

ARTICLE

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

George D. Brown*

Abstract

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

As for speech issues, there is enough ambiguity in *HLP* to let lower courts formulate and apply its test differently. *HLP* emphasizes coordination with a foreign terrorist organization before speech can be criminalized. There is now movement toward a concept of one-way coordination that can turn speech prosecutions into a form of general prevention of potential terrorists.

All of these issues were central to the trial of Mehanna. The Article’s analysis of how the trial court handled the various sentencing and speech issues will increase understanding of them, and highlight the central role of the judge.

Introduction: The Concept of Preventive Prosecution

As Jack Goldsmith demonstrates convincingly in his recent book, “Power and Constraint,”¹ there is a remarkable degree of continuity between the anti-terrorism policies of the Bush administration and that of its successor.² Much to the chagrin of many of his supporters, President Obama has built on the efforts and policies of President Bush, regardless of what the former may have said during the 2008 campaign.³ The headline-grabbing stories tell of such marquee programs as drone strikes and cyberwarfare.⁴ This Article deals with another, less publicized but equally integral, aspect of the war on terrorism: the tactic of preventive prosecution of potential terrorists, with principal reliance on the criminal statutes forbidding the provision of “material support” to terrorists and terrorist organizations.⁵ According to then-Attorney General Alberto Gonzalez, “[p]revention is the goal of all goals when it comes to terrorism because we simply cannot and will not wait for these particular crimes to occur before

*Robert F. Drinan, S.J. Professor of Law, Boston College Law School. A.B., Harvard University, 1961; LL.B., Harvard Law School, 1965. The author would like to thank Research Assistant Brian Reilly and Mary Ann Neary of the Boston College Law School Library for their invaluable help. Professor Peter Margulies contributed valuable insights on 18 U.S.C. § 2339B.

A note on chronology is in order. This Article was completed on August 6, 2012, subject to minor editorial changes. An earlier version was presented at a Boston College Law School Faculty Colloquium on June 27, 2012. This Article was completed and edited prior to the availability of any appellate material. This facilitated my desire to focus on the trial phase of the *Mehanna* case, and also to underscore the fact that the framework and themes of this Article are largely my own. This Article draws extensively on the pioneering work of Professors Chesney and Margulies.

¹ JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012).

² *Id.* at 3–22. Professor Goldsmith is remarkably gentle in his treatment of Dean Harold Koh’s Pauline conversion on issues of national security. *See id.* at 20–22. The issue of similar policies is also treated in DEAN REUTER & JOHN YOO, *CONFRONTING TERROR 9/11 AND THE FUTURE OF AMERICAN NATIONAL SECURITY* (2011).

³ *See* Goldsmith, *supra* note 1, at 4–5.

⁴ David E. Sanger, *Obama Sped Up Wave of Cyberattacks Against Iran*, N.Y. TIMES, June 1, 2012, <http://www.nytimes.com/2012/06/01/world/middleeast/obama-ordered-wave-of-cyberattacks-against-iran.html>; Jo Becker & Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. TIMES, May 29, 2012, at A1, *available at* <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html>.

⁵ Most importantly, 18 U.S.C. § 2339A (Supp. III 2009); 18 U.S.C. § 2339B (Supp. III 2009). Forms of support can include service, personnel, safe-houses, and financial services.

taking action.”⁶ The Obama administration does not claim to have adopted Bush-era policies, but when it comes to preventive prosecution, the difference is hard to find.

Relying primarily on 18 U.S.C. § 2339A and § 2339B—two statutes criminalizing “material support” to terrorists and terrorist organizations⁷—the government has moved further and further back in the chain of conduct to punish defendants. The criminal law has long recognized inchoate crimes such as conspiracy and attempt.⁸ Indeed, the material support offenses build on these very concepts.⁹ The principal critique of preventive prosecution in the terrorism context is that it sometimes reaches beyond potential *acts* to identify and incapacitate the *persons* who might commit them.¹⁰ Such prosecutions necessarily rely on a spectrum of prohibited conduct; the problem is that the defendants found at one end of this spectrum will not have done all that much. Consequently, the “conduct” for which they are convicted risks becoming a form of status crime.¹¹ Moreover, the prosecution will typically seek to prove this criminal status by highlighting an individual defendant’s associations and beliefs. Perhaps not surprisingly, preventive prosecution has triggered a wave of First Amendment concerns and accusations of a new “McCarthyism.”¹² Arab Americans and Muslim Americans, in particular, feel that they are being singled out because of their religion and political beliefs.¹³

As our legal system continues to feel its way through the “war on terror,” each new answer seems only to generate a host of additional questions. This Article addresses three such questions not widely discussed in the literature through the lens of a particular trial: the 2011 prosecution of Tarek Mehanna for providing “material support” to terrorists and

⁶ Quoted in Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 425 (2007). Professor Chesney discusses § 2339A as an example of a statute with preventive capacity. *Id.* at 480.

⁷ 18 U.S.C. § 2339A (Supp. III 2009); 18 U.S.C. § 2339B (Supp. III 2009).

⁸ 2 WAYNE R. LAFAYE, SUBST. CRIM. L. §§ 11.5, 12.1 (2d ed. 2011).

⁹ See generally Chesney, *supra* note 6.

¹⁰ See *id.* at 446–47.

¹¹ See generally LAFAYE, *supra* note 8, § 3.5.

¹² Robert Batey, *The Vagueness Doctrine in the Roberts Court: Constitutional Orphan*, 80 UMKC L. REV. 113, 120, 133 (2011) (discussing status crimes).

¹³ See Laura Rovner & Jeanne Theoharis, *Preferring Order to Justice*, 61 AM. U. L. REV. 1331, 1396 (2012) (positing that preventive prosecution has a “chilling effect on . . . Islamic political speech and association”).

terrorist organizations, and for other related crimes.¹⁴ Rather than looking backward through the perspective of appellate decisions, this Article presents the major legal questions common to preventive prosecutions of alleged terrorists through extensive analysis of the Mehanna trial. In so doing, this Article demonstrates the central role of the trial judge in directing the evolution of preventive prosecutions.

Mehanna had allegedly sought terrorist training during a brief trip to Yemen. He subsequently engaged in extensive Internet activities, particularly translations, that supported jihad generally, and al-Qaeda in particular, and was active in disseminating this material. The first question addressed is how a trial court should apply the test set forth in *Holder v. Humanitarian Law Project (HLP)*¹⁵ for criminalizing advocacy of terrorism. In that case, the Supreme Court announced a test based on the relationship between the defendant and a foreign terrorist organization—focusing on whether “material support [was] *coordinated with or under the direction of* a designated foreign terrorist organization.”¹⁶ Much of the “support” with which Mehanna was charged took the form of Internet activity such as translations, postings, and chats. The trial judge thus faced the difficult and somewhat novel task of applying *HLP*’s seemingly straightforward test to Mehanna’s rather amorphous connections with al-Qaeda.

The second question is how to reconcile the command of Federal Rule of Evidence 403¹⁷—which provides that the probative value of evidence should not be substantially outweighed by its prejudicial nature—with the reality that the kind of evidence that is likely to be offered in a material support trial may well be highly prejudicial. Such trials inevitably raise the question of what “sort of person” the defendant is. In *Mehanna*, the government introduced extensive evidence from the defendant’s Internet history in which he referred to Osama bin Laden as his real father¹⁸ and referenced the mutilation of American soldiers.¹⁹ Jurors also saw a photo of

¹⁴ United States v. Mehanna, No. 09-cr-10017-GAO (D. Mass. 2011).

¹⁵ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2726 (2010).

¹⁶ *Id.* (emphasis added). Although the Court’s formulations of the necessary relationship vary somewhat, its key point was to distinguish advocacy that might be reached from independent advocacy.

¹⁷ FED. R. EVID. 403.

¹⁸ Transcript of Record at 8-23, United States v. Mehanna, No. 09-cr-10017-GAO (D. Mass. 2011). When citing to the transcript, the first number corresponds to the day of the trial while the following numbers correspond to the page or range of pages being cited.

¹⁹ *Id.* at 22-69.

the defendant with friends in a celebratory posture in front of Ground Zero.²⁰ The prosecution argued vigorously that such evidence provided context and revealed Mehanna's state of mind.²¹ This, in turn, forced the trial judge to grapple with the question of when the "substantial prejudice" prohibited by Rule 403 is reached in a case about material support for terrorism.

The third question concerns the way in which the trial judge should calculate the sentence for a convicted defendant. In *Mehanna*, the defense requested a sentence of 63 to 78 months, the government recommended 300 months, and the court's probation office—the entity which plays the key role in most sentencing decisions—filed a report recommending a life sentence. The trial judge ultimately imposed a sentence of 210 months. Notwithstanding the fact that sentences can vary widely since the United States Sentencing Guidelines ("the Guidelines") have been made advisory,²² one is still justified in asking, why the disparity in the various recommendations? A close look at the *Mehanna* trial provides the answer. The question before the judge was the role that the "Terrorism Enhancement"²³ should play in sentencing the defendant. The Terrorism Enhancement would have automatically increased both Mehanna's "criminal history" and his "offense level,"²⁴ the two key variables in determining a sentence under the Guidelines. The extension provided by the Terrorism Enhancement guarantees a long sentence, life in many cases. The judge might have engaged in the difficult inquiry of determining whether Mehanna met the technical requirements for the type of terrorism crime the Enhancement requires.²⁵ Instead, he chose to disregard the Enhancement altogether, characterizing it as a "blunt instrument."²⁶

²⁰ *Id.* at 3-39.

²¹ *See, e.g.*, Transcript of Record, *supra* note 18, at 3-48.

²² *United States v. Booker*, 543 U.S. 220, 245 (2005). *United States v. Booker* held that the Guidelines can only be advisory in nature. *See* NORMAN ABRAMS & SARA SUN BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 869–73 (4th ed. 2006) (discussing the impact of *Booker*).

²³ U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2009).

²⁴ *Id.*

²⁵ 18 U.S.C. § 2332b(g)(5) (2006) (defining a "Federal Crime of Terrorism" as "an offense that is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct").

²⁶ Transcript of Disposition at 69, *United States v. Mehanna*, No. 09--cr-10017-GAO (D. Mass. 2012).

Once again, *Mehanna* presents a problem that will recur in preventive prosecutions. Congress and the United States Sentencing Commission apparently wanted a blunt instrument on the theory that all terrorism should be treated severely. However, judges, as was the case in *Mehanna*, may question whether some types of “terrorism” are different in kind from others. Indeed, the Terrorism Enhancement issue is part of a larger, continuing controversy about the force of the Guidelines—“advisory” rather than binding since the Supreme Court’s *Booker* decision—and the extent of judicial discretion to depart from or ignore them.²⁷

This Article—with its focus on the conduct of a particular trial—joins a growing group of “granular” analyses²⁸ of how the Article III courts function in individual terrorism cases, as opposed to more “macro” treatments of the subject.²⁹ Two recent articles are particularly worthy of note. The first, *Terrorism Trials and the Article III Courts After Abu Ali*, by Professor Stephen Vladeck, examines the complex prosecution of Abu Ali for a range of offenses, including material support, conspiracy to assassinate the President, and conspiracies relating to aircraft.³⁰ Professor Vladeck skillfully analyzes this particular case in order to place in perspective—and *validate*—the role of Article III courts at a time when other forums, such as military commissions and national security courts, have been proposed as possible alternatives.³¹ Vladeck’s article focuses on the “unique difficulties” Article III courts face in conducting trials resulting from multinational counterterrorism investigations, highlighting the *Abu Ali* court’s struggle to grapple with the evidentiary use of foreign interrogations, foreign depositions, and difficult questions under the Classified Information Procedures Act (CIPA).

The second article, *Preferring Order to Justice*, by Professors Laura Rovner and Jeanne Theoharis, deals with a different case—the prosecution of Fahad Hashmi for material support³²—and reaches a different conclusion.³³ While Hashmi ultimately pled guilty, Professors Rovner and

²⁷ *Gall v. United States*, 552 U.S. 38 (2007).

²⁸ Laura Rovner & Jeanne Theoharis, *supra* note 13, at 1340.

²⁹ *See, e.g.*, Stephen L. Vladeck, *Terrorism Trials and the Article III Courts After Abu Ali*, 88 TEX. L. REV. 1501, 1503 (2010).

³⁰ *Id.* at 1509–10 (listing charges); *see United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008).

³¹ *See id.* at 1502 n.4 (noting proposals for “national security courts”).

³² *See* Rovner & Theoharis, *supra* note 13, at 1347 (outlining charges).

³³ *See id.* at 1414 (deference to national security claims erodes courts’ role as check on the executive branch).

Theoharis argue, *inter alia*, that the prosecution would have unfairly bolstered its case by introducing into evidence controversial public statements in support of terrorism made by Hashmi.³⁴ The authors use the *Hashmi* case to paint a picture of trials in Article III courts as perhaps no better than “indefinite detentions, military commissions and other manifestations of second-class due process.”³⁵

Each of these articles provides useful insights into particular issues that arise from the legal system’s decision to rely primarily on Article III courts as the mechanism for criminal prosecution of the “war on terror.” This Article, likewise, focuses on the trial as the key point of entry to understanding how this decision has, and will continue, to play out. There are, however, important differences between this Article and those just discussed. Unlike Professor Vladeck, I do not focus on the “unique difficulties”³⁶ of a case that he describes as presenting “sui generis” issues.³⁷ What makes *Mehanna* important is that its issues are *not* unique. They will be present in most, if not all terrorism trials that take on the dimension of preventive prosecution. While it is important to understand how federal courts handle extraordinary cases, it may be more important to understand how they handle “ordinary” ones. And unlike Professors Rovner and Theoharis, this Article need not speculate on what a material support prosecution *would have* looked like, because the *Mehanna* case actually went to trial.³⁸

Notwithstanding these differences, I view this Article as broadly complementary with the other two. Each helps, through its own empirical approach, to identify pieces of a broader puzzle that will require considerable time to assemble. Terrorism cases place great strain on Article III courts. The goal of all inquiries into the role of such courts in combating terrorism should be to help them fulfill their mission as centers of justice, rather than to become a mere default forum in the “war on terror.” Like Professor Vladeck, I believe that they are on the right track.

³⁴ *Id.* at 1391–97.

³⁵ *Id.* at 1338. Earlier in the article, the authors refer to “the long history of legal lynching in this country and the central role the law and the courts have played in upholding/masking racial injustice even since the civil rights movement.” The thrust of their article is that this unfairness persists in today’s terrorism trials. *Id.*

³⁶ Vladeck, *supra* note 29, at 1504.

³⁷ *Id.* at 1528.

³⁸ *See* Rovner & Theoharis, *supra* note 13, at 1348–57 (discussing trial issues).

Part I takes a close look at the *Mehanna* trial. It reviews the record in detail in order to provide a foundation for the subsequent discussion of the doctrinal and evidentiary issues that arise in preventive prosecutions. Part II focuses primarily on the uncertainty surrounding the application of the *HLP* test to *Mehanna*'s Internet activities. It also considers the future relationship between 18 U.S.C. § 2339A and § 2339B. Part III considers the possibility that prejudicial evidence could taint the jury's attitude toward the defendant in a preventive prosecution. The risk is real, perhaps even inevitable, since such prosecutions tend to focus heavily on both the defendant's character and attitude towards jihad and terrorism generally. Part IV examines the difficult issues that arise in the sentencing of convicted defendants. The Guideline's inclusion of the Terrorism Enhancement reflects Congress' effort to capture the particular severity that our society attaches to terrorism crimes. However, this "one size fits all" approach to punishing terrorism offenses risks a backlash on the part of judges, who, as in *Mehanna*, may simply refuse to consider it on the grounds that it is too severe. Part V summarizes the crucial role of the trial judge in preventive terrorism prosecutions and provides a preliminary appraisal of the extent to which the judge in *Mehanna* discharged this function.

