

American University International Law Review

Volume 21

Issue 2 Symposium: *The Geneva Conventions and the Rules of War in the Post-9/11 and Iraq World*


Article 2

2005

Seeking Synchronicity: Thoughts on the Role of Domestic Law Enforcement in Counterterrorism

Jeff Breinholt

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>

 Part of the [Human Rights Law Commons](#), [International Law Commons](#), and the [Military, War and Peace Commons](#)

Recommended Citation

Breinholt, Jeff. "Seeking Synchronicity: Thoughts on the Role of Domestic Law Enforcement in Counterterrorism." *American University International Law Review* 21, no.2 (2005): 157-189.

This Symposium or Conference is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University International Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

ESSAY

SEEKING SYNCHRONICITY: THOUGHTS ON THE ROLE OF DOMESTIC LAW ENFORCEMENT IN COUNTERTERRORISM

JEFF BREINHOLT*

INTRODUCTION: SYNCHRONICITY AS A GOAL	158
I. THE STRANGE CASE OF EUGENE TAFOYA	161
A. THE FACTS.....	161
B. A QUESTION OF FAIRNESS.....	163
II. PRETEXTUAL PROSECUTION	166
A. HARRY LITMAN ON THE “AL CAPONE APPROACH”	166
B. RICHMAN, STUNTZ AND “MUDDIED SIGNALS”.....	169
III. PRETEXTUAL PROSECUTION IN COUNTERTERRORISM	172
A. SEEKING U.S. CITIZENSHIP	175
B. TAX-EXEMPT CHARITIES	180
C. FOREIGN AGENTS.....	185
CONCLUSION: SYNCHRONICITY AND COMPETITION.....	187

* Jeff Breinholt (J.D., UCLA 1988, B.A., Yale 1985) serves as Deputy Chief, Counterterrorism Section, Criminal Division, United States Department of Justice, where he heads a team of financial prosecutors dedicated to redressing terrorist financing through criminal prosecutions. He joined the Justice Department in 1990 with the Tax Division, and spent six years as a Special Assistant U.S. Attorney in the District of Utah before joining the Criminal Division in 1997. He is the author of two books, *COUNTERTERRORISM ENFORCEMENT: A LAWYER’S GUIDE* (2004), and *THE LEGACY OF AL CAPONE: CRIMINAL TAX AND NATIONAL SECURITY* (forthcoming 2005), and the article, *How About a Little Perspective: The USA PATRIOT Act and the Uses and Abuses of History*, 9 TEX. REV. OF L. & POL. 17 (2004). He can be reached at jeffrey.breinholt@usdoj.gov. The views expressed in this essay are the author’s own and do not reflect those of his employer. The author thanks Moni SenGupta and Laura Shuey for their editorial help.

INTRODUCTION: SYNCHRONICITY AS A GOAL

The tools the United States uses to respond to the problem of international terrorism and other threats to national security are a common topic of discussion in international relations and security studies circles. This essay addresses an aspect less often considered: the process by which the government chooses from a number of different tools, and how this process may be made more effective. The goal is what I call *synchronicity*.

The United States enjoys a multi-faceted counterterrorism arsenal. By design, there is not one favorite tool, applicable to all national security challenges. While there are frequent discussions of a “grand strategy” to deal with the threat of Islamic terrorism, there is a general consensus that there is no single silver bullet.¹ It is perhaps more appropriate to think of counterterrorism tools as a series of shiny bullets whose gleam need diligent maintenance by their owners, lest they lose their viability. These “bullets,” or tools, run the gamut, from military action, diplomacy, law enforcement and economic sanctions, to intelligence and covert action. A decision on which bullet to fire at a particular counterterrorism problem should be an ordered and reasoned one, rather than a game of Russian roulette. Reasoned decision-making can only be assured by a steady and constant engagement among government components. This is the process of synchronicity.

We have not yet fully recognized this goal. We enjoy the ability to mix and match different tools. This has not prevented us from falling into a defining cultural tendency: to focus on the naive questions, “What’s hot?” and “What’s not?” From there, we seize on the former, ignoring the latter.

Consider the question of how to deal with the terrorists we are lucky enough to capture alive. Since 9/11, the media, when faced with this issue, has focused on the military commissions, the designation of so-called enemy combatants, and the application of

1. See Martha Crenshaw, *Terrorism, Strategies, and Grand Strategies*, in *ATTACKING TERRORISM: ELEMENTS OF A GRAND STRATEGY* 74, 75 (Audrey Kurth Cronin & James M. Ludes eds., 2004) (defining “grand strategy” as “a more inclusive conception that explains how a state’s full range of resources can be adapted to achieve national security”).

the rules of the Geneva Convention. In comparison, the media gives relatively little attention to the role of domestic law enforcement.

This fascination with military options over domestic law enforcement is not merely a fondness for the flavor of the day. We have, after all, been involved in two ground wars since 9/11. Moreover, efforts to apply criminal justice concepts to the terrorist threat have been somewhat clumsy.² Nonetheless, the academic community has taken notice of the efficacy of the U.S. criminal justice system—the application of the domestic law to the problem of terrorists among us—as a powerful alternative to Pentagon-led remedies.³

This essay starts with the premise that, given the multi-faceted nature of the American counterterrorism arsenal, effective counterterrorism should strive for synchronicity. It should be based on the recognition that we have a series of counterterrorism tools and that these tools cannot reach their full expression unless they are aggressively and constantly pushed internally by their masters. Government actors who are in charge of these tools should be tough enough to wage (and enjoy) a constant battle with other government components for the right to apply their skills to particular counterterrorism challenges, mature enough to realize they will not always win, wise enough to learn from their losses, and patient enough to keep doing it. Unless the internal battle is constant, synchronicity cannot be achieved.

2. See Michael Chertoff, *Why Is This Ball in Our Court?*, WALL ST. J., June 17, 2004, at A18 (suggesting that the U.S. legislative and executive branches should balance the legal uncertainties between national security and civil libertarian interests in the war against terrorism rather than force the criminal justice system to develop a new legal framework). The President created the Pentagon-led military tribunals on November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001), well before the emergence of the disclosure issues that, prior to his guilty plea, complicated the prosecution of Zacarias Moussaoui, who was first indicted on December 11, 2001.

3. See Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 27-47 (2005) (examining the U.S. Justice Department's multi-tiered strategy adopted in response to an apparent change in focus from traditional criminal prosecution of terrorists to prevention of attacks as the overriding priority).

What are the rules of this intra-governmental competition? In this constant battle, who decides the winner? That role falls on the operational decision-makers, those charged with the responsibility for making the final determination on how the United States should respond to a particular terrorism situation. In counterterrorism, the ultimate operational decision-maker, of course, is the President, who is the Commander-in-Chief of our military and controls our federal law enforcement, as well as diplomatic, intelligence and economic sanction systems and players. The President and his advisors, if they are fortunate enough to have multiple components pushing their tools, hear the various proposals and declare a winner by making a reasoned choice. It is incumbent on those who lose a particular battle to pick themselves up and show up for work the next day, ready to do it all over again. The operational decision-makers are ill-served unless the various components battle among themselves, thereby exposing the widest range of options. Synchronicity is lost when there is an over-reliance on particular tools because a particular government component is not being sufficiently aggressive. Lack of synchronicity means missed opportunities in the long run.⁴

This essay suggests some legal concepts that, without needing any reform, could be harnessed to make the criminal justice system a more effective option in the U.S. counterterrorism arsenal, adding viable options for the American operational decision-makers to consider in deciding how to respond to national security problems. My thesis rests on the well-established notion that intelligence—raw information—is the key to preventing bad things from happening. I combine this with the concept that the United States, in a variety of contexts, already criminalizes the act of thwarting the government's right to information needed for its lawful functions. In fact, it is already a crime to deprive the government, through deception, of information to which it is entitled. After 9/11, the value of information became a premium and for those who find this fact unpalatable or inconvenient and who try to obstruct the collection of this information, even that which is sought for regulatory purposes,

4. One might view unsynchronized counterterrorism policy as akin to a sloppy golf swing. Sometimes it works and results in the straight drive down the fairway. However, where it fails is in its consistency. Inevitably, golf balls hit with an undisciplined swing veer into the woods or into the pond. As in counterterrorism, the remedy is a synchronized motion, which takes practice.

