

THE ROLE OF FEDERAL CRIMINAL PROSECUTIONS IN THE WAR ON TERRORISM

by
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In this Article, the author, who worked as an Assistant United States Attorney for eleven years, chronicles the use of criminal prosecutions before and after the attacks of September 11, 2001. The author argues that a shift from reactionary prosecutions and intelligence gathering before 9/11 to proactive prosecutions immediately after 9/11 greatly increased access to human intelligence and helped eliminate potential terrorist threats, effectively aiding the war on terrorism. However, in the last few years, there has again been a shift away from these proactive prosecutions back to the intelligence gathering mindset, which is inferior to the results obtained through traditional investigative techniques and criminal prosecutions.

I.	TERRORISM PROSECUTIONS BEFORE 9/11	838
II.	USING FEDERAL PROSECUTIONS TO PREVENT, DISRUPT, AND DETER FUTURE ACTS OF TERRORISM	838
III.	THE POST-9/11 ANTITERRORISM EFFORTS IN PRACTICE: HONEY JARS TO AL-MOAYAD	840
IV.	THE BENEFITS OF FEDERAL CRIMINAL PROSECUTIONS IN THE WAR ON TERRORISM	847
V.	CONCLUSION	849

I left the Department of Justice (DOJ) a little over one year ago, after eleven years as an Assistant U.S. Attorney in the Eastern District of New York, most recently as the Chief of that District's Violent Crimes and Terrorism Section. In that position, I experienced firsthand how effective criminal prosecutions can be as a tool in the antiterrorism effort. Initially after September 11, 2001, the proactive use of criminal prosecutions was increased and maximized, especially from a prevention and disruption perspective. Unfortunately, in the past few years there has been a shift in philosophy once again in favor of using federal agents and resources in a

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never-ending quest for intelligence gathering with no real direction, rather than active criminal investigations and prosecutions of known or suspected terrorists.

I. TERRORISM PROSECUTIONS BEFORE 9/11

Prior to September 11, 2001, terrorism prosecutions were almost exclusively reactionary. Acts of terrorism were investigated, and if they could be caught, suspected terrorists were charged and brought to trial.¹ But there was no policy for actively using criminal prosecutions as a tool to prevent, disrupt, or interfere with future attacks.

FBI agents on the terrorism squads spent most of their time gathering intelligence without a particular agenda or participation by federal prosecutors. This intelligence came largely through FISA wiretaps² and was often in foreign languages. Reels of information gathered dust for years without ever being reviewed, translated, or put to any use. Unlike most FBI agents assigned to criminal squads, agents on the terrorism squads rarely made arrests and had very limited experience with the tools typically used to investigate crimes—such as Title III wiretaps,³ informants, undercover operations, and the grand jury.

In stark contrast, FBI agents assigned to organized crime, violent gangs, or narcotics squads routinely do physical surveillance, monitor electronic surveillance intercepts, interview witnesses, conduct undercover operations, and develop relationships with informants. These agents coordinate closely with prosecutors with whom they share a single goal—gathering sufficient evidence to indict criminals and get them off the streets. As a result of conducting criminal investigations in this manner, the FBI has always had good information and knowledge regarding the membership, leadership, and activities of major criminal organizations, such as the Italian organized crime families.

II. USING FEDERAL PROSECUTIONS TO PREVENT, DISRUPT, AND DETER FUTURE ACTS OF TERRORISM

In the immediate aftermath of September 11, 2001, the government made a dramatic shift in its approach to terrorism prosecutions.⁴ The

¹ See e.g., *United States v. Salameh*, No. 93-cr-00180 (S.D.N.Y. filed Mar. 3, 1993) (charging Ramzi Yousef and others with the first World Trade Center bombing).

² Foreign Intelligence and Surveillance Act of 1978, 50 U.S.C. §§ 1801–11 (2000 & Supp. IV 2004). FISA allows the government, under certain conditions, to conduct electronic surveillance of a foreign government, faction, or agent, including groups engaged in international terrorism. See YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE* 442–43 (6th ed. 1986).

