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## The Preventive Dilemma: A Reply to David Cole

Robert Chesney<sup>†</sup>

For many years David Cole has been grappling, both in the courtroom and in the pages of the law reviews, with the difficult task of maximizing civil liberties while adequately addressing concerns related to terrorism and other national security threats. By and large, he has played the role of government critic in these debates, highlighting perceived abuses and drawing particular attention to the impact of security-oriented laws and policies on non-citizens. *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*<sup>1</sup> carries forward this tradition. But the article does not focus exclusively on proposals for limiting existing detention authorities. Cole acknowledges that some degree of preventive detention is not only inevitable but also constitutional—at least when constrained appropriately. His aim is not to eliminate the preventive detention of terrorism suspects, then, but to construct a regime in which the available mechanisms for preventive detention are tailored considerably more narrowly than they are today.

Cole's project certainly is timely. The most visible and controversial component of the post-9/11 preventive detention system—i.e., the use of military detention—has been under considerable political and legal pressure

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<sup>†</sup> Professor, University of Texas School of Law. My thanks to Matt Waxman for his comments.

1. David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693 (2009).

since its inception.<sup>2</sup> The prospect of reform has prompted an outpouring of scholarship and advocacy in favor of competing models. One camp supports reliance on federal criminal prosecution as our primary (if not exclusive) mechanism for incarcerating terrorism suspects.<sup>3</sup> Another advocates the creation of hybrid detention frameworks (often labeled “national security courts”) for use in at least some circumstances in lieu of criminal prosecution, thus filling some or all of the gap that might be created by the reduction or elimination of the existing military detention system.<sup>4</sup> *Out of the Shadows* is perhaps best understood as a contribution to the former camp and a critique of the latter.<sup>5</sup>

Cole’s desire to reconcile enhanced protections for civil liberties with both the short- and long-term interests of security is laudable. Whether his particular prescriptions are desirable, however, is another matter. I take issue with them in two respects. First, I object to his proposal for restrictions on the federal criminal law prohibiting the provision of material support to designated foreign terrorist organizations. Second, I raise concerns regarding the specifics of his proposal for restraining the substantive scope of military detention. Though Cole’s paper addresses many other topics beyond these, I leave their merits to

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2. See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (striking down the jurisdiction-stripping aspect of the Military Commissions Act of 2006); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that the military commission system crafted by the administration violated the Uniform Code of Military Justice); *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that Guantanamo detainees may invoke the federal habeas statute); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (finding statutory authority for the military detention of a citizen captured during hostilities in Afghanistan, but holding that the procedures used to justify that detention did not constitute due process); *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008) (holding that the government lacked sufficient evidence to justify the detention of a Guantanamo detainee); see also Robert M. Chesney & Jack L. Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008).

3. See, e.g., Human Rights First, *How to Close Guantanamo: Blueprint for the Next Administration* (2008), available at <http://www.humanrightsfirst.org/pdf/080818-USLS-gitmo-blueprint.pdf>; Sarah E. Mendelson, *Closing Guantanamo: From Bumper Sticker to Blueprint* (2008), available at [http://www.csis.org/media/isis/pubs/080715\\_draft\\_csis\\_wg\\_gtmo.pdf](http://www.csis.org/media/isis/pubs/080715_draft_csis_wg_gtmo.pdf).

4. See, e.g., BENJAMIN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR* (2008); Amos Guiora & John T. Parry, *Debate, Light at the End of the Pipeline?: Choosing a Forum for Suspected Terrorists*, 156 U. PA. L. REV. PENNUMBRA 356 (2008), available at <http://www.pennumbra.com/debates/terrorcourts.pdf>; Jack L. Goldsmith & Neal Katyal, Op-Ed., *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007, at A19; Michael B. Mukasey, Op-Ed., *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, at A15; Andrew C. McCarthy & Alykhan Velshi, *We Need a National Security Court* (2006), available at [http://www.defenddemocracy.org/usr\\_doc/NationalSecurityCourt.doc](http://www.defenddemocracy.org/usr_doc/NationalSecurityCourt.doc); Glenn M. Sulmasy, *The Legal Landscape After Hamdan: The Creation of Homeland Security Courts*, 13 N.E. J. INT’L & COMP. L. 1 (2006); Harvey Rishikof, *Is It Time for a Federal Terrorist Court? Terrorists and Prosecutions: Problems, Paradigms, and Paradoxes*, 8 SUFFOLK J. TR. & APP. ADV. 1 (2003).

