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The Lone Wolf – Solo Terrorism and the Challenge of Preventative Prosecution

Kendall Coffey

I. INTRODUCTION

On September 11, 2001, as we will never forget, al-Qaeda's elaborate planning and deployment of numerous terrorist agents resulted in shocking destruction and 2,976 deaths. Since the time of those shattering atrocities, though, threats within our borders have centered increasingly not on concerted activities but on solo actors of terrorism.¹ This emerging threat – often described as “Lone Wolf Terrorism”² – has seen efforts that were tragically successful including the 2009 shooting rampage that left thirteen dead at Fort Hood. Others have come frighteningly close to carnage, such as the 2010 attempt to detonate explosives in Times Square. Reports indicate that in recent years most Islamic terrorist plots in the United States do not employ multiple agents in concert and instead are perpetrated by a “Lone Wolf.”³ Recognizing this growing danger, President Barack Obama observed that single actor terrorism was “the most likely scenario that we have to guard against right now.”⁴ When an individual acts alone – and does not communicate destructive intentions to others – that per-

¹ See Patrick Jonsson, *How Undercover Agents Nabbed ‘Lone Wolf’ U.S. Capitol Terrorist*, THE CHRISTIAN SCI. MONITOR (Feb. 23, 2012), <http://www.alaskadispatch.com/article/how-undercover-agents-nabbed-lone-wolf-us-capitol-terrorist?page=-full>.

² Raffaello Pantucci, *A Typology of Lone Wolves: Preliminary Analysis of Lone Islamist Terrorists*, THE INT’L CTR. FOR THE STUDY OF RADICALISATION & POLITICAL VIOLENCE (Apr. 2011), http://icsr.info/publications/papers/1302002992ICSRPaper_ATypologyofLoneWolves_Pantucci.pdf. In the analysis published by the International Centre for the Study of Radicalization and Political Violence, the term “Lone Wolf terrorist” refers to “individual pursuing Islamic terrorist goals alone, either driven by personal reasons or their belief they are not of any ideological group...” *Id.* at 9.

³ Jonsson, *supra* note 1.

⁴ *Officials Worry About Solitary Terrorists*, UPI (Aug. 18, 2011), http://www.upi.com/Top_News/US/2011/08/18/Officials-worry-about-solitary-terrorists/UPI-22251313648694/; see also Jason Ryan, *Texas Student Khalid Aldawsari Arrested on Terror Charges; Target George W. Bush*, ABC NEWS (Feb. 24, 2011), <http://abcnews.go.com/Politics/texan-charged-plans-bomb-bush-home-dams-nuclear/story?id=12990927#.UC6Ex46Pf3Q> (“... the arrest of Aldawsari is alarming to counterterrorism officials because he was largely undetected...”).

son is far more likely than a collaborative to remain invisible until the moment of attack. Homeland Security Secretary Janet Napolitano underscored the difficulty of prior detection in these circumstances: “[B]y their very definition, they’re not conspiring with others, they may not be communicating with others, there’s very little to indicate that something is under way.”⁵ Emphasizing the stealth strategies available to lethal soloists, Andres Breivik, who used guns and bombs to kill seventy-seven people in Oslo, Norway, wrote shortly before his attacks in July 2011: “Solo Martyr Cells are completely unknown to our enemies and have a minimal chance of being exposed.”⁶

II. THE “LONE WOLF” THREAT

Because terrorism is usually driven by beliefs that are shared with others, it may seem anomalous that one would act apart from that network and without active accomplices.⁷ Yet several reasons seem to account for rising perils from solitary perpetrators of terrorism.⁸ First, since September 11th, United States military forces abroad and law enforcement at home have relentlessly pursued a highly effective campaign against Jihadist groups.⁹ Osama Bin Laden was one of many in al-Qaeda who were eliminated through arrest or military action, leaving the organization reeling and perhaps incapable of return-

⁵ Paul Cruickshank & Tim Lister, *The Lone Wolf—the Unknowable Face of Terror*, CNN OPINION (Feb. 18, 2012), http://articles.cnn.com/2012-02-18/opinion/opinion_lone-wolf-terror_1_lone-wolf-terror-attack-lone-terrorists?_s=PM:OPINION.

⁶ *Id.* at 4.

⁷ In the Code of Federal Regulations, terrorism is defined as “the unlawful use of force and violence against person or property to intimidate or coerce a government population or any segment thereof, in furtherance of political or social objectives.” 28 C.F.R. § 0.85(l) 2010.

⁸ The ICSRVP classifies lone wolves into four distinct groups. *See generally* Pantucci, *supra* note 2, at 14-30. The “loner” is an individual actor who, without the any external command or control, plans or carries out an act of terrorism by him or herself. *Id.* at 14. Similar to the “loner,” the “lone wolf” operates in the real world alone, but has some form of contact with members of a terrorist organization on the Internet. *Id.* at 19-20. The “lone wolf pack,” as one can imagine, consists of a group of lone wolves operating outside any formal structure or command. *Id.* at 24-25. Finally, the “lone attacker” will carry out an act of terrorism alone, but will do so under the direct order of a terrorist organization like al Qaeda. *Id.* at 29-30. Distinct from the “lone wolf” or “lone wolf pack,” the “lone attacker” has actual connections and regular contact with organizations. *Id.*

⁹ *Hearing before the Permanent Select Comm. on Intelligence U.S. House of Representatives*, 112th Cong. 2 (2011) (statement of Matthew G. Olsen), *available at* http://www.nctc.gov/press_room/speeches/dnctc_testimony_before_hpisci_111006.pdf [hereinafter *Olsen*] (“Counterterrorism successes and sustained pressure have left al-Qaeda at its weakest point in the last ten years, and significantly degraded the group’s ability to conduct attacks outside of South Asia. This is exemplified by the lack of a successful operation in the West since the 2005 transportation bombings in London. Further, the killing of Usama bin Ladin [sic] in May and last month’s killing of al-Qaeda’s newest deputy, Atiyah abd al Rahman, mark strategic milestones in our fight against al-Qaeda and are likely to accelerate al-Qaeda’s decline.”).

ing to its former capacity for organized destruction.¹⁰ Meanwhile, within the United States, prosecutors and investigators have had great success against domestic terror cells.¹¹ Utilizing the prosecutor-friendly laws of conspiracy as well as aggressive undercover and surveillance operations,¹² they have targeted groups across the country with striking success. Additionally, apparently recognizing the serious, perhaps irreversible, destruction to its leadership and infrastructure, al-Qaeda itself has encouraged solo terrorists to act. Its Yemen branch even published a magazine article in English, inciting attacks by lone operatives and providing a recipe, “How to Make a Bomb in Your Mom’s Kitchen.”¹³ Al-Qaeda also released a video soliciting unilateral violence titled, “You Are Only Responsible for Yourself.”¹⁴

Along with growing recognition – by United States authorities as well as terrorists – that a single perpetrator is less detectible, is the reality that deadly results can be achieved without accomplices. Today, perhaps more than ever before, a collective’s destructive belief can be advanced without collective action. In the Internet age, neither group training nor group reinforcement is required for an actor’s lethal agenda. The websites, social media, and online chat rooms give a potential terrorist access to information about everything from guns and explosives to government facilities,¹⁵ while also creating instant

¹⁰ *Id.*

¹¹ *Id.*

¹² Federal prosecutors have convicted more than 90% of terrorism-charged defendants on at least one count of terrorism according to a study conducted by Human Rights First. The study examined 257 cases of terrorism from 9/11 through the end of 2007. *Fact Sheet: Prosecuting and Detaining Terror Suspects in the U.S. Criminal Justice System*, 09 Op. Att’y Gen. 564 (June 9, 2009), <http://www.justice.gov/opa/pr/2009/June/09-ag-564.html> (citing *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Court*, HUMAN RIGHTS FIRST). “Since the 1990s, the U.S. Attorney’s Office for the Southern District of New York (S.D.N.Y) has investigated and successfully prosecuted a wide range of international and domestic terrorism cases — including the bombings of the World Trade Center and U.S. Embassies in East Africa in the 1990s. More recent cases include those against individuals who provided material support to al-Qaeda and other terrorist groups, as well as against international arms trafficker Monzer al Kassar and the Somalian pirate charged in the hijacking of the Maersk Alabama.” *Id.* Not only have federal prosecutors had great success securing convictions, but the United States has also frozen over \$139 million funds and assets and has seized more than \$60 million in funds and assets, all aimed at aiding terrorism. *Department of the Treasury, Budget of The United States Government*, U.S. GOVERNMENT PRINTING OFFICE (Feb. 2, 2004), <http://www.gpo.gov/fdsys/pkg/BUDGET-2005-BUD/pdf/BUDGET-2005-BUD-25.pdf>; see also *Winning The War on Terror, Budget of The United States Government*, U.S. GOVERNMENT PRINTING OFFICE (Feb. 2, 2004), <http://www.gpo.gov/fdsys/pkg/BUDGET-2005-BUD/pdf/BUDGET-2005-BUD-7.pdf>.

¹³ Paul Cruickshank & Tim Lister, *The ‘Lone Wolf’ – The Unknowable Face of Terror*, CNN (Feb. 18, 2012), <http://edition.cnn.com/2012/02/18/opinion/lone-wolf-terror/index.html>.

