



# Terrorist Material Support: An Overview of 18 U.S.C. 2339A and 2339B

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## Summary

The material support statutes, 18 U.S.C. 2339A and 2339B, have been among the most frequently prosecuted federal anti-terrorism statutes. Section 2339A outlaws:

- (1)(a) attempting to,
  - (b) conspiring to, or
  - (c) actually
- (2)(a) providing material support or resources, or
  - (b) concealing or disguising
    - (i) the nature,
    - (ii) location,
    - (iii) source, or
    - (iv) ownershipof material support or resources
- (3) knowing or intending that they be used
  - (a) in preparation for,
  - (b) in carrying out,
  - (c) in preparation for concealment of an escape from, or
  - (d) in carrying out the concealment of an escape from
- (4) an offense identified as a federal crime of terrorism.

Section 2339B outlaws:

- (1)(a) attempting to provide,
  - (b) conspiring to provide, or
  - (c) actually providing
- (2) material support or resources
- (3) to a foreign terrorist organization
- (4) knowing that the organization
  - (a) has been designated a foreign terrorist organization, or
  - (b) engages, or has engaged, in “terrorism” or “terrorist activity.”

The sections use a common definition for the term “material support or resources:” any service or tangible or intangible property. The Supreme Court recently held that the forms of material support in the challenge before it were not unconstitutionally vague nor was their proscription inconsistent with the First Amendment’s freedom of speech and freedom of association requirements. Violations of either section are punishable by imprisonment for not more than 15 years. Although neither section creates a civil cause of action for victims, treble damages and attorneys fees may be available for some victims under 18 U.S.C. 2333. Section 2339B has two extraterritorial jurisdiction provisions. One is general (there is extraterritorial jurisdiction over an offense under this section) and the other descriptive (there is extraterritorial jurisdiction over an offender under this section if the offender is a U.S. national, etc.). Section 2339A has no such provisions, but is likely applicable at a minimum when an offender or victim is a U.S. national; the offense has an impact in the United States; the offense is committed against U.S. national interests; or the offense is universally condemned. This report is available in an abridged version as CRS Report R41334, *Terrorist Material Support: A Sketch of 18 U.S.C. 2339A and 2339B*.

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## Introduction

The two federal material support statutes have been at the heart of the Justice Department's terrorist prosecution efforts.<sup>1</sup> One provision outlaws providing material support for the commission of certain designated offenses that might be committed by terrorists, 18 U.S.C. 2339A.<sup>2</sup> The other outlaws providing material support to certain designated terrorist organizations, 18 U.S.C. 2339B. They share a common definition of the term "material support," some aspects of which have recently come under constitutional attack.

## Background

Since their inception in the mid-1990s, Congress has periodically expanded and sought to clarify the scope of sections 2339A and 2339B. It enacted Section 2339A with little fanfare as part of a wide-ranging crime package, the Violent Crime Control and Law Enforcement Act of 1994.<sup>3</sup> Almost immediately thereafter, Congress amended Section 2339A and supplemented it with Section 2339B as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>4</sup> As the House committee report explained it, new Section 2339B reflects a recognition of

the fungibility of financial resources and other types of material support. Allowing an individual to supply funds, goods, or services to an organization, or to any of its subgroups, that draw significant funding from the main organization's treasury, helps defray the costs to

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<sup>1</sup> *A Review of the Material Support to Terrorism Prohibition Improvements Act: Hearing Before the Subcomm. on Terrorism, Technology and Homeland Security*, 109<sup>th</sup> Cong., 1<sup>st</sup> Sess. 45 (2005)(statement of Barry Sabin, Chief, Counterterrorism Section, U.S. Dept. of Justice); *Implementation of the USA PATRIOT Act: Prohibition of Material Support Under Sections 805 of the USA PATRIOT Act and 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004*, 109<sup>th</sup> Cong., 1<sup>st</sup> Sess. 18 (2005)(statement of Barry Sabin, Chief, Counterterrorism Section, U.S. Dept. of Justice); Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIFORNIA LAW REVIEW 693, 723 (2009)("The most important of these statutes is 18 U.S.C. §2339B.... [R]arely enforced before 9/11, it has since become a principal tool in the Justice Department's 'terrorism' prosecutions").

<sup>2</sup> The text of 18 U.S.C. 2339A and 2339B is appended.

<sup>3</sup> P.L. 103-322, §120005, 108 Stat. 2022 (1994). The Violent Crime Control Act was a three hundred and fifty-five page amalgam of legislative proposals consisting of thirty-three separate titles which included Cop on the Beat grants, the Violence Against Women Act, revival of the death penalty as a federal sentencing alternative, a ban on assault weapons, DNA identification, and crime victims rights. Its various components had been the subject of two dozen House committee reports, listed in 1994 U.S.C.A.N. 1801 (1994), none which appear to have addressed Section 2339A. The section, however, had been included in much the same language in separate legislative proposals offered by members of both parties in both Houses, see e.g., H.R. 1301, §110 (Representative Schumer); H.R. 2847, §702 (Representative Sensenbrenner); H.R. 2872, §421 (Representative McCullom); H.R. 1313 (Representative Brooks); S. 8, §702 (Senator Hatch); S. 1488, §726 (Senator Biden).

<sup>4</sup> P.L. 104-132, §§323, 303, 110 Stat. 1255, 1250, respectively. The Section 323 amendments to Section 2339A enlarged its predicate offense list to include 18 U.S.C. 37 (violence at international airports), 81 (arson), 175 (biological weapons), 831 (nuclear weapons), 842(m) and (n) (plastic explosives), 1362 (destruction of communications facilities), 2155 and 2156 (destruction, or defective production, of war materials), 2332 (terrorist violence against Americans overseas), 2332a (weapons of mass destruction), and 2332b(multi-national terrorism). Later in the year, Congress added three other crimes to Section 2339A's predicate offense list: 18 U.S.C. 930(c) (use of a firearm during a murderous attack on a federal facility), 1992 (train wrecking), and 2332c (chemical weapons), P.L. 104-294, §601(b)(2), (s)(2), (s)(3), 110 Stat. 3502, 3506 (1996).

the terrorist organization of running the ostensibly legitimate activities. This in turn frees an equal sum that can then be spent on terrorist activities.<sup>5</sup>

The USA PATRIOT Act amended both sections, increasing the maximum term of imprisonment from 10 to 15 years (and to life imprisonment when commission of the offense resulted in death); adding “expert advice or assistance” to forms of proscribed material support or resources; and subjecting attempts and conspiracies to violate Section 2339A to the same maximum penalties as the substantive violation of the section.<sup>6</sup>

The Intelligence Reform and Terrorism Prevention Act of 2004 amended the definition of “material support or resources” that applies to both sections.<sup>7</sup> The specific forms of support that had been used to define the term became examples of a more general definition which covers “any property, tangible or intangible, or service,” 18 U.S.C. 2339A(b)(1). Clarifying definitions of the examples “training” and “expert advice or assistance,” were added, as was a clarifying explanation of the term “personnel” as used in Section 2339B, 18 U.S.C. 2339A(b)(2), (3), 2339B(h). At the same time, the predicate offense list of Section 2339A was expanded to cover any of the federal crimes of terrorism, 18 U.S.C. 2339A(a).

## **Support of Designated Terrorist Organizations (18 U.S.C. 2339B)**

In its present form, Section 2339B outlaws:

- (1)(a) attempting to provide,  
(b) conspiring to provide, or  
(c) actually providing
- (2) material support or resources
- (3) to a foreign terrorist organization
- (4) knowing that the organization
  - (a) has been designated a foreign terrorist organization, or
  - (b) engages, or has engaged, in “terrorism” or “terrorist activity.”

### **Attempt, Conspiracy, Aiding and Abetting**

Attempt is the unfulfilled commission of an underlying offense. If the attempt is successful, the offender cannot be prosecuted or punished for both the completed offense and the attempt to commit it.<sup>8</sup> Attempt has two elements: (1) an intent to commit the underlying offense; and (2)

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<sup>5</sup> H.Rept. 104-383, 81 (1995). AEDPA also eliminated a restriction on Section 2339A investigations which the report characterized as “effectively negat[ing] the efficacy of 2339A,” id. at 82.

<sup>6</sup> P.L. 107-56, §§810(c), (d), 811(d), 115 Stat. 380, 381 (2001). At the time, attempts and conspiracies to violate Section 2339B were already subject to the same maximum penalty as the underlying substantive offense, 18 U.S.C. 2339B (2000 ed.).

<sup>7</sup> P.L. 108-458, §6603, 118 Stat. 3762 (2004). The amendments, initially temporary, were made permanent in the USA PATRIOT Act Improvement and Reauthorization Act, P.L. 109-177, §104, 120 Stat. 195 (2006).

<sup>8</sup> *United States v. Rivera-Relle*, 333 F.3d 914, 921 n.11 (9<sup>th</sup> Cir. 2003).

some substantial step towards its completion.<sup>9</sup> Mere preparation is not enough.<sup>10</sup> “To constitute a substantial step, a defendant’s actions must cross the line between preparation and attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances.”<sup>11</sup> It is no defense that, unbeknownst to the defendant, commission of the underlying offense was impossible, as for example because he was dealing with government undercover agents rather than agents of a foreign terrorist organization.<sup>12</sup> An attempt to provide material support in violation of Section 2339B and actually providing such assistance are punished the same: imprisonment for not more than 15 years (for any term of years or life, if death results from the commission of the offense), and/or a fine of not more than \$250,000 (not more than \$500,000 for an organization)(or not more than twice the amount of gain or loss associated with the offense).<sup>13</sup>

Conspiracy to provide material support in violation of Section 2339B is the agreement to provide such support.<sup>14</sup> The offense is complete upon assent; the support need only be planned, not delivered.<sup>15</sup> Moreover, each of the conspirators is liable not only for the conspiracy, but for any other foreseeable offense committed by any of the conspirators in furtherance of the overall scheme.<sup>16</sup> Like attempt, conspiracy to provide material support carries the same penalties as the completed substantive offense: imprisonment for not more than 15 years (for any term of years or life, if death results from the commission of the offense), and/or a fine of not more than \$250,000 (not more than \$500,000 for an organization)(or not more than twice the amount of gain or loss associated with the offense).<sup>17</sup> Unlike attempt, conspirators may be punished for both conspiracy and for actually providing material support should their scheme succeed.<sup>18</sup>

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<sup>9</sup> *Braxton v. United States*, 500 U.S. 344, 349 (1991); *United States v. Bristol-Martir*, 570 F.3d 29, 39 (1<sup>st</sup> Cir. 2009).

<sup>10</sup> *United States v. Barlow*, 568 F.3d 215, 219 (5<sup>th</sup> Cir. 2009); *United States v. DeMarce*, 564 F.3d 989, 998 (8<sup>th</sup> Cir. 2009).