³ 18 U.S.C. §§ 2510–22 (2000 & Supp. IV 2004). Domestically, Title III allows law enforcement to use electronic surveillance under certain conditions. See KAMISAR ET AL., *supra* note 2, at 436–39.

⁴ U.S. DEP'T OF JUSTICE, *STRATEGIC PLAN 2001–2006* (2001), *available at*

new philosophy called for using every available federal criminal statute to pursue people that existing intelligence suggested might be involved in supporting or participating in terrorist organizations and acts of terrorism. The new goal was to detect, prevent, disrupt, and deter terrorism.

The FBI devoted significant manpower to the terrorism squads. It transferred agents from other criminal squads who were more experienced in using traditional investigative tools to secure criminal convictions.⁵ An immediate benefit of this change in tactics was the quality and quantity of human intelligence that suddenly became available from criminal defendants who sought to cooperate with federal agents by providing information in exchange for leniency at sentencing or, in the case of those facing deportation, the ability to stay in the country.

This investigative approach is routine and effective in other areas of criminal law enforcement. In fact, most violent gang investigations start with junior gang members who are prosecuted for low-level crimes, such as selling drugs. In exchange for shorter jail terms, these junior gang members cooperate with law enforcement and provide information about senior gang members who have ordered murders and committed other acts of violence. The testimony of these insiders, coupled with corroborating evidence—such as conversations intercepted on wiretaps, surveillance, and undercover drug buys—reveals the full extent of a gang's membership, leadership, and activities. The result of this type of investigation is often is a comprehensive Racketeer Influenced and Corrupt Organizations ("RICO") indictment and subsequent convictions that dismantle the entire violent gang. For example, an investigation that ultimately led to the elimination of a violent Brooklyn drug gang was started by information obtained from a homeless man who was arrested for selling a single vial of crack cocaine to an undercover DEA agent.⁶

Similarly, the tactic of using a broad range of federal statutes to prosecute known offenders is not uncommon. For example, in violent gang cases where we did not have sufficient evidence to prosecute a suspect for a known murder, we used any other possible federal criminal

<http://www.usdoj.gov/archive/mps/strategic2001-2006/goal1.htm>; Carl Cameron, *FBI Reorganization Gets Under Way*, FOX NEWS, May 29, 2002, <http://www.foxnews.com/story/0,2933,53949,00.html>; Press Release, U.S. Dep't of Justice, Attorney General Ashcroft Directs Law Enforcement Officials to Implement New Anti-Terrorism Act (Oct. 26, 2001), *available at* http://www.usdoj.gov/opa/pr/2001/October/01_ag_558.htm.

⁵ Cameron, *supra* note 4; *Redesigning the FBI*, PBS ONLINE NEWSHOUR, May 29, 2002, *available at* http://www.pbs.org/newshour/bb/fedagencies/jan-june02/fbi_5-29.html.

⁶ See *United States v. Polanco*, 145 F.3d 536 (2d Cir. 1998). Similarly, in *United States v. Rucker*, No. 97-cr-01146 (E.D.N.Y. filed Dec. 15, 1997) (guilty pleas in January 1999), we successfully prosecuted twenty gang members for various drug, violent crime, and RICO violations with the help of a low-level participant who became an informant and conducted controlled drug buys.

statute to arrest and prosecute that individual to get him off the streets. Frequently, we used the federal narcotics statutes in this manner.

Using this approach, FBI agents working with federal prosecutors began effectively employing criminal prosecutions as a tool in the antiterrorism program. Agents obtained new evidence from human intelligence that had not previously been identified or pursued. More importantly, agents were able to take people off the streets who had been identified through existing intelligence as past, present, or future supporters of terrorism.

III. THE POST-9/11 ANTITERRORISM EFFORTS IN PRACTICE: HONEY JARS TO AL-MOAYAD⁷

An example of this proactive law enforcement approach to fighting terrorism is a series of cases that were investigated and prosecuted in Brooklyn, New York, shortly after September 11, 2001.

