

UPROOTING THE SOURCE OF NARCO-TERRORISM: DETERRING, PREVENTING, AND PUNISHING PRECURSOR CHEMICAL DIVERSION

*Alexander Joshua Navi**

I.	INTRODUCTION	232
II.	THE HISTORICAL CONTEXT OF CURRENT NARCOTERRORISM LEGISLATION	235
III.	INTERNATIONAL LEGISLATION AIMED AT COMBATING NARCO-TERRORISM	238
IV.	THE PRECURSOR BATTLE AGAINST NARCO-TERRORISM ON A NATIONAL LEVEL	241
	A. <i>Due Process and Legislative Intent Regarding § 960a</i> ...	243
	B. <i>Hypothetical Situations that the Proposed Amendment to § 841(a) Criminalizes Diverters Under § 960a</i>	248
	1. Diverting Precursor Chemicals to a Terrorist Organization.....	248
	2. Diverting Precursors to a Drug Cartel Engaged in Terrorist Activity	248
	3. Using Terrorism to Support Precursor Chemical Diversion.....	248
V.	CHEMICAL INDUSTRY SAFE HARBORS AND THE RECKLESSNESS MENS REA.....	249
	A. <i>DEA Prerequisites for Transporting Precursors</i>	254
	B. <i>Pre-Export Notification Online (PEN)</i>	255
VI.	CONCLUSION.....	256

* J.D. Candidate for Southwestern Law School, May 2022. I thank Professor Warren Grimes and Professor Norman Garland for their guidance through the drafting process, as well as Max Rossip and Hamilton Morris for lending me their knowledge in chemistry.

I. INTRODUCTION

What if governments across the globe could meaningfully restrain drug manufacturing, drug trafficking, and terrorism by making simple edits to already existing legislation?

As state sponsorship of terrorism declines, terrorist organizations look for more creative, and often more sinister means of financing their operations.¹ Narcoterrorism is a term used to define the nexus between terrorist activity and drug trafficking.² The two most common types of narcoterrorists are terrorists that traffic and manufacture drugs to fund their operations, and drug cartels that use terrorist activity to support their drug dealing interests.³

The United Nations (UN) and Competent National Authorities (CNA) have addressed the growing issue of unlawfully diverting licit precursor chemicals for the purposes of illicit drug manufacturing.⁴ Precursor chemicals are chemicals that are used, or likely to be used, to manufacture controlled substances. Acetic anhydride, a widely distributed and licit precursor chemical, and opium sap are the only two ingredients necessary to manufacture high-grade heroin.⁵ A 324-dollar jug of acetic anhydride can manufacture 90,000 hits of high-quality heroin and could also be used to manufacture methamphetamine.⁶ Four eighteen-liter jugs can produce eighty pounds of high-quality heroin, with a street value of at least 3.6 million dollars.⁷

It is impossible for drug cartels to make heroin and methamphetamine without acquiring the right chemicals.⁸ Narcoterrorists use diverted precursors to manufacture a variety of illicit narcotics, ultimately destroying communities and providing financial support to organizations who engage in

1. John E. Thomas, Jr., *Narco-Terrorism: Could the Legislative and Prosecutorial Responses Threaten Our Civil Liberties*, 66 WASH. & LEE L. REV. 1881, 1882-83 (2009).

2. *Id.* at 1886.

3. *See id.* at 1888.

4. U.N. International Narcotics Control Board, *Precursors and Chemicals Frequently Used in the Illicit Manufacture of Narcotic Drugs and Psychotropic Substances*, at xiii, U.N. Doc. E/INCB/2019/4 (Feb. 27, 2020) [hereinafter *Precursors and Chemicals*].

5. Cam Simpson et al., *Heroin's Hidden Ingredient is a Chemical Made by U.S. Companies*, BLOOMBERG (Aug. 26, 2020, 2:00 AM), <https://www.bloomberg.com/news/features/2020-08-26/u-s-drug-crisis-is-made-in-mexico-with-american-raw-materials>.

6. *Id.*

7. *Id.*

8. *Id.*

terrorist activity. Narcoterrorism is the gravest national security threat that governments around the world currently face,⁹ and it cannot be addressed without disciplined prosecutorial action.

To effectively restrain narcoterrorism, the law must recognize that the illicit diversion of precursor chemicals is the nexus between drug cartels, the means of financing of terrorism, and the use of terrorism to bulwark drug dealing interests. This Note will (1) critique the existing U.S. narcoterrorism statute; (2) address the due process issues that the critique may raise; (3) discuss safe-harbor rules for the chemical industry; and (4) discuss why the arguments presented herein should prevail.

In 2006, the United States Congress enacted 21 U.S.C. § 960a to address narcoterrorism:

Whoever engages in [drug activity] that would be punishable under section 841(a) of this title 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 value¹⁰ 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 life . . .¹¹

To thwart the drug-terror nexus, the law must include Table I (1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances)¹² and List II (Drug Enforcement Administration)¹³ precursor chemicals in 21 U.S.C. § 841(a).¹⁴ This would classify the precursor as a controlled substance—distributed without a license or from or to an unauthorized source. This would also double the punishment otherwise required for the crime under 21 U.S.C. § 960a if a transaction or a product thereof provides anything of pecuniary value, directly or indirectly, to entities engaged in terrorist activity.

Section 841(a) only lists substances that have already gone through the manufacturing process, such as heroin and cocaine,¹⁵ but neglects to include

9. *See id.*

10. “[A]nything of pecuniary value’ means anything in the value form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage,” 18 U.S.C. § 1958(b)(1).

11. 21 U.S.C. § 960a.

12. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *annex, opened for signature* Dec. 20, 1988, 1582 U.N.T.S. 95 [hereinafter 1988 Convention]. For further discussion on the 1988 Convention, see *infra* Part III.

13. 21 C.F.R. § 1310.02(b) (2022).

14. 21 U.S.C. § 841.

15. *Id.*

the immediate precursor chemicals necessary to produce the other illicit narcotics listed in the statute.¹⁶

The legislature should amend § 841(a) to explicitly include List II and Table I precursor chemicals because they are used to produce the substances listed in § 841(a). The result would criminalize the actions of one who provides precursor chemicals, or support from a transaction thereof, to an entity that they know engages or has engaged in terrorism under the current § 960a of the statute.

Further, the legislature should amend § 960a to include a mens rea requirement of recklessness. This would criminalize entities that recklessly provide direct or indirect support to an entity engaged in terrorism or terrorist activity. Therefore, an entity recklessly selling or distributing precursor chemicals, in violation of Drug Enforcement Administration (DEA) regulations and import-export prerequisites, could be criminalized under § 960a, if the precursors end up in the hands of those engaged in terrorist activity. Inserting recklessness as a mens rea requirement in § 960a will ensure more diligent corporate oversight within the U.S. chemical industry, deter corrupt transactions, and ensure DEA compliance, thus reducing precursor chemical diversion. It will also incentivize the U.S. chemical companies to effectively monitor all manufacturing, distribution, and sales of sensitive precursor chemicals to avoid criminal liability.

The legislature should then remove “conspiracy” and “attempt” from the language of § 960a because § 963 already criminalizes attempt or conspiracy to commit acts.¹⁷ This will avoid due process issues by preventing the prosecution of multiple inchoate crimes,¹⁸ something the courts have struggled with and are reluctant to accept as a valid criminal indictment.¹⁹ Further, it will allow the recklessness mens rea in § 960a to flow logically,

16. Simpson et al., *supra* note 5.

17. 21 U.S.C. § 963.

