analyzes those costs and suggests a path to reform.

The preventive paradigm\(^4\) has a pragmatic premise that is intuitively appealing: punishing illegal agreements now will prevent even more serious wrongdoing in the future. This view holds that government cannot hope to deter terrorists who often seek martyrdom and regard the legal system as illegitimate. Instead, government should use investigative and doctrinal tools, including informants, sting operations, and conspiracy charges, to form a preventive paradigm.

However, in embracing the preventive paradigm, the legal system makes a Faustian bargain. Law enforcement receives greater power to prevent crime. While responsible officials will struggle to exercise that discretion wisely, others will wield their power in ways that imperil democratic principles and increase the number of false positives.\(^5\)

Conspiracy charges diminish the government accountability that is crucial to constitutional governance because they punish amorphous conduct based on a “patchwork”\(^6\) of evidence.\(^7\) Through resort to one statute, 18 U.S.C. section 956, which criminalizes conspiracy to murder, maim, or kidnap abroad, the government in the Padilla prosecution reached conduct that amounted merely to seeking training for

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5. The term “false positives” as used here refers to people wrongfully detained or convicted. See Peter Margulies, Judging Terror in the “Zone of Twilight”: Exigency, Institutional Equity, and Procedure After September 11, 84 B.U. L. REV. 383, 386 (2004).


possible future membership in Al Qaeda. The tenor of the charges poses significant tensions with a core holding of modern First Amendment law that mere membership—let alone applying for the opportunity to seek membership at some future date—cannot be a basis for criminal prosecution. Moreover, the amorphous intent connoted by a camp application does not reach the level of agreement that due process should require for a section 956 violation.

The government’s interpretation of conspiracy in the Padilla prosecution threatens accountability in other ways. Conspiracy charges after September 11 have laundered cases like Padilla’s which originated in the shadow government of detention, surveillance, and torture. The post-September 11 elevation of conspiracy in the prevention arsenal targeted vulnerable groups, including immigrants, Arabs, and South Asians, encouraged hyperbole and headline-seeking among government officials, and permitted the government to resurrect stale claims. In addition, reliance on conspiracy charges has prompted ethical lapses among government lawyers who have sometimes cared more about saving a weak case than about handing over exculpatory evidence. The turn to prevention also outsources control to government informants who serve their own agendas rather than the public interest. Indeed, rather than eliminate threats, the preventive paradigm may further polarize communities, enhancing the prospects for violence.

To use conspiracy as a weapon against political violence, law must navigate through a minefield of risks. Failing to heed those risks can make conspiracy cases an exercise in political posturing and self-fulfilling prophecy. All too often, prosecutors since September 11 have fallen into this trap. This Essay analyzes the problems with post-September 11 conspiracy law and suggests reforms.

The article has four parts. Part I addresses the history of conspiracy law and doctrine, arguing that conspiracy law threatens to destabilize the balance between false positives (people mistakenly punished) and false negatives (people mistakenly punished in other ways). Conspiracy charges after September 11 have laundered cases like Padilla’s which originated in the shadow government of detention, surveillance, and torture. The post-September 11 elevation of conspiracy in the prevention arsenal targeted vulnerable groups, including immigrants, Arabs, and South Asians, encouraged hyperbole and headline-seeking among government officials, and permitted the government to resurrect stale claims. In addition, reliance on conspiracy charges has prompted ethical lapses among government lawyers who have sometimes cared more about saving a weak case than about handing over exculpatory evidence. The turn to prevention also outsources control to government informants who serve their own agendas rather than the public interest. Indeed, rather than eliminate threats, the preventive paradigm may further polarize communities, enhancing the prospects for violence.

To use conspiracy as a weapon against political violence, law must navigate through a minefield of risks. Failing to heed those risks can make conspiracy cases an exercise in political posturing and self-fulfilling prophecy. All too often, prosecutors since September 11 have fallen into this trap. This Essay analyzes the problems with post-September 11 conspiracy law and suggests reforms.

The article has four parts. Part I addresses the history of conspiracy law and doctrine, arguing that conspiracy law threatens to destabilize the balance between false positives (people mistakenly punished) and false negatives (people mistakenly punished in other ways).
The risk of false positives rises in cases of alleged political violence. In the United States, political violence is a relatively low-incidence crime and the ratio of big talkers to committed perpetrators of violence is very high. Conspiracy law is a very blunt instrument for making this crucial distinction. Moreover, the dynamics of prosecution enhance the risk of false positives. Prosecutors are eager to handle conspiracy cases because they allow prosecutors to take the initiative, display their skills, and make an impact. The prevalence of informants in conspiracy cases compounds this problem, since informants often have agendas of their own.

Part II of the article addresses the perfect storm of conspiracy doctrine and practice that developed after September 11. After September 11, conspiracy became a signature issue for a Justice Department eager to brand itself as a main player in the war on terror. In case like Jose Padilla’s, conspiracy prosecution became a tool to legitimize the shadow government of detention, interrogation, and surveillance. Part II also argues that conspiracy prosecutions after September 11 have trafficked in vague charges, encouraged an onrush of hype, and exploited legal doctrine to refurbish stale cases.

Part III details the consequences of these problems for central values in the criminal justice system and national security policy. Prosecutors have suffered ethical lapses, particularly in the areas of withholding exculpatory evidence and engaging in prejudicial publicity. Conspiracy cases have also targeted ethnic and religious minorities and have played into stereotypes about Muslim and Arab violence. Moreover, conspiracy prosecutions leverage adverse juror reactions to extreme political speech in a fashion that judicial instructions cannot fully cure. Defenses to conspiracy, such as entrapment, also fail to deal with the problem of prejudice. Finally, conspiracy charges can be counter-productive, promoting resentment and a climate that favors increased violence.

Part IV acknowledges that conspiracy charges have a place in the war on terror and suggests reforms to refine the implementation of this powerful and dangerous tool. First, this Part suggests criteria to guide prosecutors. These criteria include suspects’ prior illegal acts, advance knowledge of illegal activity, or special experience tailored to terrorism. Prosecutors and bar regulators should adopt guidelines to encourage greater deliberation about the discriminatory impact of charging decisions. Second, this Part suggests measures for courts seeking to control conspiracy prosecutions, including scrutinizing the fit between the defendant’s actual agreement and the criminal agreement required under the relevant statute, making the test for an overt act furthering an agreement more rigorous and making entrapment a more robust defense with an “objective” component.

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These proposals will not eliminate the threat of false positives, or wholly harmonize the amorphous nature of conspiracy doctrine within the rule of law. However, such proposals will promote greater reflectiveness and accountability for prosecutors in cases of alleged political violence. At the same time, they will better focus the legitimate prevention that conspiracy doctrine can provide in a dangerous world.

I. CONSPIRACY'S APPEAL TO PROSECUTORS AND ITS RISKS FOR THE RULE OF LAW

A. Conspiracy Doctrine and Democratic Values

Conspiracy "has been a favorite of prosecutors for centuries." A prosecutor charging defendants with conspiracy to murder need not show that a murder was committed. Indeed, it is not necessary to prove that the defendants even made an attempt. A jury need only find an agreement among two or more people, sometimes joined by some overt act in furtherance of that agreement.

In the appropriate case, charging conspiracy serves legitimate law enforcement purposes. Consider the case of a group that plans to rob a bank and purchases a gun or car to assist that effort. Acquiring a gun or a vehicle is a token of the group's earnestness. The group's agreement is also a precommitment device with the eagerness of some members solidifying the resolve of the others. In this case, law enforcement should not have to wait until the group actually attempts a bank robbery. Viewed from a broader perspective, however, resort to conspiracy doctrine creates substantial tensions with democratic values.

In a constitutional democracy, criminal law requires that the government prove that the defendant is responsible for a past misdeed. The government should not have the power to imprison an individual for a status that is uncontrollable, such as

15. Abraham S. Goldstein, Conspiracy to Defraud the United States, 68 Yale L.J. 405, 409 (1959); cf. United States v. Reynolds, 919 F.2d 435, 439 (7th Cir. 1990) (Easterbrook, J.) ("[P]rosecutors seem to have conspiracy on their word processors as Count I . . ."); Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925) (Hand, J.) (describing conspiracy as "that darling of the modern prosecutor's nursery").


17. United States v. Pinckney, 85 F.3d 4, 8 (2d Cir. 1996) (holding that the government need not prove the commission of the offense or even knowledge of all details of the conspiracy).

18. See Bird, supra note 16, at 44.

19. See Katyal, supra note 7, at 1346-50; cf. Pinkerton, 328 U.S. at 644 (observing that conspiracy entails "educating and preparing the conspirators for further and habitual criminal practices") (quoting United States v. Rabinovich, 238 U.S. 78, 88 (1915)); see also Cass R. Sunstein, Deliberative Trouble? Why Groups Go to Extremes, 110 Yale L.J. 71, 87-90 (2000) (discussing dynamics of group polarization, in which actions of members produce a "risky shift" in group behavior).
ethnicity,\textsuperscript{20} or for a factor that is viewed as crucial to democratic rights, such as the content of speech or thought.\textsuperscript{21} In the modern area, the courts have struck down statutes, such as vagrancy laws, that permitted the government to exercise such sweeping authority.\textsuperscript{22} The law considers future risks only in specially bounded areas of law, such as commitment of sexual predators or persons with mental disabilities.\textsuperscript{23} Of course, some spillover is present between past responsibility and prevention—if the system imprisons a burglar for burglaries already committed, this incapacitation may also prevent burglaries in the future. However, this effect is incidental to adjudication of responsibility for a past wrong. Indeed, judges caution juries that their verdicts must be based on evidence demonstrating responsibility for a past offense, not on concern about future misconduct.\textsuperscript{24}

Conspiracy is different. The heart of a criminal conspiracy charge is the intangible element of agreement.\textsuperscript{25} Agreements need not be express but can also be implicit.\textsuperscript{26} Because of this intangible core, the government need only prove that the

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\textsuperscript{23} See Kansas v. Hendricks, 521 U.S. 346, 360 (1997); Janus, supra note 21, at 590-91; cf. Zadvydas v. Davis, 533 U.S. 678, 690-91 (2001) (noting that courts may permit government to detain an especially dangerous alien already found to be deportable upon adherence to strict procedural safeguards and a showing that detention will prevent acts of terrorism).


\textsuperscript{25} See Goldstein, supra note 15, at 410.

defendant participated in a "vaguely criminal scheme," rather than showing that the defendant committed concrete criminal acts. As a result, jurors can convict when they perceive the defendant and his or her associates as possessing "a general disposition towards unlawful behavior." Moreover, the doctrine of conspiracy encourages guilt by association: jurors who take a dislike to one defendant on trial may extend that dislike to the others.

One factor that contributes to the amorphous nature of the agreement charged in conspiracy cases is that courts tend to interpret agreements broadly. This expansive construction frequently exceeds a particular defendant's own understanding and capacities. Once an agreement is in place, a defendant may be liable for acts in which he or she had no material role. For example, in Anderson v. Superior Court, the court held that the defendant, who had referred clients to a person performing abortions, was liable for abortions committed later on women whom she did not refer.

Historically, conspiracy centered on offensive thought and speech with action as an afterthought—in Dennis v. United States the United States Supreme Court upheld the Smith Act, under which the government had charged the defendants with the

27. See Phillip E. Johnson, The Unnecessary Crime of Conspiracy, 61 Cal. L. Rev. 1137, 1155 (1973). Where a defendant knows that another person is committing a criminal act and does something that enables the act, liability will hinge on whether the defendant has a special stake in the behavior, or on the seriousness of the act itself. People v. Lauria, 59 Cal. Rptr. 628, 635 (Cal. Ct. App. 1967) (holding that the manager of a telephone answering service was not a co-conspirator of an individual who ran a prostitution ring, even though the manager knew that the ring used his service, when manager received no special compensation; the court reserved the question of whether knowledge and some enabling act would be sufficient to establish agreement in the case of a more serious crime).


