

## Notes

### Agents of the Enemy: Targeting “Lone Wolf” Terrorism Under the Material Support Statutes

*Two prominent anti-terrorism statutes, 18 U.S.C. §§ 2333 and 2339B, prohibit the provision of material support to anyone who is part of a Foreign Terrorist Organization (FTO). Both statutes have a broad scope, holding individuals and entities liable for knowingly providing material support to an FTO, regardless of intent to contribute to the FTO’s terrorist activities. For this reason, the material support statutes have come under scholarly criticism for imposing guilt by association. Additionally complicating matters is the lack of any statutory criteria for determining who should be considered part of an FTO for the purposes of §§ 2333 and 2339B. As a result, the law is ambiguous regarding whether “lone wolf” terrorists, who purport to be acting on behalf of an FTO, count as members of that organization, and whether individuals or entities that provide support to lone wolves can be held liable under the existing material support laws. This Note examines the limited case law addressing the issue and analyzes three proposed tests for determining membership in an FTO, concluding that all three current proposals are inadequate. It then examines analogous legal doctrines in both domestic and international law which could guide future courts in answering the FTO membership question. It concludes by suggesting that courts should draw from both the domestic and international realm to craft a new, four-part test for determining which individuals should be regarded as part of an FTO.*

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## INTRODUCTION

On June 12, 2016, President Obama solemnly addressed the nation following what was, at the time, the deadliest mass shooting in U.S. history.<sup>1</sup> The perpetrator, Omar Mateen, had pledged allegiance to the Islamic State (referred to as ISIS, ISIL, or IS, among other names) shortly before commencing his attack on the Pulse nightclub in Orlando, Florida.<sup>2</sup> Subsequent reports revealed that, while warning signs arguably existed as to Mateen's radicalization, Mateen was not directly connected to ISIS or any other terrorist group.<sup>3</sup> The investigation into Mateen's case garnered national headlines, not only because of its horrific death toll, but also because Mateen represented a growing and particularly sinister threat—that of the so-called “lone wolf” terrorist.

Lone wolf terrorism—acts of terror carried out by a single perpetrator with no formal link to a wider network—has sharply increased in recent years.<sup>4</sup> Despite their lack of operational ties to a larger group, lone wolves often claim affiliation with a recognized terrorist organization,<sup>5</sup> many of which deliberately seek to enlist lone operatives to conduct attacks on the group's behalf.<sup>6</sup> For example, ISIS, has made the radicalization of lone wolves a significant part of its strategy,<sup>7</sup> and has been highly successful in doing so, even as the caliphate's power has waned. Between 2015 and 2016, lone wolf terrorist attacks in

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1. Michael D. Shear, *After Nightclub Massacre, Obama Expresses Outrage and a Familiar Lament*, N.Y. TIMES (June 12, 2016), <https://www.nytimes.com/2016/06/13/us/politics/president-obama-expresses-outrage-over-massacre-at-nightclub.html> [https://perma.cc/7YDC-T4DC].

2. AnneClaire Stapleton & Ralph Ellis, *Timeline of Orlando Nightclub Shooting*, CNN, (June 17, 2016), <https://www.cnn.com/2016/06/12/us/orlando-shooting-timeline/index.html> [https://perma.cc/4HYF-GUHU].

3. *Omar Mateen*, COUNTER EXTREMISM PROJECT, <https://www.counterextremism.com/extremists/omar-mateen> [https://perma.cc/LF5D-GE5D].

4. JEFFREY CONNOR & CAROL ROLLIE FLYNN, GEO. UNIV. SEC. STUD. PROGRAM: NAT'L SEC. CRITICAL ISSUE TASK FORCE REPORT: LONE WOLF TERRORISM 10 (2015), <https://georgetownsecuritystudiesreview.org/wp-content/uploads/2015/08/NCITF-Final-Paper.pdf> [https://perma.cc/TZ8A-K7UE] (documenting a 143% increase in lone wolf terrorism in recent decades).

5. Paul Gill et al., *Bombing Alone: Tracing the Motivations and Antecedent Behaviors of Lone-Actor Terrorists*, 59 J. FORENSIC SCIS. 425, 430 (2014) (noting that “more than half of the lone actors . . . characterized their actions as associated with a wider group or movement”).

6. Barak Mendelsohn, *ISIS' Lone-Wolf Strategy*, FOREIGN AFFS. (Aug. 25, 2016), <https://www.foreignaffairs.com/isis-lone-wolf-strategy> [https://perma.cc/BS2V-KW3D].

7. *See id.*

Europe and the United States doubled from prior years<sup>8</sup>—many of which were linked to ISIS. Since that time, ISIS-inspired lone wolf attacks have continued<sup>9</sup> even as ISIS' territorial holdings have rapidly shrunk in recent years.

The successful radicalization of lone wolves by international terrorist groups has troubled counterterrorism experts, given that lone wolf terror threats are extremely difficult to detect and prevent.<sup>10</sup> Since lone wolves lack a formal connection to a recognized terrorist group, detecting genuine threats can seem, as former FBI director James Comey put it, like “looking for needles in a nation-wide haystack.”<sup>11</sup> Mateen provides an example of this. He was investigated by the FBI several years before the Pulse shooting, but the investigation was closed in 2014 when the FBI determined that he had no connections to other known terrorists.<sup>12</sup> Despite pledging allegiance to ISIS on the day of the shooting, Mateen never coordinated with ISIS beforehand, and, although co-workers reported that Mateen displayed signs of radicalization leading up to the shooting and had previously expressed affinity for both al-Qaeda and Hezbollah,<sup>13</sup> law enforcement lacked sufficient evidence to bring criminal charges against him prior to the attack.<sup>14</sup> The persistent difficulty of detecting genuine threats of this kind has led counterterrorism experts to refer to lone wolf terror attacks as “the main threat to this country.”<sup>15</sup> Surely, lone wolf

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8. Daniel L. Byman, *Can Lone Wolves be Stopped?*, BROOKINGS INST. (Mar. 15, 2017), <https://www.brookings.edu/blog/markaz/2017/03/15/can-lone-wolves-be-stopped/> [https://perma.cc/DFN5-YG87].

9. Joby Warrick & Souad Mekhennet, *A Battered ISIS Grows Ever More Dependent on Lone Wolves, Simple Plans*, WASH. POST (July 20, 2017), [https://www.washingtonpost.com/world/national-security/a-battered-isis-grows-ever-more-dependent-on-lone-wolves-simple-plans/2017/07/19/3eeef9e8-6bfa-11e7-96ab-5f38140b38cc\\_story.html](https://www.washingtonpost.com/world/national-security/a-battered-isis-grows-ever-more-dependent-on-lone-wolves-simple-plans/2017/07/19/3eeef9e8-6bfa-11e7-96ab-5f38140b38cc_story.html) [https://perma.cc/W6U9-5D5U]; Christine Abizaid, Dir., Nat'l Counterterrorism Ctr., *A Survey of the 2023 Terrorism Threat Landscape* (Jan. 10, 2023), <https://www.washingtoninstitute.org/media/6141> [https://perma.cc/R6QJ-WA3J].

10. Jeffrey C. Connor & Carol Rollie Flynn, *What to Do About Lone Wolf Terrorism? Examining Current Trends and Prevention Strategies*, FOREIGN POL'Y RSCH. INST. (Nov. 26, 2018), <https://www.fpri.org/article/2018/11/what-to-do-about-lone-wolf-terrorism-examining-current-trends-and-prevention-strategies/> [https://perma.cc/A7SM-DPB3].

11. *Id.*

12. COUNTER EXTREMISM PROJECT, *supra* note 3.

13. *Id.*

14. *Id.*

15. Katie Worth, *Lone Wolf Attacks Are Becoming More Common—And More Deadly*, PBS (July 14, 2016) (quoting former CIA Director Leon Panetta), <https://www.pbs.org/wgbh/frontline/article/lone-wolf-attacks-are-becoming-more-common->

terrorism has created particularly intractable challenges in terms of prevention.

Effective prevention must begin by correcting false assumptions about how lone wolves operate and what makes their terror plots successful. Perhaps counterintuitively, lone wolf perpetrators are typically not isolated masterminds solely responsible for carrying out devastating acts of terror. Instead, a significant proportion heavily rely on the support of other likeminded individuals—what some scholars have termed the “radical milieu”<sup>16</sup>—whose assistance allows lone wolves to carry out increasingly sophisticated terror plots. According to one study, forty-eight percent of lone perpetrators communicated face-to-face with others involved in a broader movement, and thirty-five percent communicated virtually.<sup>17</sup> Seventeen percent of lone wolves sought guidance from religious or other community leaders, twenty-one percent received hands-on training prior to an attack, and forty-six percent received training from virtual sources.<sup>18</sup> In twenty-four percent of cases, other individuals provided the lone wolf with technological assistance or even weaponry.<sup>19</sup> A separate study found that, overall, seventy-eight percent of lone wolves “were exposed to external sources of encouragement or justification for the use of violence.”<sup>20</sup> Thus, while they may act alone, so-called lone wolf terrorists depend upon the support of others to effectively achieve their violent ends. This suggests that preventing lone wolf terrorism requires disruption of the informal networks of sympathetic individuals whose assistance enables would-be lone wolf terrorists to successfully carry out their mission.

Two of the most effective tools in prosecutors’ antiterrorism arsenal are 18 U.S.C. §§ 2333 and 2339B, which prohibit the provision

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and-more-deadly/ [https://perma.cc/3RMN-FZ2S]. More recently, although the National Counterterrorism Center reported that the threat posed by FTOs was “less acute” than it was during the caliphate’s peak, FTO-inspired terrorism continues to be the “most urgent threat” to U.S. homeland security. According to the report, “both groups [al Qaeda and ISIS] still aspired to strike the West and remained ‘committed’ to attacking Americans and U.S. targets worldwide . . . . In 2022, terrorist groups increasingly used their ‘highly visible’ online presence to inspire lone wolves to conduct attacks in the United States.” *U.S. Intelligence on Terror Threat*, WILSON CTR. (Dec. 8, 2022), <https://www.wilsoncenter.org/article/us-intelligence-terror-threat> [https://perma.cc/SD82-L4CG].

16. Bart Schuurman et al., *Lone Actor Terrorist Attack Planning and Preparation: A Data-Driven Analysis*, 63 J. FORENSIC SCIS. 1191, 1195–97 & n.92 (2018).

17. Gill et al., *supra* note 5, at 434.

18. *Id.*

19. *Id.*

20. Schuurman et al., *supra* note 16, at 1195.

of “material support” to a Foreign Terrorist Organization (FTO). Section 2333(d) provides for secondary civil liability against defendants who provide material support to an FTO for any terrorist attack that is “committed, planned, or authorized” by the FTO.<sup>21</sup> Section 2339B, meanwhile, provides criminal penalties of up to 20 years of imprisonment for defendants convicted of providing material support to an FTO.<sup>22</sup> Both statutes are broad in scope, penalizing defendants who knowingly provide material support *regardless* of intent to contribute to the FTO’s terrorist activities.<sup>23</sup> Sections 2333 and 2339B provide a powerful means of deterring those sympathetic to an extremist cause from facilitating acts of terrorism, thus preventing would-be terrorists from receiving much-needed resources and aid. Due to its utility, § 2339B is the most frequently invoked criminal terrorism offense by far,<sup>24</sup> and is often accompanied by allegations of civil liability under § 2333.<sup>25</sup> Both statutes present a promising avenue for combatting lone wolf terrorism given that the threat of prosecution could prove advantageous in dismantling the informal networks upon which would-be lone wolves often rely.

However, §§ 2333 and 2339B both suffer from a major deficiency. Although liability under both statutes is predicated on the recipient of material support being part of a designated FTO, neither statute specifies criteria for determining who counts as a “member” of an FTO. This is particularly problematic for categorizing lone-actor terrorists who operate in a grey area regarding their connection with a broader terrorist organization. On the one hand, many so-called “lone wolves” claim affiliation with a larger group,<sup>26</sup> and many have significant personal ties to an established terrorist organization.<sup>27</sup> On the other hand, lone wolves do not typically act under the explicit direction

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21. 18 U.S.C. § 2333(d)(2).

22. 18 U.S.C. § 2339B(a)(1).

23. *Id.*; 18 U.S.C. § 2333(d)(2).

24. RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 28 (2008).

25. *See, e.g.*, *Fields v. Twitter, Inc.*, 881 F.3d 739, 742 (9th Cir. 2018) (alleging defendant’s violation of § 2339B as a predicate for establishing liability under § 2333).

26. Gill et al., *supra* note 5, at 430 (noting that 52.9% of lone-actor terrorists claim association with an organized group).

27. *Id.* (noting that a significant portion of lone wolf terrorists maintain personal ties with a wider network).

of an FTO's leadership and may not communicate with a terrorist organization at all.<sup>28</sup>

This indeterminacy means that, while many lone wolves are directly inspired by a terrorist organization to do the group's bidding, it is unclear under what conditions the lone wolf can be considered *part of* the FTO. Consequently, it is also unclear whether individuals or entities who provide support to lone wolves can be prosecuted under §§ 2333 or 2339B. Given that prominent international terrorist organizations like al-Qaeda and ISIS continue to attract lone wolf adherents to commit acts of terror on their behalf, it is essential to develop workable criteria to determine which individuals should be barred from receiving material support under §§ 2333 and 2339B.<sup>29</sup>

Surprisingly few courts, and even fewer scholars, have addressed this issue. With no textual guidance and little applicable precedent as to who counts as part of an FTO, every court that has attempted to confront this issue has struggled to do so.<sup>30</sup> Courts have developed several divergent approaches—each equally unsatisfying. This Note argues that prior approaches have failed to create a workable definition of FTO membership and suggests an alternative test that courts could use to determine who should be considered part of an FTO. Part I discusses the function of §§ 2333 and 2339B and surveys the relevant case law regarding FTO membership. Part II critiques the case law outlined in Part I and outlines the need for a better test for FTO membership. Part III explores analogous legal doctrines which could be used to craft a test for FTO membership. This Note concludes by proposing a new, four-part test for FTO membership that will help resolve the current confusion on this issue.

## I. THE AMBIGUOUS STATUS OF FTO MEMBERSHIP UNDER §§ 2333 AND 2339B

This Part provides an overview of the background and purpose of the material support statutes. It also discusses the existing case law

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28. See Lasse Lindekilde et al., *Radicalization Patterns and Modes of Attack Planning and Preparation Among Lone-Actor Terrorists: An Explanatory Analysis*, 11 BEHAV. SCIS. TERRORISM & POL. AGGRESSION 113, 124 t.2 (2019) (finding that in only four percent of cases was a lone wolf terrorist “ordered [or] instigated by another person” to commit an act of terror).

29. Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 437 (2007) (noting that the rise of lone wolf terrorism could diminish the efficacy of the material support statutes because “[b]y definition, these statutes have no application unless the defendant can be linked to a designated entity,” yet “[t]he threat of terrorist violence . . . is not always confined to that circumstance”).

30. See *infra* Sections I.B–D.

regarding FTO membership and the current circuit split regarding who should be regarded as part of an FTO. As this Part will show, there is no predominant test for FTO membership, and the courts that have addressed the issue have largely done so without the aid of either textual guidance or applicable precedent. As a result, the existing tests for FTO membership are less than optimal, as will be discussed further in Part II.

### *A. The Broad Scope of the Material Support Statutes*

In the aftermath of the Cold War, American policymakers turned their attention from the familiar world of global power politics to a new kind of threat—the proliferation of non-state terrorist organizations. The 1993 World Trade Center Bombing,<sup>31</sup> the bombings of the U.S. embassies in Kenya and Tanzania,<sup>32</sup> the attack on the USS *Cole*,<sup>33</sup> and finally the September 11 attacks<sup>34</sup> alerted the nation to the gravity of the threat posed by transnational terrorist groups and convinced lawmakers of the need for new legislation to meet the demands of the moment.

In the period between the end of the Cold War and the U.S. invasion of Afghanistan, Congress enacted a flurry of anti-terrorism statutes designed to provide law enforcement with the necessary tools to prosecute would-be terrorists and prevent future attacks before they occur.<sup>35</sup> Among these were new provisions prohibiting “material support” to terrorism. In the interests of preventing would-be terrorists from acquiring resources that could potentially be used in future attacks against the United States, Congress defined prohibited material support broadly to include “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

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31. *World Trade Center Bombing 1993*, FBI, <https://www.fbi.gov/history/famous-cases/world-trade-center-bombing-1993> [<https://perma.cc/LQ9L-6TS4>].

32. *East African Embassy Bombings*, FBI, <https://www.fbi.gov/history/famous-cases/east-african-embassy-bombings> [<https://perma.cc/R8S5-T9GP>].

33. *USS Cole Bombing*, FBI, <https://www.fbi.gov/history/famous-cases/uss-cole-bombing> [<https://perma.cc/39JW-Z3BA>].

34. Leslie Alder, *What Happened on Sept. 11, 2001*, REUTERS (Sept. 13, 2021, 2:32 PM), <https://www.reuters.com/world/us/what-happened-sept-11-2001-2021-09-11/> [<https://perma.cc/F7J3-TJ63>].