In October 2001, Customs agents working at JFK airport arrested a Yemeni man attempting to smuggle out of the country more than \$100,000 in cash hidden in large honey jars. Law enforcement was particularly interested in this case because several honey companies recently had been identified as front organizations for funding terrorism. The "honey jar defendant" was charged with conspiracy to violate the currency reporting laws.⁸ In an attempt to gain leniency at sentencing, he cooperated with the government. He was interviewed numerous times by the Customs agents who made the initial arrest, but also by an FBI agent named Brian Murphy who had just been transferred to a terrorism squad from a narcotics squad, and who was accustomed to using a wide range of investigative tools.

Agent Murphy learned that the honey jar defendant was from an area in Brooklyn with historical connections to radical Islamic extremism. The defendant attended the al-Farooq Mosque in Brooklyn, where the Blind Sheik (Rahman) had been the imam and where discussions relating to the plot to bomb the Holland and Lincoln Tunnels took place.⁹

The honey jar defendant himself was merely engaged in an illegal money transmitting business, or *hawala*,¹⁰ sending money from families in Brooklyn to their relatives in Yemen. Although that defendant was not

⁷ United States v. Al-Moayad, No. 03-cr-01322 (E.D.N.Y. filed Dec. 15, 2003) (trial conviction and sentencing in 2005).

⁸ United States v. Al-Fatimi, No. 1:01-mj-01663-SMG (E.D.N.Y. filed Oct. 17, 2001) (charging violations of 18 U.S.C. § 371 (2000)).

⁹ NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 72 (2004), available at <http://www.9-11commission.gov/report/index.htm>.

¹⁰ *Hawalas* are typically prosecuted under 18 U.S.C. § 1960 (2000 & Supp. IV 2004), which states: "Whoever knowingly conducts, controls, manages, supervises, directs, or owns all or part of an unlicensed money transmitting business, shall be . . . imprisoned not more than 5 years . . ."

involved in financing terrorism, he became a valuable source of intelligence in that community, especially with respect to other illegal *hawala* businesses that had been operating out of storefronts in Brooklyn for years without detection or interference by law enforcement.

Because *hawalas* are unregulated and allow anonymous money transfers, they are a popular way for terrorist organizations to obtain funds. Therefore, *hawalas* were a major focus of law enforcement after September 11, 2001.

Information provided by the honey jar defendant led to an intensive six-month investigation of a Brooklyn *hawala* ring, led by a man named Al-Riany. The investigating agents used Title III wiretaps, physical surveillance, grand jury subpoenas, undercover operations, and five search warrants to indict approximately twenty individuals for unlicensed money remitting.



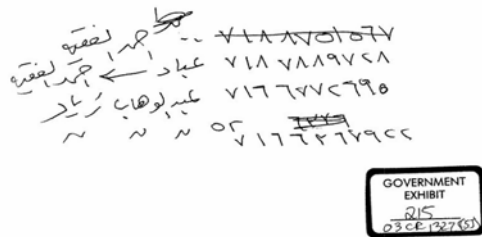
One of the storefronts in Brooklyn associated with the Al-Riany illegal hawala ring.

Most of the defendants in the Al-Riany case pled guilty, but none of them chose to cooperate with law enforcement in future investigations. Nonetheless, the publicity generated by disrupting the massive Al-Riany *hawala* ring in Brooklyn prompted a walk-in informant to contact the FBI. That informant contacted Agent Murphy directly and offered information about *hawalas* in Brooklyn, terrorist financing, and more. Specifically, Agent Murphy's new informant claimed to have information about a Yemeni sheik—Sheik Mohammed Al-Moayad—who was involved in supporting *Mujahideen* fighters all over the world.

Agent Murphy sent the informant to Yemen on three separate occasions to gather information from Sheik Al-Moayad. On the first trip, Murphy instructed the informant to ask the Sheik about people who provided weapons to *Mujahideen* fighters. The informant returned from Yemen with several names. On the second trip, Murphy instructed the informant to gather information about people in Brooklyn who were involved in funding terrorist organizations. Murphy also instructed him to start to lay the groundwork for a future undercover operation by introducing the idea of a rich American Muslim who wanted to donate money to support

Mujahideen fighters but wanted to make sure his money got into the right hands.