29. Id. at 448.

30. See Johnson, supra note 27, at 1155.

31. Krulewitch, 336 U.S. at 454 (Jackson, J., concurring) ("[J]urors . . . are ready to believe that birds of a feather are flocked together.").

32. See United States v. Monroe, 552 F.2d 860, 862 (9th Cir. 1977) (holding that an agreement was inferred in the instant case).

33. United States v. Pinckney, 85 F.3d 4, 8 (1996) (stating that conspirators do not need to know all the details of the crime for a conviction).

34. See id.


36. Id. at 316-17. The court also indicated that the defendant could be held liable for abortions committed before she joined the conspiracy. See id. at 316. But a later decision disavowed this even more blatant example of unfairness. See People v. Weiss, 327 P.2d 527, 545 (Cal. 1958) (overruled by statute on other grounds explained in People v. Griffin, 1 Cal. Rptr. 2d 620, 623 (1991)); see also Johnson, supra note 27, at 1147 (discussing above mentioned cases).
crime of being members of the Communist Party.\textsuperscript{37} According to the government, the defendants conspired by their very membership, "to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence."\textsuperscript{38} The lack of any evidence that the defendants had sought to procure weapons or other instrumentalities to realize their purported goal was irrelevant.\textsuperscript{39} On the theory of conspiracy that \textit{Dennis} represented, it was similarly irrelevant that the defendants may have joined the Party for entirely separate reasons, including campaigning for racial justice\textsuperscript{40}—a cause that mainstream political parties did not wholeheartedly embrace at that time. While subsequent case law on the First Amendment has de facto overruled \textit{Dennis},\textsuperscript{41} the key here is, in Jackson's words, the "drift in the federal law of conspiracy [that] . . . is characteristic of the long evolution of that elastic, sprawling and pervasive offense. Its history exemplifies the 'tendency of a principle to expand itself to the limit of its logic.'\textsuperscript{42} This drift in conspiracy law is gravitational in force, defying occasional judicial attempts to stem its momentum.

The overt act requirement in conspiracy is at best a modest hurdle for the government. The act need not be criminal in itself but can be a daily or routine act, like making a purchase or traveling to a particular destination, that thousands of other people might do without incurring criminal liability.\textsuperscript{43}

The legal system structures conspiracy doctrine in this way because of what cognitive psychologists call "anchoring."\textsuperscript{44} In anchoring, people focus on one

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  \item \textsuperscript{37} Dennis v. United States, 341 U.S. 494, 497 (1951).
  \item \textsuperscript{38} \textit{Id.} at 497.
  \item \textsuperscript{41} See Brandenburg v. Ohio, 395 U.S. 444, 447-50 (1969); cf. Peter Margulies, \textit{The Clear and Present Internet: Terrorism, Cyberspace, and the First Amendment}, 2004 UCLA J. L. & TECH. 4, http://www.lawtechjournal.com/articles/2004/04_041207_margulies.php (discussing application of the First Amendment to terrorist-related information and advocacy on the Internet and arguing that liability for posting information such as security arrangements at public buildings should only attach where evidence of ongoing interaction between defendant and others about future illegal acts is present).
  \item \textsuperscript{43} See Chesney, \textit{ supra} note 4, at 448; Goldstein, \textit{ supra} note 15, at 406.
\end{itemize}
characteristic or event, and then make judgments that are consistent with that anchor. Anchoring, like many other shortcuts in human judgment, can work in a "quick and dirty" way, but can also lead to serious mistakes. Mistakes occur when the anchor is either unreliable, or is insufficiently related to the ultimate judgment being made.

In conspiracy law and proof, one anchor is the arrest and charging of the defendants. The allegations against the defendants are often extreme—particularly in terrorism cases. The human tendency is to treat the allegations as true and then reason backward in time for evidence that will support the charges. Viewed in hindsight, a nebulous agreement appears more concrete and routine or equivocal actions appear to further the agreement. Only later, if at all, do people ask whether the charges are accurate.

Rules for conspiracy trials compound this problem. Rules in most criminal cases seek to avoid errors that social scientists call "false positives" or finding someone guilty of a crime that he or she has not committed. In a democracy, the law cares more about avoiding false positives than about avoiding false negatives or people whom a jury finds not guilty even though they have committed a crime. The beyond a reasonable doubt standard that the government must meet in criminal trials incorporates this crucial normative choice.

While many of the same rules, such as the standard of proof, also apply in conspiracy trials, the emphasis is different. More than other criminal cases, guilty defendants in conspiracy trials find it harder to use the requirements of the justice system to their advantage. The result is a greater risk of false positives.

To prevent conspiracy defendants from exploiting the secrecy that marks a successful plot, courts relax rules on the reliability and specificity of evidence. For example, the prosecution can rely on hearsay that would otherwise be inadmissible.

46. See Chapman & Johnson, supra note 44, at 133-34 (explaining the dangers of "confirmation bias," in which people tend to seek information consistent with their hypothesis and neglect inconsistent information).
47. Cf. id. at 134 (discussing hindsight bias, which leads people to overestimate the likelihood and predictability of past events based on subsequent occurrences known to the subject).
48. See Margulies, supra note 5, at 408.
49. See id.
51. See Blumenthal v. United States, 332 U.S. 539, 557 (1947) ("Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime."); Pinkerton v. United States, 328 U.S. 640, 644 (1946) (describing a conspiracy as "characterized by secrecy, rendering it difficult of detection" (quoting United States v. Rabinowich, 238 U.S. 78, 88 (1915)));
52. See FED. R. EVID. 801(d)(2)(E); Bourjaily v. United States, 483 U.S. 171, 175 (1987); cf.
The government can also introduce statements made by co-conspirators in the course of the alleged plot that the defendant did not know about or authorize. Participant do not need to know the details of an alleged plan nor do they need to know each other. They can resemble spokes in a wheel, acting without express coordination to achieve a common goal. Moreover, their ends may overlap but need not be identical. In essence, as Justice Jackson noted, the government can present a "hodgepodge" that a defendant cannot hope to disprove in every particular. Unless a jury seeks more specific evidence, the court will usually instruct the jury that insisting on a "smoking gun" merely rewards the cunning conspirator. The entire framework is a recipe for false positives. As senior federal judges noted starkly in a report more than seventy-five years ago to Chief Justice Taft, "the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant."

At certain moments, courts have tried to rein in the concept of agreement to curtail the unfair attribution of group conduct to individual defendants. For example, in Kotteakos v. United States, the Court held that a defendant who participated only in an individual fraudulent loan transaction was not part of a single conspiracy with those seeking unrelated loans, even though another person served as the "hub" for all transactions. Justice Rutledge, writing for the Court, observed that the government's position "confuses the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character." However, these moments of judicial gatekeeping have been few and far


53. See Davis & Vitullo, supra note 52, at 806-07.
56. See Goldstein, supra note 15, at 411.
57. Krulewitch, 336 U.S. at 446 n.2 (quoting Dep't of Justice, Annual Report of the Attorney General of the United States 5-6 (1925)).
59. Id. at 769.
between. The limitation in *Kotteakos* preserves substantial leeway for prosecutors, where they can demonstrate that the transactions serve a common plan.  

The risk of government overreaching in conspiracy cases is highest in cases of alleged political violence. Here, too, cognitive psychology enlightens our analysis. Cognitive psychologists have found that people tend to overestimate the likelihood of events that are vivid and emotionally salient. Airplane crashes are a useful example: people fear airplane crashes far more than they fear car accidents, although the latter occur far more frequently and cause exponentially greater harm. Terrorist attacks are another example. Legitimate outrage at the targeting of civilians by terrorists can obscure the rarity of these attacks in the United States. The September 11 hijackings made many people reluctant to fly for months afterward, despite the statistically rare chance of injury or death arising from terrorism during airplane travel.  

Since terrorism in this country has an exceedingly low incidence of occurrence, separating the committed terrorist from the big talker is difficult. The terrorist and the "wanna-be" may talk the same talk; indeed, the "wanna-be" may be less guarded than the truly dangerous individual. While the best prosecutors seek to factor in this concern, other officials trot out conspiracy charges to stoke the public’s fear and make political points.

History demonstrates that officials often use conspiracy charges against political foes. Centuries ago, Sir Walter Raleigh was charged with conspiracy when he became a political threat. Within the last 150 years, American authorities used conspiracy to suppress agitation by trade unionists and anarchists. Labor conspiracy charges were a favorite tool for prosecutors and big business seeking to break strikes. More recently, consider the example of the Chicago Seven conspiracy trial, in which prosecutors put on trial political protesters at the 1968 Democratic Party Convention, including counter-culture icons such as Bobby Seale.

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60. *Cf. id.* at 755.


66. *See* United States v. Dellinger, 472 F.2d 340, 348 (7th Cir. 1972). Technically, the term
of the Black Panthers and Tom Hayden of Students for a Democratic Society. Child care expert Dr. Benjamin Spock's 1968 conspiracy trial for facilitating draft evasion reveals similar concerns. Here, as in the Chicago Seven case, the courts eventually overturned the convictions. However, the government had an opportunity to both send a message to political dissidents and mobilize its own political base.

B. Conspiracy Prosecutions in Practice: Incentives and Agendas

The government's reliance on government informants and sting operations compounds the problem of false positives. Informants are sometimes necessary but are always risky. Usually, informants have unclean hands and private agendas. They often sport track records of illegal conduct and resort to cooperation with the government in the hopes of favorable treatment. Indeed, in some cases the kingpins of illegal operations are also the first to recognize the need to cooperate, giving up subordinates while masking or minimizing their own role. Some informers are attracted by other rewards and inducements, including the hundreds of thousands of dollars that the government has spent on informants after September 11. As a result, informants have an incentive to embellish or even to fabricate their stories. In one case, the informant was mentally unstable, at one point setting himself on fire outside "Chicago Seven" is misleading, since Bobby Seale was originally the eighth defendant. Seale's trial was severed after his disruptive behavior led the judge in the case to order that he be bound and gagged.

70. United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972); Spock, 416 F.2d 165.
72. The Bush administration found this out when it relied on informants with their own agendas to provide intelligence about weapons of mass destruction in Iraq. See RON SUSKIND, THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA’S PURSUIT OF ITS ENEMIES SINCE 9/11, at 169 (2006) (describing a dubious source for weapons of mass destruction information known as “Curveball”).
the White House in an effort to secure additional money. Similarly, informants used in sting operations have an incentive to push, cajole, and browbeat their targets into more and more damaging statements and admissions, just as undercover agents have an incentive to get targets in drug prosecutions to buy or sell larger amounts of drugs that will trigger stiffer sentences. A substantial number of post-September 11 conspiracy cases involved young men targeted by stings in this way, who may have never come close to an illegal agreement without such an informant’s influence.

Both informants and sting operations tend to target people of a particular race or ethnic background. Although commentators and activists regularly clamor for police to run more stings on kids from the suburbs buying drugs, buy and bust stings are regularly run on residents of inner-city neighborhoods. Sting operations have the same problem with selective targeting in the terrorism context. It hardly seems likely that police running a sting operation to arrest members of potential sleeper cells will target a group of middle-aged Mah Jongg players from the suburbs. Instead, police and prosecutors will focus on institutions and residents of neighborhoods that are predominantly Muslim, Middle Eastern, or South Asian.

Prosecutors have an incentive to ignore the risks posed by reliance on informants. Senior government officials care more about making a splash with a high-profile arrest than about subsequent difficulties with the case, which typically receive less attention from the media. Moreover, prosecutors often buy into the tales spun by informers, just as Bush administration officials snapped up the exaggerated accounts of Saddam Hussein's weapons of mass destruction relayed by Iraqi exiles. Part of this symbiotic relationship between prosecutors and informants involves instrumental motives—a high-profile conspiracy prosecution can make a prosecutor’s career. Moreover, prosecutors are often competitive and a high-profile arrest brings

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77. See Yaroshefsky, supra note 13, at 921.

the benefits of prestige and bragging rights. Prosecutors also want to take the initiative. Using informants and sting operations, prosecutors appear in control of the law enforcement agenda. Without a portfolio of such projects, prosecutors cede the initiative to their adversaries on the other side of the law.