35. *See generally* 18 U.S.C. §§ 2331–2332(f); 18 U.S.C. §§ 2333–2339B.



equipment, facilities, weapons, lethal substances, explosives, personnel . . . and transportation.”<sup>36</sup>

This far-reaching prohibition is replicated in a series of related statutes. For example, 18 U.S.C. § 2339A penalizes defendants who provide material support knowing or intending that the resources provided will be used in furtherance of terrorist activity.<sup>37</sup> In contrast, 18 U.S.C. §§ 2333 and 2339B, which deal with material support supplied to a designated FTO, are significantly broader. Unlike § 2339A, §§ 2333 and 2339B penalize defendants who provide material support to an FTO *regardless* of the defendant’s knowledge of, or intent to facilitate, the organization’s violent activities.<sup>38</sup> The broader liability of 18 U.S.C. §§ 2333 and 2339B reflects Congress’ determination that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any* contribution to such an organization facilitates that conduct,”<sup>39</sup> irrespective of a defendant’s intent. Because it is often difficult to prove that a defendant who provided material support specifically intended that the proffered resources be used in furtherance of terrorist activity,<sup>40</sup> the broader liability of §§ 2333 and 2339B plays an essential role in effectively preventing the flow of material support to terrorist organizations.

However, given that conviction under §§ 2333 and 2339B depends upon whether the recipient of material support is part of an FTO, Congress’ failure to define who counts as part of an FTO is highly problematic. The rise of lone wolf terrorism has made it even more difficult to define the class of individuals to whom the broad prohibitions of §§ 2333 and 2339B apply. Because international terrorist organizations increasingly rely on virtual propaganda to enlist new “recruits” dispersed across the globe,<sup>41</sup> there is a strong case that the proper definition of FTO membership should encompass these individuals, allowing prosecutors to charge defendants who provide support to lone wolf attackers. At the same time, given the severe penalties associated with being considered part of a designated FTO, it is imperative that only those sufficiently connected with a larger group

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36. 18 U.S.C. §§ 2339A(b)(1), 2339B(g)(4).

37. 18 U.S.C. § 2339A(a).

38. 18 U.S.C. § 2339B(a)(1); Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 18 (2005); 18 U.S.C. § 2333(d)(2).

39. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 § 301(a)(7) (1996) (emphasis added).

40. Chesney, *supra* note 38, at 13.

41. Jytte Klausen, *Tweeting the Jihad: Social Media Networks of Western Foreign Fighters in Syria and Iraq*, 38 STUD. CONFLICT & TERRORISM 1, 20 (2015).

be considered members. As courts have recognized, “FTO designation visits serious consequences”<sup>42</sup> for members of the designated organization. Not only are FTO members barred from receiving any “material support,” including essential services such as money, lodging, or transportation,<sup>43</sup> but the Secretary of the Treasury may also freeze the financial assets of FTO members,<sup>44</sup> and alien FTO members become automatically eligible for deportation.<sup>45</sup> Most importantly, FTO members are subject to terrorism charges in cases where only ordinary criminal charges would otherwise be available. Given the severe consequences of being labelled an FTO member, it is necessary that courts articulate definitive criteria for determining who should be considered part of an FTO. The remainder of this Part surveys the divergent approaches courts have taken in attempting to tackle the FTO membership question.

### B. *The Crosby Test*

The fallout from the Pulse nightclub shooting provided the first opportunity for an appellate court to decide whether lone wolves could be considered members of an FTO and whether the prohibitions of §§ 2333 and 2339B apply to defendants who provide material support to lone wolves. In *Crosby v. Twitter*, the plaintiffs—families of the Pulse nightclub victims—asserted that Twitter, Facebook, and Google had provided material support to ISIS in violation of §§ 2333 and 2339B.<sup>46</sup> ISIS’ ability to spread its message online, the plaintiffs alleged, allowed ISIS to recruit new members—like Mateen—to carry out terrorist attacks on the group’s behalf. Although Mateen lacked any direct ties to ISIS, the plaintiffs asserted that he should be considered a part of ISIS because he was radicalized by ISIS propaganda and was “virtually recruited” to carry out terrorist attacks in the United States.<sup>47</sup> Because Mateen pledged allegiance to ISIS and had used the defendants’ platforms to prepare for the nightclub attack, the plaintiffs argued that the defendants should be held liable for material support to an FTO.<sup>48</sup>

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42. Nat’l Council of Resistance of Iran v. Dep’t of State, 373 F.3d 152, 154 (D.C. Cir. 2004).

43. 18 U.S.C. §§ 2339A(b)(1), 2339B(g)(4).

44. 8 U.S.C. § 1189(a)(2)(C).

45. 8 U.S.C. § 1182(a)(3)(B)(i).

46. 921 F.3d 617, 621 (6th Cir. 2019).

47. *Id.* at 626.

48. *Id.* at 621.

The Sixth Circuit dismissed the plaintiffs' complaint, holding that §§ 2333 and 2339B were inapplicable because Mateen was not part of ISIS.<sup>49</sup> Although Matten had viewed ISIS propaganda online and claimed affiliation with the group, he was "self-radicalized" and "never had any contact with ISIS."<sup>50</sup> Further, ISIS did not help plan the Pulse nightclub shooting, did not "give official permission for (or 'authorize') the attack," and only learned about and endorsed Mateen's actions *after* the fact.<sup>51</sup> The court contrasted the evidentiary record before it with various "hypothetical facts" which "may help [a plaintiff] connect ISIS to a 'lone wolf' terrorist attack; such as using 'encrypted messaging applications' to play the role of 'confidants and coaches,' sending direct communications to the attacker, and 'remotely guid[ing]' a terrorist through an attack."<sup>52</sup> Because no such facts existed in Mateen's case, the court explained, Mateen could not be considered part of ISIS. Based on this discussion, one can surmise that, under the *Crosby* court's formulation, FTO membership requires: (1) two-way communication between an individual and the group, which must occur (2) *prior* to the terrorist activity in question, and must consist of (3) direct involvement of the FTO leadership in planning or sanctioning the aforementioned terrorist activity. Absent this kind of nexus between an individual defendant and an FTO, §§ 2333 and 2339B cannot apply.<sup>53</sup>

Several other circuits have subsequently adopted the *Crosby* test. In *Colon v. Twitter*, the Eleventh Circuit denied a second material support suit brought by victims of the Pulse nightclub shooting against Twitter, Facebook, and Google.<sup>54</sup> The *Colon* court, citing *Crosby*, barred the plaintiffs' claims on the grounds that Mateen was not a member of ISIS, and thus the Pulse nightclub shooting was not an attack "committed, planned, or authorized" by a designated FTO.<sup>55</sup> Echoing *Crosby*, the *Colon* court determined that, because ISIS did not plan or pre-approve the shooting, and because Mateen at no point established "contact with ISIS prior to the shooting," Mateen was not

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49. *Id.* at 626 ("[I]t was Mateen—and not ISIS—who committed the Pulse Night Club shooting.").

50. *Id.*

51. *Id.*

52. *Id.*

53. Importantly, *Crosby* was decided at the motion to dismiss stage. *Id.* at 621. It is at least conceivable that the *Crosby* court might have required even *stronger* evidence of a connection between Mateen and ISIS had the case advanced beyond this point.

54. *Colon v. Twitter, Inc.*, 14 F.4th 1213 (11th Cir. 2021).

55. *Id.* at 1222 (quoting *Crosby*, 921 F.3d at 626).

sufficiently connected to ISIS to be considered a member of that organization.<sup>56</sup>

*Crosby* was similarly endorsed by the Fifth Circuit in *Retana v. Twitter*, in which the court dismissed a plaintiff's claim against defendant social media companies for allegedly providing material support to a lone wolf terrorist.<sup>57</sup> The *Retana* plaintiff was a police officer injured during a mass shooting in Dallas, Texas, carried out by a lone wolf perpetrator.<sup>58</sup> The plaintiff asserted that the shooter, Micah Johnson, was a member of Hamas because he had "liked" Facebook posts belonging to a pro-Hamas black separatist group known as the African American Defense League<sup>59</sup> and had expressed sympathy with Hamas while speaking to an unnamed witness two years prior to the shooting.<sup>60</sup> The plaintiff further alleged that the defendant companies were liable for material support because they supplied Hamas with "[i]nternet services and social media platforms" on which Johnson was radicalized and planned the shooting.<sup>61</sup>

Explaining that the "[p]laintiffs' assertions are even more attenuated than the facts in *Crosby*,"<sup>62</sup> the court dismissed the claim. Hamas had not planned or pre-approved the Dallas shooting or contacted the shooter at any point, nor had Hamas endorsed Johnson's actions after the fact.<sup>63</sup> As the court explained, Johnson's fleeting expression of solidarity with Hamas was simply too attenuated a connection, absent more, to consider Johnson a member of Hamas. The court understandably believed that acceptance of the plaintiff's claims would have entailed the adoption of an overly expansive test for FTO membership. Under the *Retana* plaintiffs' theory, Johnson, had he survived, should have been prosecuted as an international terrorist instead of as a mentally ill domestic shooter.<sup>64</sup> Further, not only would the defendant social media companies be vulnerable to prosecution for material support, but other members of the African American Defense League Facebook group, who had encouraged the shooter

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56. *Id.*

57. *Retana v. Twitter, Inc.*, 1 F.4th 378 (5th Cir. 2021).

58. *Id.* at 379–80.

59. *Id.*

60. *Id.* at 380.

61. *Id.* at 379.

62. *Id.* at 382.

63. *Id.*

64. *Army Reservist Who Killed 5 Dallas Officers Showed Symptoms of PTSD*, CBS NEWS (Aug. 24, 2016, 9:10 PM), <https://www.cbsnews.com/news/army-reservist-who-killed-5-dallas-officers-showed-symptoms-of-ptsd/> [<https://perma.cc/LUE5-5GT4>].

that it was “time to act,”<sup>65</sup> could likely be prosecuted as well. Thus, the *Retana* court concluded that the definition of FTO membership under § 2333 should be restricted to individuals who have clear associative ties with an FTO or who receive direct orders from FTO’s leaders.

Finally, the Ninth Circuit in *Gonzalez v. Google* applied the *Crosby* test to another case where the perpetrators’ connection to an FTO was somewhat closer.<sup>66</sup> In *Gonzalez*, the plaintiffs—victims of the 2015 San Bernardino shooting—alleged that the perpetrators of the attack, Syed Rizwan Farook and Tashfeen Malik, were members of ISIS and that they had received material support from defendant social media companies which had allowed the shooters to plan, fundraise, and communicate prior to the attack.<sup>67</sup> Adopting the *Crosby* test, the Ninth Circuit denied the plaintiffs’ claims on the grounds that the shooters were not members of ISIS, and thus the defendants could not be liable under §§ 2333 and 2339B.<sup>68</sup> The court acknowledged that, unlike in the case of Omar Mateen, the San Bernardino perpetrators had personal connections with several individuals designated by the FBI as having “links to terrorism”<sup>69</sup> and had planned the shooting in accordance with tactics “outlined in . . . ISIS magazines.”<sup>70</sup> Regardless, the Ninth Circuit determined that while “the allegations . . . indicate some connection between the shooters and ISIS is possible . . . more is needed in order to plausibly allege a cognizable claim.”<sup>71</sup> Because the plaintiffs had not plausibly alleged that ISIS “authorized the attack beforehand,”<sup>72</sup> or that the individuals with whom the shooters

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65. *Retana*, 1 F.4th at 380.

66. 2 F.4th 871 (9th Cir. 2021).

67. *Id.* at 911.

68. *Id.*

69. *Id.*

70. *Id.* at 912.

71. *Id.* at 911.

72. *Id.*

met had helped plan the shooting,<sup>73</sup> Farook and Malik could not be considered members of ISIS within the meaning of § 2333.<sup>74</sup>

In sum, the *Crosby* test assesses an individual's alleged FTO membership by examining the degree to which the individual acts under the direct control of the group's leadership and the degree to which his actions are approved or authorized by the organization as a whole. This has the effect of limiting the prohibited recipients of material support under §§ 2333 and 2339B to individuals who operate under an identifiable command structure, therefore narrowing the potential applicability of both laws. Several courts have opted for a different path, determining that *Crosby*'s test is insufficient to capture an individual's potential connection with an FTO.

### C. *The Jama Test*

Despite relatively wide acceptance of the *Crosby* test, some courts have opted for a more flexible set of factors for determining whether a given individual is a member of an FTO. The Eastern District of Virginia's decision in *United States v. Jama* articulated an alternative test for FTO membership in the context of § 2339B.<sup>75</sup> In *Jama*, the defendants were charged with sending funds to individuals located in Somalia, who in turn used the money to aid al-Shabaab.<sup>76</sup> The defendants claimed that they could not be prosecuted under § 2339B because the recipients of the funds were not actually *members* of al-Shabaab.<sup>77</sup> Thus, the district court was squarely presented with the question of how to define FTO membership.

The court began by observing that “[t]here is surprisingly little case law concerning by what standard to determine whether a particular individual is sufficiently associated with an FTO to constitute the

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73. *Id.* (noting that, although the perpetrators had previously met with individuals identified as having “links to terrorism,” these meetings had taken place “a few years prior to the attack;” however, with regard to the specific attack in question, “[p]laintiffs’ allegations suggest only that ISIS approved of the shooting *after* learning it had occurred, not that it authorized it beforehand”). Presumably, if the plaintiffs had alleged that other ISIS-affiliated individuals had helped plan the attack, a finding of ISIS membership would have been significantly more likely. *Cf. Crosby v. Twitter, Inc.*, 921 F.3d 617, 626 (6th Cir. 2019) (suggesting that receiving instruction from FTO-affiliated “confidants and coaches” is relevant to the determination of FTO membership).

74. *Gonzalez*, 2 F.4th at 911.

75. 217 F. Supp. 3d 882 (E.D. Va. 2016).

76. *Id.* at 888.

77. *Id.* at 890.

organization itself.”<sup>78</sup> In the absence of textual guidance or controlling precedent, the court looked to a related provision, § 2339B(h), which prohibits the provision of “personnel” to an FTO. The court reasoned that the statutory definition of FTO “personnel” was “useful in fashioning a test to determine whether someone is sufficiently acting for or on behalf of an FTO to be deemed a part of the FTO.”<sup>79</sup>

“Personnel,” under § 2339B(h), includes anyone who “work[s] under that terrorist organization’s direction or control,” or otherwise “organize[s], manage[s], supervise[s], or otherwise direct[s] the operation of that organization.”<sup>80</sup> Conversely, under § 2339B(h), “individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction or control.”<sup>81</sup> The *Jama* court noted the Supreme Court’s broad reading of this provision,<sup>82</sup> which held that “personnel” includes all persons who engage in *any* form of “concerted activity” with an FTO, excluding only those individuals whose activities are *entirely* independent.<sup>83</sup> On the basis of § 2339B(h)’s broad language, the *Jama* court concluded that “Congress . . . did not intend to limit Section 2339B’s application to situations where prohibited support is delivered to designated or recognized leaders or to those who operate under some identifiable command and control structure.”<sup>84</sup> Therefore, the court concluded that an individual could be considered part of an FTO as long as they were “engaged in significant activity on behalf of an FTO relative to that FTO’s goals and objectives.”<sup>85</sup>

In its analysis of whether the individuals in question engaged in sufficiently “significant activity” on behalf of al-Shabaab, the court looked to seven factors:

- (1) the nature of the assistance provided or received by the individual (whether lawful or unlawful) and how it benefitted the FTO or otherwise advanced its goals and objectives;
- (2) for what time period the support or resources were provided;
- (3) whether the individual undertakes his or her activities specifically and

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78. *Id.*

79. *Id.* at 891.

80. *Id.* (quoting 18 U.S.C. § 2339B(h)).

81. *Id.*

82. *Id.* at 891–92.

83. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 23–24 (2010).

84. *Jama*, 217 F. Supp. 3d at 892.

85. *Id.*

exclusively for the benefit of the FTO or whether the individual undertakes similar activities for other organizations or for the public at large; (4) the degree to which the individual's actions are directed by or coordinated with others associated with the FTO or any of its generally recognized representatives; (5) the nature and extent of the individual's contacts within the FTO or with others acting on behalf of the FTO, including access to the FTO's leadership and to non-public information pertaining to the FTO's activities; (6) whether the individual self-identifies with the FTO, represents himself or herself as being part of the FTO, or purports to act on behalf of the FTO; and (7) whether the individual is reliably identified as being part of an FTO by recognized international law enforcement or other organizations.<sup>86</sup>

The court explained that these factors were not exhaustive, and a single factor may be sufficient for FTO membership designation.<sup>87</sup> In applying this flexible test to the facts before it, the court held that the recipients of the funds had engaged in sufficiently significant activity on behalf of al-Shabaab and could be regarded as members of that organization.<sup>88</sup>

The *Jama* test has subsequently been cited with some approval by the Southern District of New York in *United States v. Ullah*.<sup>89</sup> In *Ullah*, the defendant was apprehended after attempting to detonate an improvised explosive device (IED) in the Times Square Port Authority bus terminal, announcing on social media that he was acting on behalf of ISIS.<sup>90</sup> He was subsequently charged with providing “personnel”—namely, himself—to ISIS.<sup>91</sup> At trial, the defendant cited the fact that the definition of “personnel” under § 2339B(h) excludes those who act “entirely independently” of an FTO, and argued that, because he never communicated with ISIS leadership, and because ISIS did not plan or pre-approve his actions, he could not be considered ISIS personnel.<sup>92</sup>

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86. *Id.*

87. *Id.*

88. *Id.* at 892–93.