I. The *Mehanna* Trial: An Overview

A crucial variable in the outcome of preventive prosecutions is the manner in which the trial judge conducts the proceedings. These prosecutions are high-profile events in which the judge's actions send clear messages both to the government and to different segments of the broader community. Many people will applaud the fact of prosecution, not be concerned with evidentiary "technicalities," and, at sentencing, want the proverbial "book" thrown at the defendant. Other individuals may consider themselves members of a target community. They want trials that avoid stereotyping and that yield sentences that do not reflect a societal animus towards the group of which they are a part. In short, the trial judge's actions may have enormous influence beyond the individual trial in question. Indeed, the cumulative effect of preventive trials could become a central component of the "war on terror." Thus, it is particularly important to look closely at an actual trial, and to learn the lessons of *Mehanna*.

A. Overview and Statutory Background

The trial of Tarek Mehanna was long—35 days—and contentious. The defense moved for a mistrial on numerous occasions.³⁹ The very fact of prosecution, and the result—a guilty verdict on all counts charged, resulting in imposition of a seventeen and one-half year sentence—have been intensely controversial. The case has been cited as an example of the “Islamophobia that still grips the U[nited] S[tates] . . . ,”⁴⁰ and “stink[ing] of a lynch-mob mentality.”⁴¹ It has also been cited as an example of juries’ inherent bias in terrorism cases.⁴² Writing in the *New York Times*, a witness for the (unsuccessful) defense lambasted the prosecution as “a frightening and unnecessary attempt to expand the kinds of religious and political speech that government can criminalize.”⁴³

One can find alternative views in the *Boston Globe*. It named the United States Attorney for Massachusetts “Bostonian of the Year.”⁴⁴ The glowing article highlighted the fact that “Ortiz [the United States Attorney] won a noteworthy case against Tarek Mehanna of Sudbury, convicted of supporting al-Qaeda and plotting to kill U.S. soldiers in Iraq”⁴⁵ Yet shortly thereafter, a *Globe* political columnist wrote that the verdict and sentence “should be lamented”⁴⁶ The columnist, quoting a “leading civil libertarian,” stated, “I could make a translation of ‘Mein Kampf,’ and it would not mean that I should be arrested for having urged the killing of

³⁹ Transcript of Record, *supra* note 18, at 10-56, 10-62, 10-99.

⁴⁰ Ross Caputi, *Tarek Mehanna: Punished for Speaking Truth to Power*, THE GUARDIAN, April 16, 2012, available at <http://www.guardian.co.uk/commentisfree/cifamerica/2012/apr/16/tarek-mehanna-punished-speaking-truth>.

⁴¹ *Id.*

⁴² Peter Schworm, *Mehanna Conviction Stirs Outcry on Rights: Critics Contend Evidence Lacking*, BOS. GLOBE, Dec. 22, 2011, at B13.

⁴³ Andrew F. March, Op-Ed., *A Dangerous Mind?* N.Y. TIMES, April 23, 2012, available at <http://www.nytimes.com/2012/04/22/opinion/sunday/a-dangerous-mind.html>.

⁴⁴ Scott Helman, *Carmen Ortiz: The Fighter*, BOS. GLOBE MAG., Jan. 1, 2012, available at http://www.boston.com/news/local/massachusetts/articles/2011/12/30/bostonian_of_the_year_carmen_ortiz_2011/?page=full.

⁴⁵ *Id.*

⁴⁶ Joan Vennoch, *Tarek Mehanna Case Puts First Amendment on Trial*, BOS. GLOBE, April 19, 2012, available at http://articles.boston.com/2012-04-19/opinion/31362541_1_internet-posts-terrorism-training-tarek-mehanna.

Jews and Gypsies.”⁴⁷ But, the columnist argued, “[a]fter Mehanna, it might.”⁴⁸

Many of the criticisms choose to downplay and ignore, or may even reflect an unawareness of, the fact that the government’s complex case rested on several statutes and theories.⁴⁹ Part II concentrates on describing the core of the trial: the evidence supporting conviction under two key material support statutes, 18 U.S.C. § 2339A and § 2339B. Thus it is necessary to analyze in depth the doctrinal problems under these statutes that *Mehanna* raises.⁵⁰

Both statutes penalize providing “material support,” a term which is defined broadly to include such matters as “any property, tangible or intangible, or service . . . financial services . . . personnel (one or more individuals who may be or include oneself), and transportation”⁵¹ Section 2339A, titled “Providing Material Support to Terrorists,” criminalizes providing support with the “know[ledge] or inten[tion] that it is to be used in preparation for, or in carrying out” a number of enumerated offenses, such as killing or the destruction of property abroad, or “the concealment of an escape from the commission of” such offenses.⁵² The

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ To my knowledge, no critic has come forth with a defense of lying to federal investigators in violation of 18 U.S.C. § 1001 (2006). It may be argued that *Mehanna* ushers in a period of even more intrusive law enforcement tactics as the government seeks out potential terrorists within the Islamic community. These tactics will generate interactions that, in turn, generate false statements. *Mehanna* can thus be viewed as part of a slippery slope toward “entrapment” in a broad, lay sense of the word.

⁵⁰ See *infra* Section II. I will not discuss the false statement charges or the count under 18 U.S.C. § 956 (2006). This provision makes it a crime to conspire within the United States “to commit at any place outside the United States an act which would constitute the offense of murder, kidnapping, or maiming if committed in the special maritime or territorial jurisdiction of the United States.” *Id.* Section 956 is a frequent predicate offense under § 2339A. In Mehanna’s case, this charge, while contained in a separate count, seems largely subsumed under the § 2339A charge. See, e.g., *United States v. Amawi*, No. 3:06CR719, 2009 WL 1373155 at *2 (N.D. Ohio, May 15, 2009) (allowing same evidence to justify conviction under both statutes); Chesney, *supra* note 6, at 480 (noting use of 2339A to charge “aiding-and-abetting a conspiracy”); *id.* at 486 (noting use of § 956 as a § 2339A predicate); Peter Margulies, *Guantanamo by Other Means: Conspiracy Prosecutions and Law Enforcement Dilemmas After September 11*, 43 GONZ. L. REV. 513, 531 (2008) (discussing cases in which the same facts supported prosecutions under both § 956 and § 2339A).

⁵¹ 18 U.S.C. § 2339A(b)(1) (Supp. III 2009).

⁵² 18 U.S.C. § 2339A(a).

scope of § 2339A appears broad, given the large number of predicate offenses,⁵³ but the statute also appears to be constrained by the presence of some form of *mens rea* requirement.⁵⁴ Section 2339B, on the other hand, is not tied to any specified offense, but to the knowing provision of material support to a “foreign terrorist organization.”⁵⁵ The organization must be one that has been so designated by the Secretary of State pursuant to a separate statutory procedure,⁵⁶ although the defendant need not know about this designation if he knows that the organization engages in “terrorist activity” or “terrorism.”⁵⁷ Thus, in summarizing the statutory scheme at play in *Mehanna*, it can be said that § 2339A focuses on links between an individual and specified *crimes*, while § 2339B focuses on links between an individual and specified *organizations*.⁵⁸

What of Mehanna and his possible provision of material support? The government argued that two separate courses of conduct individually violated both statutes.⁵⁹ The first was a trip to Yemen in February 2004 to seek terrorist training. The government contended that this was the agreed upon purpose between Mehanna and two friends, thus constituting a conspiracy.⁶⁰ The group did not find any terrorist training camps, consequently receiving no training, and Mehanna returned within two weeks. Nonetheless, the government argued that the event could constitute an offense under both statutes. In regard to § 2339A, the government argued that what took place was at least a conspiracy or an attempt to furnish personnel (included in the definition of material support)⁶¹ aimed at the ultimate commission of two of the predicate crimes: killing abroad⁶² and

⁵³ *Id.*

⁵⁴ CTR. ON LAW & SEC., N.Y. UNIV. SCH. OF LAW, TERRORIST TRIAL REPORT CARD: SEPT. 11, 2000-SEPT. 11, 2011 21 (2011); *but see* Chesney, *supra* note 6, at 428.

⁵⁵ 18 U.S.C. § 2339B(a)(1) (Supp. III 2009).

⁵⁶ 18 U.S.C. § 2339B(g)(6); 8 U.S.C. § 1189 (2006) (outlining designation process).

⁵⁷ 18 U.S.C. § 2339B(a)(1).

⁵⁸ With the emergence of forms of loosely organized terrorist organizations, the distinction may become somewhat blurred.

⁵⁹ Second Superseding Indictment at 1, 11, 19, *United States v. Mehanna*, No. 09-cr-10017-GAO, 2010 WL 2516469 (D. Mass. 2011).

⁶⁰ Both material support statutes as well as 18 U.S.C. § 956 (2006) (relating to false statements) contain a conspiracy provision. The indictment also based a separate count on 18 U.S.C. § 371 (2006), the general conspiracy statute. This conspiracy appears to be directed solely at the issue of false statements.

⁶¹ 18 U.S.C. § 2339A (Supp. III 2009).

⁶² Second Superseding Indictment, *supra* note 59, at 11.

killing Americans abroad.⁶³ The defendants, the government maintained, would use this training to commit these crimes at a later time. The fact that they did not actually receive the training did not nullify the reasons why they sought it. Section 2339B could be satisfied as well if they planned to make themselves available to al-Qaeda.⁶⁴ Of course, if the prosecution could not prove that Mehanna and friends went to Yemen with the intent to receive training in the first place, both statutory arguments would presumably fail for lack of *mens rea*. The Yemen charge—whatever its merits or doctrinal problems⁶⁵—is simply not a matter of speech at all.

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

On the surface, both material support statutes are satisfied. The defendant is making available a resource as defined in the statute—whether viewed as “training,” “expert advice or assistance,” or “personnel.” He could be seen as making it available under § 2339A either to commit the crimes himself, or to further the cause of those who would ultimately commit the crimes, or, under § 2339B, to a foreign terrorist organization—in this case al-Qaeda, an organization that the defendant apparently wished to help.⁶⁶

At this point, however, the First Amendment enters with full force, since speech in praise of terrorism or a terrorist organization seems clearly political speech that poses no danger of imminent action.⁶⁷ The Supreme Court wrestled with the problem of speech as material support in the 2010

⁶³ *Id.*

⁶⁴ See Transcript of Record, *supra* note 18, at 35–65.

⁶⁵ See Chesney, *supra* note 6, at 448 (discussing doctrinal problems under § 2339A).

⁶⁶ If viewed as personnel, this support would encounter the requirements of § 2339B(h) of direction or control.

⁶⁷ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that it is unconstitutional to punish political speech that creates no danger of imminent action).

case of *Holder v. Humanitarian Law Project (HLP)*.⁶⁸ The subtleties of *HLP* are dealt with in Part III.⁶⁹ For present purposes it is enough to note that the Court attempted to draw the line between protected and unprotected speech by declaring that the latter could be prosecuted if done in coordination with or under the direction of a foreign terrorist organization.⁷⁰ Applying the *HLP* test narrows the inquiry considerably, and also shifts its focus by asking not whether the defendant engaged in presumably protected speech, but by considering the relationship between the defendant (and his speech) and a foreign terrorist organization. The criticisms of *Mehanna* as criminalizing free speech such as translations of *Mein Kampf* or advocacy of unpopular causes look like rearguard attacks on *HLP*, if not unawareness of its holding. It may be that critics of *HLP* are so entrenched in their opposition to the case that they not only miss the fact that the Supreme Court drew a line in a good faith attempt to reconcile the First Amendment with the unique demands of terrorism prosecutions, but also that the line has teeth. Meeting the *HLP* test was perhaps the prosecution's biggest hurdle in *Mehanna*.

B. *The Trial Itself*

This sub-part examines the evidence introduced, mainly that which supported the prosecution's theory that the two courses of conduct described above each constituted material support.⁷¹ Separate consideration will be given to the extensive, more general evidence of *Mehanna*'s support for jihad. Part IV examines the question whether this evidence, including its cumulative nature, constituted prejudice in violation of Federal Rule of Evidence 403 to the point that a reversal is warranted.⁷² This Part first outlines this evidence, while tentatively raising the question whether the three distinct groups of evidence—Yemen, the speech materials, and general sympathies—could have had a mutually reinforcing effect. Is it possible, for example, that the jury was not completely satisfied that the government's proof on the trip to Yemen as material support met the standard of "beyond a reasonable doubt," but that the other two groups of evidence impermissibly pushed that count over the line?

⁶⁸ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

⁶⁹ See *infra* Section III.A–D.

⁷⁰ *Humanitarian Law Project*, 130 S. Ct. at 2726–27.

⁷¹ Second Superseding Indictment, *supra* note 59, at 1, 11.

⁷² FED. R. EVID. 403.

1. Yemen

The trip to Yemen seems the most straightforward. The prosecution contended that Mehanna and two friends sought terrorist training, examined the possibilities, chose Yemen as the best location, and travelled there, but were unable to find any training camps.⁷³ One of the co-conspirators—Kareem Abuzahra—gave extensive testimony on the events leading up to and culminating in the trip.⁷⁴ Although he returned shortly after arriving, his testimony bore out the prosecution’s theory of the purpose of the trip. In particular, Abuzahra made the key point that the conspirators agreed that they would use as a cover story the contention that the trip was a search for schools to study Islamic theology and the Arabic language.⁷⁵

Unfortunately for the prosecution, Abuzahra was a less than ideal witness. He testified under a grant of immunity,⁷⁶ always a fertile ground for cross-examination. Abuzahra admitted that he practiced lying,⁷⁷ and answered yes to the following question: “If you did not believe that it was in your best interest to tell the truth to the FBI, you would lie, right?”⁷⁸ Defense counsel did an excellent job of portraying him as an inveterate liar who would distort the truth to obtain a benefit.⁷⁹

However, the prosecution had other witnesses who testified, although in a less complete fashion, that Mehanna went to Yemen to find a terrorist training camp.⁸⁰ There was also testimony that after returning from Yemen, Mehanna admitted failure to find what he sought.⁸¹ Additionally, the prosecution introduced a letter to a prospective bride who had expressed strong support for jihad. Mehanna’s response stated, in part, “just so you are aware of how serious I am . . . know that a short while back I went for an interview and was rejected by that company and sent back because I had no references to vouch for me as they don’t just hire anyone off the street.”⁸² In

⁷³ Transcript of Record, *supra* note 18, at 3-29.

⁷⁴ *Id.* at 23-10-49.

⁷⁵ *Id.* at 23-13.

⁷⁶ *Id.* at 22-112-114.

⁷⁷ *Id.* at 25-46.

⁷⁸ *Id.* at 25-59.

⁷⁹ *Id.* at 25-60. Perhaps the strongest part of the cross-examination can be found in the transcript at 25-4-72.

⁸⁰ *Id.* at 14-37; *see also id.* at 15-168.

⁸¹ *Id.* at 15-113.

⁸² *Id.* at 26-40.

sum, the prosecution put forth evidence that, if believed, supported its view of the trip to Yemen.⁸³

2. The “speech” material

Mehanna was a prolific user of the Internet, taking advantage of his computer skills and his knowledge of Arabic. He translated documents, posted them, and communicated arguably pro-jihadist sentiments to his friends via email. The prosecution contended that after returning from Yemen empty-handed, Mehanna continued to provide material support for terrorism through the “speech” material, a term used throughout this Article to distinguish this material from acts related to Yemen. The material support theory runs something like this: terrorist groups such as al-Qaeda need and use propaganda. Disseminating jihadist documents and viewpoints helps to spread the word. It can also serve as a form of recruitment. Mehanna thus potentially violated § 2339B by rendering support to a foreign terrorist organization. His actions could be viewed as meeting the statutory definition of material support as “service,” “personnel,” or “expert advice or assistance” (at least in the case of the translations). The same activities could also be viewed as a violation of § 2339A. The “support” (to unspecified terrorists) could ultimately lead to crimes such as killing or maiming abroad, or killing Americans abroad. The § 2339A counts specifically name these crimes and include the speech—as well as the attempt to acquire training—as criminal activity that constitutes support.⁸⁴

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

⁸³ Legal issues of whether it makes no difference that he didn’t get training are discussed in Section III. With respect to the Yemen facts the defense’s strategy consisted mainly of discrediting the prosecution’s witnesses and advancing the plausibility of the schooling reason for the trip. *See, e.g., id.* at 25-8-13.

