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THE NONEXCEPTIONALISM THESIS: HOW POST-9/11 CRIMINAL JUSTICE MEASURES FIT IN BROADER CRIMINAL JUSTICE

Francesca Laguardia*

Contrary to the assumption that “9/11 changed everything,” post-2001 criminal justice practices in the area of terrorism show a surprising consistency with pre-2001 criminal justice practices. This article relies on an analysis of over 300 terrorism prosecutions between 2001 and 2010, as well as twenty full trial transcripts, content coding, and traditional legal analysis, to show the continuity of criminal justice over this time in regard to some of the most controversial supposed developments. This continuity belies the common assumption that current extreme policies and limitations on due process are a panicked response to the terror attacks of 2001. To the contrary, terrorism cases appear to have shed light on the direction in which the United States was heading for decades.

Keywords: *terrorism, surveillance, conspiracy, exceptionalism*

INTRODUCTION

From the use of material support statutes to revelations regarding the extent of National Security Agency (NSA) surveillance of metadata, the phrase “9/11 changed everything” has been ubiquitous in discussions of criminal

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justice since 2001. However, it is only recently that scholars and practitioners have begun specifying the ways in which criminal justice supposedly changed in the wake of the 2001 terrorist attacks.¹

The idea that a single coordinated attack could result in such sudden and decisive change is a stunning indictment, not only of current practices, but also of the strength of legal professionalism, legal education, legal process, and the supposed influence of legality and legal culture. The possibility that even such a catastrophic event as the terrorist attacks of 2001 could completely undermine well-established norms and practices of criminal justice should upend any faith we may have had in the processes of the criminal justice system, their consistency, and possibly the rule of law itself.

For this reason alone, those changes should be interrogated rather than assumed. Is it true that prosecutors, faced with a new horror of the threat posed by terrorists, ignored well-established norms in order to incarcerate terror defendants? Is it true that legislators imagined new tools in the form of criminal statutes, ignoring current understandings of First Amendment doctrine, to enable that incarceration? Is it true that the fresh invasions into privacy in the form of government surveillance performed by law enforcement would have been unheard of but for the panicked response to the twenty-first century's introduction to the "new" terror threat? This article will argue that it is not. Rather, post-2001 criminal justice practices in the area of terrorism and criminal justice more generally show a surprising consistency with pre-2001 criminal justice practices.

This article will not to argue that current practices align with the democratic ideals of the United States. To the contrary, this article agrees, as many critics of current policies have claimed, that these practices illustrate a march toward tyranny that fundamentally contradicts many of the principles we believe to be enshrined in our criminal constitutional law. Moreover, certain aspects of criminal justice are clearly changing, in part as a response to the threat of terrorism (both prior to and since 2001). But we give ourselves too much credit by believing that these practices are solely the result of panic, or limited to the realm of terrorism. And by making this mistake, we both rely on arguments that are doomed to failure (that such

1. E.g., Carol Bast & Cynthia Brown, *A Contagion of Fear: Post-9/11 Alarm Expands Executive Branch Authority and Sanctions Prosecutorial Exploitation of America's Privacy*, 13 CARDOZO PUB. L. POL'Y & ETHICS J. 361 (2015).

practices are unprecedented), and neglect a more fundamental threat to our system.

Instead, the majority of those supposed changes in criminal justice are examples of longstanding practices and trends, well established prior to 2001. In those few exceptional cases where changes do appear to be taking place, the U.S. process has been deliberative debate, a push-and-pull between executive efforts to increase the reach of law enforcement and both legislative and judicial efforts to restrain the executive branch. This has resulted in precisely the political deliberation proponents of democracy would hope for, including greater public awareness of government activity and a gradual determination of the acceptable limits of the new normal.

This article begins by briefly discussing the literature of exceptionalism.² It then turns to an empirical study of criminal justice practices, specifically some that have received the most attention as overreactions to terrorism in the wake of September 11th, 2001. It concludes with a discussion of the risks we run by ignoring the completely precedented nature of our current criminal justice overreaches.

A. Background: Assuming Exceptionalism

It seems that, whether one is in favor of an exceptional response to terrorism or against it, there is general agreement that “everything changed,” generally beginning with the passage of the USA PATRIOT Act³ and facilitated by widespread horror at the brutality of the attacks of 2001.⁴ Perhaps one of the best descriptions of the supposed exception in which the United States placed itself is found in the work of David Cole. Cole, a lawyer, has dedicated the past few years to documenting changes in the legal landscape following the terrorist attacks of 2001.

2. Thanks to Mihaela Serban for this term.

3. Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PENN. J. OF CONST. L. 1001 (2004); Kevin Haggerty & Amber Gazzo, *Seeing Beyond the Ruins: Surveillance as a Response to Terrorist Threats*, 30 CAN. J. SOC. 169 (2005); Susan Herman, *The USA PATRIOT Act and the Submajoritarian Fourth Amendment*, 41 HARV. CRIM.-CIV. L. REV. 67 (2006); Ion Bogdan Vasi & David Strang, *Civil Liberty in America: The Diffusion of Municipal Bill of Rights Resolutions after the Passage of the USA PATRIOT Act*, 116 AM. J. SOC. 1716 (2009).

4. Leonie Huddy, Stanley Feldman, & Christopher Weber, *The Political Consequences of Perceived Threat and Felt Insecurity*, 614 ANNALS. AM. ACAD. POL. & SOC. SCI. 131 (2007).

According to Cole, “The terrorist attacks of September 11, 2001, altered the American landscape . . . the ‘national security state’ was born . . . The world changed . . . The United States responded to the attacks by adopting what then-attorney general John Ashcroft called a ‘paradigm of prevention.’”⁵ Similarly, but from an opposing perspective, Benjamin Wittes argues that “the United States is building something new here, not applying something old.”⁶

Proponents of the supposedly new and exceptional measures argue that the terrorist attacks exposed the need for modernization of contemporary surveillance and other counterterror methods,⁷ the handling of classified information and other procedural deficiencies in terrorism trials,⁸ and the need to prevent rather than respond to terrorist attacks.⁹ Critics respond that this push for prevention is merely an excuse for “the assertion of executive and unilateral power.”¹⁰ They criticize “new” criminal justice techniques as the imposition of “guilt by association”¹¹ and overly intrusive law enforcement tactics such as increasing surveillance.¹²

Yet many of the harshest critics of these policies, almost in the same breath, acknowledge that the tactics were not entirely new. The USA PATRIOT Act was made of provisions that already had great support, in some cases the support of a prior (presumably) more liberal President,

5. SECURING LIBERTY: DEBATING ISSUES OF TERRORISM AND DEMOCRATIC VALUES IN THE POST-9/11 UNITED STATES 1–2 (David Cole ed., 2011).

6. BENJAMIN WITTES, *LAW AND THE LONG WAR* 2 (2009).

7. David S. Kris, *Modernizing the Foreign Intelligence Surveillance Act*, in *LEGISLATING THE WAR ON TERROR* 217–51 (Benjamin Wittes ed., 2009).

8. E.g., Wells C. Bennett & Robert S. Litt, *Better Rules for Terrorism Trials*, 7 *COUNTERTERRORISM AND AMERICAN STATUTORY LAW* 3 (2009), available at <http://www.brookings.edu/research/papers/2009/05/08-terrorism-litt-bennett>.

9. Matthew Waxman, *Police and national security: American local law enforcement and counter-terrorism after 9/11*, 3 *J. OF NAT'L SEC. L. & POL.* 377 (2009); Robert M. Chesney, *Terrorism, Criminal Prosecution, and the Preventive Detention Debate*, 50 *S. TEX. L. REV.* 669 (2009); RICHARD POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006).

10. Scheppele, *supra* note 3, at 1001; Herman, *supra* note 3.

11. David Cole, *The new McCarthyism: Repeating history in the war on terrorism*, 38 *HARV. C.R.-C.L. L. REV.* 1 (2003); Robert Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 101 *MICH. L. REV.* 1408 (2003).

12. Claudia Aradau & Rens Van Munster, *Exceptionalism and the “War on Terror”*: *Criminology Meets International Relations*, 49 *BRIT. J. CRIMINOLOGY* 686 (2009); Haggerty & Gazso, *supra* note 3.

which may well have contributed to its quick passage.¹³ David Cole's criticism of the use of "guilt by association" carries its own description of the creation of those tactics, well before the 2001 attacks.¹⁴ The gradual convergence of military courts, criminal courts, and law enforcement tactics, noted by multiple scholars, also began prior to the 2001 attacks.¹⁵

Still, a few scholars have resisted this narrative. Their research suggests that the overly preventive and unchecked nature of post-2001 criminal justice practices has more to do with a trend of decreasing checks on executive power and increasingly preventive tactics that well preceded the 2001 attacks than it has to do with the attacks themselves.¹⁶ This research reminds us to look to the tactics used in conventional criminal justice to create "end runs" or "short cuts" around traditional due process protections before jumping to the conclusion that such short cuts are the invention of overreactions to the threat of terrorism.¹⁷

This article offers to continue this critical examination. Content analysis of over 300 terrorism cases, as well as legal analysis, shows that there is little to be considered "new" in criminal justice in the wake of September 11th.