<sup>11</sup> *United States v. Mincoff*, 574 F.3d 1186, 1195 (9<sup>th</sup> Cir. 2009); *United States v. Morris*, 549 F.3d 548, 550 (7<sup>th</sup> Cir. 2008).

<sup>12</sup> *United States v. Rehak*, 589 F.3d 965, 970-71 (8<sup>th</sup> Cir. 2009); *United States v. Coté*, 504 F.3d 682, (7<sup>th</sup> Cir. 2007); cf., *United States v. Lakhani*, 480 F.3d 171, 174-77 (3d Cir. 2007).

<sup>13</sup> 18 U.S.C. 2339B(a), 3571.

<sup>14</sup> *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003)(“the essence of a conspiracy is an agreement to commit an unlawful act”)(here and hereafter internal citations and quotation marks have been omitted unless otherwise indicated); *United States v. Lockett*, 601 F.3d 837, (8<sup>th</sup> Cir. 2010)(“In order to convict a defendant of conspiracy, the government must prove (1) the existence of an agreement to achieve an illegal purpose, (2) the defendant’s knowledge of the agreement, and (3) the defendant’s knowing participation in the agreement. The agreement does not have to be a formal, explicit agreement; a tacit understanding will suffice”); *United States v. Boria*, 592 F.3d 476, 481 (3d Cir. 2010); see generally CRS Report R41223, *Federal Conspiracy Law: A Brief Overview*, by Charles Doyle.

<sup>15</sup> *United States v. Rehak*, 589 F.3d 965, 971 (8<sup>th</sup> Cir. 2009); *United States v. Schaffer*, 586 F.3d 414, 422 (6<sup>th</sup> Cir. 2009).

<sup>16</sup> *Pinkerton v. United States*, 328 U.S. 640, 647 (1946); *United States v. Nerkubi*, 592 F.3d 22, 29 (1<sup>st</sup> Cir. 2010); *United States v. Wardell*, 591 F.3d 1279, 1291 (10<sup>th</sup> Cir. 2009).

<sup>17</sup> 18 U.S.C. 2339B(a), 3571.

<sup>18</sup> *Iannelli v. United States*, 420 U.S. 770, 777-78 (1975); *United States v. Chandia*, 514 F.3d 365, 372 (4<sup>th</sup> Cir. 2008)(“We also disagree with Chandia’s argument that Congress did not intend to authorize multiple punishments for a conspiracy and a substantive violation under §2339B. Chandia’s argument is based on the language of the statute, which prohibits the conspiracy and the actual provision of material support in the same section. See 18 U.S.C. §2339B(a)(1). (“Whoever knowingly provides material support ... or attempts or conspires to do so ...”). But, as the Supreme Court has held, the “settled principle” that “the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses” does not give way simply because the statute describing the substantive offense also specifically prohibits conspiracies. *Callanan v. United States*, 364 U.S. 587, 593 (1961)”).

Under the provisions of 18 U.S.C. 2, anyone who counsels, procures, aids, or abets a violation of Section 2339B or any other federal crime is punishable as though he had committed the offense himself. “In order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, [and] that he seek by his action to make it succeed.”<sup>19</sup> “Typically, the same evidence will support both a conspiracy and an aiding and abetting conviction.”<sup>20</sup> Unlike conspiracy, however, liability under section 2 only attaches if someone else commits the substantive offense.<sup>21</sup>

## Material Support

The precise scope of the term “material support or resources” for purposes of Section 2339B proved controversial almost from the beginning. The section uses the definition found in Section 2339A(b) and thus covers “any property, tangible or intangible, or service,” 18 U.S.C. 2339B(g)(4). The term excludes medicine and religious materials, but includes

- currency or monetary instruments or financial securities,
- financial services,
- lodging,
- training (i.e., instruction or teaching designed to impart a specific skill, as opposed to general knowledge),
- expert advice or assistance (i.e., advice or assistance derived from scientific, technical, or other specialized knowledge),
- safehouses,
- false documentation or identification,
- communications equipment, facilities,
- weapons,
- lethal substances,
- explosives,
- personnel (one or more individuals who may be or include oneself), and
- transportation.<sup>22</sup>

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<sup>19</sup> *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949); *United States v. Turner*, 583 F.3d 1062, 1067 (8<sup>th</sup> Cir. 2009).

<sup>20</sup> *United States v. Rodriguez*, 553 F.3d 380, 391 (5<sup>th</sup> Cir. 2008).

<sup>21</sup> *United States v. Liera*, 585 F.3d 1237, 1246 (9<sup>th</sup> Cir. 2009) (“the aiding and abetting theory required the jury to find that: (1) someone committed the underlying offense; and (2) that Liera aided and abetted its commission”); *United States v. Tagg*, 572 F.3d 1320, 1324 (11<sup>th</sup> Cir. 2009) (“To prove guilty under a theory of aiding and abetting, the Government must prove: (1) the substantive offense was committed by someone; (2) the defendant committed an act which contributed to and furthered the offense; and (3) the defendant intended to aid in its commission”); *United States v. Gonzalez*, 570 F.3d 16, 28-9 (1<sup>st</sup> Cir. 2009).

<sup>22</sup> 18 U.S.C. 2339A(b)(2) and (b)(3) supply respectively the precise definitions of “training” and “expert advice or assistance” noted above.

Section 2339B also has a more explicit description of personnel covered by its proscription, which confines the term to those provided to a foreign terrorist organization to direct its activities or to work under its direction or control.<sup>23</sup>

Shortly after the creation of Section 2339B, groups seeking to support the nonviolent activities of two designated terrorist organizations sought to enjoin enforcement against them.<sup>24</sup> Among other things, they argued that prohibitions against providing “personnel” or “training” were unconstitutionally vague and might extend to things like advocating the organizations’ interests before the U.N. Commission on Human Rights, petitioning Members of Congress on their behalf, seeking the release of political prisoners, or training the organizations’ members on the use of international law to resolve political disputes peacefully.<sup>25</sup> The district court concluded that they demonstrated sufficient likelihood of the success on the merits to warrant issuance of a preliminary injunction.<sup>26</sup> The Court of Appeals for the Ninth Circuit agreed.<sup>27</sup>

When Congress amended the definition of material support in the USA PATRIOT Act to include the provision of “expert advice or assistance” to designated terrorist organizations,<sup>28</sup> the groups again sought to enjoin enforcement.<sup>29</sup> Again, the district court agreed the term was unconstitutionally vague, noting that “like the terms ‘personnel’ and ‘training,’ ‘expert advice and assistance’ could be construed to include unequivocally pure speech and advocacy protected by the First Amendment or to encompass First Amendment protected activities.”<sup>30</sup>

Then Congress sought to clarify the definition in the Intelligence Reform and Terrorism Protection Act.<sup>31</sup> It recast the definition into its current form, with explanatory additions for the terms “personnel,” “training,” and “expert advice or assistance.”<sup>32</sup> The Ninth Circuit vacated its earlier decisions and returned the case to the district court for further consideration in light of the amendments.<sup>33</sup>

The statute fared only slightly better on remand. The district court felt the amendments clarified the term “personnel” so that it was no longer unconstitutionally vague, but the amendments did not cure the defects it had previously seen in the terms “training” and “expert advice or assistance,” a defect compounded by the introduction of the term “service” into the definition.<sup>34</sup>

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<sup>23</sup> 18 U.S.C. 2339B(h) (“No person may be prosecuted under this section in connection with the term “personnel” unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction and control”).

<sup>24</sup> *Humanitarian Law Project v. Reno*, 9 F.Supp.2d 1176 (C.D.Cal. 1998).

<sup>25</sup> *Id.* at 1203-204.

<sup>26</sup> *Id.* at 1204-205.

<sup>27</sup> *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9<sup>th</sup> Cir. 2000).

<sup>28</sup> P.L. 107-56, §805(a)(2), 115 Stat. 377 (2001).

<sup>29</sup> *Humanitarian Law Project v. Ashcroft*, 309 F.Supp.2d 1185 (C.D.Cal. 2004).

<sup>30</sup> *Id.* at 1200-201.

<sup>31</sup> P.L. 108-458, §6603, 118 Stat. 3762 (2004).

<sup>32</sup> 18 U.S.C. 2339B(h), 2339A(b)(2), (3).

<sup>33</sup> *Humanitarian Law Project v. United States Department of Justice*, 393 F.3d 902 (9<sup>th</sup> Cir. 2004).

<sup>34</sup> *Humanitarian Law Project v. Gonzales*, 380 F.Supp.2d 1134, 1150-153 (C.D.Cal. 2005)(emphasis of the court) (“[T]he Court finds that ‘training’ fails to satisfy the enhanced requirement of clarity for statutes touching upon (continued...)”).

The Ninth Circuit again agreed.<sup>35</sup> “[L]imiting the definition of the term ‘training’ to the ‘imparting of skills’ does not cure unconstitutional vagueness because, so defined, the term ‘training’ could still be read to encompass speech and advocacy protected by the First Amendment.”<sup>36</sup> As for “expert advice or assistance,” the Court noted that “[a]t oral argument, the government stated that filing an amicus brief in support of a foreign terrorist organization would violate AEDPA’s prohibition against providing ‘expert advice or assistance.’ Because the ‘other specialized knowledge’ portion of the ban on providing ‘expert advice or assistance’ continues to cover constitutionally protected advocacy, we hold that it is void for vagueness.”<sup>37</sup> Finally, like the district court, the Ninth Circuit found the term “service” unconstitutionally vague “because the statute defines ‘service’ to include ‘training’ or ‘expert advice or assistance,’ and because it is easy to imagine protected expression that falls within the bounds’ of the term ‘service.’”<sup>38</sup>

Vagueness challenges by defendants in other federal courts were largely unsuccessful, primarily either because the support involved clearly fell within the definition of proscribed personnel or expert advice or assistance,<sup>39</sup> or because the support involved money or some type of support other than personnel, training, or expert advice or assistance.<sup>40</sup> On September 30, 2009, the Supreme Court granted certiorari to review the Ninth Circuit’s decision.<sup>41</sup>

On June 21, 2010, the Supreme Court reversed.<sup>42</sup> It found that the Ninth Circuit had inappropriately merged vagueness and First Amendment concerns.<sup>43</sup> Section 2339B survived scrutiny under each of those challenges when considered separately.<sup>44</sup> A statute is impermissibly

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(...continued)

protected activities under the First Amendment.... The IRTPA amendments define ‘expert advice or assistance’ as ‘scientific, technical, *or other specialized knowledge*.... Similar to the Court’s discussion of ‘training’ above, ‘expert advice or assistance’ remains impermissibly vague because ‘specialized knowledge’ includes the same protected activities that ‘training’ covers, such as teaching international law for peacemaking resolutions or how to petition the United Nations to seek redress for human rights violations.... The Court finds that the undefined term ‘service’ in the IRTPA is impermissibly vague, as the statute defines ‘service’ to include ‘training’ or ‘expert advice or assistance,’ terms the Court has already ruled are vague. Like ‘training’ and ‘expert advice or assistance,’ it is easy to imagine protected expression that falls within the bounds of the term ‘service’”).