⁸⁴ *See infra* Section II.C.

It is one of the most well-known training manuals that are out there, instructional guides for individuals that are self-radicalizing or self-recruiting to follow in order to get an idea of what they can do to help support al Qaeda's mission. It's an official document produced by al Qaeda. It's not just produced by some random person. This is Esa al-Awshin, the—He's—not only is he an official leader of al Qaeda, but, more importantly, he's essentially the leader of their media wing, or was the leader of their media wing before his demise.⁸⁵

On the other hand, defense experts ridiculed the notion that “39 Ways” is a training manual.⁸⁶ The problem for the prosecution is that the “Ways” run the gamut from “Have Enmity Toward the Disbelievers” to “Learn to Swim and Ride Horses.”⁸⁷ It is, of course, possible that the jury was not swayed by “39 Ways” but found enough exhortation to jihad in Mehanna's other public utterances to find “material support.”⁸⁸

The government's second problem stems from the Supreme Court's *HLP* decision.⁸⁹ In the context of § 2339B, the Court held that normally protected speech could be prosecuted as material support only if coordinated with or under the direction of a designated foreign terrorist organization.⁹⁰ Section III, examines how this test, or a somewhat less burdensome one that can be derived from the Court's opinion, might apply to *Mehanna*.⁹¹ This Section focuses on the evidence attempting to satisfy the test in its relatively strict form. The government relied heavily on Mehanna's work for the British jihadist website Tibyan Publications, for which he served at one point as a moderator. The government expert

⁸⁵ Transcript of Record, *supra* note 18, at 27-46.

⁸⁶ *Id.* at 31-53-54, 32-131-137.

⁸⁷ David Cole, *39 Ways to Limit Free Speech*, N.Y. REV. OF BOOKS BLOG (Apr. 19, 2012, 3:15 PM), <http://www.nybooks.com/blogs/nyrblog/2012/apr/19/39-ways-limit-free-speech/>.

⁸⁸ *See, e.g.*, Transcript of Record, *supra* note 18, at 27-12-18, 27-49-52 (expert witness discussing the significance of al-Qaeda videos and internet activities for the organization's recruitment).

⁸⁹ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

⁹⁰ *Id.* at 2726.

⁹¹ *See infra* Section II.A-D (discussing speech issues and the addition of “coordination” to the *Holder* test).

testified that there was a close relationship between Tibyan and al-Qaeda.⁹² His testimony as to a possible Tibyan-based relationship between Mehanna and al-Qaeda was at best indirect.⁹³ He did, however, note the importance to al-Qaeda of individuals with skills like the defendant's and the utility to al-Qaeda of coordinating propagandists through online networking.⁹⁴

The government's best evidence on this issue was an apparent request from al-Qaeda to Tibyan for a particular translation, with the suggestion that Mehanna do the translation.⁹⁵ However, there is no indication that he ever did so, although there was other testimony about his Tibyan connection and references in his work to the website.⁹⁶ The defendant also seemed to think of himself as a form of media wing for al-Qaeda.⁹⁷ Still, if the *HLP* test is to be strictly applied, this aspect of the government's case seems its weakest.

3. Evidence of jihadist sympathies

Much of the evidence presented related more or less directly to the two courses of conduct alleged and his culpability under the material support statutes. However, a large portion of the trial was devoted to the presentation by the prosecution of a third category of evidence: examples of Mehanna's jihadist sympathies. The prosecution told the jury at the outset that:

You're going to see, and you're going to hear, a lot of the evidence about what the defendant was saying out of his own mouth, but also what the defendant was consuming, what he

⁹² Transcript of Record, *supra* note 18, at 27-47. Indeed, the prosecution was able to slip in a question and answer about "co-ordination with al-Qaeda." *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 27-51-52. Professor Margulies argues that "[t]he evidence proves Mehanna's coordination with Al Qaeda in two ways, one top-down, the other bottom-up. The top-down coordination involves a course of dealing with Al Qaeda on the translation of religious authorizations for violence distributed through an on-line source, At-Tibyan Publications." After reviewing the government's evidence, he views it as sufficient to establish the existence of a classic tacit or implied conspiracy. Thus, as to relations with At-Tibyan, "evidence of an agreement to perform a task is key; the task need not be completed to prove the individual's guilt." Peter Margulies, *Mehanna Notes and Summary* (2012) (unpublished memorandum on file with the author).

⁹⁵ *Id.* at 13-19-22.

⁹⁶ *See, e.g., id.* at 21-136.

⁹⁷ *See, e.g., id.* at 21-6 (prosecutor discussing defendant's propagation of a video of Zarqawi).

was reading, what he was watching. Because that all goes into what he was thinking at that time. This case is not about—it's not illegal to watch something on the television. It is illegal, however, to watch something in order to cultivate your desire, your ideology, your plots to kill American soldiers, or to help those, as in this case, who were.⁹⁸

The prosecution insisted that these materials would help prove the defendant's "intent" when he went to Yemen or translated materials.⁹⁹ The jurors were told that such evidence "will help you assess both what the defendant personally did as well as what was in his state of mind, what he was thinking as he was engaging in this conduct."¹⁰⁰ Of course, *mens rea* is relevant to most crimes, and is particularly important when the defense puts forward plausible alternative explanations for the conduct at issue. Here, for example, the trip to Yemen was presented as a search for schooling, and the Internet activities were presented as part of a scholarly dialogue, or independent expression of political views. Still, it is hard not to wonder whether the mountain of evidence about Mehanna the person was de facto proof of a crime beyond those charged: that of being a terrorist sympathizer. Part IV of this Article examines this evidence in light of the crimes charged and the possibility of prejudice in violation of Federal Rule of Evidence 403.¹⁰¹ The goal at this stage is somewhat narrower: to present as complete a picture as possible of the evidence before the jury in order to lay a background for analysis of the important doctrinal and policy issues that the *Mehanna* trial presents.

The "jihadist evidence"—a term used in this Article to refer to Mehanna's general interest in and support for jihad—was obtained through a multiplicity of methods: a search under the Foreign Intelligence Surveillance Act of the defendant's home and computer, intercepted emails, wiretapping, bugging, and witnesses wearing wires, as well as live testimony, particularly of co-conspirators.¹⁰² Much of the Internet materials were available through relatively conventional searches.¹⁰³ The range of this evidence was broad indeed. It ran the gamut from praise of the Mujahideen

⁹⁸ *Id.* at 3-38-39.

⁹⁹ *Id.* at 3-38.

¹⁰⁰ *Id.* at 3-41.

¹⁰¹ See *infra* Section III.A-B.

¹⁰² See, e.g., Transcript of Record, *supra* note 18, at 4-11-29 (describing search of home).

¹⁰³ Postings on some websites were password protected. See, e.g., *id.* at 6-83-84.

to glorification of September 11th and of Osama bin Laden.¹⁰⁴ Some of it was inflammatory, such as descriptions of beheadings and Mehanna's repeated reference to killing American soldiers as "Texas BBQ."¹⁰⁵

C. Preliminary Assessment

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

As for the Internet activities, the jury may have believed the government's expert with respect to their value to al-Qaeda. The weakest aspect of this part of the case seems to be the question of direction or coordination.¹⁰⁶ It may well be that the extensive evidence concerning Tibyan's jihadist leanings and the defendant's contacts with it was enough to tip the scales.¹⁰⁷ There is also the possibility that all three groups of evidence, as discussed above, mutually reinforced one another. The prosecution argued, for example, that the fact that the defendant urged others to join the cause demonstrated his objectives both with respect to the trip to Yemen and to the translations.

However, there is also the possibility that the jury was prejudiced against a defendant to terrorism charges, either at the outset or as a result of unfair evidence that related more to him than to the charges.¹⁰⁸ In order to

¹⁰⁴ See, e.g., *id.* at 8-23 (defendant referring to bin Laden as his "real father").

¹⁰⁵ See, e.g., *id.* at 22-69.

¹⁰⁶ See *infra* Section II.B-D.

¹⁰⁷ See, e.g., Transcript of Record, *supra* note 18, at 12-80-82; see also David Cole, *supra* note 87 (discussing Mehanna's translation of the "39 Ways" that Tibyan published).

¹⁰⁸ See Peter Schworm, *Mehanna conviction stirs outcry on rights: Critics contend evidence lacking*, BOS. GLOBE, Dec. 22, 2011, available at

put the *Mehanna* trial in clearer perspective—and to draw lessons from it for the future—it is important to examine more deeply the doctrinal underpinnings of such trials and the manner in which they should be conducted. Moreover, there is the question of what to do with a defendant found guilty after a trial. Here, the trial judge’s extraordinary action in choosing to disregard the “Terrorism Enhancement” portion of the Sentencing Guidelines brings to the fore an issue relatively unexplored in the literature: if terrorists are subject to the criminal law, including the Guidelines, and the conduct that constitutes “terrorism” varies widely, how should the legal system deal with a portion of the Guidelines that decrees that all terrorists are to be treated alike?¹⁰⁹

II. Doctrinal Issues in *Mehanna*

A significant aspect of *Mehanna* is that, if the verdict is upheld, the government may have succeeded in pushing the doctrinal envelope as to when a material support case can be brought. It thus represents a possible step further back in the chain of conduct toward preventive prosecution in the broad sense of preventing development of terrorists rather than commission of terrorist acts. While much of the commentary on *Mehanna* has focused on its First Amendment implications, the case also raises profound issues regarding the reach of § 2339A. Nonetheless, out of deference to the many critics who have treated *Mehanna* as a First Amendment case,¹¹¹ this section will first examine the role *Mehanna* occupies as one of the first prosecutions to apply *HLP*. After reviewing the Court’s treatment of the relationship between speech and material support in *HLP*, this section then examines the application of § 2339B and § 2339A, respectively, to *Mehanna*’s speech activities. It then considers one of the more underreported consequences of the *Mehanna* prosecution, namely, the extent to which it has expanded the already broad scope of § 2339A.

<http://www.bostonglobe.com/metro/2011/12/22/tarek-mehanna-conviction-draws-sharply-divided-reactions/I73lyAEVWYdBtGLIoi6LBJ/story.html?camp=pm>.

¹⁰⁹ See U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2011); see also *infra* Section IV.B (discussing the “Terrorism Enhancement”).

¹¹¹ According to Nancy Murray of the Massachusetts branch of the American Civil Liberties Union, “this case is being used by the government to really narrow First Amendment activity in dangerous new ways.” Adam Serwer, *Does Posting Jihadist Material Make Tarek Mehanna a Terrorist?*, MOTHERJONES (Dec. 16, 2011, 4:00 AM), <http://www.motherjones.com/politics/2011/12/tarek-mehanna-terrorist>. According to Carol Rose of the same organization, “it’s official. There is a Muslim exception to the First Amendment.” Vennochi, *supra* note 46.

A. HLP

Mehanna is one of the first cases to apply the test established by the Supreme Court in *HLP* to an actual prosecution. Count One of the *Mehanna* indictment, which alleges a conspiracy to violate § 2339B, recites the defendant's speech activities as one of its bases.¹¹⁰ *HLP* was a pre-enforcement challenge by plaintiffs who wished to render assistance in the form of speech to designated foreign terrorist organizations.¹¹¹ Over a strong dissent by three justices on First Amendment grounds,¹¹² the majority held that § 2339B could reach such speech even if, apparently, it would otherwise be protected by the First Amendment.¹¹³ The Court's opinion deferred to Congress' desire to "delegitimize" foreign terrorist organizations, relying heavily on the expertise of the political branches and their emphasis on prevention.¹¹⁴

The Court drew an important line, however, between speech that could constitute illegal material support and that which could not, noting that "independent advocacy that might be viewed as promoting [a] group's legitimacy is not covered."¹¹⁵ Covered activity consists of advocacy that is directly linked to a foreign terrorist organization. Unfortunately, the Court's formulations of what constitutes such a direct linkage vary in ways that pose problems for lower courts applying *HLP*. The Court first noted that § 2339B itself contains an exemption, in the context of personnel, for independent actors, including speakers: "Material support that constitutes 'personnel' is defined as knowingly providing a person 'to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization.'"¹¹⁶ The Court appeared initially to equate the statutory standard for personnel with the constitutional requirements.¹¹⁷ However, it later appeared to broaden the test for all forms of support as one of material support that is "*coordinated*

¹¹⁰ Second Superseding Indictment, *supra* note 59, at 1–10.

¹¹¹ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2717 (2010).

¹¹² *See id.* at 2733 (Breyer, J., dissenting on the grounds that the material support statute unconstitutionally infringes on free speech).

¹¹³ *See id.* at 2724 (holding that the statute does not infringe on free speech because it punishes the action of giving material support, not speech).

¹¹⁴ *See id.* at 2725.

¹¹⁵ *Id.* at 2726.

¹¹⁶ *Id.* at 2721 (quoting § 2339B(h)).

¹¹⁷ *Id.* at 2726.

with or under the direction of a designated foreign terrorist organization.”¹¹⁸ The addition of the notion of coordination appears to make the relationship requirement easier to satisfy outside the context of personnel, since direction is no longer required. This loosening goes further when the opinion states that “Congress has avoided any restriction on independent advocacy, or indeed any activities not *directed to*, coordinated with or controlled by foreign terrorist groups.”¹¹⁹ Furthermore, the Court interpreted the statute’s prohibition on the provision of a “service” to a foreign terrorist organization as applying only to “*concerted* activity, not independent advocacy.”¹²⁰

HLP has been sharply criticized, although not on the ground of uncertainty in its test. Critics have focused on the apparent departure from traditional First Amendment jurisprudence represented by cases such as *Brandenburg v. Ohio*,¹²¹ and even invoked the specter of *Korematsu*.¹²² Justice Breyer, in dissent, argued that independent expressions of support might actually help a terrorist organization more than those by persons associated with it.¹²³ With this in mind, the Court’s holding is best defended as placing the relationship between the speaker and terrorist organization (*i.e.*, whether it is “coordinated with or under the direction of a foreign terrorist organization”¹²⁴), rather than the content of the speech itself, at the center of analysis of a terrorism-related speech issue.¹²⁵ The Court, in its own estimation, simply gave effect to Congress’ intent in § 2339B to weaken terrorist organizations by holding that the First Amendment did not prohibit the penalizing of material support for terrorist groups, even if that material support took the form of speech in some cases.

¹¹⁸ *Id.* (emphasis added). Of course, if the material support takes the form of personnel, the statutory test would still have to be met.

¹¹⁹ *Id.* at 2726 (emphasis added).

¹²⁰ *Id.* at 2721 (emphasis added).

¹²¹ *Brandenburg v. Ohio*, 395 U.S. 444 (1969); see Wadie E. Said, *Humanitarian Law Project and the Supreme Court’s Construction of Terrorism*, 2011 BYU L. REV. 1455, 1504–05 (2011).

¹²² *Korematsu v. United States*, 323 U.S. 214 (1944); see *Material Support for Terrorism*, 124 HARV. L. REV. 259, 267 (2010).

¹²³ *Humanitarian Law Project*, 130 S. Ct. at 2737.