¹⁴ *Id.*

¹⁵ Olsen, *supra* note 9, at 6 (“Al-Qaeda core and some of its regional affiliates have repeatedly encouraged independent attacks, which could further encourage violent acts. Increasingly sophisticated English-language propaganda, including Inspire magazine, that provides

messages of hate to intensify the motivation for terrorism. There is no need for a would-be Jihadist to attend meetings with other radicals where an FBI informant might be present. With all of the information that can be obtained on websites and Internet articles, a potential terrorist has much less need than before to seek others for training in classes that could be more easily subject to surveillance by law enforcement. As FBI Director Robert S. Mueller observed, “[W]e have seen a rise in websites that promote jihad and give step-by-step instructions on how to build suicide vests and explosives.”¹⁶

Today, would-be Jihadists can, in effect, conduct their own home schooling on creating destructive devices and selecting targets of terrorist opportunity. Moreover, through the Internet, a loner cannot only become better informed but dangerously energized through ongoing reinforcement of prejudices and paranoias.¹⁷ As President Obama explained in an interview, “When you’ve got one person who is deranged or driven by a hateful ideology, they can do a lot of damage and it’s a lot harder to track down those lone wolf operators.”¹⁸

Recent lone wolf scenarios have seen varying stages of operational progress at the time of detection. In some instances, terrorist operations were actually initiated before the menace became known. In the worst of the solo attacks, United States Army Major Nidal Hassan shot 13 people to death at Fort Hood, Texas, in a November 2009 rampage that also wounded almost twenty-four more victims.¹⁹ In

extremists with guidance to carry out homeland attacks remains easily available via the Internet. English-language web forums also foster a sense of community and further indoctrinate new recruits, both of which can lead to increased levels of violent activity.”); see also Susan B. Glasser & Steve Coll, *The Web as Weapon*, WASH. POST (Aug. 9, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/08/08/AR2005080801018_3.html (describing how the Internet and online forums are used to disseminate ideological rhetoric and to provide instructions on how to, among many things, make and use explosives); Gabriel Weimann, *Terrorists and Their Tools – Part II*, YALE GLOBAL ONLINE (Apr. 26, 2004), <http://yaleglobal.yale.edu/content/terrorists-and-their-tools---part-ii> (“They can learn from the Internet about the schedules and locations of targets such as transportation facilities, nuclear power plants, public buildings, airports and ports, and even counterterrorism measures.”).

¹⁶ Robert S. Mueller, III, Dir. Fed. Bureau of Investigation, *Remarks at the Executive Club of Chicago* (Sept. 12, 2006), available at <http://www.fbi.gov/news/speeches/fighting-terrorism-yesterday-today-and-tomorrow/>.

¹⁷ Reinforcement and encouragement can push some would-be terrorists across the line from aspirational to operational. “Cromitie was unlikely to commit an act without the support of the FBI source” *United States v. Cromitie*, 781 F. Supp. 2d 211, 218 (S.D.N.Y. 2011).

¹⁸ *Obama: ‘Lone Wolf’ Terror Attack Biggest Concern*, YAHOO NEWS (Aug. 16, 2011), <http://news.yahoo.com/obama-lone-wolf-terror-attack-biggest-concern-223347040.html> [hereinafter *Obama: ‘Lone Wolf’ Terror*].

¹⁹ *Army Charges Fort Hood Shooting Suspect With 32 Counts of Attempted Murder*, FOXNEWS.COM (Dec. 3, 2009), <http://www.foxnews.com/us/2009/12/02/army-charges-fort-hood-shooting-suspect-counts-of-attempted-murder/> [hereinafter *Army Charges Fort Hood Shooting Suspect*]; see also *Gunman Kills 12, Wounds 31 at Fort Hood*, MSNBC.COM,

addition to cases of tragic results, there have been terrorist attacks that were actually launched but failed to succeed due to malfunctioning materials or other operational failures. Thus, a single terrorist was able to plant explosives in New York's Times Square²⁰ while the so-called "Underwear Bomber" succeeded in boarding a commercial aircraft and partially ignited explosives.²¹ Tragedies were averted because of failed detonations rather than prior detection.

Fortunately, with the overwhelming majority of lone wolf efforts, law enforcement has intercepted would-be killers before their plans advanced to a point of extreme danger. At times aided by citizen diligence, early awareness has led to intensive surveillance and covert interaction with the suspect until the time of arrest and indictment. In some instances, investigations have been initiated based on concrete evidence of terrorist activity.²² With others, most of the ingredients of criminality were largely furnished by undercover law enforcement agents who enticed suspects to participate in criminal acts that may not have otherwise materialized.²³

This article examines the lone wolf terrorist and the legal strategies that are deployed to combat this accelerating threat of terrorism. With respect to schemes that progressed to actual operations, important questions arise as to whether more could have been done to avert disaster. As to terrorist activities that were uncovered in early stages, valuable lessons may be derived as to how such success was achieved. In some instances, questions will continue to be debated as to whether the target was a would-be terrorist or a wannabe loose talker who was criminalized through law enforcement enticement. These issues and more will be engaged in paragraphs that follow.

III. HISTORICAL PERSPECTIVES

Plotting and executing a terrorist attack without commands from an organization represents a deadly tradition. In the nineteenth century, Mihkail Bakunin, the infamous Russian anarchist, described the

http://www.msnbc.msn.com/id/33678801/ns/us_news-crime_and_courts/t/gunman-kills-w#.T4TVRW_G6V8 (last updated Nov. 5, 2009) [hereinafter *Gunman*].

²⁰ Indictment, United States v. Shahzad, No. 10-cr-00541, 2010 WL 2464622 (S.D.N.Y., 2010).

²¹ Indictment, United States v. Abdulmutallab, No. 2:10-cr-20005, 2010 WL 22849 (E.D. Mich. Jan. 6, 2010).

²² See generally Complaint, United States v. Aldawsari, No. 11-MJ-017, 2011 WL 668355 (N.D. Tex. Feb. 23, 2011) [hereinafter *Complaint Aldawsari*].

²³ United States v. Cromitie, 781 F. Supp. 2d 211 (S.D.N.Y. 2011); Complaint, United States v. Khalifi, No. 1:12-MJ-87, 2012 WL 517540 (E.D. Va. Feb. 17, 2012).

concept of “propaganda by deed”²⁴ and advocated that solitary assassins should kill individuals who represented the corrupt social structure.²⁵ Among other things, acting individually allowed anarchists to avoid being bogged down by the coercive power usually associated with large, hierarchal organizations.²⁶ Although in the early 1900’s lone wolf terrorism fell out of favor with many anarchists,²⁷ terrorism by single perpetrators accelerated later in the century. Lone wolves killed 7% of United States terrorism victims during 1955-1978, a rate that increased to 26% from 1978-1999.²⁸ White supremacy, Islamist fundamentalism, anti-abortion, and nationalism/separatism have been the most prevalent ideological agendas for lone wolves in recent years.²⁹ But the best known cases actually reflect a wider range of motivations.

Leon Czolgosz, an anarchist and one of the earliest known lone wolves in American history, shot and killed President William McKinley after hearing a speech by a prominent figure in the anarchist movement.³⁰ On September 6, 1901, Czolgosz waited in line for his turn, greeted the President at a reception, and then shot him twice in the abdomen. McKinley died a week later.³¹

From 1940 to 1956, George Metesky, enraged at his employer’s denial of his disability claim after suffering a debilitating injury on the job, planted approximately thirty bombs in New York City.³² He usually targeted public places, fixing explosives to the outside of a utilities building and to the bottom of seats in movie theaters.³³ Metesky’s acts of terrorism never killed anyone but did injure seven people.³⁴

Millions will continue to debate whether the assassinations of President John F. Kennedy in 1963 and of Dr. Martin Luther King in 1968 were single perpetrator crimes or terrorism orchestrated by con-

²⁴ *Lone-Wolf Terrorism*, INSTITUT VOOR VELLIGHEIDS-EN CRISISMANAGEMENT, 12 (June 6, 2012), <http://www.transnationalterrorism.eu/tekst/publications/Lone-Wolf%20Terrorism.pdf> [hereinafter *Lone-Wolf Terrorism*].

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 14. It should be noted that these figures assume that a lone wolf is either an unaffiliated individual who commits an act of terrorism, but can also include a group of up to 3 individuals unconnected with some other group that commit an act of terrorism. See *id.* Thirty unaffiliated individual terrorist cells were identified from 1968-2007 in the United States, accounting for almost 42% of all identified cases of unaffiliated terrorism in the world. *Id.*

²⁹ *Lone-Wolf Terrorism*, *supra* note 24, at 20.

³⁰ *Leon Czolgosz*, SPARTACUS EDUCATIONAL, <http://www.spartacus.schoolnet.co.uk/USAczolgosz.htm> (last visited April 11, 2012).

³¹ *Id.*

³² *Lone-Wolf Terrorism*, *supra* note 24, at 98.

³³ *Id.*

³⁴ *Id.*

spiracies. Most agree, though, that Sirhan Sirhan acted alone when he assassinated Senator Robert F. Kennedy on May 6, 1968, in Los Angeles, California.³⁵ Born a Palestinian, Sirhan's diary revealed that he attacked Senator Kennedy because of his support for Israel and his pledge to send bombers to that country.³⁶

Ten years later, Ted Kaczynski, known as the "Unabomber," began a deadly bombing campaign. Starting in 1978, he placed or mailed sixteen bombs until his eventual arrest in 1996.³⁷ He had left a tenure-track position as a mathematician at the University of California to begin living a solitary life in a remote mountain cabin. Identifying himself as an anarchist,³⁸ Kaczynski believed that a technological society is ultimately incompatible with individual freedom and must therefore be destroyed in order to free humanity.³⁹ His attacks wounded twenty-three and killed three.⁴⁰ Kaczynski is spending the rest of his life in a maximum security federal prison.