<sup>35</sup> *Humanitarian Law Project v. Mukasey*, 552 F.3d 916 (9<sup>th</sup> Cir. 2009), cert. granted sub nom., *Humanitarian Law Project v. Holder*, 130 S.Ct. 48 (2009).

<sup>36</sup> *Id.* at 929.

<sup>37</sup> *Id.* at 930.

<sup>38</sup> *Id.*

<sup>39</sup> *United States v. Taleb-Jedi*, 566 F.Supp.2d 157, 181-82 (E.D.N.Y. 2008)(defendant who worked in the terrorist organization’s political department provided personnel within the meaning of Section 2339B); *United States v. Warsame*, 537 F.Supp.2d 1005, 1018 (D.Minn. 2008)(defendant participated in al Qaeda training camp provided personnel); *United States v. Shah*, 474 F.Supp.2d 492, 497 n.5 (S.D.N.Y. 2007)(the doctor who treated al Qaeda wounded jihadists provided personnel and expert assistance); *United States v. Marzook*, 383 F.Supp.2d 1056, 1066 (N.D.Ill. 2005)(defendant directed another to perform several tasks for the benefit of terrorist organization including scouting targets for possible attacks).

<sup>40</sup> *United States v. Assi*, 414 F.Supp.2d 707, 718 (E.D.Mich. 2006)(defendant provided equipment, i.e., “weapons” and “other physical assets”); *United States v. Hammoud*, 381 F.3d 316, 331 (4<sup>th</sup> Cir. 2004)(“There is nothing at all vague about the term ‘currency’ [which is what the defendant provided the terrorist organization]”); see also *United States v. Lindh*, 212 F.Supp.2d 541, 574 (E.D.Va. 2002)(“The Ninth Circuit’s vagueness holding in *Humanitarian Law Project* [prior to the 2004 amendments] is neither persuasive nor controlling”).

<sup>41</sup> *Holder v. Humanitarian Law Project*, 130 S.Ct. 48 (2009).

<sup>42</sup> *Holder v. Humanitarian Law Project*, 78 U.S.L.W. 4625(U.S. June 21, 2010)

<sup>43</sup> *Id.* at 4630.

<sup>44</sup> As a threshold matter, the Court rejected the suggestion that it avoid the constitutional issues by construing the (continued...)

vague when “it fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”<sup>45</sup> When a statute is clearly applicable to the conduct at issue, it is to no avail that its application may be unclear under other circumstances.<sup>46</sup>

The Court held that Section 2339B is not unconstitutionally vague as applied to the type of support at issue—coordinated advocacy on behalf of a terrorist organization and training such organization’s members to use international law to resolve disputes and to petition the United Nations and other similar entities for relief.<sup>47</sup> A reasonable person would realize that such training constitutes providing “expert advice or assistance ... derived from ... specialized knowledge,” and that such advocacy, when coordinated or directed by a terrorist organization, constitutes providing a service to such an organization.<sup>48</sup>

As for free speech, Congress may outlaw material support to a terrorist organization in the form of speech of the type at issue without offending the First Amendment. The government has a compelling interest in the suppression of terrorism. Training and coordinated support in the form of advocacy of a terrorist organization’s lawful activities frees resources to service illicit activities; lends legitimacy to the organization; and may strain diplomatic relations with the countries against whom the organization’s terrorist activities may be directed.<sup>49</sup> In the case at hand, “[a] foreign terrorist organization introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt.”<sup>50</sup> An organization guide to and through the avenues to international relief might secure relief in the form of fungible monetary aid.<sup>51</sup>

Finally, the Court confirmed rejection of the group’s freedom of association argument; the section outlaws conduct, not membership.<sup>52</sup>

## **Other Constitutional Challenges**

The constitutional challenges of Section 2339B on other grounds have been rejected in virtually every instance.

### **Overbreadth**

At first glance, if various forms of “material support” are considered vague because they sweep in both protected and unprotected speech, then it would seem they should be considered overly

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(...continued)

section to outlaw only that support provided with the intent to further an organization’s terrorist aims, *id.* at 4629. The language of the section simply precluded any such construction, *id.*

<sup>45</sup> *Id.*, quoting *United States v. Williams*, 553 U.S. 285, 304 (2008).

<sup>46</sup> *Id.* citing *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982).

<sup>47</sup> *Id.* at 4631.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 4632-634.

<sup>50</sup> *Id.* at 4635-636.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 4636.

broad for the same reason. It is true that a “showing that a law punishes a ‘substantial’ amount of protected free speech, judged in relation to the statute’s plainly legitimate sweep, suffices to invalidate all enforcement of that law.”<sup>53</sup> The Supreme Court emphasized in *Virginia v. Hicks*, however, that a challenged statute’s “application to protected speech must be ‘substantial’ not only in an absolute sense, but also relative to the scope of the law’s plainly legitimate applications, before applying the strong medicine of overbreadth invalidation.”<sup>54</sup>

The Ninth Circuit and each of the other courts to consider the issue have agreed that the various forms of proscribed material support do not include a substantial amount of protected speech when compared to the amount of unprotected speech and conduct which the terms legitimately reach.<sup>55</sup>

## **Due Process**

Closely related to the First Amendment freedom of association argument is a due process “absence of guilty intent” argument. The Supreme Court has said that due process restricts the extent to which the sins of an organization may be attributed to its members.<sup>56</sup> Due process, however, permits punishment “when the statute is found to reach only ‘active’ members having also a guilty knowledge and intent ... which therefore prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action.”<sup>57</sup>

Some have argued that this means either that due process renders Section 2339B inoperable or that conviction is only possible when the accused knew and intended that his support would be used for the unlawful purposes of the designated terrorist organization.<sup>58</sup> By and large, the courts have found the argument unpersuasive. Some do so because Section 2339B punishes conduct, not mere membership.<sup>59</sup> Others do so because the section requires knowledge that the accused either knew the beneficiary was a designated terrorist organization or knew that it engaged in terrorism.

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<sup>53</sup> *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003).

<sup>54</sup> *Id.* at 119-20.

<sup>55</sup> *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 931-32 (9<sup>th</sup> Cir. 2009); *United States v. Hammoud*, 381 F.3d 316, 329-30 (4<sup>th</sup> Cir. 2004); *United States v. Taleb-Jedi*, 566 F.Supp.2d 157, 184-85 (E.D.N.Y. 2008); *United States v. Warsame*, 537 F.Supp.2d 1005, 1016 (D. Minn. 2008); *United States v. Assi*, 414 F.Supp.2d 707, 716 (E.D.Mich. 2006).

<sup>56</sup> *Scales v. United States*, 367 U.S. 203, 224-25 (1961) (“In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow [of the U.S. government]), that relationship must be sufficiently substantial to satisfy the concept of personal guilty in order to withstand attack under the Due Process Clause of the Fifth Amendment. Membership, without more, in an organization engaged in illegal advocacy, it is now said, has not heretofore been recognized by this Court to be such a relationship”).

<sup>57</sup> *Id.* at 228.

<sup>58</sup> *United States v. Kassir*, 582 F.Supp.2d 488, 498 (S.D.N.Y. 2008) (“Defendants contend that because Section 2339B does not require a showing of specific intent to further the illegal activities of a foreign terrorist organization, it violates the due process clause of the Fifth Amendment”).

<sup>59</sup> *Id.*; *United States v. Warsame*, 537 F.Supp.2d 1005, 1015 (D.Minn. 2008); *United States v. Marzook*, 383 F.Supp.2d 1056, 1067 (N.D.Ill. 2005)

This, they believe, “satisfies the requirement of ‘personal guilty’ and eliminates any due process concerns.”<sup>60</sup>

Finally, Section 2339B defendants suffer no due process deprivation simply because they may not challenge the terrorist designation of their beneficiary.<sup>61</sup>

## **Terrorist Organizations**

Providing material support is only a crime under 2339B if the known beneficiary is a foreign terrorist organization. That is, the government must show either that (1) the defendant knows that the organization has been designated a foreign terrorist organization or (2) the defendant knows that the organization is or has engaged in “terrorism” or in “terrorist activities.”

### **Designated Terrorist Organizations.**

The process under which the Secretary of State designates an entity a foreign terrorist organization is authorized in Section 219 of the Immigration and Nationality Act, 8 U.S.C. 1189. Under the procedure, an organization may challenge its designation, 8 U.S.C. 1189(a)(4)(B), and the Secretary may revoke the designation, 8 U.S.C. 1189(a)(6). The organization may appeal the Secretary’s decision to the United States Court of Appeals for the District of Columbia, 8 U.S.C. 1189(c). A defendant, charged with providing material support to an organization, however, may not challenge the designation.<sup>62</sup>

### ***Organizations Engaged in Terrorism or Terrorist Activities***

Organizations that the accused knew engaged in “terrorism” or “engaged in terrorist activities” constitute a second class of banned beneficiaries. “Terrorism” for purposes of Section 2339B is simply “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”<sup>63</sup>

The definition of an organization that “engages in terrorist activities” is more multi-faceted. For such purposes of Section 2339B, “the term ‘engage in terrorist activity’ means, in an individual capacity or as a member of an organization—

- (I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

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<sup>60</sup> *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 926 (9<sup>th</sup> Cir. 2009); *United States v. Taleb-Jedi*, 566 F.Supp.2d 157, 179 (E.D.N.Y. 2008). Prior to the 2004 amendment which added the knowledge requirement to Section 2339B, one court, in order to avoid the section constitutionally suspect on due process grounds, construed it to require proof that the defendant knew “the recipient could or would utilize the support to further the illegal activities of the entity,” *United States v. Al-Arian*, 329 F.Supp.2d 1294, 1298-1300 (M.D.Fla. 2004).

<sup>61</sup> *United States v. Afshari*, 426 F.3d 1150, 1155-159 (D.C.Cir. 2005); *United States v. Hammoud*, 381 F.3d 316, 331 (4<sup>th</sup> Cir. 2004); *United States v. Warsame*, 537 F.Supp.2d at 1023; *United States v. Marzook*, 383 F.Supp.2d 1056, 1071-72 (N.D.Ill. 2005); *United States v. Al-Arian*, 329 F.Supp.2d at 1343-346.

<sup>62</sup> 8 U.S.C. 1189(a)(8); *United States v. Afshari*, 426 F.3d 1150, 1155-159 (9<sup>th</sup> Cir. 2005); *United States v. Hammoud*, 381 F.3d 316, 331 (4<sup>th</sup> Cir. 2004).

