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The Use of Expert Testimony in Federal Criminal Terrorism Prosecutions: A Critical Look

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The Use of Expert Testimony in Federal Criminal Terrorism

Prosecutions: A Critical Look

"His watchmen are blind, all of them know nothing. All of them are mute dogs unable to bark, Dreamers lying down, who love to slumber" - ¹

Introduction

After the al Qaeda attacks of September 11, 2001, the U.S. Department of Justice named terrorism prevention its number-one mission. ² Since the 9/11 attacks, 881 terrorism defendants have been prosecuted by the U.S. Department of Justice. ³ 580 defendants have pleaded guilty to charges, while

¹ Isaiah 56: 10

² Adam Clymer, How Sept. 11 Changed Goals of the Justice Dept., N.Y. Times (Feb. 28, 2002), <https://www.nytimes.com/2002/02/28/us/how-sept-11-changed-goals-of-justice-dept.html>.

The Intercept, Trial and Terror, Updated March 9, 2019 <https://trial-andterror.theintercept.com>. These figures are for "international terrorism" as opposed to "domestic terrorism". The FBI defines "international terrorism" as "perpetrated by individuals and/or groups inspired by or associated with designated foreign terrorist organizations or nations (statesponsored)", even when the crimes were committed in the US, <https://www.fbi.gov/investigate/terrorism>, accessed April 30, 2019. The Department of Justice uses a similar definition, U.S. Dep't of Just., Counterterrorism White Paper, 59 (June 2006), <http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf>. The subject matter of this article is "international terrorism", and the terms "terror" and "terrorism" refer to "international terrorism" so defined. These distinctions and definitions by the Justice Department have engendered much controversy. For a critical look and a good discussion of these definitions, see Michael German and Sara Robinson, Wrong Priorities on Fighting Terrorism, The Brennan

Center for Justice, October 2018. (Arguing that these definitions result in "arbitrary distinctions between terrorism based on race, ethnicity, and ideology"). See also Trevor Aaronson, Terrorism's

the courts found 188 guilty at trial. Just 3 have been acquitted and 4 have seen their charges dropped or dismissed, giving the Justice Department a near-

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perfect record of conviction in terrorism cases.

The use of expert testimony at trial is a critical component of this success.⁵ In this article, we attempt to describe the ways and for what purposes this testimony is offered, how courts generally rule and analyze admissibility under Daubert,⁶ Kumho Tire,⁷ and FRE 702. We also take a close look at some of the experts who frequently testify for the prosecution and discuss the criticism of their methods and methodologies by many within the academic community.

Double Standard- Violent, Far Right Extremists Are Rarely Prosecuted as Terrorists, The Intercept, March 23, 2019, <https://theintercept.com/2019/03/23/domestic-terrorism-fbi-prosecutions>, accessed April 30, 2019.

⁴ The Intercept, Trial and Terror, (full cite in footnote 2).

⁵ See Bob Hennelly, In High-Profile Cases, Tapping Terror Experts for Testimony Becomes De Rigueur, <https://www.wnyc.org/story/204948-high-profile-cases-tapping-terroexperts-testimony-becomes-de-rigueur/>, last accessed May 12, 2019.

⁶ Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)

⁷ Kumho Tire co. v. Carmichael, 526 U.s. 137 (1999)

A good part of our discussion will be devoted to the testimony of Evan Kohlmann, the governments " Wunderkind"⁸ expert and star witness in over twenty-two federal terrorism prosecutions.⁹

Although a good amount of the analysis and critical discussion focuses on Kohlmann's testimony, our primary goal is not to demonstrate that Kohlmann is not qualified to testify as an expert, but rather to argue that District Courts and Appellate Courts have abdicated their critical "gate keeping function" under Daubert ¹⁰and Kumho Tire, ¹¹ in allowing his and other questionable experts to provide expert testimony. Specifically, courts have failed to apply the five "Daubert factors", (1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and

⁸ See, Wesley Yang, The Terrorist Search Engine, New York Mag., Dec. 13, 2010 (referring to Kohlmann as "the Doogie Howser of Terrorism" and discussing Kohlmann's

credentials that led to his certification as an expert witness in over twenty high profile terrorism prosecutions)

⁹ See, Wadie E. Said, *Constructing the Threat and the Role of the Expert Witness*, 44 Conn. L. Rev. 1545 (2012), n. 28 and accompanying text. It should be noted that this data is from 2012 and was provided on Kohlmann's own, now defunct, website.

