

Narco-Terrorism: Could the Legislative and Prosecutorial Responses Threaten Our Civil Liberties?

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I. Introduction

The global War on Terror has changed.¹ "State sponsorship of terrorism is declining Terrorist groups, therefore, increasingly need new sources of funds, and the drug business fills this need perfectly."² Drugs fuel terrorism and economically support the very organizations America has pledged to defeat.³ As a result, the confluence of the War on Terror with the War on Drugs has culminated in the War on Narco-Terror.⁴ In post-9/11 America, with mounting evidence that the Taliban is funded by drugs,⁵ the United States government increasingly focuses on committing resources to curb this dangerous practice.⁶ Narco-terrorism is the most dangerous national security

1. See Gen. James L. Jones, U.S. Nat'l Sec. Advisor, Speech at the 45th Munich Security Conference (Feb. 8, 2009) ("It is hard to overstate the differences between the 20th and the 21st centuries. . . . To be blunt, the institutions and approaches that we forged together through the 20th century are still adjusting to meet the realities of the 21st century.").

2. Michael Braun, *Drug Trafficking and Middle Eastern Terrorist Groups: A Growing Nexus?*, in COUNTERING TRANSNATIONAL THREATS: TERRORISM, NARCO-TRAFFICKING, AND WMD PROLIFERATION 27, 27 (Matthew Levitt & Michael Jacobson eds., 2009).

3. See *id.* ("Narco-terrorism . . . provides the economic fuel for insurgencies.").

4. See DOD *Counternarcotics: What is Congress Getting for its Money?: Hearing Before the Subcomm. on Criminal Justice, Drug Policy and Human Resources of the H. Comm. on Government Reform*, 108th Cong. 9 (2004) (statement of Rep. Cummings, Member, H. Comm. on Government Reform) ("In Afghanistan, where opium production has skyrocketed since American forces removed the Taliban from power, the United Nations Office on Drugs and Crimes has stressed that the war on terror and the war on drugs are in effect the same war"); *Counternarcotics Strategy and Police Training in Afghanistan: Hearing before the Subcomm. on the Middle East and South Asia of the H. Comm. on Foreign Affairs*, 110th Cong. 5 (2007) (statement of Rep. Mike Pence, Member, H. Comm. on Foreign Affairs) ("[T]he war on drugs is a crucial piece of the war on terror.").

5. See *infra* Parts II.B.3–4 (citing two instances of the Taliban's involvement with narco-terrorism).

6. See *Obama and Calderon Meet Amidst Rash of Dire Warnings on Mexican Drug Violence*, 568 DRUG WAR CHRON., Jan. 16, 2009, http://stopthedrugwar.org/chronicle/568/obama_calderon_mexico_drug_war (last visited Oct. 21, 2009) ("[T]he \$1.4 billion, three-year anti-drug assistance plan [to Mexico] approved by Congress and the Bush administration last year was barely a drop in the bucket [and is] only a tiny fraction of the money spent on the US wars in Iraq and Afghanistan.") (on file with the Washington and Lee Law Review); Department of Justice, FY 2007 War Supplemental, at 2 (2007), available at http://www.usdoj.gov/jmd/2008factsheets/pdf/0809_war_supplemental.pdf (requesting "\$3.6 million to enhance DEA Special Operations Division (SOD) support for investigations targeting the international and transnational threat of narco-terrorism"); *Narco-Terrorism: International Drug Trafficking and*

threat immediately facing Congress,⁷ and it is readily apparent that legislative and prosecutorial action against it should be swift and severe.⁸ Yet, some restraint remains necessary. United States Attorney General—later Associate Justice of the United States Supreme Court—Robert Jackson spoke of the proper role of a prosecutor in terms that resonate similarly to the role of the United States and Congress:

Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done. . . . [L]awyers rest their good opinion of each other not merely on results accomplished but on the quality of the performance. . . . Any prosecutor who risks his day-to-day professional name for fair dealing to build up statistics of success has a perverted sense of practical values, as well as defects of character. . . . [H]e can have no better asset than to have his profession recognize that his attitude toward those who feel his power has been dispassionate, reasonable and just.⁹

Ultimately this Note argues that the proper role of Congress in drafting effective legislation against narco-terrorism is to be likewise "reasonable and just." In the context of drafting legislation in the wake of the War on Narco-

Terrorism—A Dangerous Mix: Hearing Before the S. Comm. on the Judiciary, 108th Cong. 7 (2003) (statement of Steven W. Casteel, Assistant Adm'r for Intelligence, Drug Enforcement Administration) ("Prior to September 11, 2001, the law enforcement community typically addressed drug trafficking and terrorist activities as separate issues. In the wake of the terrorist attacks in New York City, Washington, DC, and Pennsylvania, these two criminal activities are visibly intertwined.")

7. See Rep. Mark Kirk, *Congress Must Address Rising Narcoterrorism*, ROLL CALL, Dec. 4, 2006, at 10 ("Congress will face a number of national security issues, none more dangerous over the next two years than the rise of narcoterrorism . . .").

8. See George W. Bush, Statement at Attorney General Gonzales's Swearing-In Ceremony (Feb. 14, 2005) ("[T]he Department of Justice in an urgent mission to protect the United States from another terrorist attack.") (transcript on file with the Washington and Lee Law Review). Bush spoke to an audience the day he signed the USA PATRIOT Improvement and Reauthorization Act of 2005:

America remains a nation at war. . . . In the face of this ruthless threat, our Nation has made a clear choice: We will confront mortal danger; we will stay on the offensive; and we're not going to wait to be attacked again. . . . The PATRIOT Act has accomplished exactly what it was designed to do. It has helped us detect terror cells, disrupt terrorist plots, and save American lives. The bill I sign today extends these vital provisions.

George W. Bush, Remarks on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005 (Mar. 9, 2006).

9. Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 18, 18–19 (1940).

Terror, certainly tough initiatives are necessary, but the duty to act within the constraints of the Constitution is paramount.¹⁰

In 2006, Congress took an affirmative step to counteract narco-terrorism by enacting 21 U.S.C. § 960a, which reads in pertinent part:

Whoever engages in [drug activity] that would be punishable . . . if committed within the jurisdiction of the United States, or attempts or conspires to do so, knowing or intending to provide, directly or indirectly, anything of pecuniary value to any person or organization that has engaged or engages in terrorist activity . . . or terrorism . . . shall be sentenced to a term of imprisonment of not less than twice the minimum punishment [otherwise required for the drug crime], and not more than life¹¹

Congress improperly drafted this statute such that the prosecutorial net may be cast over those whom Congress did not intend to snare. This may happen in two ways, and this Note analyzes the implications of this statute from those two perspectives: the concerns associated with the inchoate nature of conspiracy law and the integral nexus of drugs and terror.

Part II introduces the history of narco-terrorism and summarizes the current case law to provide the proper foundation to analyze the future under this law. Narco-terror is a dangerous threat not only to America but also to the world. The new narco-terrorism statute has permitted criminal prosecutions against people willing and able to do serious harm to America.

Part III fully analyzes the necessity of the nexus between drugs and terror in prosecutions under the statute. The statute requires there to be some drug crime, and some support of terror, but the nexus between the two is implied, not expressed. As a result, individuals whom Congress never intended to fall under the umbrella of narco-terrorism may be prosecuted under this statute. Well-intentioned prosecutors have the statute as their guide; it is very important that it is drafted correctly. Why did legislators purposefully omit the drug-terror nexus from the text of 21 U.S.C. § 960a? Part III focuses on the necessity of the drug-terror nexus from three facets—the case history of § 960a, the textual history of "narco-terrorism," and the statute's history—to help discern congressional intent. It is obvious that history requires the nexus, but the statute does not.

10. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008) (discussing how "[t]he political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism").

11. USA PATRIOT Improvement and Reauthorization Act of 2005 § 122, 21 U.S.C. § 960a (2006).

Part IV delves into conspiracy law and the legitimacy of multiple-inchoate crimes, especially as they relate to the current narco-terrorism statute. Can an individual be guilty of "attempting to conspire" to commit narco-terror? Many scholars and courts have taken issue with such constructions in the past, yet Congress allowed for the possibility when drafting § 960a.¹² How does such a conviction comport with both congressional intent and due process of law?

Part V suggests multiple hypothetical situations combining elements of the drug-terror nexus problem with conspiracy law to illustrate potential concerns with § 960a. It takes the two concerns with § 960a that this Note addresses—"the nexus" and "conspiracy"—and hypothesizes scenarios whereby both legitimate and illegitimate outcomes, based on the text of the statute, are possible. What does the future hold for prosecutions under § 960a? Are there less dangerous individuals who might be prosecuted for narco-terror who otherwise would not have been had Congress been more careful in its drafting? The hypotheticals indicate that there are.

This Note concludes with recommendations to Congress for future legislation to better achieve the aims of the current law. "Only by extreme care can we protect the spirit as well as the letter of our civil liberties . . ."¹³ Section 960a is the result of Congress's failure to exercise such extreme care.

II. Narco-Terrorism

A. History: The Buildup to Current Legislation

To predict the future of prosecutions under this law, an examination of history is in order. "Throughout history, a broad spectrum of . . . [criminals] have used their respective power and profits in order to instill the fear and corruption required to shield them from the law."¹⁴ Modern-day narco-terrorism has its roots in the 1980s, when the Fuerzas Armadas Revolucionarias de Colombia (FARC) and other organizations began using the drug trade to finance their missions.¹⁵ Peruvian President Fernando Belaunde Terry coined

12. See *infra* Part IV (fully analyzing multiple-inchoate theory).

13. Jackson, *supra* note 9, at 20.

14. *Narco-Terrorism: International Drug Trafficking and Terrorism—A Dangerous Mix*, *supra* note 6, at 7.

15. See *Colombia's Most Powerful Rebels*, BBC NEWS, Sept. 19, 2003, <http://news.bbc.co.uk/2/hi/americas/1746777.stm> (last visited Oct 21, 2009) (stating that the FARC began using the drug trade to finance itself in the 1980s) (on file with the Washington and Lee Law Review); Press Release, Drug Enforcement Administration, Fabio Ochoa Convicted on U.S. Drug Charges (May 30, 2003), <http://www.usdoj.gov/dea/pubs/pressrel/>

the term "narco-terrorism" in 1982.¹⁶ At that time, the term meant "the union of the vice of narcotics with the violence of terrorism."¹⁷ Although narco-terrorism has existed for many decades, its prominence in the news has expanded only very recently.¹⁸ The term has spawned varied interpretations, but its exact contours remain elusive.¹⁹

Drug-funded terror continues to this day.²⁰ For some time, Congress has taken note of this escalating problem. For example, Congress has focused on addressing specific incidents:

In the District of Columbia, in November 2002, 3 separate indictments were announced charging 11 members of the FARC with the murder of 3 individuals, hostage-taking and drug trafficking involving the distribution of cocaine bound for the United States.

pr053003.html (last visited Oct. 21, 2009) ("Ochoa, along with his brothers, Pablo Escobar and others made up the Medellin Cartel in the 1980s, and existed until Escobar's death in 1993.") (on file with the Washington and Lee Law Review); Press Release, Drug Enforcement Administration, Cali Cartel Front Man Pleads Guilty and Is Sentenced On Money Laundering Charges (May 11, 2007), <http://www.usdoj.gov/dea/pubs/states/newsrel/nyc051107.html> (last visited Oct. 21, 2009) ("Between in or about 1982 and 1995, the Cali Cartel transported and sold tens of thousands of kilograms of cocaine and ultimately amassed an illicit fortune worth in excess of \$1 billion.") (on file with the Washington and Lee Law Review); Ron Chepesiuk, *The Fall of the Cali Cartel*, CRIME MAG., Oct. 21, 2006, <http://www.crimemagazine.com/06/calicartel,1021-6.htm> (last visited Oct. 21, 2009) ("Between mid-August and mid-December of 1989, Escobar and the Medellin Cartel killed 107 officials and civilians, carried out 205 bombings, and caused over \$500 million in damages. In 1988 Escobar was responsible for placing a bomb aboard a Colombian airliner that exploded and killed 107 people.") (on file with the Washington and Lee Law Review).