IV. LONE WOLF ATTACKS SINCE 9/11

A. Undetected Operations

The wide array of beliefs and ideologies that motivated soloist terror in the past added to the challenges of developing meaningful profiles and predicting future perpetrators. In the last few decades, though, a Jihadist agenda is emerging increasingly as a common denominator. The worst mass murder since September 11, 2001 that has been linked to a Jihadist agenda was the Fort Hood murder spree allegedly perpetrated by Major Nidal Hassan, a United States army psychiatrist. Using firearms, he went on a rampage in November 2009, killing thirteen people and attempting to kill many more before he was shot and paralyzed.⁴¹ Much of the motivation for Hassan's murderous binge remains unclear. And yet his proclamation that day as he stood on a desk declaring, "Allāhu Akbar," the Arabic phrase

³⁵ *Id.* at 98-99.

³⁶ *Id.*

³⁷ *Id.* at 99-100.

³⁸ HEATHER GAUTNEY, *PROTEST AND ORGANIZATION IN THE ALTERNATIVE GLOBALIZATION ERA: NGOS, SOCIAL MOVEMENTS, AND POLITICAL PARTIES* 199 (Palgrave Macmillan, 2009).

³⁹ Paul Cooijmans, *Comment on the Unabomber's Manifesto*, <http://www.paulcooijmans.com/psychology/unabomber.html> (last visited Apr. 15, 2012) ("The Unabomber's central and fatal conclusion can be summed up as: Technological society is incompatible with individual freedom and must therefore be destroyed and replaced by primitive society so that people will be free again.").

⁴⁰ *Lone-Wolf Terrorism*, *supra* note 24, at 99.

⁴¹ *Army Charges Fort Hood Shooting Suspect*, *supra* note 19.

for “God is Great,” coincides with other evidence indicating a violent reaction towards perceived American aggression against Muslims.⁴² Hassan used guns, the simplest tools for terrorists, rather than explosives. In contrast to homemade explosives, where the acquisition of key ingredients may create clues, terrorist symptoms are much less apparent with firearms and less likely to prompt intervention. In a society where the possession of handguns is now an individual constitutional right,⁴³ it is problematic and likely unrealistic to prevent access to guns except for those who have already been convicted of a felony or adjudicated mentally ill.

Hassan had no prior criminal history to suggest that a military officer and trained medical doctor could erupt in such heinous fury.⁴⁴ News reports indicate that Hassan was “pretty upset” about his pending deployment to Iraq, and he had recently received poor performance reviews.⁴⁵ By themselves, though, these circumstances do not comprise a catalyst for a killing spree. More intriguing are reports about e-mail exchanges, radical statements, and Internet postings that, if substantiated, would have signaled a dangerous mindset.⁴⁶

While the trial of Hassan may shed further light about the preventability of his crimes, when Abdul Haqim Mujahid Muhammad killed one victim and wounded another at an army recruiting office in Memphis, Tennessee, prior concerns were apparent, but no action had been taken.⁴⁷ Once a normal teenager from a solid family upbringing, Muhammad had rejected his own culture and had adopted Islam by

⁴² *Id.*

⁴³ See *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Gunman*, *supra* note 19.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Some reports linked Hasan to radical cleric Anwar al-Awlaki. See Neal Conan and Dina Temple-Raston, *FBI Tracks Possible Military Insider Threats*, NATIONAL PUBLIC RADIO (June 27, 2012), <http://www.npr.org/2012/06/27/155849671/fbi-tracks-possible-military-insider-threats>. According to NPR, there were in all “16 emails between Anwar al-Awlaki and Nidal Hasan, and that’s a lot of emails. And they - the Department of Defense and the FBI didn’t share information on that.” *Id.* According to a Fox News report, “The information about Hasan’s contact with al-Awlaki, who was killed Sept 30, 2011, in a CIA-led operation in Yemen, was reportedly not shared by the JTTF in Washington, D.C., with army investigators . . . Fox News confirmed that Hasan openly saw suicide bombings as justified and cited the writings of Usama bin Laden on at least three occasions.” Catherine Herridge, *Exclusive: Outside Review of Massacre at Fort Hood To Be Filed Soon, Calling For Change at FBI*, FOXNEWS.COM (July 6, 2012), <http://www.foxnews.com/politics/2012/07/05/exclusive-independent-fort-hood-calls-for-change-at-fbi/#ixzz21544SiRe>. If there was a single point of failure, Hasan’s email contact with a known terrorist was never connected to his radical statements as an Army officer and psychiatrist. *Id.*

⁴⁷ James Dao, *A Muslim Son, a Murder Trial and Many Questions*, N.Y. TIMES, Feb. 16, 2010, available at <http://www.nytimes.com/2010/02/17/us/17convert.html>; Robert A. Martin, Affidavit of Search & Seizure Warrant (No. 8766) (Dist. Ct. Little Rock Ark., 2009), available at http://www.investigativeproject.org/documents/case_docs/988.pdf.

the time of his early twenties.⁴⁸ Afterwards, he traveled to Yemen to learn Arabic and married a Yemeni woman. When Yemeni officials found fake Somali papers on Muhammad, they arrested him, concerned that Somali was a training ground for Islamic extremists.⁴⁹ Following that arrest, Muhammad was interviewed by the FBI. Through his family's efforts, the United States Department of State intervened to seek his release.⁵⁰ Ultimately, Muhammad's trial in Yemen was avoided as a result of the United States government's entreaties, and he was deported and returned to the United States, but his alienation intensified and his radicalization deepened.⁵¹

Following the murderous shootings, Muhammad pled guilty and received a life sentence.⁵² His father, Melvin Bledsoe, was grief-stricken, not only for his son but also for the victims. In March 2011, Bledsoe submitted a statement to the Committee on Homeland Security decrying the lack of awareness about the radicalization of young people and the failure to take preventative measures in his son's case.⁵³ In those comments, he pointed out that, although the FBI was alarmed by the beliefs disclosed during Muhammad's October 2008, interview, that information was not shared with his family.⁵⁴ Nor did the family have an opportunity to share its deepening concerns about Muhammad's radicalization with federal agents. As a result, according to Bledsoe, the indoctrination of his son progressed to a point where al-Qaeda members "convinced him to get revenge on America."⁵⁵ Bledsoe blamed the "wrong caused by political correctness"⁵⁶ and emphasized that more action needed to be taken with respect to Islamic extremism.⁵⁷ Expressing the hope that other children would not be similarly manipulated, Bledsoe said, "We must stop these extremist invaders from raping the minds of American citizens on American soil."⁵⁸

It was not prior detection but an operational failure that saved lives when Faisal Shahzad attempted to detonate explosives inside a

⁴⁸ Dao, *supra* note 47.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *The Extent of Radicalization in the American Muslim Community and that Community's Response: Hearing Before the Comm. Of Homeland Sec. 112th Cong. (2011)* (statement of Melvin Bledsoe, private citizen), available at <http://homeland.house.gov/sites/homeland.house.gov/files/Testimony%20Bledsoe.pdf>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

rental car in the middle of New York's Times Square. As a naturalized United States citizen, Shahzad returned to the United States in February 2010, after spending five months in Pakistan.⁵⁹ On May 1, 2011, inside a rented Nissan Pathfinder, he placed multiple tanks filled with propane gas, gasoline canisters, fertilizer, fireworks, clocks, wiring, and other components to create homemade explosives.⁶⁰ His efforts to activate the explosives failed, though, and when smoke was seen emanating from the car, vigilant police officers evacuated the area and called in the N.Y.P.D. bomb squad. Law enforcement efforts immediately commenced what led to Shahzad's arrest two days later as he attempted to leave the United States on a commercial flight to Dubai.⁶¹ When captured, Shahzad was utterly unrepentant. Stating that he had received training in explosives in Pakistan, he fully acknowledged his efforts to explode the bomb and commit mass murder. Shahzad will spend the rest of his life in a maximum security federal prison.⁶²

Also horrifically close to inflicting carnage was Umar Farouk Abdulmutallab. On Christmas Day 2009, the twenty-three year old Nigerian attempted to explode a suicide bomb on a transatlantic flight from Amsterdam to Detroit with 290 people on board.⁶³ While the explosive materials imbedded in his underwear did not detonate,⁶⁴ the resulting fire burned portions of Abdulmutallab's body. The terrifying proximity to disaster sparked a controversy over whether Abdulmutallab should have been permitted to board that flight.⁶⁵ Abdulmutallab's father, a Nigerian public official, had notified United

⁵⁹ *How Faisal Shahzad Was Caught: Audio From Emirates Airlines Flight*, HUFFINGTON POST (May 25, 2011), http://www.huffingtonpost.com/2010/05/04/faisal-shahzad-audio-flight-emirates-airlines_n_562776.html.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Ron Sherer, *Life Sentence for Faisal Shahzad, Could Join Shoe Bomber in Colorado*, THE CHRISTIAN SCI. MONITOR (Oct. 5, 2010), <http://www.csmonitor.com/usa/justice/2010/1005/life-sentence-for-faisal-shahzad>.

⁶³ *Times Topics - Umar Farouk Abdulmutallab*, N.Y. TIMES (Feb. 16, 2012), http://topics.nytimes.com/top/reference/timestopics/people/a/umar_farouk_abdulmutallab/index.html [hereinafter *Abdulmutallab*].

⁶⁴ Indictment, *United States v. Abdulmutallab*, No. 2:10-cr-20005, 2010 WL 22849 (E.D. Mich. Jan. 6, 2010).