¹²⁴ *Id.* at 2726.

¹²⁵ See *id.* at 2724 (“[The issue] is not whether the Government may prohibit pure political speech, or may prohibit material support in the form of conduct. It is instead whether the Government may prohibit what plaintiffs want to do—provide material support to [terrorist groups] in the form of speech.”).

While the Court's distinction between speech that constitutes material support and speech that constitutes independent advocacy is clear in the abstract, application of the test is more difficult. The Court conspicuously declined to address the issue of *how much* direction or coordination is necessary for speech actions to amount to material support.¹²⁶ The activities of someone like Mehanna, for example, may be viewed as directed *to* al-Qaeda. Perhaps he even operated in some loose form of relationship with al-Qaeda. But showing direction *from* or coordination *with* al-Qaeda is no easy task. *Mehanna* thus raises the issue of limits on when the government can curtail speech. The case certainly provides an important opportunity for lower court application of *HLP*. Indeed, in what constitutes perhaps the ultimate irony, Georgetown Law Professor David Cole, who argued for the losing side in *HLP*, has invoked it to argue that *Mehanna* went beyond *HLP*'s line. Quoting the Court, Professor Cole argued that prosecuting Mehanna constituted a "restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups."¹²⁷

It is still too early to tell if lower courts will apply the relationship requirement strictly or liberally when determining whether a defendant's speech acts cross the line from independent advocacy to material support. However, two recent Court of Appeals decisions suggest a surprisingly liberal approach. In *United States v. Farhane*,¹²⁸ the Second Circuit upheld the conviction under § 2339B of a physician who swore an oath of allegiance to al-Qaeda, promised to be on call to treat wounded members of the organization in Saudi Arabia, and gave his telephone number to an undercover operative posing as a member of al-Qaeda. The oath was worded as a statement of agreement with the organization's mission.¹²⁹ The court stated that "[f]rom the totality of these facts, a reasonable jury could have concluded that [the defendant] crossed the line from simply professing radical beliefs or joining in a radical organization to attempting a crime, specifically, [his] provision of himself as personnel to work under the direction and control of al-Qaeda."¹³⁰ A possible implication of the decision

¹²⁶ *Id.* at 2722 (refusing to answer the question of "how much direction or coordination is necessary for an activity to constitute a 'service'" within the meaning of § 2339A because it is "entirely hypothetical" and thus inappropriate for resolution in a pre-enforcement challenge).

¹²⁷ Cole, *supra* note 87.

¹²⁸ *United States v. Farhane*, 634 F.3d 127 (2d Cir. 2011).

¹²⁹ *Id.* at 132–34.

¹³⁰ *Id.* at 150.

is that unilateral action on the part of a defendant is enough. There was no direction or control from al-Qaeda or coordination with it.¹³¹ The conduct might be viewed as an “attempt” to provide material support,¹³² which would satisfy the statute, although perhaps not the Constitution. Similarly, taking an oath played a large role in the recent Eleventh Circuit decision in *United States v. Augustin*,¹³³ although there were other acts, such as videotaping an FBI building for an undercover agent.¹³⁴

Readings of *HLP* that allow punishment of seemingly independent advocacy on the grounds of a unilateral desire to help a foreign terrorist organization would almost certainly go too far. In order to protect independent advocacy, *HLP* appears to limit criminalization to advocacy that could strengthen a particular organization itself—*e.g.*, by augmenting its resources—as opposed to merely increasing the level of support for its message.¹³⁵ The introduction of “coordination” may relax the standard of “direction and control” somewhat, but a showing of coordination would still require *some relationship* with the organization; unilateral action is insufficient.¹³⁶ While this keeps the constitutional standard in harmony with the congressional purpose, it also creates a line of proscribed conduct that is difficult to locate in practice.¹³⁷

Against this background, Mehanna’s conviction might be viewed as an effort by the government to broaden *HLP*. Judge O’Toole’s instructions show a careful consideration of the Supreme Court’s message to lower courts, particularly the importance of protecting independent advocacy, even if the defendant “is advancing the organization’s goals or objectives.”¹³⁸ The instruction makes that point and continues: “Rather, for a person to be guilty under [conspiracy to violate § 2339B], a person must

¹³¹ See *id.* at 175-83 (Dearie, C.J., dissenting in part).

¹³² But see *id.* (arguing that attempt standard not met).

¹³³ *United States v. Augustin*, 661 F.3d 1105 (11th Cir. 2011).

¹³⁴ *Id.* at 1114.

¹³⁵ See *Humanitarian Law Project*, 130 S. Ct at 2726 (“Independent advocacy that might be viewed as promoting [a terrorist] group’s legitimacy is not covered.”).

¹³⁶ The importance of independent advocacy probably rules out the possibility of an “attempt” crime when the support is given to an undercover agent, regardless of the general law on attempt and impossibility. See, *e.g.*, 2 LAFAVE, *supra* note 8, § 11.5.

¹³⁷ See *In re Terrorist Attacks on Sept. 11, 2001*, 740 F. Supp. 2d 494, 522 (S.D.N.Y. 2010); but see *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002) (deciding case prior to the current definition of “personnel,” which was first included in § 2339B on December 17, 2004).

¹³⁸ Transcript of Record, *supra* note 18, at 35-24.

be acting in coordination with or at the direction of a designated foreign terrorist organization, here, as alleged in Count 1, [al-Qaeda].”¹³⁹ Thus, no matter how much independent speech Mehanna engaged in, such conduct could not, by itself, constitute an offense, although it might serve other purposes such as showing intent.¹⁴⁰ By contrast, the defense’s requested instruction would have gone further in requiring that “the person . . . have a *direct* connection to the group and be working *directly* with the group for it to be a violation of the statute.”¹⁴¹

Let us assume, however, that Judge O’Toole’s instruction on Count One (conspiracy to violate § 2339B) correctly stated the law. In reviewing the conviction—a review in which the evidence is viewed in the light most favorable to the government¹⁴²—the key question would seem to be how far one can stretch the meaning of “coordination.” It is here that the prosecution may be said to widen the scope of what constitutes material support. Mehanna worked with Tibyan, although they eventually had a falling out.¹⁴³ There was some evidence of a relationship between Tibyan and al-Qaeda, and a suggestion that the latter wanted him as a translator for a particular matter.¹⁴⁴ But the prosecution may be suggesting a broader meaning of coordination. They repeatedly referred to Osama bin Laden’s call for Muslims to take up jihad and to the actions of the defendant and his associates to respond to that call.¹⁴⁵ Taken to its extreme, this view of “coordination” would be close to that of a “global jihad movement” that has emerged under § 2339A.¹⁴⁶ It also comes close to the idea of a one-way coordination discussed above.¹⁴⁷ However, the prosecution could contend that any such coordinated activity must relate in some way to al-Qaeda, since its leader issued the call. The prosecution’s expert seems to have had this in mind when he referred to “al-Qaeda adherents.”¹⁴⁸ Nonetheless, as the worldwide terrorism movement becomes more decentralized—as “al-

¹³⁹ *Id.*

¹⁴⁰ See *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

¹⁴¹ Defendant’s Motion for Preliminary Instruction to the Jury, *United States v. Mehanna*, No. 09-cr-10017-GAO (D. Mass. 2011) (emphasis added) (drawing attention to the issue of one-way coordination).

¹⁴² *United States v. El-Mezain*, 664 F.3d 467, 540 (5th Cir. 2011).

¹⁴³ Transcript of Record, *supra* note 18, at 6-46.

¹⁴⁴ See, e.g., *id.* at 3-48-49, 12-73.

¹⁴⁵ *Id.* at 3-37, 3-48.

¹⁴⁶ See Chesney, *supra* note 6, at 427–28. Thus any form of terrorism or support would be part of a generalized conspiracy.

¹⁴⁷ See *supra* Section III.A (discussing one-way coordination in *Farhane* and *Augustin*).

¹⁴⁸ Transcript of Record, *supra* note 18, at 26-135, 27-31.

Qaeda” devolves into a proliferation of loosely affiliated groups and individuals—this limiting principle may not seem like much of a limit.¹⁴⁹

As an alternative, the prosecution may view the notion of conspiracy to violate § 2339B through speech as a way around that section’s substantive requirements as established in *HLP*. Courts have generally been receptive to the idea of conspiracy and not receptive to the defense of impossibility.¹⁵⁰ The conspiracy is viewed as a separate evil, distinct from the substantive crime.¹⁵¹ In the terrorism context, the concept of material support has been analyzed as closely related to conspiracy, particularly the techniques which conspiracy affords to reach large numbers of people and people somewhat distant from the ultimate crime.¹⁵²

But what is the object crime in *Mehanna*? Professor Cole argues that “conspiracy to engage in jihadist advocacy, in the hopes that it will aid [al-Qaeda], without more is simply a conspiracy to engage in independent advocacy. And that is [not]—and could not be—a crime.”¹⁵³ Of course, conspiracy is usually viewed as separate from the object crime.¹⁵⁴ Assuming that a conspiracy was in place at all relevant times,¹⁵⁵ the prosecution could argue that in order to provide material support, Mehanna had to start by acting independently so that he could come to al-Qaeda’s attention, and ultimately achieve a state of coordination with it. This is precisely how he reached his position with Tibyan. Thus, there was a conspiracy to provide material support in the form of speech to al-Qaeda by engaging in forms of speech that it would come to trust and want. This view of a conspiracy is slightly different from alternatives suggested by Professor Margulies: both that Mehanna’s activities had put him in a tacit conspiracy with it, and that his extensive pro-jihad interactions with individuals reached the point of a

¹⁴⁹ As currently written, however, § 2339B is only triggered by the fact of designation of some organization.

¹⁵⁰ LAFAVE, *supra* note 8, § 12.1.

¹⁵¹ *See, e.g.*, *State v. Moretti*, 244 A. 2d 499 (N.J. 1968) (noting that conspiracy focuses on the defendant’s intent, as opposed to the focus in attempt prosecutions on the ultimate crime).

¹⁵² Chesney, *supra* note 6, at 447–49; *see also* LAFAVE, *supra* note 8, at § 12.1.

¹⁵³ Benjamin Wittes, *David Cole and Peter Margulies: An Exchange on Tarek Mehanna*, LAWFARE, Apr. 22, 2012, available at <http://www.lawfareblog.com/2012/04/david-cole-and-peter-margulies-an-exchange-on-tarek-mehanna/>

¹⁵⁴ LAFAVE, *supra* note 8, § 12.1.

¹⁵⁵ It is not entirely clear when the conspiracy should be viewed as over.

“bottom-up” conspiracy.¹⁵⁶ As he puts it, “[t]he bottom-up coordination involves concrete interactions with individuals furthering Al Qaeda’s goal of recruiting fighters against U.S. personnel abroad.”¹⁵⁷

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

B. First Amendment Issues and § 2339A

Since *HLP*, discussion of the possibility that the material support statutes might permit prosecution of normally protected speech has focused on § 2339B.¹⁵⁸ A principal issue with that statute is, of course, whether the direction, coordination, or control test separates truly independent advocacy from the narrow category of speech that could be prosecuted as providing material support to terrorist organizations. Assuming that this is a real limit, the question arises whether the government can somehow sidestep it by prosecuting speech under § 2339A. This statute requires no connection with a foreign terrorist organization—designated or not—and contains no language about direction or control.¹⁵⁹ The broad general reading of § 2339A—discussed below¹⁶⁰—permits targeting support for a type of crime against unspecified persons at some unspecified point in the future. The statute represents a possible end run around § 2339B’s restrictions. Apparently the *Mehanna* prosecution saw it as an alternative.

Count Two of the indictment states a conspiracy to violate § 2339A, based on two of its predicate crimes: conspiracy to kill, maim or injure persons or damage property in a foreign country,¹⁶¹ and, extraterritorial homicide of a U.S. national.¹⁶² The indictment alleges that *Mehanna*’s trip to Yemen to acquire the training necessary to commit these crimes

¹⁵⁶ Margulies, *supra* note 94.

¹⁵⁷ *Id.*

¹⁵⁸ See, e.g., Said, *supra* note 121.

¹⁵⁹ 18 U.S.C. § 2339B(h) (Supp. III 2009). This subsection was added in 2004.

¹⁶⁰ See *infra* Section III.C.

¹⁶¹ 18 U.S.C. § 956 (2006).

¹⁶² 18 U.S.C. § 2332 (2006).

constitutes an overt act in furtherance of the conspiracy.¹⁶³ It also alleges that the overt act requirement is met by Mehanna's speech activities, including a video that he sent "to multiple associates"¹⁶⁴ that "depicts, in detail, the mutilation and abuse of the remains of U.S. personnel in Iraq."¹⁶⁵ The video contains a preface that shows a still image of Osama bin Laden as his voice is heard thanking the Iraqi mujahideen for their continued attacks on America and its allies; bin Laden tells the viewer that these mujahideen "made all Muslims proud."¹⁶⁶ The prosecution's opening statement also emphasized that the speech activities were separate from the Yemen trip. It referred to the defendant's translation service as aimed at a broad group—both locals and individuals met on the Internet—"who also wanted to support the objectives and the goals of al Qa'ida and the terrorists, to kill Americans, to get them out of Iraq and Afghanistan."¹⁶⁷ The statement described "39 ways," a training manual to help people do this,¹⁶⁸ and presented Mehanna as a would-be jihadist who had failed himself, but now wanted to help others.¹⁶⁹ Thus, § 2339A may present the possibility of getting at speech related to future terrorist crimes, without § 2339B's requirement of a link to, or relationship with, a designated foreign terrorist organization. The speech can be seen as facilitating down-the-road crimes, in harmony with the approach of section 2339A.

Of course, an end run around the *HLP* test would only be an attempted end run around the Constitution. Thus, it is helpful to recall how *HLP* went about delineating the narrow area in which the government can prosecute normally protected speech. Although Justice Breyer suggested in dissent that the Court had not applied strict scrutiny,¹⁷⁰ the Court's opinion can be read as doing so, particularly as it characterized the government's role in combating terrorism as "an urgent objective of the highest order."¹⁷¹ The Court's test—"[t]he statute reaches only material support coordinated

¹⁶³ Second Superseding Indictment, *supra* note 59, at 14-15.

¹⁶⁴ *Id.* at 17.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Transcript of Record, *supra* note 18, at 3-32.

¹⁶⁸ *Id.*

¹⁶⁹ *See id.* at 3-29. One might perhaps argue that Count Two contains the speech acts because they are only relevant to a conspiracy, but the prosecution's remarks put the speech acts as one of two "principal ways" in which the defendant sought to help terrorists.

¹⁷⁰ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2734 (2010) (Breyer, J., dissenting).

¹⁷¹ *Id.* at 2724 (majority opinion).

with or under the direction of a designated foreign terrorist organization”¹⁷²—was based on its agreement with the government that such organizations play a key role in fomenting terrorism.¹⁷³ Whether this remains an accurate view of the nature of terrorism in a more decentralized landscape does not change the fact that the Court’s analysis rested on acceptance of this characterization¹⁷⁴

The *HLP* test does not fit the typical situation covered by § 2339A: aid given to help in the commission of one of over forty designated predicate crimes.¹⁷⁵ The Court’s focus was a direct one on organizations, rather than an indirect one on down-the-road crimes, regardless of who commits them. It is hard to see the Court formulating an analogous approach to § 2339A with its potentially amorphous link to over forty crimes, many of which are often committed by persons other than terrorists.¹⁷⁶ Since the issue is one of support of crimes, as opposed to organizations, there would be a strong pull to utilize a traditional First Amendment test, with its *Brandenburg*-based approach to imminence.¹⁷⁷ Under such an approach, a § 2339A prosecution of Mehanna’s speech would be doomed. Still, the government may have planted the seed for a view of material support in the form of speech that avoids the rigors of *HLP*.