18. The Code’s drafters suggest that inchoate crimes all share the characteristic that the conduct they make criminal “is designed to culminate in the commission of a substantive offense, but has failed in the discrete case to do so or has not yet achieved its culmination because there is something that the actor or another still must do.” MODEL PENAL CODE § 5 cmt. at 293 (AM. L. INST., Proposed Official Draft 1985).

19. Compare *United States v. Murrell*, No. 79-5368, 1980 LEXIS 13625, at *4 (6th Cir. Sept. 29, 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). 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 to conspire.” *Meacham*, 626 F.2d at 509 n.7.

because conspiracy and attempt are both specific intent crimes, which require the mental state of at least knowledge or intent.²⁰

Terrorist organizations and drug cartels are often the same people, if not closely related. The amendments to § 841(a) and § 960a will effectively deter the diversion of precursors to terrorist organizations, drug cartels engaging in terrorism, and suspect entities, because the punishment would be double the drug crime sentence. In addition to deterrent prosecutorial action, common sense and history demonstrate that the drug-terror threat can only be combatted with rigorous corporate and customs monitoring, public-private cooperation, and international partnership.

II. THE HISTORICAL CONTEXT OF CURRENT NARCOTERRORISM LEGISLATION

Modern-day narcoterrorism originated in Columbia when the Fuerzas Armadas Revolucionarias de Colombia (FARC) used illicit drug enterprise as a means of financing terror operations throughout the 1980s.²¹ Terror organizations around the globe are intrinsically connected and cooperate on a regular basis to achieve their goals. For example, Afghani and Pakistani Taliban militants taught FARC and the Cali Cartel, a drug cartel engaged in terrorism, how to grow opium poppy in Colombia and have also developed contraband trafficking systems.²² As foreign terrorist organizations increasingly engage in drug trafficking to fund their logistical and political objectives, hybrid organizations materialize as a one-part foreign terrorist organization and a one-part global drug cartel.²³ In addition to terrorist organizations trafficking drugs and other contraband to finance their aspirations, drug cartels that use terrorist activity to bolster their drug dealing interests are also of notable concern in the drug-terror battle.

Money is of critical importance to terrorist organizations, and without it, they would be unable to uphold the vast global infrastructure required to execute their operations.²⁴ For example, it is widely known within the intelligence community that the Taliban, which mainly operates in

20. *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 specifically includes conspiracy and attempt). *See* 21 U.S.C. § 960a (punishing those who engage in specified conduct or “attempt[] or conspire[] to do so”).

21. Thomas, *supra* note 1, at 1885.

22. FED. RSCH. DIV., LIBRARY OF CONG., A GLOBAL OVERVIEW OF NARCOTICS-FUNDED TERRORIST AND OTHER EXTREMIST GROUPS 60 (May 2002).

23. Thomas, *supra* note 1, at 1888.

24. Matthew Levitt & Michael Jacobson, *The Money Trail: Finding, Following, and Freezing Terrorist Finances*, 89 WASH. INST. FOR NEAR E. POL’Y 1 (Nov. 2008).

Afghanistan and Pakistan, cooperates and receives money from drug dealers and drug trafficking, sometimes in exchange for protection.²⁵ This is a double-edged sword because the money is used to acquire resources to carry out terror operations while also increasing drug activity in Western countries—damaging the health, and social and economic fabric of those societies.²⁶

Baz Mohammed, a Taliban-linked narcotics kingpin extradited to the United States in 2005, rationalized his group's involvement in the drug trade, telling members of his organization that²⁷ selling heroin in the United States was a "jihad," because they were taking Americans' money and the heroin the Americans were paying for was simultaneously killing them.²⁸ According to the DEA's chief of operations, Michael Braun, "the Taliban and FARC (Revolutionary Armed Forces of Colombia—People's Army) are two perfect examples, and they are, in essence, the face of twenty-first century organized crime—and they are meaner and uglier than anything law enforcement or militaries have ever faced."²⁹

Ninety percent of the world's opium can be traced back to drug trafficking in Afghanistan, which has fueled insurgent groups in the region and caused political destabilization, corrupt government officials, and a complete undermining of the rule of law.³⁰ Precursor chemicals are the reason Afghan opium is being synthesized into heroin, and it is infecting thousands of Americans. A new legislative and enforcement regimen is required to quash the drug manufacturing and terror financing instrumentalities that are destroying countless American communities across the nation.

Data demonstrates that there is a direct link between drug trafficking and terrorist organizations in Afghanistan.³¹ The Taliban, Al Qaeda, and other destabilizing insurgent militias exploit the drug trade, mainly opium and poppy production, to orchestrate their tactical and political objectives.³² This disrupts national stability and peace,³³ and creates a concern that these

25. Michael Chertoff, Sec'y, Dep't of Homeland Sec., Keynote Address at Chapman University School of Law (Jan. 29, 2010).

26. *Id.*

27. Levitt & Jacobson, *supra* note 24, at 5.

28. *Id.* at 4-5.

29. *Id.* at 10.

30. *Oversight of the Drug Enforcement Administration: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec.*, 112th Cong. 4 (2012) (statement of Michele M. Leonhart, Administrator, Drug Enf't Admin.).

31. See Press Release, U.S. Drug Enf't Admin., U.S. Extradites Taliban-Linked Narco-Terrorist (Oct. 24, 2005).

32. *Id.*

33. *Id.*

criminal organizations, not the governments, will ultimately control the territories in which they operate.³⁴

The DEA has concluded that up to sixty percent of terrorist organizations are in some way linked to illicit narcotics trafficking, and the UN estimates that the international drug trade produces 322 billion dollars in revenue annually.³⁵ This makes the illicit narcotics trade by far the most profitable illicit activity, overshadowing illicit arms trafficking and human trafficking.³⁶ “By targeting key nodes in the financing network, we can constrict the operating environment to the point that terrorists will not be able to obtain funds where and when they need them.”³⁷

In addition to health and safety, the impact of the drug trade on the national economy is astronomical.³⁸ Data from the National Institute on Drug Abuse indicates that total costs to offset the nation’s drug abuse problem amounted to a staggering 600 billion dollars annually³⁹ and continues to increase.⁴⁰ This article’s proposal initiates a new deterrent mechanism that can neutralize the 600 billion dollars spent on offsetting the drug abuse problem by preventing the drugs from being manufactured in the first place.

Rafael Perl, Senior Policy Analyst for International Terrorism and Narcotics at the Congressional Research Service of the Library of Congress, stated that although there is much data regarding the drug-terror nexus, the line between drug cartels and terrorist organizations is increasingly blurred.⁴¹ Perl attributes it to, among other things, two major changes: (1) “an increasingly deregulated and interconnected global economy” and (2) the fact that “drugs have become an attractive and highly lucrative source of income for terrorists.”⁴²

34. The Taliban has since taken control of almost all territories within Afghanistan following the U.S. Military withdrawal. Although they vowed to cease opium trafficking pursuant to Sharia Law, the sanctions and asset freezes they face will likely lead to a shortage of funds, and thus they will continue contraband trafficking to fund their objectives. See Jonathan Landay, *Profits and Poppy: Afghanistan’s Illegal Drug Trade a Boon for Taliban*, REUTERS (Aug. 15, 2021, 10:02 AM), <https://www.reuters.com/world/asia-pacific/profits-poppy-afghanistans-illegal-drug-trade-boon-taliban-2021-08-16/>.