B. The Data

This research is based on a study of over 300 terrorism cases, consisting of over 1,000 individual defendants. "Terrorism cases" were determined to be those cases pursued in federal courts, where some government authority

13. Scheppele, *supra* note 3; Catherine Lutz, *Making war at home in the United States: Militarization and the current crisis*, 104 AM. ANTHROPOLOGIST 723 (2002); Dianne Piette, *Piercing the "Historical Mists": The People and Events Behind the Passage of FISA and the Creation of the "Wall,"* 17 STAN. L. & POL. REV. 437 (2006); Orrin Kerr, *Internet Surveillance Law After the USA PATRIOT Act: The Big Brother That Isn't*, 97 NW. U. L. REV. 607 (2003).

14. DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* (2006); Cole, *supra* note II.

15. Cole & Dempsey, *id.*; Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008).

16. Francesca Laguardia, *Special Administrative Measures: An Example of Counterterrorism Excesses and Their Roots in US Criminal Justice*, 51 CRIM. L. BULL. 157 (2015); Francesca Laguardia, *Imagining the Unimaginable: Torture and Criminal Law*, 46 COL. HUM. RTS. L. REV. 48 (2015); *see also* Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009).

17. *Id.* (any or all).

has claimed that the defendant was engaging in terrorist activity or was arrested in connection with a terrorism investigation. The research relies on content analysis of the indictments and court files of a list of cases, which was begun at the Center on Law and Security at New York University School of Law, and which the author later updated with additional cases and case resolutions.

The list proceeds from official claims that a defendant is associated with terrorism, rather than making any attempt to define “terrorism.” It therefore includes both domestic and internationally focused terrorists; terror groups ranging from the Earth Liberation Front, to FARC (the Revolutionary Armed Forces of Colombia), to al Qaeda. In a limited number of cases the court files were enhanced with trial transcripts and personal attendance at trials. These trial transcripts provide much greater detail on the evidence against and investigation of the relevant defendants. For this reason, whenever possible, this article relies on these transcripts when describing cases. For ease of understanding, the article refers to relevant defendants discussed in the section of the article (i.e., “U.S. v. Holy Land Foundation,” rather than “U.S. v. El-Mezain”). However, when referring to an appellate decision, the formal title of the decision and formal citation are used.

I. “EXCEPTIONAL” COUNTER TERROR PRACTICES . . . AND THEIR NON-EXCEPTIONALISM

Scholars have claimed the terror attacks of 2001 have created, broadly, a preventive state, generally limiting civil rights and civil liberties,¹⁸ but this article focuses only on those criminal justice policies that have gained the most attention. Specifically, this article looks to the breadth and increasing use of material support statutes, the use of preventive solitary confinement, surveillance, and the increasing use and implications of classified evidence.

A. The Use of Material Support Statutes, Their Roots in Criminal Conspiracy, and the *de facto* Lack of Difference Between the Two

Material support statutes (18 U.S.C. §§ 2339, 2339A–D) might well be the primary counterterror tool of law enforcement. The support criminalized

18. THE IMPACT OF 9/11 AND THE NEW LEGAL LANDSCAPE: THE DAY THAT CHANGED EVERYTHING? (Matthew Morgan ed., 2009).

includes (according to prosecutors) everything from the provision of personnel (such as oneself), to the provision of money, to the provision of medical support or legal expertise.¹⁹ These statutes have been the most commonly invoked federal criminal terrorism statutes.²⁰

The material support statutes are favored by the Department of Justice (DOJ) because of their broad reach, which enables the arrest and prosecution of individuals who have not yet, but might at some point, engage in terrorist activities. To this end, material support statutes criminalize the development of terrorist capabilities by criminalizing the acquisition of training from terrorist organizations, or the provision of personnel to terrorist organizations. In the words of a DOJ counterterrorism enforcement manual, this enables law enforcement to arrest individuals for “the crime of being a terrorist,” without any actual terrorist action having occurred.²¹

Although the strategic goal of sidelining terrorist activity is clearly laudable, arresting and incarcerating individuals “for the crime of being a terrorist” before they have even begun to think about actually attacking

19. *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

20. FRANCESCA LAGUARDIA, CENTER ON LAW AND SECURITY, TERRORISM TRIAL REPORT CARD: SEPTEMBER II, 2001–SEPTEMBER II, 2009 (Jan. 2010), available at <http://www.lawandsecurity.org/Publications/Terrorism-Trial-Report-Card>; see also Andrew Peterson, *Addressing Tomorrow's Terrorists*, 2 J. NAT'L SEC. L. & POL'Y 297 (2008).

21. Peterson, *id.* at 301, quoting JEFFREY BREINHOLT, U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL EDUCATION, COUNTERTERRORISM ENFORCEMENT: A LAWYER'S GUIDE 264 (2004).

A second goal of these statutes is to undermine the support systems of terror networks. Recruiting, training, equipping, and sending off individuals to launch violent attacks require money, outreach, and the acquisition of numerous safe havens globally. Criminalizing the provision of such support enables law enforcement both to deter individuals from participating in such activities and to incarcerate and thereby incapacitate individuals who are not deterred. In theory, this effort will destroy the networks on which such organizations rely (see Peterson, *supra* note 20). Additionally, some government representatives seem to believe that individuals who support terrorist organizations through funding, publication (expert advice or resources), transporting, or housing terrorists have terrorist sympathies and may one day decide to become active terrorists themselves. As one government attorney put it, “we would much rather catch terrorists with their hands on a check than on a bomb” (Christopher Wray, Written Statement in Oversight Hearing: Aiding Terrorists—An Examination of the Material Support Statute, Hearing Before the Senate Comm. on the Judiciary, 108th Cong. (May 5, 2004), http://judiciary.senate.gov/print_testimony.cfm?id=1172&wit_id=3391). This does seem to be supported by the case of Tarek Mehanna, who apparently turned to publishing terrorist literature when he failed to find a terrorist training camp that would accept him for training (*U.S. v. Mehanna*, Transcript of Proceedings (Dec. 16, 2011) (on file with author)).

targets has resulted in numerous critiques that these statutes criminalize association. According to advocates and scholars, the breadth of behavior criminalized in these material support statutes reaches to traditionally protected First Amendment activities, and chills (and thereby infringes on) activities that are not, and should not be, criminalized.²²

But is the range of activities criminalized really broader post-2001 than it already was prior to the September 11th attacks? In fact, the material support statutes were passed five years prior to the attacks, which is five years prior to this supposed shift toward prevention. Even before to their passage, some form of material support statute had been a topic of debate in Congress for almost two decades.²³ Moreover, as discussed below, despite numerous amendments, it is unclear that material support statutes have broadened in their preventive nature since their origin. In fact, the statutes appear to broaden the reach of law enforcement very little, if at all, beyond that provided by statutes criminalizing pre-material support, “ordinary” inchoate crimes.

Those material support statutes that were passed after the 2001 attacks, 18 U.S.C. § 2339C–D, are actually more specific, and therefore more limited than prior versions of material support, rather than less. Section 2339D specifically criminalizes training at a terrorist training camp, and § 2339C criminalizes the provision of funds for use in a terrorist act. Each contains a requirement that defendants have specific knowledge of the terrorist intentions of the group involved, something that was lacking from prior material support statutes.

More importantly, each statute specifically criminalizes an activity that was already well-covered by the earlier material support statutes, but without this knowledge requirement. In fact, prior to the passage of § 2339D in December of 2004, multiple defendants had already been indicted under either § 2339A or § 2339B for training at a terrorist training camp or attempting to reach a terrorist training camp in order to train there, under the logic that they had provided (or attempted to provide) personnel to terrorist organizations. These included the Lackawanna 6, whose indictment relied

22. See, e.g., Peter Margulies, *Advising Terrorism: Material Support, Safe Harbors, and Freedom of Speech*, 63 HASTINGS L.J. 455 (2012); David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorism, and the Right of Association*, 1999 SUP. CT. REV. 203, 246–50.

23. Peterson, *supra* note 20; Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1 (2005).

almost entirely on the fact that the group had attended high-level training camps and had received training in firearms.²⁴ Notably, only three of these defendants received sentences that were lower than § 2339D's maximum sentence of ten years, and then not by much: two defendants were sentenced to eight years in prison, and one was given a sentence of nine and a half years.

Those defendants who provided funds for use in a terrorist attack (as is criminalized in § 2339C) not only could be charged under § 2339A or B, but also as co-conspirators to the terrorist crime. Given the specific knowledge requirement (that the funds must have been provided specifically *for use in an attack*), intent to aid in the conspiracy would easily follow. These additions therefore seem to have made little difference to the reach of the statutes.²⁵

Rather than § 2339C or D, it was the original version of 18 U.S.C. § 2339B, criminalizing the provision of material support to a designated terrorist organization, that created the greatest controversy,²⁶ and rightfully so. Press criticisms of the statute focused on the possibility that law enforcement would arrest peaceful activists for entirely lawful expression of political views.²⁷ Interested parties at congressional hearings prior to the passage of the law, such as the National Advisory Board of the American Muslim Council, expressed their concern that lawful activity would be criminalized in the absence of proof that the funds or assistance provided would be used to support terrorism actively, as opposed to charity or more peaceful political efforts.²⁸ Concerns about the content-based nature of the statute were

24. Affidavit by FBI special agent Edward Needham, *USA v. Yahya Goba et al.*, Criminal Complaint, September 13, 2002 (on file with author).