As with all portfolios, over-investing in informants and sting operations creates risks. The best prosecutors are effective gatekeepers, winnowing out unreliable informants and cutting losses when investigations yield little of value. Too often, however, prosecutors stick with cases that are going south, “doubling down” like an investor who is sure that a declining stock will rebound. In sting operations, competitive prosecutors may experience disappointment when a subject seems to lose interest in the terrorist venture that the informant or undercover agent has proposed. For example, agents seeking to get a Bronx jazz bassist, Tarik Shah, to commit to terrorist activity had to play second-fiddle to the target’s interest in working out and making gigs. A gatekeeping prosecutor would have taken the target’s distraction as evidence that his occasionally extreme talk did not dovetail with an interest in action. Instead, however, the prosecutors in this case re-doubled their efforts, eventually persuading their target to participate in a mock swearing-in ceremony for Al Qaeda and promise to provide martial arts training for the group. By getting Shah to take the bait, the government salvaged its investment and obtained a guilty plea from Shah, thus foregoing a public trial. Nevertheless, a gatekeeping prosecutor could reasonably ask whether the operation succeeded only in netting a false positive, who would not have acted without protracted efforts by law enforcement agents.

In addition to the problems posed by unreliable informants, invidious assumptions and prepackaged scripts may skew the path of an investigation. In the terrorism enforcement context, for example, pervasive scripts about the prevalence of terrorism within Islam or among Arabs and South Asians can skew prosecutorial decisions. Here, the best prosecutors will acknowledge the influence of such images and manage their cases accordingly. However, less reflective prosecutors lack this insight.

79. Cf. Richman, supra note 14, at 798-800 (discussing the nature of prosecutors’ incentives).
80. See id. at 803-04 (discussing barriers to prosecutors reconsidering the strength of evidence, particularly in big cases).
82. Id.; Bronx Martial Arts Instructor Sentenced to 15 Years in Prison for Conspiring to Provide Material Support to Al Qaeda, U.S. FED. NEWS, Nov. 7, 2007.
83. See Fever, supra note 81.
II. CONSPIRACY AND THE AFTERMATH OF SEPTEMBER 11

In the wake of September 11, the preventive goals of conspiracy law became a signature of senior officials seeking strategic, political, and institutional advantage. As a matter of effective antiterror strategy, the catastrophic losses of September 11 argued for a revision of the traditional American acceptance of some false negatives to avoid false positives. In fact, the government needed an appropriately tailored flexibility in some areas to address the gravity of the risk posed by terrorism. Conspiracy cases should be part of this antiterrorist repertoire. However, the Bush administration’s reliance on conspiracy cases exceeded this prescription. While the motivation of these officials encompassed dismay at the attacks and an understandable desire to prevent future harm, their moves bolstered a monolithic model of law enforcement that undermined checks and balances.

Attorney General John Ashcroft wasted no time in marginalizing the deliberative virtues extolled by predecessors such as Robert Jackson, Attorney General under Franklin D. Roosevelt, who as a Supreme Court justice articulated a pioneering vision of the limits of executive power. Ashcroft pointedly evoked Robert Kennedy, warning that the Justice Department would arrest potential terrorists for “spitting on the sidewalk,” as Kennedy had cautioned racketeers. Unfortunately, Ashcroft’s reference to Robert Kennedy (who Ashcroft, in fairness, seems to have sincerely admired) concealed one essential difference between the situations facing the two men.

Kennedy’s prey, including labor racketeers such as Jimmy Hoffa of the Teamsters union, engaged in corruption as a way of doing business. Their wrongdoing was open and notorious, at least in union circles. They had succeeded in avoiding accountability before Kennedy because they bribed, intimidated, or killed potential witnesses. Indeed, the successful racketeer burnished his reputation to instill fear and enrich himself and his associates. Because of these factors, the likelihood of Kennedy punishing the wrong people was minimal and the problem of false positives did not afflict his efforts. In contrast, the base rates for political violence are very low and American terrorists tend to keep to themselves.

85. See Robert H. Jackson, The Federal Prosecutor, 24 J. Am. Judicature Soc’y 18, 20 (1940) (“Only by extreme care can we protect the spirit as well as the letter of our civil liberties, and to do so is a responsibility of the federal prosecutor.”).
86. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).
90. For a more critical view of Kennedy’s use of an informant in the investigation of corrupt
Kennedy’s forging of a signature theme reflected these differences. Indeed, Kennedy moved the government away from an area where false positives are rife—the prosecution of subversives and Communists—taking on J. Edgar Hoover in the process. Unfortunately, Ashcroft ignored the telling discontinuities between the Bush administration’s efforts and Kennedy’s approach.

While prosecutors have a legitimate interest in keeping the public apprised about their activities, John Ashcroft and Alberto Gonzales elevated public information about alleged conspiracies to the level of political theatre. In the spring of 2002, Ashcroft took time out from a trip to Moscow to broadcast the news that the FBI had arrested United States citizen Jose Padilla at the O’Hare Airport in Chicago in an alleged plot to acquire a “dirty bomb.” Ashcroft went public about another terrorism case, the Koubriti case from Detroit, claiming shortly after September 11 that the defendants had advance notice of the attacks. Ashcroft also asserted that John Walker Lindh, the so-called “American Taliban,” had engaged in a significant conspiracy against the United States. Despite thin evidence of an active role in the attacks, he sought the death penalty for Zacarias Moussaoui, who had engaged in flight training on Al Qaeda’s behalf before September 11.

The promotion of Alberto Gonzales to Attorney General maintained the government’s reliance on conspiracy. Gonzales had been heavily involved in designing the President’s overall legal strategy on terrorism, including the infamous torture memos justifying interrogation techniques that were prohibited under both international and domestic law. Gonzales continued the preventive focus of the labor boss Jimmy Hoffa, see generally Spritzer, supra note 88.

91. See EVAN THOMAS, ROBERT KENNEDY: HIS LIFE 252 (2000) (noting that Kennedy realized that FBI Director Hoover “grossly exaggerated the communist threat; indeed, the attorney general was always nudging the director to move his agents away from infiltrating the moribund American Communist Party to investigating the real threat, organized crime”).


94. See Jane Mayer, Lost in the Jihad: Why Did the Government’s Case Against John Walker Lindh Collapse?, NEW YORKER, Mar. 10, 2003, at 50, 50, 52-54 (reporting statements asserting Lindh’s guilt by Paul McNulty, the United States Attorney supervising the case who subsequently became Deputy Attorney General).


Justice Department, announcing indictments at elaborate press conferences in cases such as the Miami Seas of David case that gathered headlines for alleged plots against celebrated buildings such as the Sears Tower.\textsuperscript{97}

In each of these cases, the government ultimately had to retreat from its initial public assertions. For example, Padilla, despite his recent conviction, has never been charged with seeking a dirty bomb.\textsuperscript{98} In the Koubriti case, the government ultimately had to move to throw out the convictions it had obtained because it had failed to disclose exculpatory evidence.\textsuperscript{99} While Lindh pleaded guilty and is currently serving a twenty-year sentence for taking up arms against the United States, the facts in his case ruled out any grand conspiracy, revealing him as a young man who had taken up with the Taliban in a low-level position because of faulty judgment, distorted idealism, and a very poor sense of timing.\textsuperscript{100} While Moussaoui was by his own admission in training to be a terrorist, the case for his participation in the September 11 plot was strained at best and the government's request for the death penalty was unfair, in light of the refusal to provide access to detainees who could offer exculpatory information.\textsuperscript{101}

\section*{A. Statutory Foundations and Law Enforcement Performance since September 11}

In implementing their signature prevention approach, Ashcroft and then later Gonzales, turned to statutes that prohibited terrorist activity. Such laws prohibit preliminary efforts to provide assistance (or "material support," in the statutory language) to terrorist acts and groups.\textsuperscript{102} The material support statutes exhibit the precarious balance between false positives and false negatives that mark all conspiracy law. While the government can enforce the statutes in core cases without


\textsuperscript{100} See Mayer, supra note 94, at 50, 52-57.


\textsuperscript{102} See, e.g., 18 U.S.C. § 2339A (2000) (prohibiting "material support" to terrorist activity); § 2339B (barring "material support" to group designated as foreign terrorist organization by the Secretary of State).
raising fatal constitutional problems, the ever-expanding logic of conspiracy noted by Justice Jackson \(^{103}\) has vaulted enforcement beyond these core cases.

The material support statutes provide prosecutors with substantial leeway for this expansion of liability. Material support includes funding, “training, expert advice or assistance, . . . communications equipment, . . . personnel, transportation, and other physical assets.” \(^{104}\) It also includes “lodging, . . . false documentation or identification, . . . facilities, weapons, lethal substances, [and] explosives.” \(^{105}\) Court decisions and legislative amendments have narrowed and clarified some of these terms. For example, courts have struck down the “training” provision as vague, since it could include instruction in international law or techniques of non-violence protected by the First Amendment. \(^{106}\) However, even after judicial intervention and legislative amendments, the material support provisions still offer a broad canvas.

To appreciate this breadth, consider that the terrorist activities covered by the material support statutes include violations of 18 U.S.C. section 956. On its face, section 956 is eminently uncontroversial, presenting a core case if ever there was one: conspiracies to “kill, kidnap, [or] maim” persons abroad. \(^{107}\) However, the government is not required to prove that defendants had identified any particular target. \(^{108}\) For example, in United States v. Sattar, the government alleged that the defendants violated section 956 by persuading Sheik Abdel Rahman, the so-called “blind sheik” imprisoned for life, for conspiring to attack the United States military and assassinate Egyptian President Mubarak, and to recommend that his group withdraw from a cease-fire that it had agreed to after an attack that killed over sixty tourists in Egypt in 1997. \(^{109}\) After persuading Abdel Rahman of this course of action, the defendants, including Lynne Stewart, a well-known criminal defense lawyer, also

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104. 18 U.S.C. § 2339A(b) (Supp. II 2002) (funding includes “currency or monetary interests or financial securities [and] financial services”).

105. Id.

106. See, e.g., Humanitarian Law Project v. Dep’t of Justice, 352 F.3d 382, 403-05 (9th Cir. 2003). The USA PATRIOT Act added the “expert advice or assistance” category in 2001. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, § 805, 115 stat. 272, 377 (2001). A number of courts have held that some of these terms are unconstitutionally vague when they are applied. See United States v. Sattar, 272 F. Supp. 2d 348, 357-61 (S.D.N.Y. 2003) (holding that “personnel” and “communications equipment” were unconstitutionally vague as applied); see also Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185, 1201-03 (C.D. Cal. 2004) (upholding a vagueness challenge, but rejecting overbreadth claim).


108. See Chesney, supra note 4, at 462.

undertook to publicize the sheik's decision. Neither the discussions with the imprisoned sheik, which involved the deception of federal correctional authorities, nor the subsequent public announcement by Stewart of the change in Abdel Rahman's position involved specific plans for terrorist activity. However, the judge in the case ruled that such specificity was not required. Once the court found that the prosecution could constitutionally charge the defendants with a violation of section 956 on these facts, it further found that the facts would also support a prosecution under section 2339A for lending material support to this terrorist activity.

When the facts cement this link between section 956 and the material support statutes, the government can prosecute conduct that appears highly amorphous. For example, the government has argued that the provision of the material support statute barring the provision of "personnel" to terrorist activity includes a defendant providing himself to the global "jihad movement." The second prong of the material support statute, section 2339B, criminalizes material support of a group officially designated by the Secretary of State as a "foreign terrorist organization." Here, too, core cases seem both permissible and appropriate. For example, courts have repeatedly upheld the bar on furnishing of funds to groups acting contrary to the law or causing harm, such as Hamas. In upholding these provisions, courts have noted that such provisions burden free speech only in an incidental manner. Nothing in the statute prohibits protected speech, including praise of Hamas. In addition, the statute fulfills an important government objective: the denial of support to a foreign group with a track record of violence.