<sup>63</sup> “Terrorism” is defined by cross reference to section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, P.L. 100-204, 101 Stat. 1349 (1987), 22 U.S.C. 2656(f)(d)(2).

- (II) to prepare or plan a terrorist activity;
- (III) to gather information on potential targets for terrorist activity;
- (IV) to solicit funds or other things of value for -
  - (aa) a terrorist activity;
  - (bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or
  - (cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;
- (V) to solicit any individual—
  - (aa) to engage in conduct otherwise described in this subsection;
  - (bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or
  - (cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or
- (VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—
  - (aa) for the commission of a terrorist activity;
  - (bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;
  - (cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or
  - (dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.”<sup>64</sup>

In the Immigration and Nationality Act, and thus for purposes of Section 2339B, “the term ‘terrorist activity’ means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

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<sup>64</sup> “Engage in terrorist activity” is defined by cross reference to section 212(a)(3)(B), 8 U.S.C. 1182(a)(3)(B), of the Immigration and Nationality Act, which defines the term in subparagraph (iv).

- (I) The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).
- (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.
- (III) A violent attack upon an internationally protected person (as defined in Section 1116(b)(4) of Title 18) or upon the liberty of such a person.
- (IV) An assassination.
- (V) The use of any—
  - (a) biological agent, chemical agent, or nuclear weapon or device, or
  - (b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.
- (VI) A threat, attempt, or conspiracy to do any of the foregoing.<sup>65</sup>

## **Consequences of Charge or Conviction**

Conviction for a violation of Section 2339B is punishable by imprisonment for not more than 15 years (for any period of years or for life if death results from commission of the offense) and/or a fine of not more than \$250,000 (not more than \$500,000 for an organizational defendant). Strictly speaking, the U.S. Sentencing Guidelines are not binding. Yet, they are an indispensable part any sentencing decision.<sup>66</sup> The Sentencing Guidelines contain a special terrorism enhancement that, if it applies, can have the effect of requiring a sentence at the statutory maximum, because it calls for a minimum sentencing range that exceeds the statutory maximum of 15 years. The terrorism enhancement Guideline, Section 3A1.4, establishes a minimum offense level of 32 with a criminal history category of VI for a felony offense that “involved, or was intended to promote, a federal crime of terrorism.” The Guideline sentencing range of a crime with an offense level of 32 and a criminal history category of VI is 210 to 262 months (17.5 to 21.8 years) imprisonment.<sup>67</sup> Since the maximum term of imprisonment for violations of Section 2339B is 15 years and since a Sentencing Guideline sentence may not exceed the statutory maximum, the Guidelines call for a court to impose the statutory maximum.<sup>68</sup>

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<sup>65</sup> “Terrorist activity” is defined by cross reference to section 212(a)(3)(B), 8 U.S.C. 1182(a)(3)(B), of the Immigration and Nationality Act, which defines the term in subparagraph (iii).

<sup>66</sup> A sentencing must begin by correctly calculating the applicable sentencing range under the Sentencing Guidelines; should it elect to impose a sentence outside the Guideline range, it must demonstrate why it is reasonable for it to do so, *United States v. Stewart*, 590 F.3d 93, 134 (2d Cir. 2009).

<sup>67</sup> U.S.S.G. Sentencing Table.

<sup>68</sup> U.S.S.G. §5G1.1(a) (“Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence”); *United States v. Warsame*, 651 F.Supp.2d 978, 981 (D. Minn. 2009) (“The parties agreed, however, to the application a twelve-level enhancement pursuant to U.S.S.G. §3A1.4.... In light of these determinations, Warsame’s guidelines sentencing range was 292 to 365 (continued...)”).

The application of the terrorism Guideline requires either that the offense of conviction constitutes a federal crime of terrorism or that the offense of conviction was intended to promote a federal crime of terrorism.<sup>69</sup> An offense qualifies as a federal crime of terrorism if it satisfies two conditions.<sup>70</sup> The crime must be one listed as a federal crime of terrorism in 18 U.S.C. 2332b(g)(5)(B). Section 2339B is listed. Second, the crime must be “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government action,” 18 U.S.C. 2332b(g)(5)(A).

## **Federal Crime of Terrorism**

Classification as a federal crime of terrorism has several other consequences. Property derived from or used in the commission of such an offense is subject to confiscation, 18 U.S.C. 981(a)(1)(G). Federal crimes of terrorism are by definition predicate offenses for purposes of federal money laundering and RICO prosecutions.<sup>71</sup> Prosecution of a Section 2339B offense is subject to an eight-year statute of limitations, rather than the general five-year period.<sup>72</sup> An accused charged with a violation of a federal crime of terrorism faces an enhanced prospect of pre-trial detention.<sup>73</sup> A defendant convicted for violation of a federal crime of terrorism may be subject to a life-time term of supervised release, rather than the general five-year maximum term.<sup>74</sup>

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(...continued)

months. U.S.S.G. Ch.5, Pt.A. Because his single count of conviction carries a statutory maximum of 180 months [15 years], however, see 18 U.S.C. 2339B(a)(1), 180 months became his advisory guideline sentence”).

<sup>69</sup> *United States v. Stewart*, 590 F.3d at 137 (“The enhancement is not limited, however, to offenses that are themselves federal crimes of terrorism. By including the “intended to promote” language, the drafters of the guidelines unambiguously cast a broad net. The criminal conduct at issue need not itself meet the statutory definition of a federal crime of terrorism if a goal or purpose of the defendant’s act was to bring or help bring into being a crime listed in 18 U.S.C. 2332b(g)(5)(B)”); *United States v. Arnaout*, 431 F.3d 994, 1000-1001 (7<sup>th</sup> Cir. 2005)(“The district court found §3A1.4 did not apply because Arnaout was not convicted of a federal crime of terrorism as defined by 18 U.S.C. 2332b(g)(5)(B). We disagree.... We find that a defendant need not be convicted of a federal crime of terrorism as defined by 18 U.S.C. 2332b(g)(5)(B) for the district court to apply §3A1.4. Instead, the terrorism enhancement is applicable where a defendant is convicted of a federal crime of terrorism as defined by 18 U.S.C. 2332b(g)(5)(B) or where the district court finds that the purpose or intent of the defendant’s substantive offense of conviction or relevant conduct was to promote a federal crime of terrorism as defined by 18 U.S.C. 2332b(g)(5)(B)”).

<sup>70</sup> U.S.S.G. §3A1.4, cmt. 1 (“For purposes of this guideline, ‘federal crime of terrorism’ has the meaning given that term in 18 U.S.C. §2332b(g)(5)”); *United States v. Stewart*, 590 F.3d at 137; *United States v. Chandia*, 514 F.3d 365, 375-76 (4<sup>th</sup> Cir. 2008).

<sup>71</sup> 18 U.S.C. 1956(c)(7)(D), 1961(1)(G). Among other things, the federal racketeering statute prohibits conducting, through the patterned commission of more than one predicate offense, the affairs of an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1962, 1961. Among other things, the principal federal money laundering statute prohibits engaging in a financial transaction involving the proceeds of a predicate offense that is designed to launder the proceeds or to use them promote further predicate offenses, 18 U.S.C. 1956(a)(1), (c)(7).

<sup>72</sup> 18 U.S.C. 3286(a), 3282. Prosecution of a federal crime of terrorism may be brought at any time if the offenses involve the risk of serious bodily injury, 18 U.S.C. 3286(b).

<sup>73</sup> 18 U.S.C. 3142(f)(1)(A), (g)(1).

<sup>74</sup> 18 U.S.C. 3583(j), (b).

## Extraterritorial Jurisdiction

As a general rule, U.S. criminal law is territorial, unless Congress indicates otherwise.<sup>75</sup> Congress has used one of two methods to signal overseas application of a criminal statute. In some instances, it states in general terms that a particular statute will have extraterritorial application.<sup>76</sup> In others, it describes the circumstances under which a criminal proscription will have extraterritorial application.<sup>77</sup>

A general declaration of overseas application relies upon the principles of international law under which a claim of extraterritorial jurisdiction might be recognized. Those principles are usually referred to as:

- the territorial principle (crimes that occur in or have an effect in a country's territory);
- the nationality principle (crimes committed by a country's nationals);
- the passive personality principle (crimes committed against a country's nationals);
- the protective principle (crimes that have an impact on a country's national interests); and
- the universal principle (crimes which are universally condemned).<sup>78</sup>

Section 2339B has both a descriptive and a general statement of extraterritorial jurisdiction. The general statement declares, "There is extraterritorial Federal jurisdiction over an offense under this section," 18 U.S.C. 2339B(d)(2). The descriptive statement provides, "There is jurisdiction over an offense under subsection (a) if—

(A) an offender is a national of the United States ... or an alien lawfully admitted for permanent residence in the United States ... ;

(B) an offender is a stateless person whose habitual residence is in the United States;

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

(D) the offense occurs in whole or in part within the United States;

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<sup>75</sup> *Smith v. United States*, 507 U.S. 197, 203 (1993); *Small v. United States*, 544 U.S. 385, 388-89 (2005); see generally *Extraterritorial Application of American Criminal Law*, CRS Rept. 94-166.

<sup>76</sup> 18 U.S.C. 351(i) (crimes committed against Members of Congress)("There is extraterritorial jurisdiction over the conduct prohibited by this section"); 18 U.S.C. 2381 (treason)("Whoever ... within the United States or elsewhere... ").

<sup>77</sup> 18 U.S.C. 175(a)(biological weapon offenses)("There is extraterritorial Federal jurisdiction over an offense under this section committed by or against a national of the United States"); 18 U.S.C. 1203(b) (hostage taking)("It is not an offense under this section if the conduct required for the offense occurred outside the United States unless – (A) the offender or the person seized or detained is a national of the United States; (B) the offender is found in the United States; or (C) the governmental organization sought to be compelled is the Government of the United States").

<sup>78</sup> *United States v. Corey*, 232 F.3d 1166, 1179 (9<sup>th</sup> Cir. 2000); *United States v. Bin Laden*, 92 F.Supp.2d 189, 195-96 (S.D.N.Y. 2000).

(E) the offense occurs in or affects [U.S.] interstate or foreign commerce; or

(F) an offender aids or abets any person over whom jurisdiction exists under this paragraph in committing an offense under subsection (a) or conspires with any person over whom jurisdiction exists under this paragraph to commit an offense under subsection (a),” 18 U.S.C. 2339B(d)(1).

The general statement has been part of the section since its inception.<sup>79</sup> The descriptive statement appeared as part of the Intelligence Reform and Terrorism Prevention Act of 2004.<sup>80</sup> The legislative history of the 2004 act provides no explanation of why the apparently overlapping descriptive statement was thought necessary.<sup>81</sup> Had the general statement been dropped at the time, it would be clear Congress intended extraterritorial application to be confined to situations found in the descriptive statement. The inclusion of both suggests Congress intended extraterritorial application in any situation that falls within either provision.