25. Congress did also amend the material support statutes to allow for longer sentences, by five years, and to provide a life sentence if death results from any of the listed criminal acts. An exception for "humanitarian aid" was replaced with a more specific exception for provision of "medicine or religious materials." None of these amendments, however, affect the reach, and therefore the First Amendment implications, of the statutes.

26. In 2001, the "expert advice or assistance" prong was added to the list of types of material support in § 2339A. This prong quickly became a lightning rod for criticism of the statute, although the groups criticizing the statute, and the reasons for their criticism, had long preceded this language (*see, e.g.*, *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000)). Because precisely this criticism had already existed prior to the 2001 amendment, it is unlikely that the amendment itself broadened the reach of the statute.

27. Anthony Lewis, *Abroad at Home: This is America*, N.Y. TIMES, May 1, 1995, at A17; David Kopel, *Terrifying Terror Legislation?*, WASHINGTON TIMES, Feb. 6, 1996, at A14.

28. Azizah al-Hibri, Statement of Azizah al-Hibri, National Advisory Board, American Muslim Council, 104th Congress, 455 (1995); *see also* note 21, *supra*.

evident in discussions of precursors of the statute as well as the statute itself, with critics often focusing on the ability of the executive to criminalize support of any organization, and reiterating their fears of a McCarthy-esque executive branch. A series of editorials in the *Washington Post* specified the threat that the executive would criminalize supplying food to Nicaraguan rebels, while others focused on the Irish Republican Army and the Palestine Liberation Organization.²⁹

Yet these threats rarely materialized. It is true that indictments under § 2339B made up nearly half of all indictments under terrorism statutes, and nearly one-third of all indictments under terrorism or national security statutes between 2001 and 2010. Perhaps more importantly, use of the statute without support of other terrorism or national security violations (such as conspiracies to murder soldiers overseas, or to use explosive materials) makes up over 40 percent of instances where the statute is used.

Most often, these prosecutions appear to be based on allegations that defendants endeavored to provide weapons or technology to foreign fighters, or by allegations that defendants were soliciting or providing funds for terrorist organizations. These final types of support were always far less controversial as statutory violations, because they require the provision of tangible support rather than mere advocacy. Therefore, they should avoid the types of infringements on speech and association that are brought about in the cases of prohibitions on advice or recruitment.

Perhaps more to the point, the cases that do seem to infringe on First Amendment concerns also appear exceedingly similar to cases not prosecuted under § 2339B, suggesting that the addition of § 2339B is less of a change than critics believed. For instance, Sami Omar al-Hussayen was charged with (and acquitted of) providing material support to terrorists under § 2339B by offering support to terrorist organizations in the form of linking his organization's website to sites where readers could donate to Hamas or download terror recruitment videos.³⁰ But compare this to Tarek

29. Editorial, *Anti-Terrorism (Cont'd.)*, WASHINGTON POST, May 9, 1984, at A30; Editorial, *Bad Legislation*, WASHINGTON POST, May 1, 1984, at A14; Editorial, *One Man's Freedom Fighter . . .*, WASHINGTON POST, July 20, 1984, at A20; Editorial, *Resisting Terror—And Lawlessness*, WASHINGTON POST, April 29, 1984, at E20; Larry Magasak, *Denton to Push for Law Against Americans Helping Terrorists*, Associated Press, May 19, 1985; Editorial, BOSTON HERALD, August 15, 1992, at 14.

30. U.S. v. al-Hussayen, Second Superseding Indictment, Filed 3/4/04 (on file with author).

Mehanna, who was convicted of the more specific § 2339A for watching jihadi videos, discussing the religious justification for jihad, and translating terrorist documents into English and making them available online. Although Mehanna had attempted to join terror training camps, he had failed to do so, and the speech activity that made up the core of several charges against him was speech he appears to have made largely independently, rather than at the direction of a terrorist organization.

At trial, the government argued that an overseas online group, for which Mehanna had been offering translation services, was acting on behalf of al Qaeda, and that Mehanna purposefully offered translation services to this extremist online organization in order to aid al Qaeda. But the connection between Mehanna and al Qaeda was tenuous at best, with witnesses—including prosecution witnesses and even the Assistant U.S. Attorney prosecuting the case—seeming to agree that the online group had arisen independently, as “a forum dedicated to jihad . . . where supporters of jihad worked together in order to promote these subjects by producing translations of al Qa’ida propaganda, guide books, and other materials,” that eventually came to the attention of al Qaeda.³¹ Although al Qaeda, thereafter, allegedly “worked in coordination” with the online group, there was a distinct lack of evidence that Mehanna knew of this direct coordination.³² For these reasons, his activities appear as independent advocacy and encouragement of an ideology with which he agreed, rather than specific aid to a terrorist organization.

Perhaps even more threatening to the First Amendment was the *pre-2001* language of the prosecution of (and appellate decisions regarding) the Blind Sheikh, Omar Abdel Rahman. Abdel Rahman³³ was convicted of seditious conspiracy (to “wage a war of urban terrorism” against the United States), solicitation of murder, conspiracy to commit murder (both in regard to a plot to assassinate Egyptian President Hosni Mubarak), and a bombing conspiracy (involving plots to bomb the United Nations, federal buildings, and New York City tunnels), based on his alleged encouragement of terrorist activities. In upholding Abdel Rahman’s conviction,

31. U.S. v. Mehanna, Transcript of Proceedings 12/16/2011 (prosecution closing statement) at 68–9 (on file with author).

32. *Id.*

33. The case is officially cited as United States v. Rahman, however, the Blind Sheikh’s attorneys insisted on the use of the full “Abdel Rahman,” as “Rahman” is not a name accepted in Islamic culture.

the Second Circuit stated that recommending that the defendants attack the U.S. Army rather than the United Nations (a suggestion that was not followed), and such exhortations as (in response to a request for religious approval of a plot), “Carry out this operation. It does not require a fatwa,” amounted to *conspiracy to use force*, rather than *advocating* the use of force (which would have been protected speech under the First Amendment).³⁴ In fact, the allegations against Abdel Rahman consisted of his *leading* the conspiracy, rather than merely being involved; the Second Circuit’s ruling implicitly upheld the notion that Abdel Rahman’s unfollowed suggestion could support such charges. This threat to the First Amendment, then, hardly seems to have originated in the material support statutes.

Similarly, Emerson Begolly was charged with solicitation to commit a crime of violence (18 U.S.C. § 373(a)), based on his emphatic encouragement of terrorist activities on a radical Islamist Internet forum, and his posting of publicly available instructions on how to build a bomb.³⁵ Since Begolly pleaded guilty, there is no trial transcript and very few documents by which to research the case, and many of the documents filed in the case are sealed. Yet the (redacted) sentencing memorandum filed by the government suggests that Begolly’s solicitation consisted of exhorting visitors of the website to engage in terrorist activities, and offering ideas for possible targets. It does not suggest that he offered any inducement for those acts, such as financial or other benefits, other than his own opinion that they were justified and laudable.³⁶

Cases such as Begolly’s suggest that the material support statutes themselves are hardly broadening the scope of possible prosecutions more than enterprising prosecutors, and accepting judges and juries, are doing with traditional, “conventional” inchoate crimes (such as solicitation to a crime of violence).

A stronger argument might be that First Amendment protections have universally decreased since 2001, ignoring the creation of new statutes, and this is why these similar prosecutions are allowed to continue under conventional statutes. Yet here too, prior to 2001, the courts had little trouble disposing of the issue. As the Second Circuit stated of the Abdel Rahman conviction, crimes, in particular crimes of conspiracy, were often committed

34. *U.S. v. Rahman*, 189 F.3d 88, 104, 115 (2d Cir. 1999).

35. *U.S. v. Begolly*, Sentencing Memorandum by U.S.A., 7/9/2013 (on file with author).

36. *Id.*

“through” speech, and that this did not insulate them from sanction. The interest at stake was one of pure prevention, and speech concerns could have little bearing in such a circumstance. The court stated:

One of the beneficial purposes of the conspiracy law is to permit arrest and prosecution before the substantive crime has been accomplished. The Government, possessed of evidence of conspiratorial planning, need not wait until buildings and tunnels have been bombed and people killed before arresting the conspirators.³⁷

Indeed, in its list of speech that might be criminal, the Second Circuit included not only words that instruct or solicit, but also speech that *persuades*.³⁸

Together, these cases suggest that the addition of material support statutes made little difference to the ability, willingness, or frequency of prosecutors engaging in the types of prosecutions most feared by advocates against the statutes. Although, certainly, they have been seized upon by law enforcement agents eager to find a way to incarcerate persons who are believed to pose a threat, their novelty is belied both by their long history and by the opportunistic use of established statutes prior to their creation. Instead of “new” tactics, or even “new” applications, prosecutors and law enforcement agents moved slowly, beginning prior to 2001, to arrest earlier and earlier, utilizing what statutory support they could find. Rather than a sudden shift, legitimized by the 2001 attacks, the attacks occurred in the middle of a gradual progression, which continued in the wake of 2001.