5. To be fair, *Out of the Shadows* is much more than a meditation on the relative merits of criminal prosecution, military detention, and proposals for entirely new detention frameworks. Cole also devotes considerable attention both to immigration and material witness detention, subjects that all too often are ignored in the detention debate. I take no position on the merits of his proposals on those topics.

other commentators.

## I

### AN UNDESIRABLE REFORM: RESTRICTING THE SCOPE OF THE 1996 MATERIAL SUPPORT STATUTE

With respect to substantive criminal law, Cole focuses in particular on 18 U.S.C. § 2339B, a 1996 statute that imposes a comprehensive embargo on those foreign entities that the Secretary of State formally designates to be terrorist organizations. Specifically, § 2339B makes it a felony to provide “material support or resources” to such designated foreign terrorist organizations (DFTOs). Material support, in turn, is defined broadly to include:

any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials . . . .<sup>6</sup>

Critically, it does not matter under § 2339B whether the defendant *intends* to further any unlawful activity by providing support to the DFTO in question. Liability under the statute requires only that the defendant know that the recipient of the support is an entity that has engaged in terrorism.<sup>7</sup> This was a purposeful choice by Congress, which sought to prohibit the provision of even well-intentioned support to DFTOs. In that respect, too, § 2339B is analogous to the conventional model of an embargo.

Section 2339B advances the aim of prevention in two respects. First, it contributes to prevention in a generalized fashion by reducing the flow of resources to groups that engage in terrorism. No one would claim that this alone will put DFTOs out of business. The hope, rather, is that the support prohibition will at least have a marginal impact on the capacity of a DFTO to cause harm. Second, the government can use § 2339B to pursue prevention in a more targeted sense, in that the charge might be available against a suspect whom the government believes is personally dangerous but who cannot be linked to any particular violent plot. Not surprisingly, then, § 2339B has played a critical role in a large number of post-9/11 terrorism-related cases.<sup>8</sup>

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6. 18 U.S.C. § 2339A(b)(1) (2006) (incorporated by reference in 18 U.S.C. § 2339B(g)(4)).

7. See 18 U.S.C. § 2339B(a)(1).

8. In the six-year period from 9/11 through late summer of 2007, 108 individual defendants were charged with at least one count under § 2339B. Many of the cases involve the attempted or planned provision of weaponry, and many others involve equipment with obvious military applications such as night-vision goggles. Many others involve financial support for entities ranging from al Qaeda, to HAMAS, to the FARC. Some of these cases, to be sure, raised difficult questions of proof (indeed, some have failed for that reason), and some also involve hard questions about the proper role of undercover informants and sting operations. But the important

Cole contends that the mens rea element of § 2339B ought to be amended to require the government to prove that the defendant not only knew that he or she was providing support to a foreign terrorist organization, but also that he or she intended thereby to further the unlawful ends of that organization.<sup>9</sup> Is this a desirable reform? I think it is not,<sup>10</sup> though the strength of the argument against it varies depending on what we mean by an intent requirement in this context.

One possibility is that prosecutors under a reformed version of § 2339B would be obliged to prove that the defendant intended for his or her support to facilitate a specific terrorist act. Several problems would follow. First, such a revision to § 2339B would render the statute superfluous. A 1994 statute (18 U.S.C. § 2339A) already criminalizes the knowing or intentional provision of material support in furtherance of a broad set of predicate crimes. Second, and more significantly, such a narrowing of § 2339B would leave prosecutors unable to act when faced with an individual who gives support to a terrorist organization with a generalized desire that the support be used for violent purpose, but who takes care to remain ignorant of the details of how the organization uses his or her support.<sup>11</sup> That is plainly undesirable, and probably not what Cole means when he speaks of requiring a showing of intent for § 2339B liability to attach.