16. See *Police Station Attacked Near Site of Peru Prison Break*, UNITED PRESS INT'L, Mar. 9, 1982, available at LEXIS ("President Fernando Belaunde Terry previously labeled the attack 'narco-terrorism'); Oxford English Dictionary Online, narco-, *comb. form* (June 2003), <http://dictionary.oed.com/cgi/entry/00321135> (last visited Oct. 21, 2009) (indicating first recorded usage on March 8, 1982, from the *Associated Press Newswire*, "A new threat to the free world: Narco-terrorism") (on file with the Washington and Lee Law Review); G. Davidson Smith, *Commentary No. 13: Terrorism and the Rule of Law: Dangerous Compromise in Colombia*, CANADIAN SECURITY INTELLIGENCE SERVICE, Oct. 1991, at 1 ("Former President Belaunde Terry of Peru coined the term 'narcoterrorism'").

17. *Police Station Attacked Near Site of Peru Prison Break*, *supra* note 16.

18. The Director of the Drug Enforcement Administration from 2000–2001 stated that "for some time we have known a drug-terror nexus exists." Donnie Marshall, *Narco-Terrorism: The New Discovery of an Old Connection*, 35 CORNELL INT'L L.J. 599, 599 (2002). A survey of Lexis news articles returned from a search of "narco-terrorism" or "narcoterrorism" in five-year spans beginning with 1980 indicates that the frequency of the term has increased dramatically: 1/1/1980–1/1/1985: six incidents; 1985–1990: 163; 1990–1995: 345; 1995–2000: 377; 2000–2005: 1151; 2005–1/1/2009: 1589.

19. See *infra* Part III.B (discussing the development of the term's usage).

20. See, e.g., Braun, *supra* note 2, at 27 ("The Madrid train bombing by al-Qaeda or an affiliate was funded almost entirely by the sale of illicit drugs.").

In Houston, Texas, in November 2002, four members of the [AUC] were caught trying to exchange \$25 million of cash and cocaine for weapons, such as shoulder-fired anti-aircraft missiles, 53 million rounds of ammunition, 9,000 rifles, rocket-propelled grenade launchers, along with almost 300,000 grenades to be used by AUC operatives.

In San Diego, California, in November 2002, two Pakistani nationals and one United States citizen were charged with attempting to exchange 600 kilograms of heroin and 5 metric tons of hashish for cash and four anti-aircraft missiles to supply to the Taliban and Al-Qaeda associates.

Recently, in April 2003, the FBI and DEA disrupted a major Afghanistan-Pakistani [sic] heroin smuggling operation with the arrest of 16 individuals, in which heroin was being shipped to the United States, profits from the sale of heroin were laundered through Afghan and Pakistani-owned businesses in the United States, and then sent back to finance terrorists.²¹

This is a global phenomenon, and it is becoming increasingly clear that narco-terrorism is a major threat to the stability of Mexico, Peru, Pakistan, and other countries.²² This world-wide issue significantly threatens the United

21. *Narco-Terrorism: International Drug Trafficking and Terrorism—A Dangerous Mix: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 2–3 (2003) (statement of Sen. Orrin Hatch, Chairman, S. Comm. on the Judiciary).

22. Retired General Barry McCaffrey reported to the United States Military Academy at West Point in December 2008:

The incoming Obama Administration must immediately focus on the dangerous and worsening problems in Mexico, which fundamentally threaten US national security. Before the next eight years are past—the violent, warring collection of criminal drug cartels could overwhelm the institutions of the state and establish de facto control over broad regions of northern Mexico. . . . Mexico is not confronting dangerous criminality—it is fighting for survival against narco-terrorism.

Memorandum from Gen. Barry R. McCaffrey, Adjunct Professor, West Point, to Col. Michael Meese, Professor, West Point 4 (Dec. 29, 2008), available at http://www.mccaffreyassociates.com/pdfs/Mexico_AAR_-_December_2008.pdf; see NAT'L DRUG INTELLIGENCE CENT., U.S. DEP'T OF JUSTICE, NATIONAL DRUG THREAT ASSESSMENT 2009, at III (Dec. 2008), available at <http://www.usdoj.gov/ndic/pubs31/31379/31379p.pdf> ("Mexican [drug trafficking organizations] represent the greatest organized crime threat to the United States."). Peru's infamous communist guerilla organization known as the "Shining Path" had been on the decline for many years. See JAMES F. ROCHLIN, VANGUARD REVOLUTIONARIES IN LATIN AMERICA: PERU, COLOMBIA, MEXICO 3 (2003) ("Incredibly, the [Shining Path's] power base went from maximum to zero virtually overnight following the 1992 capture of its charismatic and dictatorial leader, Abimael Guzmán."). It appears now that activity among the Shining Path is on the rise. See Dan Collins, *Peru Guerrillas Tread a New Path*, BBC NEWS, Feb. 1, 2009, <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/americas/7830215.stm> (last visited Oct. 21, 2009) ("Recently the Shining Path has sprung back from relative obscurity to launch its most deadly attacks in more than a decade.") (on file with the Washington and Lee Law Review). It currently controls a "key drug-trafficking corridor" and its members have

States.²³ Consider the following:

As [foreign terrorist organizations] become more heavily involved in the drug trade, hybrid organizations are emerging, foreign terrorist organizations that have morphed into one part terrorist organization, one part global drug cartel. The Taliban and FARC—two perfect examples—are, in essence, the face of twenty-first-century organized crime, a visage meaner and uglier than anything law enforcement or militaries have heretofore faced. These hybrids represent the most significant security challenge to governments worldwide.²⁴

In response to these and other threats to America, Congress enacted the USA PATRIOT Act in 2001 and reauthorized many of its sunset provisions in 2005.²⁵ As part of the reauthorization, Congress introduced the narco-terrorism statute, which President George W. Bush signed into law in 2006.

B. Four Cases Demonstrate the Status Quo

To date, the United States has prosecuted four cases under the 2006 narco-terrorism law.²⁶ It is likely that the rate of these prosecutions will increase dramatically in the near future.²⁷ Understanding the history of these cases

"killed some [twenty-five] soldiers and police officers in ambushes and gun battles." *Id.* The United States Joint Forces Command made it clear in its 2008 Joint Operations Environment that "[i]n terms of worst-case scenarios for the Joint Force and indeed the world, two large and important states bear consideration for a rapid and sudden collapse: Pakistan and Mexico." U.S. JOINT FORCES COMMAND, JOINT OPERATING ENVIRONMENT: CHALLENGES AND IMPLICATIONS FOR THE FUTURE JOINT FORCE 36 (2008), available at <http://www.jfcom.mil/newslink/storyarchive/2008/JOE2008.pdf>.

23. See 109 CONG. REC. S9846 (daily ed. Sept. 8, 2005) (statement of Sen. Cornyn) (discussing how "modern day narco-terrorists" have affected Texas).

24. Braun, *supra* note 2, at 28.

25. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered titles of the U.S.C.) (enacting laws "[t]o deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes"); *USA PATRIOT Improvement and Reauthorization Act of 2005*, Pub. L. No. 109-177, 120 Stat. 192 (codified as amended in scattered titles of the U.S.C.) (reauthorizing provisions "[t]o extend and modify authorities needed to combat terrorism, and for other purposes"); Bush, Statement at Attorney General Gonzales's Swearing-In Ceremony, *supra* note 8 ("Many key elements of the PATRIOT Act are now set to expire at the end of this year. . . . To protect the American people, Congress must promptly renew all provisions of the PATRIOT Act this year.").

26. See *infra* Parts II.B.1–4 (detailing the prosecutions).

27. See Christopher M. Blanchard, *Afghanistan: Narcotics and U.S. Policy*, Cong. Research Serv. RL32686, at 27 (Dec. 7, 2004) ("New reform efforts plan to develop special prosecution teams to investigate and prosecute prominent figures in the Afghan opium trade.");

allows for a proper prediction for future cases. Especially important for this prediction is the observation that each of these four cases involved a clear drug-terror nexus²⁸ and no multiple-inchoate constructions,²⁹ rendering them helpful, but not dispositive, in this Note's analysis. Thus, they represent the status quo in narco-terror prosecutions. Deviations from these models should cause concern for those prosecuted.

I. United States v. Corredor-Ibague

A grand jury issued the first indictment under 21 U.S.C. § 960a in 2006 against José María Corredor-Ibague and nine others.³⁰ A member of the FARC, Corredor-Ibague is currently awaiting trial on these charges.³¹ The FARC is "an armed and violent organization" that is "engaged . . . in armed conflict against the government of the Republic of Colombia."³² The FARC "seeks to destabilize all levels of the Colombian government by means of violence, including murders and hostage takings, threats of violence, and other terrorist related activities."³³ It has been designated as a foreign terrorist organization, and "has been strongly anti-American, characterizing American citizens as 'military targets,' and has engaged in violent acts against Americans in Colombia."³⁴

It is alleged that Corredor-Ibague controlled "clandestine airstrips in the jungles of Southern Colombia" from which "small aircraft flew out multi-

DRUG ENFORCEMENT ADMIN., U.S. DEP'T OF JUSTICE, CONGRESSIONAL BUDGET SUBMISSION 27 (2009), available at <http://www.usdoj.gov/jmd/2009justification/pdf/fy09-dea.pdf> ("With the implementation of the amended 21 U.S.C. [§] 960a, DEA's role in narco-terrorism investigations and prosecutions expanded significantly.").

28. For a summary of the drug-terror connections in these cases, see *infra* Part III.A.

29. Each case involved a direct charge of violating 21 U.S.C. § 960a, not § 963 (conspiracy to commit § 960a). For further discussion of this matter, see *infra* Part IV.

30. See Superseding Indictment at 1, United States v. Corredor-Ibague, No. 04-212 (D.D.C. Oct. 26, 2006) (listing a total of ten defendants); Jim Kouri, *Colombian FARC Terrorists Extradited to US on Terrorism and Drug Charges*, CAN. FREE PRESS, Oct. 20, 2008, <http://canadafreepress.com/index.php/article/5689> (last visited Oct. 21, 2009) ("Corredor-Ibague was the first person in the nation to be indicted under this narco-terrorism statute, which became law in March 2006.") (on file with the Washington and Lee Law Review).

31. See Revised Ex Parte Motion for Interim Payments for Attorneys, Investigators and Interpreters Appointed Pursuant to 18 U.S.C. § 3006(A) at 2, *Corredor-Ibague*, No. 04-212 (D.D.C. Jan. 6, 2009) ("[A] trial date in the near future appears unrealistic."); Kouri, *supra* note 30 (identifying the defendant as a member of the FARC).

32. Indictment at 1–2, *Corredor-Ibague*, No. 06-344 (D.D.C. Nov. 30, 2006).

33. Indictment, *supra* note 32, at 2.

34. Indictment, *supra* note 32, at 2.

hundred kilogram quantities of cocaine . . . destined for the United States."³⁵ The Government alleges that he "organized these shipments, manufactured and sold the cocaine, and [remitted taxes] on the cocaine [to the FARC]" and also imported "small arms weaponry which was used by the FARC to supply its armed forces."³⁶

2. United States v. Jiménez-Naranjo

A superseding indictment originating in the District Court for the District of Columbia on September 25, 2007 charged Carlos Mario Jiménez-Naranjo with violation of § 960a.³⁷ It is alleged that Jiménez-Naranjo was "a high-ranking leader of the Autodefensas Unidas de Columbia ('AUC')."³⁸ The AUC is "a Colombian right-wing paramilitary and drug-trafficking organization."³⁹ The U.S. Department of State has considered it a Foreign Terrorist Organization (FTO) since September 2001.⁴⁰ The Government alleges that Jiménez-Naranjo "controlled all aspects of the cocaine industry from the coca producing land to the transportation routes for sending large quantities of cocaine."⁴¹ The defendant controlled approximately 9,000 soldiers as an AUC leader and was involved in the manufacture and transportation of "multi-ton quantities of cocaine destined for the United States."⁴²

35. Kouri, *supra* note 30.

36. *Id.*

37. *See* Indictment at 2–3, United States v. Jiménez-Naranjo, No. 05-235 (D.D.C. Sept. 25, 2007) (charging the defendant with conspiracy to violate § 960a).

38. Detention Memorandum at 2, *Jiménez-Naranjo*, No. 05-235 (D.D.C. May 13, 2008).

39. Press Release, Dep't of Justice, Colombian Paramilitary Leader Extradited to the United States to Face U.S. Drug Charges (May 7, 2008), *available at* <http://www.usdoj.gov/opa/pr/2008/May/08-crm-388.html>.

40. *See id.* (indicating the Foreign Terrorist Organization status of the AUC); Press Release, U.S. Dep't of State, Foreign Terrorist Organizations (July 7, 2009), *available at* <http://www.state.gov/s/ct/rls/other/des/123085.htm> (listing the AUC as a Foreign Terrorist Organization).