B. Preventive Detention

Preventive detention of terror suspects has become a central point of criticism for those arguing that the criminal justice system has changed in fundamental and inappropriate ways in response to the threat of terrorism.³⁹ Since 2001, it has become common practice to detain terror suspects in

37. *Rahman*, *supra* note 34, at 115.

38. *Id.* at 117, emphasis added.

39. *E.g.*, Statement of Faiza Patel, Symposium, *Trial & Terrorism: The Implications of Trying National Security Cases in Article III Courts* 2015 NAT’L SEC. L. & POL’Y, taped proceedings available at <http://jnslp.com/symposium/>; Joshua Dratel, *Ethical Issues in Defending a Terrorism Case: How Secrecy and Security Impair the Defense of a Terrorism Case*, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 81 (2003–2004).

solitary confinement both before and after trial. Held in super-maximum security facilities, and/or under conditions of confinement limiting their ability to communicate with other inmates, their families, and their lawyers, terror suspects experience a level of isolation commonly assumed to be unheard of in other U.S. federal criminal cases or prior to 2001. These conditions of confinement are referred to as Special Administrative Measures, covered by 28 C.F.R. 501.3 and 501.3(a) (hereinafter referred to as SAMs).

Terror suspects appear to be relegated to these conditions “reflexively,” that is, with little to no substantive analysis of whether such a high level of confinement is necessary.⁴⁰ Whereas super-maximum security conditions of confinement are meant to be applied only in circumstances that require their use to protect other inmates, prison staff, or the populace in general,⁴¹ in the cases of terror suspects, they appear to be applied routinely and without regard to those conditions.⁴²

This reflexive application is demonstrated, for instance, in the repeated imposition of SAMs upon defendants whom judges do not believe to be dangerous or to have current connections to broader terror networks. One example is the case of Mohamed Warsame, detained under SAMs for over four years *prior* to trial, by a judge who stated both before and after trial that the defendant did not appear to be dangerous.⁴³ Another is the case of Syed Hashmi, held under SAMs even though the charges against him involved no violence and no allegations that he could engage in terrorism himself or direct others to do so, and the government informant who had identified him had stated that he was kept out of terrorist activities or knowledge because he was too much of a public figure.⁴⁴ As one prosecutor stated in court, the use of solitary confinement prior to trial is simply “the

40. Laguardia, *Special Administrative Measures*, *supra* note 16.

41. Craig Haney, *Mental Health Issues in Long Term Solitary and “Supermax” Confinement*, 29 CRIME & DELINQ. 124 (2003); 28 C.F.R. §§ 501–501.3(a) (2016).

42. Patel, *supra* note 39; Laguardia, *Special Administrative Measures*, *supra* note 16; Kareem Fahim, *Restrictive Terms of Prisoner’s Confinement Add Fuel to Debate*, N.Y. TIMES, Feb. 5, 2009, at A27.

43. Laguardia, *Special Administrative Measures*, *supra* note 16; U.S. v. Warsame, transcript of sentencing, July 9, 2009 (on file with author); U.S. v. Warsame Memorandum, Opinion on Sentencing, Aug. 24, 2009.

44. U.S. v. Hashmi, Indictment, on file with author; U.S. v. Hashmi, transcript of proceedings, June 1, 2007, 5–6 (on file with author).

way [terrorism] defendants are held,” regardless of the substance of the charges against them or the circumstances of their cases.⁴⁵

This stands in stark contrast to the language of the regulation allowing for SAMs, which states that they are to be imposed in those cases where a defendant poses a risk of disclosing classified information or causing serious physical injury from his jail cell. Worse, critics argue, it stands in stark contrast to pre-2001 or non-terror related Department of Justice, Bureau of Prisons, and judicial practices.⁴⁶

Yet the use of SAMs is well rooted in pre-2001 conventional criminal practices. Regulations allowing for pretrial solitary confinement of defendants believed to pose an imminent danger were passed in 1988,⁴⁷ almost immediately following the Supreme Court’s decision that pretrial detention based on the dangerousness of a defendant was constitutionally allowable.⁴⁸ The use of pretrial solitary confinement was certainly in use by the early 1990s.⁴⁹

Whereas early cases were differentiated based on the amount of evidence prosecutors had that the defendant might pose a serious risk of harm from his jail cell,⁵⁰ by 2001, the practice had already deviated from being based on a *likelihood* of causing harm from one’s cell, to the *ability* to cause harm from one’s cell, placing it well on its way to the reflexive use criticized above.⁵¹ As an example, Wadil el Hage was detained on the basis of, according to the Second Circuit, “reams of exhibits” demonstrating his involvement with the 1998 U.S. embassy bombings committed by al Qaeda, in spite of the fact that the district court had already determined that el Hage would not be able to engage in terrorist activities if released from prison, let alone if released from

45. U.S. v. Sadequee, transcript of proceedings, Mar. 3, 2009, at 43 (on file with author).

46. *E.g.*, Patel, *supra* note 39; David M. Shapiro, *How Terror Transformed Federal Prison: Communication Management Units*, 44 COLUM. HUM. RTS. L. REV. 47 (2012);

47. Inmate Discipline, 53 Fed. Reg. 197 (Jan. 5, 1988).

48. U.S. v. Salerno, 481 U.S. 739 (1987).

49. Laguardia, *Special Administrative Measures*, *supra* note 16, *citing* U.S. v. Gotti, 755 F. Supp. 1159, 1164–65 (E.D.N.Y. 1991), and U.S. v. Nosair, No. 93 Cr. 181, 1994 WL 469364, at *1 (S.D.N.Y. Aug. 31, 1994).

50. Laguardia, *Special Administrative Measures*, *supra* note 16, *citing* Gotti, *id.*, Nosair, *id.*, U.S. v. Felipe, 148 F.3d 101 (2d Cir. 1998), and U.S. v. Suleiman, No. 96CR933WK, 1997 WL220308, at *1 (S.D.N.Y. Apr. 11, 1997).

51. Laguardia, *Special Administrative Measures*, *supra* note 16, *citing* U.S. v. El-Hage, 213 F.3d 74, 78 (2d Cir. 2000).

solitary confinement.⁵² The Second Circuit determined, in this case, that evidence of el Hage's continuing dangerousness while imprisoned in the general population was unnecessary to justify his SAMs. Instead, his SAMs were to be justified on the fact that he had obtained access to sensitive government information over the course of his confinement, which he could conceivably release to interested parties.⁵³

This ruling deviated from prior SAMs practice in three ways. First, it allowed for the confinement of a defendant under SAMs based on a threat that he would release *sensitive* information, rather than the *classified* information that the SAMs regulation mentions as a legitimate purpose of SAMs. Second, and more importantly, SAMs were justified on the basis of the defendant's *capability* to cause that harm, rather than evidence that he was *likely* to engage in harmful behavior from prison. In doing so, the Second Circuit made clear that SAMs would now be justified on the possibility, rather than the likelihood, of harm. Finally, the opinion offered this justification with no discussion even of the government's evidence that this disclosure of sensitive information was possible. Instead, the opinion gives the clear impression that a mere assertion by the government of a risk of harm from the defendant would be sufficient to justify SAMs. Together, these three deviations show an abdication of the role of oversight that the judiciary had played in the application of SAMs up to 2000.

This abdication was completed in the case of *Yousef v. Reno* in 2001 (mere months prior to the September 11th attacks). Again, in the case of Ramzi Yousef, the court was confronted with a defendant whose conditions of confinement, one may assume, easily could be justified. Not only had Yousef been convicted of two violent terrorist plots,⁵⁴ a government informant had provided the government with handwritten letters containing threats that Yousef was engaging in violent criminal activity while incarcerated.⁵⁵

Yet rather than confronting the facts of the case, the Tenth Circuit discovered a way by which to abandon its role of oversight. Specifically, the Tenth Circuit focused on the question of whether Yousef had exhausted his administrative remedies. He had not, the court determined,

52. *El Hage, id.*

53. *Id.*

54. *Yousef v. Reno*, 254 F.3d 1214 (10th Cir. 2001).

55. *U.S. v. Yousef*, 327 F.3d 56 (2d Cir. 2003).

in spite of the fact that the Bureau of Prisons had responded to Yousef's informal application for relief by stating that it had no jurisdiction to review his SAMs.⁵⁶ *Yousef v. Reno* was followed by a landslide of cases wherein judges dismissed prisoners' challenges of their SAMs, citing the requirement that prisoners exhaust their administrative remedies, and often citing *Yousef v. Reno* specifically.⁵⁷

This method of abdication was in no way unique to terror cases or to SAMs cases. To the contrary, the detrimental effect of the requirement that prisoners exhaust their administrative remedies, specifically the complete dismantling of judicial oversight of the conditions of confinement, has been bemoaned by numerous scholars of punishment and prisons.⁵⁸ Indeed, this trend of increasingly preventive detention, and decreasing judicial oversight of governmental allegations regarding the need for such detention, effectively explains the *el Hage* case as well, and the entire trend of increasing use of SAMs. Far from an exception, the oversight of prisons uniformly disappeared from judicial practice over this same period. The reflexive application of SAMs and the government's unilateral decision making in this area is therefore hardly shocking.