C. Section 2339A and its Limits

Critics of the *Mehanna* outcome have, as noted, devoted most of their attention to its implications for the First Amendment. However, several have raised concerns regarding Mehanna’s conviction under § 2339A for providing material support to al-Qaeda by seeking terrorist training in

¹⁷² *Id.* at 2726.

¹⁷³ *Id.* at 2724–29.

¹⁷⁴ It seems likely that the Court would wait for Congress to act in making a serious change in the nature of the organizations subject to § 2339B and the accompanying designation process. The question is likely to arise in attempts to use § 2339B against non-designated organizations that have a loose affiliation with a designated organization.

¹⁷⁵ 18 U.S.C. § 2339A (Supp. III 2009) (criminalizing providing material support or resources, “knowing or intending that they are to be used in preparation for, or in carrying out, a violation of [enumerated crimes]”).

¹⁷⁶ See *infra* Section III.C (discussing the operation of § 2339A and the possibility of uncertain criminal activity at some future point).

¹⁷⁷ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (finding that mere advocacy of a crime is not enough to overcome First Amendment protections unless the speech creates an imminent danger of its commission); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 11.3.2.5 (4th ed. 2011).

Yemen, despite failing to find any such training during his trip.¹⁷⁸ The worry is that a conviction on these facts expands the already broad reach of § 2339A. This subsection addresses whether *Mehanna* was an example of the prosecution pushing for a broader reading. Indeed, it is surprising that the critics have not devoted more attention to this portion of the case and to the breadth of § 2339A generally. In their haste to focus on the First Amendment dimensions of the verdict, critics may be missing a far more significant aspect of the use of the material support concept to engage in preventive prosecution and to reach potential terrorist conduct in its early stages.¹⁷⁹

It is necessary to first consider the operation of this statute, which Professor Chesney has described as “the most capacious option” available in preventive prosecutions.¹⁸⁰ The statute seems on its face to be narrow. It essentially requires the provision of material support or resources, “[k]nowing or intending that they are to be used in preparation for or in carrying out a violation of [a number of predicate crimes]”.¹⁸¹ Professor Chesney notes that the forty-seven predicate offenses are not necessarily uniquely terrorism crimes.¹⁸² The requirement of knowledge or specific intent with respect to the use of the support or resources has often led to the view that § 2339A is a relatively narrow statute.¹⁸³ However, the plain language of the statute does not reflect the extremely broad uses to which it has been put. Indeed, Professor Chesney describes the narrow view of § 2339A as “a mistaken impression.”¹⁸⁴ The government’s successful use of §

¹⁷⁸ See, e.g., Vennochi, *supra* note 46.

¹⁷⁹ For example, Professors Rovner and Theoharis, in examining the prosecution of Sayed Hashmi, devote a page and a half to that of *Mehanna*. Rovner & Theoharis, *supra* note 13, at 1353–54. Section 2339A merits only one sentence in a footnote. *Id.* at 1354, n. 97. They regard both prosecutions as preventive. *Id.* at 1348.

¹⁸⁰ Chesney, *supra* note 6, at 474.

¹⁸¹ 18 U.S.C. § 2339A (Supp. III 2009).

¹⁸² See Chesney, *supra* note 6, at 479. He also points out the importance of the fact that the statute goes on to criminalize provision of material support “in preparation for or in carrying out the concealment of an escape from the commission of any such violation” *Id.*

¹⁸³ See, e.g., Andrew Peterson, *Addressing Tomorrow’s Terrorists*, 2 J. NAT’L SECURITY L. & POL’Y 297, 347–48 (2008); see also *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2740–42 (2010) (Breyer, J., dissenting).

¹⁸⁴ Chesney, *supra* note 6, at 478. Chesney notes that “[t]his may reflect the fact that most conspiracy prosecutions are not truly preventive in nature and thus provide little occasion for inquiries into this aspect of the agreement element,” because “typically, defendants already have completed [or attempted] to carry out the objective of the conspiracy” *Id.* at 451.

2339A has built on the already broad concepts of conspiracy law, including the notion that mere contemplation of an offense is sufficient to form a conspiracy.¹⁸⁵ As Professor Chesney notes, § 2339A is actually “broader than conspiracy liability in several respects.”¹⁸⁶ He points out that no agreement need be shown, that mere preparation is enough, and that the broad definition of material support includes personnel, such that “one might violate § 2339A by providing one’s self as personnel to others with the goal of assisting in the commission, or simply preparation for the commission of, the predicate offense”¹⁸⁷ As with conspiracy, a general knowledge of the type of offense that might be committed could be enough to trigger liability under the statute. One district court in a § 2339A conspiracy prosecution made the following response to the defendant’s contention that there was no specific plan or agreement beyond his general interest in a discussion with co-defendants about training, security, and defense tactics: “[T]hat doesn’t matter. Ultimate actions and targets—if the government establishes the basic illegal agreement and purpose beyond a reasonable doubt—can be un-or ill-defined and inchoate.”¹⁸⁸

Professor Chesney devotes considerable attention to the case of *United States v. Hayat*¹⁸⁹ (the quoted discussion concerns Hayat’s son, Hamid). Hamid had taken a trip to Pakistan, during which the government plausibly argued he had received terrorist training. He also held strong views about jihad and was quoted, for example, to the effect that the widely publicized killing of American journalist Daniel Pearl was a good thing.¹⁹⁰ Hamid was prosecuted under § 2339A, but, as Professor Chesney asks, “[w]as Hamid now a terrorist who intended to carry out attacks upon returning to the

¹⁸⁵ See LAFAVE, *supra* note 8, § 12.1(C).

¹⁸⁶ Chesney, *supra* note 6, at 479. At the same time, he stresses the breadth of conspiracy itself: “[T]here is no need to prove that the agreement evolved [beyond the type of offense] to the point of specifying the details of executing the offense” *Id.* at 456.

¹⁸⁷ *Id.* at 479–80 (“That subtle distinction . . . has the practical effect of . . . reaching beyond the offenses themselves to encompass anticipatory activity intended to culminate in offense conduct.”).

¹⁸⁸ *United States v. Amawi*, No. 3:06CR719, 2009 WL 1373155, at *2 (N.D. Ohio May 15, 2009).

¹⁸⁹ First Superseding Indictment, *United States v. Hayat*, No. 05-cr-240 (E.D. Cal. Sept. 22, 2005).

¹⁹⁰ Professor Chesney cites this as a typical dilemma in preventive prosecution. See Chesney, *supra* note 6, at 487 (“[W]hether Hamid was prepared to take up arms in the name of the global Jihad movement was less clear”). Indeed, Professor Chesney views as one of the main problems with § 2339A the fact that the global Jihad movement can, in effect, substitute for § 2339B’s requirement of a specific organization. *Id.*

United States, or merely a misguided young man seeking adventure abroad without any intent to cause harm to others in the future?”¹⁹¹

Returning to Mehanna, should the fact that he did not find any terrorist training make a difference under § 2339A? If one accepts the broad interpretations given to the statute so far, this fact may not make a difference, at least for purposes of conspiracy and attempt charges.¹⁹² Mehanna sought to receive military training that would facilitate his committing a type of crime, in particular, two of those specified in § 2339A as predicate crimes: killing abroad; and, killing Americans abroad.¹⁹³ The specific place and victim are not relevant. The prosecution has satisfied conspiracy requirements and the trip to Yemen would certainly be a substantial step that satisfied the normal requirements of an attempt crime.¹⁹⁴ Failure to receive any training might, however, negate an actual substantive charge of material support, because Mehanna never completed the process of providing himself as “personnel” to any identifiable person or organization.

The problem with the § 2339A charges should then be immediately apparent: they raise the question of whether Mehanna was prosecuted for engaging in terrorist conduct, preparing and planning to do so, or for simply wanting to do so. Was this a case more of incapacitation or prevention? The prosecution offered some testimony on interest in civilian targets, but any attempts to attack such targets appear not to have proceeded very far. His case is thus distinct from *United States v. Amawi*, where the defendant disseminated a video on how to construct bomb vests for suicide attacks and showed great interest in specific military techniques such as sniper attacks,

¹⁹¹ See Chesney, *supra* note 6, at 488. Professor Chesney goes on to present a particularly trenchant critique of the use of § 2339A in the *Hayat* case. Professor Chesney also indicates a preference for the use of 18 U.S.C. § 2339D (2006), which makes it a crime to “knowingly receive[] military-type training from or on behalf of any organization designated at the time of the training” See Robert M. Chesney, *Terrorism, Criminal Prosecution, and the Preventive Detention Debate*, 50 S. TEX. L. REV. 669, 688 (2009).

¹⁹² Second Superseding Indictment, *supra* note 60, at 11, 19. Note that because of the presence of identified co-conspirators, a connection to the global Jihad movement is not necessary to prove any conspiracy, although there remains the question whether the fact that a person is somehow part of this movement and that Jihadists commit the predicate crimes is potentially enough to satisfy § 2339A conspiracy charges.

¹⁹³ 18 U.S.C. § 956 (2006); 18 U.S.C. § 2332 (2006).

¹⁹⁴ See LAFAVE, *supra* note 8, § 11.5. Judge O’Toole instructed the jury that impossibility of completing the crime would not be a defense to the attempt charge. Transcript of Record, *supra* note 18, at 35-31, 32.

despite not having traveled abroad.¹⁹⁵ Indeed, if Mehanna had not actually gone to Yemen, a conspiracy prosecution under § 2339A might still be possible under present law, as long as seeking terrorist training was discussed as a goal. He would seem no less dangerous than he was after the failed trip. This possibility is disturbing if one envisages prosecutions for little more than discussion and bold talk. These discussions, after all, would be about the possibility of going to Yemen, which could possibly lead to training which could possibly lead to crimes against unknown individuals. The question becomes whether a general desire to fight Americans viewed as occupying Arab lands, notably Iraq, at some point stretches the concept of specificity of the type of offense too far. At some point, the limits to conspiracy theory would break down, and a prosecution of Mehanna for this crime would seem to run into obstacles based on principles of due process as well of association and speech. Of course, Mehanna did go to Yemen. The fact that he did not find training probably does not take the case out of the reach of § 2339A as it has been developed. The government runs some risk that at some point an appellate court will consider whether that reach is excessive. *Mehanna* could be the vehicle for such an examination, but the crucial point would not be whether he received training but whether it was criminal for him to go as far as he did.

D. Section 2339B and Yemen

The Yemen-related acts were included in Count One—charging a conspiracy to violate § 2339B. The language of this statute, as opposed to § 2339A, is restrictive with regard to personnel. It provides as follows:

No person may be prosecuted under this section in connection with the term ‘personnel’ unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization’s direction or control or to organize, manage, supervise, or otherwise direct the

¹⁹⁵ *United States v. Amawi*, No. 3:06CR719, 2009 WL 1373155, at *1–*2 (N.D. Ohio May 15, 2009); *see also* *Koubriti v. Convertino*, 593 F.3d 459, 463 (6th Cir. 2010). *Koubriti* was a *Bivens* action arising out of a terrorism prosecution. During the course of that § 2339A prosecution, the evidence showed substantial activity on the part of the then defendant, including “casing” of prospective targets and acts viewed as consistent with terrorism such as document and credit fraud and attempting to obtain commercial truck licenses for transporting hazardous material.

operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control.¹⁹⁶

In a conspiracy charge, it is possible to argue that Mehanna agreed to seek the necessary link and that such an agreement is sufficient to constitute a conspiracy to violate § 2339B, at least if it were shown that he believed that any training would have come from al-Qaeda. However, the total absence of any link seems at odds with the statute's goal of weakening foreign terrorist organizations. The fact that the direction or control language was added to the statute after the Yemen trip reinforces and clarifies, but does not change this goal. The prosecution presented the Yemen trip, and related circumstances, to the jury as enough to satisfy all the substantive crimes charged.¹⁹⁷ However, the primary role of the Yemen trip appears to be to satisfy § 2339A, given the emphasis on future crimes to which the training could lead. The fit with § 2339B is questionable.

III. Prejudicial Evidence: A Special Danger in Preventive Prosecutions

On the twenty-first day of the trial, one of Mehanna's lawyers argued an evidentiary issue in the following terms:

MS. BASSIL [counsel for Mehanna]: I really think we have finally, I would suggest, tipped the balance on prejudicial over probative and cumulative. To date, we have seen 16 videos. We have had two oral descriptions of beheadings. We have seen one video of someone with a bomb. We have seen three clips of Diverse Operations in Iraq. We have seen two photographs of the front of a video cassette entitled, "Martyrs of Bosnia." We have seen, I think, two to three pictures of Osama bin Laden, the same of Zarqawi, and a picture of Zawahiri. We've seen two clips of planes

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

¹⁹⁷ Transcript of Record, *supra* note 18, at 35-65. *See also id.* at 40-41 (depicting trip as "an attempt to provide support to foreign terrorists by providing themselves as personnel to fight American forces in Iraq").

crashing into the World Trade Center; three photographs of wounded American soldiers; three photographs of flags, American flags, draped over caskets; and a photo of a United States soldier crying. We've seen endless photos of mujahideens with guns and rocket-propelled grenade launchers.¹⁹⁸

As the above quote suggests, the issue of prejudicial evidence was hotly contested in *Mehanna*. The prosecution justified its extensive use of potentially inflammatory evidence by contending:

These exhibits help set the background, or canvas, on which the picture of the defendant can be drawn, that is, a man who was motivated by and admired the leaders of al-Qaida and their successful attacks against the United States and her interests, and who desire [sic] to help fight against and kill American servicemen overseas, whether he could do it himself or convince others to do so.¹⁹⁹

The defense's objections ranged from accusations of "character assassination"²⁰⁰ to the contention that the prosecution was attempting to utilize prejudice in order to make up for its lack of any solid evidence of coordination with al-Qaeda.²⁰¹

The primary focus of this Article thus far has been on the material support statutes and the doctrinal issues they present. This Section, and the Section on sentencing that follows, turn to the role of the trial judge. While appellate courts are far from absent—especially in the sentencing context—the trial judge is front and center in preventive prosecutions.

A. *The General Framework*

This Section considers the overall approach to prejudicial evidence, with special reference to terrorism trials in general, and *Mehanna*'s in particular. As *Mehanna* illustrates, the issue of prejudicial evidence is likely to

¹⁹⁸ *Id.* at 21-7.

¹⁹⁹ *Id.* at 35-42.

²⁰⁰ *Id.* at 22-103. The defense also accused the prosecution of trying to "poison the jury." *Id.* at 10-54.

²⁰¹ *Id.* at 10-7, 10-53.

be an important one in material support cases, particularly as the preventive approach moves more toward focusing on the defendant as a person, that is, on the defendant's mindset and motives that underlie possibly ambiguous conduct. As an initial matter, the admissibility of such evidence is governed by Federal Rule of Evidence 403, which states that a court "may exclude evidence if its probative value is substantially outweighed by any of the following: unfair prejudice, confusing the issues, [or] misleading the jury" ²⁰² The exclusion of prejudicial, confusing, and misleading evidence is closely linked to the prohibition on character evidence under Rule 404(b), which states that "[e]vidence of a crime, wrong or other act is not admissible to prove a person's character in order to show that on a particular occasion that person acted in accordance with the character." ²⁰³ This prohibition might seem crucial, especially in terrorism cases, but the rule then proceeds to dilute its effect by allowing admissibility "for another purpose such as proving motive" ²⁰⁴ As the evidentiary issues in *Mehanna* demonstrate, terrorism cases present a fine line between character evidence and showing the underlying state of mind. ²⁰⁵ Anything the prosecution introduces to show a strong interest in jihad may also have the effect of showing an inclination to commit it. Beyond that link to the prohibition of character evidence, Rule 403 reflects a general concern with jury "misdecision." ²⁰⁶ Of course, most evidence is prejudicial to the opposing party, otherwise it would not be offered in the first place. ²⁰⁷ This fact is reflected in the Rule's prohibition of *unfairly* prejudicial evidence that substantially outweighs its probative value.