After that second trip, the informant reported that Sheik Al-Moayad claimed to have met Osama bin Laden in Afghanistan on two occasions, that Al-Moayad had received money collected at the al-Farooq mosque in Brooklyn, and that Al-Moayad would be willing to meet the rich American donor in Germany. The informant also returned with a list of names written by Al-Moayad of people whom he claimed could be relied on to send money from the United States to support terrorism.



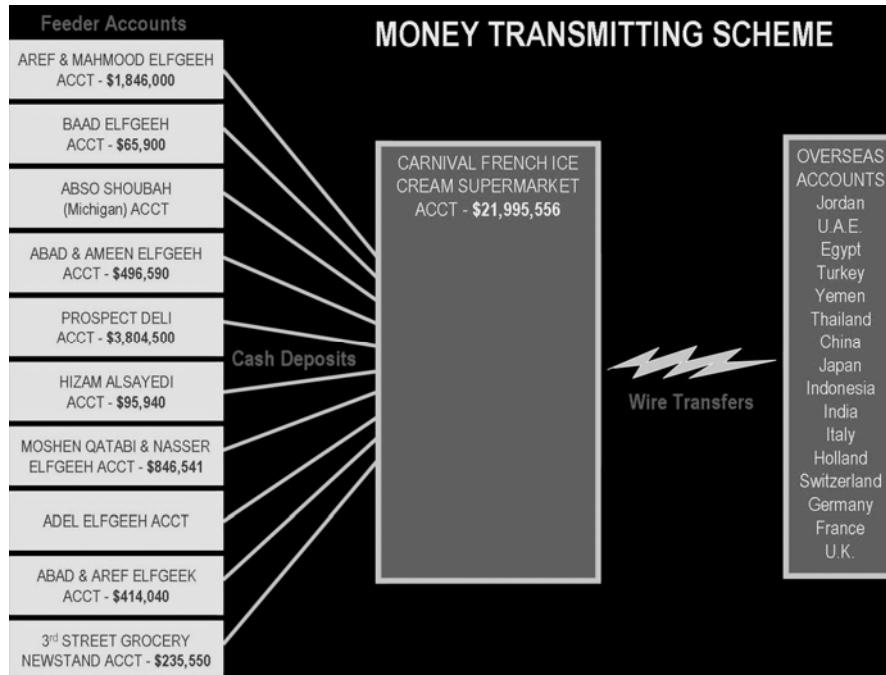
Government Exhibit Showing the Handwritten List of Names of Persons Identified as being able to send Money from the United States to Support Terrorism

The FBI started investigating Abad Elfgeeh, one of the individuals on this list, who owned a small ice cream shop in Brooklyn.



Abad Elfgeeh's Brooklyn ice cream shop.

Subpoenas to that store's banks quickly revealed that between 1996 and 2003, the bank accounts of that tiny shop had been used to funnel over \$20 million overseas.



Bank Accounts in the Elfgeeh Money Transmitting Scheme

Based on this development, Agent Murphy sent his informant, wearing a body wire, to meet Elfgeeh and talk to him about sending money to Al-Moayad in Yemen. In a taped conversation, Elfgeeh said that he had already told Al-Moayad that he could not send any more money because Yemenis were being watched too closely (this conversation took place after the Al-Riany arrests and the comment about Yemenis being watched closely in the context of money transmittals appears to be a reference to those arrests). However, during that same conversation, Elfgeeh suggested an alternative method of sending money abroad with individuals who travel with diplomatic passports, like Sheik Satar.