41. Detention Memorandum, *supra* note 38, at 2.

42. *See* Government's Motion under the Speedy Trial Act for Continuance Based on Complex Case and to Exclude Time to Obtain Evidence from a Foreign Country at 2–3, *Jiménez-Naranjo*, No. 05-235 (D.D.C. June 6, 2008) (outlining the defendant's involvement in the AUC).

3. United States v. Mohammed

The third indictment involving the narco-terrorism statute was filed against Khan Mohammed on January 23, 2008.⁴³ Mohammed was found guilty of violating § 960a and was the first person to be convicted under that statute.⁴⁴ He was an associate of the Taliban,

an organization of extremist Muslims currently conducting an insurgent campaign to rid Afghanistan of "infidels[,"] overthrow the current government, and install itself in power by means of force and acts of terrorism. Further, the Taliban engage in drug trafficking in order to finance the acquisition of weapons, ammunition and equipment necessary to conduct its attacks on coalition forces, the Afghan government and anyone else who stands in their way.⁴⁵

Mohammed's responsibilities included coordinating terrorist attacks, which he had conducted in the past and was actively planning for the future.⁴⁶ He was also an experienced drug trafficker, and "money earned from that drug trafficking was used to support himself and advance the cause of the Taliban."⁴⁷ Mohammed admitted to producing and selling opium.⁴⁸ A recorded conversation indicates that he was influential in planning and executing terrorist attacks.⁴⁹ Khan Mohammed was ordered to serve a life sentence for

43. See Superseding Indictment at 2, *United States v. Mohammed*, No. 06-357 (D.D.C. Jan. 23, 2008) (charging Mohammed with violating 21 U.S.C. § 960a).

44. See Verdict Form at 1, *Mohammed*, No. 06-357 (D.D.C. May 15, 2008) (finding the defendant guilty); Government's Response to Defendant's Sentencing Memorandum at 19, *Mohammed*, No. 06-357 (D.D.C. Oct. 6, 2008) ("Khan Mohammed is the first ever defendant convicted under § 960a."); Jim Kouri, *Afghan Taliban Gets Life Sentence in Nation's First Conviction for Narco-Terrorism*, HUNTINGTON NEWS, Dec. 28, 2008, <http://www.huntingtonnews.net/national/081228-kouri-nationaltalibansentence.html> (last visited Oct. 21, 2009) ("The conviction represented the first time a defendant had been convicted in US federal court of narco-terrorism since the statute was enacted in March 2006.") (on file with the Washington and Lee Law Review).

45. Government's Memorandum in Aid of Sentencing at 1-2, *Mohammed*, No. 06-357 (D.D.C. Aug. 26, 2008).

46. *Id.*

47. *Id.* at 2.

48. Post-Arrest Statements of Taliban Operator Khan Mohammed, on October 29, 2006 ¶ 8, at 3, *Mohammed*, No. 06-357 (D.D.C. Jan 16, 2008) ("Mohammed said . . . [h]e sold ten kilograms of opium to Jalat. . . . The opium he sold was produced by him two years ago from his own poppy.").

49. See Transcript of Recorded Conversation on August 18, 2006, Court Exhibit 2A at 4, line 30, *Mohammed*, No. 06-357 (D.D.C. May 1, 2008) (implicating Mohammed in these attacks); *id.* at 7, line 50 ("We fired rockets at the county-chief office . . ."). The recordings revealed Mohammed's intentions:

What they do is to kill the Americans. The Americans are infidels and Jihad is

violating 21 U.S.C. § 960a.⁵⁰

4. United States v. Khan

On October 21, 2008, a grand jury sitting in the Southern District of New York charged Haji Juma Khan with violating 21 U.S.C. § 960a.⁵¹ Khan "led an international opium, morphine and heroin trafficking organization" known as the "Khan Organization."⁵²

The Khan Organization has contracted to supply other drug traffickers with morphine base, which can be processed into heroin, in quantities as large as 40 tons. This is enough to supply the entire United States heroin market for more than two years. The Khan Organization also operates labs within Afghanistan that produce refined heroin, and the organization sells the heroin in quantities of as much as 100 kilograms and more.⁵³

Khan has been "closely aligned with the Taliban" and has "supported the Taliban's efforts to forcibly remove the United States and its allies from Afghanistan."⁵⁴ He is alleged to have "provided financial support to the Taliban, in the form of the proceeds of the Khan Organization's drug trafficking activities, in exchange for protection for the organization's drug trafficking operations."⁵⁵ Particularly, Khan is alleged to have "engaged in an approximately 700 kilogram morphine base transaction," utilized agents to

allowed against them. If we have to fire [the missiles] toward the airport, we will do it and if not the airport, wherever they are stationed we will fire at their base too. I mean we have to use the mines too. God willing, we and you will keep doing our Jihad [sic].

Id. at 4, line 30 (alterations in original).

50. See Judgment in a Criminal Case at 1–3, *Mohammed*, No. 06-357 (D.D.C. Dec. 23, 2008) (finding the defendant guilty of violating § 960a and ordering him to life in prison).

51. See Sealed Indictment at 3, United States v. Khan, No. 08-CR-621 (S.D.N.Y. Oct. 21, 2008), ¶ 8 ("[T]he defendant, and others . . . , unlawfully, intentionally and knowingly did combine, conspire, confederate and agree together and with each other to violate [21 U.S.C. § 960a].").

52. *Id.* at 2.

53. *Id.* at 2–3.

54. *Id.* at 3; see Jim Kouri, *Drug Kingpin Charged with Financing Taliban Terrorist Insurgency*, EXAMINER.COM, Feb. 1, 2009, <http://www.examiner.com/x-2684-Law-Enforcement-Examiner-y2009m2d1-Drug-Kingpin-charged-with-financing-Taliban-terrorist-insurgency> (last visited Oct. 21, 2009) (recounting factual allegations against Khan) (on file with the Washington and Lee Law Review).

55. Sealed Indictment, *supra* note 51, at 3.

supply heroin to others, and remitted payments to the Taliban.⁵⁶ Khan has pleaded not guilty and is currently awaiting trial.⁵⁷

III. Drug-Terror Nexus: Necessary?

The current narco-terrorism statute, when analyzed in light of its legislative and textual history, creates the possibility that prosecutorial discretion will diverge from congressional intent. Based solely on the current text of the statute, little emphasis is placed on the required nexus between drugs and terror:

Whoever engages in [drug activity] that would be punishable . . . if committed within the jurisdiction of the United States, or attempts or conspires to do so, knowing or intending to provide, directly or indirectly, anything of pecuniary value to any person or organization that has engaged or engages in terrorist activity . . . or terrorism . . . shall be sentenced to a term of imprisonment of not less than twice the minimum punishment [otherwise required for the drug crime], and not more than life⁵⁸

This observation begs the question: Could somebody be prosecuted for violation of § 960a if the drug activity is not connected—even indirectly—to the terror support?

It is clear that throughout history, the concept of—and laws against—narco-terrorism has included an explicit nexus between drugs and terror.⁵⁹ Indeed, the very word "narco-terrorism" conjures up an image of drug-dealing terrorists. Why, then, did legislators purposefully⁶⁰ omit the drug-terror nexus

56. *Id.* at 5–6.

57. *See Afghan Arraigned in Narco-Terrorism Case*, WASH. POST, Oct. 25, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/24/AR2008102403658.html> (last visited Oct. 1, 2009) ("Haji Juma Khan, 54, pleaded not guilty through an interpreter in U.S. District Court in Manhattan.") (on file with the Washington and Lee Law Review); Larry Neumeister, *Afghan Arrested in NY Narco-Terrorism Case*, USA TODAY, Oct. 24, 2008, http://www.usatoday.com/news/world/2008-10-24-afghan-drug-trial_N.htm (last visited Oct. 21, 2009) ("I am not guilty," [Khan] said.) (on file with the Washington and Lee Law Review).

58. 21 U.S.C. § 960a (2006).

59. *See infra* Parts III.A–C (reflecting on the history of the nexus associated with narco-terror).

60. The legislative history of § 960a does not indicate whether the missing nexus was purposeful. *See infra* Part III.C (chronicling the statute's legislative history). The history does indicate that a nexus was present in early drafts of the statute, but was later deleted before signed into law. *See infra* Part III.C (indicating that the change evolved in the Conference Committee's report). This Note presumes that Congress intends its actions; Congress deleted the important language on purpose. *See Carter v. United States*, 530 U.S. 255, 270–71 (2000) (determining that calling a congressional deletion of statutory language a stylistic change, with

from the text of § 960a? Justice Frankfurter admonishes readers to analyze the meaning of a statute by "listen[ing] attentively to what it does not say."⁶¹ Does this indicate congressional intent to criminalize further (by way of doubling the sentence of the drug crime) the support of terrorism, even if there is no connection between the drug crime and the support of terror? An examination of the case, textual, and statutory histories of narco-terrorism will reveal that Congress eliminated a necessary element of narco-terrorism—the drug-terror nexus—from the statute, compromising the clarity of the legislature's purpose.

A. *The Case History Supports the Nexus*

So far, case law has not provided courts with the opportunity to consider the outcome of a prosecution in which there is no connection between the drug and terror activity. All four of the prosecutions under § 960a, outlined in Parts II.B.1–4 above, have had a direct link between the drug and terror activity—what this Note calls the "drug-terror nexus."⁶² Allegedly, Corredor-Ibague paid taxes from the sale of cocaine to the FARC, a terrorist organization;⁶³ Jiménez-Naranjo was a leader of 9,000 AUC soldiers who produced many tons of cocaine;⁶⁴ Mohammed helped export opium to "turn all the infidels into dead corpses";⁶⁵ and Khan contracted to provide funds to the Taliban in exchange for protection of his drug-trafficking organization.⁶⁶ Other narco-terrorism crimes that have concerned Congress clearly demonstrate this drug-terror nexus.⁶⁷

no substantive effects, "misunderstands" the Court's "approach to statutory interpretation" and that "[i]n analyzing a statute, we begin by examining the text"); *Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001) ("We ordinarily will not assume that Congress intended 'to enact statutory language that it has earlier discarded in favor of other language.'" (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987))). In *Carter*, the Court made clear that "[a]s is often the case, the legislative history, even if it is relevant, supports conflicting inferences and provides scant illumination." *Carter*, 530 U.S. at 271 n.9. For further discussion on this topic, see *infra* notes 114–16 and accompanying text.

61. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536 (1947) ("One more caution is relevant when one is admonished to listen attentively to what a statute says. One must also listen attentively to what it does not say.").

62. See *supra* Parts II.B.1–4 (summarizing the current case law).

63. See *supra* note 36 and accompanying text (chronicling Corredor-Ibague's crimes).

64. See *supra* note 42 and accompanying text (describing Jiménez-Naranjo's involvement in narco-terrorism).

65. Government's Memorandum in Aid of Sentencing, *supra* note 45, at 8.

66. See *supra* note 55 and accompanying text (recounting Khan's connection with the Taliban).

67. See *supra* note 21 and accompanying text (listing four narco-terror crimes that have a clear drug-terror nexus).

The consistency of prosecuting individuals who have a direct drug-terror nexus could be the product of a number of factors. First, § 960a is a young statute, and such a small number of cases reduces the mathematical probability that "a bad case" could get through. Second, § 960a is an important statute, and there is high public scrutiny surrounding these prosecutions; a questionable prosecution this early would raise eyebrows. Third, § 960a is a sensitive statute, such that it seems great care goes into successfully prosecuting narco-terrorists; the cases have been prosecuted by those "who temper[] zeal with human kindness, who seek[] truth and not victims, who serve[] the law and not factional purposes, and who approach[the] task with humility."⁶⁸ Regardless of the reason, it is clear that the current case law supports an implied drug-terror nexus.

B. *The Textual History Complicates the Issue*

Since the term originated, narco-terrorism has had an implied link between drugs and terror.⁶⁹ The very use of the hyphen with the words indicates a link between "narcotics" and "terrorism." As narco-terrorism expanded in the last several decades, so has its meaning. In 1982, Peruvian President Fernando Belaunde Terry used the term to describe "the union of the vice of narcotics with the violence of terrorism" and "[a] marriage of vice with violence."⁷⁰ As early as 1984, however, it seemed that the word was gaining a wider acceptance without such a clear drug-terror nexus.⁷¹ That year, the term was used to describe the Nicaraguan government's involvement with a drug-running operation from Colombia to Florida.⁷² Although the primary drug-runners were notorious narco-terrorists by any definition of the word—including Pablo

68. Jackson, *supra* note 9, at 20.

69. See *supra* notes 16–17 and accompanying text (reviewing the first use of the term narco-terrorism).

70. *Police Station Attacked Near Site of Peru Prison Break*, *supra* note 16; *Alliance Threatens Fragile Democracy, Peru Links Rebel Group with Drug Dealers*, THE GLOBE AND MAIL, Mar. 16, 1982, at 13.