## Civil Actions

Section 2339B(c) authorizes the Attorney General or the Secretary of the Treasury to bring a civil suit in district court to enjoin violation of the section.

Although neither Section 2339B nor Section 2339A creates a private civil cause of action, 18 U.S.C. 2333 authorizes such suits for those injured in their person, property, or business by an act of international terrorism.<sup>82</sup> The courts have concluded that the violations of sections 2339A or 2339B may constitute “acts of international terrorism” for purposes of Section 2333.<sup>83</sup> They do so by construing violations of Section 2339A or 2339B as acts of “international terrorism” as defined in 18 U.S.C. 2331(1).<sup>84</sup>

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<sup>79</sup> P.L. 104-132, §303, 110 Stat. 1250 (1996), 18 U.S.C. 2339B(d)(2000 ed.).

<sup>80</sup> P.L. 108-458, §6603(d), 118 Stat. 3763 (2004).

<sup>81</sup> H.Rept. 108-724, Pt. V, at 172-73; Pt. VI, at 173-74 (2004).

<sup>82</sup> 18 U.S.C. 2332(a)(“Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorneys fees”).

<sup>83</sup> *Boim v. Quranic Literacy Institute*, 291 F.3d 1000, 1015 (7<sup>th</sup> Cir. 2002)(“If the plaintiffs could show that [the defendants] violated either Section 2339A or 2339B, that conduct would certainly be sufficient to meet the definition of ‘international terrorism’ under sections 2333 and 2331.... Congress has made clear, though, through the criminal liability imposed in sections 2339A and 2339B, that even small donations made knowingly and intentionally in support of terrorism may meet the standard for civil liability in section 2333”); *Goldberg v. UBS AG*, 609 F.Supp.2d 92, 114 (E.D. N.Y. Mar. 5, 2010)(“Following the Seventh Circuit’s lead, numerous authorities have similarly interpreted section 2331(1), citing inter alia, *Weiss v. National Westminster Bank PLC*, 453 F.Supp.2d 609, 613 (E.D.N.Y. 2006); *Almog v. Arab Bank, PLC*, 471 F.Supp.2d 257, 268 (E.D.N.Y. 2007); see also *Abecassis v. Wyatt*, F.Supp.2d \_\_\_, \_\_\_ (S.D.Tex. Mar. 31, 2010); *In re Chiquita Brands International, Inc.*, 690 F.Supp.2d 1296, 1309 (S.D.Fla. 2010); *In re Terrorist Attacks*, 392 F.Supp.2d 539, 564-65(S.D.N.Y. 2005).

<sup>84</sup> *Boim v. Holy Land Foundation*, 549 F.3d 685, 690 (7<sup>th</sup> Cir. 2008)(en banc)(“The first panel opinion discussed approvingly an alternative and more promising ground for bringing donors to terrorist organizations within the grasp of section 2333. The ground involves a chain of explicit statutory incorporations by reference. The first link in the chain is the statutory definition of ‘international terrorism’ as ‘activities that ... involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States,’ that ‘appear to be intended ... to intimidate or coerce a civil population’ or ‘affect the conduct of a government by ... assassination, and that ‘transcend national boundaries in terms of the means by which they are accomplished’ or persons they appear intended to intimidate or coerce.’ 18 (continued...)”).

## Reporting Requirements

Section 2339B(a)(2) requires financial institutions to report assets held for a foreign terrorist organization to the Secretary of the Treasury. Failure to do so subjects the institution to a civil penalty of the greater of \$50,000 or twice the value of the assets involved, 18 U.S.C. 2339B(b).

## Protection of Classified Information

Section 2339B(f) establishes a procedure for the protection of classified information during the course of civil proceedings, complete with authority for interlocutory appeals by the government.

## Support of Terrorism (18 U.S.C. 2339A)

Where Section 2339B outlaws support of terrorist organizations, Section 2339A outlaws support for the crimes a terrorist has committed or may be planning to commit. Section 2339B designates terrorist organizations; Section 2339A designates terrorist crimes. More precisely, Section 2339A outlaws:

- (1)(a) attempting to,
  - (b) conspiring to, or
  - (c) actually
  
- (2)(a) providing material support or resources, or
  - (b) concealing or disguising
    - i. the nature,
    - ii. location,
    - iii. source, or
    - iv. ownershipof material support or resources
- (3) knowing or intending that they be used
  - (a) in preparation for,
  - (b) in carrying out,
  - (c) in preparation for concealment of an escape from, or
  - (d) in carrying out the concealment of an escape from
- (4) an offense identified as a federal crime of terrorism.<sup>85</sup>

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(...continued)

U.S.C. §2331(1). Section 2331...includes not only violent acts but also ‘acts dangerous to human life that are violation of the criminal laws of the United States. Giving money to Hamas, like giving a loaded gun to a child (which also is not a violent act), is an ‘act dangerous to human life.’ And it violates ... 18 U.S.C. §2339A(a), which provides that ‘whoever provides material support or resources ... knowing or intending that they are to be used in preparation for, or in carrying out, of a violation of [e.g.,][18 U.S.C. 2332],’ shall be guilty of a federal crime. So we go to 18 U.S.C. §2332 and discover that it criminalizes the killing [of] ... any American citizen outside the United States. By this chain of incorporations by reference (section 2332(as) to section 2331(1) to Section 2339A to section 2332), we see that a donation to a terrorist group that targets Americans outside the United States may violate section 2333”); *Goldberg v. UBS AG*, 690 F.Supp.2d at 113 (“[S]ections 2339A and 2339B make clear Congress’ intent that the intentional (or reckless) provision of material support to a terrorist organization fulfills each prong of section 2331(1)’s definition of ‘international terrorism,’ and therefore suffice to establish liability under section 2333(a)”).

<sup>85</sup> More exactly, Section 2339A(a) declares, “Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be (continued...)”

## Attempt, Conspiracy, and Aiding and Abetting

The law of attempt, conspiracy, and aiding and abetting is the same for sections 2339A and 2339B. As we said of Section 2339B, in the case of Section 2339A, attempt is the unfulfilled commission of an underlying offense. If the attempt is successful, the offender cannot be prosecuted or punished for both the completed offense and the attempt to commit it.<sup>86</sup> Attempt has two elements: (1) an intent to commit the underlying offense; and (2) some substantial step towards its completion.<sup>87</sup> Mere preparation is not enough.<sup>88</sup> “To constitute a substantial step, a defendant’s actions must cross the line between preparation and attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances.”<sup>89</sup> It is no defense that, unbeknownst to the defendant, commission of the underlying offense was impossible, as for example because he was dealing with government undercover agents rather than agents of a foreign terrorist organization.<sup>90</sup> An attempt to provide material support in violation of Section 2339B and actually providing such assistance are punished the same: imprisonment for not more than 15 years (for any term of years or life, if death results from the commission of the offense), and/or a fine of not more than \$250,000 (not more than \$500,000 for an organization)(or not more than twice the amount of gain or loss associated with the offense).<sup>91</sup>

Conspiracy to provide material support in violation of Section 2339B is the agreement to provide such support.<sup>92</sup> The offense is complete upon assent; the support need only be planned, not delivered.<sup>93</sup> Moreover, each of the conspirators is liable not only for the conspiracy, but for any other foreseeable offense committed by any of the conspirators in furtherance of the overall

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(...continued)

used in preparation for, or in carrying out, a violation of section 32, 37, 81, 175, 229, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, or 2340A of this title, section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), section 46502 or 60123(b) of Title 49, or any offense listed in section 2332b(g)(5)(B) (except for sections 2339A and 2339B) or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life....” Each of the individually listed sections, such as 18 U.S.C. 32, is also among the listed federal crimes of terrorism. A full list of the federal crimes of terrorism, with identifying captions, is appended.

<sup>86</sup> *United States v. Rivera-Relle*, 333 F.3d 914, 921 n.11 (9<sup>th</sup> Cir. 2003).

<sup>87</sup> *Braxton v. United States*, 500 U.S. 344, 349 (1991); *United States v. Bristol-Martir*, 570 F.3d 29, 39 (1<sup>st</sup> Cir. 2009).

<sup>88</sup> *United States v. Barlow*, 568 F.3d 215, 219 (5<sup>th</sup> Cir. 2009); *United States v. DeMarce*, 564 F.3d 989, 998 (8<sup>th</sup> Cir. 2009).

<sup>89</sup> *United States v. Mincoff*, 574 F.3d 1186, 1195 (9<sup>th</sup> Cir. 2009); *United States v. Morris*, 549 F.3d 548, 550 (7<sup>th</sup> Cir. 2008).

<sup>90</sup> *United States v. Rehak*, 589 F.3d 965, 970-71 (8<sup>th</sup> Cir. 2009); *United States v. Coté*, 504 F.3d 682, (7<sup>th</sup> Cir. 2007); cf., *United States v. Lakhani*, 480 F.3d 171, 174-77 (3d Cir. 2007).

<sup>91</sup> 18 U.S.C. 2339B(a), 3571.

<sup>92</sup> *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003) (“the essence of a conspiracy is an agreement to commit an unlawful act”); *United States v. Lockett*, 601 F.3d 837, (8<sup>th</sup> Cir. 2010) (“In order to convict a defendant of conspiracy, the government must prove (1) the existence of an agreement to achieve an illegal purpose, (2) the defendant’s knowledge of the agreement, and (3) the defendant’s knowing participation in the agreement. The agreement does not have to be a formal, explicit agreement; a tacit understanding will suffice”); *United States v. Boria*, 592 F.3d 476, 481 (3d Cir. 2010); see generally CRS Report R41223, *Federal Conspiracy Law: A Brief Overview*, by Charles Doyle.

<sup>93</sup> *United States v. Rehak*, 589 F.3d 965, 971 (8<sup>th</sup> Cir. 2009); *United States v. Schaffer*, 586 F.3d 414, 422 (6<sup>th</sup> Cir. 2009).

scheme.<sup>94</sup> Like attempt, conspiracy to provide material support carries the same penalties as the completed substantive offense: imprisonment for not more than 15 years (for any term of years or life, if death results from the commission of the offense), and/or a fine of not more than \$250,000 (not more than \$500,000 for an organization)(or not more than twice the amount of gain or loss associated with the offense).<sup>95</sup> Unlike attempt, conspirators may be punished for both conspiracy and for actually providing material support should be their scheme succeed.<sup>96</sup>

Under the provisions of 18 U.S.C. 2, anyone who counsels, procures, aids, or abets a violation of Section 2339A or any other federal crime is punishable as though he had committed the offense himself. “In order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, [and] that he seek by his action to make it succeed.”<sup>97</sup> “Typically, the same evidence will support both a conspiracy and an aiding and abetting conviction.”<sup>98</sup> Unlike conspiracy, however, liability under Section 2 only attaches if someone else commits the substantive offense.<sup>99</sup>

## Material Support

Section 2339A uses roughly the same definition of “material support” as does Section 2339B, but to a somewhat different effect. Both use the definition found in 2339A(b) which covers “any property, tangible or intangible, or service.”<sup>100</sup> The term excludes medicine and religious materials, but includes

- currency or monetary instruments or financial securities,
- financial services,
- lodging,

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<sup>94</sup> *Pinkerton v. United States*, 328 U.S. 640, 647 (1946); *United States v. Nerkubi*, 592 F.3d 22, 29 (1<sup>st</sup> Cir. 2010); *United States v. Wardell*, 591 F.3d 1279, 1291 (10<sup>th</sup> Cir. 2009).

