

ARTICLES

CERTIFICATION IN THE CRIMINAL LAW

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A prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest . . . is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."¹

Despite these noble words, legislative and prosecutorial efforts to ensure that "guilt shall not escape" have produced sundry unconstitutional devices for

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1. *Berger v. United States*, 295 U.S. 78, 88 (1935), quoted in OFFICE OF PERSONNEL MANAGEMENT, U.S. DEP'T OF JUSTICE, UNITED STATES DEPARTMENT OF JUSTICE LEGAL ACTIVITIES 1990-1991, at ii (1990).

convicting criminal defendants.² The latest such device is “certification,” which allows a prosecutor to determine an element of a crime, and insulates the determination from judicial review. This paper argues that prosecutorial certification violates the constitutional rights to due process³ and a jury trial.⁴

The paper focuses on certification as it appears in a federal antiterrorist statute, 18 U.S.C. § 2331,⁵ “Extraterritorial Jurisdiction Over Terrorist Acts Abroad Against United States Nationals.”⁶ The statute prohibits murder, attempted murder, and serious assaults against American nationals committed outside the United States, regardless of the nationality of the attacker.⁷ However,

2. See, e.g., *In re Winship*, 397 U.S. 358 (1970) (striking down state statute authorizing conviction based on a preponderance of the evidence); *Foster v. California*, 394 U.S. 440 (1969) (striking down unfair or suggestive lineup procedures); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (striking down discriminatory application of state statute); *Strauder v. West Virginia*, 100 U.S. 303 (1879 Term) (striking down state statute excluding blacks from juries); Irene Merker Rosenberg, *Winship Redux: 1970 to 1990*, 69 TEX. L. REV. 109, 110-11 (1990) (describing conditions and legal standards prevailing in New York Family Courts in 1967).

3. See U.S. CONST. amend. V; see also U.S. CONST. amend. XIV, § 1.

4. See U.S. CONST. art. III, § 2; U.S. CONST. amend. VI.

5. The statute has a colorful legislative history. It was originally incorporated into the United States Code as 18 U.S.C. § 2331, Omnibus Diplomatic Security & Antiterrorism Act of 1986, Pub. L. No. 99-399, § 1202(a), 100 Stat. 853, 896-97 (1986) (amended 1990, 1991). Due to a clerical error, the statute was later amended and renumbered as 18 U.S.C. § 2332, Antiterrorism Act of 1990, Pub. L. No. 101-519, § 132, 104 Stat. 2240, 2250 (1990) (amended 1991). After the clerical error was discovered, the statute was restored to its former status as § 2331, Terrorist Acts Abroad Against United States Nationals, Pub. L. No. 102-27, § 402, 105 Stat. 155 (1991) (amended 1991). For a discussion of the clerical error, see 137 CONG. REC. S2500-04 (daily ed. Feb. 1991).

6. Previous commentators, including this author, have praised § 2331 as a noble effort to fight international terrorism. See, e.g., Patrick L. Donnelly, Note, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security And Antiterrorism Act of 1986*, 72 CORNELL L. REV. 599 (1987); Kane, *Prosecuting International Terrorists in United States Courts: Gaining the Jurisdictional Threshold*, 12 YALE J. INT’L L. 294 (1987); David S. Kris, *Interpreting 18 U.S.C. § 2331 Under U.S. and International Law*, 27 HARV. J. ON LEGIS. 579 (1990); Philip B. Heymann & David S. Kris, *And There Should Be Other Prosecutions Too*, WASH. POST, Jan. 7, 1990, at B7, col. 1. However, none of these previous commentators has adequately considered the domestic constitutional implications of § 2331’s certification provision.

Two other federal statutes, and one federal rule of criminal procedure also contain certification provisions. See 18 U.S.C. § 245(a)(1) (1988) (“No prosecution of any offense described in this section shall be undertaken by the United States except upon the certification in writing of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General specially designated by the Attorney General that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, which function of certification may not be delegated.”); 18 U.S.C. § 3503(a) (1988) (“A motion by the Government to obtain an order [to preserve witness testimony by deposition] under this section shall contain certification by the Attorney General or his designee that the legal proceeding is against a person who is believed to have participated in an organized criminal activity.”); FED. R. CRIM. P. 42(a) (“A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.”). Part III of this paper discusses these examples of certification, and compares them to certification in § 2331.

7. 18 U.S.C. § 2331 (1988 & Supp. III 1991). The statute reads as follows.

Terrorist Acts Abroad Against United States Nationals

(a) Homicide. Whoever kills a national of the United States, while such national is outside the United States, shall, —

(1) if the killing is a murder as defined in section 1111(a) of this title, be fined under this title or imprisoned for any term of years or for life, or both so fined and so imprisoned;

even though it addresses only terrorist attacks, § 2331 does not make “terrorism” or “terrorist intent” an element of the offense. Instead of a substantive definition of terrorism, the statute uses certification. The certification clause in § 2331 states:

[n]o prosecution for any offense described in this section shall be undertaken by the United States except on written certification of the Attorney General or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions that, in the judgment of the certifying official, such offense was intended to coerce, intimidate, or retaliate against a government or a civilian population.⁸

Section 2331 largely insulates the Attorney General’s certification from judicial review, at least in ordinary cases. The Committee Report on § 2331 indicates that the “determination of the certifying official is final and not subject to judicial review.”⁹ However, at least one former federal district judge involved in the drafting of § 2331¹⁰ noted that certification might be judicially reviewable in extreme cases, perhaps under an abuse-of-discretion standard.¹¹

- (2) if the killing is a voluntary manslaughter as defined in section 1112(a) of this title, be fined under this title or imprisoned not more than ten years, or both; and
- (3) if the killing is an involuntary manslaughter as defined in section 1112(a) of this title, be fined under this title or imprisoned not more than three years, or both.
- (b) Attempt or conspiracy with respect to homicide. Whoever outside the United States attempts to kill, or engages in a conspiracy to kill, a national of the United States shall —
 - (1) in the case of an attempt to commit a killing that is a murder as defined in this chapter, be fined under this title or imprisoned not more than 20 years, or both; and
 - (2) in the case of a conspiracy by two or more persons to commit a killing that is a murder as defined in section 1111(a) of this title, if one or more of such persons do any overt act to effect the object of the conspiracy, be fined under this title or imprisoned for any term of years or for life, or both so fined and so imprisoned.
- (c) Other conduct. Whoever outside the United States engages in physical violence —
 - (1) with intent to cause serious bodily injury to a national of the United States; or
 - (2) with the result that serious bodily injury is caused to a national of the United States; shall be fined under this title or imprisoned not more than five years or both.
- (d) Definition. As used in this section the term “national of the United States” has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).
- (e) Limitation on Prosecution. No prosecution for any offense described in this section shall be undertaken by the United States except on written certification of the Attorney General or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions that, in the judgment of the certifying official, such offense was intended to coerce, intimidate, or retaliate against a government or a civilian population.

8. 18 U.S.C. § 2331(e) (1988 & Supp. III 1991).

9. H.R. CONF. REP. NO. 783, 99th Cong., 2d Sess. 88 (1986).

10. The former judge is Abraham Sofaer, Legal Adviser to the U.S. Department of State at the time of the congressional hearings on § 2331. See, e.g., *infra* note 99.

11. See *infra* text accompanying note 122. See also *infra* text accompanying notes 120-121.

The Supreme Court has interpreted similarly-worded statutes absolutely to preclude ordinary judicial review. For example, in *Briscoe v. Bell*, 432 U.S. 404 (1977), the Court addressed § 4(b) of

This paper evaluates the certification clause in § 2331. Part I considers § 2331 under the formal, blackletter constitutional law governing issues such as

the Voting Rights Act of 1965, which stated that "certification of the Attorney General . . . under this section . . . shall not be reviewable in any court . . ." *Id.* at 408 (quoting 42 U.S.C. § 1973b(b) (1970 & Supp. V)). The Court reversed the D.C. Circuit's holding that the language of § 4(b) allowed "a limited jurisdiction . . . in the court to review actions which on their face are plainly in excess of statutory authority . . ." *Id.* (quoting *Briscoe v. Levi*, 535 F.2d 1259, 1265 (D.C. Cir. 1976)). The Court did note, however, that a "bailout suit" available under the act "serves as a partial substitute for direct judicial review." *Id.* at 412 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 333 (1966)). Further, the certification under § 4(b) involved only "objective statistical determinations by the Census Bureau and a routine analysis of state statutes by the Justice Department," *Katzenbach*, 383 U.S. at 333, not determinations of an individual defendant's mens rea as in § 2331. The Court in *Briscoe* did not reach any other issues, including the constitutionality of certification in § 4(b), *Briscoe*, 432 U.S. at 409. The Court had already held that the fifth amendment's due process clause did not protect the states from deprivations of life, liberty, or property. *Katzenbach*, 383 U.S. at 323-24. The Constitution also may not protect fully a foreign defendant involved in an attack against an American national outside the United States. See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

Despite the fact that certification in § 2331 is not judicially reviewable, courts could undoubtedly rule on the constitutionality of the certification provision itself. "[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988) (citing *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974)).

In *Webster*, an openly homosexual CIA employee sued the Director of Central Intelligence for firing him. The Director had exercised his discretion to "terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States . . ." *Id.* at 594 (quoting 50 U.S.C. § 403(c) (1988)). Deciding "whether, and to what extent, the termination decisions of the Director . . . are judicially reviewable," *id.*, the Court found that "Congress meant to commit individual employee discharges to the Director's discretion, and that [the Administrative Procedure Act] precludes judicial review of these decisions . . ." *Id.* at 601. Indeed, the Court found the statute "fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review." *Id.* at 600. However, the Court found that Congress had not meant to remove constitutional questions from the courts, and so reached the employee's claims under the due process clause. *Id.* at 603. See *United States v. Emerson*, 846 F.2d 541, 544-45 (9th Cir. 1988) (interpreting 21 U.S.C. § 811(h)(6), which stated that a decision made by the Attorney General was "not subject to judicial review," to allow constitutional judicial review so as to avoid the "serious constitutional questions" raised by congressional preclusion of constitutional review).

The "serious constitutional questions" involved in congressional preclusion of constitutional judicial review arise because of a tension in the Constitution. On one hand, article III, § 1 gives Congress the power to establish the jurisdiction of the lower federal courts. "The Constitution has defined the limits of judicial power of the United States, but has not prescribed how much of it shall be exercised by the [lower courts]; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein." *Webster*, 486 U.S. at 611 (Scalia, J., dissenting) (quoting *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850)).

On the other hand, the Bill of Rights guarantees individual rights which may require a court for vindication. "If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is . . . because . . . , under certain circumstances, the constitutional requirement of due process is a requirement of judicial process." *Crowell v. Benson*, 285 U.S. 22, 87 (1931) (Brandeis, J., dissenting); see *Battaglia v. General Motors Corporation*, 169 F.2d 254, 257 (2d Cir. 1948), *cert denied*, 335 U.S. 887 (1948).