71. See Douglas Stevenson, *[Nicaraguan Government Involved in Narco-Terrorism]*, UNITED PRESS INT'L, Aug. 8, 1984, available at LEXIS (using the term to describe the Nicaraguan military assistance in transporting cocaine to the United States) (on file with the Washington and Lee Law Review).

72. This incident involved the DEA and CIA working together with an American cooperator who flew drugs into the United States from Colombia. See DUANE R. CLARRIDGE, A SPY FOR ALL SEASONS: MY LIFE IN THE CIA 286 (Simon and Schuster 2002) (1986) (describing the operation).

Escobar—the word was used to describe the Nicaraguan government, which appears to have done little more than assist in transportation and refueling.⁷³

In 1984, the word's meaning lost more clarity when it was used to describe the battle between drug-growers and drug-suppressers.⁷⁴ It seems that the line between traditional "narco-terrorism" and drug manufacturers protecting their livelihoods was blurring. One reporter gave examples of narco-terrorism in 1984:

Colombia. Two leftist rebel armies shield mountainside growers from military interference. Cocaine sent to Cuba buys arms for guerrillas.

Peru. A multimillion-dollar U.S. drug-eradication program withers as Shining Path guerrillas seal off critical areas from agents and troops.

Bolivia. Chaos created by Communists, neo-Nazis, armed dealers and an ineffective Army halts America's 2.4-million-dollar antidrug drive.

Brazil. Lax officials allow new coca-growing enterprises to flourish.

Lebanon. Cockpit of Mideast wars is transfer point for Palestinian gunmen, Christian militiamen and Syrian troops who trade in hashish.

Afghanistan. Mountain tribes ship raw opium to Pakistan and Iran, use cash to buy weapons that guerrillas need to fight Soviet occupation.

Burma. Secessionist Kachin, Karen, Shan tribesmen, plus Communist guerrillas, buy arms with profits from selling drugs in Laos, Thailand.⁷⁵

Thus, a diverse array of activities was included under the "narco-terrorism" label. As the 1980s spawned the large-scale profitability of narcotics, those profits were non-discriminatory. Tribesmen in Afghanistan sold raw opium to

73. See Stevenson, *supra* note 71 ("Photographs taken by Drug Enforcement Agency informants and released by Sen. Paula Hawkins, R-Fla., allegedly show Nicara[gu]an government involv[e]ment in 'narco-terrorism.'"). Although the term "narco-terrorism" was used to refer to the Nicaraguan government's involvement, it appears they were assisting primarily in transportation, and not in the terrorist acts themselves. See CLARRIDGE, *supra* note 72, at 286 ("[The] plane [was] on the Sandinista runway Among the others was Sandinista minister of interior Tomas Borge's executive assistant Federico Vaughan. To cap it all, one of the photos showed a clearly marked Sandinista military fuel trailer alongside the clamshell door, standing by to refuel the aircraft.").

74. *Drug Trade Finances Revolution*, U.S. NEWS & WORLD REP., Aug. 27, 1984, at 35 ("'Narco terrorism' is code word for a new, mushrooming type of war that steadily is worsening. From Peru to Burma, drug-producing peasants and guerrillas are pitted against drug-suppressing military and civil units.").

75. *Id.*

finance their struggle against the U.S.S.R.⁷⁶ Paramilitary organizations in South America exchanged guns for drugs to commit terrorist acts on civilians and government targets.⁷⁷ The confusion surrounding this broad-sweeping term led the Canadian Security Intelligence Service to declare that narco-terrorism was "a subject of definitional controversy" in 1991.⁷⁸

Since that time, the term has not gained clarity. In 2001, Raphael Perl spoke at the National Symposium on Narco-Terrorism.⁷⁹ Perl, the Senior Policy Analyst for International Terrorism and Narcotics with the Congressional Research Service of the Library of Congress, noted that "[t]he links between drug trafficking and terrorist organizations are well documented" but "[t]he line between them is becoming increasingly difficult to draw."⁸⁰ If the drug-terror nexus is not a new phenomenon, what *has* changed? Perl provides an answer.⁸¹ He identified three major changes in the drug-terror culture that have blurred this line: first, an "increasingly deregulated and interconnected global economy"; second, "[drugs as] an attractive and highly lucrative source of income for [terrorists]"; and third, "the enhanced threat level that the combined forces of drug trafficking and terrorism pose to [the United States]."⁸² These changes seem to have culminated in terrorists using drugs as a sort of "weapon of mass destruction."⁸³ Case in point: Khan Mohammed⁸⁴ indicated in recorded conversations with a confidential informant, Jaweed, that opium was to be used as a weapon against Americans:

76. *See id.* ("[Afghani m]ountain tribes ship raw opium to Pakistan and Iran, use cash to buy weapons that guerrillas need to fight Soviet occupation.").

77. *See* Michael Isikoff, *Noriega Said to Be Part of Guns-for-Drugs Deal*, WASH. POST, Feb. 28, 1991, at A4 ("Panamanian Gen. Manuel Antonio Noriega personally authorized the shipment of 1,000 M-16 rifles to Colombia's Medellin drug cartel in exchange for cocaine that was to be distributed in this country . . .").

78. Smith, *supra* note 16, at 1.

79. *See* Raphael Francis Perl, Senior Policy Analyst for Int'l Terrorism and Narcotics, Cong. Research Serv. of the Library of Cong., Address at the National Symposium on Narco-Terrorism: Target America: Traffickers, Terrorists & Your Kids 20–28 (Dec. 4, 2001) [hereinafter *Narco-Terrorism Symposium*] (transcript available at http://www.usdoj.gov/dea/ongoing/symposium_transcript.doc) (discussing the "global outlook and the history of the war against illegal narcotics").

80. *Id.* at 21.

81. *See id.* at 22 ("If links between drug trafficking and terrorist organizations, the so-called 'guns for drugs connection,' are well established and not new, then what are we seeing here today that is new?").

82. *Id.* at 22–23.

83. *See* Steven W. Casteel, Assistant Adm'r for Intelligence, Drug Enforcement Admin., *Narco-Terrorism Symposium*, *supra* note 79, at 33 (calling drugs a fourth weapon of mass destruction).

84. For a summary of *United States v. Mohammed*, see *supra* Part II.B.3.

[Jaweed]: "This opium is going abroad and all other powders are going abroad."

[Mohammed]: "Good, may God turn all the infidels to dead corpses."

....

[Jaweed]: "All right, is it possible to find powder?"

[Mohammed]: "There are a lot, as much as you need I will give it to you. Two things would be done: one, as they say, the Jihad would be performed since they send it to America."⁸⁵

It is here that a divergence occurs. There are those who use drugs as a weapon to target Americans or use the sale of drugs directly to finance terrorism.⁸⁶ Separately, there are those who may be charged with violating § 960a when the drug-terror nexus is not so noticeably present.⁸⁷ This review of the textual history of narco-terrorism reveals wide disparity among definitions, rendering it difficult for Congress to indicate precisely what it means by simply using the word "narco-terror."

In summary, it seems as though neither the case law of § 960a nor the history of narco-terrorism provides much guidance to help determine the necessity of the nexus "that is growing at quantum speed."⁸⁸ Importantly, statutory history is a better indicator of legislative intent.⁸⁹ A study of the legislative history will show that Congress considered, and then ultimately rejected, drafting the required nexus into the statute.

C. *The Statutory History Exposes Congressional Error*

Of course, in addition to facial textual analysis, statutory history is an important tool to help discern legislative intent, to which the courts often give

85. Government's Memorandum in Aid of Sentencing, *supra* note 45, at 7–8.

86. Steven Casteel suggested that the fifty-three kilograms of Afghan heroin seized in New York City two days prior to 9/11 was part of a terrorist attack on America. *See* Casteel, *supra* note 83, at 33 (using this example to "argue that we've been under attack in this country for a long time, and [that] it didn't start on the 11th [of September 2001]").

87. *See infra* Part V (suggesting hypotheticals when this may be possible).

88. Braun, *supra* note 2, at 27.

89. *See* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 606 (1991) (indicating that legislative history is an important tool in discerning congressional intent).

great deference.⁹⁰ The importance of providing prosecutors proper statutes is paramount:

What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain. . . . With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. [It is in] such a case . . . that the greatest danger of abuse of prosecuting power lies.⁹¹

The text of § 960a does not expressly require a drug-terror nexus. To violate this statute, one must "engage in [drug-related] conduct . . . knowing or intending to provide . . . pecuniary value to any person or organization that has engaged or engages in terrorist activity."⁹² Compared to earlier versions of this statute, below, § 960a does not seem to necessitate a link between the drug activity and the terrorism. Yet, the link between the two seemed vitally important leading up to the passage of the act: "[T]he events of September 11 have brought a new focus on an old problem, narco-terrorism. . . . In attempting to combat this threat, the link between drugs and terrorism has come to the fore. . . . [T]he nexus between drugs and terrorism is perilously evident."⁹³

The analysis of this statute's history begins before its incorporation in the USA PATRIOT Act's reauthorization with Representative Henry Hyde's proposed Narco-Terrorism Enforcement Act of 2005.⁹⁴ In his speech introducing the Act on May 24, 2005, Representative Hyde stated:

The nexus between terrorism and illicit narcotics grows more and more as evidence emerges of their common, supportive links and as the use also increases of drug trafficking routes to move both narcotics and terrorists. . . . In addition, this bill raises the penalties under the material support-for-terrorism statute to reflect the seriousness of this offense. This

90. See *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 65 (2004) (Stevens, J., concurring) ("In recent years the Court has suggested that we should only look at legislative history for the purpose of resolving textual ambiguities It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress'[s] true intent when interpreting its work product.").

91. Jackson, *supra* note 9, at 19.

92. 21 U.S.C. § 960a (2006).

93. *Narco-Terrorism: International Drug Trafficking and Terrorism—A Dangerous Mix: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 10 (2003) (statement of Steven W. Casteel, Assistant Administrator for Intelligence, Drug Enforcement Administration).

94. See 151 CONG. REC. E1073 (daily ed. May 24, 2005) (statement of Rep. Hyde) (introducing the Narco-Terrorism Enforcement Act of 2005).

bill reflects the new reality, emerging challenges, and ever-clearer drug links on the global terrorism front.⁹⁵

The Narco-Terrorism Enforcement Act of 2005 evolved soon after its proposal into § 960a.⁹⁶ It is clear that the drug-terror nexus was in the forefront of the legislature's intentions.

On July 21, 2005, Representative Hyde rose to the floor to offer an amendment to the USA PATRIOT Act's reauthorization.⁹⁷ The text of the amendment was the first statutorily expressed connection between drugs and terror in narco-terrorism: "Whoever . . . manufactures, distributes, imports, exports, or possesses with intent to distribute or manufacture a controlled substance, . . . knowing or intending *that such activity*, directly or indirectly, aids or provides support, resources, or anything of pecuniary value to [terrorism] . . ."⁹⁸ The same statutory language was read to the Senate on July 29, 2005.⁹⁹ The three words "that such activity" make the necessary connection between the drug activity and the terror support; the individual must know or intend *that the drug activity* is supporting terror. It is this connection that is visibly absent from the current statute. The day that this amendment was offered, Representative Hyde spoke about its implications:

I am very pleased to offer an amendment to the USA PATRIOT Reauthorization Act which deals with the new reality of *overlapping links* between illicit narcotics and global terrorism. Evidence of this deadly and emerging *symbiotic relationship* is overwhelming. My amendment creates a new crime that will address and punish those who would *use these illicit narcotics to promote and support terrorism*. . . . My amendment . . . makes it a Federal crime . . . to engage in drug trafficking that [supports terrorism].¹⁰⁰

Other Representatives made it equally clear that the drug-terror nexus is implied, if not expressed. Representative Lungren proclaimed, "[T]he Hyde amendment recognizes a new reality in a very real danger that is growing: the

95. *Id.*

96. Indeed, the elapsed time between the introduction of the Narco-Terrorism Enforcement Act of 2005 and its incorporation into the USA PATRIOT Act was fifty-eight days.