35. Levitt & Jacobson, *supra* note 24, at 10.

36. *Id.*

37. *Id.* at 3.

38. U.S. DEP’T OF HEALTH & HUM. SERVS., *FACING ADDICTION IN AMERICA: THE SURGEON GENERAL’S REPORT ON ALCOHOL, DRUGS, AND HEALTH* (2016).

39. NAT’L INST. ON DRUG ABUSE, *PRINCIPLES OF DRUG ADDICTION TREATMENT: A RESEARCH-BASED GUIDE* (THIRD EDITION) (2018), <https://nida.nih.gov/download/675/principles-drug-addiction-treatment-research-based-guide-third-edition.pdf?v=74dad603627bab89b93193918330c223>.

40. *See id.*

41. Thomas, *supra* note 1, at 1897.

42. *Id.*

Perl's first explanation for the increasingly blurred boundary between drugs and terror bolsters the argument that more regulation, monitoring, and deterrence by criminal prosecution is needed in the global economy, specifically regarding the precursor chemicals necessary to produce deadly narcotics. The 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Convention) provides the international framework for countries to monitor and share information of diverted precursor chemical seizures, in order to identify diversion trends and new designer drugs that are being produced.⁴³ However, this international framework does not seem to have garnered the cooperation necessary to effectively combat precursor diversion pursuant to Article 12 of the 1988 Convention.⁴⁴

III. INTERNATIONAL LEGISLATION AIMED AT COMBATING NARCO-TERRORISM

The 1988 Convention unified the world in their common pursuit against drug traffickers and others who profit from it, and it invoked international cooperation to develop legislation against drug trafficking, punishable under the domestic law of the parties to the 1988 Convention.⁴⁵ The Convention has developed three tables (Tables I-III) to classify precursor chemicals based on their value in illicit use. Table I-II lists the most vigorously regulated chemicals.⁴⁶ Under Table I, acetic anhydride is among the most strictly regulated precursor chemicals⁴⁷ because of its predisposition to diversion and prominent use in the production of illicit narcotics⁴⁸ and thus the financing of terrorism.

The essence of the 1988 Convention is international partnership and the voluntary disclosure of information regarding both licit and illicit precursor chemical commerce.

Under article 12, paragraph 12, of the 1988 Convention, parties are required to submit annually to International Narcotics Control Board (INCB) information on: (a) the amounts seized of substances included in Tables I and II of that Convention and, when known, their origin; (b) any substance not included in Table I or Table II that is identified as having been used in the illicit manufacture of narcotic

43. See *Precursors and Chemicals supra* note 4, at 1.

44. See *id.* at 4.

45. Shane Heather McKenzie, Comment, *Narcotic Drugs and Psychotropic Substances: Preventing the Illicit Diversion of Exports*, 6 COLUM. J. EUR. L. 383, 384 (2000).

46. 1988 Convention, *supra* note 12, annex.

47. *Id.*

48. Simpson et al., *supra* note 5.

drugs or psychotropic substances; and (c) methods of diversion and illicit manufacture.⁴⁹

The International Narcotics Control Board (INCB) reported that only twenty-eight governments (or twenty-two percent of the 126 countries) provided information on methods of precursor diversion and illicit manufacture.⁵⁰ Information regarding the time and place of seized substances is imperative for spotting emerging patterns and trends; such information was rarely provided by parties to the 1988 Convention, resulting in an informational gap that enables illicit precursor diverters to evade law enforcement.⁵¹ It is clear that each respective country's domestic law and international cooperation with the parties to the 1988 Convention is crucial in restraining the diversion of precursor chemicals, and thus disrupting the drug-terror nexus.⁵²

The United States has an interest in ensuring that other countries, such as Mexico and Afghanistan, strengthen their regulation and monitoring of precursor chemicals' movement, because many of the drugs produced abroad end up in American neighborhoods.⁵³ The majority of illicit precursor diversion happens within the borders of a country, thus it is imperative to provide U.S. and foreign law enforcement with the resources and capabilities necessary to monitor and prosecute those engaging in the crime. Although Mexican cartels produce around ninety percent of meth used in the United States, around eighty percent of precursor chemicals used to make that meth come from China.⁵⁴ China evades counternarcotic enforcement by shipping precursors, which are usually mislabeled, into poorly monitored ports within Central America, before being transported to Mexico.⁵⁵

Unfortunately, even small-scale precursor diversion, such as a pick-up truck load, can produce massive amounts of drugs. It only takes a diminutive amount of acetic anhydride for large-scale heroin production, and the same goes for monomethylamine in producing methamphetamine. This creates an enforcement issue for smaller scale diversion operations. However, it is

49. *Precursors and Chemicals*, *supra* note 4, at 2.

50. *Id.* at 4.

51. *See id.*

52. *Id.* at 13.

53. *See generally* Press Release, Security Council, Concerned at Smuggling of Chemical Compounds in Afghanistan Used to Refine Heroin, Tightens Global, Regional Controls on Their International Trade, U.N. Press Release SC/9352 (June 11, 2008) (discussing concern of chemical precursors importing and exporting within Afghanistan) [hereinafter *Smuggling of Chemical Compounds*].

54. SEAN O'CONNOR, METH PRECURSOR CHEMICALS FROM CHINA: IMPLICATIONS FOR THE UNITED STATES 3 (2016).

55. *Id.*

widely acknowledged that import and export authorizations, and a licensing regime to issue the authorizations,⁵⁶ are critical in preventing and monitoring the diversion of precursors and the trafficking of controlled substances. Each administrative regime is a branch of a given competent national authority, which has the duty to authorize substances being imported or exported and provide pre-export notifications for precursors.⁵⁷ The procedures for authorizing imports and exports vary among governments and are consistent with their respective legal and administrative structures.⁵⁸ However, a global monitoring and information gathering body, with a uniform procedure, would identify diversion hotspots and prevent the misuse of precursors more efficiently in partnership with CNAs.

During a time where political uprisings are increasingly widespread, the danger of precursor chemicals being utilized to manufacture substances for purposes of population incapacitation and crowd control are a significant concern. One of the most sinister human rights violations in modern history resulted from the South African apartheid regime's Project Coast, which would not have occurred without having access to sensitive precursor chemicals.⁵⁹ Project Coast was a clandestine military project designed to develop drugs and other chemical and biological agents to control, poison, and kill those who opposed the regime's apartheid policies.⁶⁰ One of Project Coast's objectives was to produce drugs such as MDMA and Mandrax (methaqualone), as well as to administer infertility drugs disguised as vaccines to undermine the health of, and arguably, to entirely eliminate black populations on the other side of the apartheid fence.⁶¹

The precursors used to manufacture Mandrax, mainly N-acetyl anthranilic acid, came from China in exchange for illicitly poached abalone, a rare and endangered seafood delicacy.⁶² Today, thousands of people living in lower-income areas within South Africa, mainly people of color, still

56. For precursors, the 1988 Convention requires State parties to monitor the international trade of substances listed in its Tables I and II and, in particular, to provide an advance notice of the export of substances listed in Table I to all parties that request such advance notice, *see* 1988 Convention, *supra* note 12, at 193.

57. In the United States, it is the Drug Enforcement Administration.

58. U.N. OFF. OF DRUGS & CRIME, INT'L NARCOTICS CONTROL BD., GUIDELINES FOR THE IMPORT AND EXPORT OF DRUG AND PRECURSOR REFERENCE STANDARDS, U.N. Sales No. Mult.08.XI.6 (2007) [Hereinafter INT'L NARCOTICS].