¹⁰ Daubert at 597. The text accompanying supra, note I is intended to express this conclusion.

¹¹ 526 U.S. 137 (1999)

(5) whether it has attracted widespread acceptance within a relevant scientific community.¹

To properly understand the context and purposes for which expert testimony is used in terrorism prosecutions, it is important to understand the statutory scheme under which terrorism defendants are charged. In 1994, the first material support for terrorism prohibition, codified at 18 U.S.C. 2339A was passed by Congress.²³ Statute 18 U.S.C. SS 2339A criminalizes material support that facilitates the commission of any one of 57 previously enacted terrorism-related offenses, which are explicitly listed in the statute.¹⁴ Two years later, Congress enacted the second material support prohibition codified at 18 U.S.C. 2339B.⁴ The central distinction between the two material support prohibitions is that where 2339A criminalizes material support for

¹ Daubert at 592-595.

² Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, sec. 3, 108 Stat. 1796, 2022-23 (codified at 18 U.S.C. 2339A (2012)).¹⁴ Id.

⁴ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 303, 110 Stat. 1214, 1250-53 (codified at 18 U.S.C. 2339B (2012))

certain defined terrorism crimes, both international and domestic, 2339B criminalizes material support to certain designated foreign terrorist organizations.⁵ The two federal material support statutes have been at the heart of the Justice Department's terrorist prosecution efforts.⁶ Since the attacks on 9/11, 448 or 51 percent of all terrorism defendants prosecuted by the Justice Department have been charged with material support to a foreign terrorist organization.¹⁸ The "material support" prohibitions are often front and central to the expert testimony and we therefore devote a section to a discussion of the "material support" statutes.⁷⁸

Part One: Meet our Expert- "The Doogie Howser of Terrorism,

Evan Kohlmann owes his terrorism education to a think tank called the Investigative Project on Terrorism (IPT), where he began work as an

⁵ Id.

⁶ A Review of the Material Support to Terrorism Prohibition Improvements Act: Hearing Before the Subcommittee on Terrorism, Technology and Homeland Security, 109th Cong., 1st Sess. 45 (2005) (statement of Barry Sabin, Chief, Counterterrorism Section, U.S. Dept. of Justice)

¹⁸ The Intercept, *supra* note 4.

⁷ see, e.g., *United States v. El-Mezain*, 664 F.3d 467, 483 (5th Cir. 2011). see also said, *supra* note 9 (discussing the central role played by the expert witness's in the governments successful prosecution).

⁸ See Yang, *supra* note 8.

intern in 1998, during his freshman year at Georgetown.⁹ IPT was founded by Steve Emerson, a former journalist who spent the nineties warning of the Islamic militancy threat and assailing a Middle Eastern—studies Establishment inclined to mince words over whether Islamic militancy deserved the label "terrorism" at all.¹⁰ He was a polarizing figure, regarded as an Islamophobic alarmist by many¹¹—he famously described the 1995 Oklahoma City bombings by Timothy McVeigh as exhibiting a "Middle Eastern trait" because it "was done with the intent to inflict as many casualties as possible"²⁴—but credited for paying attention to the threat of Islamic terrorism when others were inclined to downplay it. Prior to 9/11, he had the ear of top White House counterterrorism official Richard Clarke, who has written that

⁹ Id. See also, Vanessa Blum, *Terror Analyst's Credentials Questioned*, South Florida SunSentinel, August 27, 2006, <https://www.sun-sentinel.com/news/fl-xpm-2006-08-27-0608260349story.html> last accessed May 9, 2019.

¹⁰ Yang, *supra* note 7

¹¹ In reviewing Emerson's book "Terrorist" for the New York Times Book Review, Adrienne Edgar said it was "marred by factual errors (such as mistranslation of Arabic names) that betray an unfamiliarity with the Middle East, and by a pervasive anti-Arab and anti-Palestinian bias." Adrienne Edgar, "Terrorist", *The New York Times Book Review*, May 19, 1991. See also, Carl Ernst, "Islamophobia in America: The Anatomy of Intolerance", Palgrave Macmillan. p. 86 (2013) (describing Emerson as one of the "most prominent producers of Islamophobic discourse").