A lot of commentary exists on this tension and on other problems with congressional limitations of federal jurisdiction. See, e.g., Lawrence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981); Gerald Gunther, *Congressional Power To Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984). See generally, ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 147-80 (1989).

certification. Finding that the formal constitutional law yields limited insight, Part II considers the spirit behind the formal law in conjunction with the legislative history of § 2331, and argues that the statute clearly violates that spirit. Part III compares certification in § 2331 with certification in three other contexts, to highlight the specific features of the statute which make it unconstitutional. Part IV offers a brief conclusion, and a suggestion for change in the current constitutional rules.

I. BLACKLETTER CONSTITUTIONAL LAW

A. CERTIFICATION AS A BURDEN-SHIFTING DEVICE

Certification in § 2331 ingeniously solves some of the very serious problems associated with fighting terrorism through law.¹² Specifically, certification removes the thorny element of terrorist intent to “intimidate . . . a . . . population”¹³ from § 2331. According to the statute, the government need not prove terrorist intent at all; simple certification will do. Certification essentially acts as a super burden-shifter, reducing the government’s burden of proof on terrorist intent to zero; correspondingly, it leaves the defendant with an infinitely high burden of proof because he cannot rebut the certification in court.¹⁴ Certification substitutes prosecutorial determination of terrorist intent for proof beyond a reasonable doubt.¹⁵

12. Cf. John Quigley, *Eliminating Terrorism: A Law and Justice Approach*, 3 CONN. J. INT’L L. 47 (1987).

13. 18 U.S.C. § 2331(e) (1986 & Supp. III 1991). I will use the label “terrorist intent” to stand for the “inten[t] to coerce, intimidate, or retaliate against a government or a civilian population” from the certification clause in § 2331. See *id.*

14. See H.R. CONF. REP. No. 783, 99th Cong., 2d Sess. 88 (1986). *But see supra* notes 9-11 and accompanying text; *infra* text accompanying notes 120-121; *infra* text accompanying note 122.

15. As far as the defendant is concerned, certification probably requires a mere formality from the government. *But see infra* text accompanying note 122. In *United States v. Bronk*, 604 F. Supp. 743 (W.D. Wis. 1985), the Department of Justice certified a prosecution under 18 U.S.C. § 245(a)(1). The statute stated that “[n]o prosecution of any offense described in this section shall be undertaken by the United States except upon certification in writing of the Attorney General or the Deputy Attorney General that in his judgment a prosecution . . . is in the public interest and necessary to secure substantial justice” The Department’s certification read as follows:

CERTIFICATE OF THE ACTING DEPUTY
ATTORNEY GENERAL OF THE UNITED STATES

I, Roger Clegg, hereby certify that in my judgment a prosecution by the United States of William P. Bronk under the provision of Title 18, United States Code, Section 245, is in the public interest and necessary to secure substantial justice. Signed the 26th day of October, 1984.

/s/ Roger Clegg

Roger Clegg

Acting Deputy Attorney
General of the United States

Id. at 748.

For a discussion of certification in 18 U.S.C. § 245, see *infra* notes 134-142 and accompanying text.

Obviously, by shifting the burden of proof in a criminal statute, certification raises serious constitutional questions.¹⁶ As the Court stated in *In re Winship*,¹⁷ “[I]f there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”¹⁸ Thus certification passes or fails constitutional muster according to whether terrorist intent — the certified issue — is a “necessary” fact, or an element¹⁹ of the crime prohibited by the statute. If terrorist intent is an element of § 2331, then certification is unconstitutional.²⁰

The fact that certification may be subject to limited judicial review in extreme cases²¹ does not cure its constitutional problems as a burden-shifting device. Judicial review under an abuse-of-discretion standard of what is essentially an administrative decision on an element of a crime would surely violate the constitution.²² Such judicial review obviously does not substitute for the proof beyond a reasonable doubt required by *Winship*.²³

B. THE CONFUSED PROGENY OF *In re Winship*

Unfortunately, in the twenty-one years since *Winship* announced the requirement of proof beyond a reasonable doubt of all necessary facts, the Court has not offered any clear way to distinguish “necessary” from “unnecessary” facts.²⁴ As one commentator puts it, the Court has “constitutionalized the requirement of proof beyond reasonable doubt without providing any but the most trivial explicit criteria for its application.”²⁵ While the Supreme Court precedents do

16. Cf. *Sandstrom v. Montana*, 442 U.S. 510, 519 (1979) (“It is the line of cases . . . exemplified by *In re Winship* that provides the appropriate mode of constitutional analysis for . . . presumptions” that a person intends the ordinary consequences of his actions (citations omitted)); *Carella v. California*, 491 U.S. 263, 265 (1989) (per curiam).

17. 397 U.S. 358 (1970).

18. *Id.* at 364. See *Carella*, 491 U.S. at 265 (per curiam) (quoting *Winship*, 397 U.S. at 364). Although most of the Court’s cases on burden-shifting have involved the Fourteenth Amendment’s due process clause, the same jurisprudence applies to the federal government through the Fifth Amendment’s due process clause. See LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-7, at 663-64 (2d ed. 1988).

19. I use the term “element” to refer to those facts which, under *Winship*, are “necessary” to constitute the crime, and so which must be proven beyond a reasonable doubt. See *Winship*, 397 U.S. at 364.

20. See *id.*

21. See *supra* notes 9-11 and accompanying text; *infra* text accompanying notes 120-121; *infra* text accompanying note 122.

22. See, e.g., *Ng Fung Ho v. White*, 259 U.S. 276, 284-85 (1922) (“Against the danger of . . . deprivation [of life, liberty, or property] without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this Court.” (citations omitted)); *Mullaney v. Wilbur*, 421 U.S. 684, 692 (1975) (striking down state statute which requires the defendant to prove by a preponderance of the evidence that he was acting “in the heat of passion on sudden provocation” because that issue was an element of the crime for the purposes of *Winship*).

23. See *Winship*, 397 U.S. at 364.

24. I am referring to the line of cases beginning with *In re Winship*, 397 U.S. 358 (1970), and running through *Mullaney v. Wilbur*, 421 U.S. 684 (1975), *Patterson v. New York*, 432 U.S. 197 (1977), and, most recently, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) and *Martin v. Ohio*, 480 U.S. 228 (1987).

25. Ronald J. Allen, *Rationality and Accuracy in the Criminal Process: A Discordant Note on the Harmonizing of the Justices’ Views on Burdens of Persuasion in Criminal Cases*, 74 J. CRIM. L. & CRIMINOLOGY 1147 (1983) (footnote omitted).

provide only relatively "trivial" explicit criteria, they reveal several important themes which govern issues such as certification. This section addresses the explicit doctrine of *Winship*'s progeny; Part II addresses the spirit of *Winship*.

Beginning with explicit doctrine, a bare majority²⁶ of the Court accepts the presumption that a legislature's definition of a crime determines the elements of that crime for the *Winship* standard.²⁷ "[I]n determining what facts must be proved beyond a reasonable doubt the . . . legislature's definition of the elements of the offense is usually dispositive . . ." ²⁸ Congress' definition of the elements of the offense in § 2331 does not include terrorist intent: "there is no requirement that the U.S. Government prove during the criminal prosecution the purpose of the murder. The elements are (1) the murder (2) of a U.S. national (3) outside the territorial jurisdiction of the United States."²⁹ Accordingly, on this standard, certification appears constitutional.

Yet legislative discretion to define crimes has limits. "[I]n certain . . . circumstances *Winship*'s reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged."³⁰ Those limits are far from clear. In one of its most recent cases, the Court admitted, "we have never attempted to define precisely . . . the extent to which due process forbids the reallocation or reduction of burdens of proof in criminal cases . . ." ³¹ Indeed, the Court has offered only the following absurd examples of unconstitutional burden-shifting to serve as boundary-markers. The legislature cannot "declare an individual presumptively guilty of a crime" . . . [or] "validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt."³²

The fact that the Court remains sharply divided on this issue only aggravates its doctrinal uncertainty.³³ In contrast to the majority, the dissenters appear to

26. See *Martin v. Ohio*, 480 U.S. 228 (1987) (5-4) (no need for proof beyond a reasonable doubt of insanity in homicide); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (5-4) (no need for proof beyond a reasonable doubt of visible possession of a handgun during commission of specified crimes); *Patterson v. New York*, 432 U.S. 197 (1977) (5-3) (no need for proof beyond a reasonable doubt of extreme emotional disturbance in homicide); but see *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (9-0) (proof beyond a reasonable doubt of heat of passion required in homicide). *Mullaney* has largely been abandoned. In *McMillan*, the Court stated, "[w]e believe that the present case is controlled by *Patterson*, our most recent pronouncement on this subject, rather than by *Mullaney*." *McMillan*, 477 U.S. at 85. A year later, in *Martin*, the Court reviewed the history of the burden-shifting cases, beginning with *Winship*, and noticeably failed to mention *Mullaney*. *Martin*, 480 U.S. at 231-33; see *id.* at 241 (Powell, J., dissenting) ("The Court today fails to discuss or even cite *Mullaney* . . .").

27. For the text of the *Winship* standard, requiring proof beyond a reasonable doubt of all "necessary" facts, see *supra* text accompanying note 18.

28. *McMillan*, 477 U.S. at 85; see *Patterson*, 432 U.S. at 210 ("[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense . . .").

29. H.R. CONF. REP. No. 783, 99th Cong., 2d Sess. 87 (1986).

30. *McMillan*, 477 U.S. at 86; see *Patterson*, 432 U.S. at 210 ("there are obviously constitutional limits" to a state's power to shift the burden of proof by redefining its crimes).

31. *McMillan*, 477 U.S. at 86; see *Martin v. Ohio*, 480 U.S. 228, 241 (1987) (Powell, J., dissenting) ("Today . . . the Court simply asserts that [the State] law properly allocates the burdens [of proof], without giving any indication of where th[e] limits [on burden-shifting] lie.").

32. *Patterson*, 432 U.S. at 210 (quoting *McFarland v. American Sugar Rfg. Co.*, 241 U.S. 79, 86 (1916), *Tot v. United States*, 319 U.S. 463, 469 (1943); other citations omitted); see *McMillan*, 477 U.S. at 87 (quoting *Patterson*, 432 U.S. at 210).