111. Id. at 289-92.
112. Id. at 304.
113. Id. at 304-05; see infra notes 246-256 and accompanying text (defending Sattar decision while noting problems with other, even more expansive interpretations of section 956).
114. See Superseding Indictment, supra note 98.
116. See Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135 (9th Cir. 2000).
117. Id. Compare COLE, supra note 76, at 62-64 (2003) (arguing that the statute is an unconstitutional burden on free speech in most situations because it does not require proof of specific intent to aid violence, while conceding that the government could criminalize provision of funds to Al Qaeda because of the integral link of violence to that organization's structure and purpose), and Cole, supra note 22, at 205-11 (arguing that a prohibition on material support of designated foreign terrorist organizations such as Hamas violates right to association under First Amendment), with Peter Margulies, The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity, 62 Md. L. Rev. 173, 204-05 (2003) (arguing that the statute is constitutional in many contexts, but would be impermissibly vague if applied to forms of assistance such as legal representation of group members in criminal trials); cf: Humanitarian Law Project v. Reno, 205 F.3d at 1135-38 (upholding the statute, while holding that certain terms were vague as applied); Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185, 1200-01 (C.D. Ca. 2004) (holding that prohibition on "expert advice or assistance" to designated terrorist organizations in USA
However, here, too, enforcement beyond core cases can expand to threaten protected activity and target particular groups. In addition, rigid enforcement can be counter-productive, enhancing the standing of entrepreneurs of violent ideology and discrediting more moderate elements.\footnote{See Margulies, supra note 109, at 67-68.}

The terrorism cases brought after September 11 against this legal background reflect an overall lack of prosecutorial judgment. In the most troubling cases, prosecutors and national security officials have used conspiracy charges to leverage the shadow government of detention and coercive interrogation established at Guantanamo.\footnote{See infra notes 132-135 and accompanying text.} The government has also exploited the amorphous nature of conspiracy by charging defendants with assistance to the global “jihad movement,” not to specific plots. In addition, prosecutors have used conspiracy to target terrorist wannabes or resurrect stale cases involving conduct from the 1990’s. Even where government investigation is appropriate, such as the recent cases involving alleged plots against Fort Dix and JFK Airport, the use of informants to encourage and enable the defendants undercuts the government’s claims about the seriousness of the threats. Indeed, the hype generated by these prosecutions also heightens the risk that officials will later cut legal corners to save a case headed for collapse.

B. Conspiracy and Antiterror Prosecution as a Tool of Shadow Government

The conspiracy and material support laws invoked by Ashcroft and Gonzales have strengthened the shadow governance systems that the Bush Administration established after September 11. The government used the sweeping language of the material support laws to launder detentions that would otherwise have been impermissible. To illustrate the role of material support prosecutions in legitimating and laundering shadow government, consider the case of Jose Padilla.

Padilla is a United States citizen whom the government arrested at O’Hare Airport in Chicago and held for 3 ½ years as an enemy combatant.\footnote{See Eric Lichtblau, In Legal Shift, U.S. Charges Detainee in Terrorism Case, N.Y. Times, Aug. 13, 2005, at A1.} Over the

\footnote{See Robert M. Chesney, Civil Liberties and the Terrorism Prevention Paradigm: The Guilty By Association Critique, 101 Mich. L. Rev. 1408, 1433-51 (2003) (reviewing David Cole & James X. Dempsey, Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security (2d ed. 2002) and David Cole, Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism (2003)) (arguing that certain statutory terms defining material support, such as “personnel,” may criminalize mere membership in an organization and are therefore void for vagueness). See generally Nina J. Crimm, High Alert: The Government’s War on the Financing of Terrorism and Its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy, 45 Wm. & Mary L. Rev. 1341 (2004) (analyzing relationship between material support statute and charitable giving); Peter Margulies, supra note 109 (arguing that restrictions on terrorist groups that opt to participate in democratic elections can be counter-productive).}
course of Padilla’s detention, first announced by Attorney General Ashcroft in the spring of 2002, the government used methods of interrogation and confinement that would be egregiously unconstitutional even for a prisoner in a federal “super-max” security prison, including sensory deprivation.\footnote{See Deborah Sontag, \textit{A Videotape Offers a Window into a Terror Suspect’s Isolation}, \textit{N.Y. Times}, Dec. 4, 2006, at A1.} For much of this time, the government also refused to permit Padilla to meet with his attorneys.\footnote{See Padilla ex rel. Newman v. Bush, 233 F. Supp. 2d 564, 599 (S.D.N.Y. 2002) (“Padilla . . . has no ability to make fact-based arguments because . . . he has been held incommunicado . . . at the Consolidated Naval Brig . . . .”).} Justifying these extraordinary measures, the government told at least four distinct stories. These stories culminated not in a trip to Guantanamo or some “black site” operated by a friendly government abroad, but in a conspiracy conviction for amorphous conduct that occurred almost ten years ago.\footnote{See Richard A. Serrano, \textit{Padilla Guilty on All Counts in Terror Case}, \textit{L.A. Times}, Aug. 17, 2007, at A1.}

The first and most salient government justification for Padilla’s detention was the claim that high-ranking Al Qaeda operatives had tasked Padilla with the job of assembling a “dirty bomb” containing nuclear radiation.\footnote{See Eggen, supra note 92.} When it appeared that many of the statements demonstrating this story were obtained by torture, the government proceeded to plan B. According to this narrative, Padilla had intended to blow up apartment buildings, perhaps by leaving on the gas stove in an apartment.\footnote{See Eric Lichtblau, \textit{U.S. Spells Out Dangers Posed by Plot Suspect}, \textit{N.Y. Times}, June 2, 2004, at A1.}

Deputy Attorney General James Comey publicly announced this justification in the spring of 2004, just as the Abu Ghraib scandal was gathering speed, and the Supreme Court was considering Padilla’s case.\footnote{Id.}

After the apartment building story became difficult or inconvenient to prove, the government, in 2005 (after the Supreme Court required more hearings from lower courts in the case) went to Plan C—alleging that Padilla traveled to Afghanistan and sought to fight with the Taliban against the United States and its ally, the Northern Alliance. The government asserted this justification before the conservative Fourth Circuit federal appeals court, in a panel including Judge Michael Luttig, whose deferential views toward presidential authority had earned him consideration for the United States Supreme Court. Judge Luttig responded with an opinion upholding Padilla’s continued detention.\footnote{See Padilla v. Hanft, 423 F.3d 386, 397 (4th Cir. 2005).}

Finally, on the eve of Supreme Court review of the Fourth Circuit’s decision in the fall of 2005, the government moved to Plan D—conspiracy charges in federal court. It accused Padilla of conduct from 1996 through 2000, including submission
of an alleged Al Qaeda membership application form, intended to assist the global “jihad movement.”

Under the material support statutes, the government did not have to prove that Padilla had participated in a more specific plan, sought a dirty bomb, or plotted to blow up apartment buildings. Assessing the government’s move, Judge Luttig inferred that the government had engaged in a legal “bait and switch” operation, arguing Plan C to secure a favorable ruling from the Fourth Circuit, and pivoting to Plan D to avoid Supreme Court review.

For Judge Luttig, who wrote in the anguished tone of a disappointed true believer, the pivot toward conspiracy damaged the government’s credibility, by fostering the impression that Padilla’s long detention had been a “mistake.” Whatever Luttig’s disappointment, Padilla’s conviction on conspiracy charges will most likely moot the legality of his lengthy detention outside the criminal justice system.

The utility of conspiracy and material support charges for the post-September 11 shadow government extends beyond Padilla’s case. In several other cases, the government has used conspiracy charges to convict and punish defendants who had been subject to abusive interrogations. These individuals included David Hicks,

128. See Superseding Indictment, supra note 98.
130. See Padilla v. Hanft, 432 F.3d 582, 587 (4th Cir. 2005).
131. Indeed, governmental and official immunities from suit will most likely shield the government even in the event of an acquittal. See Morse v. Frederick, 127 S. Ct. 2618, 2638 (2007) (Breyer, J., concurring and dissenting) (arguing that the Court should have resorted to qualified immunity to dispose of a lawsuit against school officials who had disciplined student for “Bong Hits 4 Jesus” sign).

The government has also interfered with access to counsel for detainees and others through measures such as attorney-client monitoring. See Teri Dobbins, Protecting the Unpopular from the Unreasonable: Warrantless Monitoring of Attorney Client Communications in Federal Prisons, 53
the Australian detained at Guantanamo for five years, whom the government handed over to Australia in early 2007 after Hicks pleaded guilty to material support.\(^{123}\) Others included the student Abu Ali\(^{134}\) and Muhammed Salah, whom a jury may have believed had been subject to abusive interrogation practices while in Israeli captivity.\(^{135}\)

Conspiracy legitimated the shadow government in another way, hinging on investigative and surveillance techniques. The material support case often involved evidence obtained through the Foreign Intelligence Surveillance Act ("FISA"), where applications for warrants go to a special court on vague allegations that the proposed subject is an "agent of a foreign power" (including a terrorist organization), instead of going to local judicial officers.\(^{115}\) FISA lacks the local base or the concreteness of the warrant procedure in the federal districts. The vast increase in FISA warrants since September 11 fuels concern that conspiracy cases allowed the government to bypass local gatekeepers.

The legitimation of shadow government also reaches into the plea negotiation stage. The government can threaten recalcitrant conspiracy defendants who are not United States citizens with a slow boat to Gitmo, where who knows what rigors
There is some evidence, for example, that the government threatened Lyman Faris, a foreign national arrested here, with detention at Guantanamo before Faris pleaded guilty to conspiracy. While Faris' case suggests that he had visited an Al Qaeda training camp and even met with Osama bin Laden, his guilty plea is very thin on the issue of participation in concrete plots.

Faris acknowledged that he had assisted unnamed Al Qaeda members with extensions on plane tickets. He also acknowledged that he had visited the Brooklyn Bridge, to assess the feasibility of bringing down the bridge by cutting through the bridge's suspension cables with torches. Faris and the government disputed whether Faris had simply driven across the bridge or had examined it in greater detail. Both sides acknowledged, however, that Faris had reported back that the plan was not feasible. At trial, Faris could have argued that he had always known that the idea was not plausible and that he informed others after driving over the bridge, as millions do every year. In this case, as in a number of others involving thin facts and frail plots, the "difference-maker" in agreeing to plead guilty rather than go to trial may have been the prospect of solitary confinement and coercive interrogation at Guantanamo Bay.

Faced with the prospect of detention at Guantanamo, many defendants will plead guilty. The appeals court that rejected Faris' argument only buttressed this concern with its blithe observation that "[e]very guilty plea necessarily entails a choice among distasteful options."

Conspiracy charges and the new anti-terror "material support" provisions have also played a crucial role in the course of the military tribunals established to try

139. Id. at 454-55.
140. Id. at 455-56.
141. Id. at 456.
142. Id.
143. Id.
144. Id. at 458.
145. Id. at 457.
146. In addition, the legitimation of shadow government continues at trial. The government has used the Classified Information Procedures Act (CIPA), 18 U.S.C. app. 3, §§ 1-16 (2000 & Supp. IV 2004), to have information about sources and methods excluded from conspiracy trials. See Yaroshefsky, supra note 136, at 208-12. In some cases, the government has even acted where CIPA is not actually applicable and extended its reasoning to cases involving interviews with detainees who could provide exculpatory evidence in advance of trial. At least one court has held that a defendant must rely on cold summaries and transcripts of detainees' interrogations, instead of having the opportunity to secure testimony with appropriate security safeguards, or at least conduct a deposition. See United States v. Moussaoui, 365 F.3d 292, 295 (4th Cir. 2004). This use of CIPA and related measures, including the state secrets privilege, poses a substantial problem under the Sixth Amendment's fair trial guarantee.
suspected terrorists at Guantanamo. The government charged Salim Ahmed Hamdan, Osama bin Laden's personal driver, with conspiracy to commit war crimes. While Justice Stevens asserted in his landmark opinion for the Court in *Hamdan v. Rumsfeld* in June, 2006 that the government lacked authority to charge Hamdan with conspiracy, in part because the conspiracy charge was so nebulus, the Military Commissions Act passed by Congress to overrule *Hamdan* provides for forms of liability very much like conspiracy, including material support to a group engaged in terrorist activity.