89. *United States v. Ullah*, No. 18-cr-16, 2020 U.S. Dist. LEXIS 245691 (S.D.N.Y. Jan. 4, 2021).

90. *Id.* at \*1–3.

91. *Id.* at \*6–7.

92. *Id.* at \*7–8.



The court, citing *Jama*, rejected the defendant's argument, explaining that "the text of § 2339B(h) . . . does not require coordination, but merely direction," and "the common meaning of the word 'direction' . . . refers to a command from one person to another, not a two-party discussion of options."<sup>93</sup> The court reasoned that the defendant could be considered ISIS personnel because he "acted at ISIS's direction by heeding the call of the organization's propaganda" which "encourage[d] attacks similar to the one he carried out at the Port Authority," and because the defendant purported to have acted "for the Islamic State."<sup>94</sup> Wielding the discretion that characterizes the *Jama* test, the *Ullah* court held that the defendant, who had never communicated with ISIS, could be considered "ISIS personnel" so long as the jury found that "(1) ISIS 'invited' its followers to carry out attacks like the Defendant's, and (2) Defendant acted in response to such an invitation."<sup>95</sup> Because *Ullah* met this criteria, his conviction was upheld.<sup>96</sup>

The *Ullah* decision illustrates the flexibility of the *Jama* test. Unlike the *Crosby* test, which focuses on the degree to which a given individual operates under a defined command structure,<sup>97</sup> the *Jama* test is designed "to reach all persons who act on behalf of an FTO to further its goals and objectives in significant ways."<sup>98</sup> *Jama*'s flexibility offers several practical advantages over *Crosby*, as well as several severe drawbacks. These are analyzed further in Part II.

#### D. Judge Gould's Agency Theory

Finally, it is worth analyzing two closely related tests for FTO membership: one proposed by Judge Gould in a partial concurrence, partial dissent filed in the *Gonzalez* case, and the other crafted by the D.C. Circuit. While the D.C. Circuit's reasoning is somewhat distinct from Judge Gould's, the two tests overlap significantly, and thus this Note considers them together. Under Judge Gould's proposed test, the FTO membership question should be resolved by applying the common law of agency. Agency law, which is often applied in the context of civil litigation, governs the question of when one party (the agent), ostensibly acting on behalf of another (the principal), can legally be considered subject to the principal's control. Under agency law, a

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93. *Id.* at \*8.

94. *Id.* at \*9–10.

95. *Id.* at \*13.

96. *Id.* at \*27–28.

97. See *Crosby v. Twitter, Inc.*, 921 F.3d 617 (6th Cir. 2019).

98. *United States v. Jama*, 217 F. Supp. 3d 882, 892 (E.D. Va. 2016).

principal-agent relationship is established where there is mutual assent by both parties that the agent will act on behalf of the principal.<sup>99</sup> Judge Gould argued that these principles should resolve the question of when a particular individual can be considered to be legally acting as part of an FTO.

According to Judge Gould, a principal-agent relationship exists between an individual terrorist and an FTO if (1) the individual in question purported to be acting on the group's behalf, and (2) the group endorsed the perpetrator's actions.<sup>100</sup> The San Bernardino shooters whose actions were at issue in the *Gonzalez* case had declared their allegiance to ISIS on social media prior to the shooting,<sup>101</sup> and while there was no indication that ISIS played any role in planning or pre-approving the attack, the group did endorse the perpetrator's actions *after* the fact.<sup>102</sup> Unlike the *Gonzalez* majority, Judge Gould would have accepted ISIS's after-the-fact ratification of the San Bernardino shooting as sufficient to establish that the perpetrators were members of ISIS since, under the relevant principles of agency law, later ratification by the principal is sufficient to establish an agency relationship.<sup>103</sup> Thus "even assuming the perpetrators had little advance connection with ISIS," ISIS' subsequent ratification, combined with the shooters' statements of allegiance, was enough to establish their membership in ISIS.<sup>104</sup>

Although no court has explicitly adopted Judge Gould's proposed test, the D.C. Circuit has developed an approach predicated on substantially similar reasoning. In *Force v. Islamic Republic of Iran*, a group of fifty-seven plaintiffs—victims of a series of terrorist attacks that took place in Israel between 2008 and 2016—brought suit against the governments of Iran and Syria for providing material support to two FTOs: Hamas and the Palestinian Islamic Jihad (PIJ).<sup>105</sup> The plaintiffs alleged that members of Hamas and the PIJ were responsible for the attacks in question, and, that by providing both organizations with significant logistical support, Iran and Syria were liable for material support under the terrorism exception to the Foreign Sovereign

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99. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006).

100. *Gonzalez v. Google LLC*, 2 F.4th 871, 934 (9th Cir. 2021) (Gould, J., concurring in part and dissenting in part).

101. *Id.* at 933.

102. *Id.*

103. *Id.* at 934.

104. *Id.*

105. 464 F. Supp. 3d 323, 334–35 (D.D.C. 2020).

Immunities Act.<sup>106</sup> Complicating the plaintiffs' claims was the fact that several of the terrorist attacks in question were committed by lone wolf perpetrators,<sup>107</sup> whose connections to the aforementioned FTOs were in question. Thus, the plaintiffs' allegations required the District Court to determine whether the attacks could properly be attributed to Hamas and the PIJ.

The court analyzed each of the plaintiffs' claims in turn, beginning with the claim brought by the estate of Taylor Force, a U.S. Army veteran who was fatally stabbed by a lone attacker while vacationing in Tel Aviv.<sup>108</sup> Force's estate claimed that the perpetrator, Bashar Muhammad Abd al-Qader Masalha, was a member of Hamas who committed the attack in question as part of a coordinated "wave" of Hamas-inspired terror attacks directed against Israeli civilians.<sup>109</sup> The court agreed, holding that Masalha could be considered a member of Hamas.<sup>110</sup> In so holding, the Court relied on three factors. First, the attack "b[ore] the hallmarks of a Palestinian terror attack incited by Hamas;"<sup>111</sup> "[s]econd, Masalha's background reveals that he was influenced by Hamas's ideology;"<sup>112</sup> and "[f]inally, and most significantly, Hamas took responsibility for the attack."<sup>113</sup>

The court went on to meticulously detail the facts most significant to its three-factor analysis. First, it noted that during the time period in which the stabbing of Taylor Force took place, "Hamas leaders routinely called on 'the Palestinian population to mount attacks in the form of stabbings, vehicular ramming attacks, and even gunfire' against Israelis"<sup>114</sup>—a coordinated campaign of terror referred to by the Israeli press as the "knife intifada" of 2015–2016.<sup>115</sup> Thus, Masalha's actions fit into a discernible pattern of terrorist activity which evidenced a direct nexus between his actions and specific instructions disseminated by Hamas leadership. Further, the court noted significant

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106. *Id.* at 335.

107. Yonah Jeremy Bob, *US Court: Iran, Syria, Hamas, IJ Can be Liable for "Lone-Wolf" Attackers*, JERUSALEM POST (June 2, 2020, 7:28 PM), <https://www.jpost.com/middle-east/us-court-iran-syria-hamas-can-be-liable-for-lone-wolf-attackers-630016> [https://perma.cc/CD5U-2GXH].

108. *Force*, 464 F. Supp. 3d at 343.

109. *Id.* at 344.

110. *Id.* (concluding that "Taylor Force was the victim of a Hamas terror attack").

111. *Id.* (internal quotations omitted).

112. *Id.*

113. *Id.*

114. *Id.* (citations omitted).

115. Bob, *supra* note 107.

evidence of Masalha's pre-existing allegiance to Hamas, including a series of social media posts from the month preceding the attack in which Masalha expressed his desire to "die as a shahid [martyr]" on behalf of Hamas.<sup>116</sup> Masalha had expressed increasingly radical beliefs leading up to the attack and publicly espoused Hamas' ideology.<sup>117</sup> Finally—and, according to the Court, "most significantly"—Hamas explicitly ratified Masalha's actions after the fact.<sup>118</sup> "The day of the attack . . . photos and messages from Masalha's Facebook account were posted to the PALINFO website, which is identified with Hamas," and "two days later, a banner was posted on the same website" claiming Masalha as a member of Hamas.<sup>119</sup> Given these facts, Masalha could be deemed part of Hamas, despite the absence of any evidence that he directly communicated with other individuals affiliated with Hamas. The court offered a similar analysis with respect to the other plaintiffs' claims, repeatedly emphasizing the fact that Hamas and the PIJ had claimed credit for all of the attacks in question<sup>120</sup> and that the timing and methods of the attacks suggested that they were carried out in response to instructions disseminated by the respective organizations to their followers.<sup>121</sup>

Although not specifically invoking agency theory, *Force*'s reasoning is strongly reminiscent of Judge Gould's proposed test. Both Judge Gould and the *Force* court focused on two essential elements: (1) the perpetrator's intent to act on the FTO's behalf; and (2) the FTO's later ratification of the perpetrator's actions. The *Force* court added a third element: the existence of a nexus between the perpetrator's actions and specific instructions disseminated by the FTO to its followers, as demonstrated by factors such as the timing of the attack, the method of commission, and the target selected.

Following the D.C. District Court's ruling in *Force*, the D.C. Circuit in *Atchley v. AstraZeneca UK* adopted reasoning even more evocative of Judge Gould's principal-agent test. The *Atchley* plaintiffs—victims of a series of terrorist attacks allegedly committed by Hezbollah—brought suit against AstraZeneca and other medical

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116. *Force*, 464 F. Supp. 3d at 344.

117. *Id.*

118. *Id.*

119. *Id.* "Palestine-info" (referred to as PALINFO in the opinion) is a network of websites used by Hamas to disseminate news and propaganda. Tomer Mozes & Gabriel Weimann, *The E-Marketing Strategy of Hamas*, 33 *STUD. CONFLICT & TERRORISM* 211, 213–14 (2010).

120. *Force*, 464 F. Supp. 3d at 355 ("First, and foremost, Hamas claimed credit for the attack.").

121. *Id.* at 354 (discussing Hamas' authorization of rocket attacks against specific Israeli targets).

supply companies, alleging that they had provided corrupt payments to representatives of Hezbollah in violation of the material support statutes.<sup>122</sup> Problematically for the plaintiffs, the individual recipients of the bribes and the perpetrators of the terrorist attacks in question were not directly tied to Hezbollah; instead, they purported to be members of Jaysh al-Mahdi, an organization that, unlike Hezbollah, was not designated as an FTO.<sup>123</sup> Because § 2333(d) required the plaintiffs to demonstrate that the attacks in question were “committed, planned, or authorized” by an FTO,<sup>124</sup> the plaintiffs argued that the perpetrators were, for all relevant purposes, acting on Hezbollah’s behalf.

The court turned to the text of § 2333 requiring that the terrorist activity at issue be “committed, planned, or authorized” by Hezbollah.<sup>125</sup> While some of the terrorist attacks in question were committed jointly by members of Hezbollah and Jaysh al-Mahdi, the majority of the plaintiffs’ claims involved attacks in which Hezbollah leadership took no direct part.<sup>126</sup> Because this latter category of terrorist activity was not directly “committed” by persons officially affiliated with Hezbollah, the attacks could only be attributed to Hezbollah if the plaintiffs could show that Hezbollah had somehow “planned or authorized” the attacks within the meaning of § 2333.<sup>127</sup>

The plaintiffs contended that the plain meaning of the terms “planned” and “authorized” demanded a broad application of § 2333.<sup>128</sup> “To ‘plan,’” the plaintiffs explained, means “to arrange the parts of” or to “design,” whereas “to ‘authorize’ means ‘to endorse, empower, justify, or permit’ another’s acts through ‘some recognized or proper authority (such as custom, evidence, personal right, or regulating power).”<sup>129</sup> Consequently, the court explained, § 2333 should apply to anyone who participated in activities which were either partially “designed” or “arranged” by an FTO, or whose actions were otherwise “endorse[d], empower[ed], justif[ied] or permit[ted]” by “some recognized or proper authority” within the FTO.<sup>130</sup> Despite the breadth of the plaintiffs’ proposed definition, the defendants did not directly

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122. *Atchley v. AstraZeneca UK Ltd.*, 22 F.4th 204, 209 (D.C. Cir. 2022).

123. *Id.* at 216.

124. 18 U.S.C. § 2333(d)(2).

125. *Id.*

126. *Atchley*, 22 F.4th at 216 (“For most of the attacks at issue, however, plaintiffs allege they were committed by Jaysh al-Mahdi with Hezbollah more in the background . . .”).

127. *Id.*

128. *Id.* at 217.

129. *Id.* (citation omitted).

130. *Id.*

contest it.<sup>131</sup> For its part, although the court arguably stopped short of explicitly adopting the plaintiffs' suggested framework, it seemed at least implicitly to do so. After extensively quoting language from the plaintiffs' brief, the court launched into its own explanation as to why the statutory terms "planned" and "authorized" should be construed broadly. It explained that "[i]t is well known that terrorist organizations, and Hezbollah in particular, often operate by proxy."<sup>132</sup> The court pointed out that in several prior cases, individuals who were not officially affiliated with Hezbollah had carried out terrorist attacks that had nevertheless been subsequently attributed to Hezbollah.<sup>133</sup> Thus, the critical inquiry was not whether the attacks in question were carried out by Hezbollah's official operatives, but rather, whether Hezbollah "stands behind the fighters who pull the trigger or detonate the device."<sup>134</sup> This reading of the statutory language, according to the court, is supported by "Congress's statutory findings in light of the realities of modern terrorism" as well as the broad remedial purpose of § 2333.<sup>135</sup>

With regard to whether the attacks against the *Atchley* plaintiffs were carried out by "proxies" of Hezbollah, the court described the ways in which Hezbollah had "planned and authorized" the perpetrator's activities.<sup>136</sup> Hezbollah had helped "plan" the terrorist attacks by providing weapons, training, and tactical instructions to Jaysh al-Mahdi.<sup>137</sup> Jaysh al-Mahdi and Hezbollah had been formally aligned for some time, and the two organizations' members frequently interacted with one another.<sup>138</sup> As for "authorizing" the attacks, "Hezbollah asserted religious authority over Jaysh al-Mahdi fighters by, for example, issuing a fatwa declaring a religious duty to attack Americans in Iraq."<sup>139</sup> Additionally, Hezbollah provided Jaysh al-Mahdi fighters with directions and training, and Jaysh al-Mahdi members "swore

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131. *Id.* ("defendants offer no contrary reading of those terms").

132. *Id.*

133. *Id.* (citing *Bartlett v. Société Générale De Banque Au Liban Sal*, No. 19-CV-00007, 2020 U.S. Dist. LEXIS 229921, at \*51 (E.D.N.Y. Nov. 25, 2020) (explaining that the actions of "third party paramilitary groups" that were indirectly "controlled and directed" by Hezbollah could be attributed to Hezbollah)).

134. *Id.*

135. *Id.*

136. *Id.* at 218.

137. *Id.* at 218–19.

138. *Id.*

139. *Id.* at 219.

fealty to Hezbollah.”<sup>140</sup> In light of these facts, the Court held that the plaintiffs had plausibly alleged that the attacks were carried out by “proxies” of Hezbollah.<sup>141</sup>

Curiously, the court appeared to believe that its decision was reconcilable with other circuits’ holdings in *Crosby*, *Colon*, and *Gonzalez*.<sup>142</sup> In contrast to the “tenuous connection” at issue in the aforementioned cases, the court explained, Hezbollah was “closely involved” in orchestrating the terrorist attacks against the *Atchley* plaintiffs.<sup>143</sup> Undoubtedly, the *Atchley* court was correct that the significant coordination between members of Jaysh al-Mahdi and Hezbollah was factually distinguishable from the lone wolf attacks at issue in *Crosby*, *Colon*, and *Gonzalez*. However, given the sheer scope of the court’s “proxy” analysis, the *Atchley* court’s holding appears far more similar to Judge Gould’s *Gonzalez* dissent than to the *Gonzalez* majority’s holding.

Both Judge Gould’s proposed test and the D.C. Circuit’s approach represent a potential middle path between the *Crosby* and *Jama* tests. Under this test, an individual’s stated affiliation with a larger organization, and the organization’s ratification of their actions, is sufficient to establish that an individual is part of the organization. In other words, unlike in *Crosby*, a direct command-and-control relationship is not required. Conversely, the requirement that the organization directly authorize its members’ actions, at least in some form, makes Judge Gould’s test more stringent than the flexible requirements of the *Jama* test. As such, the agency-based test represents a promising compromise between two competing visions.

## II. PROBLEMS WITH THE EXISTING APPROACHES

Having surveyed the competing tests for FTO membership in the relevant case law in Part I, Part II discusses the relative merits of each, concluding that none of the three tests for FTO membership discussed in Part I are adequate. Part II concludes by describing the need for courts to develop more workable criteria going forward.

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140. *Id.*

141. *Id.* at 218 (“Plaintiffs plausibly allege that Hezbollah both planned and authorized the attacks against them.”).

142. *Id.* at 217–18 (explicitly distinguishing the facts in *Atchley* from those in *Crosby*, *Colon*, and *Gonzalez*).