33. See *supra* note 26.

have adopted the following clear test: "if a [legislature] provides that a specific component of a prohibited transaction shall give rise to both a special stigma and to a special punishment, that component must be treated as a 'fact necessary to constitute the crime' within the meaning of *In re Winship*."³⁴ Yet even this test involves uncertainty because a "special" punishment and stigma can exist only against a given background of punishment and stigma. The choice of that background will therefore determine the outcome of the test.³⁵ In any case, the liberal test has not prevailed. "A State [need not] prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment" of a criminal defendant.³⁶

Without question, the Court's explicit criteria for distinguishing "necessary" from "unnecessary" facts remain somewhat paltry, even after twenty-one years and at least four major cases.³⁷ The blackletter constitutional doctrine in this area has not advanced since its birth in 1970.³⁸ Indeed, Justice Powell's criticism of the majority opinion in *Patterson v. New York*,³⁹ that the Court "simply leaves us without a conceptual framework for distinguishing abuses from legitimate legislative adjustments of the burden of persuasion in criminal cases,"⁴⁰ remains equally true today.⁴¹ All that can be said with confidence is that the trend has been to uphold burden-shifting statutes by a slim majority.⁴²

C. SEPARATION OF POWERS

Given the doctrinal uncertainty which pervades *Winship* and its progeny, it might be tempting to argue that terrorist intent is *not* an element of § 2331, and so uphold the statute. This argument would assert that terrorist intent need not be proven beyond a reasonable doubt, because it is merely a check on prosecutorial discretion, and not a part of the crime prohibited. On this reading, § 2331 would apply to *all* serious attacks against American nationals abroad, and certification would merely limit use of the statute by the Justice Department to those cases which involved terrorist intent.

However, if terrorist intent is not an element of § 2331, certification may violate separation-of-powers doctrine. The statute provides that "[n]o prosecution

34. *McMillan*, 477 U.S. at 103 (Stevens, J., dissenting) (quoting *Winship*, 397 U.S. at 364). Justice Marshall, joined by Justices Brennan and Blackmun, dissented in a separate opinion, but "agree[d] with much of Justice Stevens' dissent," *id.* at 94 (Marshall, J., dissenting), and specifically endorsed Justice Stevens' test for distinguishing "necessary" from "unnecessary" facts. *Id.* (Marshall, J., dissenting).

35. As an example, consider § 2331 itself. To determine whether the issue of terrorist intent gives rise to a special stigma and punishment, should the statute be compared to similar domestic federal criminal law with no reference to terrorism, as in 18 U.S.C. §§ 1111, 1112, 1113 (1988), or to similar extraterritorial federal criminal law with no reference to terrorism, which does not yet exist?

36. *Patterson*, 432 U.S. at 207.

37. *See supra* note 24.

38. *See supra* notes 24-25 and accompanying text.

39. 432 U.S. 197 (1977).

40. *Id.* at 225 (Powell, J., dissenting) (footnote omitted).

41. *See Martin v. Ohio*, 480 U.S. 228, 241 (1987) (Powell, J., dissenting) ("Today . . . the Court simply asserts that [the state] law properly allocates the burdens [of proof], without giving any indication of where th[e] limits [on burden-shifting] lie.").

42. *See supra* note 26.

. . . shall be undertaken by the United States except on written certification" by the Justice Department of the defendant's terrorist intent.⁴³ This language was intended to⁴⁴ and does⁴⁵ limit the Justice Department's prosecutorial discretion. If terrorist intent is not an element, if § 2331 applies to all attacks against Americans abroad, then certification hinders the Executive's ability to apply the law to the cases it covers. Put simply, certification prohibits prosecution even when the defendant has violated each and every element of the crime. This prohibition raises separation-of-powers problems.

Modern separation-of-powers doctrine, like the doctrine of *Winship's* progeny, is largely a matter of degree. In *Morrison v. Olson*,⁴⁶ the Court considered the Ethics in Government Act of 1978, 28 U.S.C. §§ 591-99 (1988), which allowed appointment of a special prosecutor to investigate high-ranking executive branch officers.⁴⁷ The question was whether "the Act, taken as a whole, violate[d] the principle of separation of powers by *unduly* interfering with the role of the Executive Branch."⁴⁸ Although the Act "undeniabl[y] . . . reduce[d] the amount of control . . . that the Attorney General and, through him, the President exercise[d] over the . . . prosecution of a certain class of alleged criminal activity,"⁴⁹ it did "give the Attorney General several means of supervising or controlling the . . . independent counsel,"⁵⁰ and did not "impermissibly undermine[]" the powers of the Executive Branch or "disrupt[] the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions."⁵¹ The Court upheld the Act 7 to 1.⁵²

Prima facie, the flexible approach of *Morrison* appears able to accommodate § 2331. After all, "the three Branches of Government [need not] 'operate with absolute independence.'"⁵³ Certification is not a major intrusion into executive turf. Certainly it does not present a potentially-ongoing interference with executive functions of the type struck down in *Immigration and Naturalization Service v. Chadha*.⁵⁴

However, certification poses a different problem than the Ethics in Government Act which was upheld in *Morrison*. The Ethics Act was designed to facilitate

43. 18 U.S.C. § 2331(e) (1988 & Supp. III 1991).

44. See *infra* text accompanying notes 120-121.

45. See *infra* text accompanying note 122.

46. 487 U.S. 654 (1988).

47. *Id.* at 660. See also n.2.

48. *Id.* at 693 (emphasis added).

49. *Id.* at 695.

50. *Id.* at 696.

51. *Id.* at 695 (citations omitted) (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856 (1986), *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977)).

52. Justice Scalia dissented, and Justice Kennedy did not participate. *Morrison*, 487 U.S. at 697.

53. *Morrison*, 487 U.S. at 693-94 (quoting *United States v. Nixon*, 418 U.S. 683, 707 (1974); other citations omitted).

54. 462 U.S. 919 (1983). *Chadha* involved a statute which allowed the Immigration and Naturalization Service to suspend the deportations of some aliens, subject to a veto by either house of Congress. The Court struck down the veto provision of the statute because it was "essentially legislative," *id.* at 952, and therefore required bi-cameral passage and presentment to the President as required by Article I. *Id.* at 945-946. LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-3, at 214-15 (2d ed. 1988). See also *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (discussing *Chadha*). Cf. *Morrison*, 487 U.S. at 694 ("Congress retained for itself no powers of control or supervision over an independent counsel.").

investigation of high-ranking executive branch officials.⁵⁵ Accordingly, the special prosecutor had to be partially independent from the executive branch. By contrast, from a separation-of-powers standpoint, certification limits prosecution of ordinary crimes. It interferes with the "Executive Branch[']s . . . exclusive authority and absolute discretion to decide whether to prosecute a case"⁵⁶ Certification represents a case of "congressional usurpation of [an] Executive Branch function[']"⁵⁷ — indeed, a core executive function⁵⁸ — ordinary law enforcement. Congress has no direct constitutional role to play in that area;⁵⁹ prosecution is not "incidental to the legislative function of Congress."⁶⁰ Thus, even relatively minor restrictions may be "of such a nature that they impede the President's ability to perform his constitutional duty."⁶¹ By imposing limits on the use of § 2331, even when all of its elements have been met, certification may "interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed'"⁶²

Ultimately, either terrorist intent is an element of § 2331, or it is not. If it is an element, then the government must prove it beyond a reasonable doubt,⁶³ and certification violates due process. If terrorist intent is not an element, then certification may represent a legislative interference with executive discretion, and violate separation-of-powers.⁶⁴ This conundrum applies even though certification in § 2331 is largely not judicially (or congressionally) reviewable.⁶⁵ For as the legislative history of § 2331 indicates, Congress intended the certification clause not as a mere formality,⁶⁶ but as a check on prosecutorial discretion.⁶⁷

To survive, certification must occupy the very narrow space between the Scylla of due process, and the Charybdis of separation-of-powers. Whether the

55. *Morrison*, 487 U.S. at 660. See also n.2.

56. *United States v. Nixon*, 418 U.S. 683, 693 (1974) (citing *The Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1869), *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965), cert. denied sub nom. *Cox v. Hauberg*, 381 U.S. 935 (1965)). See also *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

Although prosecutorial discretion may be "a fading talisman [when used] to justify the [judicial] unreviewability" of decisions to prosecute, *Heckler v. Chaney*, 470 U.S. 821, 849 (1985) (Marshall, J., concurring) (emphasis added), congressional influence on prosecutorial discretion still raises serious separation-of-powers issues. See, e.g., *Morrison*, 487 U.S. at 693; *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977).

57. *Morrison*, 487 U.S. at 694 (quoting *Bowsher v. Synar*, 478 U.S. 714, 727 (1986)).

58. See *Morrison*, 487 U.S. at 689-91.

59. *Quinn v. United States*, 349 U.S. 155, 161 (1955) (citing *Kilbourn v. Thompson*, 103 U.S. 168, 192-93 (1880)) ("powers [of law enforcement] are assigned under our Constitution to the Executive and the Judiciary"); see also U.S. CONST. art. I, § 1 (placing "All legislative Powers herein granted" in the Congress), art. II, § 3 requiring the President to "take care that the Laws be faithfully executed.')

60. *Morrison*, 487 U.S. at 694 (citations omitted).

61. *Morrison*, 487 U.S. at 691.

62. *Id.* at 689-90. The fact that the President's execution of the laws must be "faithful" to the congressional intent only engenders the questions discussed above on a different level. The President must not be "faithful" to a congressional intent which violates the constitutional separation-of-powers doctrine.

63. See *Winship*, 397 U.S. at 364.

64. See *Nixon*, 418 U.S. at 693.

65. See H.R. CONF. REP. No. 783, 99th Cong., 2d Sess. 88 (1986). See also *supra* notes 9-11; *infra* text accompanying notes 120-121; *infra* text accompanying note 122. Cf. *supra* note 11.

66. Cf. *supra* note 15.

67. See *infra* text accompanying notes 120-122.

space exists at all in this context, and whether, if it does, it can accommodate certification, is unclear. Neither the flexible approach of *Morrison* nor the confused approach of *Winship*'s progeny produce very sharp lines.

However, retreating from doctrine produces some perspective on the problem. The certification clause of § 2331 is objectionable not because it violates separation-of-powers,⁶⁸ but because it attempts an end-run around *Winship*. As Part II makes clear, certification was designed primarily to eliminate the government's burden of proof on the issue of terrorist intent, and, once this was accomplished, only secondarily to restrict the use of the statute. Part II argues that the intent to eliminate the burden of proof violates the spirit of *Winship*, and marks certification as unconstitutional.