97. *See* 151 CONG. REC. H6292 (daily ed. July 21, 2005) (statement of Rep. Hyde) (offering the amendment).

98. *Id.* (emphasis added).

99. 151 CONG. REC. S9567-68 (daily ed. July 29, 2005).

100. 151 CONG. REC. H6292 (daily ed. July 21, 2005) (statement of Rep. Hyde) (emphasis added).

deadly mix of drug trafficking and terrorism."¹⁰¹ He noted that "[t]he evidence linking these two criminal activities is overwhelming. . . . The Hyde amendment simply creates a new Federal crime for the trafficking of controlled substances which are intended to benefit a . . . terrorist organization."¹⁰² He even gave specific examples of this nexus:

Terrorists in Afghanistan are now infiltrating and controlling the cultivation of poppy and ultimately heroin. The deadly bombings in Spain were financed through drug money. Hezbollah has been linked to drug trafficking from South America to the Middle East; and of course the Revolutionary Armed Forces of Colombia has long-standing drug trafficking operations which fund their deadly activities.¹⁰³

It is apparent that the link between drugs and terror was the focus of the legislators when enacting this amendment.¹⁰⁴

On September 8, 2005, Senator Cornyn introduced a bill "[t]o prohibit narco-terrorists from aiding and supporting terrorists and terrorist organizations."¹⁰⁵ The language of this bill began to reflect more closely that of the current § 960a, yet it still contained the "nexus language" found in the House version.¹⁰⁶ In supporting this bill, Senator Cornyn not only echoed the important nexus between drug traffickers and terrorists but also elaborated on this connection:

This bill confronts the new reality and very real danger of the deadly mix of drug trafficking and terrorism. . . . Post 9/11, governments now find themselves combating classic terrorist groups that participate in, or otherwise receive funds from, drug trafficking in order to further their agenda. But whether narco-terrorists are actual drug traffickers who use terrorism against civilians to advance their agenda, or are principally terrorists who out of convenience or necessity use drug money to further their cause, the label of narco-terrorist may be equally applicable to both groups, and the full force of U.S. law should be brought to bear on these organizations.¹⁰⁷

101. *Id.* at H6293 (statement of Rep. Lungren).

102. *Id.*

103. *Id.*

104. In closing the discussion, Representative Hyde reinforced this fact. *Id.* at H6294 (statement of Rep. Hyde) ("There is a definite link between the illicit narcotics trade and the financing of terrorism. We have taken a focused look at that link, and this is an attempt to disrupt it and destroy it.")

105. S. 1642, 109th Cong. (2005).

106. That is, it also contained the "that such activity" language included in the House version. *See supra* notes 98–99 and accompanying text (explaining significance of the phrase).

107. 151 CONG. REC. S9846 (daily ed. Sept. 8, 2005) (statement of Sen. Cornyn). Senator

Senator Cornyn's statements beg the question: If the term "narco-terrorism" may be applied to both drug traffickers—who use terrorism to further their agenda—and terrorists—who use drug money to further their cause—with whom else may this term be associated? Are there other, less dangerous individuals who may be swept up in a narco-terror prosecution? The drug-terror nexus seems to serve as one protection against that possibility. That is, so long as the statute includes the requirement that the drug activity and the terrorism support be linked, only the most culpable and dangerous narco-terrorists would be targeted. Without that link, Congress simply is creating redundant punishments for those who commit multiple crimes. Representative Scott identified this possibility early on: "Drug trafficking and terrorism crimes already carry numerous penalties for the most egregious offenses, so we do not need them anew in this case."¹⁰⁸

After the two houses of Congress disagreed on the text of the USA PATRIOT Reauthorization Act, it was sent to the Conference Committee. Representative Sensenbrenner proposed the Conference Committee's recommendation to the House on December 8, 2005.¹⁰⁹ For the most part, the Conference Committee's recommendations regarding narco-terrorism were barely noticeable.¹¹⁰ One change, however, seemed to escape the attention of

Cornyn also made statements indicating the integral nexus at issue:

The legislation I introduce today creates a new Federal crime designed to punish the trafficking of controlled substances which are intended to benefit a foreign terrorist organization or any one else planning a terrorist attack. . . . This bill says that whether you are a member of or assisting a drug cartel along the border that employs terrorist tactics to protect its drug trade, or you are assisting international terrorists with the proceeds from drug transactions, this bill targets you.

Id.

108. 151 CONG. REC. H6293 (daily ed. July 21, 2005) (statement of Rep. Scott).

109. See H.R. REP. NO. 109-333, at 34–36 (2005) (Conf. Rep.) (publishing the Committee's recommended narco-terrorism statutory language); 151 CONG. REC. H11288–89 (daily ed. Dec. 8, 2005) (same). The Supreme Court has indicated that Conference Reports are especially indicative of congressional intent. See *Garcia v. United States*, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969))).

110. The managers on the part of the House and the Senate submitted a joint statement to each to explain the effect of the changes agreed upon and recommended in the conference report:

Section 122 of the conference report is substantively similar to section 124 of the House bill. There is no comparable provision in the Senate amendment. This section adds new section 1010A to Part A of the Controlled Substance Import and Export Act, (21 U.S.C. §§ 951 et seq.), making it a Federal crime to engage in drug trafficking to benefit terrorists. The conference report changes the mandatory

the managers of the House and Senate who summarized the Conference Committee's amendments.¹¹¹ The phrase "that such activity," which originally constructed a required drug-terror nexus, was absent.¹¹²

This deletion was clearly overlooked in the summary of the amendments. The summary stated that "[this section] mak[es] it a Federal crime to engage in drug trafficking to benefit terrorists,"¹¹³ implying that the nexus requirement was still present, even though it was not. The Supreme Court has relied on deletions during statutory revisions as indicative of congressional intent, and it is clear that this wording change is important.¹¹⁴ Even so, the record indicates that Congress did not notice the change. This includes Representative Hyde, author of the original bill:

I am very pleased with the conference report . . . to renew the PATRIOT Act. . . . [T]he bill includes an added provision, which I authored, offering a new tool to attack the growing phenomenon of narco-terrorism, with the proceeds of illicit drug funding and financing feeding the Foreign Terrorist Organizations . . . and supporting acts of terrorism. Passage of the PATRIOT Act conference report will enhance Federal criminal law to effectively address the current reality . . . of illicit drugs being linked to nearly half of the designated FTOs around the globe today.

In this measure, my provision makes narcoterrorism, which involves both the illicit drug trade and support for terrorism, a Federal crime, and provides tough penalties that match the nature of such deadly and dual criminal activity.¹¹⁵

If the answer to the question "Why did Congress eliminate the drug-terror nexus from § 960a?" exists, it certainly is not readily apparent. The fact

minimum penalty from the [twenty] years provided in the House bill to simply twice the minimum under 21 U.S.C. § 841(b). Finally, the conference report modifies the proof requirements of the House-passed bill to clarify that a person must have knowledge that the person or organization has engaged or engages in terrorist activity or terrorism.

151 CONG. REC. H11305 (daily ed. Dec. 8, 2005); *see id.* at H11302 (describing the explanation process).

111. *See supra* note 110 (reprinting text of the summary).

112. *See supra* notes 98–99 and accompanying text (discussing the phrase "that such activity"); H.R. REP. NO. 109-333, at 34–36 (2005) (Conf. Rep.) (publishing the Committee's recommended narco-terrorism statutory language).

113. H.R. REP. NO. 109-333, at 98 (2005) (Conf. Rep.).

114. *See, e.g.,* *United States v. R.L.C.*, 503 U.S. 291, 292 (1992) (finding that a simple deletion in statutory language is indicative of congressional intent of the deletion's consequences).

115. 151 CONG. REC. H11538 (daily ed. Dec. 14, 2005) (statement of Rep. Hyde).

remains that given the full history of what narco-terrorism entails, the nexus *should* be there, but it is not. This could cause concern in the future if a careless prosecutor—or worse, a prosecutor "who risks his day-to-day professional name for fair dealing to build up statistics of success"¹¹⁶—casts the narco-terror net over an individual who may commit these separate, unlinked crimes.

IV. Conspiracy: Legitimate?

Besides the lack of a drug-terror nexus in the text of § 960a, there is another problematic aspect with the statute: Conspiracy law. "Conspiracy is an inchoate offense."¹¹⁷ It does not require the completion of the substantive crime to be punishable by law.¹¹⁸ Combining multiple statutes with inchoate liability aspects—including § 960a—may result in multiple-inchoate liability, which courts have struggled both to understand and to accept.¹¹⁹

Section 960a explicitly references conspiracy.¹²⁰ The statute requires that an individual commit a drug offense, or *attempt* or *conspire* to do so.¹²¹ This does not appear problematic at first. However, just a few sections away, in 21 U.S.C. § 963, the law provides that "[a]ny person who *attempts or conspires* to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."¹²²

Ultimately, this means that one could be guilty of § 963 (attempt or conspiracy to commit § 960a), the substantive offense in § 960a being

116. Jackson, *supra* note 9, at 19.

117. Iannelli v. United States, 420 U.S. 770, 777 (1975). Inchoate crimes include conspiracy, attempt, and solicitation. Mizrahi v. Gonzales, 492 F.3d 156, 160 (2d Cir. 2007). The statute in question here specifically includes conspiracy and attempt. See 21 U.S.C. § 960a (2006) (punishing those who engage in specified conduct or "attempt[] or conspire[] to do so").

118. See Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 7 n.10 (1989) (observing that the Model Penal Code drafters indicate that inchoate crimes criminalize conduct that is "designed to culminate in the commission of a substantive offense, but has failed in the discrete case to do so . . . because there is something that the actor or another still must do") (quoting MODEL PENAL CODE art. 5 cmt. at 293 (Proposed Official Draft 1985)).

119. See *infra* note 129 and accompanying text (detailing the courts' struggles with multiple-inchoate liability).

120. See 21 U.S.C. § 960a (2006) (punishing those who engage in specified conduct or "conspire[] to do so").

121. See *id.* (punishing those who engage in specified conduct or "attempt[] or conspire[] to do so").

122. 21 U.S.C. § 963 (2006) (emphasis added).

conspiracy or attempt to commit a drug crime to support terrorism.¹²³ Conceivably, one could be convicted of one of four crimes: *attempt to attempt*, *attempt to conspire*, *conspiracy to attempt*, or *conspiracy to conspire*.¹²⁴ These "double inchoate" offenses remove the actor even further from the substantive act.¹²⁵ Such construction is logically absurd, reeks of due process violations, and is simply unnecessary.¹²⁶

It does not stop there. That final drug act could include, possibly, a *transactional* or *distribution* crime.¹²⁷ Almost by definition, such a crime satisfies the requirements of conspiracy.¹²⁸ Tack one more crime onto the rap sheet: Conspiracy to commit § 963, which includes conspiracy to commit § 960a, which includes a conspiratorial distribution crime. Some courts seem to have trouble with multiple-inchoate offense convictions, although a circuit split exists.¹²⁹ How far down this line can the prosecutor go before it becomes

123. Confusing? The courts think so. For a look at how the circuits have viewed this issue, see *infra* note 129.

124. See Robbins, *supra* note 118, at 5–6 (introducing the double inchoate offenses as "attempts to attempt, attempts to conspire, attempts to solicit, conspiracies to attempt, conspiracies to conspire, conspiracies to solicit, solicitations to attempt, solicitations to conspire, and solicitations to solicit").

125. See *id.* at 72 ("In their functions as inchoate crimes, both conspiracy and solicitation are offenses that punish acts further removed from the completed offense than attempt does.").

126. See *id.* at 62–84 (criticizing double inchoate crimes). Robbins condemns multiple-inchoate crimes for being logically absurd, precluding notice to offenders, and being unduly cumbersome. *Id.*

127. 21 U.S.C. § 841(a) (2006) ("[I]t shall be unlawful for any person knowingly or intentionally . . . to . . . distribute, or dispense, or possess with intent to . . . distribute, or dispense, a controlled substance . . .").

128. See *United States v. Fregoso*, 60 F.3d 1314, 1327 (8th Cir. 1995) ("If . . . the buyer . . . purchases drugs from the seller as part of a continuing buyer/seller relationship, he or she may be . . . a co-conspirator with the seller in a drug distribution conspiracy.").