American criminal laws are a powerful hammer. This creates attractive counterterrorism options that otherwise may not exist.

Part I of this essay describes a fascinating criminal case that illustrates how the government's legitimate right to information—in this particular case, how much income someone received and how it was earned—can be used to incapacitate a terrorist against whom more expedient military-style options were unavailable. The case illustrates the concept of “pretextual prosecution”: charging serious criminals with relatively minor crimes because it is not possible to prosecute them on the full extent of their conduct. Part II discusses the recent literature on the concept of pretextual prosecution, which supports the use of this strategy in the war on terror. Part III identifies three areas where the government's right to information can be used to identify and incapacitate people who are in the United States and are threats to national security or possess information relevant to the counterterrorism challenge. The conclusion brings the law enforcement tools into the context of the synchronicity thesis.

I. THE STRANGE CASE OF EUGENE TAFOYA

A. THE FACTS

In 1980, there were some 10,000 Libyans living in the United States. One, Faisal Zagallai, was a graduate student at Colorado State University and an outspoken critic of the Qadhafi regime. One of Muammar Qadhafi's intelligence officers, employed at the Libyan Embassy in Washington, contacted another Qadhafi loyalist, who in turn contacted a former Green Beret he knew. That person recruited a jobless friend of his—Eugene A. Tafoya, another former Green Beret—for the contract killing.⁵ On October 14, 1980, a drunken Tafoya, posing as an IBM recruiter, visited Zagallai's home and tried to shoot him in his living room, leaving Zagallai blind in one eye. Tafoya escaped through a window.

5. See Murray Waas, *The Terpil Transcripts: Dinner with Idi and Other Tales*, THE NATION, Nov. 28, 1981, at 568 (reporting that Tafoya was just one element of a multipart operation of Libyan recruited and trained hit men connected to the murder and maiming of a dozen opponents of Qadhafi's regime exiled throughout Europe and the United States).

A few months later, two boys playing in an irrigation ditch near Zagallai's home found a pistol. The serial numbers were traced back to a North Carolina pawn shop near Fort Bragg and a person who sold the weapon to Tafoya. Using credit card and rental car receipts, authorities tracked Tafoya down in New Mexico, where a search uncovered a hit list that targeted American citizens. As it turned out, Tafoya was linked to rogue CIA operatives Edwin Wilson and Frank Terpil.⁶ Wilson was eventually convicted of various crimes in U.S. courts.⁷

The Colorado prosecution of Tafoya for the attempt on Zagallai's life did not include the Qadhafi evidence and, although he was convicted, on January 5, 1982 he received only a two-year sentence.⁸

At that point, two creative prosecutors from the U.S. Department of Justice's Criminal Division stepped in, obtaining a tax indictment against Tafoya.⁹ Their theory: Tafoya committed a crime by filing 1980 and 1981 federal income tax returns that omitted assassination fees he had received from Edwin Wilson. The jury convicted him. The Fifth Circuit, affirming Tafoya's conviction, rejected his

6. See *id.* (describing Terpil and Wilson's recruitment of Tafoya and documenting that Wilson and Tafoya had a telephone conversation shortly before the attempted murder of Zagallai); see also Agnus Deming, *Kaddafi's U.S. Connection*, NEWSWEEK, July 20, 1981, at 44.

7. See *United States v. Wilson*, 750 F.2d 7 (2d Cir. 1984) (upholding Wilson's conviction for obstruction of justice and attempted murder of prosecutors and witnesses in the U.S. District Court for the Southern District of New York); *United States v. Wilson*, 732 F.2d 404 (5th Cir. 1984) (affirming Wilson's conviction for illegal shipment of plastic explosives in the U.S. District Court for the Southern District of Texas); *United States v. Wilson*, 721 F.2d 967 (4th Cir. 1983) (sustaining Wilson's conviction for illegal export of an M-16 rifle and four revolvers in the U.S. District Court for the Eastern District of Virginia). Wilson's conviction in the U.S. District Court for the Southern District of Texas was later vacated because of a knowingly false affidavit used to support the government's case at trial. *United States v. Wilson*, 289 F. Supp. 2d 801 (S.D. Tex. 2003).

8. See *Ex-Green Beret Gets 2-Year Term*, N.Y. TIMES, Jan. 6, 1982, at A12; see also *People v. Tafoya*, 703 P.2d 663 (Colo. Ct. App. 1985) (disagreeing with Tafoya's assertion that the trial court erred in denying his motion to suppress evidence and affirming his conviction).

9. The prosecutors were Karen Morrisette and Dan Fromstein. Ms. Morrisette is currently with the Fraud Section. Mr. Fromstein retired from the Counterterrorism Section in February 2005.

argument that the government was unfairly transforming the murder case into a tax prosecution.¹⁰

B. A QUESTION OF FAIRNESS

Tafoya may be unsettling to aspiring criminals, to whom it may appear that American law enforcement has an unfair advantage. It was based on a simple notion: illegal earnings—"dirty money"—qualify as income. In addition, the American taxing authorities have the right to inquire how someone earned their income.

Consider why somebody takes steps to conceal their income-generating activities. Saving taxes is merely one of many possible motives. The hidden income may derive from some illegal activity, like drug trafficking or extortion. If the person who makes a living this way reports the proceeds and pays his proper taxes on it, he will likely suffer from the interminable fear that the IRS, if it decides to audit him, will discover the true source of the funds, and report him to the DEA or the FBI.

Criminal tax cases are occasionally premised on more than whether the defendants have failed to pay their taxes. In dirty money cases, the tax charges can involve the failure to report the true source of the income, in addition to the amount. When someone fails to report dirty income, they can generally be prosecuted for tax fraud, money laundering, and any crime that generated the dirty money. When law enforcement needs to move quickly before all of the evidence of the underlying misconduct is amassed, tax fraud may be the only immediate option available.

Imagine *Tafoya*'s chagrin at finding himself in federal court in San Antonio, Texas, charged with tax crimes after he was able to essentially beat the murder rap in Colorado. Was this a fair fight? How could the federal jury in Texas give *Tafoya* a fair shake when they learned that the income he was accused of not reporting was compensation for his job as a paid assassin for the Libyan dictator?

10. *United States v. Tafoya*, 757 F.2d 1522, 1524 (5th Cir. 1985) (finding that the trial court "diligently and effectively" ensured that the evidence presented was relevant to show source of income and motive, and the probative value of the evidence outweighed its prejudicial effect).

The federal judge in San Antonio clearly had his work cut out for him. The prosecution was entitled to prove the income-nature of the payments Tafoya failed to report on his return. Its theory was that the payments were income because they were for services rendered—as a hit man for Edwin Wilson and Muammar Qadhafi. This proof had to be offered in a way that did not turn the jury against Tafoya based on evidence whose prejudice exceeded its probative value.

Tafoya was ultimately convicted. At trial, Tafoya's defense was that the payments he received for the violence was not income. His appeal, however, focused on the claim that his defense to the tax charges was prejudiced by the illegal activity. As the Fifth Circuit later noted:

The key issue at trial was whether Tafoya was paid for his work. [James Dean, an employee of Edwin Wilson], who recruited Tafoya, admitted that Tafoya's initial assignment was undertaken for expenses only—and the hope of more remunerative future assignments. Tafoya testified that, indeed, Wilson promised payment for future assignments. Tafoya contended, however, that Wilson failed to fulfill his promise. According to Tafoya, he “fronted” the expense of costly international travel and received only partial reimbursement. In short, Tafoya testified that he reported no income from Wilson because Wilson cheated him out of salary. Tafoya also characterized one payment by Wilson as a loan or a gift.¹¹

The trial court refused to allow the prosecutors to put on evidence “that Tafoya, in the course of his employment with Wilson, (1) shot a Libyan residing in Colorado, (2) firebombed a home in Canada, and (3) sought to obtain poison in London for the purpose of killing an unknown person.”¹² Nonetheless, Tafoya admitted shooting the victim, but denied receiving the payment salary promised by Wilson for the shooting.¹³ The prosecutor then asked, “[a]fter that incident in [Colorado], by the way, isn't it correct that [the Libyan] lost the sight of one of his eyes as a result of that shooting?”¹⁴ This led to an oral

11. *Id.*

12. *Id.* at 1525.