II. THE SPIRIT OF *WINSHIP*

A. THE CASES

While *Winship* and its progeny leave a confused trail of blackletter law, they do articulate a constitutional and a political vision which helps distinguish "necessary" from "unnecessary" facts. Essentially, a slim majority⁶⁹ of the Court trusts legislatures to write their laws fairly, with the proper respect for the rule and policies of *Winship*.⁷⁰ As Justice White stated in *Patterson*:

[L]ong before *Winship*, the universal rule in this country was that the prosecution must prove guilt beyond a reasonable doubt. At the same time, the long-accepted rule was that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant. *This did not lead to such abuses or such widespread redefinition of crime and reduction of the prosecution's burden that a new constitutional rule was required.*⁷¹

The Court often has repeated the idea that legislatures can be trusted.⁷²

Of course the dissenters have articulated a different vision. Fearing that the "test the Court . . . [has] establishe[d] allows a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case,"⁷³ Justice Powell wrote:

[t]o be sure, it is unlikely that legislatures will rewrite their criminal laws in [an] extreme form. The Court seems to think this likelihood of restraint is an added reason for limiting review largely to formalistic examination. *But it is completely foreign to this Court's responsibility for constitutional adjudication to limit the scope of judicial review because of the expectation — however reasonable — that legislative bodies will exercise appropriate restraint.*⁷⁴

68. On the current Court, I expect that only Justice Scalia, who wrote blistering dissents in *Morrison*, 487 U.S. 654 (1988) and in the later case of *Mistretta v. United States*, 488 U.S. 361 (1989), could be convinced by the separation-of-powers attack on certification.

69. See *supra* note 26.

70. However, as Justice Powell pointed out in dissent in *Patterson*, the Court has not given a clear indication of what "fair" means in this constitutional context. *Patterson*, 432 U.S. at 225 (Powell, J., dissenting).

71. *Id.* at 211 (emphasis added) (footnote omitted).

72. See, e.g., *id.* at 211 n.12; *McMillan*, 477 U.S. at 89-91; *Martin v. Ohio*, 480 U.S. 228, 232 (1987) (citing *Patterson*, 432 U.S. at 201-02).

73. *Patterson*, 432 U.S. at 223 (Powell, J., dissenting).

74. *Id.* at 224 n.8 (Powell, J., dissenting) (citation omitted) (emphasis added).

Regardless of whose vision is accurate, the important issues revolve around whether a statute raises “the specter . . . of [legislatures] restructuring existing crimes in order to ‘evade’ the commands of *Winship*”⁷⁵ Intuitively, both the majority and dissenting opinions recognize that if *Winship* is to retain any force at all, it must apply to more than the elements of the crime as defined by the legislature. If legislative definitions control, then clever draftsmanship — rewriting crimes to include fewer elements — can undermine *Winship*, and remove virtually all of the prosecution’s burden of proof.

As an example of the dangers involved in a purely formal implementation of *Winship*, consider the following brief hypothetical. Faced with ever-expanding drug-trafficking on the D.C. city streets, Congress decides to write a new narcotics law, the Statute To Undermine the Proliferation of Illegal Drugs, or STUPID. Congress determines that the problem is particularly severe late at night, and that drug dealers often use weapons. The first draft of the statute articulates the main elements of the crime: “It shall be a crime to (1) be on the streets after midnight while (2) possessing more than 10 grams of a controlled substance, and (3) carrying an unlicensed handgun.”

In hearings on STUPID, the Department of Justice, frustrated with its past inability to convict drug dealers, suggests that Congress rewrite the statute to make things easier on the government. Congress agrees, and after several weeks, the following new version of STUPID emerges. “(1) It shall be a crime to be on the streets after midnight. (2) No prosecution for any offense described in this statute shall be undertaken by the United States except on written certification from a federal prosecutor that, in his judgment, such offense involved a defendant carrying (A) more than 10 grams of a controlled substance, and (B) an unlicensed handgun.”

Of course STUPID would never be passed; it is only a specter.⁷⁶ But it does illustrate the dangers that loom on the horizon of a purely formal implementation of *Winship*. As Justice Powell wrote in *Patterson*, a purely formal application of *Winship*

becomes an exercise in arid formalities [and] a rather simplistic lesson in statutory draftsmanship [A] state statute could pass muster under [a formal implementation of *Winship*] if it defined murder as mere physical contact between the defendant and the victim leading to the victim’s death, but then set up an affirmative defense leaving it to the defendant to prove that he acted without culpable *mens rea*. The State, in other words, could be relieved altogether of responsibility for proving *anything* regarding the defendant’s state of mind, provided only that the face of the statute meets the [formal] drafting [requirements].⁷⁷

75. *McMillan*, 477 U.S. at 89 (footnote omitted). For the text of the *Winship* command, requiring proof beyond a reasonable doubt on all elements of a crime, see *supra* text accompanying note 18.

76. See *Patterson*, 432 U.S. at 224 n.8 (Powell, J., dissenting) (“To be sure, it is unlikely that legislatures will rewrite their criminal laws in this extreme form.”).

77. *Patterson*, 432 U.S. at 224 & n.8 (Powell, J., dissenting) (emphasis in original). Cf. *McMillan*, 477 U.S. at 100 (Stevens, J., dissenting) (“Consider, for example, a statute making presence ‘in any private or public place’ a ‘felony punishable by up to five years imprisonment’ and yet allowing ‘an affirmative defense for the defendant to prove, to a preponderance of the evidence, that he was not robbing a bank.’” (quoting *Fernand N. Dutile, The Burden of Proof in Criminal Cases: A Comment on the Mullaney-Patterson Doctrine*, 55 NOTRE DAME L. REV. 380, 383 (1980))).

Part IIB, below, argues that the legislative history of § 2331 exposes the statute as a lesser version of STUPID, which raises many (though not all⁷⁸) of the same constitutional problems. It presents § 2331 as the result of a legislature exceeding the “constitutional limits beyond which [it] may not go”⁷⁹ in shifting the burden of proof in a criminal statute. In Justice Rehnquist’s inimitable prose, Part IIB shows how certification of terrorist intent became “a tail which wags the dog of the substantive offense”⁸⁰ of § 2331.

B. LEGISLATIVE HISTORY

The legislative history of § 2331 reveals that the central reason for using certification was to evade the commands of *Winship*. Section 2331 began in the Senate as an antiterrorist bill with a substantive definition of terrorism as one of the elements of the crime. After discussions with the Justice Department on the difficulty of proving terrorism and terrorist intent beyond a reasonable doubt, § 2331 was rewritten to include certification. Because of the importance of the legislative process to the constitutionality of burden-shifting statutes,⁸¹ the following paragraphs carefully review the legislative history of certification in § 2331.

1. Terrorism Before § 2331

During 1985, the U.S. witnessed a series of dramatic terrorist attacks abroad, which resulted in the death of several Americans.⁸² On June 14, gunmen commandeered TWA Flight 847 with 104 Americans aboard, and forced the pilot to land the jet in Beirut, Lebanon.⁸³ Once on the ground, the hijackers shot and killed U.S. Navy diver Robert Stethem.⁸⁴ Less than four months later, on October

78. For example, if it prescribed any substantial punishment, STUPID would surely raise an eighth-amendment issue, which would not apply to § 2331. Some scholars have suggested the eighth amendment as the only limit to a legislature’s power to shift the burden of proof. See, e.g., John C. Jeffries, Jr. & Paul B. Stephan, III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L. J. 1325, 1365 (1979) (“In our view, the only sensible construction of *Winship* is one that demands, as an essential of due process, proof beyond a reasonable doubt of facts sufficient to justify penalties of the sort contemplated. In other words, *Winship* should be read to assert a constitutional requirement of proof beyond a reasonable doubt of a constitutionally adequate basis for imposing the punishment authorized.”).

79. *Patterson*, 432 U.S. at 210.

80. *McMillan*, 470 U.S. at 88.

81. See *Patterson*, 432 U.S. at 228 (Powell, J., dissenting).

82. See Robert D. McFadden, *Survivors Tell of Attacks at Two Airports*, N.Y. TIMES, Dec 28, 1985, at 6, col. 1. See also 132 CONG. REC. S1382 (daily ed. Feb. 19, 1986) (“The Congress hereby finds that — (a) between 1968 and 1985, there were over eight thousand incidents of international terrorism, over 50 per centum of which were directed against American targets.”) (passed by the Senate, February 19, 1986); 132 CONG. REC. S1385 (discussing “the U.S. citizens who were murdered at the Rome and Vienna airports in the recent incidents”) (statement of Sen. Specter); 132 CONG. REC. S1386 (“Mr. President, the hijacking of the Achille Lauro and the recent atrocities at the Rome and Vienna airports have given new urgency to the debate over the proper U.S. response to international terrorism.”) (statement of Sen. Leahy); 132 CONG. REC. H1244 (daily ed. March 18, 1986) (“As we have become all too aware, terrorist attacks are growing at an average annual rate of about 12 to 15 percent, and have become an ever-present threat throughout the world. Most recently, the hijackers of the cruise ship *Achille Lauro* brutally slayed Leon Klinghoffer, a partially paralyzed New York appliance shop owner on the trip as a 36th wedding anniversary present to his wife.”) (statement of Rep. Ackerman).

83. N.Y. TIMES, June 15, 1985, at 1, col. 6.

84. Richard Halloran, *Slain Passenger Was a Navy Diver*, N.Y. TIMES, June 18, 1985, at 9, col. 6. See *Bills to Authorize Prosecution of Terrorists and Others Who Attack U.S. Government Employees and Citizens Abroad: Hearing on S. 1373, S. 1429, and S. 1508 Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 41* (1985) [hereinafter *Senate Hearings*].

7, 1985, several heavily-armed men hijacked the Italian cruise ship Achille Lauro, and killed American Leon Klinghoffer.⁸⁵ Finally, on December 27, terrorists opened fire with automatic weapons near the El Al terminals in the Rome and Vienna airports, killing twenty persons, including five Americans.⁸⁶

2. Initial Congressional Reaction: "Terrorism" as an Element of the Crime

Congress responded quickly and forcefully to the terrorist attacks: on July 10, 1985, Senator Arlen Specter introduced S. 1429, the precursor to § 2331, a bill to authorize prosecution of terrorists who attack U.S. nationals abroad.⁸⁷ Senator Specter, himself a former prosecutor,⁸⁸ intended to "establish jurisdiction in the courts of the United States of America to protect U.S. interests around the world when they are attacked by terrorism"⁸⁹ Ultimately, S. 1429 merged with H.R. 4151 and was signed by President Reagan on August 27, 1986.⁹⁰

From its birth, S. 1429 was an antiterrorist law, part of "action . . . needed to deter the international threat of terrorism."⁹¹ During hearings on S. 1429 and H.R. 4151, its House counterpart,⁹² members of Congress expressed their outrage at terrorism. "I just do not think the citizens of this country nor the citizens of the world will sit by any longer and watch 11-year old girls gunned down in airports and elderly wheelchair-bound men shot and then thrown into the ocean."⁹³

The first versions of S. 1429 contained a substantive definition of terrorism. Naturally enough, in an effort to fight violent terrorist attacks, the original drafters of S. 1429 articulated both the violent actions — murder, attempted murder, assaults, and conspiracies⁹⁴ — and the special terrorist mens rea required for conviction.⁹⁵ On July 30, 1985, in hearings before the Senate, S. 1429 read as follows:

(a) Whoever in an act of international terrorism kills or attempts to kill any national of the United States shall be punished

85. John Tagliabue, *Ship Carrying 400 Is Seized; Hijackers Demand Release of Fifty Palestinians in Israel*, N.Y. TIMES, Oct. 8, 1985, at 1, col. 4. See *supra* note 82.