John Sugg, *Steven Emerson's Crusade*, FAIR, January 1, 1999, <https://fair.org/extra/steven-emersons-crusade/>, accessed May 8, 2019. These comments seem to have been made on CBS News.

Emerson would provide him information on jihad that he could not get out of his own intelligence agencies.¹²

In January 2015, following terrorist attacks in Paris, France, Emerson stated in an interview on Fox News that the city of Birmingham was populated entirely by Muslims and was a "no go area" for non-Muslims.¹³ In the same interview, he claimed that in London, "Muslim religious police beat anyone who doesn't dress according to Muslim, religious Muslim attire".²⁷ He described Birmingham as one of a number of European cities "where sharia courts were set up, where Muslim density is very intense, where the police don't go in, and where it's basically a separate country almost, a country within a country".²⁸ In response, the Fox News host Jeanine Pirro said, "you know

what it sounds like to me, Steve? It sounds like a caliphate within a particular country. In response to these comments, British Prime Minister David Cameron said that he "choked on his porridge" when he heard them and observed that Emerson was "clearly a complete idiot Sir Albert Bore, the leader of the council, mocked Emerson, writing "As I arrived for work at the

¹² Clarke, Richard A., *Your Government Failed You: Breaking the Cycle of National Security Disasters*, Ecco, New York (2008), page 134.

¹³ BBC News, Apology for 'Muslim Birmingham' Fox News claim, January 12, 2015, <https://www.bbc.com/news/uk-england-30773297>, May 9, 2019.

Council House this morning I was full of awe and admiration for the many commuters who braved the 'no-go area' that is now Birmingham city centre, and described Emerson's remarks as "stupid, untrue and damaging,

27 Id.

28 Matthew Holehouse, "David Cameron: US terror 'expert' Steve Emerson is a 'complete idiot'", The Daily Telegraph, January 12, 2015,

1 1340399/David-Cameron-USterror-expert-Steve-Emerson-is-a-complete-idiot.html, last accessed May 9, 2019.

29 Id.

30 Id.

ridiculous".¹⁴ Emerson was forced to apologize for these remarks, saying he had "relied on sources he had used in the past" who had proven faulty.¹⁵

He has claimed that President Obama is shielding former ISIS fighters in the United States from FBI surveillance, and has repeatedly said that his own truth-telling has made him an assassination target for Islamic fundamentalists.¹⁶ When asked by a reporter some years ago whether there

¹⁴ Sir Albert Bore, **I** Could Not Be Prouder of Birmingham's Witty, Intelligent Response to Fox News, Huffington Post, January 14, 2015, https://www.huffingtonpost.co.uk/sir-albertbore/fox-news-birmingham_b_6469024.html, last accessed May 13, 2019.

¹⁵ See BBC News, *supra* note 26.

¹⁶ Andrew O'hehir, Fox News' bogus CIA terror analyst fed off a nation hooked on lies: Wayne Simmons is a symptom of a much deeper disease, Salon.com, October 21, 2015, [htt](http://www.salon.com/2015/10/21/fox_news_cia_terror_analyst/)

was any truth to that, an unwary FBI agent responded: "No, none at all".¹⁷ Perhaps most importantly for our discussion, Emerson has no academic or governmental credentials beyond his media celebrity, and does not claim any.³⁵

While at the Investigative Project on Terrorism, Kohlmann wrote what would later become his book, *Al-Qaida's Jihad in Europe: The Afghan-Bosnian Network*.¹⁸ With only his book¹⁹ and stint with the Investigative Project on Terrorism as credentials, Kohlmann became an expert witness for the Justice Department and a consultant for the FBI.²⁰ An FBI agent described the baby-faced expert as "the Doogie Howser of Terrorism, and George

[s://mvw. alon.com/2015/10/20/fox news bo us cia terror anal st and a nation hooked o n lies wayne simmons is a symptom of a much deeper disease/](https://www.alon.com/2015/10/20/fox-news-bo-us-cia-terror-analyst-and-a-nation-hooked-on-lies-wayne-simmons-is-a-symptom-of-a-much-deeper-disease/), last accessed May 9, 2019.

¹⁷ Id.