13. *Id.* at 1526.

14. *Id.*

admonishment by the judge. Later, the Fifth Circuit addressed the prosecutor's cross-examination:

Evidence of the fact of Tafoya's assassination efforts was relevant. Tafoya claimed to have received only expenses, loans, or gifts. A jury reasonably could assess the credibility of Tafoya's claim differently depending on the nature of Tafoya's employment. It is unlikely that one would attempt three killings in exchange largely for expenses—or continue killings for over a year if not paid for the first one. Moreover, the nature of Tafoya's employment was probative of his motive to conceal the employment by failing to report illegal income. Finally, and on the simplest level, the government had to show the jury that Tafoya did *something* to earn the income it alleged he failed to report. This is a frequent problem in tax prosecutions, and prosecutors consistently have been permitted to prove the source of unreported income, a rule that here permitted evidence to establish the job for which Tafoya was hired and paid.¹⁵

Note that the Fifth Circuit's cautionary language did not focus on the propriety of using the criminal tax laws to redress terrorism that may not have been adequately handled in state court. In fact, in affirming Tafoya's conviction, the Fifth Circuit rejected his argument that the government was unfairly transforming the murder case into a tax prosecution.¹⁶

15. *Id.* at 1526-27. The court did, however, have choice words for the prosecutor's questions:

The district court made plain its intent to exclude the potentially prejudicial details of Tafoya's assassination efforts. At several turns the prosecutor bridled against this limitation but was effectively restrained by the district court. The district court's attentiveness avoided the necessity of a reversal. However, we caution prosecutors that tax cases are not to be transformed—by evidence, argument, or implication—into trials for other crimes. Some evidence of income source is necessary to prove a false return case and to make it intelligible, but emphasis of the illegal source of income or dwelling on lurid details is inappropriate. If it distracts a jury's focus, we will not hesitate to reverse.

Id. at 1528.

16. *See id.* (concluding that the district court had not abused its discretion by ruling that the probative value of the evidence concerning the assassination outweighed the potential for unfair prejudice). In a post-script, in 1983, Tafoya was found extraditable to Canada, where he was wanted for a Qadhafi-related

II. PRETEXTUAL PROSECUTION

Tafoya was a modern version of what played out in a Chicago courtroom during the Prohibition era. Al Capone, the most infamous mobster of his time, was brought down not for bootlegging or extortion or loan sharking or murder. Rather, he was convicted of failing to report all of his income on his tax returns.¹⁷ The *Capone* case has been a vehicle for some recent academic analysis on “pretextual prosecution”: targeting people based on suspicion of one crime but prosecuting them for another, lesser crime. Is this strategy legal? Does it reflect sound public policy? Two recent law review articles have looked into this question. Although the authors agree that the practice is legal, they disagree on the second question. An examination of their reasoning, however, lends support to the argument that the United States should be aggressive in prosecuting those who deprive the government of information pertinent to terrorism.

A. HARRY LITMAN ON THE “AL CAPONE APPROACH”

Professor Harry Litman is a visiting associate professor at Rutgers Law School in Camden, and a former United States Attorney in Pittsburgh and Justice Department official in Washington. He takes on the question of pretextual prosecution—which he describes as the “Al Capone approach to federal prosecution law enforcement”—in the August 2004 issue of the *Georgetown Law Journal*, ultimately concluding that it is an appropriate exercise of federal prosecutorial discretion, which should be encouraged.¹⁸

A former prosecutor, Litman does not reach this conclusion blithely. He notes the criticism that has been leveled at the Department of Justice’s post-9/11 strategy of pursuing immigration cases against hundreds of noncitizens from Arab countries based on the possibility, “however remote,” that the detainees have some

firebombing. *In re Extradition of Tafoya*, 572 F. Supp. 95 (W.D. Tex. 1983). After his U.S. conviction, he also litigated the question of whether his U.S. military pension should be applied to reimburse the government for the costs of his court-appointed attorney. *United States v. Tafoya*, 803 F.2d 140 (5th Cir. 1986).

17. *Capone v. United States*, 56 F.2d 927 (7th Cir. 1932).

18. Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135, 1135 (2004).

connection to the war on terrorism. He then proceeds to take on some of the best arguments against pretextual prosecution. They include:

- Decisions to prosecute may not account for the personal qualities and characteristics of a criminal defendant beyond the charged offense because, in pretextual prosecutions, conduct unsubstantiated in a court of law provides a basis for actual or potentially enhancing punishment of a criminal defendant, where law enforcement and prosecutorial decisions lack standard procedural safeguards, or the “crucible of adversary proceedings.”¹⁹

- Pretextual prosecution can increase the risk of a criminal case being brought against a defendant based on ulterior motives, such as personal animosity, racial prejudice or political opposition.²⁰ The ulterior motives of the prosecutor make the decision personal, where the prosecutorial decision-making process may include the criminal defendant’s political beliefs or unpopularity with the governing class, as well as a criminal defendant “being personally obnoxious to the prosecutor himself.”²¹

- To the extent that prosecutions rely on a law that “has fallen into desuetude” or that never has been enforced, pretextual prosecution raises the specter of singling out conduct that should not be criminalized, and of citizens not having adequate notice that their conduct could result in criminal charges.²²

- If the government searches hard enough, it can find anyone to have violated some obscure statute.²³ It seems unjust for such a large portion of the government’s resources to target one person.²⁴

19. *Id.* at 1153 (noting that this practice may seem to be in conflict with the U.S. criminal justice system’s commitment to the due process requirement that criminal defendants be proven guilty beyond a reasonable doubt in a neutral forum with set rules).

20. *Id.* at 1149.

21. *Id.* at 1155-56.

22. *Id.* at 1170 (using the detention of Zacarias Moussaoui on a technical immigration charge as an example).

23. *Id.* at 1151 (noting that there are many laws on the books that are no longer enforced but nonetheless are actionable).

24. *Id.* at 1155.

- Such a long arm of the prosecution's power allows for the potential of totalitarianism.²⁵

In the end, Professor Litman finds these arguments unavailing, based partly on how our criminal justice system is structured and the existence of sufficient safeguards to protect against these fears.²⁶ We rely on a system that involves prosecutorial discretion. Most agree that prosecutors should choose how to apply their resources against the pool of violators in some other way than randomness. In this sense, your "dangerousness" (perhaps as shown by your prior criminal record) should be a legitimate factor in determining whether you should be chosen for prosecution. If you are being prosecuted on the basis of race or your political beliefs, you may seek to have the indictment dismissed by advancing a claim of selective prosecution. It is, after all, unconstitutional for the government to treat similarly-situated people differently on the basis of some impermissible classification, like race.

If you can demonstrate a *prima facie* case of selective prosecution—irrespective of your guilt or innocence—you can force the prosecution to explain its prosecutorial decision. If it is based on an improper motive, the indictment will be dismissed. As far as fair notice is concerned, the criminal laws themselves serve that function, and one cannot comfortably rely on the fact that a law has not been prosecuted in choosing to violate it. The fear of totalitarianism requires many more degenerative steps in our legal system to become manifest, and this concern ignores the fact that prosecutors are held to a standard of proving what they allege.