143. *Id.* at 218.

*A. The Crosby Test is Inconsistent with the Broad Language of §§ 2333 and 2339B and Ignores the Way Terrorist Organizations Actually Operate*

Despite its acceptance in several courts of appeal, the *Crosby* test for FTO membership is predicated upon erroneous factual assumptions about how terrorist organizations actually operate, and it runs contrary to Congress' broad prohibition on the provision of material support to all persons affiliated with an FTO. While neither §§ 2333 nor 2339B specifically define FTO membership, both statutes evince a clear congressional intent to prevent *anyone* affiliated with an FTO from receiving material support.<sup>144</sup> The *Crosby* court ignored this indication entirely, evidently presuming that the prohibitions of §§ 2333 and 2339B should only pertain to individuals acting under the direct command of terrorist leaders. This reflects a flawed assumption on the part of the *Crosby* court that terrorist organizations operate by means of a hierarchical command structure, and that FTO members—who operate within that structure—can clearly be distinguished from non-members. Unlike the *Crosby* court, Congress recognized that terrorist organizations often operate in a decentralized manner, and expressed its intention to prohibit the provision of material support to *all* individuals sufficiently associated with an FTO.<sup>145</sup>

By limiting the prohibition on the provision of material support in §§ 2333 and 2339B to recipients who operate within a terrorist organization's formal command-and-control structure, the *Crosby* court narrowed the scope of these statutes to an extent that is plainly contrary to Congress' stated purpose. While neither statute specifically defines the class of individuals—FTO members—to whom the provision of material support is prohibited, the text of both statutes explicitly instructs courts to read their prohibitory provisions broadly. In the “findings” part of both §§ 2333 and 2339B, Congress noted that FTOs often “act[] through *affiliated groups or individuals*.”<sup>146</sup> Given Congress' recognition that terrorist organizations may act through the use of “affiliates,” and given its desire to effectively prevent those associated with an FTO from receiving resources that could be used in acts of terrorism, Congress explicitly instructed courts to apply §§ 2333 and 2339B in a flexible manner. In § 2339B, Congress expressed its desire to “provide the fullest possible basis, consistent with the Constitution,

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144. See discussion *infra* Section II.A.

145. See discussion *infra* Section II.A.

146. Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, § 301(a)(6) (1996) (for § 2339B); Justice Against Sponsors of Terrorism Act of 2016, Pub. L. No. 114-222, 130 Stat. 852 § 2(a)(3) (2016) (emphasis added) (for § 2333).



to prevent persons within the United States . . . from providing material support” to terrorism.<sup>147</sup> Congress articulated similarly broad aims with respect to § 2333, reaffirming in a 2016 amendment to that provision its desire to “provide civil litigants with the broadest possible basis, consistent with the Constitution . . . to seek relief against persons . . . that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States.”<sup>148</sup> In order to prevent foreign terror threats, *anyone* affiliated with an FTO should be barred from receiving material support under §§ 2333 and 2339B—even if they operate outside of the FTO’s defined command structure.

Given Congress’ clearly articulated purpose to prevent the flow of material support to *anyone* affiliated with an FTO, it is necessary that the application of §§ 2333 and 2339B reflect “the manner in which international terrorist organizations . . . actually operate.”<sup>149</sup> Due to a need to maintain flexibility and longevity<sup>150</sup> and a desire to expand geographical reach,<sup>151</sup> terrorist organizations increasingly opt for a decentralized organizational structure. Terrorist groups such as ISIS have intentionally “cultivated looser networks of cells, operatives, and sympathizers in Europe, Asia, Africa, and the United States.”<sup>152</sup> A critical component of this strategy is the active radicalization of lone operatives to commit terrorist attacks on behalf of a larger group.<sup>153</sup> The degree of connection between lone operatives and a wider terrorist network is often understated. One study of 119 lone actor terrorists found that “47.9% interacted face-to-face with members of a wider

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147. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, § 301(b) (1996).

148. Justice Against Sponsors of Terrorism Act of 2016, Pub. L. No. 114-222, 130 Stat. 852, § 2(b) (2016).

149. *United States v. Ullah*, No. 18-cr-16, 2020 U.S. Dist. LEXIS 245691, at \*3 (S.D.N.Y. Jan. 4, 2021).

150. Nicholas B. Pace, *Decentralization: The Future of ISIS*, SMALL WARS J. (Nov. 5, 2014, 8:49 AM), <https://smallwarsjournal.com/jrnl/art/decentralization-the-future-of-isis> [<https://perma.cc/VL8J-HUMJ>].

151. See, e.g., Cameron Glenn, *Al Qaeda v ISIS: Leaders & Structure*, WILSON CTR. (Sept. 28, 2015), <https://www.wilsoncenter.org/article/al-qaeda-v-isis-leaders-structure> [<https://perma.cc/D2HZ-7TGH>] (noting ISIS strategy of maintaining loosely connected overseas affiliates over which it does not exercise direct control, while increasing its perceived influence by claiming credit for the actions of its international arms).

152. U.S. INST. OF PEACE, *THE JIHADI THREAT: ISIS, AL QAEDA, AND BEYOND* 17 (2016), <https://www.usip.org/publications/2016/12/jihadi-threat-isis-al-qaeda-and-beyond> [<https://perma.cc/L3N7-EZZY>].

153. Mendelsohn, *supra* note 6.

network . . . and 35.3% did so virtually.”<sup>154</sup> Another study confirmed this trend, finding that “62% [of lone wolves] . . . [had] contacts with clearly radical, extremist, or terrorist individuals;” “33% socialized with individuals who could be designated as leaders or authority figures within radical, extremist, or terrorist groups;” and “31% were recognized members or participants in radical, extremist, or terrorist groups at some point in their lives.”<sup>155</sup> While these lone actors do not typically work under direct orders from an organization’s leadership,<sup>156</sup> they do coordinate frequently. In at least twenty-six percent of cases, lone wolf terrorists received help from other group members in planning a specific act of terror, and in thirty-five percent of cases, lone wolves received outside aid during the preparatory stages of an attack.<sup>157</sup> Effective counterterrorism requires an acknowledgement of the role lone wolves play within a larger group.<sup>158</sup> Given these facts, the proper test for FTO membership should account for individuals who operate within an FTO’s sphere of influence, even if they do not operate under that organization’s direct command.

The *Crosby* test incorrectly assumed that FTO membership should be evaluated by reference to the degree to which an individual acted under the direct orders of recognized terrorist leaders. In ruling that Omar Mateen was not a member of ISIS, the Court distinguished Mateen, who “by himself and without ISIS’ help . . . planned and committed the Orlando attack,”<sup>159</sup> from a hypothetical ISIS member, whose membership in ISIS would be marked by his being “give[n] official permission for . . . the attack,” and “remotely guid[ed]” through the attack by “confidants and coaches” in ISIS leadership.<sup>160</sup> The court was certainly correct about Mateen’s lack of connection to ISIS or any

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154. Gill et al., *supra* note 5, at 430.

155. Schuurman et al., *supra* note 16, at 1195.

156. *Id.* (noting that “the ultimate decision to carry-through with an act of terrorism violence was [the lone operative’s] alone”); Lindekilde et al., *supra* note 28, at 124 (finding that in only four percent of cases was a lone wolf terrorist “ordered [or] instigated by another person” to commit an act of terror).

157. Lindekilde et al., *supra* note 28, at 124.

158. Gill et al., *supra* note 5, at 430–34; Schuurman et al., *supra* note 16, at 1195 (documenting the often close relationship that so-called lone wolf terrorists have to a recognized organization); Mendelsohn, *supra* note 6 (discussing the strategic value of radicalizing lone wolf adherents).

159. *Crosby v. Twitter, Inc.*, 921 F.3d 617, 626 (6th Cir. 2019).

160. *Id.*

other terrorist organization.<sup>161</sup> However, in this respect, Mateen was the exception, not the rule.<sup>162</sup> The *Crosby* test, crafted to reflect the court's understandable intuition that Mateen's attenuated connection to ISIS should not render him a "member," is less helpful when applied to the more typical cases of lone wolf terrorism, where a perpetrator operates in conjunction with, but not at the command of, a larger organization. In these situations, it is imperative that courts adopt a more flexible test for FTO membership than the one promulgated in *Crosby*, so as to allow courts to analyze the full degree of an individual's relationship to an FTO.

### B. The Constitutional Infirmities of the *Jama* Test

While the *Crosby* test defines FTO membership too narrowly, the *Jama* test suffers from the opposite problem, being so vague as to allow courts—and prosecutors—undue discretion in applying §§ 2333 and 2339B. After correctly noting that "Congress . . . did not intend to limit 2339B's application to situations where prohibited support is delivered to designated or recognized leaders or to those who operate under some identifiable command and control structure,"<sup>163</sup> the *Jama* court proceeded to create an unwieldy seven-factor test for adjudicating an individual's alleged FTO membership. Under the *Jama* court's test, a single factor may provide sufficient evidence of a defendant's alleged FTO membership.<sup>164</sup> Thus, the *Jama* test provides courts little guidance for determining whether someone is sufficiently affiliated with an FTO to be considered part of that organization. This indeterminacy gives rise to serious constitutional concerns for the application of §§ 2333 and 2339B.

#### 1. The Vagueness of the *Jama* Test

*Jama*'s seven-factor test is overly vague and provides little predictive value in terms of who will and will not be labelled a "member"

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161. Ed Pilkington & Dan Roberts, *FBI and Obama Confirm Omar Mateen Was Radicalized on the Internet*, GUARDIAN (June 14, 2016, 2:06 PM), <https://www.theguardian.com/us-news/2016/jun/13/pulse-nightclub-attack-shooter-radicalized-internet-orlando> [<https://perma.cc/5RGB-8QEL>].

162. Joseph Ax, *Wolf Dens, Not Lone Wolves, the Norm in U.S. Islamic State Plots*, REUTERS (June 14, 2016, 6:10 AM), <https://www.reuters.com/article/us-usa-islamic-state-crime-insight-idUSKCN0Z015A> [<https://perma.cc/T4RJ-7HU3>].

163. *United States v. Jama*, 217 F. Supp. 3d 882, 892 (E.D. Va. 2016).

164. *Id.*

of an FTO.<sup>165</sup> Because courts are invited to assign different weight to each *Jama* factor based on the surrounding circumstances, it is virtually impossible to clearly define the class of individuals to whom §§ 2333 and 2339B apply. This level of open-endedness is not only unhelpful for courts applying *Jama*, but it also creates the potential for unconstitutionally vague applications of the material support statutes.

This is not the first time that vagueness concerns have been raised in the context of the material support laws. In *Holder v. Humanitarian Law Project*, the Supreme Court upheld § 2339B against several constitutional challenges, including a claim that the law was void for vagueness.<sup>166</sup> The *Holder* plaintiffs, humanitarian organizations, sought to provide legal assistance and humanitarian aid to the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE)—both designated FTOs.<sup>167</sup> The plaintiffs, fearing prosecution under the broad prohibitions of § 2339B, challenged the law's constitutionality on the grounds that several terms within the law's definition of "material support" were overly vague.<sup>168</sup>

One challenged term was the statutory prohibition on the provision of "personnel" to an FTO.<sup>169</sup> The statutory definition of FTO "personnel" is broad, encompassing anyone who "work[s] under [a] terrorist organization's direction or control to organize, manage, supervise, or otherwise direct the operation of that organization."<sup>170</sup> Despite the breadth (and arguable vagueness) of this definition, the Court upheld it against constitutional challenge, noting that the statute clearly distinguished between persons who perform "concerted activity" in conjunction with an FTO, as opposed to mere "independent advocacy" unconnected with the FTO itself.<sup>171</sup> As applied to the *Holder* plaintiffs, the scope of the prohibited activity was clear: To the extent that the plaintiffs wished merely to engage in *independent* advocacy on behalf of the PKK or the LTTE, they would not be considered "personnel" of either organization.<sup>172</sup>

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165. Jordan E. Helton, Comment, *Construction of a Terrorist Under the Material Support Statute*, 18 U.S.C. § 2339B, 67 AM. U. L. REV. 553, 588 (2018).

166. 561 U.S. 1, 21 (2010).

167. *Id.* at 10.

168. *Id.* at 14.

169. *Id.*

170. *Id.* at 23; 18 U.S.C. § 2339B(h).

171. *Humanitarian L. Project*, 561 U.S. at 23–24.

172. *Id.* at 24 ("[A]ny independent advocacy in which the Plaintiffs wish to engage is not prohibited by § 2339B."). The Court determined that § 2339B's exclusion of independent advocacy applied to the statutory definitions of both "personnel" and "services." *Id.* at 23–24.

Citing *Humanitarian Law Project*, the *Jama* court evidently believed it was on firm constitutional ground in borrowing from the “personnel” concept to fashion its definition of FTO membership.<sup>173</sup> However, *Humanitarian Law Project*’s distinction between concerted action and independent activity is somewhat complicated in the context of lone wolf perpetrators. The *Jama* court’s solution—an unpredictable, multi-factor test—creates new vagueness concerns that were not present in *Humanitarian Law Project*. Recall *United States v. Ullah*, in which the court determined that a lone perpetrator was “ISIS personnel,” even though he had never been in contact with ISIS.<sup>174</sup> Although the *Ullah* defendant contended that he could not be ISIS “personnel” because he acted “entirely independently of the group,”<sup>175</sup> the court, citing *Jama*, ruled that the defendant could nevertheless be considered part of ISIS because he “acted at ISIS’s direction by following the call of the organization’s propaganda” which “encourage[d] attacks similar to the one he carried out,” and because the defendant purported to have acted “for the Islamic State.”<sup>176</sup> The *Ullah* court read *Jama* to say that an individual who had no contact whatsoever with an FTO could still be considered a “member” if that individual acted under the organization’s “direction” by heeding its general calls for violence. Given that the *Ullah* defendant had explicitly pledged allegiance to ISIS, the *Ullah* court certainly cannot be faulted for concluding that the defendant was ISIS “personnel.” Nevertheless, the *Ullah* decision illustrates that the *Jama* test may be applied in unpredictable ways and underscores the need for more definitive criteria for assessing a given individual’s connection to an FTO.

## 2. The Problem of Guilt by Association

A related critique, which has been made generally in regards to §§ 2333 and 2339B, is that the aforementioned statutes impose guilt by association. Because both statutes penalize the provision of material support to FTO members *regardless* of the intent of the person

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173. *United States v. Jama*, 217 F. Supp. 3d 882, 890–92 (E.D. Va. 2016) (noting that, in *Humanitarian Law Project*, “the Supreme Court considered various constitutional challenges to certain aspects of Section 2339B,” and “terms [in § 2339B] are either defined or have been construed in ways that are useful in fashioning a test to determine whether someone is sufficiently acting for or on behalf of an FTO to be deemed a part of the FTO,” before going on to discuss the statutory definition of FTO “personnel”).

174. *United States v. Ullah*, No. 18-cr-16, 2020 U.S. Dist. LEXIS 245691, at \*8–9 (S.D.N.Y. Jan. 4, 2021).

175. *Id.* at 7–8.

176. *Id.* at 9–10.

providing the resources, Professor David Cole has argued that the material support statutes resemble previously discredited Cold War-era efforts to crack down on political opposition by criminalizing association rather than illegal intent.<sup>177</sup> Just as individuals were previously prosecuted for communist associations even in the absence of proof that the individual themselves advocated violent action,<sup>178</sup> so too can individuals who advocate for extremist causes be punished for providing material support to terrorist groups without themselves engaging in any illegal activity. Despite these concerns, §§ 2333 and 2339B have consistently been upheld by courts against litigants contending that the statutes impose guilt by association.<sup>179</sup> As the Second Circuit explained in *United States v. Al Kassar*, the provision of material support to a recognized terrorist group “is intimately associated with criminal activity,” and thus guilt can be attributed to any defendant who knowingly provides material support to such organizations.<sup>180</sup>

However, *Jama*’s seven-factor test adds an additional wrinkle to the application of §§ 2333 and 2339B. *Jama*’s vague test provides little guidance as to who counts as a member of an FTO. This indeterminacy could lead to situations in which legal, protected activity is later deemed “material support” because one of the individuals involved is determined to be part of an FTO. Take, as a hypothetical example, an online pro-ISIS chatroom that regularly circulates instructional manuals on how to comport oneself with the requirements of the Quran as interpreted by ISIS. Suppose a member of the chatroom later carries out a lone wolf terrorist attack. Are the other members of the chatroom, who engaged only in protected speech, guilty of providing “expert advice or assistance” to a member of ISIS? If the lone wolf attacker could be considered a “member” of ISIS, then the answer would most likely be yes. In other words, the legality of the chatroom’s activities depends upon the identity of one of the participants. Worse yet, the *Jama* factors are so indeterminate that it will be difficult

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177. David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 9–10 (2003).

178. *Id.* at 4–8 (chronicling relevant history).

179. See, e.g., *United States v. Farhane*, 634 F.3d 127, 138 (2d Cir. 2011); *United States v. Lindh*, 212 F. Supp. 2d 541, 573 (E.D. Va. 2002); *United States v. Shah*, 474 F. Supp. 2d 492, 500 (S.D.N.Y. 2007).