More likely, Cole has in mind an intent requirement that would encompass a generalized intent to facilitate the unlawful ends of an organization. Such a requirement would exclude from liability only those who affirmatively mean to support lawful activity. This is a less troubling proposal, yet it still is problematic.

As Cole points out, a generalized intent requirement should not prove much of a hurdle with respect to the most serious material support defendants. It should be easy to obtain convictions, for example, in the case of persons who provide support to DFTOs in the form of armaments or military-style training,

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point for now is that the typical § 2339B prosecution does involve defendants alleged to be involved in non-trivial forms of aid for designated foreign terrorist organizations. See Robert M. Chesney, *Federal Prosecution of Terrorism-Related Offenses: Conviction and Sentencing Data in Light of the “Soft-Sentence” and “Data-Reliability” Critiques*, 11 LEW. & CL. L. REV. 851, 884–88, 894–901 (2007) (providing conviction and sentencing data for § 2339B prosecutions).

9. Consistent with this view, Cole for some years has represented the Humanitarian Law Project in long-running civil litigation challenging the constitutionality of this statute. The Supreme Court recently granted *certiorari* in that case, lending a degree of urgency to the arguments advanced in *Out of the Shadows*. See Humanitarian Law Project v. Mukasey, 552 F.3d 916 (9th Cir. 2007), *cert. granted sub. nom.* Holder v. Humanitarian Law Project (U.S. Sept. 30, 2009) (No. 08-1498).

10. I make a limited exception for a narrow scenario in which an intent requirement may be required as a constitutional matter. See *infra* note 13.

11. Other statutes might come into play in this scenario, including support-style prohibitions found in 18 U.S.C. § 2339C and the International Emergency Economic Powers Act (50 U.S.C. § 1705), and perhaps also federal conspiracy liability. Presumably, however, comprehensive reform of federal criminal law along these lines proposed for § 2339B would extend to amendments of these other authorities as well.

and those who provide financial aid to a group such as al Qaeda that uses donations almost exclusively in connection with unlawful activity. That is a fair point.

But what about other scenarios? Here, Cole's proposal would shield from liability two categories of persons: "hopeful donors" who provide "dual-use" support to a DFTO in hopes that the DFTO will use it in conformity with their good intentions (e.g., money); and "innocuous donors" who provide support that could not be used for any purpose other than lawful activity (e.g., coloring books).

The argument for continuing to prohibit support in the "hopeful donor" scenario is strong. Consider, for example, an individual who writes a check to HAMAS after watching a rousing video about the plight of Palestinian refugees and the need for funds to support a new hospital. Should the government be able to prohibit that transaction? There are at least three arguments that it should. First, "dual-use" support may be put to use by the DFTO in ways other than what the donor intended. Second, at least with respect to monetary donations, support may be fungible. The provision of \$1000 for a hospital frees HAMAS to divert the same amount from another source for use in connection with violence. Third, and perhaps most significantly, the non-violent activities of groups such as HAMAS, particularly social services, contribute significantly to their standing and popularity with constituent populations. Thus, support for its seemingly noble activities can have the unfortunate, indirect effect of enhancing its capacity for violent activities as well.

The argument for continuing to prohibit support in the "innocuous donor" scenario is somewhat weaker because the first argument noted above—involving the risk of unintended diversion of the support—does not apply. The other two arguments remain viable, however. Innocuous donations still may have the effect of freeing a DFTO to spend scarce funds on other priorities, including unlawful activity. Furthermore, innocuous donations, as much as dual-use donations, may contribute to the overall health and popularity of the organization. Similar concerns might explain why there is no intent element when it comes to the enforcement of embargoes against foreign states.<sup>12</sup> Foreign non-state actors should not be treated differently.

There is of course a difference between the person who tries to send explosives to al Qaeda and the person who hopes to send coloring books to a HAMAS-sponsored orphanage. Indeed, I believe that the law should account for this variation. But we do not need to gut § 2339B in order to account for this distinction. Instead, I propose calibrating the maximum punishment for a violation of § 2339B with reference to the mens rea proved at trial. Section

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12. *See, e.g.*, 50 U.S.C. § 1702 (2006) (delegating authority to President to impose economic sanctions on foreign states or entities upon declaration of a national emergency); *Id.* § 1705 (criminalizing violation of sanctions promulgated under § 1702, without respect to defendant's intentions).