<sup>95</sup> 18 U.S.C. 2339B(a), 3571.

<sup>96</sup> *Iannelli v. United States*, 420 U.S. 770, 777-78 (1975); *United States v. Chandia*, 514 F.3d 365, 372 (4<sup>th</sup> Cir. 2008)(“We also disagree with Chandia’s argument that Congress did not intend to authorize multiple punishments for a conspiracy and a substantive violation under §2339B. Chandia’s argument is based on the language of the statute, which prohibits the conspiracy and the actual provision of material support in the same section. See 18 U.S.C. §2339B(a)(1). (‘Whoever knowingly provides material support ... or attempts or conspires to do so ...’). But, as the Supreme Court has held, the ‘settled principle’ that ‘the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses’ does not give way simply because the statute describing the substantive offense also specifically prohibits conspiracies. *Callanan v. United States*, 364 U.S. 587, 593 (1961)’”).

<sup>97</sup> *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949); *United States v. Turner*, 583 F.3d 1062, 1067 (8<sup>th</sup> Cir. 2009).

<sup>98</sup> *United States v. Rodriguez*, 553 F.3d 380, 391 (5<sup>th</sup> Cir. 2008).

<sup>99</sup> *United States v. Liera*, 585 F.3d 1237, 1246 (9<sup>th</sup> Cir. 2009)(“the aiding and abetting theory required the jury to find that: (1) someone committed the underlying offense; and (2) that Liera aided and abetted its commission”); *United States v. Tagg*, 572 F.3d 1320, 1324 (11<sup>th</sup> Cir. 2009)(“To prove guilty under a theory of aiding and abetting, the Government must prove: (1) the substantive offense was committed by someone; (2) the defendant committed an act which contributed to and furthered the offense; and (3) the defendant intended to aid in its commission”); *United States v. Gonzalez*, 570 F.3d 16, 28-9 (1<sup>st</sup> Cir. 2009).

<sup>100</sup> 18 U.S.C. 2339A(b); 18 U.S.C. 2339B(g)(4).

- training (i.e., instruction or teaching designed to impart a specific skill, as opposed to general knowledge),
- expert advice or assistance (i.e., advice or assistance derived from scientific, technical or other specialized knowledge),
- safehouses,
- false documentation or identification,
- communications equipment, facilities,
- weapons,
- lethal substances,
- explosives,
- personnel (one or more individuals who may be or include oneself), and
- transportation.<sup>101</sup>

Section 2339B alone has a more explicit description of “personnel” covered by its proscription, which confines the term to those provided to a foreign terrorist organization to direct its activities or to work under its direction or control.<sup>102</sup> The omission of a comparable provision from Section 2339A has led one court to include within the term those provided to work in a coordinated way for preparation or commission of a federal crime of terrorism.<sup>103</sup>

Because Section 2339A requires that the support be given while knowing or intending that it be used in preparation for or in the commission of a specific terrorist offense, the section has survived the vagueness challenges that have troubled Section 2339B.<sup>104</sup>

## **Concealing or Disguising Material Support**

Section 2339A condemns either providing material support or concealing “the nature, location, source, or ownership” of such support. The provision has been part of Section 2339A from the beginning<sup>105</sup> and seems designed to reach the middle men or conduits between terrorists and their supporters. Expansion of the definition of material support to include services and the option of charging middle men with conspiracy or aiding and abetting may have rendered the provision

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<sup>101</sup> 18 U.S.C. 2339A(b)(2) and (b)(3) supply respectively the precise definitions of “training” and “expert advice or assistance” noted above.

<sup>102</sup> 18 U.S.C. 2339B(h) (“No person may be prosecuted under this section in connection with the term ‘personnel’ unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction and control”).

<sup>103</sup> *United States v. Abu-Jihaad*, 600 F.Supp.2d 362, 400 (D. Conn. 2009).

<sup>104</sup> *United States v. Stewart*, 590 F.3d 93, 117 (2d Cir. 2009); *United States v. Amawi*, 545 F.Supp.2d 681, 684 (N.D. Ohio 2008); *United States v. Abdi*, 498 F.Supp.2d 1048, 1058 (S.D. Ohio 2007).

<sup>105</sup> P.L. 103-322, §120005(a), 108 Stat. 2022 (1994), 18 U.S.C. 2339A (1994 ed.).

redundant. In any event, concealment charges seem to have thus far been confined to those who have also been charged with providing support.<sup>106</sup>

## **Use in Relation to a Federal Crime of Terrorism**

Section 2339A only outlaws activities related to one or more of the federal crimes of terrorism listed in 18 U.S.C. 2332b(g)(5)(B) (other than sections 2339A or 2339B). The crimes, mostly violent offenses, are those likely to be committed in a terrorist context. A few of the more than 40 crimes on the list, like 18 U.S.C. 1203 (hostage taking), have a specific terrorist element (e.g., committed to influence or retaliate for government action). Most, like 18 U.S.C. 81 (arson within a federal enclave), do not.<sup>107</sup>

The defendant must know or intend that the support will assist in the commission of a federal crime of terrorism. Since the section bans attempts, conspiracies, and support used in preparation for a federal crime of terrorism (as well as support for carrying out such a crime), a violation of Section 2339A may occur even if the anticipated federal crime of terrorism has not.<sup>108</sup> On the other hand, since the section also reaches support for concealment of an escape from a federal crime of terrorism, a violation of the section may occur even after the federal crime of terrorism.

Several of the federal crimes of terrorism statutes cover conspiracy to violate their provisions; for example, 18 U.S.C. 956 (conspiracy to commit certain violent crimes overseas). Although the law ordinarily does not permit prosecution of a conspiracy to conspire, the “[c]ourts have recognized that one conspiracy can serve as the predicate for another conspiracy when the ‘[overarching] conspiracy and the predicate conspiracy are distinct offenses with entirely different objectives.’”<sup>109</sup>

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<sup>106</sup> *United States v. Stewart*, 590 F.3d at 114 (“The government charged that the defendants provided ‘material support or resources’ in the form of ‘personnel’.... The government further asserted that Stewart and Yousry ‘conceal[ed] and disguise[d] the nature, location, and source’ of their material support by means of the defendants’ covert conduct”); *United States v. Hassoun*, 476 F.3d 1181, 1183-184 (11<sup>th</sup> Cir. 2007) (“Count Three charges the defendants with violating 18 U.S.C. §2339A(a) by providing material support and resources, and concealing and disguising the nature thereof, all with the knowledge and intent that the material support and resources be used in preparation for and carrying out a violation of §956”).

<sup>107</sup> 18 U.S.C. 2332b(g)(5) consists of two parts. One, section 2332b(g)(5)(A), includes within the definition of federal crimes of terrorism those offenses that are “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.” The second, section 2332b(g)(5)(B) includes within the definition any offense proscribed by one of the statutes listed there. The definition of federal crimes of terrorism for purposes of Section 2339A by cross reference to 2332b(g)(5)(B) suggests that a violation of Section 2339A need not involve the terrorism-related circumstances of (5)(A) except when a prosecution involves a (5)(B) offense that has such a requirement.

<sup>108</sup> *United States v. Hassoun*, 476 F.3d 1181, 1188 (11<sup>th</sup> Cir. 2007) (emphasis in the original) (“[T]he Government need not prove all the elements of §956 [conspiracy to commit certain violent crimes overseas], the object offense, in order to satisfy the elements of the substantive § 2339A charge. By its elements, §2339A criminalizes material support given ‘in preparation for’ the object offense – clearly, the object offense need not even have been completed yet, let alone proven as an element of the material support offense. To meet its burden under §2339A, the Government must at least prove that the defendants provided material support or resources *knowing that they be used in preparation* for the § 956 conspiracy”).

<sup>109</sup> *United States v. Khan*, 461 F.3d 477, 493 (4<sup>th</sup> Cir. 2006).

## Consequences of Charge or Conviction

Conviction for a violation of Section 2339A is punishable by imprisonment for not more than 15 years (for any period of years or for life if death results from commission of the offense) and/or a fine of not more than \$250,000 (not more than \$500,000 for an organizational defendant).

Although strictly speaking the U.S. Sentencing Guidelines are not binding, they weigh heavily in any sentencing decision.<sup>110</sup> The Sentencing Guidelines contain a special terrorism enhancement that, if it applies, can have the effect of requiring a sentence at the statutory maximum, because it calls for a minimum sentencing range that exceeds the statutory maximum of 15 years. The terrorism enhancement Guideline, Section 3A1.4, establishes a minimum offense level of 32 with a criminal history category of VI for a felony offense that “involved, or was intended to promote, a federal crime of terrorism.” The Guideline sentencing range of a crime with an offense level of 32 and a criminal history category of VI is imprisonment for from 210 to 262 months (17.5 to 21.8 years).<sup>111</sup> Since the maximum term of imprisonment for violations of Section 2339A is 15 years and since a Sentencing Guideline sentence may not exceed the statutory maximum, the Guidelines call for a court to impose the statutory maximum.<sup>112</sup>

The application of the terrorism Guideline requires either that the offense of conviction constitutes a federal crime of terrorism or that the offense of conviction was intended to promote a federal crime of terrorism.<sup>113</sup> An offense qualifies as a federal crime of terrorism if it satisfies two conditions.<sup>114</sup> The crime must be one listed as a federal crime of terrorism in 18 U.S.C. 2332b(g)(5)(B). Section 2339A is listed. Second, the crime must be “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government action,” 18 U.S.C. 2332b(g)(5)(A).

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<sup>110</sup> A sentencing must begin by correctly calculating the applicable sentencing range under the Sentencing Guidelines; should it elect to impose a sentence outside the Guideline range, it must demonstrate why it is reasonable for it to do so, *United States v. Stewart*, 590 F.3d 93, 134 (2d Cir. 2009).

<sup>111</sup> U.S.S.G. Sentencing Table.

<sup>112</sup> U.S.S.G. §5G1.1(a)(“Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence”); *United States v. Warsame*, 651 F.Supp.2d 978, 981 (D. Minn. 2009)(“The parties agreed, however, to the application a twelve-level enhancement pursuant to U.S.S.G. §3A1.4.... In light of these determinations, Warsame’s guidelines sentencing range was 292 to 365 months. U.S.S.G. Ch.5, Pt.A. Because his single count of conviction carries a statutory maximum of 180 months [15 years], however, ... 180 months became his advisory guideline sentence”).