59. *See Hamilton's Pharmacopeia: The Story of the South African Quaalude* (VICE Media Group 2016) https://www.vicetv.com/en_us/video/the-story-of-the-south-african-quaalude/58069a24384d80472bbca53.

60. Chandré Gould & Peter Folb, U.N. Institute for Disarmament Research, Project Coast: Apartheid's Chemical and Biological Warfare Programme, at vii, UNIDIR/2002/12 (2002).

61. *See id.* at 230.

62. *Hamilton's Pharmacopeia: The Story of the South African Quaalude*, *supra* note 59.

suffer from addiction to Mandrax.⁶³ After the dissolution of the apartheid regime, forensic chemists found enough precursor chemicals in their labs to make over 3.5 million tablets of Mandrax.⁶⁴ Mandrax is particularly dangerous because of its potential use as a crowd control weapon to incapacitate protesters by making them docile—as illustrated by its use on anti-apartheid protesters dependent on Mandrax.⁶⁵ Proper regulation, monitoring, and vetting of precursor movement by an international body could have potentially prevented this atrocious misuse of precursors to create weapons, drugs, and agents that were used to ethnically cleanse an entire population. It is imperative that the international community places uniform safeguards to prevent authoritarian regimes from improper utilizations of precursors against dissenters. Ultimately, this would provide a safer environment for democratic spirit to thrive and spread across the globe.

IV. THE PRECURSOR BATTLE AGAINST NARCO-TERRORISM ON A NATIONAL LEVEL

In 1988, Congress passed the Chemical Diversion and Trafficking Act (CDTA), placing forty-one chemicals under control because of their high risk for illicit uses.⁶⁶ These laws provide a series of regulations and criminal sanctions to address both national and international diversion of sensitive precursor chemicals, without restricting access to precursor chemicals used for legitimate commerce.⁶⁷ The DEA classifies and regulates sensitive chemicals and solvents that are likely to be used in illicit drug and controlled substance manufacturing.⁶⁸ These precursors are categorized on two DEA lists, List I for precursor reagents, and List II for precursors that can be used to synthesize and purify controlled substances, such as illicit narcotics.⁶⁹

Including List II precursor chemicals in § 841(a) would effectively ensnare people who knowingly provide precursor chemicals to any person or organization that they know engages or has engaged in terrorism under § 960a. As written, § 960a effectively doubles the sentence of someone engaging in drug crimes, who knows or intends that the transaction supports

63. *Id.*

64. *Id.*

65. *Id.*

66. Chemical Diversion and Trafficking Act, 21 C.F.R. §1310.02(a)-(b) (1988).

67. *See id.* at 153-54.

68. *Overview of Controlled Substances and Precursor Chemicals*, USC ENV'T HEALTH & SAFETY (2020), <https://ehs.usc.edu/research/cspc/chemicals/> [Hereinafter *Overview of Controlled Substances*].

69. *Id.*

terrorism.⁷⁰ However, under my proposal to § 960a, those who recklessly sell or distribute precursors would also be criminalized under the statute. This aims to incentivize corporations to increase monitoring of distribution and sales, to comply with DEA regulations, and to reduce executive's temptation to turn a blind eye to corrupt dealings that yield large returns.

The U.S. Drug Enforcement Administration (DEA) is the executive agency that combats drug trafficking, as it issues authorizations for controlled substances and precursors to be imported and exported to and from the United States. However, many of their operations are not restricted domestically, as the agency often combats foreign and global drug cartels and terrorist organizations.

Section 811(e) provides that the Attorney General may place an immediate precursor in the same schedule as the drug it is likely used to produce.⁷¹ An immediate precursor is a substance the Attorney General has found to be the primary substance used, or likely to be used, to manufacture a drug.⁷² Therefore, the Attorney General may choose to classify acetic anhydride in the same schedule as the heroin it is used to produce and the same would apply to scheduling monomethylamine in the same category as the methamphetamine.⁷³

The Attorney General's discretion to schedule a precursor in the same class as the immediate drug it produces would show to be a powerful tool in combating illicit precursor diversion. As in § 811(e), there are fewer procedural hurdles for the DEA to overcome when controlling a precursor chemical as opposed to controlling a drug.⁷⁴ This is because drug cartels are finding new ways to utilize different chemicals to synthesize drugs since some new ones are more potent and easier to make.⁷⁵ Therefore, the legislature has deemed it necessary to empower the Attorney General to take immediate action to control precursors that are being utilized to produce controlled substances in novel ways.

Former head of the Drug Enforcement Agency, Donnie Marshall, noted that the crime and violence associated with terrorism and drug dealing are inextricably linked.⁷⁶ Terrorists and drug traffickers are usually the same people, if not closely associated.⁷⁷ Marshall asserts that they are linked

70. Thomas, *supra* note 1, at 1914.

71. 21 U.S.C. § 811(e).

72. *Id.*

73. *See id.*

74. *See id.*

75. *See Smuggling of Chemical Compounds, supra* note 53, ¶ 2.

76. Donnie Marshall, *Narco-Terrorism: The New Discovery of an Old Connection*, 35 CORNELL INT'L L.J. 599, 603 (2002).

77. *Id.*

because drug trafficking finances terrorism, and that they both use the same strategies to evade law enforcement.⁷⁸ Therefore, there is no way to meaningfully restrain terrorism without restraining drug trafficking and abuse.

Another tool that competent national authorities use is testing kits to test imported and exported goods that are at risk of being diverted or controlled substances or precursors. Forensic laboratories test seized materials suspected of being precursors, narcotics, or psychotropic substances. However, access to these laboratories and skilled individuals able to identify these substances are not readily available to all competent national authorities.⁷⁹ The availability of functioning laboratories and individuals skilled in this area is critical in ensuring that the test results produced correctly identify emerging trends and distinguish the guilty from the innocent.⁸⁰

A. *Due Process and Legislative Intent Regarding § 960a*

Only four individuals have been successfully prosecuted under § 960a and understanding the nature of these cases is necessary to predict how similar future cases will be handled.⁸¹ Each case has demonstrated a direct and clear drug-terror nexus⁸² without multiple-inchoate charges.⁸³ However, the precedent is not dispositive, so not all future cases must be prosecuted under the same direct-nexus circumstances to stay within the bounds of legislative intent.

The legislature intentionally drafted § 960a in a manner that allows prosecutors to ensnare drug criminals with even a remote connection to terrorist organizations under the statute. Legislative intent has been clearly displayed in congressional hearings, debates, and within the statute's language to demonstrate the seriousness of the drug-terror issue at hand. Section 960a explicitly requires that an individual commits a drug offense or *attempt* or *conspire* to do so.⁸⁴ The statute does not require the actor to execute the substantive crime to be prosecuted, indicating the legislative

78. *Id.*

79. INT'L NARCOTICS, *supra* note 58, at 3.

80. *Id.*

81. Thomas, *supra* note 1, at 1888.

82. *Id.* at 1889.

83. *Id.* Each case involved a charge of directly violating 21 U.S.C. § 960a, not 21 U.S.C. § 963 (conspiracy to commit an offense proscribed in § 960a).

84. *See* 21 U.S.C. § 963a (emphasis added) (punishing those who engage in specified conduct or “conspire[] to do so”).

intent to ensnare individuals that are even remotely involved in the drug-terror nexus.