129. Compare *United States v. Murrell*, No. 79-5368, 1980 U.S. App. LEXIS 13625, at *4 (6th Cir. 1980) ("There is no such thing as an 'attempt to conspire.'"), and *United States v. Meacham*, 626 F.2d 503, 509 n.7 (5th Cir. 1980) (calling certain double inchoate offenses "inane"), with *United States v. Mowad*, 641 F.2d 1067, 1074 (2d Cir. 1981) (affirming a "conspiracy to attempt" conviction by finding that "the Government's charge contains all elements necessary to prosecute a conspiracy: [A] provision making the act of conspiring a crime and a provision making the object of the conspiracy a crime"), and *United States v. Clay*, 495 F.2d 700, 710 (7th Cir. 1974) (affirming a "conspiracy to attempt" bank robbery conviction by finding that "[w]hile entering the savings and loan was obviously an objective of the conspiracy and a federal crime, the men necessarily contemplated their attempting to gain entry into the building, and such attempts are expressly proscribed by [federal statute]"). In *Meacham* the Fifth Circuit reasoned:

[I]t would be the height of absurdity to conspire to commit an attempt, an inchoate offense, and simultaneously conspire to fail at the effort. It would be even more inane to commit the other crime the government would have us recognize—attempt

unconstitutional?¹³⁰

A. RICO Provides an Analogy

Helpful to the prediction of the multiple-inchoate implications of § 960a is an analogy to statutes with more established history. Especially infamous for their double inchoate problems are Racketeer Influenced and Corrupt Organizations (RICO) laws.¹³¹ RICO laws "make[] it a crime to conspire to

to conspire. A scenario leading to a prosecution for that offense might read something like this: *A* suggests to *B* that they get together to discuss the possibility of violating the criminal code and to select the provisions they will violate. *B* agrees to meet and talk. While ascending the staircase leading into the room in which they will meet, both slip and fall down the stairs. *A* dies of his injuries. *B*, who survives, is prosecuted for an attempt to conspire. The propriety of applying conspiracy statutes "through" attempt statutes is not before us in this case. We note the possibilities such an application could cause merely to highlight our belief that, had Congress intended that there be prosecutions for conspiracies to attempt to violate the drug laws, it would have so provided in terms less ambiguous than those found in [§§ 846 and 963]. Congress is as much aware as we are of the venerable maxim that penal statutes are to be strictly construed.

Meacham, 626 F.2d at 509 n.7. Likewise, the court held that "[§§ 846 and 963] do not authorize conspiracy-to-attempt prosecutions." *Id.* at 509. The court in *Meacham* did not rule on the question of "whether the government may prosecute the *conceptually bizarre* crime of conspiracy to attempt in instances where separate provisions make both the conspiracy and the attempt criminal offenses." *Id.* (emphasis added).

130. The Fifth Circuit called statutes like §§ 846 and 943 "unclear." *See Meacham*, 626 F.2d at 509 ("[The government] did not use a single statute as unclear as [§§ 846 and 963] to prosecute a conspiracy to attempt."). This lack of clarity (as applied) suggests that the statute could be unconstitutional. *See Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (finding an ordinance improperly vague because "'men of common intelligence must necessarily guess at its meaning'" (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926))). The Supreme Court held that "the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties" and called this standard "a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law." *Connally*, 269 U.S. at 391. Ultimately, such a vague statute "violates the first essential of due process of law." *Id.* The "void-for vagueness" doctrine is couched in terms of the Due Process Clause of the Fifth Amendment for federal statutes and the Fourteenth Amendment for state actions. *See United States v. Mena*, 863 F.2d 1522, 1527 (11th Cir. 1989) ("The due-process clause of the [F]ifth [A]mendment requires that a statute be declared void if it is so vague that 'men of common intelligence must necessarily guess at its meaning and differ as to its application.'" (quoting *Connally*, 269 U.S. at 391)); *State v. Reed*, 618 N.W.2d 327, 332 (Iowa 2000) ("Under the Due Process Clause of the Fourteenth Amendment . . . , 'the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983))).

131. *See* 18 U.S.C. § 1961(1) (2006) (defining "racketeering activity"). An interesting but

engage in racketeering activity, and ‘racketeering activity[]’ in turn includes conspiracies to engage in a number of wrongful acts.”¹³² However, the courts have been reluctant to reverse RICO-based convictions on multiple-inchoate bases.¹³³ Yet, the construction of these statutes seems to violate the void-for-vagueness test articulated by the federal courts.¹³⁴ Why do courts treat them differently? One explanation might come from the practice of only analyzing the statutes as they were applied in the actual case, as opposed to how they *could* have been applied.¹³⁵ That is, even if the courts would agree that it is possible to construe these statutes in a manner that violates due process protections, the actual application of the laws in prosecutions that have come before the courts has not violated such protections.¹³⁶

unimportant connection for purposes of this Note: “[§ 960a(a)(4)] designates the new offense a federal crime of terrorism . . . thus making it among other things a RICO and money laundering predicate offense.” Charles Doyle, *Criminal Money Laundering Legislation in the 109th Congress*, CRS REPORT RS22400, at 3 (Mar. 15, 2006).

132. Benjamin E. Rosenberg, *Several Problems in Criminal Conspiracy Laws and Some Proposals for Reform*, 43 CRIM. L. BULL. 427, 459 (2007).

133. *See, e.g.*, *United States v. Ruggiero*, 726 F.2d 913, 923 (2d Cir. 1984) (holding that “a RICO conspiracy under 18 U.S.C. § 1962(d), supported by predicate acts of racketeering activity that in themselves are conspiracies,” is punishable), *abrogated on other grounds by* *Salinas v. United States*, 522 U.S. 52, 61 (1997); *United States v. Zemek*, 634 F.2d 1159, 1170 n.15 (9th Cir. 1980) (finding that “RICO itself has consistently withstood constitutional challenges as void for vagueness”). In *Zemek*, the defendant argued that “a conspiracy to obstruct state gambling laws . . . is not properly chargeable as a predicate crime of a RICO conspiracy” and “inclusion thereof creates a ‘conspiracy to conspire’ which is void for vagueness.” *Id.* The court disagreed with this reasoning because “[t]he essence of a RICO conspiracy is not an agreement to commit predicate crimes but an agreement to conduct or participate in the conduct of the affairs of an enterprise through a pattern of racketeering.” *Id.*

134. *See* *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 251–56 (1989) (Scalia, J., concurring) (criticizing the vagueness of RICO statutes and the Court’s interpretations of them); *see also* Rosenberg, *supra* note 132, at 459 (calling RICO “maddeningly vague”).

135. *See, e.g.*, *Kunz v. New York*, 340 U.S. 290, 304 (1951) (Jackson, J., dissenting) (“This Court has not applied, and, I venture to predict, will not apply, to federal statutes the standard that they are unconstitutional if it is possible that they may be unconstitutionally applied.”); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.”). *But see, e.g.*, *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982) (“In a facial challenge to the overbreadth and vagueness of a law, a court’s first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.”); *Young v. Mun. Court*, 94 Cal. Rptr. 331, 334 (Cal. Ct. App. 1971) (“Where an enactment is attacked on First Amendment grounds, the court is not limited to examination of the application involved in the particular case, but may consider all possible applications of the statute.”).

136. *See* *Steffel v. Thompson*, 415 U.S. 452, 473 (1974) (“[T]he mere possibility of erroneous application of the statute does not amount ‘to the irreparable injury necessary to justify a disruption of orderly state proceedings.’” (quoting *Dombrowski v. Pfister*, 380 U.S.

This distinction begs the question of what the future will hold for § 960a prosecutions. The case must first come to the court in the form of an individual who challenges the vague laws *himself*,¹³⁷ who is charged expressly in a multiple-inchoate fashion,¹³⁸ and who challenges the law as applied in his particular case.¹³⁹ The § 960a cases that have evolved thus far have not posed this question to the courts.¹⁴⁰ It is likely that such a challenge would fail, if for no other reason than the fact that the courts tend to punish drug crimes harshly.¹⁴¹ Additionally, the importance of successfully prosecuting narco-terrorism is such that courts will probably be hesitant to find a grand jury's indictment faulty based only on their chosen method of construing the statutes.¹⁴² The courts may find some sort of "seriousness exception."¹⁴³

479, 485 (1965)).

137. See *Hoffman Estates*, 455 U.S. at 495 n.7 (1982) ("[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." (quoting *United States v. Mazurie*, 419 U.S. 544, 550 (1975))).

138. See *United States v. Awan*, 459 F. Supp. 2d 167, 184 (E.D.N.Y. 2006) ("[D]efendant is not being charged with a conspiracy to conspire or a conspiracy to prepare to conspire but only with providing support to an existing conspiracy."). In *Awan*, the court differentiated between the defendant's material support of a conspiracy and his membership in that conspiracy. *Id.* The court reasoned that "[t]he defendant is not being charged with being a member of the conspiracy to murder, kidnap or maim. He is simply alleged to have completed the offense of conspiring to and actually providing material support to carry out such a conspiracy." *Id.*

139. See *United States v. Zemek*, 634 F.2d 1159, 1170 n.15 (9th Cir. 1980) ("Absent development of authority and some relation to the facts of this case, we decline to hypothesize constitutional defects."); see also *supra* note 135 and accompanying text (discussing the difference between facial and as-applied challenges).

140. For a discussion on the case law associated with § 960a, see *supra* Parts II.B.1–4.

141. See Theodore Caplow & Jonathan Simon, *Understanding Prison Policy and Population Trends*, 26 CRIME & JUST. 63, 71–72 (1999) (describing the change toward more intense drug punishments as a result of political pressure).

142. In the circuits that have upheld multiple-inchoate constructions, see *supra* note 129, the crimes were arguably less severe than those implicated by § 960a. One case involved dealing and exporting firearms without a license, *United States v. Mowad*, 641 F.2d 1067, 1074 (2d Cir. 1981), and the other involved bank robbery, *United States v. Clay*, 495 F.2d 700, 710 (7th Cir. 1974).

143. Applying this concept to multiple-inchoate crimes was first introduced by Thurman Arnold in 1930. See Thurman W. Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53, 65 (1930) (discussing the idea that a court may choose to punish serious inchoate crimes, but not less-serious crimes).

B. Public Policy Determines the Proper Result

In addition to double (or triple) inchoate crimes being "logically absurd," they appear to be violative of public policy.¹⁴⁴ This is another reason why § 960a, as drafted, reflects Congress's imprecise and improper construction. Society demands conspiracy laws for a number of reasons. When people join together with a common scheme in crime, they are regarded as more dangerous than one individual acting in that capacity.¹⁴⁵ Additionally, the agreement to commit a crime demonstrates the criminals' dangerousness and the "firmness of their criminal intentions."¹⁴⁶ This is because "to unite, back of a criminal purpose, the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer."¹⁴⁷ Furthermore, "[c]oncerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the

144. See Robbins, *supra* note 118, at 62–84 (criticizing double inchoate crimes). Robbins chronicles the courts' rationalizations for not being receptive of double-inchoate prosecutions. *Id.* The focus is on the "logical absurdity" and legislative intent analyses instead of true public policy arguments. *Id.* at 85; see also *United States v. Meacham*, 626 F.2d 503, 509 (5th Cir. 1980) (calling double inchoate offenses "conceptually bizarre"); Arnold, *supra* note 143, at 62 ("One way of treating cases arising under [criminal attempt] statutes is to determine whether the policy of the statute can be said to include the conduct of the defendant and whether the penalty seems appropriate to the offense."); *supra* note 129 and accompanying text (discussing *Meacham* in more detail).

145. See *Iannelli v. United States*, 420 U.S. 770, 778 (1975) (recognizing that "conspiracy poses distinct dangers quite apart from those of the substantive offense"). The Court stated:

This settled principle derives from the reason of things in dealing with socially reprehensible conduct: [C]ollective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.

Id. (quoting *Callanan v. United States*, 364 U.S. 587, 593–94 (1961)). In fact, the Supreme Court found that "conspiracy is a distinct evil, dangerous to the public, and so punishable in itself." *Salinas v. United States*, 522 U.S. 52, 65 (1997).

146. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.02 (4th ed. 2006) (providing an overview of the policy considerations behind conspiracy laws); MODEL PENAL CODE § 5.03 cmt. at 387–88 (focusing on American Law Institute's purposes for including conspiracy laws in the Model Penal Code).