¹⁸ Trever Aaronson, A Terrorism Expert 's Secret Relationship with The FBI, *The Intercept*, July 27, 2015, <https://theintercept.com/2015/07/27/doogie-huekster-terrorism-experts-secretrelationship-fbi/>, last accessed May 11, 2019,

¹⁹ When Kohlmann began testifying, all he had was an undergraduate thesis, the book was published later, see Yang *supra* note 8.

²⁰ Aaronson, *supra* note 36.

²¹ Id.

Washington University law professor constitutional-law professor Jonathan Turley described Kohlmann to New York magazine as having been "grown hydroponically in the basement of the Bush Justice Department."²²

Kohlmann does not speak Arabic; has never been to Iraq or Afghanistan; does not hold a postgraduate degree in any related field; has no experience in military, law-enforcement, or intelligence work; and continues to submit his undergraduate thesis (now book) on Arab mujahidin in Afghanistan as evidence of his expertise.⁴¹

The following exchange between Kohlmann and a defense lawyer during cross examination is illustrative.

Q. Okay. Have you ever been to Afghanistan?

A. No, I have never been to Afghanistan.

Q. Do you speak Pashto?

A. No, I do not speak Pashto.

Q. That's a language used in Afghanistan?

A. In southern Afghanistan. That's correct; yes.

²² Yang, *supra* note 8. ⁴¹

Id.

Q. We've heard a lot of talk about Pakistan. Have you ever been to Pakistan - A. No.

Q. -- once in your life?

A. No, I've never been to Pakistan.

Q. The language spoken in Pakistan is Urdu?

A. That's correct,

Q. You don't speak Urdu, do you?

A. NO.

Q. We've heard an awful lot of talk about the country of Iraq. Have you ever in your life been to Iraq?

A. No, I haven't been to Iraq.

Q. One of the languages spoken in Iraq is Kurdish, is it not?

A. In a small portion of Iraq, yes.

Q. One of the languages spoken is Kurdish, right?

A. That's correct; yes.

Q. You don't speak Kurdish, do you?

A. No. No, I don't speak Kurdish.

Q. You have never been to Iran, have you?

A. No, I haven't been to Iran.

Q. And you don't speak Persian, do you?

A. No, I don't.

Q. You have never been, in your life, to Syria, have you? A. No, I have not.

Q. You've never been to Lebanon?

A. Not Lebanon, no.

Q. You've never been to Egypt?

A. That's correct.

Q. You've never been to Yemen?

A. That's correct.

Q. You're not fluent in reading Arabic, are you?

A. No, I'm not.

Q. You're not fluent in writing Arabic, are you?

A. That's correct.

Q. You're not fluent in speaking Arabic, are you?

A. I wouldn't claim to be, no. That's correct.²³

Jonathan Turley said he was "astonished" by Kohlmann's slim credentials after taking over a case in which he testified. "It seemed to me the thinnest resume of anyone I'd ever encountered in a national security case," Turley said. "To this day, I'm not sure how he became an "expert. "43 Turley is not the only one. In a court filing, Marc Sageman, a forensic psychiatrist and former CIA officer who has been called to the witness stand several times to discredit Kohlmann's claims²⁴, described his testimony and reports as "so biased, one-sided and contextually inaccurate that they do not provide a fair and balanced context for the specific evidence to be presented at a legal hearing."⁴⁵ Sageman also alleged in the same report that Kohlmann views his expert testimony not as well-researched and settled science to be discussed honestly at trial, but as a kind of information clay to be molded for the prosecution's benefit.²⁵ Sageman wrote that "He selects what is most supportive for the side that retains him. Indeed, he told me so at one time

²³ Trial Transcript Day 27 Page 109-110, U.S. v. Tarek Mehanna, Docket number I :09-cr10017, U.S.D.C. District of Massachusetts (2011).⁴³See Blum, supra note 21.

²⁴ For example, Sageman testified for the defense in U.S. v, Mehanna, supra note 42.