A corresponding 21 U.S.C. § 963 states, “[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.”⁸⁵ Effectively, the legislature has gone so far as to convict an individual under § 963 for attempt or conspiracy to commit a § 960a offense, the substantive offense being conspiracy or attempt to commit a drug crime in support of terrorism. This results in a combination of double inchoate crime possibilities: *attempt to attempt*, *attempt to conspire*, *conspiracy to attempt*, or *conspiracy to conspire*.⁸⁶

Admittedly, this has confused courts and sparked criticism regarding the potential for due process violations when prosecuting multiple inchoate criminals.⁸⁷ The possible violation of due process rests in the statute itself. As written, it is unclear, and that vagueness could implicate the statute as unconstitutional.⁸⁸ However, the explicit effort by the legislature to convict even the farthest removed actor engaging in drug-terror crimes remains.

There is a possibility that those engaged in drug activity, not connected to terrorism, are found guilty under § 960a, because the statute does not explicitly emphasize the drug-terror nexus.⁸⁹ Drug and terror crimes are intrinsically connected, and bureaucratic and legal compartmentalization has

85. 21 U.S.C. § 963.

86. *See supra* note 18.

87. Thomas, *supra* note 1, at 1904-05.

88. The Fifth Circuit called both 21 U.S.C. §§ 846, 943 “unclear . . . to prosecute a conspiracy to attempt.” *See United States v. Meacham*, 626 F.2d 503, 509 (5th Cir. 1980). This lack of clarity (as applied) suggests that the statute could be unconstitutional. *See Coates v. City of Cincinnati*, 91 S. Ct. 1686, 1688 (1971) (finding an ordinance improperly vague because “men of common intelligence must necessarily guess at its meaning” (quoting *Connally v. Gen. Const. 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.” *Id.* 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) (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))).

89. Thomas, *supra* note 1, at 1893.

made it difficult for law enforcement to effectively combat narcoterrorism.⁹⁰ The reluctance to treat drug organizations as terrorists, and terrorist organizations as drug traffickers, has come at a substantial cost to American public health, safety, and stability.⁹¹ Therefore, the congressional intent when drafting § 960a, correctly indicates that there is almost always a connection, direct or indirect, between drug crimes and supporting terrorism.

John E. Thomas argues that the removal of the phrase “that such activity”⁹² effectively diminishes a clear drug-terror nexus and raises concerns that a careless or malicious prosecutor can unjustifiably ensnare an individual not connected to terrorism under the narcoterrorism statute.⁹³ However, § 960a in its essence addresses the drug-terror nexus; the legislature intended to broadly deter such behavior by giving prosecutors vast discretion in prosecuting drug-terror actors. Although § 960a does not seem to necessitate a direct drug-terror link with clear and express language,⁹⁴ the legislative intent when drafting § 960a was not to draw a clear link, but rather to “raise the penalties under the material support-for-terrorism statute to reflect the seriousness of this offense.”⁹⁵

Thomas provides a hypothetical differentiating a terrorist using proceeds from drug sales to support terrorism and a drug dealer using terrorism to scare away law enforcement.⁹⁶ Ultimately, Thomas argues that only individuals using proceeds from drug sales to fund terrorism should be prosecuted under § 960a, exempting those who use terrorism to protect their drug business.⁹⁷ This reasoning is futile because terrorists and drug traffickers are often the same people, or at least closely related.⁹⁸ Drug traffickers’ criminal methodology is applicable to terrorists, and vice-versa. There cannot be meaningful restraint of terrorism without meaningful restraint of drug abuse and drug trafficking.⁹⁹ Congress recognized the nexus when drafting § 960a,

90. Marshall, *supra* note 76, at 599.

91. *Id.*

92. Thomas, *supra* note 1, at 1900 (“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]. . .” (quoting 151 CONG. REC. H6207 (daily ed. July 21, 2005) (statement of Rep. Hyde) (offering the amendment))).

93. *Id.* at 1903-04.

94. *Id.* at 1899.

95. See 151 CONG. REC. 11090 (2005) (statement of Rep. Hyde (introducing the Narco-Terrorism Enforcement Act of 2005)).

96. Thomas, *supra* note 1, at 1912-13.

97. *Id.* at 1911-13.

98. See Marshall, *supra* note 76.

99. *Id.* at 599.

and it correctly¹⁰⁰ reflects their legislative intent to ensnare those who, directly or indirectly, use terrorism to protect their drug dealing interests, as well as those who use drug trafficking proceeds to finance terrorism.

Further, Thomas raises concerns that a small dealer, who provides even minimal support to a terrorist organization,¹⁰¹ can be prosecuted by an overzealous prosecutor under § 960a and serve a twenty-year statutory minimum sentence.¹⁰² He argues that these are not the kind of people the legislature intended to criminalize under § 960a.¹⁰³ Thomas takes a theoretical approach by applying the law to a situation where one who is not morally culpable enough to be designated as a terrorist, is prosecuted under § 960a.

Thomas provides a hypothetical in which a twenty-two-year-old recent college graduate, *K*, supplied marijuana to friends at a fraternity reunion only once.¹⁰⁴ Officials discovered that *K* is an outspoken supporter of the Animal Liberation Front (ALF), which is a designated terrorist organization that has carried out numerous terrorist attacks in the name of animal rights.¹⁰⁵ *K* sends two checks for 500 dollars to ALF annually with the knowledge that the money will be used to finance terrorist activities.¹⁰⁶ Technically, *K* could be prosecuted under § 960a for selling drugs and then using the proceeds to provide support to a terrorist organization.

Thomas argues that *K* is not the type of individual the legislature intended to criminalize under § 960a, and such prosecution is allowed under the statute in a manner unintended by Congress. However, thus far, nobody has been prosecuted under the statute for the kind of conduct mentioned in Thomas's hypothetical. Looking at the precedent, the practical reality of prosecutions under § 960a should not raise concern as to prosecutors' misuse and abuse, rather it should be supported due to its deterrent effect on drug trafficking and financing of terrorism.

First, there are many safeguards ensuring the integrity of federal prosecutors, including presidential appointment and senate confirmation.¹⁰⁷ It is rare for a federal prosecutor's judgement to be overruled because of their intimate understanding of court precedent, local sentiment and perspective,

100. Thomas, *supra* note 1, at 1910.

101. *Id.* at 1913-14.

102. *Id.* at 1914.

103. *Id.*

104. *Id.* at 1913.

105. *Id.*

106. *Id.*

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

and jurors' feelings.¹⁰⁸ Also, the establishment of standards of performance and administrative uniformity will lessen the chances of the prosecutor risking their reputation by unjustly pursuing statistics of success.¹⁰⁹ Thus, it is unlikely that a prosecutor will deviate from the precedent to serve some malicious or politically motivated interest.¹¹⁰ Prosecutors are deterred from prosecuting individuals like the small dealer under § 960a, because it would damage their reputation¹¹¹ and impose undue judicial and administrative costs and burdens.¹¹² A prosecutor's greatest asset is to be recognized in their profession as one whose attitude towards those prosecuted has been reasonable, disinterested, and honorable.¹¹³

Second, individuals and organizations diverting precursors are sophisticated in the ways of drug trafficking and are usually trafficking immediate precursors at high quantities with the goal of mass-producing illicit narcotics. There is no situation where they can be categorized with the small dealer mentioned in Thomas's hypothetical, because they will always hold greater moral and economic culpability. A precursor diverter cannot find themselves in the situation of a casual drug user supporting terrorism because diverting precursor chemicals is never a casual or harmless transaction. Further, even a small transaction, a mere sixteen-liter jug of a precursor, can enable a large number of narcotics to be manufactured. Diverters of precursors are precisely the type of actor that Congress intended to hold criminally liable under § 960a and prosecuting them as such would accurately reflect congressional intent.¹¹⁴

Since narco-terrorism is the gravest national and international security threat, it cannot be addressed without disciplined prosecutorial action.¹¹⁵ Legal and bureaucratic compartmentalization of these intertwined issues diminishes combative effectiveness,¹¹⁶ thus, the benefits of enabling prosecutors to prosecute precursor diverters under § 960a outweigh the disadvantages.