147. *Krulwitsch v. United States*, 336 U.S. 440, 448–49 (1949) (Jackson, J., concurring).

individuals involved will depart from their path of criminality."¹⁴⁸ Finally, concerted activity permits more complex crimes, and the likelihood of additional crimes being attempted and executed increases.¹⁴⁹

However, the further an actor is removed from the substantive crime—that is, from creating the *actual* harm—the less important it is to criminalize those acts.¹⁵⁰ Permitting courts to punish acts "further removed from a completed offense" would give them "unlimited discretion."¹⁵¹ It would also "render illegal acts which, in themselves, are insufficient even to constitute an anticipatory crime. Thus it would forbid conduct which is not unlawful."¹⁵² The Ninth Circuit called indicting in this fashion a "poor practice."¹⁵³ Furthermore, the construction of multiple statutes in this manner appears to contradict the intent of the legislature.¹⁵⁴ Most importantly, however, permitting such strange constructions would not give notice to potential offenders—a requirement to be constitutional.¹⁵⁵

In summary, although no grand jury has indicted anybody in a multiple-inchoate fashion under § 960a, the potential exists. Congress drafted the statutes with the inchoate language included, and "Congress is as much aware as [the courts] are of the venerable maxim that penal statutes are to be strictly construed."¹⁵⁶ This, in addition to the absent drug-terror nexus, is a hallmark of a sloppy legislature, the consequence of which could be more people prosecuted than Congress anticipated.

148. *Callanan*, 364 U.S. at 593.

149. *See id.* at 593–94 (enumerating the various justifications for punishing inchoate offenses).

150. *See Rosenberg, supra* note 132, at 460 ("[T]here is . . . a terrible danger . . . that a defendant may be convicted of this charge even though the jury has not thoroughly understood it. . . . All of the reasons that argue against the criminalization of conspiracy apply with even greater force to conspiracies-to-conspire.").

151. *Robbins, supra* note 118, at 64.

152. *People v. Schwimmer*, 411 N.Y.S.2d 922, 932 (N.Y. App. Div. 1978) (Titone, J., dissenting).

153. *United States v. Dearmore*, 672 F.2d 738, 740 (9th Cir. 1982).

154. *See Robbins, supra* note 118, at 62 ("[S]ome recent decisions declining to recognize double inchoate offenses have referred to the absence of express legislative intent to allow courts the essentially common-law authority to create crimes by combining statutory inchoate offenses.").

155. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (invalidating a municipal vagrancy ordinance as "void for vagueness," and requiring an ordinance to give a person of ordinary intelligence fair notice that the statute forbade his contemplated behavior).

156. *United States v. Meacham*, 626 F.2d 503, 509 n.7 (5th Cir. 1980).

V. Hypothetical Situations with a Less Forgiving Prosecutor

The cases that have arisen under § 960a thus far have not addressed the nexus and conspiracy issues that this Note has raised.¹⁵⁷ The reasons for this are speculative,¹⁵⁸ but immaterial for the future. The fact remains that the text contains these flaws, and an unreasonable, incautious, or politically motivated prosecutor could use the statute in a way unintended by Congress.¹⁵⁹ This Part suggests four hypothetical situations to gauge the breadth of a prosecutor's discretion under the text Congress approved.¹⁶⁰ These hypotheticals demonstrate the broad reach that this statute implicates. They demonstrate that § 960a, used properly, can serve effectively the goals of Congress. They also demonstrate that, used improperly, the statute can have an unjustly devastating effect on even non-narco-terrorists.

A. Terrorist Selling Drugs to Support Terror

The Sendero Luminoso (or "Shining Path") is the Communist Party of Peru and is a U.S. State Department-designated Foreign Terrorist Organization.¹⁶¹ A leader in this organization, *M*, regularly ambushes Peruvian police officers and attempts to assassinate high-ranking city officials in an effort to support cultural revolution.¹⁶² *M* has a small guerilla army that is directly involved in the production, sale, and

157. See *supra* notes 26–57 and accompanying text (reviewing the cases that have arisen under § 960a).

158. For a short list of possible reasons, see *supra* Part III.A.

159. See Jackson, *supra* note 9, at 18 ("While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.").

160. Hypotheticals have helped develop Supreme Court precedent in the past. See, e.g., *United States v. Villamonte-Marquez*, 462 U.S. 579, 594 n.1 (1983) (Brennan, J., dissenting) (proposing a hypothetical situation to illuminate the consequential effects of the majority's decision).

161. See Public Notice for Redesignation of Foreign Terrorist Organization, 66 Fed. Reg. 51,090 (Oct. 5, 2001) (listing alternate names for Shining Path as Sendero Luminoso and Communist Party of Peru); Press Release, U.S. Dep't of State, *supra* note 40 (listing the Shining Path as a Foreign Terrorist Organization).

162. The statute defines "terrorist activity" by reference to 8 U.S.C. § 1182(a)(3)(B). See 21 U.S.C. § 960a (2006) (criminalizing narco-terrorism). This includes attempted assassinations. See 8 U.S.C. § 1182(a)(3)(B)(iii)(IV) (2006) (listing "assassination[s]" as a form of terrorist activity). The statute defines "terrorism" by reference to 22 U.S.C. § 2656f(d)(2). See 21 U.S.C. § 960a (2006) (criminalizing narco-terrorism). "[T]he term 'terrorism' means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents." 22 U.S.C. § 2656f(d)(2) (2006).

transportation of cocaine to fund its terrorist activities. At all times, *M* is using cocaine sales to fund his terrorist organization so that its goals may be achieved.

This is the individual Congress is targeting with § 960a.¹⁶³ The fact pattern closely resembles the cases currently pending before the United States federal courts.¹⁶⁴ The drug-terror nexus is very evident, and a prosecutor could reasonably charge *M* with violating § 960a without mention of any conspiracy laws.

B. Drug Dealer Using Terror to Support Drug Crimes

N is a large-scale drug dealer in Washington, D.C. He supports himself and his family from the sale of cocaine and heroin. He only deals in very large quantities, often truckloads, of the drugs. He hires bodyguards who are well armed and who protect him at all times. *N* receives information that the DEA is about to set up a sting operation to finally catch him. To "send a message" to the DEA, *N* has a friend hijack a DEA vehicle, place explosives in the trunk, and roll the vehicle into a DEA office, killing several agents.¹⁶⁵

This is the second kind of narco-terrorism suggested by Senator Cornyn when he originally introduced the bill to the Senate.¹⁶⁶ Senator Cornyn specifically stated that "actual drug traffickers who use terrorism against civilians to advance their agenda" should be targeted.¹⁶⁷ This marked the move away from the traditional narco-terror model: A terrorist who used the

163. See *Narco-Terrorism Enforcement Act of 2005*, 151 CONG. REC. E1073 (daily ed. May 24, 2005) (statement of Rep. Hyde) ("This bill makes clear that . . . if these drugs help support or sustain a foreign terrorist organization, the producers and traffickers can, and should be, prosecuted for material support of terrorism . . .").

164. See, e.g., *supra* Parts II.B.1–4 (summarizing the current case law).

165. Both hijacking and the use of explosives are considered "terrorist activity." 8 U.S.C. § 1182(a)(3)(B)(iii)(I), (V)(b) (2006). Soliciting another to commit the terrorism also qualifies as engaging in terrorism. § 1182(a)(3)(B)(iv)(V). Unfortunately, this hypothetical is not far removed from reality. In 2004, drug dealers firebombed Edna McAbier's Baltimore home after she called the police about their illegal activities. *Honoring the Brave Warriors Who Have Enlisted in the Fight Against Narco-Terrorism*, 152 CONG. REC. E1800 (daily ed. Sept. 21, 2006) (statement of Rep. Cummings). Similarly, in 2002, Angela Dawson and her five children were killed in their Baltimore home when drug dealers filled the home with gasoline and set it on fire. *Id.* This was after Dawson "fought to get [the] drug dealers off her street, and away from her five young children." *Id.*

166. See *supra* note 107 and accompanying text (identifying the targets of the bill).

167. 151 CONG. REC. S9846 (daily ed. Sept. 8, 2005) (statement of Sen. Cornyn).

proceeds from drugs to support his cause.¹⁶⁸ The drug-terror connection is somewhat less direct in this case. Here, *N* is using terror to scare away drug enforcement agents so that he can continue dealing drugs. Yet, *N* could *not* have been convicted under the original text of the statute.¹⁶⁹ The original bill required that the criminal must commit a drug crime knowing *that such activity* would support terrorism.¹⁷⁰ Here, the focus is on the terrorism supporting the drug crimes. Clearly such a distinction did not matter to Senator Cornyn. When he introduced the bill to the Senate, it still contained the "that such activity" language necessitating a nexus.¹⁷¹ When Congress removed the nexus from the statute, it appears they were attempting to make prosecutions such as *N*'s more legitimate.

C. Casual User Supports Terrorism

Twenty-two-year-old *K* is a recent college graduate with lofty public servant aspirations. He holds a steady job working for the local government. As is standard procedure for individuals working in his capacity, *K* has undergone—and passed—many drug tests over the course of his career. During a fraternity reunion, *K* is photographed at a party smoking marijuana. There is also a short video of him distributing marijuana to his friends. As the investigation into *K*'s background evolves, officials learn that *K* is also an avid supporter of the Animal Liberation Front (ALF)—an "extremist animal rights movement that has carried out numerous terrorist attacks in the United States since 1987."¹⁷² To support ALF, *K* sends two checks for \$500 to the organization each year. The money directly supports—and *K* knows this—terrorist activities.

According to 21 U.S.C. § 960a, *K* is a narco-terrorist. He engaged in a crime that violated 21 U.S.C. § 841(a)—distribution of a controlled substance—and knowingly contributed to the pecuniary support of terrorism. Is this the individual that Congress was targeting with § 960a? Every discussion on the floor of the House and Senate suggests the opposite

168. See *supra* note 107 and accompanying text (discussing the shift from the traditional narco-terrorism model to include drug traffickers who employ terrorism to achieve their cause).

169. See *supra* note 98 and accompanying text (discussing text of the original bill).

170. See *supra* note 98 and accompanying text (discussing text of the original bill).

171. See *supra* note 106 and accompanying text (discussing text of Senate bill). For more discussion on the "that such activity" language, see *supra* Part III.C.

172. FED. BUREAU OF INVESTIGATION, FBI PUB. NO. 0308, TERRORISM: 2000/2001, at 2 (2004).

conclusion.¹⁷³ This possibility was even discussed: "This might, unfortunately, bring in some small-time dealer that did not know what he was doing and all of a sudden he is subjected to 20-year mandatory minimums when he was not much of a dealer at all."¹⁷⁴

No popular definition of "narco-terrorist" supports this idea, either.¹⁷⁵ Yet, Congress has given prosecutors, those with "more control over life, liberty, and reputation than any other person in America," the tool to double *K*'s sentence.¹⁷⁶ This is the sort of unreasonable result that can occur because Congress erred in drafting the text of § 960a. This is not to say that *K* should not be prosecuted. On the contrary, "[i]f anyone is engaged in drug trafficking of any significance in order to support terrorism, they can already be charged with both a drug offense and the material support of terrorism."¹⁷⁷

D. Multiple-Inchoate Terrorist

A is a terrorist. He is running low on funds for his terrorist operation. He thinks that a good way to raise money is to manufacture methamphetamine and sell it, but he does not know how to make it. *A* contacts his friend *B*, who *A* understands is knowledgeable in ways of cooking meth. *A* explains to *B*, "I am considering moving from 'terrorist' to 'narco-terrorist,' but I have not decided to do so yet. I want to discuss this possibility with you." Agreeing to nothing else, *A* and *B* agree to meet to discuss possibly violating § 960a.

A knows he will need a purchaser for this meth once it is made. He calls a fellow terrorist with more capital, *C*. The well-funded *C* agrees with *A* to meet with *A* and *B*, excited at the possibility of meeting and agreeing to purchase a large amount of methamphetamine, which *C* will then distribute to support his terrorist operations. *C* writes about this excitement in his diary.

On the way to the meeting, government agents apprehend all three of the individuals.

173. See *supra* Part III.C for a discussion of the legislative history.

174. 151 CONG. REC. H6293 (daily ed. July 21, 2005) (statement of Rep. Scott). At the time Representative Scott made this statement, the bill's text included a twenty-year mandatory minimum sentence, a provision that was later removed. See 151 CONG. REC. H6292 (daily ed. July 21, 2005) (reprinting the text of the statute).

175. See *supra* Part III.B for a discussion of the textual history of narco-terrorism.

176. Jackson, *supra* note 9, at 18.

177. 151 CONG. REC. H6293 (daily ed. July 21, 2005) (statement of Rep. Scott).