Recourse to conspiracy material support in the military commission context raises substantial concerns about policy, fairness, and the integrity of legal proceedings. Generally, offenses against the law of war have focused on a few core areas, including violence against civilians, torture and cruel treatment of captives, and the unjustified use of force against nations or populations. Concentrating on these core areas ensures wide agreement within the international community. Including more amorphous offenses, such as material support, threatens that international consensus and distracts from the clear principles underlying this body of law. The amorphous nature of conspiracy charges also creates a further danger, compounded by the difficulty of securing concrete evidence about wrongdoing abroad. Because of the difficulty of obtaining evidence, conspiracy charges may become a cover for criminalizing mere membership in an organization. This problem enhances the risk of guilt by association that always lurks in conspiracy doctrine.

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149. *See id.* at 2780 (arguing that neither treaty nor statute incorporates the offense of conspiracy into the law of war or defines its elements or the spectrum of punishments available; asserting that this absence of clear precedent or authorization risks “concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution”). Since Justice Kennedy did not share his position, Stevens did not command a majority on this view. *Id.* at 2809 (Kennedy, J., concurring); *cf. Mark A. Drumb, Atrocity, Punishment, and International Law* 37-39 (2007) (analyzing tensions caused by charges of collective wrongdoing in international law, including adjudication of responsibility for crimes against humanity such as genocide). *See generally* Stephen Ellmann, *The “Rule of Law” and the Military Commission*, 51 N.Y.L. SCH. L. REV. 761, 781-87 (2006-07) (analyzing *Hamdan* in light of rule of law values).
151. *Cf. Drumb*, supra note 149, at 183 (noting “universal condemnation of the great evils” that undergirds international criminal law).
Charging crimes like material support in military commissions also raises fundamental questions of fair notice. In our system, an individual must have notice that conduct is criminal before being prosecuted or punished. When an individual must resort to a crystal ball to discern what conduct today will be criminal in the future, the state is playing “gotcha,” not dispensing justice. Sadly, Congress set the stage for this sad spectacle when it passed the Military Commissions Act (“MCA”), which makes material support a violation triable before a military commission. The Administration proceeded to charge detainees including Salim Hamdan and the Australian, David Hicks, with providing material support, even though their alleged acts occurred before the MCA became law. When Hicks agreed to a plea bargain after spending almost five years in harsh confinement at Guantanamo, he admitted to conduct remarkably similar to the acts cited in material support cases—“casing” buildings for possible future terrorist attacks. However, the law of war almost certainly did not prohibit these acts at the time Hicks committed them. Consequently, the charges against Hicks lacked the fundamental element of notice.

Pivoting toward conspiracy in the Hicks plea agreement also allowed the terrorists, while acknowledging that “[s]ome alleged terrorists have not committed overt crimes and can be tried only on a conspiracy theory that comes close to criminalizing group membership”).


157. See Williams, supra note 133.

158. See Hamdan, 126 S. Ct. at 2780. If Hicks had intended to assist in an attack that claimed the lives of civilians and such an attack had occurred, he might have been liable under international criminal law for aiding and abetting a war crime and participating in a joint criminal enterprise. The issues of vicarious liability raised by this scenario are still highly controversial. See Victor Hansen, What’s Good for the Goose is Good for the Gander—Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards Its Own, 42 GONZ. L. REV. 335, 349-65 (2007) (analyzing related doctrine of command responsibility, which imposes liability on commanders for actions taken by subordinates); see also Allison Marston Danner & Jenny S. Martinez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law, 93 CAL. L. REV. 75, 82-85 (2005) (noting due process problems with doctrine, which in some tribunals has been read to require little in the way of knowledge or intent by defendant). Compare In re Yamashita, 327 U.S. 1, 16-17 (1946) (upholding conviction of Japanese general for failure to intervene to stop acknowledged atrocities against Filipino civilians committed by subordinates), with id. at 27-30 (Murphy, J., dissenting) (arguing that lack of proof of general’s knowledge of these atrocities presented serious problem of due process).

159. See U.S. CONST. art. I, § 9, cl. 3.
administration to camouflage the use of harsh interrogation methods that were used on detainees in Afghanistan and at Guantanamo for much of this period.\textsuperscript{160}

Conspiracy and material support charges in military commissions also encourage overreliance on informers and sting operations. The monitoring of informants and sting operations is difficult enough in a domestic legal system, where informants’ private agendas frustrate efforts at quality control.\textsuperscript{161} In the international arena, developing accurate information is even more challenging. Informants’ agendas proliferate, and contacts that build up trust over time give way to casual exchanges of information that no government can monitor for accuracy.\textsuperscript{162} In Afghanistan, for example, the United States relied on bounty hunters who received thousands of dollars, and then disappeared into the maze of tribal existence.\textsuperscript{163} While some genuine terrorists were probably caught, it seems certain that the informants profiled their prey, handing over Arabs en masse. The whole slipshod process reinforced Justice O’Connor’s concern in the \textit{Hamdi} case that many detainees might be false positives—not hardened terrorists, but aid workers, journalists, or pilgrims in the wrong place at the wrong time.\textsuperscript{164}

C. Remaining Problems with Conspiracy: Unfair Attribution, Hype, and Stale Cases

Even charges that do not directly bolster the Bush administration’s shadow government of detention and interrogation can be unfairly amorphous, exaggerated, or stale. Here too, accusations of conspiracy and material support are convenient vessels. Indeed, these problems are more insidious, since they do not send off the flares that mark obvious paradigm shifts like the Administration’s detention of alleged enemy combatants.

1. Amorphous Prosecutions and Unfair Attribution

A central concern in any regime of group liability is the congruency between the aims and acts fairly attributable to the group and those of the individual defendant. An unduly narrow view of the individual defendant’s aims and acts will make conspiracy impossible to prove. However, a sweeping view of the relationship between the individual and the group will impose liability on the individual for acts and aims outside of his control, in which his interest was remote, contingent, or generic. Moreover, imposing liability for acts and aims closely related to speech

\begin{itemize}
\item \textsuperscript{160} See generally Williams, supra note 133.
\item \textsuperscript{161} See Yaroshefsky, supra note 13, at 942-44.
\item \textsuperscript{162} Cf. \textit{Hamdi} v. Rumsfeld, 542 U.S. 507, 530 (2004) ("The nature of humanitarian relief work and journalism present a significant risk of mistaken military detentions.").
\item \textsuperscript{164} See \textit{Hamdi}, 542 U.S. at 533-34.
\end{itemize}
triggers tensions with the First Amendment. Recent terror prosecutions, including the trial of Jose Padilla and his co-defendants, raise these risks.

Consider first the case of Kifah Jayyousi, convicted along with Jose Padilla on conspiracy charges. The charges against Jayyousi centered on his alleged recruitment of individuals like Padilla to attend terrorist training camps, and on his sending of supplies such as satellite-phones to Chechnya. The recruitment charges were very general, since the evidence backing them up concerned Jayyousi’s management of a regular publication that espoused Islamist ideas—activity that would typically be covered by the First Amendment. To make this into conspiracy, the government had to allege that the publication was merely a front for generating new training camp recruits. The government made these sorts of arguments during the McCarthy Era. Reviving them does not bode well for First Amendment rights.

Similarly, in Jayyousi’s case the government could not specify the exact destination of the satellite-phones sent to Chechnya, and whether they helped terrorist fighters or simply refugees from the violence there. Particularly since violence has occurred on both sides in the bitter Chechnyan conflict, proof that Jayyousi intended that the phones facilitate violence was thin. However, conspiracy charges allowed the government to take its chances, with victory arguably hinging less on concrete evidence and more on the jury’s assessment of Jayyousi’s “general disposition.”

Padilla’s conviction reinforces the amorphous nature of conspiracy in cases of political violence, and its tension with First Amendment values. Consider the government’s prime evidence—Padilla’s submission of an application for attendance at an alleged terrorist training camp. Several levels of contingency separate Padilla’s bid from efforts to murder, maim, or kidnap persons abroad. First, submission of an application did not necessarily lead to attendance. Second, many attendees at the camps did not follow up on their training, because they became disillusioned, discovered other priorities, or followed prudent counsel to refrain from further activity. Third, even those who did not fall away from Al Qaeda did not necessarily collaborate in schemes to commit violent acts. Viewed in this light, the

167. See supra note 165 and accompanying text.
168. See Superseding Indictment, supra note 98.
scope of Padilla’s agreement—at best, an agreement to attend a camp—does not match the agreement to facilitate murder, mayhem, or kidnapping that is required under section 956.

The government closed this gap between Padilla’s agreement and the agreement required by statute by invoking the apparition of the global “jihad movement.” However, this vague entity should not substitute for proof of an appropriately tailored agreement. Permitting this substitution of a vague concept for evidence of agreement would exceed the limits on culpability for conspiracy that the Supreme Court imposed in groundbreaking cases like *Kotteakos v. United States*. Admittedly, the risk of violent acts flowing indirectly from camp attendance and the difficulty of monitoring activities abroad justify prohibiting United States residents from attending such camps. However, courts should not view violating this prohibition as a spoke in the same wheel that includes actual terrorist attacks.

While the government has not expressly relied on a “hub and spokes” theory in post-September 11 cases, this is the effect of the government’s sweeping interpretation of section 956. The problems that the Supreme Court identified in a case like *Kotteakos* with an unduly expansive view of hub and spokes conspiracies also pervade Padilla’s prosecution. The heart of Justice Rutledge’s concern in *Kotteakos* was the unfairness of attributing to one defendant the responsibility for other separate alleged illegal plans. In a case like *Kotteakos*, the Court held that participation in one allegedly fraudulent loan transaction would not support culpability for other transactions in which the defendant had no interest. In contrast, courts have held that defendants who imported controlled substances were

172. Moreover, the act of traveling abroad, as well as the myriad acts of collaboration and peer learning implicit in training camp participation, arguably make this behavior conduct, not merely speech, for First Amendment purposes. Prohibiting active participation in training camps abroad (as opposed to prohibiting a visit to the camp for the purpose of reporting for a media outlet) is arguably not a restriction on political speech, but merely an incidental restriction on speech caused by permissible regulation of conduct. *See Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1135 (9th Cir. 2000) (upholding statute, while holding that certain terms were vague as applied); *cf. Chesney, supra* note 117, at 1433-51; *See generally Margulies, supra* note 117; Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After Reno v. AADC*, 14 GEO. IMMIGR. L.J. 313, 331 (2000). *See generally Regan v. Wald*, 468 U.S. 222 (1984) (finding broad delegation of power by Congress to executive branch to determine scope of travel restrictions); *Zemel v. Rusk*, 381 U.S. 1 (1965) (upholding measures that outlawed travel to certain countries, including Cuba). *But see Cole, supra* note 22 (raising First Amendment and freedom of association concerns). However, the limited justification for prohibiting participation in camps abroad does not support imputing all of Al Qaeda’s planned violent acts to camp attendees under 18 U.S.C. § 956.
173. *See Kotteakos*, 328 U.S. at 776-77.
174. *Id. at 769.*
175. *Jordan v. United States*, 370 F.2d 126, 128 (10th Cir. 1966).
Padilla's case, while it shares some features with the integrated drug trafficking enterprise, is ultimately closer to the separate transactions analyzed in Kotteakos. The common features are obvious: an organization such as Al Qaeda needs personnel, and Padilla provided himself. Padilla's application to the camp indicates that he shared the murderous ideology of Al Qaeda higher-ups. Upon closer examination, however, the analogy to the drug enterprise breaks down. While Al Qaeda needs people to implement its aims, it shares this need with all organizations with illegal or, for that matter, legal goals. In the drug context scenario, the law does not prohibit individuals from training to become traffickers. Establishing culpability requires participation in some aspect of the enterprise’s operations, including transportation, distribution, or finance. The relationship between undergoing training, joining in operations, and planning operations more closely resembles a pyramid than a hub and spokes. In considering how far down the pyramid liability should extend for the violent acts of the group, courts should stop at the operations level. While the state can prohibit participating as a trainee, it should punish this conduct as a discrete offense, rather than attributing to trainees the violent acts of the organization.