This tip prompted Agent Murphy to gather all available information on "Sheik Satar." He learned that Satar was a Yemeni man who had used a diplomatic passport to travel to Brooklyn in late 1999 for a fundraising trip. Satar had been under FBI surveillance for the entire three-day trip and the FBI surveillance revealed that Satar was almost constantly in the company of a man named Numan Maflahi. Maflahi had picked him up at the airport when he arrived, picked him up every morning from where

he was staying, took him from mosque to mosque to make fundraising speeches, took him to Elfgeeh's ice cream shop to send funds to Yemen, ate meals with him, took him home every night, and finally dropped him off at the airport at the end of his trip.



Surveillance Photo of Maflahi (on left) with Satar (in middle) in Brooklyn in 1999

Directly after leaving New York, Satar traveled to Italy. Italian authorities revealed that while in Italy, Satar attended a well-known radical mosque in Milan and made a fundraising speech praising Osama bin Laden and calling for support of bin Laden and the *Mujahideen* fighters in Chechnya. With this information, Agent Murphy inferred that just days earlier, while in Brooklyn, Satar had been making similar fundraising speeches to raise money to support bin Laden and terrorism and that his escort—Numan Maflahi—would know exactly what Satar had been saying and doing. Murphy interviewed Maflahi, who claimed to have had only minimal contact with Satar and denied assisting him in any way with fundraising. Maflahi's statements were thoroughly belied and contradicted by all of the physical and electronic surveillance that had been conducted by the FBI while Satar was in the United States during that three-day visit. Lying to the FBI is a federal offense, for which Maflahi was eventually arrested, tried, and convicted.¹¹ Significantly, the evidence used to convict Maflahi consisted largely of the surveillance conducted in late 1999, including FISA wiretap intercepts, that had been shelved prior to the request to declassify that evidence for use in the Maflahi criminal investigation. Thus, but for the Maflahi criminal prosecution in 2004, that evidence might never have been used or

¹¹ United States v. Maflahi, No. 03-cr-00412 (E.D.N.Y. filed Apr. 9, 2003) (trial conviction in 2004).

thoroughly analyzed.

The investigation of the Sheik Al-Moayad continued with a third trip to Yemen by the informant. Agent Murphy instructed the informant to tell the Sheik that the American donor needed proof of the Sheik's involvement in supporting terrorism. He returned with four receipts from charity organizations that Al-Moayad claimed were front organizations for Hamas, which is a designated terrorist organization. He also brought a video of a group wedding that had been sponsored by Sheik Al-Moayad. Al-Moayad had invited the informant to videotape the wedding to bring back to the American donor as proof of the Al-Moayad's efforts to prepare the youth for jihad. During the wedding, the leader of Hamas in Yemen made a speech praising Al-Moayad for sponsoring the wedding and announcing the success of a Hamas suicide operation in Israel, which had taken place in Tel Aviv earlier that day. The attendees responded by erupting into chants of "God is great."

Meanwhile, Agent Murphy gathered other evidence of Al-Moayad's ties to terrorist support, including an al-Qaeda training camp entry form that listed Al-Moayad as the sponsor of a trainee.

299

بسم الله الرحمن الرحيم

شروط القبول في المعسكرات

أشهد أنه والصلوة والسلام على رسول الله وعلى آله وصحبه ومن وآله .

أخبرني القائل... السلام عليكم ورحمة الله وبركاته.

فقبل الله من ربك وسلكه تبارك وتعالى أن يوفقنا وإياك إلى ما فيه وبرصنا .

هذه مجموعة شروط وضوابط تلك الفيلد. فإذ لا تزال فترة تعاملات مما حتى يسهل العمل على اكتساب مستغني

يمكن ومن ثم أخصني شار من معسكراتنا سابقين الذي تبارك وتعالى أن يسهل وإياك. وبذلك هذه الشروط:

1. أن تكون معاق من الأمراض التي تعيق أو تعطل أداء واجب الإعداد.
2. عمل واستعداد المستعدين أو كتابة كافة البيانات - فيها من الشر - إلى المعسكر.
3. أن تلتزم بالقدرة التي حددها للتدريب (.....) - بما أن هذه القدرة الأساسية وشهريين كاشفين.
4. يمنع حالات القدرة الأساسية المخرج من المعسكر تحت أي عذر (التمثال - مستشركات - ... إلخ) إلا في الحالات الضرورية وحسبما تقرره الإدارة.
5. أن تلتزم بالالتزام وبرامج المعسكر في الشرعي والعسكري والإداري في دول أي إحتلال.
6. أن تلتزم بضوابط كل عتلة لها و تسليح وتطبخ في الشدائد والفكر وعلى فكرة عليك ما تم تومر جمعية.
7. أن تسلم كل أماناتك عند قدومك إلى الإدارة - المساعدة - جوان السهم - طاعات شخصية - أموال (.....) إلخ.
8. أن تسلم أي (مصحف - راديو - كاميرا - تصوير - عابرة أو عديم) أو أي شيء آخر إلى إدارة المساعدة.
9. لا تشترى أو تشتر أي طعام أو شراب ما دمك في المعسكر.
10. أن تجتهد وتظهر الحرص على الاستفادة.
11. أن الإحتلال بالالتزام أو برنامج المعسكر - حرر حبه بعد ذلك إلى الإعتناء من التدريب.
12. من حق الإدارة إعتناك من التدريب دونما إله أو أي سبب.
13. لا تلتزم إدارة المساعدة أو المعسكر - مع أي شيء أو التمثال.
14. يهيبه بواجب الحضور مستمرا من التدريب (هذه برضائي - ملاحظ - كلام وتفتقر).

توقيع

أخبرني القائل... السلام عليكم ورحمة الله وبركاته.

فقبل الله من ربك وسلكه تبارك وتعالى أن يوفقنا وإياك إلى ما فيه وبرصنا .

هذه مجموعة شروط وضوابط تلك الفيلد. فإذ لا تزال فترة تعاملات مما حتى يسهل العمل على اكتساب مستغني

يمكن ومن ثم أخصني شار من معسكراتنا سابقين الذي تبارك وتعالى أن يسهل وإياك. وبذلك هذه الشروط:

والله اعلم ما أكون وكذا.

ملاحظة: إن إعتناك يعني قولك بكل الشروط والضوابط المذكورة وأنتم ما من سعيها جميعا كما يعني إعتناك

لتحمل لعمات المحافظة. وفعلت الله

الإستاء:

AFGP-0002
800628-001-0357

GOVERNMENT
EXHIBIT
299
09-06-1502 (65)

Terrorism Training Camp Entry Form

One of the Lackawanna Six¹² defendants, who cooperated with the government after his arrest in Buffalo, New York, testified that this form was identical to the one he had to fill out in connection with attending an al-Qaeda training camp in Afghanistan. The Lackawanna defendant also said that he would not have gained entrance to the camp without a sponsor who was known to the organizers of the camp to be a supporter of al-Qaeda. Other evidence procured by Agent Murphy during the Al-Moayad investigation included documents seized from *Mujahideen* fighters in Croatia, including two address books that contained Al-Moayad's name and home phone number.

Since Al-Moayad had indicated that he would be willing to travel to Germany to meet the American donor, the FBI enlisted the help of German law enforcement to conduct an undercover operation. The plan was to have a number of meetings take place in a hotel in Frankfurt, Germany, in rooms with video and audio surveillance equipment installed. Al-Moayad traveled to Germany to meet the "American donor," who was also an FBI informant. During three days of meetings with the two informants, the Sheik discussed his past and current ties to al-Qaeda and Hamas, bragged about being bin Laden's sheik and religious advisor, stated he had provided financial aid to bin Laden, and agreed to use the American donor's money to support any organization that promotes jihad.