What the critic of pretextual prosecutions needs to win the argument, according to Litman, is a series of events that are not realistic to anyone other than those who are inclined to believe the worst about our nation's law enforcers.²⁷

In effect, the critic is worrying about the possibility of a two-tiered pretext, in which the prosecutor proceeds from the "bad" pretext—for example, racial animus—through the

25. *Id.* at 1151.

26. *Id.* at 1182 (arguing that law enforcement can do a lot of wrong using their discretion, but the Al Capone approach is generally justified and sensible).

27. *Id.* at 1179.

“good” pretext—for example, dangerousness to the community—to the actual federal charge (of which, by hypothesis, the putative defendant is in fact guilty). But it is hard to see in practice what the middle step offers the hypothetical malevolent prosecutor. In order for the possibility to present a genuine practical concern, we first have to posit a set of cases in which a) the defendant is guilty of the federal offense; b) his offense is not sufficiently serious to justify federal prosecution in its own right; c) there is, however, a colorable claim for application of the Al Capone approach; and while d) that claim would not normally justify prosecution under the approach fairly applied, e) it is strong enough for the malevolent prosecutor to exploit as an additional pretext to give cover to her racial animus or other inappropriate motivation. If the case is strong enough on its own merits, the Al Capone approach does no work; if it is less than nearly strong enough, the Al Capone approach will not help. The problem is not only that there is no reason to believe that such cases actually arise with any frequency.²⁸

Litman succeeds in showing that pretextual prosecution is neither illegal nor unconstitutional, and he goes a long way towards establishing it as a laudable strategy.

B. RICHMAN, STUNTZ AND “MUDDIED SIGNALS”

More recently, two other commentators addressed pretextual prosecution, reaching a different conclusion than Litman. In the March 2005 edition of the *Columbia Law Review*, Professors Daniel Richman and William Stuntz acknowledge that the strategy cannot be adequately attacked based on concerns about the fairness to the individual defendants.²⁹ They accept, for example, that “[p]retextual prosecutions are a widely accepted feature of our criminal justice

28. *Id.* Moreover, the judiciary is an effective bulwark against this type of abuse. American judges have not been reluctant to interpose their judgment when U.S. security efforts go too far. Jeff Breinholt, *How About a Little Perspective: The USA PATRIOT Act and the Uses and Abuses of History*, 9 TEX. REV. L. & POL. 17, 20 (2004).

29. Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 639 (2005) (arguing that the most troubling aspect of pretextual prosecution is not the lack of fairness to defendants, but rather the challenge it poses to the federal government to monitor its own efforts of combating crime).

system, and they are widely, albeit not universally, understood to be both legally and ethically permissible.”³⁰ They instead try to argue that the practice is bad for society, since the public is somehow entitled to non-pretextual prosecutions, lest they be dazed and confused and unable to keep score properly.³¹ This is a rather bizarre argument.

According to Richman and Stuntz, it is bad for society when prosecutors succeed in charging and convicting someone for something less than what motivated the law enforcement attention in the first place because this results in “muddied signals.”³² But who, exactly, is confused? The confusion lies in the public, according to the authors, because the public is deprived of the knowledge of bad characters in its midst.³³ So are would-be criminals, who are led to believe that if they take care not to violate small laws, they can escape punishment for their larger offenses. Richman and Stuntz maintain that *Capone* sends a message that is too complicated to be helpful, and that is: “If you run a criminal enterprise, you should keep your name out of the newspapers and at least pretend to pay your taxes.”³⁴

Richman and Stunz base their argument on the claim that the similarity of the charges that drive the prosecution and the charges that are recorded on the defendant’s rap sheet determine the political economy of criminal law enforcement.³⁵ The effectiveness of the law enforcement depends on the crimes and charges coinciding.³⁶ In other words, it is unfair for prosecutors to charge serious criminals with non-serious crimes, since it deprives the public of the right to

30. *Id.* at 585.

31. *Id.* at 586-87 (asserting that when crimes and charges do not match up, the public loses trust in the justice system).

32. *Id.* at 586 (noting that while the public may have understood the reasons underlying Capone’s tax fraud prosecution because of his notoriety, such publicity and fame is not the norm in pretextual prosecutions).

33. *Id.*

34. *Id.*

35. *Id.* (asserting that where a conviction is for an unrelated, lesser crime than the one prompting the investigation, voters receive muddied signals from the government).

36. *Id.*

know both the identities of the real bad people, and information on the good prosecutors.

Richman and Stuntz argue that the Justice Department's reliance on the Al Capone strategy after 9/11—which they accept as a necessity—left it in a “quandary.”³⁷ Justice officials, they claim, would have liked to tally the number of terrorists their prosecutors were able to put away. Instead, by going after immigration violators and those who provide material support to terrorists, federal law enforcement “lack[ed] any external validation of its claimed success,”³⁸ leaving the Bush Administration hard pressed to demonstrate to Congress and the public that it has effectively used the massive resources that have been committed to counterterrorism.³⁹

What is Richman and Stuntz's solution to the “problem” of pretextual prosecution? It seems their goal is greater politicization of the criminal justice system, making federal prosecutors more accountable to the public, like their colleagues at the state level who are accountable to the voters:

The key is political accountability. The federal law enforcement system will never have the accountability of its local counterparts. Federal officials are appointed, not elected. The issues on which their political masters rise and fall are usually not related to crime. And it is hard (though, as we have seen, not impossible) for federal crimes to carry the same immediacy as a body in the street or a battered victim. Even so, federal officials can be held to a far greater degree of responsibility than they have faced for the past three quarters of a century. Whatever its faults, one large and important virtue of the War on Terror is that it makes that goal more achievable. Other political forces are working in

37. *Id.* at 587.

38. *Id.*

39. Richman and Stuntz fail to explain how their fellow academics have been able to keep up with all the good news, nor point to any official Justice Department statements indicating that it found its post-9/11 efforts less than satisfying. See Chesney, *supra* note 3.

the same direction. The result may be, over time, fewer Al Capones—and better federal law enforcement.⁴⁰

Of course, the result could be more Al Capones and Eugene Tafoyas running around free, happily unencumbered by police scrutiny.

III. PRETEXTUAL PROSECUTION IN COUNTERTERRORISM

As aggravating as some of Richman and Stuntz's arguments are, their article is filled with a number of keen observations relevant to the national security challenge we face today. They accurately recognize that the only real constitutional limitations on substantive criminal law involve claims of privacy and First Amendment activity that would be chilled by particular statutes, and that courts generally do not delve into questions of whether particular illegal conduct is overcriminalized.⁴¹ They credit the value of "strategically defined crimes," like possession of burglary weapons, which seek to get at precursor conduct.⁴² They acknowledge the value of the Al Capone approach in New York City, where stepped-up enforcement of minor crimes like turnstile jumping led police to offenders with outstanding warrants on major crimes, and resulted in a sharp decline in subway crime.⁴³ Perhaps most significantly, even if they do not like pretextual prosecution in general, they are willing to accept it after 9/11. Here, their comments were remarkably cogent:

Confronted with the greatest security challenge it has faced in recent years, the federal law enforcement bureaucracy has turned to the strategy it used to bring down Capone and dozens of other mob figures. And, indeed, that strategy is particularly well-suited to the War on Terror. Among the

40. Richman & Stuntz, *supra* note 29, at 639.

41. *Id.* at 597 (adding that there are no real limitations on the types of sentences a legislature may attach to "modest" crimes).

42. *Id.* at 609 (acknowledging that such crimes open the door to pretextual charging).