One can argue that the ideology behind terrorist groups should permit a broader construction of the agreement made by the terrorist trainee. Unlike the participants in the individual loan transactions in Kotteakos, the terrorist trainee arguably has a stake in all of the terrorist group’s activities. The participant in the fraudulent loan transaction presumably cares only about money. It makes sense, therefore, to cabin his liability at the frontier of his financial concern with the single transaction. In contrast, the terrorist trainee’s ideology makes him concerned with the success of each of the terrorist group’s enterprises. However, attribution of responsibility based on ideological sympathies is problematic.

Attribution of this kind, triggered by alleged participation in the global “jihad movement,” raises substantial First Amendment concerns. One can view Padilla’s application to the training camp as an application for membership in Al Qaeda, or as evidence of his attendance and hence his membership. In practical terms, this theory echoes the government’s theory in Dennis, that mere membership in the Communist Party indicates an intent to overthrow the government by force and violence. The vision of the First Amendment embraced after the McCarthy Era holds that mere

membership is political speech. On this view, the offensiveness of the speech is irrelevant to the protection that the First Amendment affords. In both the Communist Party and Al Qaeda examples, some members of each organization clearly engaged in violence, espionage, or other harmful conduct. However, imputing this harmful conduct to all members of the organization violates the modern understanding of the First Amendment that the Supreme Court derived after decisions in the crucible of the McCarthy Era.

2. Hype

The advantages of conspiracy and material support charges have also helped the government convict a number of one-time terrorist wannabes whose connections to acts of violence are tenuous. In United States v. Hayat, the government prosecuted a young man who may have attended some kind of training camp in Pakistan, although the government never alleged that the camp was an Al Qaeda facility or identified its nature and location. The case was brought to the government by an informant, who was paid a six-figure amount for his work. In another recent case, the government secured a guilty plea from a Bronx bass player, Tarik Shah, who swore allegiance to Al Qaeda in a ceremony staged by federal agents after promising an informant that he would provide martial arts training. The government’s own indictment acknowledges that the plot to provide martial arts training lay fallow for months as Shah focused on working out and getting gigs. In a recent case in Miami involving a religious sect of Haitian-Americans that an informant had allegedly persuaded to collect data on South Florida and Chicago buildings, the informant also

180. See, e.g., Redish, supra note 39, at 12-13 (discussing espionage committed by some members of the United States Communist Party, as revealed in KGB records disclosed after the fall of the Soviet regime).
182. See Neil MacFarquhar, Echoes of Terror Case Haunt California Pakistanis, N.Y Times, Apr. 27, 2007, at A1; cf Hayat, 2007 WL 1454280 (denying the defendant’s motion for a new trial due to juror bias). Comments made by one of the jurors to a reporter for the Atlantic Monthly and cited in the court’s decision reveal the distinctive nature of factual determinations under the preventive paradigm:

The “punch line” [according to the juror] was that he thought these cases were more than a jury could handle. “We’re not being asked, ‘Did the defendant commit the crime?’ -- whether it’s larceny, murder, whatever. Now you’re being asked, ‘Is the defendant capable of doing a crime?’ And I don’t think that that is in the . . . level of understanding of the juror.”

Id. at *7; see also Chesney, supra note 4, at 87-92 (discussing the Hayat case).
183. See Feuer, supra note 81.
had to regularly remind the leader of the sect of the group’s responsibilities, as internecine squabbling within the sect proved to be a distraction.\textsuperscript{184}

This pattern also holds in the recent cases that attracted vast media attention, involving alleged plots to attack Fort Dix and JFK Airport respectively. In both of these cases, a number of the defendants expressed ambivalence when informants tried to “up the ante.”\textsuperscript{185} In the Fort Dix case, for example, the defendants reacted negatively when the informant suggested that the group use rocket-propelled grenade launchers (“RPG’s”).\textsuperscript{186} Bona fide terrorists would have presumably leapt at the chance.\textsuperscript{187} Even in the JFK case, where the alleged originator of the plan had worked at the airport,\textsuperscript{188} at least one party to the alleged plot expressed concerns about minimizing casualties\textsuperscript{189} which would seem incongruous in a committed terrorist.

Each of these two recent headline-grabbing cases also involve other indicia of exaggeration, centering on the role of government informants. In the Fort Dix case, an FBI agent’s affidavit reflects a gap of almost five months between the informant’s infiltration of the alleged conspiracy and the discussion of Fort Dix as a target by one of the defendants.\textsuperscript{190} Left unclear is whether the informant himself brought up Fort Dix in earlier conversations. In the JFK Airport case, the government funneled money to the informant to finance trips to Trinidad in furtherance of the alleged

\textsuperscript{184} See Shane & Zarate, supra note 97. In the case that raised the most legitimate concern about violence, an informant whom the government had paid over $100,000 entered into an agreement with a young man to plan to explode a bomb at New York’s busy Herald Square subway stop, near the original Macy’s and Penn Station. See William K. Rashbaum, Defense Presses Police Informer About His Job, N.Y. TIMES, May 2, 2006, at B1; William K. Rashbaum, Man Gets 30 Years in Subway Bomb Plot, N.Y. TIMES, Jan. 9, 2007, at B1. In this case, which resulted in a conviction, the views consistently expressed by the young man were profoundly disturbing, and the stakes were huge, given the volume of traffic through the station and the potential for massive casualties. Even in this case, however, the informant seemed to be the prime mover behind the scheme. The actual steps taken to further the plot were tentative and limited to inspecting some bags to determine if they could hold explosives.

\textsuperscript{185} See infra notes 186 and 188.


\textsuperscript{187} Whatever the ultimate ambivalence expressed by some of the defendants, the participation of the Fort Dix defendants in a video involving illegal weapons possession justified law enforcement officials opening an investigation. See infra note 240 and accompanying text (discussing Fort Dix case).

\textsuperscript{188} Cf. Carol Eisenberg, Controversy Over Informants’ Roles, NEWSDAY, June 10, 2007, at A16 (noting proactive role played by informant in JFK case, and incentive for informant to magnify defendants’ plans in light of his criminal record and interest in favorable treatment by law enforcement).


\textsuperscript{190} See Criminal Complaint, supra note 2, at 2, 5-6.
The defendants lacked the resources to take these trips on their own. Although conspiracy law does not and should not require that suspects have independent capabilities, the informant’s dominance suggests that the government may be picking convenient targets, rather than preventing violence.

3. Stale Claims

Conspiracy charges also give a tactical advantage to prosecutors because they perform a makeover on stale claims. Since even routine acts can further a conspiracy, prosecutors can lengthen the duration of the alleged plan by citing minor conduct far more recent than the plot’s core events. Consider here the press conference at which John Ashcroft announced the indictment on conspiracy and racketeering charges of Muhammad Salah for allegedly providing financial aid to Hamas. Ashcroft touted the charges as demonstrating a “15-year racketeering conspiracy.” In truth, the last significant events in the alleged conspiracy occurred in 1993.

In 1993, Salah was arrested on the West Bank and interrogated extensively by Israeli agents. After a lengthy interrogation that may have included techniques subsequently prohibited by Israeli courts, he was convicted and spent a number of years in jail in Israel. Because of acts only collaterally related to terrorism, including allegedly providing false answers in responses to a civil lawsuit, the government was able to argue that the conspiracy was ongoing, even though this claim exaggerated the conspiracy’s nature and scope. Although the government had earlier designated Salah as a terrorist without a hearing and frozen his assets, he was finally acquitted of the principal terrorist charges in 2007. However, since Salah was convicted of obstruction based on his false answers in the discovery phase of a civil lawsuit, law enforcement authorities have been able to leverage this alleged early 1990’s agreement into more prison time.

This leveraging of conspiracy to encompass wrongdoing remote in time is a feature of other terrorism prosecutions. In the case of Sami Al-Arian, for example, the government charged the defendant with terror fundraising occurring prior to

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191. See Eisenberg, supra note 188.
193. Id.
194. Higgins, supra note 135.
195. See Supreme Court of Israel, Judgment Concerning the Legality of the General Security Service’s Interrogation Methods (September 6, 1999), in TORTURE: A COLLECTION, supra note 132, at 165, 173-77 (refusing to authorize coercive interrogation methods).
196. See Three Hamas Terrorists Indicted for Racketeering, supra note 192.
197. See Higgins, supra note 135.
198. Id.
1995. A jury acquitted on this ground in late 2005, but Al-Arian remains in jail on a contempt citation. He has spent the past five years in federal confinement. Decade-old conduct also forms the basis for the prosecution of Jose Padilla’s co-defendants, and figures in the prosecution of Padilla himself.

III. CONSPIRACY’S DISCONTENTS: ETHICAL LAPSES, STEREOTYPES, AND SELF-FULFILLING PROPHECIES

The hazards of conspiracy charges in national security cases affect trial tactics and potentially undermine law enforcement concerns in the long run. As law enforcement officials scramble to protect their investment in a shaky case, ethical lapses can proliferate. In addition, the law has not dealt adequately with the risk that juries will draw forbidden inferences based on the defendant’s ethnicity or his political views. Finally, reliance on conspiracy prosecutions may be counterproductive in the long term, building resentment and despair in targeted communities.


200. Al-Arian eventually pleaded guilty to a less serious immigration charge and agreed to be deported. His contempt citation stems from his refusal to testify before a grand jury in a long-running investigation of Northern Virginia Islamic charities that has thus far yielded only limited results. Jerry Markon, Ex-Professor’s Contempt Citation Prolonged, WASH. POST, June 22, 2007, at B3.

The use of immigration charges in Al-Arian’s case points up a further problem with prosecutorial accountability. Targeting immigrants for prosecution gives law enforcement a convenient “Plan B” if a criminal prosecution fails. Even if a jury acquits, as in the Al-Arian case or the case of Sami Al-Hussayen, an Idaho computer student accused of aiding Hamas, the government can fall back on deportation proceedings. Richard B. Schmitt, Acquittal in Internet Terrorism Case is a Defeat for the Patriot Act, L.A. TIMES, June 11, 2004, at A20 (reporting on jury’s verdict in Al-Hussayen case); see also Maureen O’Hagan, A Terrorism Case that Went Awry, SEATTLE TIMES, Nov. 22, 2004, at A1 (discussing subsequent agreement on Al-Hussayen’s removal from the country). Because the government has this fallback position, it has fewer incentives to deliberate carefully before bringing criminal charges. See generally Daniel C. Richman & William J. Stuntz, Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution, 105 COLUM. L. REV. 583, 618-24 (2005). A similar danger exists with respect to crimes such as perjury or obstruction of justice that occur during an investigation. Id. at 617-18. Here, too, the government can manipulate the process to gain leverage on a defendant targeted for other reasons. While the government has legitimate bases for enforcing immigration laws and laws that promote integrity and accuracy in investigations, prosecutorial discretion in enforcement decisions creates a possibility of abuse. In the worst case scenario, an irresponsible prosecutor may target a person first and come up with a charge later. This mindset, encouraged by the linkage between conspiracy, immigration, and investigation-related crimes, threatens the rule of law. See Jackson, supra note 85, at 19 (“If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted.”).