⁴⁵ Aaronson, supra note 36,

²⁵

when I challenged him about his testimony in the [Hammad] Khurshid case in Copenhagen, because he had neglected to mention important facts under oath. He justified his one-sidedness by saying that it was an adversarial process and it was up to the defense attorneys to cross examine him. ²⁶

Phil Girardi, a former CIA Case Officer and Army Intelligence Officer who spent twenty years overseas in Europe and the Middle East working terrorism cases, has said that within the intelligence community and at the Pentagon, Kohlmann, like many of his "expert colleagues", is widely considered a phony who has ingratiated himself with those who prefer an affable young media resource saying all the right things about terrorism, alarming the public while exuding a "charade of expertise." ²⁷

Kohlmann is not a traditional expert. Much of his research is not peerreviewed. Kohlmann's key theory, to which he has testified several times on the witness stand, involves a series of indicators that he claims determine whether someone is likely a homegrown terrorist. Yet he has never tested the theory against a randomly selected control group to account for bias or

²⁶ Id.

²⁷ Phil Girardi, Cashing in on Counter-Terrorism, The American Conservative, August 1, 2015, <https://www.theamericanconservative.com/articles/cashing-in-on-counter-terrorism/>, last accessed May 9, 2019.

coincidence.²⁸ Kohlmann has conceded that his terrorism indicators, and his methodology in general, are not supported by any statistical analysis that would prove their veracity.⁵⁰

Aside from the criticism that focuses on Kohlmann's expertise and qualifications to testify as an expert and accusations of his ideological bias, perhaps unsurprisingly, his financial arrangement with the government and in what other capacities he provides "services" to the government, have attracted scrutiny as well.⁵¹ This information is classified and generally beyond the scope of what defense counsel can question him about.⁵²

While representing at trial Mustafa Kamel Mustafa, of the Finsbury Park Mosque in London, defense lawyer Joshua Dratel, who has security clearances, was given classified materials about Kohlmann, a witness in the Mustafa prosecution.⁵³ However, the judge in the Mustafa case allowed very limited references to the contents of the classified materials during Dratel's cross-examination of Kohlmann — providing a clue to what the government is hiding about its star terrorism expert. "You have done more than consulting for the FBI, correct?" Dratel asked Kohlmann. "Correct," Kohlmann said from the witness stand. "You have done more than act as an expert for the

²⁸ U.S. V. Boyd, et al. Docket No. 5:09-CR-216-FL, Daubert Hearing Testimony by Evan Kohlmann, Pages 96-102.

government, correct?" Dratel followed. "That's correct, yes," Kohlmann admitted. That's as far as the judge would allow.²⁹

The U.S. government has paid Kohlmann and his company at least \$ 1.4 million for testifying in trials around the country, assisting with FBI investigations and consulting with agencies ranging from the Defense Department to the Internal Revenue Service. He has also received another

⁵¹ Aaronson, *supra* note 36.

⁵² *Id.*

⁵³ *Id.*

benefit,³⁰ Uncle Sam's mark of credibility, which has allowed him to work for NBC News and its cable sibling, MSNBC, for more than a decade as an onair "terrorism analyst."

Part Two: The Statutory Framework

. In 1994, the first material support for terrorism prohibition, codified at 18 U.S.C. 2339A was passed by Congress.³¹ Statute 18 U.S.C. 2339A

²⁹ *Id.*

³⁰ *Id.* As far back as 2011, Kohlmann testified that he received over \$1 million in fees from various government agencies. He further testified that he charges between \$350-400 per hour.

³¹ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, sec. 120005, 108 Stat. 1796, 2022-23 (codified at 18 U.S.C. 2339A (2012)).

criminalizes material support that facilitates the commission of any one of 57 previously enacted terrorism-related offenses, which are explicitly listed in the statute.³² Two years later, Congress enacted the second material support prohibition codified at 18 U.S.C. 2339B³³. The central distinction between the two material support prohibitions is that where 2339A criminalizes material support for certain defined terrorism crimes, both international and domestic, 2339B criminalizes material support to certain designated foreign terrorist organizations" Since the attacks on 9/11, 448 or 51 percent of all terrorism defendants prosecuted by the Justice Department have been charged with material support to a foreign terrorist organization.⁶⁰

Sections 2339B, the provision that bans providing material support to a foreign terrorist organization (FTO), is, by the government's reckoning, the most important statute employed in terrorism prosecutions.⁶¹ Norman Abrams has described it as a "catch-all that can be invoked in widely varying situations where individuals engage in conduct that may contribute in some way to the commission of terrorist offenses.'⁹⁶²

³² *Ida*

³³ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 303, 110 Stat. 1214, 1250-53 (codified at 18 U.S.C. 2339B (2012)).