II. FISA—THE PRECURSOR OF METADATA COLLECTION, AND THE FIGHT OVER CONTENT

The revelations that have come to light about the reach of NSA surveillance are many and varied, but they may be summarized in three small words: it

56. *Yousef*, *supra* note 54.

57. See *Yousef*, *supra* note 55, at 166; *Al-Owhali v. Ashcroft*, 279 F.Supp.2d, 13 n.5 (D.D.C. 2003); *United States v. Elzahabi*, No. 04-282 (D. Minn) ORDER of Dec. 7, 2005, at note 5, available at http://scholar.google.com/scholar_case?case=11004938886914500817&q=el+zahabi+december+2005&hl=en&as_sdt=2,33; *U.S. v. Ali*, 2005 WL 2757939 (E. D. Va. Oct. 24, 2005); *U.S. v. Sattar*, 2006 U.S. Dist. LEXIS 79328 (S.D.N.Y. 2006); *U.S. v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008); *Ayyad v. Gonzales*, 2008 U.S. Dist. LEXIS 62863 (D. Colo. 2008).

58. Keramet Ann Reiter, *The Most Restrictive Alternative: A Litigation History of Solitary Confinement in U.S. Prisons 1960–2006*, 57 *STUD. L. POL. & SOC'Y* 71 (2012); Van Swearingen, *Imprisoning Rights: The Failure of Negotiated Governance in the Prison Inmate Grievance Process*, 96 *CAL. L. REV.* 1353 (2008); Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 *N.Y. U. REV. L. & SOC. CHANGE* 477 (1997).

is vast. Specifically, the NSA appears to be conducting completely untargeted surveillance of the telephonic communications of, possibly, the entire population of the United States. Verizon has been ordered to turn over all records of phone calls received and dialed as well as the length of the call,⁵⁹ and apparently Sprint and AT&T give the same records to the government.⁶⁰ In a somewhat more targeted strategy, the NSA also collects contact lists from Internet messaging providers such as Yahoo, Hotmail, and Gmail,⁶¹ as well as the content of Internet communications.⁶² For these Internet communications, some connection to a foreign intelligence target is, allegedly, required for the NSA to collect the records, although this connection may be somewhat removed, so that the NSA may collect records on people who are connected to legitimate targets.⁶³ This information may be supplemented with credit card transaction records, provided by credit card companies.⁶⁴ It is unclear whether the information from credit card companies is acquired in a targeted or bulk fashion. The NSA has also collected the contents of phone conversations (i.e., the NSA has performed wiretapping) of U.S. citizens.⁶⁵

59. *In Re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from Verizon Business Network Services, Inc., on Behalf of MCI Communication Services, Inc., D/B/A/ Verizon Business Services, United States Foreign Intelligence Surveillance Court, April 25 2013, *available at* <https://epic.org/privacy/nsa/Section-215-Order-to-Verizon.pdf>.

60. Siobhan Gorman, Evan Perez, & Janet Hook. *US Collects Vast Data Trove*. WALL STREET J, June 7, 2013, *available at* <http://online.wsj.com/news/articles/SB10001424127887324299104578529112289298922>.

61. Barton Gellman & Ashkan Soltani, *NSA Collects Millions of E-mail Address Books Globally*, WASH. POST, Oct. 14, 2013, *available at* http://www.washingtonpost.com/world/national-security/nsa-collects-millions-of-e-mail-address-books-globally/2013/10/14/8e58b5be-34f9-11e3-80c6-7e6dd8d22d8f_story.html.

62. Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, WASH. POST, June 7, 2013, *available at* http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3aocoda8-cebf-11e2-8845-d970ccb04497_story.html.

63. Gellman & Poitras, *id.*; Gellman & Soltani, *supra* note 61.

64. Gorman et al., *supra* note 60.

65. Charlie Savage, *N.S.A. Often Broke Rules on Privacy, Audit Shows*, N.Y. TIMES, Aug. 16, 2013, at A0, *available at* <http://www.nytimes.com/2013/08/16/us/nsa-often-broke-rules-on-privacy-audit-shows.html>.

This next section first discusses the collection of metadata, and its precursors in U.S. constitutional law and criminal justice practice. The possibility that amendments to the Foreign Intelligence Surveillance Act of 1978 (FISA) have substantially increased the collection of the content of telephone and Internet communications will be discussed in the following section.

A. Metadata Outside the Context of Terrorism: The Conventional Criminal Precursors of the NSA Data Collection Program

Although the extent of NSA metadata surveillance may be surprising to the public, it is unsurprising in light of current technological capabilities and traditional law enforcement practices. In fact, conventional law enforcement agencies have for decades collected metadata in the form of call records, bank records, and business transactions with the mere application of a subpoena.

The law regarding the collection of metadata begins and ends with the third-party exception to the Fourth Amendment. Via this exception, information given to a third party loses its Fourth Amendment protection, under the theory that information provided to a third party cannot be reasonably expected to remain private.⁶⁶ Although the exception may have begun with the concept of admissions to informants,⁶⁷ it quickly progressed to include bank records,⁶⁸ the phone records required for phone companies to bill customers,⁶⁹ and items left to be picked up by others (such as garbage)—no matter the level of expectation one might have as to how far afield that information might travel.⁷⁰

The Third Party Doctrine was highly criticized long prior to 2001,⁷¹ but the public's increasing attention to preventive policing and increasing

66. Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561 (2009); *Smith v. Maryland*, 442 U.S. 735 (1979); *U.S. v. Miller*, 425 U.S. 435 (1976).

67. Kerr, *supra* note 66; Michael W. Price, *Rethinking Privacy: Fourth Amendment Papers and the Third-Party Doctrine*, 8 J. NAT'L SECURITY L. & POL'Y 247 (2015); *Hoffa v. U.S.*, 385 U.S. 293, 302 (1966); *Lopez v. U.S.*, 373 U.S. 427 (1963).

68. *U.S. v. Miller*, 425 U.S. 435 (1976).

69. *Smith v. Maryland*, 442 U.S. 735 (1979).

70. *California v. Greenwood*, 486 U.S. 35 (1988).

71. Clark D. Cunningham, *A Linguistic Analysis of the Meanings of "Search" in the Fourth Amendment: A Search for Common Sense*, 73 IOWA L. REV. 541, 580 (1988) (Cases relying on the Third Party Doctrine are some of the most highly criticized Fourth Amendment cases.);

technological reliance have brought its flaws into stark relief.⁷² Modern technology creates records of almost every purchase (through credit cards), from medical supplies, to contraceptives, to political donations.⁷³ Research, curiosity, and social activity are commonly completed on the Web, and Internet service providers keep records of all of this activity, as do advertising agencies.⁷⁴ Cell phone companies regularly collect and maintain records of the locations of their associated phones, leading to the question of whether anyone using a cell phone could be tracked at any time.⁷⁵ At the extreme interpretation of the doctrine, an argument could be made that all written communications completed via the Internet or via texting are stored in third-party files, and therefore have no Fourth Amendment protection against government search.⁷⁶

But even if post-2001 counterterrorism policies (including the massive record collections enabled by FISA amendments) have highlighted these flaws, this does not mean the flaws appeared only in light of the threat of terrorism or the nation's response to that threat. To the contrary, as noted above, the Third Party Doctrine has been roundly criticized since its inception. Current scholars debating the extent of the damage caused by the doctrine do not argue that some new, post-terror interpretation has created its problems, but that current technology has demonstrated the inherent deficiency of Fourth Amendment protection and the need to make a fresh start.⁷⁷

1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.7(c), at 747 (4th ed. 2004) (“The result reached in *Miller* is dead wrong, and the Court’s woefully inadequate reasoning does great violence to the theory of Fourth Amendment protection which the Court had developed in *Katz*.”).

72. Price, *supra* note 67; Orin Kerr & Greg Nojeim, *The Data Question: Should the Third-Party Records Doctrine Be Revisited?*, A.B.A. J. (Aug. 1, 2012, 9:20 A.M.), available at http://www.abajournal.com/magazine/article/the_data_question_should_the_third-party_records_doctrine_be_revisited/; Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75S. CAL. L. REV. 1083, 1087 (2002).

73. Solove, *supra* note 72, at 1092–93.

74. *Id.*

75. *U.S. v. Jones*, 132 S.Ct. 945, 963 (2012); Katherine J. Strandburg, *Home, Home on the Web and Other Fourth Amendment Implications of Technosocial Change*, 70MD. L. REV. 614, 638–39 (2011).

76. Strandburg, *id.*; Price, *supra* note 67, at 21.

77. Suggested reformulations of Fourth Amendment doctrine have included a recommendation to follow First Amendment principles (Price, *supra* note 67) or to look at privacy invasions from a totality of the circumstances, a mosaic approach, rather than an individual

Nor is this extreme interpretation merely theoretical, nor has it been used solely in response to terrorism or post-2001. It is now clear that law enforcement both assumed this interpretation of the Third Party Doctrine to be accurate, and acted on that assumption, in response to conventional criminal activity predating 2001. In 2013, the public learned of the Hemisphere Project, a database shared amongst federal, state, and local law enforcement (in response to subpoenas rather than warrants) that held records of every long-distance or international call “for every telephone carrier that uses an AT&T switch to process a telephone call.”⁷⁸ The project had already been ongoing for 27 years by that point⁷⁹—at least fourteen years prior to the supposed crisis of 2001—and was used primarily as an investigative tool against conventional (non-terror) crimes.