180. 660 F.3d 108, 130 (2d Cir. 2011); see also *Holder v. Humanitarian L. Project*, 561 U.S. 1, 36 (2010) (emphasis added):

Given the sensitive interests in national security and foreign affairs at stake, the political branches have adequately substantiated their determination that, to serve the Government’s interest in preventing terrorism, it was necessary to prohibit providing material support . . . even if the supporters meant to promote only the groups’ nonviolent ends.

to predict ahead of time which individuals might later be deemed FTO members. This creates a significant risk that §§ 2333 and 2339B will be applied in a manner that imposes guilt by association and violates the First Amendment.<sup>181</sup> From both a practical and a constitutional perspective, this makes the *Jama* test highly problematic.

### 3. The *Jama* Test Allows Prosecutors Undue Discretion in Labelling Perpetrators as Members of an FTO

The indeterminacy of *Jama* allows for an impermissible level of prosecutorial discretion in applying the material support laws. Prosecutorial discretion in promulgating charges of material support has been the subject of much scholarship,<sup>182</sup> yet was not raised—and therefore not resolved—in the Supreme Court’s *Humanitarian Law Project* decision.<sup>183</sup> Given the difficulty of determining who counts as a member of an FTO, the problem must be addressed.

As courts have repeatedly recognized, “FTO designation visits serious consequences”<sup>184</sup> for members of a designated organization. The Secretary of the Treasury may freeze the assets of known alien FTO members, rendering them automatically eligible for deportation.<sup>185</sup> If arrested for crimes, they may be subject to terrorism charges where only ordinary criminal charges would otherwise be available.<sup>186</sup> Given the severe penalties associated with being designated as an FTO member, it is necessary to guard against the threat of selective prosecution. The motivating factors behind lone wolf terrorism, which may range from severe mental illness<sup>187</sup> to genuine ideological

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181. Helton, *supra* note 165, at 567 n.74.

182. See, e.g., Abdulrahman Alwattar, Comment, *The Material Support Statutes and Their Tenuous Relationship with the Constitution*, 20 U. PA. J. CONST. L. 473, 484 (2017) (documenting disparate treatment of Muslim minorities under the material support laws); Khaled A. Beydoun, *Lone Wolf Terrorism: Types, Stripes, and Double Standards*, 112 NW. U. L. REV. 1213, 1236–37 (2018) (discussing how racial stereotypes may inform prosecutorial decision-making).

183. *Humanitarian L. Project*, 561 U.S. at 20.

184. Nat’l Council of Resistance of Iran v. Dep’t of State, 373 F.3d 152, 154 (D.C. Cir. 2004).

185. See *supra* Section I.A (explaining the various penalties associated with FTO membership).

186. See *supra* Section I.A.

187. Emily Corner & Paul Gill, *Is There a Nexus Between Terrorist Involvement and Mental Health in the Age of the Islamic State?*, 10 COMBATING TERRORISM CTR. SENTINEL, Jan. 2017, at 1, 2, [https://ctc.usma.edu/wp-content/uploads/2017/01/CTC-Sentinel\\_](https://ctc.usma.edu/wp-content/uploads/2017/01/CTC-Sentinel_)

commitment, should merit different prosecutorial responses. Even as between terror plots that appear to be very similar, ordinary criminal charges may be more appropriate in one instance, whereas terrorism charges are more appropriate in another. The criteria used for determining who counts as a member of an FTO should reflect this.

Because *Jama*'s flexible seven-factor test does not provide a definitive indication of whether a given individual is or is not an FTO member, it leaves a significant part of the determination to prosecutors. The level of discretion afforded by the *Jama* test is problematic given the potential for racially or religiously charged prosecutions.<sup>188</sup> The wide latitude afforded to prosecutors by the *Jama* court leaves open the possibility that unconscious bias could lead prosecutors to label certain individuals "members" of an FTO—with the harsh penalties that accompany that label—based on the perpetrator's identity or perceived affiliation.

Thus, while the *Jama* court correctly recognized that "Congress . . . did not intend to limit Section 2339B's application to situations where prohibited support is delivered to designated or recognized leaders or those who operate under some identifiable command and control structure,"<sup>189</sup> *Jama*'s failure to articulate clear criteria for adjudicating an individual's membership in an FTO is highly problematic. Courts must move beyond the *Jama* test and seek a more workable solution.

### *C. Judge Gould's Agency Test is Promising, But Still Flawed*

Given the infirmities of both the *Crosby* and *Jama* tests, Judge Gould's agency-based test offers a promising, though imperfect, solution. As noted previously, agency law addresses the question of when one party (the agent), ostensibly acting on behalf of another (the principal), can legally be considered subject to the principal's control. An agency-based test offers a potential middle ground between *Crosby* and *Jama*. Judge Gould's test would provide more flexibility than the *Crosby* test in that a principal-agent relationship does not require direct control by the principal. Yet, this test would offer more predictability than would the *Jama* test, because it would limit the FTO "member"

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Vol9Iss1121.pdf [https://perma.cc/RZ6F-2934] (documenting high rates of mental illness among lone actor terrorists).

188. Beydoun, *supra* note 182, at 1218 (noting racial disparities in how instances of lone wolf terrorism are reported and prosecuted).

189. *United States v. Jama*, 217 F. Supp. 3d 882, 892 (E.D. Va. 2016).



designation to individuals who affirmatively obtained the organization's authorization to act on its behalf.

However, Judge Gould's agency-based test contains serious flaws as well. Establishing a principal-agent relationship between an individual and an FTO requires (1) intention by the agent to work on behalf of the FTO and (2) authorization of the agent's actions by the FTO.<sup>190</sup> As Judge Gould rightly pointed out in his partial concurrence, partial dissent in *Gonzalez*, under "well-established principles of agency law," "authorization can occur not only by advance planning, but also by ratification" after the fact.<sup>191</sup> This principle of post-hoc ratification may make sense in the typical applications of agency law, such as contract and tort disputes, but not in this context. Under Judge Gould's formulation, if a perpetrator commits an act of terrorism that is *subsequently* endorsed by an FTO, anyone who provided aid to the perpetrator—no matter how small—could be charged with material support. This would contravene the longstanding presumption against statutes applying retroactively.<sup>192</sup> Courts have consistently recognized that this presumption is "deeply rooted in our jurisprudence," and that "elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly."<sup>193</sup> As such, some applications of §§ 2333 and 2339B under Judge Gould's test could potentially raise due process issues.

This same critique applies (at least to some extent) to the D.C. Circuit's test. In *Force v. Islamic Republic of Iran*, the district court repeatedly highlighted the importance of an FTO's post-hoc ratification in deciding whether a given perpetrator was a member of the FTO.<sup>194</sup> While the *Force* court's meticulous fact-based analysis is clearly worthy of praise, its emphasis on post-hoc ratification as an element of establishing FTO membership is potentially problematic for the same reasons stated above. Likewise, the *Atchley* test—which encompasses any individual who either participates in activities which are partially "designed" or "arranged" by an FTO, or whose actions are otherwise "endorse[d], empower[ed], justif[ied] or permit[ted]" by

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190. Cf. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006).

191. *Gonzalez v. Google LLC*, 2 F.4th 871, 934 (9th Cir. 2021) (Gould, J., concurring in part and dissenting in part); RESTATEMENT (THIRD) OF AGENCY § 4.01(1) (AM. L. INST. 2006).

192. See *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964).

193. *Landgrad v. USI Film Prods.*, 511 U.S. 244, 265 (1994); see also *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring).

194. *Force v. Islamic Republic of Iran*, 464 F. Supp. 3d 323 (D.D.C. 2020); see *supra* Section I.D.

“some recognized or proper authority” within the FTO<sup>195</sup>—reaches so broadly as to afford little predictive value regarding whether the perpetrator will be deemed part of an FTO. Moreover, without additional clarification, the *Atchley* test might apply retroactively so as to encompass material support provided to individuals whose actions are only “endorse[d]” or “justif[ied]” by a terrorist group *after* the fact. Thus, while the agency-based test proposed by Judge Gould and the similar “proxy” test adopted by the D.C. Circuit provides a promising alternative to the excesses of *Crosby* and *Jama*, these approaches also contain potential flaws which undermine their long-term workability.

### III. UNEXPLORED ALTERNATIVES: LOOKING TO ANALOGOUS LEGAL REGIMES TO RESOLVE THE AMBIGUITY IN §§ 2333 AND 2339B

As previously described, it is necessary that courts move beyond current precedent in future adjudications relating to a defendant’s alleged membership in an FTO. To that end, this Note urges the adoption of a more workable test for FTO membership by examining analogous legal principles. Section III.A discusses several domestic legal doctrines that relate to the FTO membership issue. Although U.S. law does not define “membership in a terrorist organization,” courts have confronted questions similar to the FTO membership issue in analogous contexts. An examination of how courts have implicitly resolved these questions is useful for creating a test for FTO membership. Further, given the existing gaps in U.S. domestic law, courts should look internationally for guidance, as several other countries have extensively considered the FTO membership question. Section III.B provides a discussion of international approaches to the FTO membership issue. Finally, Section III.C amalgamates the lessons of domestic and international law and suggests a new, four-part test for FTO membership.

#### A. U.S. Domestic Law

Although U.S. law does not directly address the issue of FTO membership, courts and lawmakers have, in other contexts, addressed questions akin to the FTO membership issue. This section provides an overview of several existing concepts in U.S. domestic law that might be useful for courts seeking to craft a better test for FTO membership.

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195. See *supra* Section I.D.

### 1. Section 2339B(h)'s "Personnel" Provision

Although the material support statutes are silent regarding the definition of FTO membership, § 2339B(h) does define FTO "personnel." Under § 2339B(h), persons who "work under [the FTO's] direction or control or . . . organize, manage, supervise, or otherwise direct the operation of" the FTO can be considered FTO "personnel."<sup>196</sup> Despite the flaws of the *Jama* court's overall approach, it was undoubtedly correct that § 2339B(h)'s definition of FTO "personnel" is highly relevant to the question of who should be considered part of an FTO. Thus, any court seeking to answer the FTO membership question should closely examine the language of § 2339B(h).

As the broad language in § 2339B(h) makes clear, the *Jama* court was correct in holding that "Congress . . . did not intend to limit section 2339B's application to situations where prohibited material support is delivered to designated or recognized leaders or to those who operate under some identifiable command and control structure."<sup>197</sup> Instead, the statutory definition of FTO "personnel" suggests that "Congress intended to reach all persons who act on behalf of an FTO to further its goals and objectives in significant ways."<sup>198</sup> Section 2339B(h) therefore belies the *Crosby* court's contention that individuals should only be considered part of an FTO if they undertake terrorist activity with the FTO's "official permission" or are otherwise given direct orders by "confidants and coaches" in the FTO's leadership.<sup>199</sup>

However, while § 2339B(h) provides valuable guidance at a general level, defining the precise scope of § 2339B(h)'s "personnel" provision presents thorny issues when it comes to lone wolf terrorism. Section 2339B(h) explicitly provides that defendants will not be considered FTO "personnel" unless they "work under [the FTO's] direction or control;" conversely, persons who "act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control."<sup>200</sup> Even in upholding § 2339B against constitutional challenge, the Supreme Court acknowledged the existence of "difficult questions of exactly how much direction or

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196. 18 U.S.C. § 2339B(h).

197. *United States v. Jama*, 217 F. Supp. 3d 882, 892 (E.D. Va. 2016).

198. *Id.*

199. *Crosby v. Twitter, Inc.*, 921 F.3d 617, 626 (6th Cir. 2019).

200. 18 U.S.C. § 2339B(h).

coordination is necessary” for conviction.<sup>201</sup> Consequently, although several lone wolf terrorists have been found guilty of providing themselves as “personnel” to an FTO,<sup>202</sup> the extent to which § 2339B(h) applies to lone wolves remains heavily contested.

The fallout from the Mateen case provides an illustration. Following the Pulse nightclub shooting, Mateen’s widow, Noor Salman, was charged with aiding and abetting her husband’s provision of himself as “personnel” to ISIS.<sup>203</sup> Prosecutors alleged that Salman knew about, encouraged, and participated in her husband’s terror plot by “concealing the plan from his family on the night of the attack,”<sup>204</sup> “casing possible locations for an attack,”<sup>205</sup> and “driving him to purchase ammunition.”<sup>206</sup> Despite having initially confessed to assisting her husband in preparing for the Orlando shooting, Salman was ultimately acquitted.<sup>207</sup> Her acquittal largely resulted from her diminished mental capacity,<sup>208</sup> significant weaknesses in the government’s case relating to the circumstances surrounding her confession, and the lack of corroborating evidence proving that she took part in preparing for the Orlando attack.<sup>209</sup> One aspect of the trial that received less attention, however, was the dispute between the prosecution and the defense as to whether Mateen could himself be regarded as ISIS “personnel.”<sup>210</sup>

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201. Holder v. Humanitarian L. Project, 561 U.S. 1, 24 (2010).

202. See, e.g., United States v. Ullah, No. 18-cr-16, 2020 U.S. Dist. LEXIS 245691, at \*11 (S.D.N.Y. Jan. 4, 2021).

203. Grand Jury Indictment at 2, United States v. Salman, No. 6:17-cr-18-Orl-40KRS, (M.D. Fla. Jan. 12, 2017), <https://www.flmd.uscourts.gov/sites/flmd/files/documents/dockets/mdfl-salman-indictment.pdf> [<https://perma.cc/A6WB-VSAA>].

204. United States’ Trial Brief on Aiding and Abetting at 5, *Salman*, No. 6:17-cr-18-Orl-40KRS (M.D. Fla. Feb. 19, 2018), <https://www.flmd.uscourts.gov/sites/flmd/files/documents/dockets/mdfl-salman-trial-brief-on-aiding-and-abetting.pdf> [<https://perma.cc/ZY6H-8MVU>].

205. *Id.* at 6.

206. *Id.*

207. Patricia Mazzei, *Noor Salman Acquitted in Pulse Nightclub Shooting*, N.Y. TIMES (Mar. 30, 2018), <https://www.nytimes.com/2018/03/30/us/noor-salman-pulse-trial-verdict.html> [<https://perma.cc/9UD8-4QJ8>].

208. Eric Levenson et al., *Pulse Gunman’s Widow Found Not Guilty*, CNN (Mar. 31, 2018, 5:26 AM), <https://www.cnn.com/2018/03/30/us/noor-salman-pulse-trial-verdict/index.html> [<https://perma.cc/7GHT-XB3B>].

209. Mazzei, *supra* note 207.

210. United States’ Trial Brief on the Attempted Provision and Provision of Personnel or Services Under 18 U.S.C. § 2339B at 1, *Salman*, No. 6:17-cr-18-Orl-40KRS (M.D. Fla. Feb. 19, 2018 [hereinafter U.S. Trial Brief on Provision], <https://www.flmd.uscourts.gov>).

For its part, the Government argued that “there is no requirement for two-way communication between Mateen and ISIL” to meet § 2339B(h)’s “direction and control” requirement,<sup>211</sup> and that Mateen clearly fell within the ambit of § 2339B(h) “as demonstrated most clearly by his (accepted) pledge of allegiance and his action in accordance with ISIL’s commands.”<sup>212</sup> In support, the Government cited precedent in the First and Second Circuits in which defendants with no personal connection to a terrorist group were nevertheless convicted of providing themselves as “personnel” to an FTO.<sup>213</sup> The Government argued that despite Mateen’s total lack of communication with ISIL, he could nevertheless be considered ISIL “personnel” because he “watched a video by ISIL calling for ‘soldiers’ in America to commit violent attacks during Ramadan,” and “read multiple articles describing this same video and also describing ISIL’s interest in attacks in the United States,” thereby heeding ISIL’s generalized calls for violence and carrying out a terrorist attack at ISIL’s “direction.”<sup>214</sup>

Unsurprisingly, the defense offered a different reading of the “direction and control” requirement. The defense argued that, although two-way communication between a defendant and an FTO is not *explicitly* required by § 2339B(h), several prominent convictions under that provision “contain the common denominator of contact or attempted contact with representatives of designated organizations in satisfaction of the control requirement.”<sup>215</sup> At the very least, the defense contended, § 2339B(h) requires something more than mere “allegiance to and *general* direction from a terrorist organization.”<sup>216</sup> To be properly classified as FTO “personnel,” the defense argued, an individual must have taken steps evincing an “intent to place themselves under the terrorist organization’s direction and control.”<sup>217</sup> For

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gov/sites/flmd/files/documents/dockets/mdfl-salman-trial-brief-on-attempted-provision-and-provision-of-personnel-or-services.pdf [https://perma.cc/25ZK-7L4B].

211. *Id.* at 7.

212. *Id.*

213. *Id.* at 7 (citing *United States v. Mehanna*, 735 F.3d 32, 50 (1st Cir. 2013)); *id.* at 3 (citing *United States v. Farhane*, 634 F.3d 127, 152 (2d Cir. 2011)) (“[W]hen a person supplies himself as the bomber or pilot or doctor sought by a terrorist organization, he provides—or certainly attempts to provide—material support in the form of personnel *as soon as he pledges to work under the direction of the organization.*” (emphasis added)).

214. U.S. Trial Brief on Provision, *supra* note 210, at 4.

215. Defendant’s Trial Brief at 5, *Salman*, No. 6:17-cr-00018-ORL-40KRS (M.D. Fla. Feb. 19, 2018), <https://www.flmd.uscourts.gov/sites/flmd/files/documents/dockets/mdfl-salman-trial-brief-by-noor-zahi-salman.pdf> [https://perma.cc/6LV5-YNBQ].