Rule 403 is not toothless, although its uncertain impact is further diluted by substantial deference on the part of appellate courts. ²⁰⁸ For this reason, it is important to consider the factors appellate courts have considered when reviewing the evidentiary findings of district court judges in terrorism cases. First, did the trial judge make a conscientious assessment

²⁰² FED. R. EVID. 403.

²⁰³ FED. R. EVID. 404(b).

²⁰⁴ FED. R. EVID. 404(b)(2).

²⁰⁵ See *United States v. Al-Moayad*, 545 F.3d 139, 160–62 (2d. Cir. 2008); *United States v. Hammoud*, 381 F.3d 316, 340–42 (4th Cir. 2004), *vacated by* *Hammoud v. United States*, 543 U.S. 1097 (2005); *United States v. Salameh*, 152 F.3d 88, 122 (2d Cir. 1998).

²⁰⁶ 1 WIGMORE, EVIDENCE § 10A at 684 (TILLERS REV. 1983).

²⁰⁷ See, e.g., *United States v. El-Mezain*, 664 F.3d 467, 511 (5th Cir. 2011).

²⁰⁸ See, e.g., *United States v. Old Chief*, 519 U.S. 172, 180–85 (1997); *El-Mezain*, 664 F.3d at 507–08; *United States v. Abu-Jihaad*, 630 F.3d 102, 131 (2d Cir. 2010).

before admitting or excluding evidence?²⁰⁹ Second, did the trial judge give limiting instructions aimed at mitigating the prejudicial impact of evidence?²¹⁰ Third, was alternative, less prejudicial evidence available to prove the same point?²¹¹ Fourth, is there an indication that the jury engaged in a rational decision-making process?²¹² Fifth, did the jury selection process help to mitigate any potential prejudice that might arise from the evidence?²¹³

These factors are of varying utility in the terrorism context. Consider the last one. Every pre-trial selection process will raise the question of possible prejudice on *voir dire*, and lead to the seating of jurors who claim they are not prejudiced. Prejudice is easy to deny, and, often hard to detect. Moreover, there is a related risk that Arab-Americans and Muslim-Americans will not be substantially represented in the jury pool.²¹⁴ As for a rational decision-making process, we rarely know what went on in the secret deliberations, and knowing it might not make a difference once a verdict is in.²¹⁵ This factor may come into play when the jury finds the defendant guilty on some counts and innocent on others.²¹⁶ It is not helpful in a single count case or one, like *Mehanna*, in which the defendant is found guilty on all counts.

On the other hand, it may be possible to determine whether the trial judge made a conscientious assessment of the evidence and its effect. An explanation of particular rulings would be an example.²¹⁷ Hearing

²⁰⁹ *Al-Moayad*, 545 F.3d at 159-60; *United States v. Awadallah*, 436 F.3d 125, 131 (2d Cir. 2006); *Salameh*, 152 F.3d at 111.

²¹⁰ *Abu-Jihaad*, 630 F.3d at 133; *Al-Moayad*, 545 F.3d at 161-62; *Awadallah*, 436 F.3d at 134.

²¹¹ *Old Chief*, 519 U.S. at 182-84; *Al-Moayad*, 545 F.3d at 160-61; *Awadallah*, 436 F.3d at 132. Stipulation plays a role in the provision of alternative evidence, but its role varies from case to case.

²¹² *United States v. Benkahla*, 530 F.3d 300, 310 (4th Cir. 2008); *United States v. Chandia*, 514 F.3d 365, 375 (4th Cir. 2008).

²¹³ *United States v. Jayyousi*, 657 F.3d 1085, 1114 (11th Cir. 2011); *Abu-Jihaad*, 630 F.3d at 134.

²¹⁴ Peter Margulies, *Guantanamo by Other Means: Conspiracy Prosecutions and Law Enforcement Dilemmas After September 11*, 43 GONZ. L. REV. 513, 550 (2008).

²¹⁵ See Transcript of Disposition, *supra* note 26, at 12-13. For example, the defense counsel informed Judge O'Toole that a juror would like to speak to him during the sentencing hearing; he refused to hear from the juror.

²¹⁶ See *Benkahla*, 530 F.3d at 310; *Chandia*, 514 F.3d at 375.

²¹⁷ See *Al-Moayad*, 545 F.3d at 159-60; *Awadallah*, 436 F.3d at 131; *United States v. Salameh*, 152 F.3d 88, 111 (2d Cir. 1998).

argument before ruling on evidentiary questions would be another. One can also examine the instructions to see if the issue of prejudice was addressed.

Beyond these general considerations, there are other evidentiary aspects of a case that can be examined after the fact. An example is the possibility that the evidence became cumulative. One formulation of this principle is that in any given trial there is necessarily a point at which the probative value of additional evidence aimed at proving the same point would be outweighed by the unfair prejudice of additional evidence.²¹⁸ An alternative method of achieving the goals of the cumulative evidence rule is invocation of the cumulative error rule. Thus, individual instances of prejudicial error might be allowed to stand if, by themselves, their introduction would be harmless error, but, when taken as a whole, the introduction of improper evidence amounts to a violation of due process.²¹⁹ Overall, the appellate role may not seem heavy handed, but—apart from the trial judge’s acute knowledge of its presence—appellate courts will at times reverse a conviction if the record leads to the conclusion that certain conduct so infected the trial as to make the resulting conviction a denial of due process.²²⁰

B. Terrorism Trials and Evidentiary Issues

Professor Peter Margulies has pointed out the possibility of latent prejudice in terrorism trials, particularly the possibility of stereotyping at play before the proceeding even begins.²²¹ Once the trial is underway, much of the evidence will, not surprisingly, involve terrorism. One can debate whether such evidence really creates new prejudices or even augments existing ones. It is not clear that, say, an email of the defendant praising Osama bin Laden, is going to affect the jury’s decision as to whether the defendant really was a “terrorist” of some sort. An ongoing stream of such emails might, however, have that effect. Thus, it seems correct to apply essentially the same rules concerning prejudicial evidence to terrorism-related trials as is applied to litigation generally.²²²

²¹⁸ See Wigmore, *supra* note 206, § 10a at 685.

²¹⁹ See generally FED. R. CRIM. P. 52; Taylor v. Kentucky 436 U.S. 478, 487–88 (1978); *Al-Moayad*, 545 F.3d at 178.

²²⁰ See *United States v. Hammoud*, 381 F.3d 316, 340 (4th Cir. 2004); *United States v. Scheetz*, 293 F.3d 175, 185 (4th Cir. 2002).

²²¹ Margulies, *supra* note 214, at 549–50.

²²² Placing terrorism-related cases in the general criminal justice system would seem to imply an acceptance of that system’s rules. Otherwise there is a danger of creating a subset

C. Terrorism Cases and Prejudicial Evidence

The issue of prejudicial evidence has arisen in numerous terrorism-related cases. In all but one instance, the defendant's objections have not prevailed.²²³ Beyond the fact that appellate courts virtually always uphold the trial judge, it is hard to draw much general guidance from appellate opinions since they tend to be highly fact-specific.²²⁴ This subsection will first look briefly at cases in which prejudicial evidence charges were rejected. It will then consider *United States v. Al-Moayad*, in which prejudice was found.²²⁵

In *United States v. Rezaq*,²²⁶ a small number of photos were admitted at trial, including one particularly graphic one. The District of Columbia Circuit declined to find “grave abuse” despite the possibility of prejudice.²²⁷ Admission of photos of victims was also sustained in *United States v. Salameh*.²²⁸ There, the photos showed victims of the bombing with which the defendant was allegedly associated. The Second Circuit upheld the admission of the photos on the grounds that they were “probative of the nature and location of the explosion that killed the victims, which defendant disputed at trial.”²²⁹ *Salameh* raises questions as to the utility of stipulation as a means of providing “alternative evidence.”²³⁰ The defendant was willing to stipulate that the bombing caused injury and death. Citing Supreme Court precedent, however, the court stated that “a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the government chooses to present it.”²³¹ In *United States v. Hammoud*,²³² several Hezbollah videos were ruled admissible—including footage of crowds shouting “death to America”—in a case involving material support

of the criminal justice system with harsher rules for one class of cases, and perhaps, an additional risk that those rules could, in turn, affect the broader system.

²²³ See, e.g., *Al-Moayad*, 545 F.3d at 197.

²²⁴ For example, it is hard to articulate a quantitative standard for prejudice. If one existed it would certainly be relevant to the *Mehanna* case.

²²⁵ *United States v. Al-Moayad*, 545 F.3d 139 (2d Cir. 2008).

²²⁶ *United States v. Rezaq*, 134 F.3d 1121 (D.C. Cir. 1998).

²²⁷ *Id.* at 1137.

²²⁸ *Salameh*, 152 F.3d at 122.

²²⁹ *Id.*

²³⁰ *Id.* at 122–23.

²³¹ *United States v. Old Chief*, 519 U.S. 172, 186–87 (1997).

²³² *United States v. Hammoud*, 381 F.3d 316 (4th 2004).

to Hezbollah.²³³ On appeal, the trial judge's ruling that the tapes were essential to proving motive was upheld.²³⁴ The Fourth Circuit viewed the case as straightforward because the defendant had put in issue his support for the violent activities of Hezbollah.²³⁵

A more analogous case to *Mehanna* is *United States v. Benkahla*.²³⁶ On appeal of a false statement conviction, the defendant argued that admission of "several dozen videos, photographs, and documents (how many exactly is in dispute) went well beyond what was necessary to establish materiality and became a vehicle for placing irrelevant and prejudicial statements and events before the jury."²³⁷ The Fourth Circuit's opinion upholding admission is particularly significant because of its statement that the trial judge "could well conclude that lengthy testimony about various aspects of radical Islam was appropriate, and indeed necessary, for the jury to understand the evidence and determine the facts."²³⁸ The defendant's mindset surfaced again in *United States v. El-Mezain*.²³⁹ In a case that turned on whether charitable contributions ultimately went to Hamas, a range of evidence about Hamas' violent activities was admitted. The Fifth Circuit concluded that the evidence "provided meaningful context and explanation."²⁴⁰ It also expressed the following view that may serve as the closest thing we have to a general statement of the law in this area: "because this was a case about supporting terrorists, it is inescapable, we believe, that there would be some evidence about violence and terrorist activity."²⁴¹

United States v. Al-Moayad appears to be the only terrorism case in which a defendant's conviction was reversed on the ground of a violation of

²³³ *Id.* at 340–41 ("The segments played by the Government included speeches by Hizballah leaders praising men who had martyred themselves and crowds shouting "Death to America" and "Death to Israel." Another tape depicted a group swearing to become martyrs "to shake the grounds under our enemies, America and Israel." Most significantly, some of the tapes depicted Hizballah military operations and encouraged donations from those who could not participate directly in Hizballah operations.").

²³⁴ *Id.* at 342.

²³⁵ *Id.* The court considered the photos probative of the defendant's knowledge of Hezbollah's nature and activities.

²³⁶ *United States v. Benkahla*, 530 F.3d 300 (4th Cir. 2008).

²³⁷ *Id.* at 309.

²³⁸ *Id.* at 310.

²³⁹ *United States v. El-Mezain*, 664 F.3d 467 (5th Cir. 2011).

²⁴⁰ *Id.* at 511.

²⁴¹ *Id.*

Rule 403.²⁴² It involved allegations of material support violations²⁴³ in which the key event was a meeting between the defendants and an undercover agent at which the defendants agreed to receive money and return a portion to Hamas. The defendants alleged numerous Rule 403 errors, including the admission of a picture of a bus bombing by Hamas, as well as a wedding speech by a Hamas official citing the bombing. The Second Circuit found this and other evidence to be excessively prejudicial.²⁴⁴ The court stated that:

[T]he record reflects that the district court did consider the balance between [testimony about the bombing's] probative value and possible prejudicial effect before allowing [the witness] to take the stand. However, we must conclude that, given the highly charged and emotional nature of the testimony and the minimal evidentiary value, the court's decision was arbitrary.²⁴⁵

The case is of uncertain precedential value.²⁴⁶ The evidence about Hamas was only one of several evidentiary rulings challenged on appeal. The issue of willingness to stipulate brought into play the possibility of alternative methods of proof.²⁴⁷ The appellate court was clearly convinced that the trial judge had not made a conscientious assessment of the evidence. It even invoked the cumulative error doctrine in holding that due to the large number of incorrect rulings “the district court's errors deprived the Defendants of a fair trial.”²⁴⁸ Although unstated, an appellate court's overall appraisal of how the trial judge handled a terrorism case, inherently prone to prejudice, will often play a key role in its review of particular evidentiary rulings.

²⁴² United States v. Al-Moayad, 545 F.3d 139 (2d Cir. 2008).

²⁴³ The defendants were convicted of conspiring to provide material support to designated terrorist organizations Hamas and al-Qaeda, and attempting to provide material support to Hamas under 18 U.S.C. § 2339B (Supp. III 2009). Al-Moayad was also convicted of attempting to provide material support to al-Qaeda and providing material support to Hamas under 18 U.S.C. § 2339B (Supp. III 2009).

²⁴⁴ See *Al-Moayad*, 545 F.3d at 172, 178.

²⁴⁵ *Id.* at 160.

²⁴⁶ See *El-Mezain*, 664 F.3d at 510–11 (distinguishing *Al-Moayad* on the facts); see also Transcript of Record, *supra* note 18, at 21-8–10.

²⁴⁷ See *Al-Moayad*, 545 F.3d at 160–61.

²⁴⁸ See *Id.* at 159.

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

Critics have focused on the First Amendment aspects of *Mehanna* while virtually ignoring the potentially serious claim of prejudice. One might expect civil libertarians to see in the latter a greater long-run danger to the value of a fair trial than application of the *HLP* test with its insistence on protecting independent advocacy.²⁴⁹ Indeed, while First Amendment issues surfaced frequently during the trial, far more attention was devoted to the admissibility of possibly prejudicial evidence under Rule 403, particularly during sometimes-lengthy exchanges between opposing counsel and the judge.²⁵⁰ The government spent an extraordinary amount of time offering various forms of evidence about jihad and the defendant's ongoing interest in it. Despite expressing some concern about the need for redaction to "minimize unfair prejudice,"²⁵¹ the judge ultimately admitted most of this material. Given the apparent thrust of the law—tilting toward admissibility, but suggesting that at some point the limits of Rule 403 can be reached—how might these rulings hold up when the trial is reviewed on appeal?

The Rule 403 challenge is the strongest argument for *Mehanna*. Although quantity by itself may not be a ground for reversal unless the cumulative evidence rule is triggered, the amount of potentially prejudicial evidence in *Mehanna* could serve to distinguish it from terrorism cases in which trial judges' rulings have been upheld.²⁵² Several of the factors that have been identified as indicating the possibility of prejudice are present. Judge O'Toole's instructions did not place any particular emphasis on the problem of prejudicial evidence, although he did give a general admonition about the need for fairness and impartiality, and the need to avoid prejudice.²⁵³ The defense's apparent willingness to stipulate on some issues might be seen as an alternative, less prejudicial method of proof.²⁵⁴ The jury's unanimous verdict does not indicate differentiated considerations of

²⁴⁹ The outer boundaries of § 2339A also deserve consideration in mainstream—as opposed to academic—commentary, although they lack the sound bite quality of invocations of *Mein Kampf*.

²⁵⁰ See Transcript of Record, *supra* note 18, at 21-7, 21-11 (discussing, *inter alia*, the *Al-Moayad* case and the defendant's references to killing American soldiers as Texas BBQ).