⁶⁵ Less than two weeks after the attack, the Obama administration mandated full-body pat downs for people flying into the United States from Afghanistan, Algeria, Lebanon, Libya, Iraq, Nigeria, Pakistan, Saudi Arabi, Somalia, and Yemen. Jonathan Alcom, *Airport Security*, SECURE AIRPORTS (Jan. 6, 2010), <http://secureairports.blogspot.com/2010/01/airport-security.html>. In addition, citizens from these countries had their carry-ons checked again before they boarded the plane. See *Airport Security*, N.Y. TIMES TOPICS, http://topics.nytimes.com/top/reference/timestopics/subjects/a/airport_security/index.html?inline=nyt-classifier (last updated Aug. 12, 2012).

States' authorities that he believed his son had become dangerously committed to Islamic radicalism.⁶⁶ Although Abdulmutallab was placed upon a watch list, he was not designated for a no-fly status. As a result, he was able to skirt the watch list by boarding the Delta Airlines flight in Amsterdam and come within moments of exploding a suicide bomb that would have caused hundreds of deaths. Tragedy was averted but only because his detonation efforts failed. It is apparent that highly reliable information that Abdulmutallab might be dangerous did not translate into security measures making him unsuitable for boarding commercial airlines. Described by prosecutors as "an unrepentant would-be mass murderer," he was sentenced in February 2012, to life in prison.⁶⁷

Like Muhammad, whose solid family in Memphis deplored his actions, Abdulmutallab had an eminently respectable family background. He also had, for law enforcement purposes, a clean record. With both young men, families were deeply worried about their son's accelerating radicalization, but the communication between responsible families and responsive authorities failed to make a timely connection.

B. Prior Detection – Citizens' Tips Lead to Arrests

Citizen vigilance was the key to detecting the dangerous propensities of Saudi college student Khalid Aldawsari in Lubbock, Texas. In February 2011, when he attempted to purchase phenol, a component of explosives, Aldawsari was reported to the authorities by a North Carolina supply company.⁶⁸ As authorities later learned, Aldawsari had already acquired three gallons of sulfuric acid and eight gallons of nitric acid, two key ingredients of bomb-making, both of which were purchased over the Internet.⁶⁹ Once alerted, the FBI used secret Foreign Intelligence Surveillance Act warrants to enter his apartment. The resulting search disclosed highly incriminating evidence ranging from a journal entry about carrying out attacks inside the United States to e-mails listing "nice targets" and instructions for converting a cell phone into a detonator.⁷⁰ According to the criminal

⁶⁶ *Abdulmutallab*, *supra* note 63.

⁶⁷ 'Underwear Bomber' Umar Farouk Abdulmutallab Handed Life Sentence, THE GUARDIAN, Feb 16, 2012, <http://www.guardian.co.uk/world/2012/feb/16/underwear-bomber-sentenced-life-prison?INTCMP=SRCH>.

⁶⁸ Charlie Savage & Scott Shane, *Saudi Student is Charged in Texas With Plotting Attacks in the U.S.*, N.Y. TIMES, Feb. 25, 2011, at A16, available at http://www.nytimes.com/2011/02/25/us/25_terror.html.

⁶⁹ *Complaint Aldawsari*, *supra* note 22 at 5.

⁷⁰ Savage, *supra* note 68.

complaint filed against Aldawsari, his blog entries included his request to “grant me martyrdom for your sake and make Jihad easy for me only in your path”⁷¹ Aldawsari’s e-mail account served as repositories for his research on targets, explosives, and explosive components.⁷²

Not only was the evidence of Aldawsari’s deadly objectives overwhelming, but his capacity to inflict destruction was also clear. His assembly of components for explosives, along with his studies in chemical engineering, indicated an extremely dangerous scheme well on its way to perpetration until a member of the public alerted the authorities. On June 27, 2012, a federal court convicted Adawsari for attempting to use a weapon of mass destruction. Aldawsari will be sentenced on October 9, 2012 and faces life in prison.⁷³

A citizen’s tip also prompted authorities in Waco, Texas to investigate United States Army Private First Class Naser Abdo, following his purchase of six pounds of gunpowder, shotgun ammunition, and a magazine for a semi-automatic weapon.⁷⁴ A twenty-one year old soldier, Abdo had earlier invoked Muslim beliefs to seek conscientious objector status. His military status, however, was placed on hold following his arrest for child pornography,⁷⁵ and in early July 2011, he went AWOL (Absent Without Official Leave). Following the tip from the gun store clerk a few weeks later, agents arrested Abdo in a motel room a few miles from Ft. Hood. Inside his room, agents found a hand gun, gun powder, shrapnel, pressure cookers, and an article apparently published by al-Qaeda, “Make a Bomb in the Kitchen of Your Mom.”⁷⁶ Abdo admitted that he intended to construct two bombs and explode them in a restaurant frequented by soldiers. As he was led from court the day after his arrest, he shouted, “Nidal Hasan Fort Hood,” in apparent tribute to the alleged perpetrator of mass murder.⁷⁷ As a result of a store clerk’s vigilance and the ensuing counter-terrorism effort, Abdo’s alleged scheme was stopped within days

⁷¹ *Id.*; *Complaint Aldawsari*, *supra* note 22 at 6.

⁷² *Complaint Aldawsari*, *supra* note 22 at 4.

⁷³ *Saudi is Convicted in Bomb Attempt*, N.Y. TIMES, June 28, 2012, at A19, available at <http://www.nytimes.com/2012/06/28/us/saudi-is-convicted-in-bomb-attempt.html>.

⁷⁴ See Warrant for Arrest, *United States v. Abdo*, No. W11-167M, 2011 WL 3500841 (W.D. Tex. Aug 1, 2011).

⁷⁵ *AWOL Soldier Indicted in Fort Hood Bomb Plot*, YAHOO NEWS (Aug. 9, 2011), <http://news.yahoo.com/awol-soldier-indicted-fort-hood-bomb-plot-204446980.html> [hereinafter *AWOL Soldier*].

⁷⁶ *Complaint*, *United States v. Abdo*, No. 6:11-mj-00167-JCM, 2011 WL 3211099 (W.D. Tex. Aug 1, 2011); *AWOL Soldier*, *supra* note 75.

⁷⁷ *Accused Ft. Hood Bomb Plotter Charged with Attempted Use of WMD*, FOX NEWS (Nov. 8, 2011), <http://www.myfoxboston.com/story/17774001/accused-ft-hood-bomb-plotter-charged-with-attempted-use-of-wmd>.

of potential disaster.⁷⁸ Thereafter, Abdo was convicted on July 12, 2012 of six felonies, including planning to blow up a restaurant full of Fort Hood soldiers and planning to create a weapon of mass destruction. He faces a life sentence.⁷⁹

C. Prior Detection - Targeting Suspects Through Undercover Operations

As the fatal and near-fatal cases of lone wolf terrorism demonstrate, solitary schemes provide fewer clues prior to perpetration. To confront the daunting challenges of prior detection and the frightful consequences of failure, federal authorities pursue even modest evidence of terrorist leanings with intensity in order to assure that no stone is left unturned. To unearth any symptom of Islamic militancy, undercover agents make aggressive attempts to test a subject's attitudes and potential for destructive conduct. At times, these pursuits include immersing the subject in unrelenting enticements that, as one observer suggested, "might be having the effect of turning armchair observers to active radicals."⁸⁰ As with any sting operation, imaginary schemes are created by investigators to bait the trap for the subject.⁸¹ As a result, questions may arise as to whether a crime was prevented by law enforcement or effectively created by undercover informants.

The publicly-disclosed facts do not show what made Rezwan Ferdaus a person of interest in the first place. But when, outside his mosque in Worcester, Massachusetts, a cooperating witness began discussing firearms, Ferdaus approached the cooperator to inquire

⁷⁸ Warrant for Arrest, *United States v. Abdo*, No. 6:11-mj-00167-JCM, 2011 WL 3500841 (W.D. Tex. Aug 1, 2011).

⁷⁹ Sarah Kuta, *Naser Jason Abdo Sentenced to Life for Fort Hood Plot*, HUFFINGTON POST (Aug. 10, 2012), http://www.huffingtonpost.com/2012/08/10/naser-jason-abdo-fort-hood_n_1764297.html

⁸⁰ Jonsson, *supra* note 1.

⁸¹ A sting operation is "defined as any effort by the authorities to encourage wrongdoing, with the intention of punishing the offenses that result." Bruce Hay, *Sting Operations, Undercover Agents, and Entrapment*, NELLCO LEGAL SCHOLARSHIP REPOSITORY (Oct. 9, 2003), http://lsr.nellco.org/cgi/viewcontent.cgi?article=1229&context=harvard_olin. For example, in the case of *United States v. Nunez*, 146 F.3d 36 (1st Cir. 1998), a police informant asked the defendant, a drug addict who financed his drug addiction by building and selling explosives to gangs in Massachusetts, to construct a bomb to kill members of a rival gang. Nunez agreed and went shopping with the undercover agent for all of the necessary ingredients and parts. *Id.* After finishing the job, the defendant handed the bombs in a duffel bag to the officer and in exchange, the officer paid him \$75. *Id.* Meanwhile, the police informant was wearing a wire and the car contained a hidden video camera. *Id.* The police saw and heard everything. *Id.* Upon completion of the deal, the police arrested Nunez and charged him with unlawfully possessing and selling nine pipe bombs. *Id.* He was sentenced to 10 years in prison. *Id.*

about obtaining guns and bombs.⁸² According to the cooperator, “Ferdaus was interested in starting a movement.”⁸³ As early as the first meeting with the cooperating witness, Ferdaus described his knowledge of GPS systems and electronics indicating that he had the skill to use explosive-filled drone airplanes to attack United States military facilities. Ferdaus further indicated that he would need funding to support his violent schemes.⁸⁴ Although there was no evidence of actual contact with any terrorist organization, his plans were detailed. Indeed, he “carefully researched and wanted to carry-out his plan to attack the Pentagon with remote controlled aircraft,” and he hoped to make contact with members of al-Qaeda or other potential terrorists.⁸⁵ Multiple recordings with the cooperating witness included Ferdaus describing his goal of “blowing up federal buildings” and “killing persons inside.”⁸⁶