86. John Tagliabue, *Airport Terrorists Kill Thirteen and Wound 113 At Israeli Counters in Rome and Vienna: Four Attackers Killed*, N.Y. TIMES, Dec. 28, 1985, at 1, col. 6.

87. S. 1429, 99th Cong., 1st Sess. (1985). See 132 CONG. REC. S1057 (daily ed. Feb. 5, 1986).

88. See *Senate Hearings*, *supra* note 84, at 36, 43.

89. See *id.* at 40, 41-42.

90. 1985-1986 Cong. Index (CCH) 21,027, 35,072 (1986). This and the preceding paragraph were adapted from Kris, *supra* note 6, at 579-80.

91. *Antiterrorism Act of 1986: Hearing on H.R. 4294 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 1 (1986) [hereinafter *House Hearings*]. See H.R. CONF. REP. NO. 783, 99th Cong., 2d Sess. 87 (1986).

92. See 1985-1986 Cong. Index, *supra* note 90, at 21,027, 35,072. See also, *House Hearings*, *supra* note 91, at 22 ("Is your bill [H.R. 4151] identical with the Senate bill that Senator Specter introduced, S. 1429, Mr. Wyden? . . . Yes, there are some numbering differences, but no substantive differences.") (question from Rep. McCollum; answer from Rep. Wyden).

93. *House Hearings*, *supra* note 91, at 19 (statement of Rep. Wyden). See also, e.g., 132 CONG. REC. S1382-88 (daily ed. Feb. 19, 1986) (referring to terrorists as "these most heinous criminals") (statement of Sen. Specter); 132 CONG. REC. S1386 (referring to the "recent atrocities at the Rome and Vienna airports") (statement of Sen. Leahy); 132 CONG. REC. S1387 (referring to terrorists as "these vile murderers" and "these barbaric criminals") (statement of Sen. Hatch).

94. S. 1429, 99th Cong., 1st Sess. (1985), 131 CONG. REC. S1441 (daily ed. July 11, 1985); see *Senate Hearings*, *supra* note 84, at 36-37.

95. S. 1429, 99th Cong., 1st Sess. (1985), 131 CONG. REC. S1441 (daily ed. July 11, 1985); see *Senate Hearings*, *supra* note 84, at 36-37.

(b) Whoever *in an act of international terrorism* assaults, strikes, wounds . . . or makes any other violent attack upon . . . any national of the United States . . . shall be fined

(c) For the purposes of this section, "*international terrorism*" is used as defined in the *Foreign Intelligence Surveillance Act*, title 50, section 1801(c).⁹⁶

The Foreign Intelligence Surveillance Act contained the following substantive definition of terrorism:

"International terrorism" means activities that — (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;

(2) appear to be intended —

(A) to intimidate or coerce a civilian population;

(B) to influence the policy of a government by intimidation or coercion; or

(C) to affect the conduct of a government by assassination or kidnapping;

and

(3) occur totally outside the United States or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.⁹⁷

At the Senate Hearings on S. 1429, Senators Specter and Hatch had the following discussion concerning the definition of terrorism in § 1801(c).

Senator SPECTER I think [the definition of terrorism in § 1801(c)] is a sound definition.

Senator HATCH. I think it is, too, and I believe it has been upheld by the courts. Do you see any possible problems with that definition?

Senator SPECTER. I do not. Terrorism is not easy to define. That definition has been used after a lot of deliberation, and I think it is a good one.

Senator HATCH. OK.⁹⁸

3. Justice Department Reaction to "Terrorism" as an Element of the Crime

Unfortunately, the definition of terrorism in § 1801(c) did not satisfy everyone. Between the Senate Hearings on S. 1429 on July 30, 1985, and the House Hearings on March 4, 1986, the Justice Department (and the State Department) worked with Senator Specter's staff, and modified S. 1429 to exclude any reference to terrorism.⁹⁹ (The title of the bill remained "An act . . . to

96. S. 1429, 99th Cong., 1st Sess. (1985), *Quoted in Senate Hearings, supra* note 84, at 8 (emphasis added).

97. 50 U.S.C. § 1801(c) (1988).

98. *Senate Hearings, supra* note 84, at 43-44. At the time of the Senate Hearings, July 30, 1985, the definition of terrorism in 50 U.S.C. § 1801(c) recently had been upheld by the Second Circuit in *United States v. Duggan*, 743 F.2d 59, 70-72 (2d Cir. 1984). Senator Hatch cited the case in later comments to the Senate. 132 Cong. Rec. S1057 (daily ed. Feb. 5, 1986).

99. "But, basically what we did as we worked together with the Senate in developing Senator Specter's bill, S. 1429 . . . we did not want to have to prove as an element of the crime, someone's political beliefs." *House Hearings, supra* note 91, at 29 (statement of Victoria Toensing, Deputy Assistant Att'y Gen., U.S. Department of Justice); *id.* at 39 ("The Department of State understands and appreciates this committee's desire to do something about terrorism. It is a problem that confronts and frustrates us all. Mr. Chairman, I have worked with other committees of this Congress, and I am perfectly willing to work closely with you and this subcommittee on specific bills, roll up my sleeves, sit down, work with my staff in improving anything you want to put forward. I worked with Senator Specter on the bill [S. 1429] that was just passed in the Senate" (statement of Abraham Sofaer, Legal Adviser, U.S. Department of State)).

authorize prosecution of terrorists who attack United States nationals abroad”¹⁰⁰ This change in wording did not reflect a change in the purpose of the bill. Unquestionably, the driving — and limiting — force behind S. 1429 remained a determination to combat terrorism.¹⁰¹

During the House Hearings on S. 1429, Deputy Assistant Attorney General Victoria Toensing explained why the Justice Department had worked to remove “terrorism” from the substance of S. 1429.

Our major concern . . . is . . . inclusion of [terrorist intent] as an element of the offense. [Terrorist intent] is . . . an extremely difficult element to prove¹⁰². . . . [W]e did not want a person’s political motive, their reason for committing the crime, as an element of the crime because then it would be impossible to prove it. It would make a circus in the courtroom. . . . We do not want it in the elements. . . . [W]e do not want to have to prove it¹⁰³. . . . [T]o put [terrorist intent] in the statute to prove as an element of the offense, would make it virtually impossible to be able to conduct a successful courtroom prosecution.¹⁰⁴

Abraham Sofaer, the Legal Advisor to the State Department, and a former district judge from the Southern District of New York, echoed Ms. Toensing’s concerns, “[t]errorism cannot be defined in any manner that is generally acceptable for a criminal statute, where precision is required. Prior efforts have led to tortured results”¹⁰⁵ Judge Sofaer also stated, “[w]e would not be surprised if the Department of Justice had concerns about making it an element of the offense that the deed in question have been done ‘in an act of international terrorism.’ This requirement could raise evidentiary . . . problems that could unduly complicate prosecutions under this legislation.”¹⁰⁶

Ms. Toensing and Mr. Sofaer repeated their positions several times throughout the hearings,¹⁰⁷ emphasizing that the “major concern [of the Justice Department] . . . is . . . [to avoid] inclusion of motive as an element of the offense.”¹⁰⁸ Indeed, Ms. Toensing was so vehement about excluding a substantive definition of terrorism from antiterrorist bills that she offered her own staff to work with Representative Hughes, the Chairman of the House Subcommittee on Security and Terrorism, to rewrite another antiterrorist bill. “I offer my staff to work with you, Mr. Chairman, because it is very important to us we do not have to prove [terrorist intent] as an element of the offense.”¹⁰⁹

4. *The Final Version of § 2331: Certification of “Terrorism”*

By the time of its incorporation into the United States Code as § 2331, the statute eschewed a definition of terrorism, and merely defined the violent crimes,

100. *Id.* at 13 (title of S. 1429).

101. *See, e.g.*, H.R. CONF. REP. NO. 783, 99th Cong., 2d Sess. 87 (1986) (“The committee of conference does not intend that [§ 2331] reach nonterrorist violence inflicted upon American victims. Simple barroom brawls or normal street crime, for example, are not intended to be covered by this provision.”).

102. *House Hearings, supra* note 91, at 35.

103. *Id.* at 44.

104. *Id.* at 45.

105. *Id.* at 42. *See Senate Hearings, supra* note 84, at 63.

106. *Senate Hearings, supra* note 84, at 68 (prepared statement).

107. *See House Hearings, supra*, note 91, at 29, 35, 50, 52-53, 56.

108. *Id.* at 35.

109. *Id.* at 56.

attempts, and conspiracies which it prohibited, "there is no requirement that the U.S. Government prove during the criminal prosecution the purpose of the murder. The elements are (1) the murder (2) of a U.S. national (3) outside the territorial jurisdiction of the United States."¹¹⁰ Nonetheless, the motivating force behind § 2331 — terrorism — remained central. "[T]he committee of conference does not intend that [the law] reach nonterrorist violence inflicted upon American victims. Simple barroom brawls or normal street crime, for example, are not intended to be covered by this provision."¹¹¹

To ensure that § 2331 would be used only against terrorists, the law required the Attorney General to certify that an offense to be prosecuted under the statute was in fact terrorism.¹¹² Indeed, the final version of § 2331 contained a certification provision *prohibiting* prosecution by the United States absent written certification from the Attorney General (or a high-ranking subordinate).¹¹³ Certification was designed to remove "terrorism" as an element of the crime to be proven under § 2331.¹¹⁴

Most members of Congress apparently approved of the substitution of certification for a definition of terrorism. The first version of S. 1429 to include a certification provision passed the Senate 92 - 0 on February 19, 1986.¹¹⁵

However, not all members of Congress were entirely pleased with the bill, even if they voted for it. Senator Hatch noted: "I regret that the bill does not define terrorism per se, and . . . I believe in the need for a statutory definition of international terrorism" ¹¹⁶ Senator Hatch also stated, "[i]f we are merely to penalize terrorist attacks, then the definition of terrorism as provided by the original bill in section 2(c), relying upon the definition of the Foreign Intelligence Surveillance Act, is much more preferable."¹¹⁷ Senator Specter also seemed reluctant to abandon a definition of terrorism: "the bill does not attempt to define terrorism. However, those seeking guidance on this issue can refer to the definition provided in the Foreign Intelligence Surveillance Act, title 50, section 1801(c)."¹¹⁸ During the House Hearings, Representative Hughes stated,

[w]ell, we will attempt to deal with just exactly how terrorism is defined. I must tell you candidly I have some problems with attempting to draft legislation that is not a little more specific as to what we intend to catch by way of criminal conduct prosecutable in this country, but we will continue to work with you¹¹⁹

Further, the certification clause in § 2331 tracked the language from the Foreign Intelligence Surveillance Act's definition of terrorism¹²⁰ because Congress

110. H.R. CONF. REP. No. 783, 99th Cong., 2d Sess. 87 (1986).

111. *Id.*

112. *Id.* Cf. *infra* text accompanying notes 120-121; *infra* text accompanying note 122.