43. *Id.* (calling such tactics "Capone in reverse" because the person is caught for the minor infraction, but ultimately can be prosecuted for the charge on the outstanding warrant).

hallmarks of the 9/11 plot and Al Qaeda operations generally are low-profile cells of individuals who do not conspicuously violate the law until they are ready to inflict catastrophic damage or assist those who do. To be sure, it is sometimes possible to grab terrorists at a point in their planning such that the government can clearly prove their intentions and still neutralize the threat, as occurred when Sheik Abdel Rahman and others who were prosecuted for plotting to blow up a number of New York City landmarks in 1993. Yet in that case, an FBI informant had infiltrated the group—a piece of investigative success that can rarely be replicated.⁴⁴

With these infiltration difficulties in mind, the authors continued:

If they can be criminally prosecuted before they strike, the provable offenses of those seeking to commit terrorist acts will thus be relatively minor. Bringing such cases can disrupt terrorist plans and provide leverage for the government to obtain cooperation from defendants; it can also incapacitate targets without resort to material witness warrants, immigration detentions, and other noncriminal processes that (according to some) are amenable to even greater misuse. Moreover, the government can satisfy its discovery obligations without revealing valuable intelligence (so long as it's not exculpatory) when it brings these stripped-down cases.⁴⁵

It seems that pretextual prosecution in an effort to keep innocent Americans safe from terrorist violence is defensible, even among the most vigorous critics of the Al Capone strategy.

The *Tafoya* case reflects a modern example of this approach. Eugene Tafoya could not be charged with a violent crime, since he had already been prosecuted by the state of Colorado for trying to kill Faisal Zagallai. Instead, federal prosecutors got him on a tax reporting violation—the crime of failing to tell the IRS how he earned a living (as a paid assassin for a Libyan dictator), and how much he earned for his services. What brought Tafoya down was, in essence, false statements to the IRS designed to conceal his terrorist associates.

44. *Id.* at 622

45. *Id.* at 623.

After 9/11, most people accept the idea that the United States government has a right to know who among us is associated with terrorist organizations. While it is certainly not a crime to associate with such groups, or even to advocate on their behalf, it is a crime to affirmatively help them.⁴⁶ People who are associated with terrorist groups are more likely to help them, and to have information on what they are up to. Moreover, there are a number of well-established American regulatory regimes in which the government is entitled to inquire into one's associations, and in which it is a crime to lie about them. Is it an abuse of the criminal justice system to punish people who lie about their terrorist associations, and to use the threat of criminal prosecution to compel them to provide this information?⁴⁷ Arguably not, if we agree that effective counterterrorism depends on information.

What regulatory systems are already in place to seek information on terrorist associations, and how can they be harnessed to make domestic law enforcement more robust in the counterterrorism arena while maximizing the information on terrorist planning and operation? I suggest three areas for immediate attention: the systems that grant U.S. citizenship, those that oversee tax-exempt status, and those that regulate U.S. persons acting as foreign agents.

46. This is an important distinction that underlies the constitutionality of the Department of Justice's most effective counterterrorism weapon—the crime of “providing material support . . . to designated foreign terrorist organizations.” 18 U.S.C. § 2339B (2000); *see also* Humanitarian Law Project v. Reno, 205 F.3d 1130, 1133 (9th Cir. 2000) (“The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group. Plaintiffs are even free to praise the groups for using terrorism as a means of achieving their ends. What [the Antiterrorism and Effective Death Penalty Act of 1996] prohibits is the act of giving material support, and there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions. Nor, of course, is there a right to provide resources with which terrorists can buy weapons and explosives.”).

47. It is important to bear in mind that I am not suggesting that people be targeted for criminal investigation because of their associations with certain controversial groups. Indeed, current FBI guidelines (with which I do not disagree) prohibit inquiries solely on the basis of protected First Amendment activity. What I am saying is that, where certain associations are relevant to who among us might have information about the intentions of our enemies, such people should not be able to deny their associations under oath with impunity.

A. SEEKING U.S. CITIZENSHIP

It is a crime to knowingly procure naturalization contrary to law.⁴⁸ It is a separate crime to “knowingly make[] any false statement under oath, in any case, proceeding, or matter relating to . . . naturalization . . .”⁴⁹

Persons applying for naturalization are required to fill out and sign, under penalties of perjury, a document known as a Form N-400. Part 10 of that form requires applicants to list any past and present membership in, or association with, every “organization, association, fund, foundation, party, club, society, or similar group in the United States or in any other place.”⁵⁰

Since 9/11, the Department of Justice has successfully charged people with failing to report their affiliation with certain terrorist organizations on their Form N-400,⁵¹ and with lying to federal law enforcement about their association with certain accused terrorists.⁵² Do these prosecutions represent an unconstitutional punishment of one’s First Amendment rights to association?

In the 1950s, courts rejected this argument by labor leaders charged with falsely denying their Communist ties. For example, on September 17, 1945, union leader Harry Bridges, an immigrant seaman from Austria, appeared in the Superior Court in San Francisco for a naturalization hearing and denied that he was then, or had ever been, a member of the Communist Party in the United States. Three years later, he was indicted for naturalization fraud and ultimately convicted.⁵³ Similarly, to avail his union of the processes of the National Labor Relations Board, in December 1955, John

48. 18 U.S.C. § 1425(a).

49. *Id.* § 1015(a).

50. U.S. Citizenship & Immigration Serv., U.S. Dep’t of Homeland Sec., Form No. N-400, Application for Naturalization, pt. 10(b) (2005), *available at* <http://uscis.gov/graphics/formsfee/forms/files/n-400ins.pdf>. In *United States v. Damrah*, an opinion discussed *infra*, membership and affiliation questions in the old N-400 form were located in Part 9. 412 F.3d 618, 620 (6th Cir. 2005).

51. *See Damrah*, 412 F.3d at 621.

52. *See United States v. Biheiri*, 341 F. Supp. 2d 593, 596-97 (E.D. Va. 2004) (finding that prosecution was not vindictive).

53. *Bridges v. United States*, 346 U.S. 209, 211-12, 214 (1953).

Joseph Killian filed an affidavit that said, *inter alia*, "I am not a member of the Communist Party or affiliated with such Party." In November 1955, Killian was indicted in Chicago under 18 U.S.C. § 1001, based on the theory that he falsely denied membership and affiliation with the Communist Party in his affidavit. Killian was convicted.⁵⁴ Both Bridges and Killian argued that their prosecutions were defective and that they were being punished for their associations, and each of their cases reached the Supreme Court (albeit on different issues).⁵⁵

Killian's challenge was to the jury instructions on the meaning of "membership" and "affiliation."⁵⁶ In addressing this question, Justice Whitaker's opinion for the Court involved an analysis of the nature of the crime Killian was charged with violating and the following observations that support the premise of this essay:

[Killian] was not charged with criminality for being a member of or affiliated with the Communist Party, nor for participation in any criminal activities of or for the Communist Party. He was not charged with advocating or teaching the overthrow of the Government . . . or with knowing membership in an organization advocating the overthrow of the Government by force and violence The charge was that, to enable a labor union of which he was an officer to comply with § 9(h) of the National Labor Relations Act and thus be permitted to use the processes of the Labor Board, petitioner, on December 11, 1952, knowingly made and caused to be transmitted to the Labor Board a false affidavit, saying he was not then a member of or affiliated with the Communist Party when in fact he was both a member of and affiliated with the Communist Party, and that those acts were made criminal and punishable by 18 U.S.C. § 1001, 18 U.S.C.A. § 1001.⁵⁷

The Supreme Court upheld Killian's conviction.⁵⁸ Bridges' conviction, however, was reversed because of the statute of

54. *Killian v. United States*, 368 U.S. 231, 234-35 (1961).

55. *Id.* at 235, 241-42; *Bridges*, 346 U.S. at 214.

56. *Killian*, 368 U.S. at 245.