Following Ferdaus’ arrest, the United States Magistrate Judge, considering whether he should be released on bail, found the defendant to be a “troubled young man” as well as very bright.⁸⁷ Noting his college degree in physics and his considerable knowledge of electronics, the court observed that he “reconfigured twelve cell phones as ‘detonation’ devices and he prepared a video showing others how to make a mobile phone into a ‘detonator.’”⁸⁸ As a result, the court had little difficulty in concluding that Ferdaus was a danger to community and that the evidence against him was strong even though the actual tools for them were provided to him by federal agents. On July 20, 2012, Ferdaus pleaded guilty to attempting to provide material support to terrorists and attempting to damage and destroy a federal building. Sentencing is set for November 1, 2012, and, under the plea agreement, prosecutors will be asking for a 17-year jail sentence for Ferdaus.⁸⁹

Other cases further confirm that relentless enticement is standard operating procedure, so that a subject’s proclivities for terror are test-

⁸² Decision on the Government’s Motion for Detention, *United States v. Ferdaus*, No. 1:11-cr-10331-RGS, 2011 WL 5909547 (D. Mass. Nov. 28, 2011).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 9

⁸⁶ *Id.* at 8

⁸⁷ Indictment, *United States v. Ferdaus*, No. 1:11-cr-10331-RGS, 2011 WL 5909547, at *9 (D. Mass. Nov. 8, 2011).

⁸⁸ *Id.*

⁸⁹ Denise Lavoie, *Mass. Man Admits Guilt in Plot to Blow Up Pentagon*, CHICAGO SUN TIMES (July 20, 2012), <http://www.suntimes.com/news/nation/13889039-418/mass-man-admits-guilt-in-plot-to-blow-up-pentagon.html>. Four other charges were dropped as part of the plea agreement. *Id.*

ed exhaustively.⁹⁰ In the 2011 case of Amine El Khalifi, the undercover operation in Alexandria, Virginia was launched based on evidence that the defendant espoused undertaking violent operations against the United States.⁹¹ Indeed, El Khalifi indicated from the outset of the investigation that he had a “plan to explode a bomb at an office building in the City of Alexandria containing offices occupied by the U.S. military.”⁹² As he continued to discuss his schemes with undercover operatives, El Khalifi offered details about placing a bomb in a restaurant that “was frequented by military officials,” as well as conducting a suicide operation in which he would blow himself up in the United States Capitol Building in Washington, D.C.⁹³ In fact, he said he “would be happy killing thirty people.”⁹⁴ With El Khalifi’s predisposition for lethal schemes well-established, the informants provided him with supposed tools of the trade, including an inoperable MAC-X automatic weapon and a jacket supposedly containing a bomb.⁹⁵ The discussions also included the prospective purchase of nails, glue, and cell phones to create homemade bombs.⁹⁶ Following extensive surveillance and recordings, federal agents waited until El Khalifi walked from his car toward the United States Capitol.⁹⁷ Then, they arrested him for crimes including an attempt to use a weapon of mass destruction against government property.⁹⁸ Although El Khalifi’s case relied on undercover operatives to provide the apparent means of destruction, those means were delivered into the hands of a suspect already committed to a terrorist agenda. El Khalifi pleaded guilty to one count of attempted use of a weapon of mass destruction against United States property on June 22, 2012.⁹⁹

⁹⁰ United States v. Cromitie, 781 F. Supp. 2d 211, 218 (S.D.N.Y. 2011).

⁹¹ Complaint, United States v. Khalifi, No. 1:12-MJ-87, 2012 WL 517540 (E.D. Va. Feb. 17, 2012).

⁹² *Id.* at ¶ 6.

⁹³ *Id.* at ¶¶ 8, 12.

⁹⁴ *Id.* at ¶ 12.

⁹⁵ *Id.* at ¶ 13.

⁹⁶ *Id.*

⁹⁷ *Id.* at ¶ 20.

⁹⁸ *Id.* at ¶¶ 20-21.

⁹⁹ M2 PressWIRE, *Virginia Man Pleads Guilty in Plot to Carry out Suicide Bomb Attack on U.S. Capitol*, NEWSEDGE (June 25, 2012, 5:52 AM), <http://dialog.newsedge.com/portal.asp?site=2007100814443105593225&searchfolderid=pg2007100814522209759333&block=default&portlet=ep&nzesm=on&display=Crime&action=sitetopics&mode=realtime&nzenb=left&criteria=%5Btopic%3Dcrime%5D&searchID=730376&datetime=%5Bt-minus%3D7%5D&hd> laction=story&storyid=%5Bstoryid=hL8LNPDD9d7-MThuU4BKB0k-o8RULhStcQSs6Py0aCCUPZfGS7he6QeeBdOqWFQooDtEWhkgLYrynLPxfSSg***%5D&rtcrdata=on&epname=EF0RE&

Another lone wolf, Jose Pimental, also known as Mohammed Yusuf, had apparently studied information about bomb-making that was published online by al-Qaeda in its English language publication, *Inspire*.¹⁰⁰ Fortunately, through a network of smaller police departments, the New York police learned of Pimental's activities in May 2009 and began to monitor him.¹⁰¹ An informant recorded incriminating statements while the surveillance of Pimental indicated that he purchased a clock, double piping, Christmas lights, and other components of potential explosives.¹⁰² Ultimately, he was videotaped drilling holes into pipes, an event that prompted his arrest and prosecution under state terrorism charges.¹⁰³ Although his plans were far from sophisticated or even well-developed, his rhetoric confirmed a dangerous predisposition that warranted the extensive undercover efforts leading to his arrest.

In September 2009, Michael C. Finton, age twenty-nine, was arrested as he tried to detonate what he believed to be a bomb inside a van outside the federal courthouse in Springfield, Illinois.¹⁰⁴ Finton, who also used the name Talib Islam, was an unmarried, part-time cook who had converted to Islam during the six years he had spent in state prison for convictions of aggravated battery and robbery.¹⁰⁵ The abundant evidence of his al-Qaeda leanings ranged from his professed admiration of John Walker Lindh, the so-called "American Taliban," to his expressions of interest in the Taliban attack that killed 166 in Mumbai, India.¹⁰⁶ The investigation began in February 2009 after a confidential informant introduced Finton to undercover agents. The false explosives were provided by undercover FBI agents posing as al-Qaeda operatives following months of surveillance. Charged with an attempt to murder a federal officer, as well as attempted use of a weapon of mass destruction against federal property, he pled guilty on May 9, 2009 and received a 28-year prison sentence.¹⁰⁷

¹⁰⁰ Joseph Goldstein & William K. Rashbaum, *City Bomb Plot Suspect Is Called Fan of Qaeda Cleric*, N.Y. TIMES (Nov. 20, 2011), <http://query.nytimes.com/gst/fullpage.html?res=9406E1DA1431F932A15752C1A9679D8B63&scp=1&sq=&st=nyt>.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Indictment, United States v. Finton, No. 10-cr-30215, 2010 WL5641787 (S.D. Ill. Nov. 29, 2010).

¹⁰⁵ Mike Robinson, *Michael Finton Charged by FBI For Attempting to Bomb the Springfield Federal Courthouse*, HUFFINGTON POST (Sept. 24, 2009), http://www.huffingtonpost.com/2009/09/24/michael-finton-charged-by_n_298669.html

¹⁰⁶ *Id.*

¹⁰⁷ Terry Frieden, *Man Sentenced to 28 Years For Plotting to Bomb Federal Courthouse*, CNN JUSTICE (May 9, 2011), http://articles.cnn.com/2011-05-09/justice/illinois.bomb.plot_1_federal-courthouse-sting-operation-michael-finton?_s=PM:CRIME.

D. Prior Detection – Creating the Crime?

In the case of James Cromitie,¹⁰⁸ the United States district judge offered a remarkable description of the defendant's claim that the undercover operation violated the due process clause of the United States Constitution.

Defendant's renewed motion, made and denied without prejudice prior to the trial, to have the indictment dismissed on the ground that the Government "created the criminal, and then manufactured the crime." (cite omitted). There is some truth to that description of what transpired here, nonetheless, the motion is denied.¹⁰⁹

The case began when Cromitie of Newburgh, New York said to a government witness that he wanted to go back to Afghanistan to obtain a wife because of "the brothers killed in Pakistan and Afghanistan."¹¹⁰ Later statements were even more troubling as Cromitie expressed a desire to go to "paradise"¹¹¹ because he wanted to "do something to America."¹¹² Even so, for months Cromitie pushed back on the informant's attempts to discuss the actual pursuit of terrorist schemes.¹¹³ Despite his initial militant rhetoric, Cromitie later retracted his statement about going to Afghanistan and also indicated that he did not want to "go that far" with respect to any violent activities.¹¹⁴ As Cromitie's reluctance grew, the FBI made the striking observation that, "Cromitie was unlikely to commit an act without the support of the FBI source"¹¹⁵ Ultimately, Cromitie received all the support he needed when the FBI's operative offered him \$250,000 and proposed a scheme to target Stewart Air Force Base in Connecticut with a bomb plot. As the district judge observed:

The Government selected targets The Government provided every item used in the plot: cameras, cell phones, cars, maps and even a gun. The Government did all the driving (as none of

¹⁰⁸ United States v. Cromitie, 781 F. Supp. 2d 211, 218 (S.D.N.Y. 2011). Cromitie who was charged along with several others, would not be considered a "lone wolf" under most definitions. See Pantucci, *supra* note 2. Nevertheless, because his action was not directed by other organizations and because it proceeded operationally like other single actor cases, it is useful here, especially with respect to examining the highly aggressive government's tactics.