113. 18 U.S.C. § 2331(e) (1988 & Supp. III 1991). For the text of the certification clause in § 2331(e), see *supra* text accompanying note 8.

114. H.R. CONF. REP. No. 783, 99th Cong., 2d Sess. 88 (1986). *But see infra* text accompanying notes 120-121; *infra* text accompanying note 122.

115. 132 CONG. REC. S1382 (daily ed. Feb 19, 1986).

116. *Id.* at S1386.

117. 132 CONG. REC. S1057 (daily ed. Feb. 5, 1986).

118. 132 CONG. REC. S1382 (daily ed. Feb. 19, 1986). Although Senator Specter made this statement before the House Hearings, the substitution of certification for the definition of terrorism had already occurred. See *supra* note 117.

119. *House Hearings, supra* note 91, at 56.

120. 50 U.S.C. § 1801(c) (1988); see *supra* note 97, accompanying text.

was unwilling to let legislative history alone guide the Justice Department. Congress wanted to ensure that § 2331 would be used only against terrorism.

Mr. HUGHES. We do not want to capture the barroom brawl. We do not want to capture other types of attacks upon Americans that basically are not within the realm of terrorist-type attacks.

Mr. SOFAER. But it is inconceivable that the Attorney General of the United States . . . would reach out to try to take jurisdiction over such activity overseas.

Mr. HUGHES. Mr. Sofaer, I thought that too. We passed a pharmacy robbery statute which I thought was rather specific. It had a \$500 threshold. The Justice Department interpreted that to mean \$5,000 . . . attorneys general sometimes do not necessarily comply with the letter of the law; and to suggest that it is adequate . . . not [to] put [the definition of terrorism] in [the] statute is a little bit unusual. You are going to have problems getting courts to follow the intent when it is in the [elements of the] statute, let alone when it is not . . .¹²¹

Certification represented a compromise of sorts, allowing terrorist intent partly to limit prosecutorial discretion without requiring proof beyond a reasonable doubt at trial. As Judge Sofaer stated,

if the Attorney General or a U.S. attorney somewhere really abuses his discretion under this law [and brings a case which does not involve terrorist intent], a motion could be made to a district judge, in some egregious case of some kind, and I would not be surprised if something were done about it.¹²²

C. CERTIFICATION AS AN ATTEMPT TO EVADE *Winship*

The lengthy¹²³ legislative history of S. 1429 makes two points absolutely clear. First, the bill was designed and intended to fight terrorism, not mere "barroom brawl[s]."¹²⁴ There is no evidence that Congress intended to extend the law to cover every act of serious violence against American nationals outside the country; all the evidence points to a desire to prohibit only terrorist attacks.¹²⁵ Indeed, coverage of all attacks would have almost certainly violated international law,¹²⁶ and would have been, at the least, "controversial and precedent-setting . . ."¹²⁷

Second, the final version of § 2331 used certification rather than a definition of terrorism because the Justice Department did not want to have to prove terrorist intent as an element of the crime. Despite an extant definition of terrorism in another federal criminal law, and despite the clear intent of Congress to fight only terrorism, § 2331 eschewed a definition of the term and resorted to certification because the Justice Department felt that it could not prove terrorist intent beyond a reasonable doubt.

121. *House Hearings*, *supra* note 91, at 56.

122. *Id.* at 54.

123. *See id.* at 54 (the law "has much more stronger legislative history in it than an ordinary bill.") (statement of Abraham Sofaer, Legal Advisor, U.S. Department of State).

124. *See, e.g., id.* at 44; H.R. CONF. REP. NO. 783, 99th Cong., 2d Sess. 87 (1986).

125. *See, e.g.,* H.R. CONF. REP. NO. 783, 99th Cong., 2d Sess. 87 (1986).

126. *See generally* Kris, *supra* note 6, at 587-96.

127. 132 CONG. REC. S1057 (daily ed. Feb. 5, 1986) (statement of Senator Specter).

These two points combine to cast serious doubt on the constitutionality of certification in § 2331. The legislative history reveals that terrorist intent is the “tail which wags the dog of the substantive offense.”¹²⁸ Section 2331 was conceived, designed and promulgated to fight terrorism, not other violent attacks. Congress never intended to prohibit even the most serious non-terrorist violence. To paraphrase Justice Rehnquist, terrorist intent was always the “dog” of the statute. But certification removed terrorist intent from the formal elements of the statute, and allowed the Justice Department to determine its existence virtually free from judicial scrutiny or review, transforming terrorist intent into the mere “tail” of the offense. Yet even after all the draftsmanship and legislative tinkering, terrorist intent remained the central issue in § 2331, and continued to “wag[] the dog of the substantive offense.”¹²⁹

Further, § 2331 required certification rather than proof beyond a reasonable doubt precisely to “‘evade’ the commands of *Winship*”¹³⁰ Clearly, the Justice Department feared having to prove terrorist intent beyond a reasonable doubt. That fear may have been legitimate. Removing the central and motivating element of a criminal statute because of fears that it would be too hard to prove was not legitimate, at least when the legislature was clearly not ready to give up the limiting force of that element and indicated as much in the text of the statute.

III. HYPOTHETICAL CASES

So far, I have tried to make two main points. First, in Part I, certification at least arguably violates either the blackletter constitutional law of *Winship* and its progeny or the separation of powers. Second, in Part II, certification clearly violates the spirit underlying the blackletter law of *Winship* and its progeny. However, because the blackletter rules from Part I were “trivial,”¹³¹ and because “spirit” is inherently somewhat vague, this Part considers several hypothetical cases to help map out the constitutional terrain surrounding certification, and to emphasize the special problems with certification in § 2331.

Certification exists in at least three other places in the federal law: two federal statutes,¹³² and one Federal Rule of Criminal Procedure.¹³³ In this section, I evaluate these three examples of certification and compare them to certification in § 2331.

A. CERTIFICATION IN 18 U.S.C. § 245

18 U.S.C. § 245, part of the Civil Rights Act of 1968, enumerates certain “Federally Protected Activities,” such as voting or serving on a jury, and provides fines and imprisonment for persons who prevent others from engaging in these activities.¹³⁴ The statute contains a certification clause similar in form to that in

128. *McMillan*, 477 U.S. at 88.

129. *Id.*

130. *Id.* at 89 (footnote omitted).

131. Allen, *supra* note 25, at 1147.

132. 18 U.S.C. §§ 245(a)(1), 3503(a) (1988).

133. FED. R. CRIM. P. 42.

134. 18 U.S.C. § 245 (1988). The statute reads as follows:

§ 2331. It prohibits prosecution absent particular, written determinations by the Attorney General or one of his subordinates.

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- (a) (1) Nothing in this section shall be construed as indicating an intent on the part of Congress to prevent any State, any possession or Commonwealth of the United States, or the District of Columbia, from exercising jurisdiction over any offense over which it would have jurisdiction in the absence of this section, nor shall anything in this section be construed as depriving State and local law enforcement authorities of responsibility for prosecuting acts that may be violations of this section and that are violations of State and local law. No prosecution of any offense described in this section shall be undertaken by the United States except upon the certification in writing of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General specially designated by the Attorney General that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, which function of certification may not be delegated.
- (2) Nothing in this subsection shall be construed to limit the authority of Federal officers, or a Federal grand jury, to investigate possible violations of this section.
- (b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with . . .
- (1) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from . . .
- (A) voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher, or any legally authorized election official, in any primary, special, or general election;
- (B) participating in or enjoying any benefit, service, privilege, program, facility, or activity provided or administered by the United States;
- (C) applying for or enjoying employment, or any requisite thereof, by any agency of the United States;
- (D) serving, or attending upon any court in connection with possible service, as a grand or petit juror in any court of the United States;
- (E) participating in or enjoying the benefits of any program or activity receiving Federal financial assistance; or
- (2) any person because of his race, color, religion or national origin and because he is or has been —
- (A) enrolling in or attending any public school or public college;
- (B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;
- (C) applying for or enjoying employment, or any requisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;
- (D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror;
- (E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;
- (F) enjoying the goods, services, facilities, privileges, advantages or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments; or

No prosecution of any offense described in this section shall be undertaken by the United States except upon the certification in writing of the Attorney General, [or various of his high-ranking subordinates], that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, which function of certification may not be delegated.¹³⁵

Substantively, however, the certification clause of § 245 does not pose the same problems as the clause of § 2331. It does not violate separation of powers, or the letter or spirit of the burden-shifting cases.

Certification in § 245 does not limit prosecutorial discretion. The issue to be certified in § 245 — that a prosecution is “in the public interest and necessary to secure substantial justice” — is virtually an empty shell, and can be filled with whatever the Justice Department desires. No prosecutor in good faith ever brings a case without the belief that it will secure “substantial justice” and aid

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- (3) during or incident to a riot or civil disorder, any person engaged in a business in commerce or affecting commerce, including, but not limited to, any person engaged in a business which sells or offers for sale to interstate travelers a substantial portion of the articles, commodities, or services which it sells or where a substantial portion of the articles or commodities which it sells or offers for sale have moved in commerce; or
 - (4) any person because he is or has been, or in order to intimidate such person or any other person or class of persons from —
 - (A) participating, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F); or
 - (B) affording another person or class of persons opportunity or protection to so participate; or
 - (5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F), or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate. . . shall be fined not more than \$1,000, or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than \$10,000, or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life. As used in this section the term “participating lawfully in speech or peaceful assembly” shall not mean the aiding, abetting, or inciting of other persons to riot or to commit any act of physical violence upon any individual or against any real or personal property in furtherance of a riot. Nothing in subparagraph (2)(F) or (4)(A) of this subsection shall apply to the proprietor of any establishment which provides lodging to transient guests, or to any employee acting on behalf of such proprietor, with respect to the enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of such establishment if such establishment is located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor as his residence.
 - (c) Nothing in this section shall be construed so as to deter any law enforcement officer from lawfully carrying out the duties of his office; and no law enforcement officer shall be considered to be in violation of this section for lawfully carrying out the duties of his office or lawfully enforcing ordinances and laws of the United States, the District of Columbia, any of the several States, or any political subdivision of a State. For purposes of the preceding sentence, the term “law enforcement officer” means any officer of the United States, the District of Columbia, a State, or political subdivision of a State, who is empowered by law to conduct investigations of, or make arrests because of, offenses against the United States, the District of Columbia, a State, or political subdivision of a State.

135. *Id.* § 245(a)(1).

the “public interest.” Indeed, certification in § 245 could limit good-faith prosecutorial discretion only if the Attorney General of the United States demanded to prosecute a case despite his publicly-admitted belief that the prosecution was unjust or against the public interest. Any prosecutor willing to do this, of course, would simply falsify the certification, precisely because § 245(a)(1) does not require certification of any substantive issue.