With this evidence, Al-Moayad was arrested and extradited to the United States where he was tried and convicted for violating 18 U.S.C. § 2339(b) by providing material support to al-Qaeda and Hamas. He was sentenced to a term of seventy-five years.¹³

After the arrest in Germany, Abad Elfgeeh, the owner of the little ice-cream shop, was arrested for unlicensed money remitting in connection with his *hawala*.¹⁴ He was convicted after trial and is serving a fifteen-year sentence. Numan Maflahi was arrested for lying to the FBI about his knowledge of Sheik Satar's 1999 fundraising trip and was convicted after trial, and is serving a five-year sentence.¹⁵ The FBI had hoped those defendants would cooperate and provide more information and intelligence, but, to date, they have chosen to serve their full prison

¹² The "Lackawanna Six" is the name given to a group of six men from the suburbs of Buffalo, N.Y., who were arrested and charged with providing material support to al-Qaeda by attending an al-Qaeda training camp in Afghanistan. All six defendants pleaded guilty. *United States v. Goba*, No. 02-cr-214S (W.D.N.Y. filed Oct. 21, 2002); "Lackawanna" Six Plead Not Guilty, CBS NEWS, Oct. 22, 2002, <http://www.cbsnews.com/stories/2002/09/23/attack/main522894.shtml>; *Buffalo Terror Suspect Admits al Qaeda Training*, CNN.COM, May 20, 2003, <http://www.cnn.com/2003/LAW/05/20/buffalo.terror/index.html?iref=newssearch>.

¹³ *United States v. Al-Moayad*, No. 03-cr-01322.

¹⁴ *See United States v. Elfgeeh*, No. 03-cr-00133 (E.D.N.Y. filed Feb. 3, 2003) (trial conviction in 2004).

¹⁵ *United States v. Maflahi*, No. 03-cr-00412.

sentences instead.

These cases are just one example of a series of cases investigated and prosecuted as part of the government's commitment to detection, prevention, and disruption through federal criminal prosecutions immediately after September 11. However, in more recent years, the prosecutorial approach has lost momentum. Investigators have shifted their focus back to amassing intelligence as a goal in and of itself. As detailed below, this approach overlooks and devalues the positive impact that criminal prosecutions have in the antiterrorism effort.

IV. THE BENEFITS OF FEDERAL CRIMINAL PROSECUTIONS IN THE WAR ON TERRORISM

First and foremost among the benefits of criminal prosecution is the immediate access to human intelligence. People charged with crimes often provide useful and incriminating information about their peers to keep themselves out of jail. In fact, the FBI and local police have hundreds of drug and gang informants—mostly as a result of previous arrests. Prior to September 11, 2001, law enforcement agents assigned to antiterrorism squads had very little in the way of human intelligence in their arsenal. Although that gap started to be filled by criminal prosecutions like the ones described above, human intelligence is transitory and depends on law enforcement developing and maintaining relationships with defendants.

That said, in my experience, fewer terrorism-linked defendants cooperate with law enforcement. Neither Elfgeeh, Maflahi, nor any of the Al-Riany defendants cooperated. This reluctance to cooperate in antiterrorism prosecutions might be the result of zealotry or fear. But undoubtedly bringing more criminal prosecutions will only help develop more human intelligence, just as the Al-Riany prosecution led to the walk-in informant who helped Agent Murphy investigate the criminal cases against Sheik Al-Moayad, Elfgeeh, Maflahi, and others.

A second important benefit of criminal prosecutions is that they generate more reliable information. Federal prosecutors thoroughly vet and test information gathered during criminal investigations because they are not willing to indict or try a case based solely on the word of an informant. Prosecutors insist on corroborating evidence and push agents for more evidence to bolster a case. When you have to demonstrate probable cause to a judge to get a wiretap, or proof beyond a reasonable doubt to a jury, information must be reliable and corroborated.

In the Al-Moayad case, for example, the informant lit himself on fire in front of the White House just two months before the start of trial. Although the government could no longer call him as a witness, it could still rely on the video and audio tapes taken in Germany that captured much of the same information he had previously brought from Yemen. Additionally, Agent Murphy had found additional evidence from Afghanistan, Croatia, and Israel to corroborate the informant's account

of Al-Moayad's support of al-Qaeda and Hamas.