²⁵¹ *Id.* at 21-10.

²⁵² See, e.g., *United States v. Chandia*, 514 F.3d 365, 375 (4th Cir. 2008) (holding that a potentially prejudicial video was harmless because it took up only three minutes of time at trial).

²⁵³ Transcript of Record, *supra* note 18, at 35-153.

²⁵⁴ *Id.* at 10-61-62, 3-67-69.

the issues in the case. It may simply demonstrate that it thought Mehanna was guilty on all of the counts.

On the other hand, Judge O’Toole did review proposed exhibits and other evidence beforehand, and indicated concern for the problem of prejudice.²⁵⁵ Perhaps most significant are the lengthy exchanges referred to above. These sidebar conferences—a form of mini-oral argument—even included a discussion of *Al-Moayad*.²⁵⁶ Additionally, when considering the question of cumulative evidence, the judge expressed the view that the sheer amount of it might be a point in the prosecution’s favor.²⁵⁷ It is hard to argue that his general handling of the evidence did not reflect a thorough appraisal of it,²⁵⁸ or that his handling of the overall trial did not reflect a conscientious effort at managing a complex and sensitive prosecution.

Even if one concludes that an appellate court might let the matter rest, the amount of negative, stereotypical evidence introduced in *Mehanna* illustrates a key problem with preventive prosecutions: this tactic makes it easier for critics to say that Mehanna was really convicted for being a Muslim who held objectionable views.²⁵⁹ Let us assume that the legal system will see more of these prosecutions, and that like Mehanna’s, they will be highly public. The judge, who plays the role of “gatekeeper” in the judicial process,²⁶⁰ has a special responsibility to prevent latent prejudices from dominating the trial.

IV. Sentencing Issues in Preventive Prosecutions

The sentencing decision is perhaps the most visible one that any judge makes in a trial. This is particularly true in terrorism trials that have the hallmarks of preventive prosecution.²⁶¹ These cases are—and will

²⁵⁵ *Id.* at 27-13.

²⁵⁶ *Id.* at 27-14, 21-10 (distinguishing *Al-Moayad* from *Mehanna* on the grounds that *Mehanna* involves a terrorism charge).

²⁵⁷ *Id.* at 25-107 (“The very accumulation itself might itself have some probative value.”).

²⁵⁸ Compare *id.* at 10-49–62, with *United States v. Al-Moayad*, 545 F.3d 139, 160 (2d Cir. 2008) (holding that the trial judge acted arbitrarily in allowing clearly prejudicial evidence).

²⁵⁹ See, e.g., Cole, *supra* note 87; see generally March, *supra* note 43 (arguing that the *Mehanna* case unconstitutionally criminalizes thoughts).

²⁶⁰ See Margulies, *supra* note 214, at 553–54. One might also consider the role of prosecutors in controlling the amount of such evidence. Cf. *id.* at 552–53 (discussing the role of prosecutors in bringing cases of this nature).

²⁶¹ See *infra* Section VI.A.

continue to be—high profile and controversial by nature. Some people will feel that they never should have been brought.²⁶² Others will demand a stiff sentence to punish the defendant’s conduct and to incapacitate him.²⁶³ The inherent difficulties faced by the judge are greatly increased by the extraordinary uncertainty in federal sentencing law, and the presence of a substantial “Terrorism Enhancement” in the United States Sentencing Guidelines.²⁶⁴

A. The Uncertain State of Federal Sentencing Law

The adoption of the United States Sentencing Guidelines in 1987 “revolutionized federal sentencing.”²⁶⁵ Prior to the adoption federal judges had “largely uncontrolled discretion,” and there was no appellate review of sentencing decisions.²⁶⁶ The Guidelines were mainly a response to dissatisfaction with sentencing disparity. They were the product of extensive work by the United States Sentencing Commission, based on “the premise that treating similar offenses and similar offenders alike forms the basis of a just and rational sentencing policy.”²⁶⁷ The result of this work was an extremely complex set of Guidelines—binding on trial courts and subject to appellate review—that attempted to reconcile the irreconcilable by first creating a numerical system for mechanically computing sentences and then permitting a number of adjustments that would “individualize” the sentence.²⁶⁸

However, in the 2005 case of *United States v. Booker*, the Supreme Court, by a majority of five to four, held the Guidelines system unconstitutional.²⁶⁹ The Court found a violation of the Sixth Amendment in

²⁶² Sahar Aziz, *Tarek Mehanna: Punishing Muslims for Free Speech Only Helps al’ Qaeda*, THE CHRISTIAN SCIENCE MONITOR, Apr. 19, 2012, available at <http://www.csmonitor.com/Commentary/Opinion/2012/0419/Tarek-Mehanna-Punishing-Muslims-for-free-speech-only-helps-Al-Qaeda>.

²⁶³ Chesney, *supra* note 6, at 425.

²⁶⁴ U.S. Sentencing Guidelines Manual § 3A1.4 (2009) (“If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32 . . . In each such case, the defendant’s criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.”).

²⁶⁵ See ABRAMS & BEALE, *supra* note 22, at 838.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 842.

²⁶⁸ *Id.* at 843.

²⁶⁹ *United States v. Booker*, 543 U.S. 220, 226 (2005).

the fact that the Guidelines sentence could rest, in part, on facts found by a judge using the preponderance of the evidence standard, rather than a jury governed by reasonable doubt.²⁷⁰ A different majority held that this did not render the Guidelines null and void.²⁷¹ This second majority determined that the best way to preserve the intent of Congress as expressed in the 1984 Sentencing Act was to keep the Guidelines in place but to treat them as advisory.²⁷² Separately, this majority made it clear that trial courts were to give substantial consideration to the goals of the act expressed in 18 U.S.C. § 3553(a)—imposing sentences that “reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational and vocational training and medical care.”²⁷³

Not surprisingly, chaos ensued at both the trial and appellate levels. Some judges took the view that sticking as closely to the Guidelines as possible would enhance goals of uniformity and fairness.²⁷⁴ Others took a more nuanced approach, leading to the creation of a form of “common law of sentencing.”²⁷⁵ The holding(s) in *Booker* also created uncertainty about the respective roles of appellate and trial courts. Appellate review remained in place,²⁷⁶ yet trial courts now possessed greater discretion than they had when the Guidelines were mandatory. Writing for the remedial majority, Justice Breyer stated, “[w]ithout the ‘mandatory’ provision, the act nonetheless requires judges to take account of the Guidelines together with other sentencing goals.”²⁷⁷ This indicates appellate judges would have something to review, and a potentially significant role. Yet Justice Breyer went on to state that the sentencing factors as well as past practice “imply a practical standard of review already familiar to appellate courts: review for ‘unreasonable[ness].’”²⁷⁸

Two years after *Booker* the Supreme Court addressed the issue of appellate review, and came down firmly on the side of district court

²⁷⁰ *Id.*

²⁷¹ *Booker*, 543 U.S. at 245 (Breyer, J., Dissenting).

²⁷² *Id.*

²⁷³ 18 U.S.C. § 3553(a) (2006); *Booker*, 543 U.S. at 260 (Breyer, J., Dissenting).

²⁷⁴ See ABRAMS & BEALE, *supra* note 22, at 873.

²⁷⁵ See generally *id.* at 870–73.

²⁷⁶ *Booker*, 543 U.S. at 260 (Breyer, J., Dissenting).

²⁷⁷ *Id.* at 259.

²⁷⁸ *Id.* at 261; see also ABRAMS & BEALE, *supra* note 22, at 889.

discretion. In *Kimbrogh v. United States*²⁷⁹ the trial judge expressed disagreement with the Guidelines' formula for calculating a sentence for the possession of crack cocaine²⁸⁰ and sentenced the defendant to a lower range than the Guidelines suggested. The Second Circuit vacated the sentence on the ground that a sentence outside the Guidelines range is *per se*²⁸¹ unreasonable when based on a disagreement with the Guidelines' approach to a particular issue. The Supreme Court reversed,²⁸² noting the Guidelines' now-advisory status, and also repeated the importance of broader § 3553(a) sentencing factors.²⁸³ Indeed, the Court seemed to be suggesting that § 3553(a) should now be the lodestar for trial courts. The companion decision in *Gall v. United States*²⁸⁴ elaborated on the procedure that district court judges must follow to ensure that a sentence is not reversed, even if the appellate court would have reached a different result.²⁸⁵ The judge must begin by correctly calculating the applicable Guidelines range. Then, after hearing argument from both sides, the judge must consider the § 3553(a) factors. The judge may not presume that the Guidelines range is reasonable, but rather, must engage in an individualized assessment of the defendant's offense. Any non-Guidelines sentence requires justification. Meaningful appellate review may come next, but judges who follow the procedure will survive it. In *Gall* itself, the Court reversed the Eighth Circuit's vacation of a sentence. The circuit court had held that a variance from the Guidelines must be supported by extraordinary circumstances.²⁸⁶ The net result of the 2007 cases is to emphasize the nonbinding status of the Guidelines (even though trial judges must start with them), and to vest substantial sentencing discretion in trial judges—as long as they follow the proper steps and can ground their decisions in § 3553(a).

²⁷⁹ *Kimbrogh v. United States*, 552 U.S. 85 (2007).

²⁸⁰ *Id.* at 91.

²⁸¹ *United States v. Kimbrogh*, 174 F. App'x 798, 799 (4th Cir. 2006) *rev'd and remanded in Kimbrogh v. United States*, 552 U.S. 85 (2007).

²⁸² *Kimbrogh*, 552 U.S. at 91.

²⁸³ *Id.*

²⁸⁴ *Gall v. United States*, 552 U.S. 38 (2007).

²⁸⁵ *Id.* at 51.

²⁸⁶ *Id.* at 49 (“Most importantly, both the exceptional circumstances requirement and the rigid mathematical formulation reflect a practice—common among courts that have adopted ‘proportional review’—of applying a heightened standard of review to sentences outside the Guidelines range. This is inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions—whether inside or outside the Guidelines range.”).

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

An examination of recent terrorism cases suggests that appellate courts continue to scrutinize terrorism sentences carefully, and are even willing to increase sentences imposed after trial. For example, in *United States v. Jayyousi*,²⁸⁷ the Eleventh Circuit invoked *Gall*, which it read as involving a two-step process.²⁸⁸ The “first step,” which the court labeled as mechanical, included most of what the Supreme Court seemed to require in *Gall*.²⁸⁹ The second step was described as “concerning the substantive reasonableness of the sentence.”²⁹⁰ This rather probing review went beyond the procedural requirements and led to the conclusion that one of the defendants’ sentences should be vacated and adjusted upward on remand.²⁹¹

Other courts of appeals have required adjustment, including upward adjustment.²⁹² One typical basis for reversal is when the trial court compares the defendant’s case to other terrorism cases and imposes a similar sentence. If the appellate court finds that specific comparisons were utilized, but that the cases were not in fact similar, it will often vacate the sentence. In *United States v. Abu Ali*, the court vacated a downward deviation from the Guidelines sentence.²⁹³ It found that the defendant’s plans for terrorism on a massive and significant scale, even though not carried out, rendered inappropriate a comparison with cases such as those of John Walker Lindh,²⁹⁴ Timothy McVeigh, and Terry Nichols, despite the fact that those defendants had carried out their plans.²⁹⁵ General unreasonableness and inapt comparisons play a major role in appellate

²⁸⁷ *United States v. Jayyousi*, 637 F.3d 1085 (11th Cir. 2011).

²⁸⁸ *Id.* at 1116.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 1119.

²⁹¹ *Id.* at 1117–19.

²⁹² *See, e.g.*, *United States v. Ressay*, 679 F.3d 1069 (9th Cir. 2012); *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008).

²⁹³ *Abu Ali*, 528 F.3d at 269. For other courts also vacating downward deviations, *see also Ressay*, 679 F.3d at 1094; *Jayoussi*, 637 F.3d at 1117–18.

²⁹⁴ *Id.* at 259.

²⁹⁵ *Id.* at 264–65. The court found that Abu-Ali’s case was not similar to the *McVeigh* and *Nichols* cases because his threats to assassinate the President and his plans to kill American civilians would have caused extraordinary harm. The court reasoned that requiring a completed act before giving out large sentences would impose too high a standard for giving lengthy sentences. *Id.*

review of terrorism-related sentences. However, hanging over all these cases is the shadow of the Guidelines' "Terrorism Enhancement."

The Enhancement was added by the Commission in 1994 at the direction of Congress.²⁹⁶ The Federal Sentencing Guidelines Manual provides that "[i]f the offense is a felony that involved, or was intended to promote, a federal crime of terrorism [the punishment is increased]."²⁹⁷ The "Application Notes" define a "federal crime of terrorism" by reference to 18 U.S.C. § 2332b(g)(5),²⁹⁸ which, in turn, provides a two-part definition: first, the crime must be "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct,"²⁹⁹ and second, the offense must be one of a list of crimes often, but not necessarily, connected to terrorism.³⁰⁰ The result of application of the Enhancement is quite severe. In the technical terms of the Guidelines it increases the "offense level" by 12 and the "criminal history" category to VI, the highest possible category.³⁰¹ In practical terms it is likely to mean life imprisonment.

The Enhancement is controversial. One critic has described it as "draconian,"³⁰² stretching "far beyond its roots in international terrorism, giving it far-reaching power, and leading to devastating consequences."³⁰³ The principal contention is that the Enhancement leads to disproportionate sentences by treating a wide range of crimes alike.³⁰⁴ It can be seen as reflecting a monolithic perception of terrorism, rather than a nuanced perception of different crimes and differences of severity within a punishable crime. On the other hand, it has been defended on precisely this ground: terrorism is terrorism, regardless of the form it takes; it is a unique form of crime that requires unique treatment. The remarks of Judge Walker on a particular sentencing decision give a good sense of this position:

²⁹⁶ See *United States v. Stewart*, 590 F.3d 93, 172 (2d. Cir. 2009) (Walker, J., Dissenting).

²⁹⁷ U.S. Sentencing Guidelines Manual § 3A1.4 (Supp. III 2009).

²⁹⁸ Application Notes for U.S. Sentencing Guidelines Manual § 3A1.4 (2009).

²⁹⁹ 18 U.S.C. § 2332b(g)(5) (2006).

³⁰⁰ *Id.* The list performs a similar function to the enumeration of crimes in § 2339A.

³⁰¹ See ABRAMS & BEALE, *supra* note 22, at 842–46 (describing the operation of these two aspects of the Guidelines). The minimum offense level is also automatically increased to 32. See *supra* note 264. However, many terrorism offenses will already be close to this level.

³⁰² James P. McLaughlin, *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, 28 L. & INEQ. 51, 51 (2010).

³⁰³ *Id.* at 52.

³⁰⁴ *Id.* at 58.

Congress and the Sentencing Commission plainly intended for the punishment of crimes of terrorism to be significantly enhanced without regard to whether, due to events beyond the defendant's control, the defendant's conduct failed to achieve its intended deadly consequences. Such intent is plain from the many criminal statutes and Guidelines unrelated to terrorism that specifically account for the level or absence of injury, while the material support statute and Terrorism Enhancement do not.³⁰⁵

According to Judge Walker, “Courts routinely, and unflinchingly apply the Terrorism Enhancement in the absence of proven harm.”³⁰⁶ Nonetheless, an interesting controversy has arisen as to whether the defendant must be found to have committed one of the enhancement-triggering crimes and to have done so in a way “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.”³⁰⁷ A plain reading of the Application Note's reference to § 2332b(g)(5) certainly says as much, which thus implies that the sentencing court must make two separate findings: one regarding the *actus reus* and the other regarding the *mens rea*. In practice, however, courts have differed over whether these two findings may be collapsed into one on the ground that the *actus reus*—that is, the commission of one of the underlying felonies—is all that is required because such offenses will affect the “conduct of government” by definition.³⁰⁸ Consequently, interpreting the applicability of § 2332b(g)(5) may present a more typical question of legal interpretation than most sentencing questions. However, as with the admission of evidence, the sentencing judge is captain of the ship. The likelihood of

³⁰⁵ *United States v. Stewart*, 590 F.3d 93, 175 (2d. Cir. 2009) (Walker, J., Dissenting).