216. *Id.* at 5 (emphasis added).

217. *Id.*

example, these steps might include “following [an FTO’s] instructions to photograph and videotape buildings as potential targets,”<sup>218</sup> or “swearing an oath, purchasing firearms, and training, in combination with traveling to Turkey with the intent to join ISIS.”<sup>219</sup> Absent proof that Mateen had taken steps to submit himself to ISIS’ control—rather than merely responding in general terms to ISIS’ generalized calls for violence—the defense argued that Mateen could not be considered ISIS “personnel.”<sup>220</sup>

Due to the numerous weaknesses of the government’s case against Noor Salman, the court never addressed the issue of Mateen’s alleged “personnel” status. However, the conceptual debate in which the government and the defense engaged regarding § 2339B(h)’s “direction and control” requirement illustrates the ongoing ambiguity in the statutory language. The *Jama* court’s singular reliance on the language of § 2339B(h) when fashioning its test for FTO membership led it to create a set of overbroad factors that offer little guidance for future courts adjudicating the FTO membership issue.<sup>221</sup> In considering the usefulness of § 2339B(h), courts should take care not to duplicate the mistakes of the *Jama* court. Thus, although the language of § 2339B(h) provides a helpful framework for analyzing the FTO membership issue, it is necessary for courts to consider other relevant legal doctrines as well.

## 2. The “Specially Designated Global Terrorist” List

In addition to prosecuting suspected FTO members under § 2339B(h)’s “personnel” provision, the government may also choose to designate individuals determined to be part of an FTO as “Specially Designated Global Terrorists” (SDGTs). Pursuant to the President’s authority under the International Emergency Economic Powers Act, President Bush created the SDGT list via executive order on September 23, 2001.<sup>222</sup> Executive Order 13224 and its implementing regulations allow the government to freeze the assets of suspected terrorists following a joint determination by the Secretary of the Treasury, the Secretary of Homeland Security, the Secretary of State, and the Attorney General that the individual in question has engaged in specific

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218. *Id.* (citing *United States v. Augustin*, 661 F.3d 1105, 1121 (11th Cir. 2011)).

219. *Id.* (citing *United States v. Nagi*, 254 F. Supp. 3d 548, 560 (W.D.N.Y. 2017)).

220. *Id.* at 4 (arguing that the statute should not be read so broadly as to encompass “any activity *generally solicited* by the organization” (emphasis added)).

221. *See infra* Section II.B.1.

222. Exec. Order No. 13,224, 3 C.F.R. 786–90 (2001).

terror-related activity.<sup>223</sup> Persons may be designated if they are found “to have committed or have attempted to commit, [or] pose a significant risk of committing . . . acts of terrorism,”<sup>224</sup> are “owned, controlled, or directed by, or to have acted or purported to act for or on behalf of . . . any person whose property” is already designated,<sup>225</sup> “have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, an act of terrorism,”<sup>226</sup> “have participated in training related to terrorism provided by any person” already designated as an SDGT,<sup>227</sup> or are determined “to be a leader or official of an entity” previously designated.<sup>228</sup>

While SDGT designation is not limited to individuals who are “members” of an FTO, the SDGT criteria is highly relevant to the FTO membership question given that the stated purpose of the list is to identify and sanction individuals who “support or otherwise associate with . . . foreign terrorists.”<sup>229</sup> Consequently, some scholars have pointed to the SDGT factors as a model for developing a test for FTO membership under §§ 2333 and 2339B.<sup>230</sup> Certainly, the far-reaching language of the SDGT listing factors is congruent with the broad purposes of §§ 2333 and 2339B to bar anyone who is “affiliated” with an FTO from receiving material support.<sup>231</sup>

Notwithstanding the general compatibility between the SDGT factors and the Congressional intent behind §§ 2333 and 2339B, the SDGT sanctioning process has been subject to extensive criticism.<sup>232</sup> These criticisms—which typically focus on due process and freedom

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223. *Id.* § 1(b)–(d); Prohibited Transactions Involving Blocked Property, 31 C.F.R. § 594.201(a)(2)–(3) (2022). The requirement that the Secretary of Homeland Security be involved in the decision-making process was added to the regulations later, following the creation of DHS. The criteria for listing have also been updated since the issuance of the original executive order. This Note reflects the regulation’s listing criteria as of March 5, 2023.

224. 31 C.F.R. § 594.201(a)(2)(i) (2022).

225. *Id.* § 594.201(a)(3)(i).

226. *Id.* § 594.201(a)(3)(iii).

227. *Id.* § 594.201(a)(3)(iv).

228. *Id.* § 594.201(a)(3)(v).

229. Exec. Order No. 13,224, 3 C.F.R. 786–90 (2001).

230. *See, e.g.,* Helton, *supra* note 165, at 595–99.

231. *See supra* Section II.A.

232. *See, e.g.,* *The “Specially-Designated Global Terrorist” Designation Scheme and its Constitutional Flaws*, ACLU, [https://www.aclu.org/sites/default/files/field\\_document/sdgt\\_designation\\_briefer\\_final.pdf](https://www.aclu.org/sites/default/files/field_document/sdgt_designation_briefer_final.pdf) [<https://perma.cc/FG3J-72GW>]; Laura K. Donohue, *Constitutional and Legal Challenges to the Anti-Terrorist Finance Regime*, 43 WAKE FOREST L. REV. 643, 672–73 (2008).

of association concerns<sup>233</sup>—undoubtedly have merit: The determination of whether a given individual fits the SDGT criteria is left entirely to the executive branch, rather than to the courts, and is often made on the basis of classified information.<sup>234</sup> As such, critics rightly point out that “the SDGT regime uses vague criteria and lacks an evidentiary standard for designating entities . . . and the designation process itself is unclear.”<sup>235</sup> While these flaws should not prevent courts from borrowing from the SDGT criteria, courts should be careful before adopting the broad language of the SDGT regime wholesale. This is especially true given the severe penalties associated with being deemed part of an FTO. Thus, despite the usefulness of the SDGT framework, courts should look for ways to anchor the broad language of the SDGT list in a tangible evidentiary standard.

### 3. Treason Prosecutions

Finally, courts could analogize to treason prosecutions when determining who is a member of a terrorist organization. The U.S. Constitution provides that treason consists of either “levying War” against the United States, or “adhering to its Enemies.”<sup>236</sup> Scholars have argued that both prongs of the offense apply to individuals who join a terrorist organization.<sup>237</sup> Terrorist organizations such as ISIS and al-Qaeda—which maintain armed battalions, acquire territorial holdings, and target American soldiers and civilians—can certainly be said to levy war against the United States.<sup>238</sup> Furthermore, given that both ISIS and al-Qaeda have publicly declared themselves enemies of the United States, any individual who acts on behalf of these organizations may be found guilty of treasonable adherence to the enemy.<sup>239</sup> Early in the War on Terror, prosecutors and judges seriously

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233. ACLU, *supra* note 232, at 5.

234. *See, e.g.,* Al Haramain Islamic Found., Inc. v. U.S. Dep’t of the Treasury, 686 F.3d 965, 980–81 (9th Cir. 2012) (noting that, by necessity, classified information plays a significant role in SDGT designations).

235. ACLU, *supra* note 232, at 1.

236. U.S. CONST. art. III, § 3, cl. 1.

237. *See* Stephen Jackson, *Treason in the Age of Terrorism: Do Americans Who Join ISIS ‘Levy War’ Against the United States?*, 9 AM. UNIV. NAT’L SEC. L. BRIEF 155, 210–11 (2019).

238. *See id.* at 196 (footnotes omitted):

[T]hat ISIS targets and kills Americans, attacks NATO members, aspired to . . . nation-state [status], and openly engages in hostilities against the United States . . . supports the conclusion that . . . [ISIS] is not only capable of levying war against the United States but has already done so.

239. *See id.* at 196–201.



considered the treason clause as a potential avenue for charging Americans accused of having joined al-Qaeda and the Taliban.<sup>240</sup> Although prosecutors largely refrained from invoking the treason clause due to the plethora of other, more terrorism-specific charges at their disposal, the debate regarding whether to invoke the treason clause against suspected terrorists underscores the historical use of treason charges against defendants accused of membership in rebel and terrorist organizations that have commenced hostilities against the United States.<sup>241</sup> As such, the kinds of issues that frequently arise in treason prosecutions—such as assessing the degree to which a defendant is affiliated with a particular rebel group or terrorist organization—are markedly similar to those related to the terrorist membership question.<sup>242</sup> Examining treason prosecutions provides a glimpse into how courts have, in other contexts, approached issues akin to the FTO membership question.

The first major treason case in the United States dealt with the “levying War” prong of the Treason Clause. In *Ex parte Bollman*, the defendants, accused of orchestrating an insurrection plot against the U.S. government, had attempted to enlist others to join a rebel army but had been arrested before any rebel forces could actually be mobilized.<sup>243</sup> They were subsequently charged with treason and filed a habeas motion before the Supreme Court challenging their imprisonment.<sup>244</sup> The Court dismissed the charges, distinguishing between the preparatory acts in which the defendants engaged and the act of “levying War” within the meaning of the treason clause. To levy war, the Court explained, “there must be an actual assemblage of men for the purpose of executing a treasonable design.”<sup>245</sup> Further, as stated in

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240. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (Scalia, J., dissenting) (“Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime.”); George P. Fletcher, *Ambivalence About Treason*, 82 N.C. L. REV. 1611, 1611–12 (2004) (noting that treason charges were likely available for American Taliban member John Walker Lindh, although he was not prosecuted due to political concerns).

241. Fletcher, *supra* note 240, at 1611–19 (discussing the historical use of treason prosecutions); *id.* at 1627 (discussing the availability of other terrorism-specific offenses as a potential reason for the lack of treason prosecutions in the War on Terror).

242. See Kristen Eichensehr, *Treason’s Return*, 116 YALE L.J. POCKET PART 229 (2007) (noting that the standard for treasonous associations with the enemy “is essentially the same standard that courts apply under the statute criminalizing material support for terrorism, which requires the prosecution to prove that defendants provided themselves as personnel to act at the ‘direction or control’ of a designated terrorist organization”).

243. *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 115–16 (1807).

244. *Id.* at 125.

245. *Id.* at 127.

*United States v. Burr*, the assemblage must be one which “carries with it *speciem belli*, the appearance of war,” and must be “so circumstanced that it may be reasonably concluded they are in a posture of war.”<sup>246</sup> Because no such body of men was actually assembled in the *Bollman* case, “no enlisting of men to effect it, would be an actual levying of war.”<sup>247</sup> The Court further clarified that “if war be *actually* levied, that is, if a body of men be actually assembled . . . all those who perform *any* part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered traitors.”<sup>248</sup> However, in the absence of such an organized force, or some otherwise discernable coordination among the participants, the defendants’ actions could not be classified as “levying War” for the purpose of a treason prosecution.

In short, “levying War” under the treason clause requires (1) actual coordination between the participants, which (2) must have advanced beyond the planning stages, and (3) must reach a level of organization that resembles actual war-like conditions—or, as the *Burr* court put it, “*speciem belli*.”<sup>249</sup> Applying these requirements to the terrorism context, one might surmise that any person who, for example, travels to the former Islamic State for the purpose of fighting on its behalf would likely fall within the ambit of the “levying war” prong. Additionally, lone-actor terrorists who operate outside of FTO-controlled territory may still be considered to have “levied war” on behalf of the FTO if they are found to be “leagued in a general conspiracy” with that organization<sup>250</sup>—for example, if they overtly coordinate with, or take direct orders from, recognized terrorist leaders. However, *true* lone wolf terrorists—who do not directly communicate with other members of a terrorist group—are unlikely to fall within the ambit of this prong of the Treason Clause.

However, suspected terrorists who do not fall within the ambit of the “levying War” prong may still be convicted of treason for adherence to the enemy. Unlike “levying War,” adherence to the enemy is broader in that it does not require direct coordination with others.<sup>251</sup> Nevertheless, the scope of adherence to the enemy is limited by the

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246. *United States v. Burr*, 25 F. Cas. 55, 163 (C.C.D. Va. 1807).

247. *Bollman*, 8 U.S. at 127.

248. *Id.* at 126 (emphasis added).

249. *Burr*, 25 F. Cas. at 163.

250. *Bollman*, 8 U.S. at 126.

251. See Jackson, *supra* note 237, at 209 (arguing that lone wolf terrorists are eligible for treason charges since “[t]o be guilty of aiding and comforting a U.S. enemy, Marquez must have provided *actual* aid and comfort with *intent* to betray his nation,” as opposed to having to be proved to be a member of a terrorist assemblage to be guilty of “levying war”).

Constitution's requirement that the prohibited adherence must render actual "aid and comfort" to the enemy.<sup>252</sup> This requirement has been interpreted to mean that prohibited adherence must consist of an act which "strengthens, or tends to strengthen, the enemies of the United States in the conduct of a war"<sup>253</sup> or otherwise substantially "advance[s] [the enemy's] interests."<sup>254</sup>

The Supreme Court expanded on this requirement in two World War II-era cases: *Cramer v. United States* and *Haupt v. United States*. Both cases dealt with the same Nazi plot in which eight German spies landed in the United States with the object of carrying out various acts of sabotage.<sup>255</sup> In the first case, *Cramer*, the defendant, after having received "a cryptic note left under his door," met with the saboteurs over drinks.<sup>256</sup> Although the purpose of the meeting was unknown, the government secured a conviction and argued on appeal that the meetings "gave [the saboteurs] a source of information and an avenue for contact" as well as "psychological comfort" and "social intercourse" which helped the saboteurs maintain their false identities.<sup>257</sup> However, the Court overturned Cramer's conviction, holding that conviction for treasonable adherence to the enemy required proof—which the government had failed to provide—that Cramer's actions had materially advanced the saboteurs' mission.<sup>258</sup> The Court noted that "Cramer furnished . . . no shelter, nothing that can be called sustenance or supplies, and there is no evidence that he gave them encouragement or counsel, or even paid for their drinks."<sup>259</sup> Because Cramer's meeting with the saboteurs was "no part of the saboteurs' mission and did not advance it,"<sup>260</sup> he could not be convicted of treason.

In contrast, the Court upheld the defendant's conviction in *Haupt* after finding that the defendant's actions had directly aided the saboteurs in achieving their goals.<sup>261</sup> The *Haupt* defendant, father of one of the saboteurs, had provided shelter, transportation, and

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252. U.S. CONST. art. III, § 3, cl. 1.

253. *United States v. Fricke*, 259 F. Supp 673, 676 (S.D.N.Y. 1919).

254. *Kawakita v. United States*, 343 U.S. 717, 742 (1952).

255. See generally *Cramer v. United States*, 325 U.S. 1, 3–6 (1945); *Haupt v. United States*, 330 U.S. 631, 633 (1947). For additional details regarding the sabotage plot, see *Ex parte Quirin*, 317 U.S. 1, 21–22 (1942).

256. *Cramer*, 325 U.S. at 5.

257. *Id.* at 37–38.

258. *Id.* at 45–48.

259. *Id.* at 37.

260. *Id.* at 38.

261. *Haupt v. United States*, 330 U.S. 631, 644 (1947).

employment for his son, with full knowledge of his son's mission.<sup>262</sup> Distinguishing *Cramer*, the Court explained that Haupt's actions "have the unmistakable quality which was found lacking in the *Cramer* case of forwarding the saboteur in his mission. . . . In the light of [the younger Haupt's] mission and his instructions, [the defendant's acts] were more than casually useful; they were aid in steps *essential to his design*."<sup>263</sup> In short, because Haupt had undertaken activities that clearly advanced the saboteur's mission, the Court determined that his conviction could be upheld.

It follows from *Cramer* and *Haupt* that only those individuals whose actions materially advance the cause of a declared enemy of the United States are guilty of adhering to the enemy. Thus, terror suspects—even those who do not directly communicate with members of a terrorist organization—may be found guilty of adherence to the enemy, provided that their actions materially advance the terrorist organization's goals. Conversely, wholly independent terrorist activity that is not undertaken in response to instructions disseminated by terrorist leaders or that does not achieve the organization's stated goals cannot fall within the ambit of adherence to the enemy. For example, a suspected terrorist who heeded ISIS' call to attack a specific target at a specific time could, even without directly coordinating with ISIS, be tried for treason under the adherence to the enemy prong. However, a defendant who carried out a terrorist attack in the name of ISIS, but whose actions provided no benefit to the organization itself, likely could not.

Thus, in the context of treason prosecutions, courts have developed various principles that are useful for evaluating the degree of association between a given defendant and a terrorist organization. As mentioned above, prosecutors have generally opted against using treason charges against suspected terrorists, given the abundance of specific anti-terrorism statutes at their disposal. Still, given that treason charges were historically used to prosecute persons suspected of membership in various insurgent or terrorist groups, courts would do well to analogize to treason prosecutions when determining who is part of an FTO. Nevertheless, if courts are to craft a workable test for FTO membership, they must do more than reason by analogy. To this end, several other countries have more directly considered the FTO membership issue. Section III.B discusses the relevant international approaches and what American courts can learn from them.

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262. *Id.* at 633.