Working towards obtaining sufficient evidence to establish the elements of a criminal offense forces agents to fully digest and understand the information that they gather. It is more difficult to draw faulty inferences from new information when a prosecutor is cross-examining you about every detail, demanding a correctly translated transcript, and then insisting on further corroboration. When investigators aimlessly "gather intelligence," no one is focusing on what that information is or what it means. Agents end up with huge collections of information that are not analyzed or put to good use.

Third, every criminal prosecution generates more information and evidence. In addition to cooperating defendants and informants, as discussed above, these criminal prosecutions produce search warrants, post-arrest statements, and assistance from foreign governments—all of which typically cannot be obtained until an investigation becomes public through a "takedown" or public arrest. Investigating cases with an eye towards making arrests facilitates access to these other sources of information.

While these are the more obvious benefits to criminal prosecutions as part of an antiterrorism program, there are also some limitations. For instance, not all significant evidence relevant to terrorism cases falls neatly within the four corners of the Federal Rules of Evidence. The *Mujahideen* form that an al-Qaeda camp trainee filled out listing Al-Moayad as his sponsor is a perfect example. That piece of evidence was clearly relevant to our case—Al-Moayad was charged with supporting al-Qaeda. One of the Lackawanna Six defendants testified that he had to fill out an identical form to get into the al-Qaeda training camp he attended near Kandahar, Afghanistan, and that he had to have a sponsor known to the organizers of the camp. The *Mujahideen* form that listed Al-Moayad as a sponsor was recovered in December 2001 when U.S. forces invaded Afghanistan. It was sent to the FBI Legal Attaché stationed in Pakistan with a description of the al-Qaeda safe house near Kandahar where it came from. On appeal, the defense has challenged the use of this evidence because the people busy fighting a war in Afghanistan, who picked it up in the first instance, were not called as witnesses at trial. The defense has argued that the combined testimony of the Lackawanna Six defendant and the FBI Legal Attaché are insufficient to authenticate that document. A ruling by the Second Circuit Court of Appeals adopting the defense's position and holding that this document—recovered in a combat zone during wartime—was not sufficiently authenticated, would seriously undermine our ability to prosecute terrorism cases in federal court.

Another difficulty with prosecuting terrorism crimes is reconciling the need for international cooperation with the need to respect the laws of foreign countries. Terrorism is an international problem. Different components come from all over the world. Money could be raised in one country for a cell that is located in another country consisting of

individuals who are from another country who received military or terrorism training in another country and are planning an attack in yet another country.

Being able to effectively investigate and disrupt that type of activity requires a lot of international assistance. In the Al-Moayad case, we got that help, but not without some obstacles. For example, German law enforcement, having afforded us the courtesy of conducting an entire undercover operation on their soil, did not want to have to reveal their methods of operation in a U.S. court when they would never have to do so in German courts under prevailing German law. The court granted our motions *in limine* on this issue, but nonetheless, German law enforcement witnesses were sometimes put in the awkward position on cross-examination of having to say, "I do not have the legal authority to answer that question."

Finally, politics and bureaucracy are a major hurdle to prosecuting terrorism or terrorism-related cases. Both the FBI and DOJ—and sometimes even the White House—have a tendency to micromanage terrorism investigations. Agents, who are required to send endless numbers of reports up the chain of command detailing every move and development, find it nearly impossible to simultaneously run an informant or investigate a case and complete all the necessary paperwork. Moreover, with micromanagement comes second-guessing of decisions every step of the way. And if there is the slightest hint of information relating to a possible threat, the agents are ordered to act immediately, even before they can gather enough evidence to support a prosecution or fully investigate the scope of a plot or all of its participants.

V. CONCLUSION

In the last few years there has been a strong shift away from using criminal prosecutions to detect, prevent, disrupt, and deter future acts of terrorism. Instead, agents have returned to a focus on "gathering intelligence." In my opinion, that approach to fighting terrorism is short sighted and overlooks the quality and quantity of the intelligence that is obtained through traditional investigative techniques and criminal prosecutions which, despite some of the headaches and obstacles unique to terrorism cases, should continue to be used and prioritized as a valuable tool in the antiterrorism effort.