57. *Id.*

58. *Id.* at 258.

limitations, although the Ninth Circuit did find his false statements legally actionable:

There was, at the time in suit, no statutory bar to any alien's naturalization on account of membership in the Communist Party, and possessing such membership was not a crime. There was, however, a bar against naturalization of one who adhered to the belief that this government should be changed by force or violence, and such adherence was a legal ground for deportation. False denials of such membership at a naturalization proceedings [sic] were material. The Russian brand of Communism and works of Karl Marx and Lenin were well known and their teachings of the doctrine of overturning our government by force and violence was common knowledge. Had Bridges answered the court's question in the affirmative, the next line of questions which logically would have followed would have been as to whether Bridges believed in the violent overthrow of the government. From the answers received, the court would determine whether the applicant was devoted to the United States Constitution, and whether as a matter of fact and law Bridges qualified as a person entitled to citizenship.⁵⁹

Clearly, the United States has an interest in limiting citizenship to those people who are committed to be good Americans. If citizenship is to mean anything, a government must be able to discriminate between nationals and non-nationals when conferring the benefits of American citizenship. By the same token, where naturalization is a benefit to be conferred only on the eligible—a concept with which few would disagree—we have an obligation to assure that eligibility standards are met. The requirement that applicants affirm, under penalties of perjury on their citizenship application, that they have listed all of the organizations of which they are members or affiliates, is hardly novel. Punishing people for lying in this context is an important component of maintaining the integrity of this process.

A good illustration of how this concept can be applied in the counterterrorism context comes from a recent case successfully prosecuted in Akron, Ohio.⁶⁰ In 1984, Fawaz Damrah entered the

59. *Bridges v. United States*, 199 F.2d 811, 829 (9th Cir. 1952), *rev'd on other grounds*, 346 U.S. 209 (1953).

60. *United States v. Damrah*, 412 F.3d 618 (6th Cir. 2005).

United States on a visa, and within two years became the *Imam* (religious leader) of the Al-Farooq Mosque in New York.⁶¹ During that time, Damrah approached the Board of Directors of the Mosque for approval to open a New York office of Afghan Refugee Services, Inc. ("ARS") within the Mosque. ARS was created during the late 1980s to support Afghan fighters who were attempting to expel Russians from Afghanistan. As a director of ARS, Damrah, along with the organization's leader, traveled around the United States attempting to raise money. Damrah's involvement with ARS ended in 1990, when he left Al-Farooq Mosque due to a dispute over the use of contributions to ARS after the 1989 expulsion of the Soviets from Afghanistan.

During this period, Damrah was also involved with the Palestinian Islamic Jihad ("PIJ"), a group which objects to the existence of the State of Israel and is committed to its destruction. Since 1989, the U.S. Department of State has included the PIJ in its list of major terrorist groups based on PIJ's involvement in various terror attacks. Damrah's association with the PIJ extended as well to the Islamic Committee for Palestine ("ICP"), which was used to raise funds for the PIJ in the United States. Did Damrah know the true nature of PIJ and ICP, and their support for violence? At a videotaped ICP fundraising event, Damrah stated, "A brief note about the Islamic Committee for Palestine: It is the active arm of the Islamic Jihad Movement in Palestine. We preferred to call it the 'Islamic Committee for Palestine' for security reasons."⁶²

After Damrah's 1990 break with Al-Farooq Mosque, he moved to Cleveland, Ohio. There, he became the *Imam* of the Islamic Center of Cleveland. He thereafter went through the naturalization process and became a U.S. citizen.

On his application, an INS⁶³ Form N-400, which he submitted on October 18, 1993, Question 3, Part 7 asked: "Have you at any time, anywhere, ever ordered, incited, assisted, or otherwise participated in

61. *Id.* at 620-21 (recounting the relevant background facts of the case).

62. *Id.* at 621.

63. The INS's services and benefits functions transitioned into the U.S. Citizenship and Immigration Service within the Department of Homeland Security in 2003. See U.S. Citizenship & Immigration Serv., About Us, <http://uscis.gov/graphics/aboutus/index.htm> (last visited Dec. 2, 2005).

the persecution of any person because of race, religion, national origin, or political opinion?"⁶⁴ Damrah answered in the negative.⁶⁵

Part 9 of Form N-400,⁶⁶ captioned "Memberships and Organizations," instructed him to:

List your present and past memberships in or affiliation with every organization, association, fund, foundation, party, club, society, or similar group in the United States or in any other place. Include any military service in this part. If none, write "none." Include the name of the organization, locations, dates of membership and the nature of the organization.⁶⁷

In response to this question, Damrah listed the "Islamic Council of Ohio" and the "Islamic Center of Cleveland," but he omitted ARS, the PIJ, and the ICP.⁶⁸ He signed Part 11 of Form N-400, which required that the applicant "swear or affirm, under penalty of perjury under the laws of the United States of America, that this application, and the evidence submitted with it, is all true and correct."⁶⁹

INS examiner Kim Adams subsequently interviewed Damrah on December 17, 1993, in order to determine whether he was qualified for naturalization. Adams reviewed the answers Damrah supplied on his Form N-400 and took note of those changes Damrah wished to make. In her testimony, Adams stated that a "yes" response to the question regarding persecution "could render [the applicant] ineligible for naturalization."⁷⁰ If an untruthful answer to the persecution question was discovered, the INS could deny the application. The INS could also deny the application if information was provided about organizations potentially involved in persecution. Adams also testified that if membership or affiliation with a suspect organization was provided, she would attempt to

64. *Damrah*, 412 F.3d at 621.

65. *Id.*

66. *See supra* note 50 (explaining that membership and affiliation questions on Form N-400 were previously located under Part 9).

67. *Damrah*, 412 F.3d at 621.

68. *Id.*

69. *Id.*

70. *Id.*

obtain further information, request documentation, or “forward the application over to the investigative section for further inquiry.”⁷¹ Upon completion of his interview with Adams, Damrah signed the Form N-400 under penalty of perjury.

Damrah was naturalized on April 29, 1994. The omissions from Damrah’s naturalization application were discovered in 1995 when videotapes of the ICP fundraiser were seized in a law enforcement raid in Florida.

Damrah was indicted on December 16, 2003, and charged with unlawful procurement of naturalization. The indictment alleged that Damrah:

(1) knowingly procured naturalization contrary to law and to which he was not entitled by failing to disclose membership in or affiliation with ARS, the PIJ, and the ICP; (2) falsely stated that he had never ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion; and (3) failed to disclose that he had been arrested and charged with assault in January of 1989 in New York City.⁷²

He was convicted by the jury, following a week-long trial.⁷³ Damrah’s appeal, which argued that the charges were duplicitous and that there was insufficient evidence to convict him, was unsuccessful.⁷⁴

B. TAX-EXEMPT CHARITIES

The 9/11 Commission issued a special report which claimed that, contrary to widespread belief, al Qaeda received much of its funding not from Osama Bin Laden’s personal inheritance, but rather from

71. *Id.*

72. *Id.*

73. *Id.* The court refused to suppress evidence obtained by the government through surveillance sanctioned under the Foreign Intelligence Surveillance Act. *Id.*

74. *Id.* at 628-29 (holding further that Damrah failed to prove reversible error pertaining to the proffered jury instructions).

charities in the Persian Gulf region.⁷⁵ Given that the United States is the richest and arguably most generous country on earth, is it logical to operate on the belief that there are charities here that are associated with some of the world's terrorist organizations? If not, one need only consider the number of U.S.-based charities that have been implicated in terrorism-related illegal financial transactions since 9/11.⁷⁶

Unlike Canada and the United Kingdom, the United States does not have a federal charities commission. Instead, American charities are sometimes regulated by the individual states' consumer protection laws.⁷⁷ The closest thing the United States has to a federal regulator of charities is the IRS, which determines whether non-profit entities operate in such a way that they can legally offer their donors the benefits of tax deductions for charitable contributions.⁷⁸ To perform this function, the IRS requires the newly-formed charity to apply to the IRS for tax-exempt status under 26 U.S.C. § 501(c)(3), submitting what is known as an IRS Form 1023. Thereafter, the organization must file an annual information tax return—Form 990—which is signed under penalties of perjury.

75. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, STAFF REPORT TO THE NAT'L COMM'N, MONOGRAPH ON TERRORIST FINANCING 4 (2004), available at http://www.9-11commission.gov/staff_statements/911_Terr_Fin_Monograph.pdf (noting that al Qaeda fundraising efforts generated approximately \$30 million per year through Islamic charities and facilitators who gathered money from donors).