In addition to § 960a, *C* is charged with violating § 963: Conspiracy to commit § 960a.¹⁷⁸ The evidence of the § 960a crime is his diary, which describes the anticipated conspiracy of narco-terrorism. The substantive drug crime was possession with intent to distribute. Thus, *C* was attempting to conspire to possess with the intent to distribute a controlled substance, intending to financially support terrorist activity.¹⁷⁹

This Note mentions this hypothetical "merely to highlight [the] belief that, had Congress intended that there be prosecutions for conspiracies to attempt to violate the drug laws, it would have so provided in terms less ambiguous than those found in [§§ 846 and 963]."¹⁸⁰ Indeed, "Congress is as much aware as we are of the venerable maxim that penal statutes are to be strictly construed,"¹⁸¹ a rule "perhaps not much less old than construction itself."¹⁸² After all, "[i]t is the legislature, not the Court, which is to define a crime, and ordain its punishment."¹⁸³

Yet, such a construction is feasible. This represents the sort of triple-inchoate crime issue that infrequently—though importantly—arises in this context. An attempt to conspire to possess with intent to distribute removes the individual far from the culpability of dangerous activity.¹⁸⁴ An individual prosecuted in this manner is not the person that Congress intended to punish. For this reason alone, the statute should be redrafted to focus on the aims of the legislature and eliminate the possibility of overzealous prosecutions of non-narco-terrorists.

VI. Recommendations to Congress for a Proper Statute

"Even when laws have been written down, they ought not always to remain unaltered."¹⁸⁵ Congress should take a proactive step and redraft

178. See *supra* note 122 and accompanying text (discussing how § 963 includes conspiracy or attempt of the actions proscribed by § 960a).

179. This hypothetical is very loosely based on one offered by former Fifth Circuit Judge Henry Politz. For the text of his hypothetical, see *supra* note 129.

180. *United States v. Meacham*, 626 F.2d 503, 509 n.7 (5th Cir. 1980).

181. *Id.*

182. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

183. *Id.*

184. See DRESSLER, *supra* note 146, at 475 n.112 ("Some courts . . . may be troubled on policy grounds about recognizing such a highly inchoate offense: A conspiracy can occur far sooner than an attempt; an attempted conspiracy, therefore, takes the process to an even earlier stage.").

185. ARISTOTLE, *THE POLITICS* 39 (Stephen Everson ed., Benjamin Jowett trans., Cambridge Univ. Press 1988).

narrowly the text of § 960a to reflect its original aims. Targeting true narco-terrorism is a legitimate function of Congress. Allowing prosecutors to do so in a multiple-inchoate fashion, or without a drug-terror nexus, is not. "Altering the important provisions of a statute is a legislative function,"¹⁸⁶ not a function of the courts.

This Note offers a new 21 U.S.C. § 960a. Though much of the language is borrowed from the current text, it has been altered to reflect a more carefully considered law that provides prosecutors adequate discretion while still protecting the liberties of non-narco-terrorists. The result is an improved, clearer statute that achieves the aims of Congress better than the current law.

A. The Text of the New 21 U.S.C. § 960a

21 U.S.C. § 960a

(a) Prohibited Acts

Whoever violates § 841(a) of this title, knowing or intending that such activity provides anything of pecuniary value to a person or organization that engages in terrorist activity, shall be punishable under this section.

(b) Punishment

A person violating subsection (a) shall be sentenced to: 1) a term of imprisonment of not less than twice the minimum punishment otherwise required by § 841(b)(1) of this title, and not more than life; 2) a fine in accordance with the provisions of Title 18; or 3) both.

Any sentence imposed under this subsection shall include a term of supervised release of at least 5 years in addition to such term of imprisonment, 18 U.S.C. § 3583 notwithstanding.

(c) Proof requirements

To violate subsection (a), a person must have knowledge that the person or organization has engaged or engages in terrorist activity.

(d) Definitions

186. *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 258 (1970) (Black, J., dissenting).

"Terrorist activity" is defined by 8 U.S.C. § 1182(a)(3)(B).

"Anything of pecuniary value" is defined by 18 U.S.C. § 1958(b)(1).

(e) Jurisdiction

There is jurisdiction over an offense under this section if:

(1) the prohibited drug activity or the terrorist offense occurs in or affects interstate or foreign commerce;

(2) an offender provides anything of pecuniary value for a terrorist offense that causes or is designed to cause 1) death or serious bodily injury to a national of the United States while that national is outside the United States, or 2) substantial damage to the property of a legal entity organized under the laws of the United States (including any of its States, districts, commonwealths, territories, or possessions) while that property is outside of the United States;

(3) the prohibited drug activity occurs in whole or in part outside of the United States (including on the high seas), and a perpetrator of the offense or the prohibited drug activity is a national of the United States or a legal entity organized under the laws of the United States (including any of its States, districts, commonwealths, territories, or possessions); or

(4) after the conduct required for the offense occurs, an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States.

B. The Rationale for the New Text

There are two primary differences between the current and the proposed § 960a. First, the original drug-terror nexus language "that such activity" has been revived to insist that the nexus is inherent in narco-terrorism.¹⁸⁷ Second, the proposal eliminates reference to conspiracy and attempt to help reduce the impulse of prosecutors to establish a multiple-inchoate construction against a minimally culpable individual.¹⁸⁸ A number of other changes have been made.

187. See *supra* notes 98–99 and accompanying text for a discussion on the phrase "that such activity."

188. See *supra* Part IV for a discussion on the problem with multiple-inchoate crimes. Section 963, which criminalizes conspiracy and attempt of § 960a, should remain the same. See 21 U.S.C. § 963 (2006) ("Any person who attempts or conspires to commit any offense defined

Clarity being a hallmark of a well-drafted statute, the proposal has attempted to remove the clutter of parentheticals from the text.¹⁸⁹ The proposal removed superfluous language and numbered provisions in the statute to guide the reader to the intent of the legislature. The result is a clear statute that effects the purpose of Congress with greater economy than the current § 960a.

Applying this new statute to the hypotheticals presented in Part V above, the practical differences become apparent. Under the proposed § 960a, *M*, the member of the Shining Path who produces cocaine and terrorizes government officials, would still be convicted.¹⁹⁰ Such an actor being Congress's most obvious target, the statute achieves its primary aim. The Washington, D.C. drug dealer who terrorizes the DEA, *N*, would not be prosecuted under this statute.¹⁹¹ It requires that the drug crime provide pecuniary support for the terrorism, not the other way around. Although *N* deserves to be punished, "[d]rug trafficking and terrorism crimes already carry numerous penalties for the most egregious offenses, so we do not need them anew in this case."¹⁹² Simply put, there is already a remedy for this wrong.

The casual drug-using public servant, *K*, is not subject to the new § 960a.¹⁹³ There is no nexus between his drug crime and his terrorism support. Both are punishable by law, but Congress does not mean to double his sentence for being a narco-terrorist. By requiring the nexus, *K* properly may be prosecuted without improperly being labeled a narco-terrorist. Finally, the triple-inchoate liable *C* likewise would be safe from prosecution under this statute.¹⁹⁴ Multiple-inchoate liability crimes are logically absurd and violative of public policy.¹⁹⁵ The new version of the statute narrows the possible scope

in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."). Indeed, this Note does not advocate the abolition of all conspiracy laws. "We need to have conspiracy clauses that enable us, as [terrorists] start to interconnect from South America, Asia and the Middle Eastern gangs as they swap cocaine for other things and convert and move in the underground market. We need to stay up with how the terrorists are working." 151 CONG. REC. H6293 (daily ed. July 21, 2005) (statement of Rep. Souder).

189. There is an "interest in requiring the Congress to draft its legislation with greater clarity or precision." *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 45 (1992) (Stevens, J., dissenting).

190. For the hypothetical discussed here, see *supra* Part V.A.

191. For the hypothetical discussed here, see *supra* Part V.B.

192. 151 CONG. REC. H6293 (daily ed. July 21, 2005) (statement of Rep. Scott).

193. For the hypothetical discussed here, see *supra* Part V.C.

194. For the hypothetical discussed here, see *supra* Part V.D.

195. See *supra* note 126 and accompanying text (criticizing multiple-inchoate criminal liability); see also *supra* Part IV.B (discussing how public policy should control multiple-inchoate liability jurisprudence).

of prosecution to disallow prosecutors from targeting the less culpable who do not fit the definition of "narco-terrorists."

VII. Conclusion

Narco-terrorism is a dangerous problem both at home and abroad.¹⁹⁶ It will take many years to combat and there is no single remedy for the issue.¹⁹⁷ Yet, government leaders from both sides of the aisle agree that *something* must be done.¹⁹⁸ One response was enacting 21 U.S.C. § 960a.¹⁹⁹ So far, it has proven to be an effective tool for combating narco-terrorism.²⁰⁰ However, the possibility remains that it could be used in a manner inconsistent with the original aims of Congress. Robert Jackson warned of zealous prosecutors who seek victims and serve factional purposes.²⁰¹ Supplied with the current text of § 960a, such a prosecutor could cast the narco-terrorism net over an individual whom Congress did not intend to be prosecuted in this manner.²⁰² Although this has not occurred yet, "[n]o one will deny that wrong statutes can be and are enforced."²⁰³ As presently written, § 960a is a "wrong statute." First, it allows

196. See Marshall, *supra* note 18, at 599–604 (describing the history and effects of narco-terrorism in America and around the world).

197. See Braun, *supra* note 2, at 28 ("[T]he Defense Department estimates that the war on terror could last for another thirty to fifty years."); Marshall, *supra* note 18, at 604 ("Law enforcement alone is not the answer to the problems of drugs or terror. Aggressive coordinated programs of public awareness, education, prevention, civic action, corporate involvement, along with aggressive use of law enforcement and the criminal justice system are essential . . .").

198. See *Obama's Remarks on Iraq and Afghanistan*, N.Y. TIMES.COM, July 15, 2008, <http://www.nytimes.com/2008/07/15/us/politics/15text-obama.html?pagewanted=all> (last visited Oct. 21, 2009) (quoting Democrat Barack Obama as saying, "We cannot lose Afghanistan to a future of narco-terrorism") (on file with the Washington and Lee Law Review); Ramon Bracamontes, *U.S. Pays Millions to Help Mexico Fight Vicious Cartels*, EL PASO TIMES, Feb. 7, 2009, http://www.elpasotimes.com/news/ci_11655818 (last visited Oct. 6, 2009) (reporting that Republican Senator Cornyn "supports assisting the Mexican government in fighting narco-terrorism due to its serious implications for our national security") (on file with the Washington and Lee Law Review).

199. See 151 CONG. REC. H6292 (daily ed. July 21, 2005) (statement of Rep. Hyde) ("My amendment creates a new crime that will address and punish those who would use . . . illicit narcotics to promote and support terrorism."); *id.* at H6293 (statement of Rep. Lungren) (stating that narco-terrorism "is a serious crime and one that needs to be stopped, and this amendment would do the job").

200. In 2008, Khan Mohammed was the first person to be convicted under the statute. For further discussion about his case, see *supra* Part II.B.3.

201. See Jackson, *supra* note 9, at 20.

202. For an example of how this could happen, see the hypothetical suggested *supra* Part V.C.

203. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460 (1897).

for the severe punishment—double the sentence for the drug crime—of an individual whose alleged "narco-terror" did not contain a drug-terror nexus, as the case, textual, and statutory histories all indicate is required.²⁰⁴ Second, it allows a creative prosecutor to arrange an indictment in a multiple-inchoate crime fashion, a construction that troubles courts and academics alike.²⁰⁵ Both of these problems present the possibility of prosecutions inconsistent with congressional intent.

The remedy for this problem is redrafting the statute. Such legislation should be clear, precise, and—most importantly—include a drug-terror nexus requirement and remove inchoate-crime references. "Only by extreme care can we protect the spirit as well as the letter of our civil liberties . . ."²⁰⁶ Section 960a is the result of Congress's failure to exercise such extreme care. Congress now has the duty to act swiftly to redraft the statute so it may better reflect the real aims of laws against narco-terrorism: Punishing those who most deserve it.²⁰⁷

204. For a discussion on the drug-terror nexus requirement, see *supra* Part III.

205. See generally *supra* Part IV (considering the legitimacy of multiple-inchoate crimes in the narco-terrorism context).

206. Jackson, *supra* note 9, at 20.

207. Memorandum from U.S. Att'y Gen. John Ashcroft to all Federal Prosecutors (Sept. 22, 2003), http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm ("It is the policy of the Department of Justice that, in all federal criminal cases, federal prosecutors must charge and pursue the most serious . . . offenses . . .").