201. See Superseding Indictment, supra note 98, at 5-18.
A. Ethical Issues

The conspiracy cases reveal a litany of ethical lapses by government attorneys. Prosecutors have not only a constitutional duty to hand over evidence disproving guilt, but also an ethical duty to be honest with the court. Similarly, ethical rules require that prosecutors try their cases in the courtroom, not in the shifting winds of public opinion. However, the pressure of high-profile terrorism cases tempts prosecutors to cut corners.

To illustrate these risks, consider United States v. Koubriti. The government arrested the defendants in Detroit shortly after September 11, 2001. The men had been staying in an apartment formerly rented by an individual sought by the government in connection with the attacks. In the apartment, authorities found a number of items of interest, including a drawing that appeared to be a sketch of an American air base in Turkey and a video that appeared to have been an effort to “case” sites in Las Vegas for possible attack. The government charged each of the defendants with conspiracy. Attorney General Ashcroft eagerly proclaimed that the defendants had received advance word of the September 11 attacks. At the defendants’ trial in the spring of 2003, the government’s chief witness testified to incriminating statements made by the defendants about their plans. Attorney General Ashcroft again spoke out publicly, thanking the witness for his valuable work. A jury convicted two of the defendants of conspiracy.

Unfortunately for the preventive ideal, very little about the Koubriti case turned out to be real. Before the trial, the government’s own experts had discredited the prosecution’s theory that the drawing depicted an American air base. Instead, the experts said, the drawing was more likely simply a crude drawing of the Middle East. Experts cast similar doubt on the prosecution’s theory about the Las Vegas video, viewing it as generic tourist footage. However, the prosecutor in the case

205. Id. at 727.
207. See Koubriti, 305 F. Supp. 2d at 736.
208. Id. at 725.
209. See Hakim & Lichtblau, supra note 206.
211. Id. at 736.
212. See Hakim & Lichtblau, supra note 206.
213. Id.
failed to alert the defense to the views of his experts. Meanwhile, the informer Ashcroft praised so highly had, as it turned out, fabricated or exaggerated much of his testimony. Even before the trial, the judge presiding over the case forced Ashcroft to retract his statement that the defendants had received advance notice of the September 11 attacks, as both prejudicial and unsupported by proof. Subsequently, the judge admonished Ashcroft for his laudatory comments during trial about the prosecution’s chief witness.

After the defendants had spent well over a year in prison, pressure from defense lawyers and the court forced the government’s hand. In an extraordinary submission to the court, the government acknowledged the warnings of its experts and the problems with its informant and moved to vacate the convictions. The government also charged the prosecutor in the case with obstruction of justice. On this view, the prosecutor was a “bad apple,” echoing the Administration’s story about errant guards practicing torture and humiliation on the night shift at Abu Ghraib. The bad apple theory does not explain, however, why the prosecutor got word before trial that despite clear indications of future problems, higher-ups were pleased with the case.

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214. See id.
215. Id.
217. Id. at 725-26. Deputy Attorney General Comey’s public comments about Jose Padilla’s role while the Supreme Court was considering the legality of Padilla’s detention as an enemy combatant in 2004 also violated the spirit of the prohibition on pretrial publicity. See supra text accompanying note 126; see also Lichtblau, supra note 125 (reporting Comey’s comments). Comey’s comments on Padilla contrast with his positive role in the internal dispute about the NSA spying program, and reinforce the interaction between shadow government and conspiracy charges. David Johnston & Scott Shane, Notes Detail Pressure on Ashcroft Over Spying, N.Y.TIMES, Aug. 17, 2007, at A14 (discussing debate within administration over terrorist surveillance program, in which Ashcroft and Comey apparently urged reductions in the program’s scope). The government, at the time Comey made his remarks, was still holding Padilla as an enemy combatant. So Comey may have reasoned that remarks before Padilla was charged in a civilian court did not count. This reasoning seems strained, however, because unchallenged accusations contribute over time to a public image that can prejudice a future criminal defendant. An anxious public may take unchallenged allegations as true, and the detained Padilla was in no position to respond. More chillingly, Comey may have assumed that Padilla would never be charged criminally, but would instead be detained for an indefinite duration. This result would have rendered the sentiments of a jury pool irrelevant. However, given that Comey’s remarks occurred before the Supreme Court decided the case, this perspective would have been presumptuous, at best.

220. See id.
221. See Hakim & Lichtblau, supra note 206. The problems in the Koubriti prosecution dovetail with a history of elite lawyers engaging in questionable conduct in national security cases to seek tactical advantage and avoid public embarrassment. See Margulies, supra note 20, at 652-54 (detailing lack of candor displayed in Korematsu litigation by then-Assistant Attorney General
CONSPIRACY PROSECUTIONS

B. Policy Problems and Self-Fulfilling Prophecies

The reliance on informers in the conspiracy cases creates other problems of policy and integrity. In a case like Koubriti, the informer turned out to be inaccurate and unreliable, spinning tales that his patrons in law enforcement wanted to hear.\textsuperscript{222} In other cases, too, citizens expecting integrity in government should wonder about testimony that was bought and paid for with ample cash, or informers seeking to stave off their own prosecution on drug and racketeering charges.

Other problems stem from the culture of informing nurtured by such law enforcement tactics. As commentators have noted, surveillance sometimes acts not as a deterrent, but as a catalyst for illegal behavior. Communities resent intrusive methods and work collectively to thwart them.\textsuperscript{223} Alienation and resentment become the coin of the realm in community discourse. In this environment, voices of moderation lose credibility.\textsuperscript{224} Moreover, when communities fear informers, discussion and debate will go underground. Without the tempering effect of ventilating diverse views in the public square, groups preach only to the choir. Communities become more polarized. This polarization can produce more violence in the future. In a sense, reliance on informers to deal with the political violence robs Peter to pay Paul—it nets results today, but may build a more determined and dangerous terrorist tomorrow.

C. Stereotypes

The impact of conspiracy prosecutions on precious First Amendment freedoms also contributes to polarization. Courts have failed to adequately address this issue. Blackletter law allows the government to present a defendant's extreme political views as evidence of motive and agreement with co-conspirators.\textsuperscript{225} However, it is impossible to police the effect that such material has on a jury. The result is that a significant risk exists that defendants will be convicted because of their opinions and not because of their conduct.

This is not merely a problem in terrorism cases. Many criminal cases entail some risk of invidious factors influencing juries. For example, it is possible that the

\textsuperscript{222} See Hakim & Lichtblau, \textit{supra} note 206.
\textsuperscript{223} See Katyal, \textit{supra} note 7, at 1351 (discussing incentives in criminal organizations caused by need to monitor associates).
\textsuperscript{225} See United States v. Rahman, 189 F.3d 88, 114-17 (2d Cir. 1999).
ethnic identity of defendants in organized crime cases serves as a signal to the jury that the defendants are guilty—juries are more willing to assume guilt if the defendant’s last name ends with a vowel,226 despite the instruction that a judge might give to the contrary.227 We know from our history that juries were often prejudiced against people of color.228 However, even more reason to be concerned exists today about prejudice in the context of terrorism prosecutions.

First, changes in jury selection have helped ameliorate the problems in other areas. For example, government can no longer use preemptory challenges to keep African-Americans off juries.229 In contrast, the numbers of Arab-Americans, South Asian-Americans, or Muslim-Americans are still so low that getting adequate representation in a jury pool is unlikely. Moreover, popular images of these groups are so negative that many members of the jury pool from other backgrounds will experience at least some subtle prejudice.230 Indeed, these images are so ubiquitous that the prejudice may be unconscious231—all the more dangerous for being something that people will not recognize and acknowledge in the jury selection process.

Another problem is the asymmetry between the starkness of the opinions expressed by defendants to informants and what the government actually has to prove in conspiracy cases. The government merely has to prove agreement and some overt


227. See Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction." (citation omitted)).


act. Here, again, the problem of low base rates undermines the jury’s deliberative role. The vast majority of people with extreme political opinions are no more likely than anyone else to act on them. Indeed, it is possible that those with extreme opinions vent their frustration through expressing those sentiments, thereby dissipating anger that might otherwise fester into violence. The calming effect of such venting in the public square is one pragmatic justification for democracy. However, in a conspiracy case, evidence of the large cohort of inactive people is either irrelevant to the charge of agreement, or ineffective for the defense.

Even if it is unlikely that the defendants would have followed through with the plot, this does not legally rebut the prosecution’s case. As a matter of law, the likelihood of follow-through is irrelevant. Mere agreement is enough and the law says that moments of ambivalence do not rebut proof of a general underlying agreement. In any case, information about base rates of violence is less vivid and therefore less persuasive than the extreme opinions of this defendant. Here, as elsewhere, operating from individual cases instead of base rates can skew outcomes.

A jury may also reason backward from the claimed object of the conspiracy to the proof of agreement. Suppose that the government has charged the defendants with conspiring to destroy the JFK Airport, as a recent case alleges. Cognitive psychologists tell us that people tend to find proof more persuasive when the potential harm is horrific. Surrendering to this syndrome, the jury may adapt the government’s preventive rationale and reason that it is prudent to remove even a small risk of a major disaster. In this way, allegations of political violence turn our constitutional commitment to avoiding false positives on its head. “Better safe than sorry” no longer means voting to acquit to avoid imprisoning the innocent. Instead, it means that prevention of harm requires a guilty verdict even on thin evidence.

Affirmative defenses to conspiracy are nearly always futile. Our current law of entrapment requires that the defendant have no predisposition toward crime. Here, though, the defendant’s opinions also play a role in confirming that the defendant has a predisposition. Moreover, the law of entrapment also permits a wide range of government enticements. One of the few cases where the courts found entrapment involved an informant’s effort to persuade participants at a rehab clinic to engage in drug trafficking. The Court condemned the government’s effort to troll for drug suspects among people sincerely committed to kicking the habit. However, the modest standard set by this case does not adequately regulate the more subtle government enticement at work in the political violence context.

232. See Eisenberg, supra note 3.
236. Id. at 376.
IV. CONTROLLING CONSPIRACY

Despite these risks, in the hands of wise and effective prosecutors, conspiracy charges can enhance public safety while respecting civil liberties. The legal system must encourage prosecutors to bring appropriate conspiracy cases while winnowing out cases that are ripe for abuse. This result requires a combination of internal, ethical, and judicial controls that enhance accountability and promote prosecutorial deliberation.

A. Internal and Ethical Criteria

Prosecutors should prioritize investigation of suspected terrorists with special indicia of risk. Criteria of this kind will minimize the use of precious law enforcement resources to pursue wannabes and big talkers. In addition, internal and ethical guidelines can require consideration of the opportunity costs of particular charging decisions.

Conspiracy investigations using informants and stings are appropriate when an individual has a pattern of appearances in reports of the illegal activities of others, under circumstances that strongly suggest advance knowledge or specific encouragement. In the pre-September 11 Abdel Rahman case, the government successfully prosecuted an extremist Brooklyn cleric known as the "blind Sheik." Information available to the government suggested that Abdel Rahman had been a common thread in a group responsible for several high-profile acts of violence including the first World Trade Center bombing and the assassination of Rabbi Meir Kahane. The jury convicted Abdel Rahman after hearing a tape of the Sheik specifically authorizing an informant to kill Egyptian President Mubarak during a visit by Mubarak to the United States. The group’s track record of violence reduced the risk of false positives that so often plagues conspiracy cases.

In a similar vein, ongoing illegality is an appropriate cue for law enforcement interest. If suspects are currently violating the law, they reveal the earnestness and commitment that characterize a successful conspiracy. In the Fort Dix case, the defendants, who were undocumented aliens, were seen firing guns in the now-infamous DVD that formed the basis for the first tip to law enforcement. Since undocumented aliens cannot lawfully possess guns under federal law, this illegality was a sufficient basis for pushing forward with the investigation.