76. See *Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748, 750 (7th Cir. 2002); *United States v. Dhafir*, 104 F. App'x 782 (2d Cir. 2004); *United States v. Al-Arian*, 308 F. Supp. 2d 1322, 1351 (M.D. Fla. 2004); *United States v. Arnaout*, 282 F. Supp. 2d 838, 846 (N.D. Ill. 2003); *Holy Land Found. for Relief and Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 69-71 (D.D.C. 2002); *United States v. Benevolence Int'l Found.*, 222 F. Supp. 2d 1005, 1008-09 (N.D. Ill. 2002).

77. See Dana Brakman Reiser & Evelyn Brody, *Who Guards the Guardians?: Monitoring and Enforcement of Charity Governance: Introduction*, 80 CHI.-KENT L. REV. 543, 545 (2005) (noting that the source of state laws regulating much of charities' internal affairs include trust law, non-profit corporate law, and for-profit corporate law). Because these state laws derive from various sources, there is no distinct and comprehensive set of regulations. *Id.*

78. See Internal Revenue Serv., Dep't of the Treas., Exemption Requirements, <http://www.irs.gov/charities/charitable/article/0,,id=96099,00.html> (last visited Dec. 2, 2005) (noting that the IRS requires that an organization must either be a corporation, community chest, fund, foundation, or charitable trust in order to be organized exclusively for charitable purposes).

The IRS grants exemption from federal income tax to “[c]orporations, and any community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or to foster national or international amateur sports competition . . . , or for the prevention of cruelty to children or animals”⁷⁹ Such entities, referred to as “501(c)(3) organizations,” enjoy two primary benefits: (1) their income is not subject to taxation, and (2) donations to them are deductible as charitable contributions on donors’ federal income tax returns.

Foreign 501(c)(3)’s—that is, exempt organizations that are incorporated outside the United States—do not enjoy the second benefit; donations made to them are not deductible by the donor. Similarly, domestic 501(c)(3) organizations sending money overseas must demonstrate that they are not acting as mere conduits for foreign organizations, lest the deductibility of their donations may be disallowed. A domestic 501(c)(3) will not be considered a conduit to a foreign entity if it maintains discretion and control over the disbursements abroad.

To be recognized as a 501(c)(3) organization, most entities must file an IRS Form 1023 (Application for Recognition of Exemption), which is signed under penalties of perjury by an authorized agent of the entity.⁸⁰ The information required by the form includes an employer identification number (“EIN”), a confirmed copy of the organization’s Article of Incorporation, a copy of any by-laws adopted by the organization, a full description of the organization’s purposes and activities, and financial statements showing the organization’s receipts (and their sources) and expenditures (and their nature) for the current year and for the preceding three years; including a balance sheet for the most recent period.⁸¹ Historically, the Form 1023 included several specific questions:

79. 26 U.S.C. § 501(c)(3) (2000).

80. Internal Revenue Serv., Dep’t of the Treas., Form No. 1023, Application for Recognition of Exemption (2004) [hereinafter Form 1023], available at <http://www.irs.gov/pub/irs-pdf/f1023.pdf>.

81. *Id.*

- “What are or will be the organization’s sources of financial support?”⁸²

- “Describe the organization’s fundraising program, both actual and planned, and explain to what extent it has been put into effect Attach representative copies of solicitations for financial support.”⁸³

- “Does the organization control or is it controlled by any other organization?”⁸⁴

- “Is the organization financially accountable to any other organization?”⁸⁵

- “Describe the organization’s present and proposed efforts to attract members, and attach a copy of any descriptive literature or promotional material used for this purpose.”⁸⁶

Recently, the Form 1023 was amended.⁸⁷ The new form asks for more specific information on the applicant’s foreign activities.⁸⁸ These amendments were the result of an increased IRS focus on terrorist financing.⁸⁹

82. Internal Revenue Serv., Dep’t of the Treas., Form No. 1023, Application for Recognition of Exemption, pt. II, l. 2 (1997) (on file with author).

83. *Id.* pt. II, l. 3.

84. *Id.* pt. II, l. 5.

85. *Id.* pt. II, l. 7.

86. *Id.* pt. II, l. 11(b).

87. See Form 1023, *supra* note 80; see also *Exempt Organizations: Enforcement Problems, Accomplishments, and Future Direction: Hearing on Charities and Charitable Giving: Proposals for Reform Before the Sen. Fin. Comm.*, 109th Cong. 8 (2005) (statement of Mark W. Everson, Comm’r of Internal Revenue Serv.) [hereinafter *Hearing*], available at <http://www.finance.senate.gov/hearings/testimony/2005test/metest040505.pdf> (noting that the recent revision to Form 1023 aims to reduce the number of organizations that abuse their tax-exempt status by asking questions which help identify organizations that have close ties to service organizations owned by insiders).

88. Form 1023, *supra* note 80, pt. VIII.

89. See *Hearing*, *supra* note 87, at 12-13 (“We want to assure that U.S. charities have no role in financing terrorist activity, and we continue to assist in the fight against terrorism and those who fund it. On the criminal side, we have ongoing investigations concerning potential terrorist financing We are seeking better information about U.S. charities with international activities.”).

Once an entity gains 501(c)(3) status, it is required to file an annual tax return, known as an IRS Form 990.⁹⁰ The IRS Form 990 is available for inspection, and some members of the public rely on Form 990 as the primary or sole source of information about a particular organization. According to IRS instructions, “how the public perceives an organization in such cases may be determined by the information presented on its return,” and accuracy is vitally important.⁹¹ Form 990 must be signed under penalties of perjury. The Form 990 instructions describe regulations that require 501(c)(3)-recognized entities to make their filed Form 990 available to the public for inspection.⁹²

Among the items on Form 990 that may be relevant to terrorist-related associations:

- Requiring charities to disclose information regarding their direct or indirect relationships with other charities. According to the IRS instruction booklet, this provision helps prevent diversion or expenditure of a charity’s funds for non-charitable purposes.⁹³
- Requiring charities to report their website address, or report “n/a” if they do not have one.⁹⁴
- Requiring the charity to report certain types of organizations “affiliated” with (closely related to) the filing charity, and that the filing charity is required to attach a schedule listing the name and address of each affiliate receiving payments.⁹⁵
- Requiring a yes/no answer to the question, “Did the organization engage in any activity not previously reported to the IRS? If ‘Yes,’ attach a detailed description of each activity.”⁹⁶

90. Internal Revenue Serv., Dep’t of the Treas., Form No. 990, Return of Organization Exempt from Income Tax [hereinafter Form 990], *available at* <http://www.irs.gov/pub/irs-pdf/f990.pdf>.

91. Internal Revenue Serv., Dep’t of the Treas., Instructions for Form 990 and Form 990-EZ, at 1-2 (2004) [hereinafter Form 990 Instructions], *available at* <http://www.irs.gov/pub/irs-pdf/i990-ez.pdf>.

92. *Id.* at 10; *see* 26 C.F.R. 301.6104(d)-1 (2005).

93. Form 990 Instructions, *supra* note 91, at 11.

94. Form 990, *supra* note 90, Item G.

95. *Id.* l. 16.

96. *Id.* l. 76.

- Requiring a yes/no answer to the question, “Did the organization solicit any contribution or gifts that were not tax deductible?”⁹⁷

If Form 1023 or Form 990 contain false information, the persons responsible for them can be charged with tax perjury or found guilty of a felony.⁹⁸ Moreover, because these forms are intentionally made public so that people can make educated decisions about which charities should receive their donations, false items are arguably a fraud on the public.⁹⁹

C. FOREIGN AGENTS

The Foreign Agent Registration Act (“FARA”)¹⁰⁰ was enacted to:

[P]rotect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be informed of the identity of such persons and may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities.¹⁰¹

FARA requires every agent of a foreign principal to file a registration statement with the Attorney General setting forth certain information specified in the statute.¹⁰² A foreign principal is defined

97. *Id.* l. 84a.