2339B currently provides a 15-year maximum sentence regardless of the type of support or mens rea involved. Congress should change this to reflect the distinctions noted above. If prosecutors prove that a defendant intended to support the unlawful ends of an organization, that defendant should face the full, 15-year maximum (if not something higher). If prosecutors are able only to show that a reasonable person in the defendant's position would have known that his or her actions would support unlawful activity, even if defendant subjectively did not realize this, then a shorter maximum sentence would be appropriate. And if prosecutors can only prove that the defendant gave support with knowledge of the recipient's identity, as in the true innocuous donor scenario, a relatively brief maximum should apply.<sup>13</sup>

## II

### AN AMBIGUOUS REFORM: LINGERING QUESTIONS REGARDING THE SUBSTANTIVE SCOPE OF MILITARY DETENTION

Perhaps the most remarkable aspect of Cole's article is its treatment of military detention. Put simply, Cole concedes that military detention is lawful and appropriate in at least some scenarios involving al Qaeda and the Taliban. This may make *Out of the Shadows* unwelcome among some civil libertarians and human rights advocates. Moreover, depending on what this concession means in practice, it may yet prove unwelcome even to proponents of the military detention alternative.

The lynchpin of Cole's argument is that the United States is currently engaged in actual armed conflict in Afghanistan.<sup>14</sup> For persons captured by the military in such a setting, Cole correctly observes, a pure "prosecute or release" approach excluding military detention is unrealistic and undesirable. But difficult questions remain regarding the scope of military detention authority he has in mind. It is clear that Cole believes that the Bush Administration

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13. Of course, these arguments are beside the point if Cole is correct that the lack of an intent requirement renders § 2339B unconstitutional. The critical case here is *United States v. Scales*, which upheld the prohibition against membership in subversive organizations contained in the Smith Act, subject to a requirement that prosecutors prove (1) that defendants were active, rather than just nominal, members of the group and (2) that defendants intended to further the group's unlawful ends. See 367 U.S. 203 (1961). I have argued elsewhere that *Scales* applies to § 2339B in the extremely limited scenario in which prosecutors contend that a defendant provided support in the form of providing himself as "personnel" subject to a DFTO's direction and control, but that otherwise § 2339B is subject to (and compliant with) the intermediate standard of review associated with *United States v. O'Brien*, 391 U.S. 367 (1968). See Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 101 MICH. L. REV. 1408, 1432–52 (2003) (reviewing DAVID COLE AND JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* (2002) and DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003)).

14. See, e.g., Jason Straziuso, *U.S. Deaths Reach 101 for the Year in Afghanistan*, WASH. POST, Aug. 25, 2008 (stating that Taliban units have "transformed into a fighting force" and citing an assault on a U.S. post involving two hundred fighters).

overstated the scope of detention authority it could lawfully claim. As reflected in the definition of “enemy combatant” employed by Combatant Status Review Tribunals (CSRTs) at Guantanamo, the Bush Administration asserted authority to detain any

individual who was part of or supporting Taliban or al Qaida [sic] forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.<sup>15</sup>

Recently, the Obama administration qualified this definition by requiring that support be “substantial” before it can serve as the predicate for detention, at least insofar as Guantanamo detainees are concerned.<sup>16</sup> This may or may not satisfy Cole, however.

Drawing on the concurring opinion of Judge Wilkinson in *al-Marri v. Pucciarelli*,<sup>17</sup> as well as the opinion of the Israeli Supreme Court in *A. v. State of Israel*,<sup>18</sup> Cole explains that detention ought to be limited to:

- (1) persons involved in actual hostilities with the United States on the part of al Qaeda or the Taliban; or
- (2) members of al Qaeda or the Taliban who can be shown, by their activities or their position within the organization, to have played a direct role in furthering its military ends, such as through training, planning, directing, or engaging in hostile military activities.