In 2015, a separate program was revealed,⁸⁰ involving a call records database maintained by the Drug Enforcement Agency and containing every record of every American phone call made overseas to certain countries.⁸¹ At its height, this program collected the records of every American phone call made to 116 countries.⁸² This program was also in place well before 2001, by almost a decade, and was primarily focused on drug crimes rather than any fears of domestic or international terrorism.⁸³

These programs demonstrate law enforcement’s own take on its authority under the Third Party Doctrine, as well as its knowledge of the opportunities for manipulation that doctrine offered in conjunction with modern technology. Although the NSA’s program reached further than either of these two, its existence seems a natural development in the context of the

step-by-step analysis (Orin Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311 (2012)).

78. *Synopsis of the Hemisphere Project*, N.Y. TIMES, Sept. 1, 2013, <http://www.nytimes.com/interactive/2013/09/02/us/hemisphere-project.html>.

79. *Id.*; Scott Shane & Colin Moynihan, *Drug Agents Use Vast Phone Trove, Eclipsing N.S.A.’s*, N.Y. TIMES, Sept. 1, 2013, at A1.

80. Presumably the programs are separate, as one dates back to 1987 and the other, reportedly, to 1992.

81. Hanni Fakhouri, *The Many Problems with the DEA’s Bulk Phone Records Collection Program*, ELECTRONIC FRONTIER FOUNDATION, Jan. 23, 2015, <https://www EFF.ORG/deeplinks/2015/01/many-problems-deas-bulk-phone-records-collection-program>.

82. Brad Heath, *U.S. secretly tracked billions of calls for decades*, USATODAY, Apr. 8, 2015, <http://www.usatoday.com/story/news/2015/04/07/dea-bulk-telephone-surveillance-operation/70808616/>

83. *Id.*

developments already taking place in federal and state law enforcement, as demonstrated by these programs. The NSA's broad and aggressive interpretation of the Third Party Doctrine had already been established and put to use in law enforcement more broadly, and in the context of conventional criminal investigation. To the extent that NSA collection of metadata (rather than content) is being considered, it is difficult to make an argument that this would not have happened without the context of, or panic caused by, the attacks of 2001.

In contrast, the collection of content appears to present precisely this threat. The following section addresses this question.

B. Collection of Content

Laura Donohue has offered a comprehensive explanation of the expansion of content surveillance of U.S. telephone and Internet communications, through the FISA Amendments Act of 2008.⁸⁴ Donohue asserts that amendments to §§ 702–704 have allowed U.S. intelligence to collect and maintain content of the communications of U.S. persons (including both U.S. citizens and permanent resident aliens) that relates to purely domestic activities, so long as the intelligence community carefully neglects to notice or research whether or not the persons surveilled are in fact U.S. persons, or whether or not the collected communications involve domestic matters.⁸⁵

Donahue's analysis is compelling and concerning, and certainly tends to show a substantive legal change following 2001 that might well affect criminal justice more broadly. However, the history she describes is also worth noting, and suggests that rather than a panicked response to 2001, the codification of these intelligence capabilities has been (and continues to be) slow and deliberative.

As Donohue describes, the FISA amendments were first envisaged in the form of the Presidential Surveillance Program (PSP), a truly exceptional program, conceived immediately following the 2001 terrorist attacks and legally questionable.⁸⁶ As would be expected from a program created out of

84. Laura K. Donohue, *Section 702 and the collection of international telephone and internet content*, 38 HARV. J. L. & PUB. POL'Y 117 (2015).

85. *Id.* at, e.g., 123–24, 193–94.

86. *Id.* at 125–26.

panic and exceptionalism, the legal basis for the PSP was entirely founded in war powers.⁸⁷

But the universally positive (or at least acquiescent) response to this program that we might have expected in a state of emergency never materialized. To the contrary, as soon as the public became alerted to the program, the G.W. Bush Administration began scrambling to justify it.⁸⁸ Indeed, Congress's response to the revelations of the program appears to have been to clarify (i.e., specify and thereby limit) the surveillance authority that the PATRIOT ACT had granted the executive branch.⁸⁹

The executive branch responded by venturing into strategic interpretations of the statute in order to broaden its authority.⁹⁰ This strategy also met with resistance, not only from Congress but from the Foreign Intelligence Surveillance Court (FISC). According to Donohue, rather than simply abiding by executive branch arguments, it took FISC eighteen months to accept President Bush's logic, and even then FISC rejected the logic when applied to domestic facilities.⁹¹ Moreover, even the acceptance of the President's efforts to broaden PATRIOT's reach failed to offer the flexibility the PSP had granted. The new interpretation placed the President's efforts in the legal context of FISA, but FISA was more restrictive than the PSP had been (requiring oversight, including probable cause determinations, by FISC). It was for this reason that the executive branch began pursuing FISA amendments.⁹²

While the Bush Administration was successful in pushing Congress to amend FISA, via the FISA Amendments Act (FAA), the amendments also included numerous limitations on executive action and privacy protections for individuals. As to § 702, covering the targeting of non-U.S. persons abroad, these protections include minimization procedures, as well as the creation of procedures to "ensure that the acquisition is limited to targeting individuals outside of the United States and to prevent the intentional acquisition of domestic communications,"⁹³ as well as reporting requirements designed to ensure that these procedures are being met.⁹⁴

87. *Id.*

88. *Id.* at 127, n. 131.

89. *Id.* at 131.

90. *Id.*

91. *Id.* at 133.

92. *Id.* at 135.

93. *Id.* at 139–40.

94. *Id.* at 140–41.

Section 703 requires comparable procedures to FISA, including probable cause requirements, when the government is acquiring electronic surveillance of a U.S. person who is outside the United States, but the acquisition will be inside the United States.⁹⁵ It also limits the retention, as well as the dissemination, of intelligence acquired.⁹⁶ Section 704 forbids the intentional targeting of U.S. persons outside the United States who have a reasonable expectation of privacy, unless the targeting can be authorized under FISA.⁹⁷ However, it does not place minimization requirements on data retention, and appears in practice to apply only when intelligence agents know that the person they are targeting is a U.S. person.⁹⁸ Neither section includes the particularity requirements one would traditionally assume would accompany eavesdropping (as to whether the device surveilled will be used by the target for the purposes justifying the surveillance).⁹⁹

These changes are substantial. However, they have not gone unchallenged. Indeed, criticisms immediately followed the passage of the FAA from the academic community, from civil liberties advocates, and from Congress itself.¹⁰⁰ This Congressional response may come in part from the fact that members of Congress appear not to have fully comprehended the implications of the Amendments when passing the legislation.¹⁰¹ Although the Amendments were renewed in 2012,¹⁰² the NSA's surveillance practices have remained a news staple, and revocation of the powers is a repeated topic in presidential debates,¹⁰³ with a slim majority of Americans disapproving of the practices.¹⁰⁴ Scholarly articles such as Donohue's¹⁰⁵

95. *Id.* at 143.

96. *Id.* at 144.

97. 50 U.S.C. § 1881c(a)(2) (2015).

98. Donohue, *supra* note 84, at 143.

99. *Id.* at 144.

100. *Id.* at 153–4, 177–79.

101. *Id.* at 174–75.

102. Emily Berman, *The Paradox of Counterterrorism Sunset Provisions*, 81 *FORDHAM L. REV.* 1777, 1779 (2013).

103. Transcript, Republican Candidates Debate, Dec. 15, 2015, <http://www.presidency.ucsb.edu/ws/index.php?pid=11177>; Transcript, Democratic Candidates Debate, Oct. 13, 2015, <http://www.presidency.ucsb.edu/ws/index.php?pid=110903>.

104. George Gao, Pew Research Center, *What Americans Think About Surveillance, National Security, and Privacy* (May 29, 2015), at <http://www.pewresearch.org/fact-tank/2015/05/29/what-americans-think-about-nsa-surveillance-national-security-and-privacy/>.

105. Donohue, *supra* note 84.

and more general scholarly indictments of current Fourth Amendment doctrine¹⁰⁶ echo and amplify these concerns. It appears that although the FISA amendments are holding on, they are holding on tenuously, and may be modified or revoked before they have an opportunity to substantially change criminal justice (certainly before they modify criminal justice practices beyond those allowances that already existed, as noted above in Section II.A).

III. THE USE OF CLASSIFIED INFORMATION

Limitations on defense attorneys' opportunities to evaluate classified evidence against their clients can severely impact their chances to test government claims, and terrorism trials (and cases based on evidence built in terrorism investigations) implicate classified information in a number of ways that conventional criminal trials do not. Terrorism trials may involve investigations by foreign intelligence agencies, and therefore include information that the U.S. government classifies in order to protect its working relationship with the other country. They may involve investigation by our own intelligence community, and therefore certain sources and methods of obtaining information may be classified. They may involve interrogations of detainees at Guantánamo or other detention sites, the details of which have been classified.