98. 26 U.S.C. § 7206 (2000).

99. Form 990 is in the process of being amended to require greater reporting on charities’ foreign activities, in order to assist terrorist financing enforcement efforts. *See Hearing, supra* note 87, at 13.

100. 22 U.S.C. §§ 611-621 (2000).

101. 56 Stat. 248, 248-49 (1942); *see also* *Meese v. Keene*, 481 U.S. 465 (1986) (reviewing the meaning of “political propaganda” under FARA); *Viereck v. United States*, 318 U.S. 236, 244 (1943) (discussing congressional intent behind FARA).

102. 22 U.S.C. § 612(a) (noting that the registration statement includes information such as the nationality of the individual, the nature of the registrant’s

as a government of a foreign country, a foreign political party, or an individual affiliated or associated with either of them; a person outside of the United States; an organization having its principal place of business in a foreign country; or a domestic concern subsidized by any one of the former.¹⁰³ FARA further defines the term "agent of a foreign principal" to include any person who acts as a publicity agent or public-relations counsel for a foreign principal; any person who collects information, or reports information to a foreign principal; and any person who engages in other similar activities that are described in FARA in considerable detail.¹⁰⁴ Diplomatic and consular representatives, persons engaged in trade or commerce, and press associations are expressly exempted from filing a registration statement.¹⁰⁵ Non-exempt parties' failure to file a registration statement, or filing a false one, is a felony, with a maximum five-year sentence.¹⁰⁶ The criminal offenses within FARA have been consistently upheld in the face of constitutional challenges.¹⁰⁷

In 1966, FARA was amended to allow the Attorney General to secure an injunction or restraining order whenever "any person is engaged in or about to engage in any acts which constitute or will

business, and the nature and amount of contributions that the registrants received from each foreign principal).

103. *Id.* § 611(b).

104. *Id.* § 611(c).

105. *Id.* § 613. This provision of FARA exempts eight classes of foreign agents from the requirements of Section 612(a): 1) diplomatic or consular officials; 2) officials of foreign governments; 3) staff members of diplomatic or consular officers; 4) persons engaged in various private, nonpolitical activities; 5) persons solely engaged in religious, scholastic, or scientific pursuits; 6) persons whose activities concern the defense of a foreign government when such activities are vital to U.S. security interests; 7) persons qualified to practice law on behalf of identified foreign principals before U.S. courts and tribunals; and 8) agents of foreign principles. *Id.*

106. *Id.* § 618(a). Some experts believe that FARA could be amended to provide for a more onerous penalty in cases where the foreign principal is a terrorist organization.

107. *See* Att'y Gen. of the United States v. Irish N. Aid Comm., 530 F. Supp. 241 (S.D.N.Y. 1981); Att'y Gen. of the United States v. Irish N. Aid Comm., 346 F. Supp. 1384, 1391 (S.D.N.Y. 1972), *aff'd without opinion*, 465 F.2d 1405 (2d Cir. 1972); United States v. Frank, 23 F.R.D. 145, 146 (D.D.C. 1959); United States v. Peace Info. Ctr., 97 F. Supp. 255, 262 (D.D.C. 1951).

constitute a violation of any provision [of FARA].”¹⁰⁸ These civil remedies were added because the pre-existing criminal sanctions were thought too harsh for the sort of activities that were prescribed by the statute.

Since 9/11, however, there are signs that FARA and its related criminal statutes can become valuable tools in the national security arsenal.¹⁰⁹

CONCLUSION: SYNCHRONICITY AND COMPETITION

It may seem odd to describe synchronicity as the product of a constant and permanent internecine battle between various official counterterrorism components. Intra-governmental warfare, after all, does not conjure the image of smooth statecraft. I am not trying to justify or encourage turf wars, with which the American public is rightly disgusted. What I am suggesting is an ever-expanding definition of turf, and a competition that is focused and regulated.

The American counterterrorism policy needs more entrepreneurial spirit—an application of market forces—within the national security community. We need a bigger playing field, and more players. This includes a greater emphasis on domestic criminal tools, at a time when their efficacy is sometimes overlooked in favor of other tools that make for better news stories. This is particularly true of those criminal tools designed to assure that the government has information it needs to perform its lawful functions. If protecting innocent people from political violence is one such function, we need information about U.S. associations with international terrorist organizations. Criminal prosecutions should focus on fraudulent attempts to obtain government benefits—like citizenship and tax-exempt status—while concealing these terrorist associations. These investigations should be pursued because they promote the integrity

108. 22 U.S.C. § 618(f).

109. See *United States v. Dumeisi*, No. 03 CR 664-1, 2003 WL 22757747, at *1-2 (N.D. Ill. Nov. 20, 2003) (prosecuting for the crime of acting as an unregistered agent of a foreign government); see also Jeanine Ibrahim, *Indiana Man Tried to Sell Spy Names to Iraq, U.S. Alleges*, MIAMI HERALD, Mar. 4, 2005, at 5A (discussing the arrest of Shaaban Hafiz Ahmad Ali Shaaban).

of the benefits programs and regulatory regimes and could lead to valuable intelligence. More importantly, they add to a menu of options available to the country's counterterrorism officials.

My argument for more intra-government competition is not unique. In his recent book-length critique of the 9/11 Commission Report, Judge Richard A. Posner comes very close to what I am suggesting, although his focus is on the ideal organization of the intelligence community, rather than counterterrorism generally.¹¹⁰

Posner's main complaint with the 9/11 Commission recommendations and the subsequent legislation involves the tendency in reform efforts to equate centralization with coordination. The two terms, Posner argues, are not synonymous. If an organizational structure is too centralized, the result can be impediments to the flow of information and a reduction in the diversity of methods and cultures that promote a better end-product. Where the product itself is intelligence, the process should promote, rather than inhibit, competition, something that is sometimes lost in movements towards centralization.

His argument is informed by his recognition of cognitive limitations. The human mind will never be able to process all data presented to its senses. If we have one person in charge of the intelligence community, this person runs the risk of being inundated with too many stimuli, particularly if he sits atop of a highly centralized organization where diversity is not encouraged. This person instead should promote an organizational architecture that encourages a marketplace of ideas, which serve as a cauldron that results in a better product for his consumption.

This phenomenon is even more pronounced when it comes to counterterrorism operational decisions, which are based on intelligence or, more precisely, "actionable intelligence." Operational decisions—how and when to act, and against whom—are necessarily made at the top. The person at the top, no matter how well he or she is served by staff, can never be an expert in the various systems that define whether a stream of intelligence qualifies as actionable, thereby justifying an application of one of the many counterterrorism

110. RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11 (2005).

tools. We do not ask federal prosecutors to determine whether there is sufficient intelligence to justify a military strike, nor do we ask military commanders to review the sufficiency of evidence for a proposed criminal prosecution. Instead, the operational decision-makers need to rely on those people who are experts in their particular tools, and these experts should be encouraged to pursue options, even if the process, to an outside observer, appears to be parochial.

As Judge Posner puts it, when it comes to the business of intelligence:

A diversity of preconceptions will generate a richer selection of relevant information to analyze and a broader range of perspectives among the analysts. We want analysts to be sampling from the broadest possible range of data and to be drawing inferences from their samples with different mindsets [W]e want an intelligence culture in which the regnant theories are constantly being challenged, not by devil's advocates, who are merely stage challengers, but by people who really see the world differently; and for those people to have a voice and be heard—for a genuine clash of theories to occur, as in science—requires a diverse intelligence system, implying a flat structure with loose rather than tight control over its component parts.¹¹¹

The same is undoubtedly true if we are to make full and effective use of a counterterrorism arsenal that is multi-faceted. Synchronicity can only come from robust and constant competition.

111. *Id.* at 155.