³⁰⁶ *See Id.* at 176. *But see, e.g.*, *United States v. El-Mezain*, 664 F.3d 467 (5th Cir. 2011) (applying the Terrorism Enhancement to a case in which the defendants raised money for Hamas); *United States v. Jayyousi*, 657 F.3d 1085 (11th Cir. 2011) (applying the Enhancement in a case in which the defendant claimed he was merely giving aid to suppressed Muslims).

³⁰⁷ *Stewart*, 590 F.3d at 137–38.

³⁰⁸ *Compare* *United States v. Abu Ali*, 528 F.3d 210, 262 (4th Cir. 2008) (holding that the Terrorism Enhancement is applicable because the defendant's acts necessarily encompassed the requisite intent), *with* *United States v. Chandia*, 514 F.3d 365, 375 (4th Cir. 2008) (holding that the Terrorism Enhancement is inapplicable when there has not been a factual finding of the requisite intent).

deferential appellate review strengthens this position, especially in the post-*Kimbrough/Gall* era.

C. Mehanna's Sentence and the Judge's Methodology

Judge O'Toole faced highly conflicting arguments when ruling on Mehanna's sentence. The defense recommended a sentence of 63 to 78 months.³⁰⁹ The prosecution recommended 25 years.³¹⁰ The court's probation office—the agency charged with applying the Guidelines to individual cases and advising judges on the appropriate sentence—recommended life.³¹¹ To identify the proper sentence in light of such disparate views, Judge O'Toole's methodology involved the complex, three-step procedure laid down in *Gall*.

Judge O'Toole first calculated the Guidelines sentence by identifying the base offense level. He then considered whether to make upward or downward adjustments to reflect the presence of any aggravating or mitigating factors, such as the defendant's role in the offense(s),³¹² and concluded that only upward adjustments were warranted.³¹³ He then applied the first half of the Terrorism Enhancement—the 12 level increase in the base offense—but refused to apply the criminal history increase, which he referred to as “off the charts.”³¹⁴ Under this analysis, the Guidelines sentence was life in prison, but Judge O'Toole emphasized from the outset that he would not impose such a sentence.³¹⁵

He next heard from the parties, each of whom emphasized the high profile nature of the case³¹⁶ as well as 18 U.S.C. § 3553(a).³¹⁷ The

³⁰⁹ Defendant's Memorandum on Appropriate Sentence Under the Sentencing Guidelines at 3, *United States v. Mehanna*, No. 09-cr-10017-GAO (D. Mass. 2011).

³¹⁰ Government's Sentencing Memorandum at 13, *United States v. Mehanna*, No. 09-cr-10017-GAO (D. Mass. 2011).

³¹¹ *Id.* at 11–12.

³¹² Transcript of Disposition, *supra* note 26, at 8–12.

³¹³ *See id.* at 10 (upward adjustment for obstruction of justice); *id.* at 9–10 (declining to make a downward adjustment for a minor role).

³¹⁴ *Id.* at 9–12. The Enhancement would have given Mehanna the highest possible criminal history level despite the fact that he had no criminal history prior to his arrest, a fact that would have resulted in a life sentence when combined with the Enhancement's prescribed increase in offense level. Ultimately, Judge O'Toole refused to apply either aspect of the Enhancement. *See supra* text accompanying note 302.

³¹⁵ Transcript of Disposition, *supra* at note 26, at 11–12.

³¹⁶ *See, e.g., id.* at 22, 44–45.

government in this situation had perhaps the easier task, since it could build on the guilty verdict. Thus, the prosecution invoked factors such as protecting the public.³¹⁸ The defense emphasized issues of speech,³¹⁹ and referenced a number of cases with low sentences for conduct arguably more serious than the defendant's.³²⁰ The defendant then gave a dramatic presentation of his views,³²¹ in which he emphasized the need for Muslims to defend other Muslims under attack.³²² This remarkable—at times defiant—speech, was hardly a plea for leniency.

The proceedings then entered a third phase in which the judge viewed the primary source of guidance as § 3553(a), not the Guidelines.³²³ He emphasized both “the nature and circumstances of the offense” and “the need to provide for just punishment of like offenses.”³²⁴ Moreover, Judge O’Toole went out of his way to express the view that Mehanna’s “speech” activities were more than independent advocacy,³²⁵ stating that “the jury has answered that question,” and that “to think otherwise one would have to disregard a good deal of the trial evidence.”³²⁶ Finally, like the prosecution, he noted that one “object of criminal prosecution is simply to incapacitate a defendant from committing another offense by reason of incarceration.”³²⁷ This object is reflected in § 3553(a).³²⁸

Judge O’Toole next engaged in an in-depth criticism of the Terrorism Enhancement.³²⁹ He viewed the automatic adjustment of the offense level in any “terrorism” case as arbitrary because it applied without regard to the facts of a particular case.³³⁰ He argued this was “contrary to and subversive of the mission of the Guidelines which is to address with some particularity the facts of each case.”³³¹ Judge O’Toole reserved his

³¹⁷ *Id.* at 13–47.

³¹⁸ *See id.* at 31.

³¹⁹ *Id.* at 43–44.

³²⁰ *Id.* at 43.

³²¹ *Id.* at 47–59.

³²² *Id.* at 56–57.

³²³ *Id.* at 61–75.

³²⁴ *Id.* at 61 (quoting § 3553(a)).

³²⁵ *Id.* 62–64.

³²⁶ *Id.* at 64.

³²⁷ *Id.* at 66.

³²⁸ 18 U.S.C. § 3553(a) (2006).

³²⁹ Transcript of Disposition, *supra* note 26, at 69–70.

³³⁰ *See id.* at 69.

³³¹ *Id.*

harshest criticism for the automatic increase in the defendant's criminal history category to the highest one, dismissing it as a "fiction."³³² Mehanna, for example, had no criminal history. Judge O'Toole ultimately concluded that application of the Guidelines without the Enhancement would yield a suggested range of 168 to 210 months and that the § 3553(c) factors pointed toward a sentence at the upper end of the range.³³³ In the end, he arrived at a form of "non-Guidelines guidelines" sentence of 210 months,³³⁴ with seven years of supervised release.³³⁵

Judge O'Toole played a more forceful role in sentencing than in any other aspect of the trial. To some extent this posture is inevitable, given the post-*Booker* role of federal judges in sentencing. An open question is whether his sentencing methodology will hold up if challenged on appeal. The government lodged an objection immediately after the sentence was handed down.³³⁶ The defense will presumably appeal the sentence as well. But if the First Circuit reverses the convictions, it might not reach the sentencing issue. Assuming the issue is contested, the government would seem to have the stronger set of arguments.³³⁷

First, the government could argue that the judge engaged in an improper comparison of *Mehanna* with other terrorism cases.³³⁸ Appellate courts have reversed trial court sentencing decisions based on the use of such comparisons.³³⁹ However, the reversals seem mainly to have been based on improper comparisons to cases that differed in one or more significant factual ways from the case under review.³⁴⁰ Judge O'Toole sought uniformity by utilizing a comparison of a sample of cases that were similar in terms of the offense charged.³⁴¹ The "sample" was admittedly small, but the use of the comparison may survive. As Judge O'Toole

³³² *Id.* He also viewed it as "fundamentally at odds with the design of the Guidelines." *Id.*

³³³ *See id.* at 70–73.

³³⁴ *Id.*

³³⁵ *Id.* at 74.

³³⁶ *Id.* at 75–76.

³³⁷ The defense would hardly support the Terrorism Enhancement, and would have an uphill fight, after *Gall* and *Kimbrough*, in challenging a sentence that appears to have followed those cases and is less than the prosecution recommended. *See* discussion *supra* Part IV.A.

³³⁸ *See* Government's Sentencing Memorandum, *supra* note 310, at 12; Transcript of Disposition, *supra* note 26, at 26–27.

³³⁹ *See, e.g.,* United States v. Ressam, 679 F.3d 1069, 1091 (9th Cir. 2012).

³⁴⁰ *See, e.g.,* United States v. Abu Ali, 528 F.3d 210, 262 (4th Cir. 2008).

³⁴¹ Transcript of Disposition, *supra* note 26, at 70–72.

implied, his field comparison seems in line with the search for uniformity that the Guidelines reflect.³⁴² However, there is room for disagreement over whether being charged with the broad crimes of “providing material support” under two distinct statutes makes defendants similar. This disagreement reflects the broader tension between the Guidelines’ search for uniformity and the goal of individualized sentencing.

Additionally, the government could argue that Judge O’Toole erred by dismissing the Enhancement. The issue here is not whether the judge added the Enhancement at the wrong step when calculating the Guidelines sentencing, but rather, whether he was correct in dismissing the applicability of the Enhancement in its entirety. Indeed, it would exalt form over substance to place the emphasis on *when* Judge O’Toole threw out the Enhancement. The Enhancement, although not a statute, was created at the express direction of Congress.³⁴³ However, like the Guidelines, it was actually promulgated by the Commission, and does not have the binding force of a statute. While the Supreme Court has never ruled on the Enhancement, lower courts differ.³⁴⁴ Furthermore, it is hard to argue with Judge O’Toole’s point that assigning the highest possible criminal history to a defendant with no criminal history does not accord with the broader goals of sentencing as illustrated by the Guidelines.³⁴⁵ Although apparently ignored by the press and critics, this aspect of *Mehanna* may turn out to be the most controversial. Judge O’Toole thus made a significant contribution to the debate about the role of the criminal justice system in terrorism prosecutions, especially preventive ones. The Enhancement is based on a one-size-fits-all approach that may not be sensitive to the differentiation among “terrorists” that *Mehanna* brings to the fore.

³⁴² *Id.* at 73.

³⁴³ *United States v. Stewart*, 590 F.3d 93, 172 (2d. Cir. 2009) (Walker, J., Dissenting).

³⁴⁴ See Defendant’s Memorandum on Appropriate Sentence under the Sentencing Guidelines, *supra* note 310, at 11–13 (discussing both the general concept of downward departures based on criminal history and examples of disagreement with the Enhancement’s use of criminal history category VI). Compare *Stewart*, 590 F.3d at 153–57 (Calabresi, J., concurring) (arguing that it was within district court’s discretion to consider “atypical” nature of defendant’s crime and lack of evidence of harm in arriving at an individualized sentence where Guideline recommendation was controlled by broad Enhancement), *with id.* at 175–79 (Walker, J., concurring in part and dissenting in part) (arguing that the “atypical” nature of the defendant’s crime and lack of evidence of harm did not justify the district court’s elimination of the Enhancement).

³⁴⁵ Transcript of Disposition, *supra* note 26, at 69.

V. The Central Role of the Judge

Much of this Article has dealt with the actions of Federal District Court Judge George O'Toole during the *Mehanna* trial. This subsection builds on those actions in formulating a broad outline of the role of the judge in preventive prosecutions.

A. *The Sentence*

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

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

³⁴⁶ See *Kimrough v. United States*, 552 U.S. 85, 107–10 (2007).

³⁴⁷ See U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2009).

³⁴⁸ See Chesney, *supra* note 6, at 486 (discussing use of § 2339A “as a means to incapacitate suspects.”).

B. Evidentiary Rulings

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

C. Doctrinal Issues

Finally, there is the question of how the judge handles uncertain doctrinal issues—both in his evidentiary rulings and in his instructions. *Mehanna* presented a number of uncertainties, such as how much interaction with a terrorist organization is needed to satisfy *HLP*. Another is whether § 2339A should really be applied as loosely as it seems to be, so that any amorphous crime, somewhere down the road, satisfies the requirement of a link to the defendant's conduct and thus the statute's apparent *mens rea* requirement. Judge O'Toole appeared to treat these as matters of settled law in his instructions. The fact that he let in a lot of evidence on what Mehanna did and said has the virtue of leaving appellate courts with room to maneuver if there is to be a change or amplification of the applicable law. A trial judge might be more aggressive in framing the issues, for example, in explaining to the jury the possible meanings of "coordination" in a § 2339B count. However, he probably thought that the jury could work with what the Supreme Court gave them, and that any refinement would come from a higher court anyway. He denied the defense's request for an instruction that would, in effect, have ruled out one-way "coordination," perhaps leaving some latitude in defining that term. Such an approach certainly does not

³⁴⁹ See Wittes, *supra* note 153.

hurt the preventive paradigm, as the result in *Mehanna* bears out. Assuming no major change on appeal, prosecutors who favor that paradigm can work effectively within existing law until and unless some court restricts it.³⁴⁸ The Federal District Court for Massachusetts was not that court.

It is not the intention of this Article to criticize Judge O’Toole. He kept tight control over a contentious 35-day trial, during which emotions frequently reached the boiling point.³⁵⁰ His sentence displeased the government; his evidentiary rulings displeased the defense. His doctrinal approach took the law as he found it, leaving any changes to higher courts. His overall handling of the trial seems to have led to a victory for those who espouse aggressive use of the preventive approach. Nothing in it stops them. Given the importance of the trial judge’s role, this is no small victory.

Conclusion

Mehanna is an important case. In a prosecution based largely on statutes forbidding provision of “material support” to terrorists and terrorism-related crimes, the defendant was found guilty. The trial put to the test principles of preventive prosecution as well as the ability of the government to prosecute terrorism-related speech in light of the Supreme Court’s decision in *Holder v. Humanitarian Law Project (HLP)*. A close examination of the trial yields valuable insights on both issues as well as broader questions raised by the “war on terror” and the use of the criminal justice system to fight it. This examination leads to the conclusion that in a trial like *Mehanna*’s, three facets assume critical importance: (1) the judge’s approach to application of the *HLP* test; (2) the judge’s rulings about how much evidence concerning the defendant as a jihadist sympathizer should be admitted; and, (3) if conviction results, the judge’s approach to sentencing in a terrorism case.

³⁴⁸ See Robert M. Chesney, *Terrorism, Criminal Prosecution, and the Preventive Detention Debate*, in Symposium: Law, Ethics, and the War on Terror, 50 S. TEX. L. REV. 669, 674–675, 679 (2009) (emphasizing capacity of current federal criminal law to permit preventive prosecutions).

³⁵⁰ See, e.g., Transcript of Disposition, *supra* note 26, at 60 (accusation by the defendant that the prosecutor was a “liar”).

With respect to the first, the judge in *Mehanna* took a cautious approach, essentially restating what appears to be existing law. However, with respect to the *HLP* test on criminalizing speech, the judge may have left the door open for a broad interpretation of when a defendant's speech is sufficiently linked to a terrorist organization that it can be criminalized. As for evidentiary rulings, the judge permitted the introduction of a large amount of potentially inflammatory evidence, apparently accepting the prosecution's view that the value of establishing "context" and "state of mind" outweighed the risk of prejudice. As for sentencing, the judge took a middle ground approach, imposing a substantial sentence, but refusing to apply the Sentencing Guidelines' "Terrorism Enhancement." His sentencing decision can be seen not only as a rejection of a rigid approach to terrorism-related crimes, but also as acceptance of a nuanced approach which contains room for the concept of prevention.

Overall, a close look at the trial demonstrates the central role that the judge will play in any preventive prosecution. As the defendant's conduct shifts away from actual acts of terrorism and specific preparations for them, the jury will look to the judge for guidance. In *Mehanna*, the judge conducted the trial with a firm hand, but in a manner—and with a result—that leaves room for the controversial notion of preventive prosecution.