¹⁰⁹ United States v. Cromitie, 781 F. Supp. 2d 211, 213 (S.D.N.Y. 2011).

¹¹⁰ *Id.* at 215.

¹¹¹ *Id.* at 217.

¹¹² *Id.* at 215.

¹¹³ *Id.*

¹¹⁴ *Id.* at 217.

¹¹⁵ *Id.* at 218.

the defendants had a car or driver's license). The Government funded the entire project.¹¹⁶

Ultimately, the court found that even though Cromitie had for months resisted the undercover ploys, he nevertheless "put himself back into the Government's sights" when he was prompted by the government informant's \$250,000 offer to pursue the Government created plot.¹¹⁷ In denying the motion to dismiss the indictment, the court observed that to establish the government's "over involvement" in creating criminality, a due process violation only arises if the "outrageous Government misconduct" exceeds all notions of permissible conduct and shocks the conscience of the court.¹¹⁸ Tellingly, the court observed that the defense is "... an issue frequently raised that seldom succeeds."¹¹⁹

V. PREVENTATIVE DETENTION V. PREVENTATIVE PROSECUTIONS

A review of reported lone wolf activity demonstrates that even though some tragic and near-tragic results have occurred, especially in firearm cases, law enforcement has demonstrated a highly effective and successful capacity to intervene well in advance of imminent peril. To be sure, the debate continues over whether more steps and earlier steps should be taken. Few question the imperative for disabling terrorist schemes long before they are inflicted on Americans. Along the spectrum between hostile opinions and murderous deeds, earlier is manifestly better than later because the consequences of acting too late are so catastrophic.

A. Crimeless Prisoners

The urgency of preventative strategies has prompted an emerging focus on methodologies that do not require a provable crime. In the wake of 9/11, the material witness statute was utilized to an unprecedented extent to authorize the temporary incarceration of individuals whose testimony was allegedly needed and whose presence must therefore be secured.¹²⁰ Imprisoning these "witnesses" – many of

¹¹⁶ *Id.* at 221.

¹¹⁷ *Id.* at 224.

¹¹⁸ *Id.* at 227-28.

¹¹⁹ *Id.* at 213.

¹²⁰ CHARLES DOYLE, CONG. RESEARCH SERV., RL33077, ARREST AND DETENTION OF MATERIAL WITNESSES: FEDERAL LAW IN BRIEF AND SECTION 12 OF THE USA PATRIOT AND TERRORISM PREVENTION REAUTHORIZATION ACT, 3-4 (2005), *available at* <http://www.au.af.mil/au/awc/awcgate/crs/rl33077.pdf>. The federal material witness statute can be located at 18 U.S.C.A. § 3144 ("If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracti-

whom appeared to be persons of interest who were not provable as criminals – sparked criticism that the material witness law was being used pre-textually to justify otherwise unconstitutional preventative detentions.¹²¹ Since the law was conceived to hold only “material witnesses” rather than unchargeable suspects, any such misuse of this statute would have troubling implications given our nation’s traditional aversion to arresting individuals when no crime is even alleged.¹²² In the case of Abdullah Al-Kidd, a Kansas native who played college football at the University of Idaho,¹²³ the potential for abuse was vividly illustrated. Stopped at Dulles Airport in March 2003, while en route to Saudi Arabia for doctoral studies, he was arrested as a “material witness,” confined naked in a cell for many hours, even though no one accused him of any crime.¹²⁴ On June 27, 2012, a federal magistrate judge ruled that Al-Kidd was falsely imprisoned and that the material witness law had been abused.¹²⁵ Although subject to further review by the United States district judge, this decision nonetheless represented the first ruling against the government on the merits in a post 9/11 material witness case.¹²⁶

As court decisions continue to delineate limits to the material witness law, a potentially more profound expansion of the government’s capacity to detain preventatively was enacted on January 1, 2012 when President Obama signed into law the National Defense Authorization Act of 2012 (“NDAA”).¹²⁷ The controversial anti-terrorism provisions of the NDAA appear to allow the United States military to detain individuals without charges or trial – including

cable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title.”)

¹²¹ *Id.* at n.3 (highlighting the various criticisms directed at the material witness statute).

¹²² Preventative detention is utterly contrary to our society. “There could be no more eloquent demonstration of the coercive power of authority to imprison upon prediction, or of the dangers which the almost inevitable abuses pose to the cherished liberties of a free society.” *United States v. Salerno*, 481 U.S. 739, 766-67 (1987) (Marshall, J., dissenting).

¹²³ Associated Press, *APNewsBreak: Judge Says US Wrongly Held Idaho Man*, FOX NEWS (June 27, 2012, 7:35 PM), <http://www.foxnews.com/us/2012/06/27/apnewsbreak-judge-says-us-wrongly-held-idaho-man/>.

¹²⁴ Adam Liptak, *Justice to Hear Appeal Over Liability for Detention*, N.Y. TIMES (Oct. 18, 2010), <http://www.nytimes.com/2010/10/19/us/19scotus.html>.

¹²⁵ Associated Press, *supra* note 123.

¹²⁶ Nina Totenberg, *Court Considers Ashcroft’s Liability in Terror Case*, NAT’L PUBLIC (Mar. 2, 2011), <http://www.npr.org/2011/03/02/134059232/u-s-citizen-looks-to-supreme-court-for-vindication>; Associated Press, *supra* note 123.

¹²⁷ National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. (1st Sess. 2011).

United States citizens.¹²⁸ Although the current administration has expressed its intention not to use such powers against citizens,¹²⁹ and vigorous judicial challenges would await any such efforts, the enactment of this legislation suggests an anxiety about the existing tools for preventing terrorism.

B. Existing Federal Laws for Preventative Prosecutions

That anxiety, however, seems unjustified. While the concerns are understandable, the reality is that federal criminal prosecution in terrorism cases has been remarkably effective. An analysis of more than 120 prosecutions dating back to the 1980's – many of them focused on preventing and disabling terrorist activities – demonstrates a conviction rate of 91.1%.¹³⁰ Justice has not only been consistent, it has been forceful. Along with eleven cases of life sentences, the remaining cases resulted in an average of almost 101 months in federal prison.¹³¹

With multi-actor terrorist schemes, the existing laws for preparatory crimes are clearly adequate for preventative prosecutions of terrorism. Conspiracy laws do not require completed acts of violence but instead center on agreements with illegal objectives.¹³² While conspiracy can be charged as a separate crime apart from the substantive offense,¹³³ by its nature, this crime requires proof that “the defendant agreed with at least one other person ‘to try to accomplish a common and unlawful plan’”¹³⁴ Accordingly, even though conspiracy laws have been expanded significantly to combat terrorism,¹³⁵ the essential

¹²⁸ Erik Kain, *President Obama Signed the National Defense Authorization Act – Now What?*, FORBES (Jan. 1, 2012), www.forbes.com/sites/erikkain/2012/01/02/president-obama-signed-the-national-defense-authorization-act-now-what/.

¹²⁹ *Statement by President of H.R. 1540*, THE WHITE HOUSE: OFFICE OF THE PRESS SECRETARY (Dec. 31, 2011), <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540>.

¹³⁰ James Benjamin, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, 42 CASE W. RES. J. INT'L L 267, 268, 270 (2009).

¹³¹ *Id.*

¹³² As one commentator notes, “the potential to intervene at an early stage along the continuum between inclination and action makes conspiracy a potentially powerful tool for preventative intervention.” Robert Chesney, *Terrorism, Criminal Prosecution and the Preventative Detention Debate*, 50 S.TEX L. REV. 669, 684 (2009). As this article explains, even an informal membership in the jihad movement may suffice as the crime of conspiracy under current terrorism laws. *Id.* at 687.

¹³³ *United States v. Sattar*, 314 F. Supp. 2d 279, 306 (S.D.N.Y. 2004).

¹³⁴ *United States v. Hassoun*, 476 F.3d 1181, 1188 (11th Cir. 2007) (quoting Eleventh Circuit Pattern Jury Instruction: Criminal § 13.1 (2003)).

¹³⁵ *Sattar*, 314 F. Supp. 2d at 306 (analyzing laws criminalizing conspiracy to provide material support to designated terrorist organizations along with more severe penalties); see also *United States v. Moussaoui*, 483 F.3d 220, 223 n.1 (4th Cir. 2007) (guilty plea in the face of six different terrorism conspiracy charges ranging from conspiracy to use weapons of mass destruction to conspiracy to commit air piracy).

element of agreeing to act illegally with another would not be efficacious in the case of a true lone wolf.