<sup>113</sup> *United States v. Stewart*, 590 F.3d at 137 (“The enhancement is not limited, however, to offenses that are themselves federal crimes of terrorism. By including the “intended to promote” language, the drafters of the guidelines unambiguously cast a broad net. The criminal conduct at issue need not itself meet the statutory definition of a federal crime of terrorism if a goal or purpose of the defendant’s act was to bring or help bring into being a crime listed in 18 U.S.C. 2332b(g)(5)(B)”); *United States v. Arnaout*, 431 F.3d 994, 1000-1001 (7<sup>th</sup> Cir. 2005)(“The district court found §3A1.4 did not apply because Arnaout was not convicted of a federal crime of terrorism as defined by 18 U.S.C. 2332b(g)(5)(B). We disagree.... We find that a defendant need not be convicted of a federal crime of terrorism as defined by 18 U.S.C. 2332b(g)(5)(B) for the district court to apply §3A1.4. Instead, the terrorism enhancement is applicable where a defendant is convicted of a federal crime of terrorism as defined by 18 U.S.C. 2332b(g)(5)(B) or where the district court finds that the purpose or intent of the defendant’s substantive offense of conviction or relevant conduct was to promote a federal crime of terrorism as defined by 18 U.S.C. 2332b(g)(5)(B)”).

<sup>114</sup> U.S.S.G. §3A1.4, cmt. 1 (“For purposes of this guideline, ‘federal crime of terrorism’ has the meaning given that term in 18 U.S.C. §2332b(g)(5)”); *United States v. Stewart*, 590 F.3d at 137; *United States v. Chandia*, 514 F.3d 365, 375-76 (4<sup>th</sup> Cir. 2008).

## Federal Crime of Terrorism

Classification as a federal crime of terrorism has several other consequences. Property derived from or used in the commission of such an offense is subject to confiscation, 18 U.S.C. 981(a)(1)(G). Federal crimes of terrorism are by definition predicate offenses for purposes of federal money laundering and RICO prosecutions.<sup>115</sup> Prosecution of a Section 2339A offense is subject to an eight-year statute of limitations, rather than the general five-year period.<sup>116</sup> An accused charged with a violation of a federal crime of terrorism faces an enhanced prospect of pre-trial detention.<sup>117</sup> A defendant convicted for violation of a federal crime of terrorism may be subject to a life-time term of supervised release, rather than the general five-year maximum term.<sup>118</sup>

## Extraterritorial Jurisdiction

Unlike Section 2339B, Section 2339A has neither a general nor a descriptive statement of extraterritorial jurisdiction. Nevertheless, it seems likely that the courts would find its provisions applicable overseas for any of several reasons. First, extraterritorial jurisdiction is thought to apply to overseas accomplices to crimes with extraterritorial application.<sup>119</sup> Second, to confine application to purely domestic violations would likely frustrate congressional intent and the purpose for its enactment.<sup>120</sup> Third, violations would most likely be prosecuted under circumstances evidencing one or more of the principles that justify the exercise of federal jurisdiction under international law, for example, the offense has an impact in the U.S. (territorial principle); the offender is a U.S. national (nationality principle); the victim is a U.S. national (passive personality principle); the offense has an impact on U.S. national interests (protective principle); or the offense is universally condemned (universal principle).<sup>121</sup>

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<sup>115</sup> 18 U.S.C. 1956(c)(7)(D), 1961(1)(G). Among other things, the federal racketeering statute prohibits conducting, through the patterned commission of more than one predicate offense, the affairs of an enterprise whose activities affect interstate or foreign commerce, 18 U.S.C. 1962, 1961. Among other things, the principal federal money laundering statute prohibits engaging in a financial transaction involving the proceeds of a predicate offense when the transaction is designed to launder the proceeds or to use them to promote further predicate offenses, 18 U.S.C. 1956(a)(1), (c)(7).

<sup>116</sup> 18 U.S.C. 3286(a), 3282. Prosecution of a federal crime of terrorism may be brought at any time if the offense involves the risk of serious bodily injury, 18 U.S.C. 3286(b).

<sup>117</sup> 18 U.S.C. 3142(f)(1)(A), (g)(1).

<sup>118</sup> 18 U.S.C. 3583(j), (b).

<sup>119</sup> *United States v. Felix-Guiterrez*, 940 F.2d 1200, 1205 (9<sup>th</sup> Cir. 1991) (“We conclude that the crime of “accessory after the fact” gives rise to extraterritorial jurisdiction to the same extent as the underlying offense. That is, if the underlying substantive statute applies extraterritorially, the statute making it unlawful to assist another in avoiding apprehension, trial or punishment also applies extraterritorially when invoked in connection with an extraterritorial violation of the underlying statute.... We have inferred extraterritorial application of conspiracy statutes on the basis of a finding that the underlying substantive statutes reach extraterritorial offenses. We see no reason why a different rule should apply in accessory after the fact cases”).

<sup>120</sup> *United States v. Bowman*, 260 U.S. 94, 98 (1922) (Some offenses “are such that to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense”).

<sup>121</sup> *United States v. Clark*, 435 F.3d 1100, 1106 (9<sup>th</sup> Cir. 2006); *United States v. Yousef*, 327 F.3d 56, 90-1 (2d Cir. 2003); *United States v. McAllister*, 160 F.3d 1304, 1308 (11<sup>th</sup> Cir. 1998).

## Civil Actions

Repeating again the principles mutually applicable to sections 2339B and 2339A, we note that although neither Section 2339B nor Section 2339A creates a private civil cause of action, 18 U.S.C. 2333 authorizes such suits for those injured in their person, property, or business by an act of international terrorism.<sup>122</sup> The courts have concluded that the violations of sections 2339A or 2339B may constitute “acts of international terrorism” for purposes of Section 2333.<sup>123</sup> They do so by construing violations of Section 2339A or 2339B as acts of “international terrorism” as defined in 18 U.S.C. 2331(1).<sup>124</sup>

## Venue

Section 2339A asserts that venue is proper in “any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law,” 18 U.S.C. 2339A(a). The reach of this provision may be limited by Supreme Court decisions suggesting that venue over offenses committed within the United States is only proper in those districts in which the conduct element of the offense occurs.<sup>125</sup>

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<sup>122</sup> 18 U.S.C. 2332(a)(“Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorneys fees”).

<sup>123</sup> *Boim v. Quranic Literacy Institute*, 291 F.3d 1000, 1015 (7<sup>th</sup> Cir. 2002)(“If the plaintiffs could show that [the defendants] violated either Section 2339A or 2339B, that conduct would certainly be sufficient to meet the definition of ‘international terrorism’ under sections 2333 and 2331.... Congress has made clear, though, through the criminal liability imposed in sections 2339A and 2339B, that even small donations made knowingly and intentionally in support of terrorism may meet the standard for civil liability in section 2333”); *Goldberg v. UBS AG*, 690 F.Supp.2d 92, 114 (E.D. N.Y. 2010)(“Following the Seventh Circuit’s lead, numerous authorities have similarly interpreted section 2331(1), citing inter alia, *Weiss v. National Westminster Bank PLC*, 453 F.Supp.2d 609, 613 (E.D.N.Y. 2006); *Almog v. Arab Bank, PLC*, 471 F.Supp.2d 257, 268 (E.D.N.Y. 2007); see also *Abecassis v. Wyatt*, F.Supp.2d \_\_\_, \_\_\_ (S.D.Tex. Mar. 31, 2010); *In re Chiquita Brands International, Inc.*, 690 F.Supp.2d 1296, 1309 (S.D.Fla. 2010); *In re Terrorist Attacks*, 392 F.Supp.2d 539, 564-65(S.D.N.Y. 2005).

<sup>124</sup> *Boim v. Holy Land Foundation*, 549 F.3d 685, 690 (7<sup>th</sup> Cir. 2008)(en banc)(“The first panel opinion discussed approvingly an alternative and more promising ground for bringing donors to terrorist organizations within the grasp of section 2333. The ground involves a chain of explicit statutory incorporations by reference. The first link in the chain is the statutory definition of ‘international terrorism’ as ‘activities that ... involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States,’ that ‘appear to be intended ... to intimidate or coerce a civil population’ or ‘affect the conduct of a government by ... assassination, and that ‘transcend national boundaries in terms of the means by which they are accomplished’ or persons they appear intended to intimidate or coerce.’ 18 U.S.C. §2331(1). Section 2331...includes not only violent acts but also ‘acts dangerous to human life that are a violation of the criminal laws of the United States. Giving money to Hamas, like giving a loaded gun to a child (which also is not a violent act), is an ‘act dangerous to human life.’ And it violates ... 18 U.S.C. §2339A(a), which provides that ‘whoever provides material support or resources ... knowing or intending that they are to be used in preparation for, or in carrying out, of a violation of [e.g.,][18 U.S.C. 2332],’ shall be guilty of a federal crime. So we go to 18 U.S.C. §2332 and discover that it criminalizes the killing [of] ... any American citizen outside the United States. By this chain of incorporations by reference (section 2332(as) to section 2331(1) to Section 2339A to section 2332), we see that a donation to a terrorist group that targets Americans outside the United States may violate section 2333”); *Goldberg v. UBS AG*, 690 F.Supp.2d at 113 (E.D.N.Y. 2010)(“[S]ections 2339A and 2339B make clear Congress’ intent that the intentional (or reckless) provision of material support to a terrorist organization fulfills each prong of section 2331(1)’s definition of ‘international terrorism,’ and therefore suffice to establish liability under section 2333(a)”).

<sup>125</sup> *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999); *United States v. Cabrales*, 524 U.S. 1, 6-7 (1998).