263. *Id.* at 635 (emphasis added).

### *B. International Approaches*

Although U.S. courts have rarely confronted the FTO membership question head-on, the issue has been addressed extensively on an international level. As discussed below, several countries have directly criminalized membership in a terrorist organization and have specifically defined what activities constitute “membership” in a proscribed group. Despite rightful criticism of these laws, U.S. courts would be well advised to learn from other nations’ efforts to adjudicate the FTO membership issue. Additionally, Section III.B considers the United Nations (U.N.) terrorist sanctioning regime, which specifies criteria by which individuals “associated with” a designated FTO can be placed on an international sanctions list. Although this list has also been subject to extensive criticism, the U.N. framework provides important guidance for addressing the FTO membership issue domestically given the United States’ role in crafting the U.N. sanctioning criteria.

#### 1. International Laws Criminalizing Membership in a Terrorist Organization

Many countries, including several prominent U.S. allies, have criminalized FTO membership, and have enacted statutory provisions defining what “membership” constitutes. Although some such laws have been rightly criticized as overbroad,<sup>264</sup> others contain carefully considered legal criteria which could prove useful in determining who should count as part of an FTO for the purposes of §§ 2333 and 2339B. Given the existing ambiguity in U.S. law, it is worthwhile to examine how our international counterparts have approached the issue.

##### *a. The Austrian, French, and German Approach*

One approach is to define FTO membership by means of the same criteria used to evaluate membership in a “criminal enterprise.” Prominent examples of this approach appear in the penal codes of Austria, France, and Germany. The Austrian statute penalizing membership in a terrorist organization defines “membership” by reference to

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264. HUMAN RTS. WATCH, IN THE NAME OF SECURITY: COUNTERTERRORISM LAWS WORLDWIDE SINCE SEPTEMBER 11, at 17 (2012).

§ 278(3) of the Austrian Criminal Code,<sup>265</sup> which governs criminal enterprises generally. Section 278(3) states that an individual's membership status in a criminal association is determined by whether the individual "commits a criminal offense within the scope of [the group's] criminal orientation or participates in its activities by providing for information or assets in another way with the awareness that he promotes thereby the association or its criminal acts."<sup>266</sup> The enterprise must consist of "a long-term association of more than two people," and its members must work in conjunction for the purpose of "carry[ing] out one or more terrorism offenses."<sup>267</sup> Anyone who participates in the activities of the terrorist "enterprise," irrespective of how minor their role, is considered a member, providing they knowingly or intentionally "promote the association or its criminal acts" through their conduct.<sup>268</sup> Members need not have designated roles and may participate formally or informally, so long as they collaborate for the purpose of furthering the group's illicit ends.<sup>269</sup>

The French provision criminalizing FTO membership adopts a similar structure, defining "membership" as "involvement in a group or conspiracy the objective of which is to prepare, using one or more material facts, any of the terrorist acts" enumerated elsewhere in the French criminal code.<sup>270</sup> As with the Austrian provision, the French statute does not require that participants in the terrorist "enterprise" serve in defined roles or even participate consistently in the group's activities in order to be considered a member; instead, membership merely requires that participants be "involved" in some manner in purposely furthering an act of terrorism.<sup>271</sup>

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265. STRAFGESETZBUCH [StGB] [Penal Code] §§ 278(b)(2), 278(3), <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622> [https://perma.cc/T3V2-FKCT] (Austria).

266. *Id.* § 278(3), translated in *Organized Crime Convention Article 5: Criminalization of Participation in an Organized Criminal Group*, U.N. Office on Drugs and Crime [hereinafter *Organized Crime Convention Article 5*], [https://sherloc.unodc.org/cld/en/legislation/aut/penal\\_code/special\\_part/articles\\_278-278a/section\\_278-278a.html?](https://sherloc.unodc.org/cld/en/legislation/aut/penal_code/special_part/articles_278-278a/section_278-278a.html?) [https://perma.cc/T6TJ-LUEE].

267. StGB [Penal Code] § 278(b)(2), <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622> [https://perma.cc/BDZ2-MAN6].

268. *Id.* § 278(3), translated in *Organized Crime Convention Article 5*, *supra* note 266.

269. *Id.*

270. Code penal [C. pén.] [Penal Code] art. 421-2-1 (Fr.), translated in Antoine Alexiev, *French Legislation on Terrorism, French Association of Victims of Terrorism*, (Apr. 24, 2009), [https://afvt.org/wp-content/uploads/2009/05/french\\_legislation\\_terrorism\\_AfVT\\_gb.pdf](https://afvt.org/wp-content/uploads/2009/05/french_legislation_terrorism_AfVT_gb.pdf) [https://perma.cc/EHM7-SPK9].

271. *Id.*

Likewise, under German law, an individual may be considered part of a terrorist organization if they participate in “a structured association of more than two persons, established to exist for a longer period of time, regardless of whether [the group] has formally defined roles for its members, continuous membership or a developed structure,” so long as “[the group’s] purpose is the pursuit of an overriding common interest.”<sup>272</sup>

This approach to defining FTO membership has several distinct advantages. First, the Austrian, French, and German statutes achieve important ends consistent with the broad purpose of §§ 2333 and 2339B. Because defendants’ membership in a terrorist “enterprise” neither depends on whether the defendant continuously participated in the organization’s activities, nor on the specific acts in which the defendant engaged on the organization’s behalf, the “criminal enterprise” test allows courts to engage in a flexible inquiry regarding the extent of a given individual’s involvement with an FTO. This compares favorably to the *Crosby* test, which incorrectly limited the definition of FTO membership to individuals who are “give[n] official permission . . . or authorize[d]” to act by a recognized FTO leader.<sup>273</sup> At the same time, the criminal enterprise approach avoids some of the vagueness concerns associated with the *Jama* test. The criminal enterprise approach’s requirement that members must operate “within the scope of [the group’s] criminal orientation”<sup>274</sup> ostensibly excludes individuals who act “entirely independently” from the FTO from being considered members, as Congress intended.<sup>275</sup>

Furthermore, the “criminal enterprise” model comports with relevant precepts of international law. As the legislative commentary accompanying Austria’s FTO membership statute explains, the “criminal enterprise” approach to terrorist membership accords with the dictates of the United Nations Convention against Transnational Organized Crime (UNTOC),<sup>276</sup> which establishes a “legal framework for international cooperation” in countering both organized crime and

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272. STRAFGESETZBUCH [StGB] [Penal Code], §§ 129(a), para. 1; 129(b) Foreign Criminal and Terrorist Organisations; Confiscation, [https://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#p1330](https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1330) [<https://perma.cc/2CBB-2RJC>] (Ger.).

273. *Crosby v. Twitter, Inc.*, 921 F.3d 617, 626 (6th Cir. 2019).

274. STRAFGESETZBUCH [StGB] [Penal Code] § 278(3), (Austria), *translated in Organized Crime Convention Article 5*, *supra* note 266.

275. 18 U.S.C. § 2339B(h).

276. Republic of Austria Parliament, [https://www.parlament.gv.at/PAKT/VHG/XXI/I/I\\_01166/fnameorig\\_000784.html](https://www.parlament.gv.at/PAKT/VHG/XXI/I/I_01166/fnameorig_000784.html) [<https://perma.cc/TLH6-KDXA>] (noting that “the model for this formulation is . . . Article 5 (1) (a) sublit. ii / b of the Palermo Convention,” the Palermo Convention being the informal name given to UNTOC).

international terrorism.<sup>277</sup> UNTOC was adopted due to the signatories' "deep concern" about "the growing links between transnational organized crime and terrorist crimes," and their shared conviction that a common legal approach was needed to deal with both issues.<sup>278</sup> The Austrian parliament explicitly modeled its definition of FTO membership after Article 5(1)(a)(ii)(b) of UNTOC, which mandates that parties adopt legislation penalizing individuals who engage in "activities of [an] organized criminal group in the knowledge that his or her participation will contribute to the achievement of [a] criminal aim."<sup>279</sup> It is therefore unsurprising that France and Germany—also signatories to UNTOC<sup>280</sup>—chose to adopt a similar approach. Given that the United States is also a party to UNTOC,<sup>281</sup> an appealing option would be to borrow from the UNTOC framework, as these other nations have done.

Like Austria, France, and Germany, the United States frequently prosecutes individuals determined to be part of a "criminal enterprise," primarily through the Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>282</sup> To constitute a RICO enterprise, members must share a "purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose."<sup>283</sup> As with the Austrian, French, and German criminal enterprise statutes, RICO does not require that defendants hold official positions or regularly participate in the organization's activities in order to be considered a member—all that is required is that the defendant work in conjunction with other members of the enterprise for the purpose of furthering the organization's illegal objectives.<sup>284</sup> Although courts have thus far refused to consider the RICO enterprise test as a basis for resolving the FTO membership

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277. G.A. Res. 55/25, United Nations Convention Against Transnational Organized Crime, at 2 (Nov. 15, 2000).

278. *Id.*

279. U.N. Convention Against Transnational Organized Crime art. 5(1)(a)(ii)(b), Nov. 15, 2000, S. TREATY DOC. NO. 108-16, 2225 U.N.T.S. 209.

280. United Nations Treaty Collection, Status of Treaties: United Nations Convention Against Transnational Organized Crime (June 29, 2023), [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XVIII-12&chapter=18&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12&chapter=18&clang=en) [<https://perma.cc/B5Z8-6A5U>].

281. *Id.*

282. 18 U.S.C. § 1961.

283. *Boyle v. United States*, 556 U.S. 938, 946 (2009).

284. *See id.* at 948.



question,<sup>285</sup> RICO provides a promising model, as demonstrated by the adoption of similar approaches in Austria, France, and Germany.

Despite the strengths of the criminal enterprise model, drawbacks exist as well. As scholars have previously noted, “[t]he government would be heavily favored in a test that relied on factors used in RICO.”<sup>286</sup> A RICO-based test would include in its definition of FTO membership all individuals who participate in the FTO’s activities, even to a minimal extent. RICO itself covers anyone who performs two racketeering acts within a ten-year span.<sup>287</sup> Given the serious penalties that accompany terrorism convictions, it is doubtful whether individuals who commit sporadic acts of crime should be put in the same category as those who have demonstrated a long-term ideological commitment to extremism. However, a RICO-based test would arguably do just that.

A RICO-based test for FTO membership would, in other ways, be overly narrow. As mentioned above, RICO and its international equivalents require the existence of interpersonal relationships among individual defendants in order for those individuals to be considered “members” of the enterprise. Such a test would likely exclude a significant number of lone-actor terrorists with no personal connection to an FTO, but who nevertheless act on the FTO’s behalf. While one might argue that such individuals should not be considered part of the FTO, scholars have criticized other countries’ use of criminal enterprise provisions in the FTO membership context on the grounds that “the legal definition is too narrow to cover the diversity of terrorist actors, and especially fails to cover the fluid and loose nature of some of the network or organizational types used by terrorists.”<sup>288</sup> A test for FTO membership based on the criminal enterprise model may make it difficult to charge lone actor terrorists at all, given the evidentiary problems with linking them to a larger organization. Thus, while a RICO-based test affords important flexibility, lawmakers should be wary before adopting such a test wholesale.

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285. See, e.g., *Atchley v. AstraZeneca UK Ltd.*, 22 F.4th 204, 217 (D.C. Cir. 2022) (“We do not directly address plaintiffs’ RICO theory.”); *United States v. Jama*, 217 F. Supp. 3d 882, 891 (E.D. Va. 2016) (noting the possibility of using a RICO-based test, but not addressing the merits of that test).

286. Helton, *supra* note 165, at 591.

287. *United States v. Garver*, 809 F.2d 1291, 1300 (7th Cir. 1987).

288. Daniel Koehler, *Recent Trends in German Right-Wing Violence and Terrorism: What Are the Contextual Factors Behind “Hive Terrorism”?*, PERSPS. ON TERRORISM, Dec. 2018, at 72, 83.

*b. The Israeli Approach*

The Israeli approach exemplifies a second option from which Congress could draw in crafting a new test for FTO membership. Given Israel's extensive experience dealing with terrorist threats,<sup>289</sup> Israel's approach is particularly worthy of consideration. Under Israeli law, an individual can be deemed a member of a terrorist organization if he either "takes an active part in the activity of a terrorist organization or operates as a representative or agent on behalf of a terrorist organization," or "express[es] consent to join a terrorist organization to a person whom he had reasonable grounds to believe belongs to a terrorist organization or is a representative or agent on its behalf."<sup>290</sup> This language mirrors the Austrian, French, and German definitions of FTO membership in that "taking an active part" in the activities of a terrorist group requires participation in an association with "an organized and continuous structure that commits terrorist attacks or that operates with the intention that terrorist attacks will be committed."<sup>291</sup> Similarly, as with the Austrian, French, and German provisions, the Israeli statute provides that persons accused of membership in a terrorist organization need not occupy defined roles within the organization, nor continuously participate in its activities or even know the identities of all other participants in the organization in order to be considered a member.<sup>292</sup>

However, unlike the criminal enterprise provisions of Austria, France, and Germany, the Israeli statute addresses the issue of lone operatives who may not be personally connected with other known terrorists. Israeli law contains an evidentiary presumption that "anyone who presented himself . . . as a member of a terrorist organization will be presumed to belong to a terrorist organization."<sup>293</sup> This presumption is rebuttable "if the accused raises a reasonable doubt with respect to their membership" in the FTO.<sup>294</sup> Essentially, Israeli law attempts

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289. United Nations: Victims of Terrorism Support Portal, Government Support: Israel, <https://www.un.org/victimsofterrorism/en/node/359> [<https://perma.cc/6UHQ-LZTN>].

290. § 2, The Counter-Terrorism Law, 5776-2016, SH 2556, 898 (Isr.) [hereinafter Israel Counter-Terrorism Law], [https://www.gov.il/BlobFolder/dynamiccollectorresultitem/counter-terrorism-law-2016-english/he/legal-docs\\_counter\\_terrorism\\_law\\_2016\\_english.pdf](https://www.gov.il/BlobFolder/dynamiccollectorresultitem/counter-terrorism-law-2016-english/he/legal-docs_counter_terrorism_law_2016_english.pdf) [<https://perma.cc/83PY-6ZG7>] (unofficial English translation from Israel's Ministry of Justice).

291. Compare *id.*, with *supra* Section III.B.1.a.

292. Compare Israel Counter-Terrorism Law, *supra* note 290, § 2, with *supra* Section III.B.1.a.

293. Israel Counter-Terrorism Law, *supra* note 290, § 2.

294. *Id.*

to solve the lone wolf issue by saying that while an individual's self-identification with an FTO cuts strongly in favor of his membership, self-identification alone is insufficient—there must be some other nexus connecting the individual to a designated FTO. This approach allows individuals who purport to act as “agents” or “representatives” of the FTO to be properly considered as such, while ensuring that prosecutors cannot mistakenly label an individual as part of an FTO without at least a minimal link between the individual and the organization.<sup>295</sup> This evidentiary presumption toes the line between the significant prosecutorial interest in charging individuals who self-identify as terrorists, while ensuring that individuals cannot be labelled FTO “members” on the basis of a tenuous or fleeting connection with a proscribed organization. The Israeli statute, therefore, skillfully balances important interests in a manner that American courts would be well-served to copy in crafting their own tests for FTO membership.

Notwithstanding these advantages, the Israeli counterterrorism law has also been subject to criticism.<sup>296</sup> The law provides that individuals who “express consent” to join an organization—even without actively participating in its activities—can be considered FTO members.<sup>297</sup> In essence, this creates a prohibition on “mere membership” in a proscribed organization, which, under U.S. law, would almost certainly be unconstitutional.<sup>298</sup> Any definition of FTO membership in the U.S. context would need to include a minimum threshold of illicit acts in order to pass constitutional muster. Thus, although the Israeli law provides an example of evidentiary presumptions that may be useful in tackling the FTO membership issue, courts would need to

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295. Adi Hashmonai & Yaniv Kubovich, *ISIS Sympathizers Suspected of Bomb Plot on Northern Israeli High School*, HAARETZ (Oct. 2, 2022), <https://www.haaretz.com/israel-news/2022-10-02/ty-article/.highlight/isis-sympathizers-suspected-of-bomb-plot-in-northern-israeli-high-school-arrested/00000183-97cc-d7ae-afe7-dfef23260000> [<https://perma.cc/ALN2-AQV5>]. As exemplified by this case, the Israeli law's evidentiary presumption allows FTO sympathizers with relatively loose connections to a centralized organization to nevertheless be labeled FTO “members” based upon their stated intentions. In this case, the perpetrators appeared to have been radicalized online, rather than belonging to or interacting with a larger group. However, it appears from the article that the perpetrators' self-identification with ISIS, combined with various allegations regarding their radicalization and terrorist activity, formed the basis for the indictment, including the “membership” charge.

296. Elena Chachko, *Israel's New Counterterrorism Law*, LAWFARE (July 13, 2016, 9:42 AM), <https://www.lawfareblog.com/israels-new-counterterrorism-law> [<https://perma.cc/G8LN-6L27>] (noting that “the new law's definition [of terrorism] does potentially expose a range of speech-based activities to classification as terrorist acts”).