108. *Id.*

109. *Id.* at 18-19.

110. Thomas, *supra* note 1, at 1911.

111. Jackson, *supra* note 107, at 19.

112. *Id.*

113. *Id.*

114. Thomas, *supra* note 1, at 1910, 1914.

115. *Precursors and Chemicals*, *supra* note 4, at xiii.

116. Marshall, *supra* note 76, at 599.

B. Hypothetical Situations that the Proposed Amendment to § 841(a) Criminalizes Diverters Under § 960a

The proposed amendment to § 841(a) would criminalize a new swath of individuals who are diverting precursors to organizations engaged in terrorism. Different hypothetical situations discussed below would criminalize a diverter of precursor chemicals § 960a.

1. Diverting Precursor Chemicals to a Terrorist Organization

The first hypothetical analyzes a situation in which a precursor diverter knowingly or intentionally diverts precursor chemicals directly to a terrorist organization to manufacture illicit narcotics. The diverter could be prosecuted under § 960a for providing something of pecuniary value to a terrorist organization. However, explicitly including precursors in § 841(a) would tie the sentencing for the crime to the controlled substance that particular precursor was used to produce. For example, if the prison sentence for heroin is twenty-five years, and acetic anhydride is used to make heroin, the sentence for diverting acetic anhydride to narcoterrorists would also be twenty-five years.

2. Diverting Precursors to a Drug Cartel Engaged in Terrorist Activity

The second hypothetical is a situation in which *A* is diverting precursor chemicals to a drug cartel that uses terrorist activity to bulwark drug dealing interests. *A* is not directly involved in the drug cartel, but he brokers deals, which he knows will ultimately deliver precursor chemicals to the drug cartel, disguised as a shell corporation. This drug cartel is also engaged in terrorist activity, which includes assassinations of public officials and law enforcement officers. As mentioned above, drug cartels and terrorist organizations are so entwined that it is often difficult to differentiate between them. *A* intends to indirectly provide drug cartels engaged in terrorist activity with the means necessary to manufacture the drugs that fuel their entire operation. Here, *A* would be criminalized under § 960a even though *A* is not part of the drug cartel and does not directly engage in terrorist activity.

3. Using Terrorism to Support Precursor Chemical Diversion

This hypothetical analyzes a scenario in which someone uses terrorism to support precursor chemical diversion for the purpose of producing controlled substances. Suppose *B*, a member of a designated terrorist organization, regularly ambushes law enforcement and attempts to assassinate high-ranking city officials in an effort to deter them from thwarting its drug operations. *B* controls a small militia that is directly

involved in the manufacture, distribution, and transportation of various drugs to fund its terrorist activities. The only source of funding for this organization are the proceeds from drug sales. *B*'s operation requires precursor chemicals to produce drugs in order to fund the organization, so it regularly raids ships importing precursor chemicals.

Section 960(a) criminalizes those who engage, or attempt, or conspire to engage in drug activity, knowing or intending to provide, directly or indirectly, anything of pecuniary value to any entity engaging in terrorist activity. Here, *B* raids ships to acquire precursors to manufacture drugs, of which the sale proceeds are used to finance terrorism. In accordance with my proposed amendment to § 841(a), *B* would be criminalized under § 960a, and the sentencing would be tied to the drug that precursor was used to produce.

Most controlled substances seized by the law enforcement cannot be manufactured without precursor chemicals. To prosecute precursor diversion only as one with drug trafficking makes sense because that transaction is likely only one of many in the process of drug manufacturing, and the earlier that process is undermined, the more lives will be saved.

Section 1182(a) lists aliens who are inadmissible to the United States, specifically those who have engaged in any form of terrorism or are connected to any terrorist organization. It provides the definition of a terrorist, which is any alien who has engaged in a terrorist activity; incited terrorist activity with the intention to cause serious bodily harm or death; is a representative of a terrorist organization or a political, social, or other group that endorses or espouses terrorist activity.¹¹⁷ Any of the activity mentioned in § 1182(a), in conjunction with selling precursors to fund a terrorist organization, selling precursors to a terrorist organization, or using terrorism to bolster drug dealing or precursor diversion would criminalize individuals under § 960a by means of my proposed amendment to § 841(a).

However, aside from rogue individuals, drug cartels, and terrorist organizations diverting precursors, some justifiably raise concerns about chemical companies that are recklessly, and sometimes intentionally, selling precursors that end up in the hands of drug cartels and terrorist organizations. Lowering the mens rea to recklessness will criminalize companies irresponsibly selling precursors to terrorist organizations under § 960a.

V. CHEMICAL INDUSTRY SAFE HARBORS AND THE RECKLESSNESS MENS REA

The chemical industry is one of the largest industries worldwide and, especially in the United States, is one of the largest national producers of

117. 8 U.S.C. § 1182.

chemical products globally.¹¹⁸ This industry is entwined with thousands of other industries. It is vital for the operation of the pharmaceutical and textile industries, and many commodity producing companies around the world.¹¹⁹ Including the pharmaceutical industry, the United States chemical shipment value was more than 797 billion dollars just in 2019.¹²⁰ The total value of the chemical industry increased from 1.7 trillion dollars in 2001 to almost 4 trillion dollars in 2019.¹²¹ It is as much expansive as it is sensitive, and the following will discuss the importance of effective monitoring, reporting, and enforcement.

The leading companies, based on their revenue, are Dow Chemical Inc., LyondellBasell Industries, Linde, and Ecolab.¹²² Several of the top U.S. chemical companies were also among the 2020 top chemical companies ranking based on revenue. These companies are well versed in the regulatory processes of manufacturing, importing, and exporting listed precursor chemicals, and they will likely not be criminalized under this note's proposed amendment to § 960a because they ordinarily follow standard corporate procedures in conformity with DEA regulations. My proposal aims to target those who divert precursors on a smaller scale, against which it is more difficult to enforce the provisions of the code, because a small quantity of precursors can produce a substantial amount of a drug. The chemical industry is projected to increase by 12.3 percent in 2021, 4 percent in 2022, and 2 percent in 2023.¹²³ This is a vast and growing industry, one with many liabilities and regulations. Nevertheless, U.S. chemical companies face few legal risks relative to the gravity of precursors ending up in the wrong hands, and drug cartels and terrorist organizations are taking advantage of it.¹²⁴

Taminco U.S. Inc., a subsidiary of Eastman Chemical Co., knowingly violated federal narcotics laws by illegally selling more than 22,000 gallons of monomethylamine (MMA) to two unauthorized Mexican companies

118. Lucia Fernandez, *U.S. Chemical Industry – Statistics & Facts*, STATISTA (Oct. 21, 2021), https://www.statista.com/topics/1526/chemical-industry-in-the-us/#topicHeader__wrapper.