By contrast, § 2331 requires certification of a difficult issue — indeed, the most difficult issue in early drafts of the statute. Unlike the ironically labeled “substantial justice” of § 245, “terrorist intent” has real substance; it is not an empty shell.¹³⁶ If terrorist intent is not an element of § 2331, then requiring certification of that intent as a prerequisite to prosecution does limit the “absolute [prosecutorial] discretion”¹³⁷ of the executive.¹³⁸

It seems clear that Congress wrote a certification clause into § 245 not to limit prosecutorial discretion, but to limit the class of persons who could exercise it. Section 245 covers a wide range of controversial conduct, and Congress was within its rights to demand high-level input into the decision to prosecute.¹³⁹ The nondelegation clause in § 245(a)(1),¹⁴⁰ missing from § 2331, only reinforces this point. Certification in § 245 does not limit prosecutorial discretion in any meaningful way.

Certification in § 245 also accords with *Winship* and its progeny. Clearly, the legislature did not intend the “fact” of a prosecution being “in the public interest” as an element of the crime. Presumptively, then, the fact is not “necessary” for *Winship*.¹⁴¹ Indeed, the absurdity of making this “fact” an element illustrates that certification in § 245 accords with the spirit behind the *Winship* cases as well. Certification in § 245, unlike its counterpart in § 2331, did not result from prosecutorial fear of the “reasonable doubt” standard. No sensible criminal statute would ever require the government to prove that its prosecution accorded with “substantial justice” and the “public interest,” because those issues exist outside the realm of the defendant’s conduct and state of mind. They could never be “fact[s] necessary to constitute the crime”¹⁴² with which a defendant is charged, and thus do not require proof beyond a reasonable doubt or any proof at all. The certified issues in § 245 have nothing to do with the defendant per se, but only with the executive branch’s perception of him and his actions.

In short, § 245 illustrates the permissive use of certification as a device for ensuring high-level input into a decision to prosecute without actually limiting prosecutorial discretion. Unlike § 2331, it does not shift the burden of proof on any issue which could conceivably be an element of the crime.

136. See *supra* notes 120-122 and accompanying text.

137. *United States v. Nixon*, 418 U.S. 683, 693 (1974) (citing *The Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1869); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965), *cert. denied sub nom. Cox v. Hauberg*, 381 U.S. 935 (1965)).

138. See *supra* notes 120-122 and accompanying text.

139. See generally *Morrison v. Olson*, 487 U.S. 654, 691 (1988).

140. The last clause of § 245(a)(1) states, “which function of certification may not be delegated.”

141. See *supra* note 28 and accompanying text.

142. *In re Winship*, 397 U.S. 358, 364 (1970).

B. CERTIFICATION IN 18 U.S.C. § 3503

18 U.S.C. § 3503 allows a court to order the deposition of a witness in a criminal case in "exceptional circumstances,"¹⁴³ and requires that "[a] motion by the Government to obtain an order under this section shall contain certification by the Attorney General or his designee that the legal proceeding is against a person who is believed to have participated in an organized criminal activity."¹⁴⁴

143. 18 U.S.C. § 3503(a) (1988).

144. *Id.* The statute reads as follows:

(a) Whenever due to exceptional circumstances it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved, the court at any time after the filing of an indictment or information may upon motion of such party and notice to the parties, order that the testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness. A motion by the Government to obtain an order under this section shall contain certification by the Attorney General or his designee that the legal proceeding is against a person who is believed to have participated in an organized criminal activity.

(b) The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition. The officer having custody of a defendant shall be notified of the time and place set for the examination, and shall produce him at the examination and keep him in the presence of the witness during the examination. A defendant not in custody shall have the right to be present at the examination, but his failure, absent good cause shown, to appear after notice and tender of expenses shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(c) If a defendant is without counsel, the court shall advise him of his rights and assign counsel to represent him unless the defendant elects to proceed without counsel or is able to obtain counsel of his own choice. Whenever a deposition is taken at the instance of the Government, or whenever a deposition is taken at the instance of a defendant who appears to be unable to bear the expense of the taking of the deposition, the court may direct that the expenses of travel and subsistence of the defendant and his attorney for attendance at the examination shall be paid by the Government. In such event the marshal shall make payment accordingly.

(d) A deposition shall be taken and filed in the manner provided in civil actions, provided that (1) in no event shall a deposition be taken of a party defendant without his consent, and (2) the scope of examination and cross-examination shall be such as would be allowed in the trial itself. On request or waiver by the defendant the court may direct that a deposition be taken on written interrogatories in the manner provided in civil actions. Such request shall constitute a waiver of any objection to the taking and use of the deposition based upon its being so taken.

(e) The Government shall make available to the defendant for his examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the Government and which the Government would be required to make available to the defendant if the witness were testifying at the trial.

(f) At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: That the witness is dead; or that the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the witness refuses in the trial or hearing to testify concerning the subject of the deposition or part offered; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Any deposition may also be used by any party for the purpose

At first glance, § 3503 appears to exhibit some of the same problems as § 2331. The statute essentially requires certification that the defendant in the case is involved in organized crime. Perhaps this fact, used as an element of the crime in some federal criminal statutes,¹⁴⁵ requires proof beyond a reasonable doubt. If so, then certification in § 3503 is as unconstitutional as its counterpart in § 2331.

In fact, however, § 3503 does not pose a constitutional problem, because the statute does not define a crime. Section 3503 merely governs the use of depositions in federal court. The defendant does not suffer any direct harm from prosecutorial certification that the government suspects him of engaging in organized crime. Even the dissenters in the burden-shifting cases would not require proof beyond a reasonable doubt on the certified issue in § 3503. After all, no punishment flows from the certification.¹⁴⁶ And although certification gives rise to a stigma, it surely does not exceed the stigma posed by an indictment under an organized-crime statute.¹⁴⁷ Accordingly, the suspicion that the defendant in § 3503 is engaged in organized crime need not “be treated as a ‘fact necessary to constitute the crime’ within the meaning of . . . *In re Winship*.”¹⁴⁸

For similar reasons, § 3503 does not infringe on prosecutorial discretion. Because the statute does not describe a crime, there is no real prosecutorial discretion to limit. Congress unquestionably has the power to promulgate rules and statutes to regulate procedure and admissibility of evidence in the federal courts.¹⁴⁹ Certainly the executive branch does not have the discretion to use depositions in criminal cases when Congress forbids it.¹⁵⁰

In sum, § 3503 illustrates a permissive use of certification outside the substantive criminal law. In contrast to § 2331, it does not define a crime at all, and so need not adhere to the safeguards provided by *Winship* or the separation-of-powers cases.

C. FEDERAL RULE OF CRIMINAL PROCEDURE 42

Fed. R. Crim. P. 42(a) allows a federal district judge to punish contempt of court “summarily if the judge certifies that the judge saw or heard the conduct

of contradicting or impeaching the testimony the deponent as a witness. If only part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

(g) Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

145. See, e.g., 18 U.S.C. §§ 1961-1968 (1988) (RICO).

146. See *McMillan*, 477 U.S. at 103 (Stevens, J., dissenting).

147. See *id.* (Stevens, J., dissenting). If the Justice Department indicted someone in a case without even a hint of organized crime, and then certified that it did suspect him of engaging in organized crime under § 3503, the district judge would surely not grant the order for the deposition.

This highlights another difference between § 2331 and § 3503; in the former, the prosecutorial certification is subject only to limited judicial review; in the latter, prosecutorial certification is only one ingredient in the equation which allows a district judge the discretion to decide whether or not to grant an order authorizing a deposition.

148. *McMillan*, 477 U.S. at 103 (Stevens, J., dissenting) (quoting *Winship*, 397 U.S. at 364).

149. *Mistretta v. United States*, 488 U.S. 361, 387 (1989) (“Congress has undoubted power to regulate the practice and procedure of the federal courts” (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941) (footnote omitted))).

150. *Id.*

constituting the contempt and that it was committed in the actual presence of the court.”¹⁵¹ On its face, Rule 42(a) might appear utterly to flout due process; its certification clause not only allows a summary determination of one element of the crime of contempt,¹⁵² it allows summary determination of the entire crime.

However, despite the fact that criminal contempt proceedings deserve “the [same] protections normally provided in criminal proceedings,”¹⁵³ the Supreme Court has upheld Rule 42(a)¹⁵⁴ because it allows certification by a judge rather than a prosecutor.¹⁵⁵ The distinction between a judge and a prosecutor makes perfect sense. Judges serve as neutral fact-finders, while prosecutors do not. Despite the language quoted at the beginning of this paper,¹⁵⁶ our adversary system does not permit prosecutors to exercise the kind of detached neutrality required by the Constitution.¹⁵⁷ They cannot serve both as accusers and as fact-finders.

On the other hand, our system expects and depends on judicial neutrality.¹⁵⁸ In this respect, criminal contempt actions are the same as other actions: “the court is not a party. There is nothing that affects the judges in their own persons. Their concern is only that the law should be obeyed and enforced, and their

151. FED. R. CRIM. P. 42(a). The rule reads as follows:

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subsection (a) of this rule shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant, or on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

152. The Court has recently stated: “we have come to regard criminal contempt as ‘a crime in the ordinary sense,’ . . . to rebut earlier characterizations of such actions as undeserving of the protections normally provided in criminal proceedings.” *Young v. United States ex rel. Vuitton Et Fils, S.A.*, 481 U.S. 787, 799-800 (1987) (quoting *Bloom v. Illinois*, 391 U.S. 194, 201 (1968); other citations omitted).

153. *Id.* at 800 (citations omitted).

154. See *United States v. Wilson*, 421 U.S. 309, 317 (“Our conclusion that summary contempt is available . . . is supported by the fact that Rule 42 has consistently been recognized to be no more than a restatement of the law existing when the Rule was adopted.” (citations omitted)); *id.* at 321-22 (1975) (Blackmun, J., concurring) (“So long as this Court holds, as it does, that the summary procedure of Rule 42(a) satisfies the requirements of due process, the Rule should be read to mean precisely what it says.”); *id.* at n.10; *id.* at 319; Note of Advisory Committee on Rules to FED. R. CRIM. P. 42(a).

155. Cf. *Vuitton Et Fils*, 481 U.S. at 799 n.9.

156. See *supra* text accompanying note 1.

157. See *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

158. See, e.g., *id.* (“The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law.”).

interest is no other than that they represent in every case."¹⁵⁹ Judicial certification of contestable issues can accord with due process even if prosecutorial certification does not.

Of course, in certain cases, judicial certification would pose the same kinds of problems as prosecutorial certification. If a judge received money for issuing summary criminal contempt orders, she would no longer be neutral. Such a situation would certainly "deprive[] a defendant . . . of due process of law [because it would] . . . subject his liberty . . . to the judgment of a court the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him" ¹⁶⁰ In the ordinary run of cases, however, judicial certification accords with due process.