239. Rahman, 189 F.3d at 117.
240. Jerry Seper, 6 Held in Plot to Hit Fort Dix; Aimed to Kill U.S. Soldiers, WASH. TIMES, May 9, 2007, at A1.
A suspect should receive priority for further investigation when that suspect has special experience with the purported target of the attack. Experience increases the knowledge level of the suspect and the possibility of a successful plot. It also enhances the likelihood that the suspect has a grudge or other motivation that may impel the suspect toward consummation of the plot. Russell Defreitas, one of the defendants in the Kennedy Airport case, had long experience as an employee at JFK Airport. While his plot to blow up gas tanks was still farfetched, his experience could not be wholly discounted by law enforcement officials.

The difficult deliberative calculus required of prosecutors could also benefit from further internal and ethical guidance on the interaction of conspiracy charges and issues of nationality, ethnicity, and religion. Guidelines in the US Attorneys' Manual or elsewhere should require that prosecutors consider the long-term impact of investigative methods such as reliance on informers and sting operations, particularly in communities such as Arab or South-Asian neighborhoods often targeted for terrorist investigations.

In addition, the ethical rules that prosecutors must follow should require greater selectivity and more gatekeeping in targeting particular communities. Currently, the rules of ethics provide only modest guidance for prosecutors. While the comments to the Rules articulate a shining vision of the prosecutor as a "minister of justice," the Rules themselves do little to realize this ideal. More specific rules and more concrete enforcement will ensure that responses to crisis are both measured and effective.

In sum, prosecutorial deliberation is not a recipe for doing nothing. Indeed, a deliberative approach requires law enforcement officials to move quickly when the situation warrants. However, a more proactive strategy should focus on the reasonable possibility of violence acts or substantial funding of violence, and should not target wannabes and penny ante players.

B. The Judicial Role

Courts also have a role to play as gatekeepers, making up for the lack of deliberation displayed by prosecutors. As always, a robust judicial role may clash

242. Greg Miller & Erika Hayasaki, Terrorist Attack and JFK is Disrupted, Federal Investigators Say, L.A. TIMES, June 3, 2007. Experience of other kinds may also be useful. For example, technological expertise may be significant, enhancing the ability to complete a plan.


244. See MODEL RULES OF PROF'L CONDUCT R. 3.8 (2007) (noting duties to refrain from prosecuting a charge except when supported by probable cause, disclose exculpatory evidence and avoid prejudicial pretrial statements). See generally Bruce A. Green, Prosecutorial Ethics as Usual, 2003 U. ILL. L. REV. 1573 (2003) (criticizing failure of revisions to ethics code to further specify duties of prosecutors).

with tactics that law enforcement and national security officials deem expedient. However, courts can strike a balance that acknowledges security concerns while enhancing the government’s accountability.

First, the courts should return to the wisdom of earlier conspiracy cases like *Kotteakos* by requiring congruency between the scope of alleged agreements and the scope required under section 956. In the hub and spoke cases, the courts achieved this congruency by limiting the generality that the government could impute to specific transactions. When a defendant in one of the spokes agreed to engage in conduct with the goal of defrauding the government in a particular transaction, the courts limited the scope of agreement to that transaction. Courts refused to impute to this defendant each of the individual frauds generated by the many other spokes. Comparable specificity would promote fairness in the context of section 956.

A section 956 defendant like Padilla has allegedly committed what we can call an affiliative crime. His act was affiliative because it reflected solidarity with the general aims of Al Qaeda and other terrorist groups. As noted above, attendance at a camp is closely related to manifestations of solidarity that would clearly constitute protected speech, such as marching in a demonstration supporting Al Qaeda. Some of the behavior at the camp, include chanting and posing for videos, is indistinguishable from such protected expressions of affiliation. The discrete act of applying to attend or even attending a terrorist training camp does not fit the broader agreement to commit violent acts that supports section 956 liability.

Most importantly, attendance at a training camp is not a fungible good, comparable to the provision of funding or equipment. Once provided, money or equipment may be used by a terrorist group for any purpose. However, a person attending a training camp is not fungible in this sense. The individual must be trained, and has the opportunity to desert, defect, or become disaffected at any point. Even the specific intent to participate in terrorist acts at some future date, once training is complete, cannot obviate these contingencies, which are inherent in

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249. As noted above, this uncertainty should not bar more limited material support liability based directly on the conduct involved in attending a training camp abroad. *See supra* notes 102-119 and accompanying text. The problem here is one of imputation under section 956 of an agreement to engage in violence.

Lack of fungibility should not bar a section 956 prosecution of an alleged recruiter of terrorist trainees, since over time the sheer numbers of recruits will overcome contingencies in particular cases. Moreover, an effective recruiter’s job consists of winnowing out individuals who may become ambivalent, exhausted, or disillusioned. Anyone who conspires to recruit two or more camp attendees would be culpable on this view of section 956.
the human condition. In this sense, applying to or even attending a terrorist training camp possesses an element of uncertainty distinct from the character of the conduct that could be properly charged under section 956.

Beyond policing the scope of agreements punishable under section 956, courts should also be more robust in their gatekeeping function, making up for failures. In cases dealing with material support to designated terrorist groups such as Hamas, courts have struck down as vague or otherwise impermissible certain portions of the statutes. For example, courts have ruled that the use of the terms "training," "personnel," and "expert advice or assistance" encompass too much activity that the First Amendment protects, such as training a group in international law or nonviolent techniques. According to courts, these terms provide insufficient guidance for individuals to discern the boundary between protected and prohibited acts, and therefore chill protected speech.

Another important judicial innovation would require an emphasis in instructions to juries on the materiality of defendant’s overt acts. In conspiracy cases, for example, the law could require not merely an act in furtherance of the conspiracy that might be casual or inadvertent, but an act that materially advances the goals of the conspiracy—that makes it more likely that the goals will be achieved. On this view, an alleged conspirator in a plot to blow up a subway station would commit a material overt act by purchasing ingredients such as fertilizer or dynamite that are needed for explosives. Other acts less proximate in time, such as a plane hijacker’s taking plane trips with no other purpose than casing the airline’s systems, could also be material overt acts. However, acts with a more ambiguous interpretation, such as the assembly of diagrams of a site from generic online sources, would not be sufficient

250. See Hannah Arendt, The Human Condition 178 (1958) ("The fact that man is capable of action means that the unexpected can be expected from him . . .").

251. The government should be able to use section 956 to reach certain kinds of helping conduct even when the location or timing of an attack is uncertain. For example, in United States v. Sattar, 314 F. Supp. 2d 279 (S.D.N.Y. 2004), the court held that the government could charge defendant Sattar with a violation of section 956. The defendants allegedly conspired to secure an authorization from an imprisoned cleric, the “blind sheik” Abdel Rahman, for renewed violence. Here, the defendants sought to trigger violence by an established group of the cleric’s supporters with a track record of terrorism. See Douglas Jehl, 70 Die in Attack at Egypt Temple, N.Y. Times, Nov. 18, 1997, at A1. This track record supplied a context to the agreement of the defendants sufficiently broad to support section 956 liability, even though the defendants did not agree on specific attacks. Indeed, the blind sheik’s authorization was fungible in the way that attendance at a training camp is not, by potentially authorizing a myriad of violent acts.

252. See Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137 (9th Cir. 2000).

253. In some cases, such decisions have sparked useful attempts in Congress to clarify the statutory language. See 18 U.S.C.A. § 2339A, B (2004) (amending statute to provide that defendant accused of providing training must provide training in specific skill, while defendant accused of providing personnel to designated group must act under direction and control of that group, and not independently).
unless the government could show that the defendant or his co-conspirators specifically intended to use the plans to destroy the site.

An additional step might be the reform of the entrapment defense. Right now, the defense does not curb unnecessary sting operations, since the government can almost always show the defendant's predisposition to commit the crime. Courts should replace this subjective test with an objective test more focused on the government's conduct. Judges should instruct the jury that if the jury finds that a government agent or informant was the primary player behind the agreement, the jury should acquit the defendant. This change in entrapment doctrine would revive the defense, and make it useful in curbing overreaching or manufactured plots by the government. However, the defense would still permit a conviction when the defendant had a track record or pattern of acts demonstrating knowing and voluntary participation, thereby requiring less pushing on the part of the agent of the informant. In the *Abdel Rahman* case, for example, the blind sheik needed very little prompting to discuss in vivid terms the duty to assassinate President Mubarak of Egypt. In other cases, such as the Miami Seas of David case that even government officials have belittled, a more robust entrapment doctrine would temper the preventive paradigm by preventing false positives.

V. CONCLUSION

The post-September 11 preventive paradigm ushered in an old dilemma: conspiracy's fragile balance between false positives and false negatives. Addressing the risk of political violence through conspiracy charges poses special risks, as history has revealed from Sir Walter Raleigh to the Chicago Seven trial. Unfortunately, the administration's policymakers—always impatient with a historical narrative that they did not initiate—ignored these risks. After September 11, conspiracy prosecutions laundered shadow government machinations such as extralegal detention and interrogation. The preventive paradigm thrived on hype, prioritizing stale cases and terrorist wannabes. In the process, prosecutors too often let informants' agendas supplant prosecutorial judgment, and finessed obligations such as the duty to disclose exculpatory evidence and refrain from prejudicial pretrial publicity.

The government's broad interpretation of liability under section 956 in cases such as the prosecution of Jose Padilla accentuates conspiracy's perennial dilemma. By charging Padilla with conspiracy to murder, maim, and kidnap abroad by virtue of his application to attend a terrorist training camp, the government attributed plots and


256. Because prosecutors must care about both false positives and false negatives, their job is extraordinarily difficult. In contrast, terrorists do not care about false positives. They construct elaborate justifications to explain that all victims are complicit. The difficulty of the prosecutor's job is another measure of its importance in a democracy. See Green, *supra* note 244, at 1576-78.
plans to Padilla that far exceeded the narrow scope of his alleged agreement. Padilla’s conviction was surely expedient in light of the government’s earlier assertions, and it was never mentioned at trial that Padilla had sought a “dirty bomb.” However, the expedience of the conviction only heightens the risk that the government will use section 956 conspiracy to target people because of who they are, or whom the government fears them to be. As Robert Jackson warned during an earlier time of crisis, that temptation is a central threat to the rule of law.257

Prosecutors should reject this temptation while preserving conspiracy’s virtues as a legitimate weapon against terrorists. Where suspects have prior knowledge of attacks and appear to be a common strand in a web of wrongdoing, as in the case of Sheik Abdel Rahman, the use of stings and informers is appropriate. This is also true where the suspects are already engaging in illegal conduct, as in the undocumented aliens taking target practice in the Fort Dix case, or have special knowledge or experience, as in the JFK arrests. The best prosecutors will use this powerful weapon when necessary, after deliberation about the always elusive balance between false positives and false negatives. To aid in this deliberation, ethics rules and Justice Department policy should require more deliberation about both the short- and long-term costs of conspiracy prosecutions to cooperation from targeted communities of Muslims, Arabs, and South Asians.

Courts play a necessary role as gatekeepers when prosecutors fail. In a case like Padilla’s, courts should require congruency between the scope of the defendant’s alleged agreement and the aim of murder, mayhem, or kidnapping required under section 956. Actual or attempted participation at a training camp abroad should be punishable not under section 956, but merely as lending material support to terrorist activity.

In addition, courts should make the overt act requirement more robust, to ensure that a conspiracy amounts to more than a wannabe’s wishlist. Courts should also refine the entrapment defense, instructing a jury to acquit when a government informer is the prime mover behind the alleged plot.

Responsible prosecutors recognize that the wrongful conviction of an innocent person ultimately aids the terrorist cause. Terrorists wager that responses to threats will produce a crisis of legitimacy within democratic governments. Overreliance on conspiracy charges has generated such crises in the past, as the responses to labor and leftist agitation demonstrate. The post-September 11 preventive paradigm has written another chapter in this sad history. While criticism has focused on Guantanamo, the abuses of conspiracy law may ultimately have an even greater impact. This essay is a modest step towards identifying the challenges for prudent and effective prosecutors, and implementing appropriate reforms.

257. See Jackson, supra note 85, at 19.