Along with conspiracy laws, another powerful tool in combating preparatory terrorism is law proscribing the giving of material assistance to foreign terrorist organizations designated by the United States Secretary of State.¹³⁶ Originally enacted in 1996, the “material support or assistance” laws criminalize giving assistance to organizations such as al-Qaeda, and since 1996, the laws have been legislatively expanded to encompass providing a “service.”¹³⁷ These “services” include “training” as well as “expert advice or assistance.” Significantly, illegal services also include furnishing “personnel,” a key element because one’s own services can constitute providing “personnel” within the meaning of the law.¹³⁸

Based on the definitions for providing “material support or assistance,” a federal appeals court found that an individual’s decision to offer one’s own services to al-Qaeda constitutes a crime of terrorism even if nothing further is attempted:

[W]e nevertheless conclude that Augustia and Phanur’s volunteering of their services to Al Qaeda was sufficient for a jury to deem it material support in the form of personnel. Section 2339A(g)(4) makes clear that providing personnel which means “(one) or more individuals who may be or include oneself,” constitutes material support under § 2339B.¹³⁹

Along with broad definitions for the scope of “material support or assistance,” these laws also explicitly encompass crimes of preparation:

By its elements, § 2339A criminalizes material support given in preparation for the object offense – clearly, the object offense need not even have been completed yet, let alone proven as an element of the material support offense.¹⁴⁰

Because laws of conspiracy and providing support to terrorist organizations necessarily implicate associational crimes, they are not ordinarily tailored for an early arrest of the true lone wolf. As one court explained the traditional options for preparatory crimes, “. . . the three inchoate offenses are described as attempt, conspiracy, and so-

¹³⁶ See 18 U.S.C. § 2339A.

¹³⁷ 18 U.S.C. § 2339A(b)(1) (“the term “material support or resources” means any property, tangible or intangible, or service . . .”).

¹³⁸ 18 U.S.C. § 2339A(b) (deferring training); 18 U.S.C. § 2339A(b)(3) (“Expert advice or assistance”); 18 U.S.C. § 2339A(b)(3) (defining “personnel”).

¹³⁹ *United States v. Augustin*, 661 F.3d 1105, 1120 (11th Cir. 2011).

¹⁴⁰ *United States v. Hassoun*, 476 F.3d 1181, 1188 (11th Cir. 2007).

licitation. . . .”¹⁴¹ Because neither conspiracy nor solicitation would, by definition, apply to a suspected terrorist acting exclusively on his own, lone wolf cases frequently relied on crimes of attempted terrorism.¹⁴²

Because attempted terrorism will likely remain the principal charge against solitary actors, it is apparent that the needs of early prevention will continue to rely on aggressive undercover tactics whenever possible suspects are identified. As demonstrated in the case of James Cromitie,¹⁴³ the government’s numerous efforts to induce a suspect to attempt to commit terrorist crimes did not constitute either entrapment, according to the jury, or a due process violation, according to the district judge.¹⁴⁴ Nor did the government’s heavy involvement justify any reduction in Cromitie’s prison sentence. During his sentencing, his attorney argued that federal agents deliberately created a scheme to increase Cromitie’s prison time by introducing a “missile element into the case.”¹⁴⁵ The result was a twenty-five year minimum sentence.¹⁴⁶ Even so, the court denied the defendant’s claim of “sentencing manipulation” as inapplicable to cases of legislatively enacted mandatory sentences. In overruling the defense argument, the district judge acknowledged the high likelihood that the government did indeed add circumstances to the imaginary scheme in order to impose added years upon the ultimate sentence.¹⁴⁷

As *Cromitie* illustrates, the government’s ability to target suspects aggressively – offering them proposed details, supposed weaponry, and actual cash – has seemingly few limits. And yet, whatever may be the enticements, it takes a willing suspect to become an indictable defendant. In rejecting another defense claim that the govern-

¹⁴¹ *Sattar*, 314 F. Supp. 2d at 305 n.14.

¹⁴² *United States v. Khalifi*, No. 1:12-MJ-87, 2012 WL 517540 (E.D. Va. Feb. 17, 2012) (attempt to sue weapon of mass destruction against U.S. property); *United States v. Ferdaus*, No. 1:11-cr-10331-RGS, 2011 WL 5909547 (D. Mass Nov. 8, 2011) (attempt to destroy federal building attempt to provide material support to terrorist organization); *United States v. Finton*, No. 10-cr-30215, 2010 WL5641787 (S.D. III. Nov. 29, 2010) (attempt to murder federal officer). Some recent laws may provide an additional predicate for preventative action against solo actors in limited circumstances – receiving “military-type training” from designated foreign terrorist organizations became a crime in 2004. 18 U.S.C. § 2339(D)(c)(1). Moreover, some of the material support laws do not require a defendant to be acting in concert with others so long as the actor’s efforts are intended to provide those others with assistance. 18 U.S.C. § 2339A(b).

¹⁴³ *United States v. Cromitie*, 781 F. Supp. 2d 211, 218 (S.D.N.Y. 2011).

¹⁴⁴ *Id.*

¹⁴⁵ Sentencing, *United States v. Cromitie*, 09 CR. 558 CM, 2011 WL 2693297, at *4 (S.D.N.Y. 2011).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* (“None of this changes the fact that the defendants embraced the idea of firing a missile at government aircraft; it does not vitiate their convictions on Counts 5 and 6. Nor, as I have already opined, does it constitute the sort of “outrageous government misconduct” that violates the defendants’ Fourteenth Amendment due process rights.”).

ment's over-involvement violated the due process clause, the federal appeals court said:

The evidence in this case does not show that the government ran "the entire operation with only meager assistance from the [appellants]." Rather, the government only provided means to those who were "willing and predisposed."¹⁴⁸

Thus, sting operations in terrorism cases may be controversial at times, but they are a well-accepted law enforcement tactic. Further, they are essential to counter-terrorism investigations, especially in single actor scenarios. By definition, the lone wolf suspect does not operate with accomplices whose loose lips might create leads for law enforcement.¹⁴⁹ With the formidable challenge of detecting the activity of solo operators, anti-terrorism investigations are obliged to exhaustively explore any possible symptoms of peril. Often, the tactics entail extreme activism by federal agents who may spend months testing a suspect's willingness to cross the line from talking trash about America to planning violence against Americans. Since the proper focus is prior interception and prevention of terrorism, though, sting operations will remain a vital part of anti-terrorism strategies as surely as they will continue to be vigorously debated.

C. Preventative Investigations: Data Mining and Monitoring

While the statutory tools utilized for charging crimes of terrorism are apparent, less obvious are some of the investigative techniques that are being continually developed and enhanced. Understandably, the government's latest methodologies for data mining and electronic surveillance are generally not made public. In some contexts, though, the mechanisms for early detection encompass private-public cooperation and are publicly documented.

One such system is set forth in Title 21, Section 830 of the United States Code: Regulation of Listed Chemicals and Certain Machines. This portion of the Controlled Substances Act provides for the Suspicious Orders Task Force (SOTF) which requires that:

Each regulated person shall report to the Attorney General. . . any regulated transaction involving an extraordinary quantity of a listed chemical, an uncommon method of payment or delivery, or any other circumstance that the regulated person believes may

¹⁴⁸ United States v. Augustin, 661 F.3d 1105, 1123-24 (11th Cir. 2011).

¹⁴⁹ See *Obama: 'Lone Wolf' Terror*, *supra* note 18.

indicate that the listed chemical will be used in violation of [the law].¹⁵⁰

The act further sets forth guidelines which “assist chemical manufacturers, distributors, wholesalers and retailers to be alert to suspicious orders involving listed chemicals” by delineating what constitutes a suspicious amount, payment method, or delivery location.¹⁵¹ While the SOTF generally deals with drug-related cases, it applies to hazardous chemicals as well.

In furtherance of such objectives, a “see something say something” campaign was adopted by the Department of Homeland Security (“DHS”) to encourage members of the public to report suspicious activity.¹⁵² Additionally, the Federal Bureau of Investigation (“FBI”) established a Public Access Center Unit (“PACU”), which receives and assesses tips on potential threats.¹⁵³ In 2003, the FBI launched “Operation Tripwire” to enlist specific industries to be on the lookout for terrorist planning or training activities.¹⁵⁴ Since its inception, Operation Tripwire has targeted thirty different industries, including airlines, prisons, and chemical companies, encouraging them to cooperate with FBI agents concerning what may constitute suspicious activity.¹⁵⁵ When and if anything suspicious or unusual is encountered, businesses are encouraged to contact FBI’s Joint Terrorism Task Force.¹⁵⁶

While specific results of Operation Tripwire may not be disclosed for security reasons, at least one major success became public. When Khalid Alaawasri attempted to purchase hazardous chemicals for bomb-making from Carolina Biological Supply, he was detected, then reported.¹⁵⁷ Because Carolina Biological Supply, a Tripwire participant, apparently had procedures in place to monitor orders involving the chemicals in question and report any suspicions, it alerted the FBI,

¹⁵⁰ 21 U.S.C. § 830(b)(1)(A); *see also* 21 C.F.R. 1310.05(a)(1); *Knowing Your Customer/Suspicious Order Reporting*, U.S. DEP’T OF JUSTICE DRUG ENFORCEMENT AGENCY: OFFICE OF DIVERSION CONTROL, http://www.deadiversion.usdoj.gov/chem_prog/susp.htm#e1 (last visited Aug. 16, 2012).

¹⁵¹ *Id.*

¹⁵² Information Sharing Environment, *Annual Report to The Congress*, NATIONAL COUNTERTERRORISM CENTER, 36 (June 30, 2011), <http://www.nctc.gov/itacg/docs/ISE-Annual-Report-to-Congress-2011.pdf>.