The precise scope of detention authority conveyed by this proposed definition is uncertain. The first part of the definition refers to “actual” involvement in hostilities, and the second refers to having a “direct role” in military activities. Both formulations call to mind the “direct participation in hostilities” (DPH) test. DPH is a concept ordinarily employed in the law of war to identify circumstances in which civilians lawfully may be targeted with lethal force, notwithstanding the general rule that civilians cannot intentionally be targeted.<sup>19</sup> The essential notion behind DPH is that civilians should lose their

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15. Combatant Status Review Tribunal Process § B (attached to Memorandum from Gordon England, Sec’y of the U.S. Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba (July 29, 2004)), available at [www.defenselink.mil/news/Jul2004/d20040730comb.pdf](http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf).

16. See *In re Guantanamo Bay Detainee Litigation*, No. 08-442 (D.D.C. Mar. 13, 2009) (Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay), available at <http://www.scotusblog.com/wp/wp-content/uploads/2009/03/doj-detain-authority-3-13-09.pdf>.

17. *Al-Marri v. Pucciarelli*, 534 F.3d 213, 325 (4th Cir. 2008) (Wilkinson, J., concurring in part and dissenting in part).

18. *CrimA 6659/06 A v. State of Israel*, [2008] 44, available at [http://elyon1.court.gov.il/files\\_eng/06/590/066/n04/06066590.n04.pdf](http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf).

19. For an overview of the direct participation standard, see the three reports generated in connection with a series of “expert meetings” co-hosted by the International Committee of the Red Cross (ICRC) and the T.M.C Asser Institute between 2003 and 2005. See INT’L COMM. OF THE RED CROSS, DIRECT PARTICIPATION IN HOSTILITIES (2005), <http://www.icrc.org/web/eng/>

protection from targeting if they opt to engage in combat. Several scholars<sup>20</sup>—as well as some of the Guantanamo detainees<sup>21</sup>—have suggested that DPH might also prove useful as a detention-eligibility standard, and Cole’s definition appears to share that view.

The problem with relying upon DPH as a detention standard is that most of the key elements of the concept are sharply contested. There is widespread agreement that DPH extends at least to personal and immediate participation in violence (e.g., throwing a grenade.) However, there is no consensus with respect to whether DPH covers a person acting as an ammunition carrier, a spotter, or an explosives-maker, let alone a financier, logistician, or other more remote participant in the chain of violence. Even where an act clearly does constitute DPH, there is no consensus regarding how long the resulting change of status lasts before the civilian might revert to the default position of protected status. Nor is there consensus on how a position as a “member” or “leader” in an organization might impact that question. Cole’s proposal appears to support a relatively flexible approach to such questions (note the express inclusion of training and planning in addition to actually engaging in military activities), but precisely how he would draw these lines remains uncertain.

Cole’s definition also raises a concern insofar as it appears to limit detention in Afghanistan to those who are formally linked to or are fighting on behalf of al Qaeda and the Taliban. Whether this is a significant problem depends on what one means by “al Qaeda” and “the Taliban.” The unfortunate reality in the Afghanistan-Pakistan theater is that there are a wide variety of groups participating to varying degrees in the insurgency, and not all of them necessarily are properly defined as part of or acting on behalf of al Qaeda or the Taliban.

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In the final analysis, *Out of the Shadows* is a well-considered critique of current detention policies related to terrorism. I did not come away persuaded by all of the solutions that David Cole proposes, but I did come away persuaded that this is an earnest effort to reconcile our society’s strong commitments to both liberty and security, and an important contribution to the national debate.

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siteeng0.nsf/htmlall/participation-hostilities-ihl-311205?opendocument (last visited Oct. 17, 2009).

20. See, e.g., Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2654–58 (2005) (concluding that detention should extend to lawful combatants as well as to civilians who directly participate in hostilities). For a discussion of the utility of targeting concepts in formulating detention rules, see Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365 (2008).

21. See Brief for the Boumediene Petitioners, *Boumediene v. Bush*, No. 06-1195 39-43 (U.S. Aug. 24, 2007).