Although these circumstances arise far more frequently in terrorism cases, they are being resolved in a manner that was already well established prior to the 2001 attacks. The Classified Information Procedures Act¹⁰⁷ (CIPA) was passed in 1980, to allow prosecutors to continue with cases where classified information might be implicated at trial. The Congressional record suggests that numerous cases had arisen over the 1970s in which prosecutors had been forced to dismiss criminal cases due to defendants' threats that they would reveal classified information in the course of their trials if the government persisted in prosecuting them.¹⁰⁸ This problem was referred to as "graymail."

106. See notes 66–71, *supra*, and accompanying text.

107. P.L. 96-456, 94 Stat. 2025, enacted October 15, 1980, 18 U.S.C. Appx. III §§ 1–16.

108. Ellen Yaroshesky, *Secret Evidence Is Slowly Eroding the Adversary System: CIPA and FISA in the Courts*, 34 HOFSTRA L. REV. 1063 (2005); Larry Eig, *Classified Information*

Because of this, the statute focuses on the creation of pretrial procedures and the requirement that defense attorneys disclose prior to trial any classified information they expect to reveal over the course of the trial. This allows the government to make an informed decision about how to deal with the issue, before being confronted with the material (or an adverse ruling allowing the introduction of the material) at trial. At these pretrial hearings, the judge is to determine whether the information is truly necessary for a defendant's case. If not, the prosecutor is under no obligation to disclose the information, and the judge will forbid the defendant from doing so.¹⁰⁹

However, in preparation for those instances when defendants' rights do require exploring otherwise classified information, CIPA creates a procedure by which prosecutors may substitute either a government admission of the relevant facts or a summary of the information, rather than providing the information itself.¹¹⁰ If the judge determines that substitution would be insufficient to protect the defendant's rights, he or she may preclude witnesses, dismiss charges, or dismiss the entire indictment, depending on the extent to which the classified information permeates the allegations against the defendant.¹¹¹

CIPA does not provide for a judge to order that information be declassified. Nor does CIPA allow judges to require that defense attorneys be allowed to investigate the relevant classified information to determine whether or not the substitution provided sufficiently describes the relevant information. Instead, judges are provided the classified information that prosecutors believe to be relevant, and judges determine whether the summaries adequately describe the information.¹¹²

This is by no means a perfect solution, particularly for defendants. Substitutions cannot be cross-examined, and the classified nature of the

Procedures Act (CIPA): An Overview (Congressional Research Service, 1989); H.R. Rep. No. 96-831, 96th Cong., 2d Sess. 7 (1980).

109. Yaroshesky, *id.*; CIPA at §§ 5, 6(e).

110. CIPA at § 6(c).

111. CIPA at § 6(e)(2).

112. Yaroshesky, *supra* note 108, at 1069 and n.29; *see also* U.S. v. Moussaoui, 282 F. Supp. 2d 480, 481 (2003) ("the United States has advised the Court that it cannot, consistent with national security considerations, comply with the Court's Orders of January 31 and August 29, 2003. The Court must accept this representation as the product of the reasoned judgment of the Executive Branch." (footnotes omitted)).

background material makes independent investigation into the circumstances of its creation almost impossible.¹¹³ But these issues were familiar long before 2001.¹¹⁴ Multiple cases arising prior to 2001 emphasize the importance of vigorous adversarial examination by opposing attorneys and parties, and the problems CIPA created by limiting this examination.

Secret evidence in pre-2001 deportation cases has been discovered to hide rumor, stereotyping, and mistranslations.¹¹⁵ Highlighting this point even further, mistranslations in particular are a recurring theme only found after adversarial examination in terrorism prosecutions.¹¹⁶ For instance, in the cases of both Aref and Warsame, an Arabic word was believed to mean “commander,” but turned out after defense translation to mean instead “brother,” “comrade,” or “trainer.”¹¹⁷

Still, the passage of CIPA in late 1980 illustrates the fact that the idea that defendants must simply cope with such invasions on their ability to cross-examine witnesses adequately is not a new function of counterterrorism post-2001. In truth, a defendant’s rights to disclosure are fairly limited in general. A defendant may be entitled to exculpatory evidence, but he is never entitled to view every single document or piece of information held by prosecutors in order to determine for himself what is exculpatory in his case. He is entitled to the prior recorded statements of any witnesses, under *Giglio*,¹¹⁸ but this is

113. For criticisms of CIPA, see Yaroshefsky, *supra* note 108; Joshua Dratel, *Section 4 of the Classified Information Procedures Act: The Growing Threat to the Adversary Process*, 53 WAYNE L. REV. 1041 (2007).

114. David Greenberger, *An Overview of the Ethical Implications of the Classified Information Procedures Act*, 12 GEO. J. LEGAL ETHICS 151 (1998); Frank Askin, *Secret Justice and the Adversary System*, 18 HASTINGS CONST. L.Q. 745 (1990).

115. Susan Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEORGETOWN IMMIGR. L.J. 87 (1999).

116. Such instances include *U.S. v. Rahman* 1:93-cr-00181 SDNY (*e.g.*, Trial Tr. 4/18/1995 at 8229 (Cross Examination of Abdel Hafiz, translation disagreement as to whether “what is your command” is just a way of saying “goodbye”) (on file with author); *U.S. v. Holy Land Foundation* 3:04-cr-00240 NDTX (*e.g.*, Transcript of Proceedings 8/8/07, at 24, 131 (objections to government translations, government stated “Islamists” for years, until defense counsel pointed out it should say “Muslims”) (on file with author); *U.S. v. Aref* 1:04-cr-00402 NDNY (*e.g.*, Transcript of Proceedings 8/22/06 at 19 (Pretrial Conference 5) and Trial Tr. 9/20/06 at 997 (government has translated a word as “commander” when it means “brother”)).

117. *U.S. v. Aref*, *id.*; *U.S. v. Warsame*, transcript of sentencing, *supra* not 43, at 8.

118. *Giglio v. U.S.*, 405 U.S. 150 (1972).

limited to statements of witnesses and not of individuals who will never testify at trial.¹¹⁹

In treating as classified evidence obtained from foreign sources, as well as background material related to those sources, and in protecting government classification decisions in spite of the hurdles it poses for cross-examination, judges are simply acting on well-established evidentiary principles that prioritize national security over the reliability of evidence presented against defendants. In fact, it appears that in no case or statute has a determination ever been made that reliable verdicts require otherwise.

The breadth of eavesdropping authorized under § 702 of the Foreign Intelligence Surveillance Act, as amended by the FISA Amendments Act of 2008,¹²⁰ may bring issues of classified information into more conventional criminal cases. Moreover, at least one prominent defense attorney has pointed to the use of “parallel construction” of information as a threat to traditional guarantees of due process.¹²¹ Through parallel construction, law enforcement agents may hide the influence of information gathered via FISA (and therefore classified) by constructing a pretextual case by which to prosecute the defendant. The process is similar to pretext searches in the criminal context: having been alerted to suspected criminal activity (through FISA wiretaps), the NSA alerts local law enforcement to their suspicion regarding a particular individual. Local law enforcement then creates a pretext to engage in criminal investigation of that individual, possibly by means as simple as finding an excuse to pull a car over on the highway and search the car.¹²²

Even here, the precursors of the practice are clearly evident in the use of pretext to stop, search, arrest, and prosecute criminal suspects. In the early years following the 2001 attacks, the use of pretextual prosecution was often remarked upon as a striking development in the area of counterterrorism

119. *Id.*; see also statements of Joshua Dratel and Leonie M. Brinkema, Symposium, *Trial & Terrorism: The Implications of Trying National Security Cases in Article III Courts*, 2015 J. NAT'L SEC. L. & POL'Y, taped proceedings available at <http://jnslp.com/symposium/>.

120. Pub. L. 110-261, 122 Stat. 2436 (July 10, 2008).

121. Statement of Joshua Dratel, Symposium, *Trial & Terrorism: The Implications of Trying National Security Cases in Article III Courts*, 2015 J. NAT'L SEC. L. & POL'Y, taped proceedings available at <http://jnslp.com/symposium/>.

122. *Id.*; John Shiffman & Kristina Cooke, Exclusive: *U.S. directs agents to cover up program used to investigate Americans*, Reuters, Aug. 5, 2013, <http://mobile.reuters.com/article/idUSBRE97409R20130805>.

policy among those who seem to neglect its long history both in and out of counterterrorism,¹²³ or among those who are aware that it was used prior to 2001 but believe that there was a sudden and marked increase in the years following 2001.¹²⁴ But the very fact that pretextual prosecution is often referred to as “Al Capone policing”¹²⁵ suggests its long and storied history, both inside the terrorism context and out.

Pretextual prosecution is the practice of prosecuting a suspect for any crime law enforcement feels they can prove, rather than the crime law enforcement is actually concerned about. In this manner, persons suspected of, for instance, terror financing, may be incarcerated based on proof that they misfiled federal forms, or that they hid the nature of the organization they were funding. Similarly, immigration violations, such as working while on a student visa, enable the government to deport suspects with no discussion of terrorism whatsoever. As John Ashcroft stated, “Let the terrorists among us be warned: If you overstay your visa—even by one day—we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage.”¹²⁶

But although pretextual prosecution received renewed attention in the wake of the 2001 terrorist attacks, its standing as an established tool of law enforcement prior to 2001 is unquestionable. Due in part to the steady increase in criminalization, prosecutors often have not only a range of criminal violations to choose from in selecting charges, but also an impossibly large range of possible defendants. Indeed, prosecutors are overrun with possible cases, and are given the discretion to choose which cases to pursue and which to dismiss.¹²⁷ The ability to choose from a large number of possible defendants not only allows for the use of discretion to pursue those suspects believed to be most dangerous, it encourages such choices.