¹⁵³ *Id.*

¹⁵⁴ Matthew Harwood, *Tripping Up Terrorists*, SECURITY MANAGEMENT (Jan. 3, 2012), <http://securitymanagement.com/article/tripping-terrorists-009356?page=0%2C0>.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

leading to the investigation and ultimately the arrest and conviction of Alaawasri.¹⁵⁸

Another important monitoring device was strengthened in 2001 when Congress passed Title III of the USA PATRIOT Act: “the International Money Laundering Abatement and Anti-Terrorism Financing Act of 2001,” to attack terrorist financing by raising barriers to terrorist access to the United States financial system. Among other requirements, these sections impose on bank and other United States financial institutions additional due diligence and record-keeping requirements that are conceived to ascertain possible funding sources for terrorism. These requirements have apparently contributed to asset seizures, sanctions, and increased surveillance that has evidently dealt serious blows to al-Qaeda’s financing. Indeed, the United States Treasury reports that it has frozen \$139 million in assets after 9/11 pursuant to these laws.¹⁵⁹

Systems for detecting hazardous chemicals and suspicious money can have a meaningful impact in combating terrorism that utilizes explosives or well-financed organizations and operations. But a solo killer who uses firearms rather than bombs apparently remains the least preventable form of terrorism. Major Nidal Hassan and Abdul Haqim Mujahid allegedly succeeded with guns. Would-be bombers, on the other hand, have been repeatedly intercepted since 9/11 before killing, even if fortuitously at times.

On August 5, 2012, another single gunman attacked, this time, in the Sikh Temple of Wisconsin.¹⁶⁰ Wade Michael Page killed six and wounded three before police bullets and self-inflicted wounds combined to kill him.¹⁶¹ Linked to white supremacy groups, Page was the leader of a so-called hard-rock band, End Apathy,¹⁶² and authorities treated the shooting as an act of domestic terrorism.¹⁶³ Like other

¹⁵⁸ *Id.* According to Security Management, “Carolina Biological Supply had known it should alert the FBI thanks to an FBI program known as Operation Tripwire, designed to enlist business in the government’s effort to detect terror plots. Tripwire is an example of public-private cooperation that appears to be yielding results.”

¹⁵⁹ See *Department of the Treasury*, *supra* note 12; Sean Paul Ashley, *The Future of Terrorist Financing: Fighting Terrorist Financing in the Digital Age*, 2 PENN ST. U.J. INT’L AFFAIRS, no. 1, Spring 2012, at 7. Al-Qaeda’s operations are estimated to cost \$30 million annually of Al-Qaeda’s remaining expenses – some \$270 million in investments to administering and maintaining the organization. *Id.*

¹⁶⁰ Erica Goode & Serge F. Kovaleski, *Wisconsin Killer Fed and Was Fueled by Hate-Driven Music*, N.Y. TIMES (Aug. 6, 2012), <http://www.nytimes.com/2012/08/07/us/army-veteran-identified-as-suspect-in-wisconsin-shooting.html?pagewanted=all>; CNN Wire Staff, *Wisconsin Siblings Tell of Running to Warn Others as Temple Shooting Erupted*, CNN (Aug. 9, 2012), <http://www.cnn.com/2012/08/08/us/wisconsin-temple-shooting/index.html?hptzhp12>.

¹⁶¹ *Id.*

¹⁶² CNN Wire Staff, *supra* note 160.

¹⁶³ Goode & Kovaleski, *supra* note 160.

lone wolf shooters discussed in this article, Page legally acquired his 9mm semi-automatic handgun with multiple ammunition magazines.¹⁶⁴ His background, while troubling, did not place him on the radar of law enforcement. Some past acquaintances of Page said he spoke in the past of “racial holy war,”¹⁶⁵ but neither family members nor others had reported any recent warning signs.¹⁶⁶ Although the Southern Poverty Law Center reportedly had Page’s name on its lists of alleged white supremacists, because he was “one of thousands,” that name was not furnished to law enforcement.¹⁶⁷ Unfortunately, there may be more white supremacists than there are resources to effectively monitor all of them.¹⁶⁸

Another horror, while not connected to a terrorist agenda, also tragically confirmed America's extreme vulnerability to a solo shooter. On July 20, 2012, in a movie theater in Aurora, Colorado, James Holmes allegedly murdered 12 and wounded 58.¹⁶⁹ He had no prior criminal record. According to news reports, though, Holmes created a one man arsenal stockpiling thousands of bullets and head-to-toe ballistic gear, including body armor purchased on eBay.¹⁷⁰ One source indicated that Holmes picked up 160 pounds of ammunition from a FedEx stop.¹⁷¹ Apparently, no one noticed, and website operators who sell guns, ammunition, and combat gear are not required to conduct background checks or engage in detailed record keeping.¹⁷²

While gun control advocates may demand background checks of potential purchasers, there is no compelling evidence that background checks would have prevented the violent tragedies at the Wisconsin Sikh temple or in the movie theater in Aurora, Colorado.¹⁷³ The 9mm handgun used by Page and the four guns allegedly used by Holmes were all purchased legally. In fact, Holmes passed the background

¹⁶⁴ CNN Wire Staff, *supra* note 160.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Goode & Kovalski, *supra* note 160.

¹⁶⁸ *Id.*

¹⁶⁹ *James Holmes Built Up Aurora Arsenal of Bullets, Ballistic Gear Through Unregulated Online Market*, CBS NEWS (July 24, 2012), http://www.cbsnews.com/8301-201_162-57478749/james-holmes-built-up-aurora-arsenal-of-bullets-ballistic-gear-through-unregulated-online-market/ [hereinafter *James Holmes*].

¹⁷⁰ Jack Healy, *Suspect Bought Large Stockpile of Rounds Online*, N.Y. TIMES (July 22, 2012), <http://www.nytimes.com/2012/07/23/us/online-ammunition-sales-highlighted-by-aurora-shootings.html?pagewanted=all>.

¹⁷¹ *James Holmes*, *supra* note 169.

¹⁷² Leslie Meredith, *Is It Easier to Buy a Gun Online?*, TECH NEWS DAILY (July 24, 2012), <http://www.technewsdaily.com/4600-is-it-easier-to-buy-a-gun-online.html>.

¹⁷³ *Bloomberg Sets Sights on Illegal Gun Sales Online*, REUTERS (Dec. 14, 2011), <http://www.reuters.com/article/2011/12/15/us-usa-guns-online-idUSTRE7BE01Z20111215>.

checks required in person and from online retailers.¹⁷⁴ But arguably more can be done. Almost assuredly, law enforcement will study the Sikh temple murders to examine whether more surveillance resources should be allocated to white supremacist hate groups.¹⁷⁵ Moreover, while the Constitution affords protection to gun ownership,¹⁷⁶ there is no current doctrine limiting the government's capacity to undertake data mining of suspicious activity directed towards stockpiling weapons and ammunition. The SOTF provides a framework for a reporting system by businesses that could be applied to guns, ammunition, and ballistic gear. The guidelines for identifying suspicious purchases of certain chemicals, criteria that speak to an "extraordinary quantity" or "uncommon method of payment or delivery," may offer a framework for detecting and reporting hazardous firearms and munitions,

VI. CONCLUSION

Plainly, aggressive tactics for investigating and prosecuting lone wolf terrorism are needed to address a grave danger that is accelerating. Overwhelmingly, law enforcement has demonstrated the effectiveness of existing legal tools for prosecuting terrorists, ranging from sting operations to today's substantive anti-terrorism laws. And yet because the stakes are so high, the public and its leaders understandably seek to pursue ways to do more to prevent terrorism.

Illustrating this pursuit is the ongoing controversy over preventative detention, highlighted by the enactment of the National Defense Authorization Act of 2011. Such a debate, however, should not fail to analyze the critical question of whether there are demonstrable shortfalls in the existing criminal laws. As with organized schemes, the results in combatting the growing menace of the lone wolf dispel any need for crimeless military detention of suspects in order to prevent destruction. To the contrary, the results of investigation and prosecution have repeatedly demonstrated that when relevant information is obtained and properly analyzed, the existing undercover strategies and present laws are highly effective. The few cases where warning

¹⁷⁴ Healy, *supra* note 170.

¹⁷⁵ According to the New York Times, a former Homeland Security analyst complained that the number of analysts monitoring non-Islamic military has been sharply reduced. Goode & Kovalski, *supra* note 160.

¹⁷⁶ *District of Columbia v. Heller*, 554 U.S. 570 (2008) (The Second Amendment protects an individual's right to keep and bear arms, "statutes banning handgun possession in the home violated Second Amendment."); *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (holding "that Second Amendment right to keep and bear arms is fully applicable to the states by virtue of the Fourteenth Amendment").

signals were not acted upon were failures to properly diagnose danger rather than a legal incapacity to act forcefully. Indeed, there are no reported cases of suspects who were investigated – and deemed candidates for detention – but then released to pursue a destructive agenda due to the inadequacy of existing laws.

Rather than new laws for arrest and detention that could collide with constitutional safeguards, the primary challenge should be securing more information of potentially troubling activities, so that existing preventative strategies can be activated. While surveillance and monitoring resources are properly focused on foreign terrorists organizing activities, the capacity to better assess white supremacist and other domestic hate groups can be further examined. Moreover, laws that foster monitoring abnormal transactions involving chemicals and funds are accepted tools in combatting terrorism. Whether a political will exists for extending measures to guns and munitions, though, is beyond the scope of this article.¹⁷⁷ Nor could the effectiveness of such measures be assessed without further study. Tragically, not all terrorism is preventable. When terrorism erupts, especially by a single killer using guns, sometimes a ticking time bomb can be too far below the radar for anyone to see.

¹⁷⁷ Valli Ramanathan, *Colorado Shooter James Holmes' Online Arsenal Rampage Raises Debate Over Gun Rights and Arms Freedom*, INT'L BUS. TIMES (July 24, 2012), <http://www.ibtimes.com/articles/366235/20120724/colorado-shooting-dark-knight-rises-james-holmes.htm>.