The original animating force behind the passage of the law was simple—Congress was concerned that terrorist groups were raising money in the United States under the cover of charitable activity.⁶³ 2339B was regarded as an attempt to close the loophole left open by previous terrorism support statutes; namely, it was designed as a tool to combat the purportedly pressing problem of terrorist groups raising money for violence under the

⁵⁹ Id.

⁶⁰ The Intercept, *supra* note 3.

(i Ctr. On Law & Sec., N.Y. Univ. Sch. Of Law, Terrorist Trial Report Card: September 11, 2001—September 11, 2011 13—14 (2011), available at <http://www.lawandsecurity.org/Portals/0/Documents/TTRC%20Ten%20Year%20Issue.pdf>

⁶²

Norman Abrams, The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code, I J. NAT'L SEC. & POL'Y 5, 7 (2005).

⁶³ Said, Wadie E., Crimes of Terror: The Legal and Political Implications Federal Terrorism Prosecutions, Oxford University Press (2015), Page 51.

cover of charity.³⁴ The technical term "material support" involves not just money but also "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel³⁵³⁶ and transportation, except medicine or

³⁴ Id. Page 52,

³⁵ Interestingly, "personnel" can include oneself. People traveling to join an overseas terror group can be charged with providing "personnel" under the statute.

³⁶ U.S.C. S 2339A(b)(

religious materials.⁶⁶ Unlike Section 2339A, S 2339B does not require any intent to aid in the commission of a criminal offense. Any support, even if given for humanitarian purposes, is a violation of 2339B.³⁷

The rationale of prohibiting any support, even for peaceful purposes is a "money is fungible" type of argument. As the Supreme Court has stated, "material support meant to promote peaceable, lawful conduct can be diverted to advance terrorism in multiple ways. The record shows that designated foreign terrorist organizations do not maintain organizational firewalls between social, political, and terrorist operations, or financial firewalls between funds raised for humanitarian activities and those used to carry out terrorist attacks. Providing material support in any form would also undermine cooperative international efforts to prevent terrorism and strain the United States' relationships with its allies, including those that are defending themselves against violent insurgencies waged by foreign terrorist groups."⁶⁸

The broad scope of Section 2339B came under constitutional attack in *Holder v. Humanitarian Law Project*.⁶⁹ The lawsuit was a civil challenge by individuals in the United States who wished to provide financial support and specialized training, and engage in advocacy in service of the political and

³⁷ *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

humanitarian goals of two FTOs: the Liberation Tigers of Tamil Eelam (LTTE), also known as the Tamil Tigers, a Sri Lankan rebel group, and the PKK, a Kurdish separatist group in conflict with Turkey.⁷⁰ The plaintiffs brought the lawsuit as a preemptive measure; rather than wait to be prosecuted under 2339B, they challenged the statute's constitutionality, based on the fact that the advocacy work they wished to pursue would likely expose them to criminal liability under the law's terms.⁷¹ By the time the dispute made its way to the Supreme Court in 2010, the issues had been distilled into a general challenge to the statute's criminalization of material support in the form of speech under the First Amendment, as well as an argument that four types of

⁶⁸ *Id.* at 23. at 23.

⁶⁹ 561 U.s. 1 (2010).

⁷⁰ *Id.* at 3.

⁷¹ *Id.* at 10.

material support—"training," "expert advice or assistance, service," and "personnel"—were unconstitutionality void for vagueness under the Fifth Amendment.³⁸ All the support that the plaintiffs were attempting to provide

³⁸ *Ids*

could be construed as protected speech under the First Amendment, and that support went to the legitimate, as opposed to the illegal, goals of an FTO.

The Court ruled that material support, even in the form of speech or association, could be criminalized because of its link to an FTO.³⁹ The Court made a somewhat blurry distinction between "lawful independent advocacy" and illegal material support in "coordination" with an FTO.⁴⁰

Part Three: Material Support and "Terrorism Experts" a Toxic Mix

In this section we attempt to demonstrate the interplay between the material support statutes and the use of "terrorism experts" illustrated by the prosecution of Tarek Mehanna for violating the material support ban, and unsurprisingly a case in which Evan Kohlmann's testimony was pivotal in securing a conviction.

³⁹ Id. 15-17.