119. *Industries Supported by Chemical Industry*, PON PURE CHEMICALS GROUP (Aug. 12, 2015), <https://www.pure-chemical.com/blog/industries-supported-by-chemical-industry/>.

120. Fernandez, *supra* note 118.

121. Lucia Fernandez, *Value of Global Chemical Shipments 2001-2019*, STATISTA (Aug. 5, 2021), <https://www.statista.com/statistics/258996/total-global-chemical-shipments-value-since-2001/>.

122. *Id.*

123. Lucia Fernandez, *Forecast on U.S. Annual Chemical Industry Production Growth 2020-2025*, STATISTA (July 6, 2021), <https://www.statista.com/statistics/407803/forecast-for-annual-growth-in-chemical-industry-in-the-us/>.

124. Cam Simpson, *U.S. Chemical Companies Face Few Legal Risks, and the Cartels Bank on It*, BLOOMBERG (Dec. 2, 2020, 2:00 AM), <https://www.bloomberg.com/news/features/2020-12-01/u-s-chemical-companies-face-few-legal-risks-cartels-bank-on-it>.

without conducting even basic checks of their background.¹²⁵ In just the first half of 2010, Taminco sold the two Mexican companies enough MMA to produce about 100,000 kilograms of meth, which is more than eleven times the total amount of meth seized by U.S. law enforcement that whole year.¹²⁶ It is possible that one of the Mexican companies may never have existed at all.¹²⁷

Federal drug laws impose penalties on the U.S. chemical companies that fail to monitor the sale and distribution of every liter of substances they produce. The requirements include verifying the legitimacy of a customer, confirming that each shipment reached its intended consumer, and immediately notifying the DEA if something went wrong.¹²⁸ Taminco's Mexico sales representative sold the MMA to himself, then resold it to unknown buyers.¹²⁹ Presently, Taminco would not be criminalized under the current enactment of § 960a, because, although they recklessly sold precursors to an unverified customer, they did not provide precursors to an organization that they knew was engaged in terrorist activity. However, if the sale representative knowingly or intentionally resold the precursors to a drug cartel or an organization that engages in terrorist activity, he could be criminalized under § 960a.

Under proposal presented herein, Taminco and the sales representative may be prosecuted under § 960a, because they recklessly sold precursor chemicals to non-existent, unverified entities in a country rampant with narcoterrorism. If the Mexican entities, which Taminco provided the MMA to, directly provided support to an entity engaged in terrorism, Taminco and the sales representative would be liable under the proposed modifications to § 960a. However, if Taminco had sold the precursors to a verified source, and then that source diverted the precursors to be illicitly trafficked, Taminco would not be criminalized under the proposed version of § 960a provisions. Nonetheless, Taminco displayed a conscious disregard of a substantial and unjustifiable risk by selling 22,000 gallons of MMA to unverified entities in a country rampant with narcoterrorism, and its executives and directors responsible for the trade should be held criminally liable.

A company that recklessly disregards the possibility that their precursors will end up in the hands of drug cartels or terrorist organizations should be held to the same standard as one who does so with intent or knowledge. Limiting the § 960a mens rea to intent and knowledge creates prosecution

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

hurdles. Lowering the mens rea to recklessness will enable prosecutors to establish criminal responsibility at a higher rate, ensure DEA regulatory compliance, incentivize chemical companies to execute diligent monitoring and vetting, and ultimately protect the health and safety of Americans and people abroad.

Despite the three decades of international drug laws aimed at preventing the diversion of precursors, drug cartels and terror organizations continue to use American made chemicals to keep heroin, meth, and cocaine labs running at full capacity.¹³⁰ Eastman paid only a total of 1.3 million dollars for illegally selling the 22,000 gallons of MMA, which is enough to produce about 3.2 billion dollars' worth of methamphetamine.¹³¹ This is a result of a corporate culture that puts sales above all else,¹³² which is dangerous, especially when sensitive precursors are being distributed.

Taminco's parent company, a private equity fund called CVC Capital Partners, ramped up the sale of chemicals between 2007 and 2010 by fourteen percent in anticipation of selling the company or a public stock offering. The imminent sale of Taminco was the motive for the parent company to sell as many chemicals as possible, even in an irresponsible, reckless, and even illicit manner.

The negligible penalty for a crime that can potentially devastate thousands of communities provides virtually no deterrent effect. It will allow chemical companies to continue illegally selling billions of dollars' worth of precursors to unverified consumers, and only pay fines that are a small fraction of their profit. To them, it is just the price of doing business, and American citizens are paying for it with their lives.

Furthermore, the Taminco prosecution is "likely to be the only one of its kind in the past decade."¹³³ While aiding and abetting the production or distribution of just fifty grams of methamphetamine holds a federal sentence of at least ten years in prison, nobody implicated in the Taminco case was imprisoned, despite their sale amounting to two million times over the fifty-gram threshold.¹³⁴ Moreover, none of Taminco's executives who were responsible for the crimes were in the courtroom at the time of Eastman's guilty plea. The Department of Justice focuses on prosecuting money launderers and drug dealers rather than big chemical companies; chemical company prosecutions are almost unheard of.¹³⁵

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

This case demonstrates how a lack of deterrent prosecutorial action and ineffective monitoring led to the illegal sale of 22,000 gallons of MMA to a potentially non-existent company, and possibly into the hands of Mexican drug cartels that use terrorism to support their drug trafficking interests. If prosecutors went after big chemical companies and their executives for this kind of misconduct, it would deter the misconduct and urge companies to establish thorough monitoring systems.

If the Justice Department prosecutes these crimes, the cost-benefit analysis for companies weighing the benefits of illegally selling precursors against the gravity of the punishment would likely incentivize them to yield to the rule of law and comply with DEA regulations. It would also send a chilling message to drug cartels and terrorist organizations that rely on illicitly sold precursors through backdoor transactions with chemical companies or their agents, as seen in the Taminco case. This requires the Justice Department to recognize that precursors are the root and nexus of the drug issue at hand, and as such, their illicit distribution should be investigated and prosecuted accordingly.

In May 2019, a counter-narcotics squad operating in Sinaloa, Mexico, was led to an open-air heroin producing factory after being struck by a strong chemical odor.¹³⁶ They discovered four eighteen-liter jugs of the precursor acetic anhydride, which was bottled, branded and sold in Mexico by Avantor Inc., a publicly traded U.S. company valued at 12.3 billion dollars.¹³⁷ This further evidences that U.S. chemical companies are selling precursors that end up in the hands of drug cartels, and subsequently in the American neighborhoods as the immediate narcotics. It emphasizes the need for more rigorous monitoring and due diligence when selling sensitive precursors to customers in places where there is a strong drug cartel presence and where government officials may be prone to coercion or corruption.

It is apparent from the soaring methamphetamine and heroin overdoses that the U.S. and international laws aimed at holding chemical companies accountable for their global sales have failed to even minimally prevent the production of the world's most dangerous drugs.¹³⁸ Although the successful prosecution of Taminco is a step in the right direction, it is not nearly enough to invoke a sense of accountability and diligent monitoring among other chemical companies that sell precursors. This note's proposal to amend § 841(a) to list the precursors and to lower the mens rea to recklessness in § 960a will create major implications on the operations, liabilities, and investments of chemical companies dealing with sensitive precursors. It may

136. Simpson et al., *supra* note 5.

137. *Id.*

138. *Id.*

also call for an increased spending toward extensive monitoring, research, and reporting.