## **Appendix A. 18 U.S.C. 2339A Predicate Offenses**

18 U.S.C. 32 (destruction of aircraft)

18 U.S.C. 37 (violence at international airports)

18 U.S.C. 81 (arson within a federal enclave)

18 U.S.C. 175 (biological weapons offenses)

18 U.S.C. 175b (unlawful possession biological materials)

18 U.S.C. 175c (smallpox virus offenses)

18 U.S.C. 229 (chemical weapons offenses)

18 U.S.C. 351 (murder, kidnaping, or assault upon Members of Congress, etc.)

18 U.S.C. 831(nuclear material offenses)

18 U.S.C. 832 (material support of foreign nuclear weapons program)

18 U.S.C. 842(m) or (n) (plastic explosives offenses)

18 U.S.C. 844(f) or (i) (bombing federal property or property in or affecting commerce)

18 U.S.C. 930(c) (homicide with dangerous weapon in a federal facility)

18 U.S.C. 956 (conspiracy to commit certain violent crimes overseas)

18 U.S.C. 1030(a)(1), (5)(A)(i) (certain computer fraud and abuse offenses)

18 U.S.C. 1114 (murder of a federal officer or employees)

18 U.S.C. 1116 (murder of a foreign dignitary)

18 U.S.C. 1203 (hostage taking)

18 U.S.C. 1361 (destruction of federal property)

18 U.S.C. 1362 (destruction of communications property)

18 U.S.C. 1363 (destruction of property within a federal enclave)

18 U.S.C. 1366 (destruction of an energy facility)

18 U.S.C. 1751 (murder, kidnaping or assault of the President, inter alia)

18 U.S.C. 1992 (violent attacks on mass transit)

- 18 U.S.C. 2155 (destruction of national defense material)
- 18 U.S.C. 2156 (production of defective national defense material)
- 18 U.S.C. 2280 (violence against maritime navigation)
- 18 U.S.C. 2281 (violence against maritime fixed platforms)
- 18 U.S.C. 2332 (violence against Americans overseas)
- 18 U.S.C. 2332a (weapons of mass destruction offenses)
- 18 U.S.C. 2332b (multinational terrorism)
- 18 U.S.C. 2332f (bombing public places or facilities)
- 18 U.S.C. 2332g (anti-aircraft offenses)
- 18 U.S.C. 2332h (radiological dispersal device offenses)
- 18 U.S.C. 2339 (harboring terrorists)
- 18 U.S.C. 2339A (material support of terrorist offenses)
- 18 U.S.C. 2339B (material support of designated terrorist organizations)
- 18 U.S.C. 2339C (financing of terrorism)
- 18 U.S.C. 2339D (receipt of foreign terrorist organization training)
- 18 U.S.C. 2340A (torture)
- 21 U.S.C. 960a (narco-terrorism)
- 42 U.S.C. 2122 (atomic weapons offenses)
- 42 U.S.C. 2284 (atomic weapons offenses)
- 49 U.S.C. 46502 (air piracy)
- 49 U.S.C. 46504 (2d sentence) (assault on a flight crew with a dangerous weapon)
- 49 U.S.C. 46505(b)(3) or (c) (explosive or incendiary devices, or endangerment of human life by means of weapons, on an aircraft within U.S. jurisdiction)
- 49 U.S.C. 46506 (homicide or attempted homicide aboard an aircraft within U.S. jurisdiction)
- 49 U.S.C. 60123(b) (destruction of gas pipeline facilities)

## **Appendix B. 18 U.S.C. 2339A (text)**

### **Providing material support to terrorists.**

**(a) Offense.** – Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of Section 32, 37, 81, 175, 229, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1091, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, 2340A or 2442 of this title, Section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), Section 46502 or 60123(b) of Title 49, or any offense listed in Section 2332b(g)(5)(B) (except for sections 2339A and 2339B) or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.

### **(b) Definitions.**– As used in this section –

**(1)** the term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials;

**(2)** the term "training" means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and

**(3)** the term "expert advice or assistance" means advice or assistance derived from scientific, technical or other specialized knowledge.

## Appendix C. 18 U.S.C. 2339B (text)

### Providing material support or resources to designated foreign terrorist organizations

#### (a) Prohibited activities. –

(1) **Unlawful conduct.** – Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in Section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in Section 140(d) (2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

(2) **Financial institutions.** – Except as authorized by the Secretary, any financial institution that becomes aware that it has possession of, or control over, any funds in which a foreign terrorist organization, or its agent, has an interest, shall –

(A) retain possession of, or maintain control over, such funds; and

(B) report to the Secretary the existence of such funds in accordance with regulations issued by the Secretary.

(b) **Civil penalty.** – Any financial institution that knowingly fails to comply with subsection (a)(2) shall be subject to a civil penalty in an amount that is the greater of –

(A) \$50,000 per violation; or

(B) twice the amount of which the financial institution was required under subsection (a)(2) to retain possession or control.

(c) **Injunction.** – Whenever it appears to the Secretary or the Attorney General that any person is engaged in, or is about to engage in, any act that constitutes, or would constitute, a violation of this section, the Attorney General may initiate civil action in a district court of the United States to enjoin such violation.

#### (d) Extraterritorial jurisdiction. –

(1) **In general.** – There is jurisdiction over an offense under subsection (a) if –

(A) an offender is a national of the United States (as defined in Section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)) or an alien lawfully admitted for permanent residence in the United States (as defined in Section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20));

(B) an offender is a stateless person whose habitual residence is in the United States;

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

(D) the offense occurs in whole or in part within the United States;

(E) the offense occurs in or affects interstate or foreign commerce; or

(F) an offender aids or abets any person over whom jurisdiction exists under this paragraph in committing an offense under subsection (a) or conspires with any person over whom jurisdiction exists under this paragraph to commit an offense under subsection (a).

**(2) Extraterritorial jurisdiction.** – There is extraterritorial Federal jurisdiction over an offense under this section.

**(e) Investigations.** –

**(1) In general.** – The Attorney General shall conduct any investigation of a possible violation of this section, or of any license, order, or regulation issued pursuant to this section.

**(2) Coordination with the Department of the Treasury.** – The Attorney General shall work in coordination with the Secretary in investigations relating to –

(A) the compliance or noncompliance by a financial institution with the requirements of subsection (a)(2); and

(B) civil penalty proceedings authorized under subsection (b).

**(3) Referral.** – Any evidence of a criminal violation of this section arising in the course of an investigation by the Secretary or any other Federal agency shall be referred immediately to the Attorney General for further investigation. The Attorney General shall timely notify the Secretary of any action taken on referrals from the Secretary, and may refer investigations to the Secretary for remedial licensing or civil penalty action.

**(f) Classified information in civil proceedings brought by the United States.** –

**(1) Discovery of classified information by defendants.** –

(A) **Request by United States.** – In any civil proceeding under this section, upon request made ex parte and in writing by the United States, a court, upon a sufficient showing, may authorize the United States to –

(i) redact specified items of classified information from documents to be introduced into evidence or made available to the defendant through discovery under the Federal Rules of Civil Procedure;

(ii) substitute a summary of the information for such classified documents; or

(iii) substitute a statement admitting relevant facts that the classified information would tend to prove.

**(B) Order granting request.** – If the court enters an order granting a request under this paragraph, the entire text of the documents to which the request relates shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

**(C) Denial of request.** – If the court enters an order denying a request of the United States under this paragraph, the United States may take an immediate, interlocutory appeal in accordance with paragraph (5). For purposes of such an appeal, the entire text of the documents to which the request relates, together with any transcripts of arguments made ex parte to the court in connection therewith, shall be maintained under seal and delivered to the appellate court.

**(2) Introduction of classified information; precautions by court.** –

**(A) Exhibits.** – To prevent unnecessary or inadvertent disclosure of classified information in a civil proceeding brought by the United States under this section, the United States may petition the court ex parte to admit, in lieu of classified writings, recordings, or photographs, one or more of the following:

- (i) Copies of items from which classified information has been redacted.
- (ii) Stipulations admitting relevant facts that specific classified information would tend to prove.
- (iii) A declassified summary of the specific classified information.

**(B) Determination by court.** – The court shall grant a request under this paragraph if the court finds that the redacted item, stipulation, or summary is sufficient to allow the defendant to prepare a defense.

**(3) Taking of trial testimony.** –

**(A) Objection.** – During the examination of a witness in any civil proceeding brought by the United States under this subsection, the United States may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible.

**(B) Action by court.** – In determining whether a response is admissible, the court shall take precautions to guard against the compromise of any classified information, including –

- (i) permitting the United States to provide the court, ex parte, with a proffer of the witness's response to the question or line of inquiry; and
- (ii) requiring the defendant to provide the court with a proffer of the nature of the information that the defendant seeks to elicit.

**(C) Obligation of defendant.** – In any civil proceeding under this section, it shall be the defendant's obligation to establish the relevance and materiality of any classified information sought to be introduced.

**(4) Appeal.** – If the court enters an order denying a request of the United States under this subsection, the United States may take an immediate interlocutory appeal in accordance with paragraph (5).

**(5) Interlocutory appeal.** –

**(A) Subject of appeal.** – An interlocutory appeal by the United States shall lie to a court of appeals from a decision or order of a district court –

**(i)** authorizing the disclosure of classified information;

**(ii)** imposing sanctions for nondisclosure of classified information; or

**(iii)** refusing a protective order sought by the United States to prevent the disclosure of classified information.

**(B) Expedited consideration.** –

**(i) In general.** – An appeal taken pursuant to this paragraph, either before or during trial, shall be expedited by the court of appeals.

**(ii) Appeals prior to trial.** – If an appeal is of an order made prior to trial, an appeal shall be taken not later than 14 days after the decision or order appealed from, and the trial shall not commence until the appeal is resolved.

**(iii) Appeals during trial.** – If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals –

**(I)** shall hear argument on such appeal not later than 4 days after the adjournment of the trial, excluding intermediate weekends and holidays;

**(II)** may dispense with written briefs other than the supporting materials previously submitted to the trial court;

**(III)** shall render its decision not later than 4 days after argument on appeal, excluding intermediate weekends and holidays; and

**(IV)** may dispense with the issuance of a written opinion in rendering its decision.

**(C) Effect of ruling.** – An interlocutory appeal and decision shall not affect the right of the defendant, in a subsequent appeal from a final judgment, to claim as error reversal by the trial court on remand of a ruling appealed from during trial.

**(6) Construction.** – Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States to protect against the disclosure of classified information, including the invocation of the military and State secrets privilege.

**(g) Definitions.** – As used in this section –

**(1)** the term "classified information" has the meaning given that term in Section 1(a) of the Classified Information Procedures Act (18 U.S.C. App.);

(2) the term "financial institution" has the same meaning as in Section 5312(a)(2) of Title 31, United States Code;

(3) the term "funds" includes coin or currency of the United States or any other country, traveler's checks, personal checks, bank checks, money orders, stocks, bonds, debentures, drafts, letters of credit, any other negotiable instrument, and any electronic representation of any of the foregoing;

(4) the term "material support or resources" has the same meaning given that term in Section 2339A (including the definitions of "training" and "expert advice or assistance" in that section);

(5) the term "Secretary" means the Secretary of the Treasury; and

(6) the term "terrorist organization" means an organization designated as a terrorist organization under Section 219 of the Immigration and Nationality Act.

**(h) Provision of personnel.** – No person may be prosecuted under this section in connection with the term "personnel" unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control.

**(i) Rule of construction.** – Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States.

**(j) Exception.** – No person may be prosecuted under this section in connection with the term "personnel", "training", or "expert advice or assistance" if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General. The Secretary of State may not approve the provision of any material support that may be used to carry out terrorist activity (as defined in Section 212(a)(3)(B)(iii) of the Immigration and Nationality Act).

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