297. Israel Counter-Terrorism Law, *supra* note 290, § 2.

298. *Scales v. United States*, 367 U.S. 203, 208–09 (1961) (construing provisions of the Smith Act as requiring more than “mere membership,” so as to avoid constitutional issues).

significantly modify the Israeli criteria before it could be utilized in domestic adjudications.

*c. The Canadian Approach*

Finally, Congress could draw from the Canadian approach to the FTO membership issue. Unlike the Israeli statute, which encompasses individuals who merely agree to participate in the activities of an FTO, the Canadian approach evaluates an individual's membership with regards to the specific functions they perform on the FTO's behalf. Section 83.18 of the Canadian Criminal Code provides that anyone "who knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out terrorist activity" can be considered part of a terrorist organization.<sup>299</sup> Section 81.18(3) provides a non-exclusive list of factors used to establish that an individual has "participate[d]" in a terrorist group, including:

- (a) providing, receiving or recruiting a person to receive training; (b) providing or offering to provide a skill or an expertise for the benefit of, at the direction of or in association with a terrorist group; (c) recruiting a person in order to facilitate or commit (i) a terrorism offense, or (ii) an act . . . that, if committed in Canada, would be a terrorism offense; (d) entering or remaining in any country for the benefit of, at the direction of or in association with a terrorist group; and (e) making oneself, in response to instructions from any of the persons who constitute a terrorist group, available to facilitate or commit (i) a terrorism offense, or (ii) an act . . . that, if committed in Canada, would be a terrorism offense.<sup>300</sup>

In addition, section 83.18(4) lists a set of factors which "the court may consider" in determining whether the aforementioned activities are performed on behalf of an FTO, including whether the defendant:

- (a) uses a name, word, symbol or other representation that identifies, or is associated with, the terrorist group;
- (b) frequently associates with any of the persons who constitute the terrorist group;
- (c) receives any benefit from the terrorist group; or
- (d) repeatedly engages in

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299. Criminal Code, R.S.C. 1985, c C-46, § 83.18(1) (Can.).

300. *Id.* § 83.18(3)(a)–(e).

activities at the instruction of any persons who constitute the terrorist group.<sup>301</sup>

Both section 83.18(3), which specifies activities that constitute participation in a terrorist group, and section 83.18(4)'s additional factors for courts to "consider" are non-exclusive; in other words, a court may find that a defendant participated in the activity of a terrorist organization without the defendant having engaged in any of the aforementioned activities.<sup>302</sup> This has subjected the participation offense to several constitutional challenges alleging that the statutory language is overly broad.<sup>303</sup>

In response to these challenges, the Supreme Court of Canada in *R. v. Khawaja* imposed two requirements on the Canadian participation offense: an "ulterior intention" requirement and a so-called "de minimis" threshold for activities that fall within section 83.18's ambit.<sup>304</sup> With regard to the "ulterior intention" requirement,<sup>305</sup> the court explained that "participation" in a terrorist organization requires proof beyond a reasonable doubt that the defendant possessed "the specific intent to enhance the abilities of [the] terrorist group" to carry out illegal activities.<sup>306</sup> This "heightened mens rea," the court explained, was designed to exempt individuals "who may unwittingly assist terrorists or who do so for a valid reason. Social and professional contact with terrorists—for example, such as occurs in normal interactions with friends and family members—will not, absent the specific intent to enhance the abilities of a terrorist group, permit a conviction."<sup>307</sup> In addition, activities undertaken on behalf of an FTO must meet a de minimis threshold in order to be considered "participation."<sup>308</sup> As the court explained, its "de minimis" requirement meant that the participation statute "excludes conduct that a reasonable person would not view as capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity."<sup>309</sup> In other words,

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301. *Id.* § 83.18(4)(a)–(e).

302. *Id.* §§ 83.18(3), 83.18(4).

303. See Michael Nesbitt & Dana Hagg, *An Empirical Study of Terrorism Prosecutions in Canada: Elucidating the Elements of the Offences*, 57 ALTA. L. REV. 595, 626 (2020) (noting that defendants have "challenged the constitutionality of section 83.18 on the basis that it is an 'inchoate' offence based on an inchoate predicate").

304. See generally *R. v. Khawaja*, [2012] 3 S.C.R. 555 (Can.).

305. *Id.* ¶ 25.

306. *Id.* ¶ 47.

307. *Id.*

308. *Id.* ¶ 51.

309. *Id.*

actions taken for or on behalf of a terrorist group do not constitute “participation” unless the activity in question (1) *materially enhances* the FTO’s operational capabilities, and (2) specifically contributes to forwarding the group’s illicit goals (as opposed to serving its lawful objectives). The Canadian Supreme Court determined that by imposing these requirements, the participation offense could pass constitutional muster, as it would be restricted to individuals who knowingly and intentionally took part in activities that were essential to the illicit aims of the terrorist group.

However, the Canadian statute also contains several flaws from which American courts should learn. Consider the activities listed under section 83.18(3) which, per se, constitute participation in a terrorist organization.<sup>310</sup> Specifically, the sections concerning “providing or offering to provide a skill or an expertise for the benefit of, at the direction of or in association with a terrorist group”<sup>311</sup> and “entering or remaining in any country for the benefit of, at the direction of or in association with a terrorist group”<sup>312</sup> are improperly vague and do not meaningfully contribute to the efficacy of the Canadian law. First, an individual may “offer to provide a skill . . . in association with” a terrorist organization without themselves being a “member” of that organization. For example, political activists may wish to provide legal or political training to members of a designated terrorist organization,<sup>313</sup> but should not themselves be considered part of the terrorist organization for having done so. Likewise, individuals who “enter[] or remain[] in any country for the benefit of, at the direction of or in association with”<sup>314</sup> an FTO should not necessarily be considered FTO members. For example, the spouses and children of FTO fighters, who reside within FTO-controlled territory with the FTO’s permission, but who do not engage in terrorist activity and who are often victimized themselves, should not be considered FTO members. Given the severity of the offense in question, it is imperative that U.S. courts discard such overly broad criteria.

## 2. U.N. Sanctioning Regimes

Finally, this Note considers the U.N. terrorism sanctioning regimes, which are designed to identify and sanction individuals

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310. Criminal Code, R.S.C. 1985, c C-46, § 83.18(3)(b) (Can.).

311. *Id.*

312. *Id.* § 83.18(3)(d).

313. *See, e.g.,* Holder v. Humanitarian L. Project, 561 U.S. 1, 10 (2010).

314. Criminal Code, R.S.C. 1985, c C-46, § 83.18(3)(d) (Can.).

determined to be part of a designated terrorist group. Most prominently, the U.N. Security Council maintains sanctioning regimes targeted against members of proscribed terrorist organizations. Beginning in 1999, U.N. Security Council Resolution 1267 imposed sanctions on the Taliban as an organization and urged consideration of “further measures against Usama Bin Laden and his associates.”<sup>315</sup> Subsequent sanctions have been added against members of the Taliban,<sup>316</sup> Al-Qaeda,<sup>317</sup> and ISIS,<sup>318</sup> plus any “affiliate, splinter group or derivative thereof.”<sup>319</sup> Over time, the U.N. has developed a list of factors for determining which individuals are sufficiently associated with a proscribed group as to be eligible for inclusion on the sanctions list. Given that the United States is one of the five permanent members of the Security Council,<sup>320</sup> its perspective has greatly influenced the evolution of the U.N. sanctioning regime. Thus, the U.N. sanctioning criteria are highly relevant to considerations of FTO membership in the context of U.S. domestic law. However, despite the potential relevance of the U.N. sanctioning regime, previous scholarship on the FTO membership issue has provided only a brief discussion of the U.N. sanctioning criteria before quickly dismissing it as overbroad.<sup>321</sup> Notwithstanding ongoing criticism of the Security Council’s terrorist designation process,<sup>322</sup> it is worth considering what factors the Security Council thought relevant in evaluating an individual’s connection with an FTO.

Actions that make an individual eligible for inclusion on the U.N. sanctions list include: “(a) Participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of; (b) Supplying, selling or transferring arms and related materiel to; (c) Recruiting for; or otherwise supporting acts or activities of” a designated

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315. S.C. Res. 1267, ¶¶ 2–5 (Oct. 15, 1999) (demanding “that the Taliban turn over Usama bin Laden without further delay” to authorities who will bring him to justice and imposing sanctions against the Taliban unless it fully complies).

316. S.C. Res. 1617, ¶ 1 (July 29, 2005).

317. *Id.*

318. S.C. Res. 2253, ¶ 2 (Dec. 17, 2015).

319. *Id.* ¶ 3(c).

320. U.N. Sec. Council, Current Members, <https://www.un.org/securitycouncil/content/current-members> [<https://perma.cc/62P7-8R69>].

321. *See, e.g., Helton, supra* note 165, at 595.

322. *See id.* at 573 (“While not uncommon in post-9/11 counterterrorism laws, many were concerned that [the definition’s focus on association to groups] led to inaccurate listings based on little or low-quality information.”).

terrorist organization.<sup>323</sup> In the years since Resolution 1267 was passed in 1999, the U.N. has repeatedly refined these criteria in response to criticism.<sup>324</sup> Notably, despite various revisions to the sanctioning criteria, the Security Council retained broad language regarding the relationship between an individual and an FTO. An individual may be eligible for sanctions if they perform any of the proscribed activities “in conjunction with, under the name of, on behalf of, or in support of” a designated FTO.<sup>325</sup> The deliberate use of such language exemplifies the Security Council’s recognition that FTOs often operate in a decentralized manner, and that any definition of FTO membership that fails to account for this reality risks being too narrow. At the same time, the requirement that sanctioned FTO members perform specific functions on the FTO’s behalf, such as “recruiting,” “supplying, selling or transferring arms,” or “financing, planning, preparing, or perpetrating” terrorist activity,<sup>326</sup> ensures that individuals will not be improperly included on the list unless there is a specific nexus between their actions and the FTO. These carefully-crafted criteria deserve American courts’ attention in the domestic context.

### *C. Proposing a New “Sphere of Influence” Test for FTO Membership*

The textual gap in §§ 2333 and 2339B has required courts to take it upon themselves to determine who counts as part of an FTO. This has proven extremely problematic in practice, especially with regard to cases involving lone wolf terrorists whose connection to an FTO is uncertain. The proper test for FTO membership should be flexible enough to reflect the broad objectives articulated in the text of §§ 2333 and 2339B while also being sufficiently tailored as to clearly exclude *true* lone-actor terrorists. In short, a workable test should encompass those individuals who operate within an FTO’s sphere of influence, though not necessarily under its direct command. Given the deficiencies of the various existing approaches, this Note proposes a new, four-part test for FTO membership, which it refers to as the

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323. S.C. Res. 2253, ¶ 3 (Dec. 17, 2015); *see also* S.C. Res. 2396, ¶ 42 (Dec. 21, 2017).

324. *Compare* S.C. Res. 2253, ¶¶ 3–10 (Dec. 17, 2015), *with* S.C. Res. 1617, ¶ 2 (Jul. 29, 2005), *and* S.C. Res. 1267, ¶¶ 2–5 (Oct. 15, 1999). The 1999 Resolution, sanctioning the Taliban as a group, did not specify criteria for inclusion and presumably could have included any individual determined to be “associate[d]” with Osama Bin Laden. By contrast, the 2005 and 2015 Resolutions provide more specific factors for listing, which are enumerated above. *See also* Helton, *supra* note 165, at 573 (discussing criticism of the U.N. terrorist list).

325. S.C. Res. 2253, ¶ 3(a) (Dec. 17, 2015); *see also* S.C. Res. 2396, ¶ 42 (Dec. 21, 2017).

326. S.C. Res. 2253, ¶ 3(a)–(c) (Dec. 17, 2015).



“sphere of influence” test. By combining aspects of the various domestic and international legal doctrines that are relevant to the FTO membership issue, this Note’s test will seek to determine which individuals are acting within an FTO’s sphere of influence, as compared to those who truly act of their own accord. Under this Note’s proposed test, courts would be required to consider whether the defendant (1) presented themselves as part of the FTO; (2) expressed consent to join the FTO to another individual whom the defendant believed to be part of the FTO; (3) took part in recruiting, selling or transferring arms, financing, planning, facilitating, preparing, or perpetrating a terrorism offense for the purpose of furthering the FTO’s interests; and (4) materially enhanced the FTO’s stated objectives through their activities. By balancing these four factors, courts will be able to achieve clarity regarding who is and is not part of an FTO.

The first factor, whether the defendant presented themselves as part of an FTO, is likely to be the least controversial. While a defendant’s mere self-identification with an FTO should not, on its own, be sufficient to establish the defendant’s membership in the FTO, it should clearly weigh in favor of the defendant’s being labeled part of the FTO. The first factor of this Note’s proposed test would function as a rebuttable presumption, akin to the Israeli approach.<sup>327</sup> Under this test, lone wolf terrorists who purported to act on behalf of an FTO would be presumed to be “members” of the FTO. The other three prongs would provide defendants with an opportunity to raise a reasonable doubt with regard to their connection to an FTO. This would ensure that individuals are not wrongly labeled as part of an FTO—with the accompanying penalties—absent clear evidence of such a connection.

The second factor, modeled after the “criminal enterprise” approach taken by Austria, France, and Germany,<sup>328</sup> would account for the associative aspects of membership in a terrorist organization. The presence of this factor would weigh against true “lone wolves” being considered part of an FTO, absent some kind of personal connection to other self-identified members of the FTO. Of course, the presence of this factor would not necessarily prevent lone wolves from being considered FTO members if their conduct fit within the other three components of this Note’s proposed test. However, in cases where a given defendant lacked a personal connection to other members of the FTO, a higher showing on the other three elements would be necessary.

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327. See *supra* Section III.B.1.ii.

328. See *supra* Section III.B.1.i.

The third factor, which borrows from the language of the U.N. sanctioning list,<sup>329</sup> ensures that, in order to be labeled part of an FTO, an individual must engage in specific activities on the FTO's behalf. The enumeration of specific terrorist activities, borrowed from the U.N. criteria, helps distinguish between individuals who are passive "members" of a proscribed organization and those who themselves engage in activities "for the purpose" of furthering the FTO's objectives. Thus, this component helps to ensure that individuals who are merely associated with an FTO or who are mere sympathizers to the FTO's cause are not improperly labeled FTO members.

Finally, the fourth factor, although overlapping with the third, serves an independent and important function. It is modeled both from the Canadian Supreme Court's "de minimis" threshold<sup>330</sup> and from the requirement in treason prosecutions that a defendant's acts must "strengthen, or tend to strengthen" the FTO.<sup>331</sup> Mere independent activity undertaken on the FTO's behalf, but not solicited by the FTO, would not clear this threshold. In contrast, individuals who responded to an FTO's specific solicitation to take action—for example, carry out a terrorist attack at a specific time against a specific target—would meet the "de minimis" threshold. In order for this factor to be met, prosecutors would be required to establish a direct link between an individual's activities and an FTO's stated goals and objectives. This would be especially important for adjudicating cases involving lone wolf terrorists and would provide a means of distinguishing persons who merely acted of their own accord from those who acted in response to the FTO's direct and explicit solicitation of specific terrorist activity. Only persons who fell into the latter category could be considered "members" of the FTO.

In sum, this "sphere of influence" test, derived from relevant legal doctrines in domestic and international law, provides a much more definitive method of determining whether a given individual can properly be regarded as part of an FTO. Given the importance of resolving the ambiguity in §§ 2333 and 2339B, and given that courts have, to date, struggled to articulate a workable test for FTO membership, it is necessary to chart a new course. An examination of the relevant legal concepts laid out in this Note provides a valuable starting point for adjudicating the issue of FTO membership in the future. The test proposed above will aid courts in making the difficult factual determinations needed in cases where the FTO membership question

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329. See *supra* Section III.B.2.

330. See *supra* Section III.B.1.iii.

331. See *supra* Section III.A.3.

arises and will provide courts with a framework by which to tackle the intractable problem of lone wolf terrorism.

## CONCLUSION

Despite the glaring ambiguity in §§ 2333 and 2339B, few courts have had occasion to address the issue of how membership in an FTO should be defined. The courts that have attempted to resolve this ambiguity have struggled to do so, producing several alternative tests for FTO membership, all of which are inadequate. At the same time, the rise in lone wolf terrorism in recent years has increased the complexity of determining who should be considered part of an FTO. Given how frequently prosecutors invoke the material support statutes, it is imperative that the existing ambiguity be resolved.

Helpfully, several models exist upon which lawmakers and judges might draw when formulating a definition of FTO membership. An examination of these sources could prove beneficial in resolving the existing statutory gap in §§ 2333 and 2339B. Specifically, this Note has argued for the adoption of a new, “sphere of influence” test for FTO membership. Under this proposed test, courts would consider whether the defendant (1) presented themselves as part of the FTO; (2) expressed consent to join the FTO to another individual whom the defendant believed to be part of the FTO; (3) took part in recruiting, selling or transferring arms, financing, planning, facilitating, preparing, or perpetrating a terrorism offense for the purpose of furthering the FTO’s interests; and (4) materially enhanced the FTO’s objectives through their activities. These four factors balance one another and ensure that the broad purposes of §§ 2333 and 2339B are accomplished while avoiding language that is overly vague or unhelpful. Courts and legislatures should consider adopting these or similar criteria in enacting a definition of FTO membership and remedying the issues for future cases.

*Samuel E. Chestna\**

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