Further, Rule 42(a) limits itself to those cases where the judge personally witnessed the contempt. The judge cannot certify activity outside of the courtroom, and she cannot certify states of mind or other intangible offenses.¹⁶¹ In contrast to § 2331, Rule 42(a) does not create the need to probe the intricacies of the contemnor's thoughts to determine whether he intended to "coerce . . . a . . . population."¹⁶² The judge must "s[ee] or hear[]" the conduct.¹⁶³

Thus Rule 42(a) illustrates a third and final permissive use of certification, and highlights two features of § 2331 which make the statute unconstitutional. Because Rule 42 covers only those relatively minor and obvious cases of criminal conduct committed before an observing district judge, it does not commit the sins of § 2331. By contrast, certification in § 2331 is pernicious because it allows certification by a prosecutor, not a judge, and because it allows certification of a very subtle and difficult issue (one that the Justice Department doubted its own ability to prove in open court).

Certification in Rule 42(a) also explicitly raises an issue latent in § 2331: the right to a trial by jury.¹⁶⁴ The Supreme Court has upheld summary contempt against jury-trial challenges,¹⁶⁵ claiming that it "has always been . . . one of the powers necessarily incident to a court of justice — that it should have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it,"¹⁶⁶ at least where the punishment for the contempt does not exceed six months' imprisonment.¹⁶⁷ Summary criminal contempt appears virtually invulnerable to a jury-trial attack. In *United States v. Barnett*,¹⁶⁸ the Court cited over fifty cases upholding summary

159. *United States v. Barnett*, 376 U.S. 681, 697 (1964) (quoting *United States v. Shipp*, 203 U.S. 563, 574 (1906) (Holmes, J.)); *Cf. Rose, Warden v. Clark*, 478 U.S. 570, 577-79 (1986); *Ward v. City of Monroeville*, 409 U.S. 57 (1972).

160. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). See *Rose*, 478 U.S. at 577 (1986) ("The State of course must provide a trial before an impartial judge . . ." (citations omitted)). FED. R. CRIM. P. 42(b), which provides for contempt orders when the alleged contempt occurs outside the judge's presence, holds: "[i]f the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent."

161. FED. R. CRIM. P. 42(a).

162. 18 U.S.C. § 2331(e) (1988 & Supp. III 1991).

163. FED. R. CRIM. P. 42(a).

164. See U.S. CONST. art. III, § 2; U.S. CONST. amend. VI.

165. *United States v. Barnett*, 376 U.S. 681, 692-700 (1964).

166. *Id.* at 696-97 (quoting *Eilenbecker v. District Court*, 134 U.S. 31, 36 (1890)).

167. See, e.g., *Blanton v. North Las Vegas*, 489 U.S. 538 (1989); *Muniz v. Hoffman*, 422 U.S. 454, 475-76 (1975).

168. 376 U.S. 681 (1964).

contempt,¹⁶⁹ and stated: “where so many cases in both federal and state jurisdictions by such a constellation of eminent jurists over a century and a half’s span teach us a principle which is without contradiction in our case law, we cannot overrule it.”¹⁷⁰

The history pervading summary criminal contempt, however, does not extend to § 2331. Apart from anomalies such as a court’s contempt power, history clearly supports the right to a jury.

England, from which the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury. This right has become as much American as it was once the most English In the ultimate analysis, only the jury can strip a man of his liberty or his life.¹⁷¹

Certification in § 2331 replaces a jury determination of terrorist intent just as it replaces a judicial determination of that intent.¹⁷² Accordingly, § 2331 probably violates the Sixth Amendment to the same extent that it violates the Fifth Amendment.¹⁷³ Both lines of attack are open, and both depend upon the same arguments.¹⁷⁴

IV. CONCLUSION

This paper attempted to show that certification in § 2331 violates both the letter and spirit of the Constitution, and, by comparing it to other examples of certification, to explain precisely why it is unconstitutional. Part I argued that terrorist intent is an element of the crime prohibited by § 2331, and so requires proof beyond a reasonable doubt (or, alternatively, that certification violates separation-of-powers doctrine). Part II tried to show that certification in § 2331 resulted from a desire to avoid having to prove the admittedly difficult issue of terrorist intent. It argued that as a matter of constitutional law and policy, legislatures should not be allowed to structure their criminal statutes with the intent to avoid *Winship*. Part III evoked the particular features of certification in § 2331 which made it unconstitutional.

Beyond the implications which certification has for § 2331, however, it also speaks more generally to the Supreme Court’s burden-shifting cases.¹⁷⁵ Certification should force the Court to stop avoiding the issues which surround *Winship* and fashion some real criteria for distinguishing “necessary” from “unnecessary”

169. *Id.* at 694 & n.12.

170. *Id.* at 699. See *Muniz*, 422 U.S. at 475 (1975) (noting “the historic rule that state and federal courts have the constitutional power to punish any criminal contempt without a jury trial.” (citations omitted)).

171. *Irvin v. Dowd*, 366 U.S. 717, 721-22 (1961). See *Carella v. California*, 491 U.S. 263, 268 (1988) (Scalia, J., concurring) (“The constitutional right to a jury trial embodies ‘a profound judgment about the way in which law should be enforced and justice administered.’” (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968))).

172. H.R. CONF. REP. NO. 783, 99th Cong., 2d Sess. 88 (1986).

173. See *McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986) (“In light of the foregoing [discussion of due process], petitioners’ final claim — that the Act denies them their Sixth Amendment right to a trial by jury — merits little discussion.”).

174. See *id.*

175. See *supra* note 24.

facts.¹⁷⁶ So far, the Court has assumed that its vague pronouncements would “not lead to such abuses . . . that a new constitutional rule was required.”¹⁷⁷ Certification undermines that assumption, and adds new urgency to the claim that “it is completely foreign to this Court’s responsibility for constitutional adjudication to limit the scope of judicial review because of the expectation . . . that legislative bodies will exercise appropriate restraint.”¹⁷⁸

Real rules are overdue. If legislative power to rewrite criminal laws has any limits — if the legacy of *Winship* is to be other than “an exercise in arid formalities”¹⁷⁹ — then the limits must be articulated. The veiled warning that “there are limits . . . beyond which [legislatures] may not go,”¹⁸⁰ in burden-shifting amounts to no warning at all. It merely reserves in the Court some discretion to announce limiting rules at a later date. Certification shows that the time for such rules has come.

Certification also shows that the rule which the Court adopts should address the legislative process as well as the legislative result.¹⁸¹ For certification in § 2331 was pernicious just because it resulted from an effort to get around *Winship*, and was detectable as such only by reference to its legislative history. The Court must adopt a rule which governs how legislatures may attack crime through law.

The Court has several alternatives from which to chose.¹⁸² (1) “[W]henver the [legislature] distinguishes crimes or sentences based on an articulated factor, that factor must be proven beyond a reasonable doubt by the prosecution.”¹⁸³ (2) “[I]f a [legislature] provides that a specific component of a prohibited transaction shall give rise to both a special stigma and to a special punishment,”¹⁸⁴ that component must be proven beyond a reasonable doubt. (3) The same test as (2), above, plus a requirement that “in the Anglo-American legal tradition the factor in question historically has” given rise to such a stigma and punishment.¹⁸⁵

These three positions all attempt to serve as rule-like proxies for the fundamental policy rationale underlying *Winship*, “the requirement of proof beyond a reasonable doubt in a criminal case [is] bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”¹⁸⁶ In society’s test of criminal guilt, the Constitution regards false positives as worse than false negatives. With this background in mind, the Court should choose the standard which, in its view, best protects the

176. See *In re Winship*, 397 U.S. 358, 364 (1970).

177. *Patterson v. New York*, 432 U.S. 197, 211 (1977).

178. *Id.* at 224 n.8 (Powell, J., dissenting).

179. *Id.* at 224 (Powell, J., dissenting).

180. *Id.* at 209-10.

181. Cf. Jeffries & Stephan, *supra* note 78 (proposing a substantive, Eighth-Amendment approach to implementing *Winship*).

182. Cf. Allen, *supra* note 25, at 1148-49.

183. *Id.* at 1148 (footnote omitted).

184. *McMillan v. Pennsylvania*, 477 U.S. 79, 94 (1986) (Stevens, J., dissenting).

185. *Patterson v. New York*, 432 U.S. 197, 226 (Powell, J., dissenting) (footnotes omitted). A fourth possibility, which is substantive, rather than procedural, would be a requirement of “proof beyond a reasonable doubt of facts sufficient to justify penalties of the sort contemplated.” Jeffries & Stephan, *supra* note 78, at 1365.

186. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

innocent without overly protecting the guilty, which best ensures that "guilt shall not escape nor innocence suffer."¹⁸⁷

Although the differences between the three standards appear subtle, the choice of one rather than another will make some difference. For example, Justice Powell, the author of the dissents in *Patterson v. New York*,¹⁸⁸ and *Martin v. Ohio*,¹⁸⁹ voted with the majority to uphold the Pennsylvania law in *McMillan v. Pennsylvania*.¹⁹⁰ Similarly, certification in § 2331 would surely fail test (1), probably fail test (2), and possibly pass test (3) above.¹⁹¹

But the main point is that the Court must pick *some* rule. The differences between the rules are outweighed by the similarity which they share in contrast to the current state of affairs: they articulate an administrable standard of judicial review of legislative action. Lower courts, legislatures, lawyers, and society all need a way to understand the permissible uses of burden-shifting. The Court must give us a "conceptual framework for distinguishing abuses from legitimate legislative adjustments of the burden of persuasion in criminal cases."¹⁹²

Of course whatever the constitutional rule adopted, legislatures will not rewrite their criminal laws wholesale to evade the commands of *Winship*.¹⁹³ Certification and its ilk will likely be reserved for those special cases where the crime in question is perceived as an especially serious threat. Yet when the nation's ire is provoked, as it was by terrorism in 1985, legislatures, as democratic bodies, may follow passion rather than reason. The Justices must be on guard for such moments, and must formulate rules to protect against them.¹⁹⁴

187. See *supra* text accompanying note 1.

188. 432 U.S. 197, 216 (1977). Justice Powell also wrote the majority opinion striking down the Maine law in *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

189. 480 U.S. 228, 236 (1987).

190. 477 U.S. 79 (1986).

191. The reason for this is that terrorist intent as defined in § 2331, like the visible possession of a handgun in *McMillan*, is arguably (or at least possibly) not something that has historically given rise to special punishment and stigma in Anglo-American law.

192. *Patterson*, 432 U.S. at 225 (Powell, J., dissenting).

193. See *McMillan*, 477 U.S. at 101-02 (Stevens, J., dissenting).

194. See JOHN H. ELY, *DEMOCRACY AND DISTRUST* (1980) quoted in *McMillan*, 477 U.S. 102 n.5 (Stevens, J., dissenting).