A. *DEA Prerequisites for Transporting Precursors*

The Drug Enforcement Administration has already developed a series of regulations to provide a safe harbor for companies that are mass importing and exporting controlled precursors. If the chemical industry abides by these confines, they should not find themselves liable to criminal sanctions. Title 21 of the Code of Federal Regulations, Sections 1309, 1313, and 1314 provide the regulatory confines within which chemical manufacturers, retailers, importers, exporters, and distributors must conduct business.¹³⁹ Through a combination of industry outreach and voluntary compliance measures, the DEA strives to control chemical diversion in partnership with the industry and the public.

All businesses, research organizations and individuals seeking to handle any controlled chemical are required to apply for an individual DEA registration, and this registration allows the entities to purchase, store, and use precursor chemicals.¹⁴⁰ The Environmental Health & Safety agency conducts an onsite visit with the DEA registrant to ensure all storage and security measures have been met prior to the DEA's scheduled appointment.¹⁴¹

First, Section 1300.02 provides definitions relating to listed chemicals and parties involved in brokering, selling, manufacturing, and distributing precursor chemicals. A broker or trader of a precursor chemical means any individual, corporation, corporate division, partnership, association, or other legal entity which assists in arranging an international transaction in a listed chemical by negotiating contracts; serving as an agent or intermediary; or fulfilling a formal obligation to complete the transaction by bringing together a buyer and seller, a buyer and transporter, or a seller and transporter, or by receiving any form of compensation for doing so.¹⁴²

Bulk chemical manufactures are subject to chemical import and export declarations, in which they must send the DEA a detailed report of the chemicals being imported or exported.¹⁴³ The rule provides that a quantity of a chemical listed in Section 1310.02, which is either equivalent or exceeds

139. 21 C.F.R. § 1309 (2012); 21 C.F.R. § 1313 (2020); 21 C.F.R. § 1314 (2020).

140. *Overview of Controlled Substances*, *supra* note 68.

141. *Id.*

142. 21 C.F.R. § 1300.02 (2020).

143. Revision of Import and Export Requirements for Controlled Substances, 81 Fed. Reg. 96,992 (Dec. 30, 2016).

the threshold reporting requirements found in Section 1310.04(f), may be imported into the United States for transshipment, provided that advance written notice is given to the Regulatory Section, Diversion Control Division, Drug Enforcement Administration. The chemical must be reported no later than fifteen calendar days prior to the proposed date it will transship or transfer through the United States. The written notification must contain detailed information including dates, descriptions, weights, contact information, imports and exports, identification, and shipping routes.¹⁴⁴

If these prerequisites are followed, the chemical industry will not be liable under this note's proposal regarding § 960a because being thoroughly informed about precursor transactions negates the possibility of establishing even a reckless mens rea. Only entities that intentionally, knowingly, or recklessly divert precursor chemicals to organizations engaging in terrorism will be in violation of § 960a under this note's proposal. It will not disrupt the chemical industry's legitimate precursor business dealings, although it may have implications on the chemical industry's ability to export precursor chemicals to countries designated by the State Department as state-sponsors of terrorism, such as the Islamic Republic of Iran.

B. *Pre-Export Notification Online (PEN)*

Governments party to the 1988 Convention are obligated to give pre-export notifications of precursor-importing countries and territories that have officially requested it to the governments, pursuant to Article 12, paragraph 10(a) of the 1988 Convention.¹⁴⁵ PEN was developed by the INCB to establish this exchange of information between National Competent Authorities and is used as a fundamental tool for preventing the diversion of precursors in the international trade.¹⁴⁶

Public-private partnerships between the U.S. government and the chemical industry are vital to ensure international cooperation, and they can also provide a safe harbor for bulk chemical manufacturers as a uniform means for compliance.¹⁴⁷ The INCB has repeatedly emphasized the role of

144. 21 C.F.R. § 1313.31 (2016).

145. *Governments That Have Requested Pre-Export Notifications Pursuant to Article 12, Paragraph 10(a), of the 1988 Convention*, INT'L NARCOTICS CONTROL BD., https://www.incb.org/incb/en/precursors/precursors/annex_vi.html (last visited Nov. 13, 2021).

146. *Toolkit for Competent National Authorities*, INT'L NARCOTICS CONTROL BD., https://www.incb.org/incb/en/precursors/precursors/tools_and_kits.html (last visited Nov. 13, 2021) [hereinafter *Toolkit*].

147. *Public-Private Partnerships: Preventing Trafficking and Diversion Through Public-Private Partnerships*, INT'L NARCOTICS CONTROL BD., https://www.incb.org/incb/en/precursors/global_project/partnerships/main.html (last visited Nov. 13, 2021).

public-private partnerships and voluntary cooperation by the chemical industry as an effective strategy to thwart the diversion of precursors as well as their use in illicit drug manufacturing.¹⁴⁸

The aspects of accessibility and real-time notification provide an effective way for companies and National Competent Authorities to monitor the whereabouts of exported and imported precursors, as well as crucial information regarding where, when, and how precursor chemicals are diverted. The Precursor Incident Communication System (PICS) also bolsters National Competent Authorities' ability to monitor and notify one another about precursor incidents, as it provides real-time communication and information between national authorities.¹⁴⁹

The engagement of the industry in utilizing these tools will provide a safe harbor for them because it will provide notice to all parties involved in the transaction, and if a precursor shipment does get diverted, the liability will not fall on the company involved in the transaction. The INCB recognizes the vital role that chemicals play in the processing and manufacture of illicit drugs.¹⁵⁰ On the other hand, these same chemicals are also vital to many different industries that play an important role in our daily lives, as they are the foundation for countless commodities upon which the modern world relies.¹⁵¹

VI. CONCLUSION

For law enforcement to effectively disrupt the drug-terror nexus, it must uproot the life-source of terrorism: precursor chemicals. Thus, § 960a should explicitly target those who engage in the diversion of precursor chemicals because precursor diverters are precisely the type of individuals that Congress intended to criminalize under § 960a, so prosecuting them as such would accurately reflect congressional legislative intent.¹⁵²

Amending § 841(a) to include List I and List II precursors will expressly make illicit precursor transactions that support terrorism criminal under § 960a, which will enable prosecutors to bring precursor diverters tied to terrorism to justice. As discussed, drug cartels and terrorist organizations are merged into hybrid organizations that rely on each other to support each other's interests, and the law cannot ignore it.

148. *Toolkit*, *supra* note 145.

149. *Precursors Incident Communication System (PICS)*, INT'L NARCOTICS CONTROL BD., https://www.incb.org/pics/en/bi_home.html (last visited Nov. 13, 2021).

150. *Toolkit*, *supra* note 145.

151. *Id.*

152. Thomas, *supra* note 1, at 1910, 1914.

Amending § 960a to include recklessness as mens rea would criminalize individuals recklessly providing direct or indirect support to any entity engaging in any terrorist activity. This would criminalize chemical companies like Taminco that are recklessly selling or distributing precursor chemicals that end up in the hands of narcoterrorists.

Removing conspiracy and attempt from the language of § 960a would prevent multiple inchoate crime prosecutions under the statute, negating any due process or constitutionality issues raised by Thomas. The effect of ensnaring far removed actors will not be defeated, in line with the legislative intent, because § 963 already criminalizes attempt or conspiracy to commit the § 960a offense.¹⁵³

This Note aimed to influence policy pursuant to disrupting the means of financing terrorism and drug trafficking for the ultimate purpose of preserving public health, safety, national sovereignty, and the global economy.

153. 21 U.S.C. § 963.