⁴⁰ Id. 30-33. The Court also rejected the void for vagueness challenge, as applied to the facts of this case but left open the possibility of a different factual setting yielding a different result, id. at 14, 18-24.

Mehanna, 31, was born in the United States to Egyptian immigrant parents and grew up outside of Boston. He became a devout Muslim who was fiercely critical of US foreign policy, especially in Muslim countries. He believed deeply in the right of Muslims living in Muslim-majority countries to defend against foreign occupation. And he talked about it. He subtitled "jihadi" videos; he translated an archaic oft-translated Arabic text *39 Ways to Serve and Participate in Jihad*; and he engaged in religious and political debate online through instant messages, e-mails and web postings. He also traveled to Yemen for a brief trip in 2004—the government alleged he sought to join a terrorist training camp, while Mehanna claimed he sought religious and language instruction—but whatever he was looking for, he did not find it, and he quickly returned home.⁴¹

To support the material support claim, the government offered two theories of liability. First, the speech theory: The government's indictment charged that Mehanna "created and/or translated, accepted credit for authoring, and distributed text, videos, and other media, to inspire others to

⁴¹ Amna Akbar, *How Tarek Mehanna Went to Prison for a Thought Crime*, *The Nation*, December 31, 2013, <https://www.thenation.com/article/how-tarek-mehanna-went-prison-thoughtcrime/> last accessed May 14, 2019.

engage in violent jihad." ⁴²The government continued to press this argument in court even as it conceded that Mehanna did not translate or speak under Al Qaeda's direction and presented no evidence that he acted at the group's request, or even that he ever met or communicated with anyone from Al Qaeda.⁴³ The second theory of liability offered by the government is the travel theory. The government argued that Mehanna traveled to Yemen in search of a terrorist training camp so that he could prepare for battle against US troops in Iraq. It pushed this theory even as it conceded that there were no terrorist training camps in Yemen in 2004 and never introduced evidence that Mehanna had found one.⁷⁸

To support the charges under the speech theory, the government had to prove that the translations assisted Al- Qaeda in their recruiting efforts. On the travel theory, the government had to show that Mehanna traveled to Yemen for the purposes of joining a terror group. Kohlmann testified that the kind of videos and documents that Mehanna translated and promoted online

⁴² USA v. Mehanna et al, Docket No. 1:09-cr-10017 (D. Mass. Jan 15, 2009), Criminal Complaint filed November 7, 2008.

⁴³ Akbar, supra note 75.

⁷⁸ Id.

were a crucial function, allowing al-Qaida to recruit and incite young men to violence.

The defense called Marc Sageman, a doctor as well as a sociologist, and had been CIA case officer in Afghanistan coordinating America's covert operation against the Soviet occupation.⁷⁹ Sageman has studied al-Qaida from its birth in 1988; he knew and lived with all the major commanders of the mujahideen who were fighting the Soviet army. He became a forensic psychiatrist and has seen his writings included in Army training manuals. He consults for the Defense Department, the Department of Homeland Security and the CIA. He has classified security clearance; which government witnesses don't have.⁴⁴ On the stand Sageman was questioned,

Does al-Qaida use the Internet to recruit?"

"No," he replied, "that's not how people join al-Qaida."

"How do people join?"

"It's really a bottom-up phenomenon," Sageman answered.

⁴⁴ Id.

When questioned by defense attorneys about his methodology, Sageman answered, "I use a scientific method".

David Boeri, In Mehanna Trial, Defense Saves The Star Witness For Last, WBUR News, December 15, 2011, https://www.wbur.o@news/201_1/12/15/mehanna, last accessed May 15, 2019.

"And how does that compare with the government's witness, Mr. Kohlmann?" she asked.

"He tells stories," Sageman replied.⁴⁵

Conclusion

Prosecutions for terror related offenses reflect the legislature pushing the boundaries of criminal conduct- in some cases beyond the constitution. The executive branch engages in unethical conduct by using dubious nonqualified experts. It is imperative that the judicial branch stand up to its

⁴⁵ Id.

constitutional role and restrain these abuses. Courts have abdicated their critical "gatekeeping function" by allowing in "junk science" that virtually assure a conviction. Perhaps Isaiah said it best, "His watchmen are blind, all of them know nothing. All of them are mute dogs unable to bark, Dreamers lying down, who love to slumber"-