123. Chesney, *supra* note 11.

124. Cole, *supra* note 11; COLE & DEMPSEY, *supra* note 14; CHRISTOPHER SHIELDS, KELLY DAMPHOUSSE, & BRENT SMITH, *HOW 9/11 CHANGED THE PROSECUTION OF TERRORISM* (2009).

125. Daniel Richman & William Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution* 105 COLUMBIA L. REV. 583 (2005); Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 92 1135 (2003).

126. John Ashcroft, Memorandum, Anti-Terrorism Plan, Sept. 17, 2001.

127. Litman, *supra* note 125; William Stuntz, *The pathological politics of criminal law*, 100 MICH. L. REV. 505 (2001).

This means that prosecutors, confronted with a dilemma about whom to pursue amongst a large selection of defendants who have engaged in similar levels of criminality, will make their decisions based on factors other than the particular crime to be charged. This may include repeat offenders, defendants believed to have valuable information about other suspects, or unprovable but compelling beliefs that the individual defendant is dangerous in a way that is larger than the particular crime for which the prosecutor has proof.¹²⁸

Most likely this strategy presents itself most often in the discretionary decisions of individual prosecutors in individual cases. However, Harry Litman has identified a number of varied types of crimes and social scenarios that have given rise to broad policies of pretextual prosecution in recent years. These have ranged from the increased use of drug and gun possession charges, trespassing and public intoxication charges, and parole enforcement against repeat violent offenders in order to reduce violent crime in times of perceived crisis, to the blatant use of drug prosecutions in order to incarcerate a suspected murderer when it seemed that trying him for murder would be unsuccessful.¹²⁹

The use of pretextual prosecution against suspected terrorists was also well established prior to 2001. Indeed, the case of the LA 8 (seven Palestinian men and a Kenyan woman, whom the FBI believed to be associated with the Popular Front for the Liberation of Palestine) dates to 1987 and resulted in the revelation that the Immigration and Naturalization Service was encouraging a *policy* of utilizing technical and other immigration violations pretextually to deport immigrants suspected of association with terrorist groups. This was part of a larger policy of “disruption,” that is, pretextual prosecution. FBI policy at the time was to identify persons believed to be associated with terrorist groups and find crimes to charge them with, in order to incarcerate, deport, or otherwise incapacitate and disrupt possible plans.¹³⁰

Using pretext to disrupt and create “clean” prosecutions, as Joshua Dratel complains, blocks defense attorneys from examining the information on

128. Litman, *supra* note 125; see also Elizabeth Glazer, *Thinking Strategically: How Federal Prosecutors Can Reduce Violent Crime*, 26 FORDHAM URBAN L.J. 573 (1999); David Kennedy, *Pulling Levers: Chronic Offenders, High-Crime Settings, and a Theory of Prevention*, 31 VALP. L. REV. 449 (1997).

129. Litman, *supra* note 125; see also Kennedy, *supra* note 128.

130. COLE & DEMPSEY, *supra* note 14.

which searches were based originally.¹³¹ One doubts, for instance, that Al Capone would have been entitled to the basis for the government's suspicion of his organized criminal activity, were he prosecuted solely for tax evasion through legitimate businesses. Similarly, it is unimaginable that prosecutors routinely disclose evidence of their police officers' racial bias (the true reason for suspicion in many pretext highway stops), given the Supreme Court's consistent determinations that the actual reason for a stop is irrelevant, if sufficient probable cause of criminal activity exists.¹³²

In such circumstances, then, we see once again the extreme, slippery-slope results of the small holes in due process protections that were established long prior to, and in many cases entirely independent of, the threat of terrorism. Although the threat of terrorism highlights these issues, it most certainly did not create them.

CONCLUSION

In response to criticism of law enforcement tactics used in the immediate wake of the September 11th attacks, defenders of the Department of Justice insisted that a new approach to law enforcement was necessary to deal with the threat of terrorism.¹³³ Criminal justice, it was asserted, had been "reactive" until 2001; post-September 11th, criminal justice had to become "preventative."¹³⁴

Yet examples of these "new" preventative measures bear a striking resemblance to lawful measures already long in place. Criminalizing association, often warned against as one of the most fundamental changes to

131. Dratel, *supra* note 121.

132. *See, e.g.*, *Whren v. U.S.*, 517 U.S. 806 (1996) (finding subjective intent is irrelevant to the propriety of a traffic stop if police had probable cause to stop the defendant); *Al-Kidd v. Ashcroft*, 131 S.Ct. 2074, 2081 (2011) ("we have almost uniformly rejected invitations to probe subjective intent"); David Harris, *Addressing Racial Profiling in the States: A Case Study of the New Federalism in Constitutional Criminal Procedure*, 3 U. PA. J. CONST. L. 367 (2001).

133. Ashcroft, *supra* note 126; John Ashcroft, Memorandum to Heads of the Components of the Department of Justice, Nov. 8, 2001; Viet Dinh, Harold Leventhal Talk: *Ordered Liberty in the Age of International Terrorism* (n.d.), http://www.dcb.org/for_lawyers/sections/administrative_law_and_agency_practice/dinh.cfm.

134. *Id.*

criminal law,¹³⁵ was in fact more extreme in pre-2001 versions of antiterror legislation (§ 2339A and B) than it was after modifications made in case law and through amendments leading up to and after 2001.¹³⁶ The use of SAMs to detain suspects in solitary confinement pre-conviction, and even many of the “new” powers of surveillance, were created or (in the case of surveillance) developed in case law and law enforcement practice several years before the attacks.

Of all of the supposedly “new” tactics used in the criminal justice system to pursue terrorists, only the collection of electronic and telephonic content of conversations is a true change from prior practice, and this change has not proceeded unchallenged. Instead, argument continues at the legislative, judicial, and executing levels of government, as well as in the public debate. Rather than rolling over in the face of an emergency, then, the democratic process appears to be in full gear in response to these new law enforcement tactics.

This contextual analysis not only shows the consistency of post-2001 policy with pre-2001 criminal justice, it suggests that these criminal justice norms influenced broader U.S. policy, and expands our understanding of how those criminal justice norms were developing in the late twentieth century. It calls attention to the fact that the available tools *will be used to their limits*, reminding us that the slippery slope does exist and is a force to be reckoned with. Institutional pressures in law enforcement encourage the progressively more broad, extreme, and imaginative use of any powers available. These pressures and the law enforcement response thereto require no added stimulus from “new” threats or public panics—or, if those threats and panics are necessary, they appear to have been present long before the terror “crisis” appeared. Far from a brand new response to a brand new threat, U.S. counterterrorism policy post-2001 came directly from the technologies and practices of crime control that had been largely already developed. The above suggests we shouldn’t be shocked by post-2001 tactics. More importantly, it suggests how pre-2001 law enforcement tactics allowed for, encouraged, and shaped the post-2001 “abuses” that are the subject of so much concern.

The myth of the Rule of Law is that law moves slowly, acting as a progressive force when logic and reasoning prove the faults in basic

135. Chesney, *supra* note II; COLE & DEMPSEY, *supra* note 14.

136. See Section II.A, *supra*; see also Peterson, *supra* note 20.

cultural assumptions that influence lawmakers, and acting as a calming force when general panic and strong emotions cause the public to seek sudden and unreasonable change. This check on public emotions is meant to work through legal socialization, where the legal reasoning and methodologies that have been taught to judges and attorneys over decades might overtake the general panic of the day. This socialization and cultural education takes place as well in legal institutions, where the legal imagination becomes limited to institutionally accepted practices.

Although current counterterrorism practices in the criminal justice system might hardly be described as restrained, this limitation on the legal imagination appears to have been well in place over the course of the past fifteen years. Despite political arguments that the threat of terrorism had moved beyond the legal realm, and could not be addressed even by the laws of war, when faced with such an unfamiliar threat, U.S. policy makers defaulted to practices, and defenses of those practices, that had been used for decades. In those areas where they stepped outside of accepted practices, they quickly (and perhaps somewhat desperately) endeavored to find their way back within well-understood legal norms.

This fact does not excuse current legal activities, or render them harmless. Instead it should serve as a reminder that the limits of law enforcement activity must be carefully guarded, and it highlights the holes and openings that were granted in criminal constitutional doctrine long before the terror threat became a focus of discussion. As we can see, for instance, in the increasing number of articles written on the flaws of the Third Party Doctrine, the threat of terrorism and increasing use of these loopholes in response may be a blessing in disguise—finally focusing public and scholarly attention on the extreme levels to which these exceptions had risen. Indeed, if we are lucky, this “panic” may yet serve to stimulate real change in criminal procedure, forcing legal actors to remedy the flaws that have festered quietly over the past several decades.