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

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Updated December 8, 2016

Congressional Research Service
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www.crs.gov
R41333

CRS REPORT
Prepared for Members and
Committees of Congress

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) whoever
(2) [knowingly]
(3)(a) attempting to,
    (b) conspiring to, or
    (c) actually
(4)(a) providing material support or resources, or
    (b) concealing or disguising
        (i) the nature,
        (ii) location,
        (iii) source, or
        (iv) ownership of material support or resources
(5) 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
(6) an offense identified as a federal crime of terrorism.

Section 2339B outlaws:
(1) whoever
(2) knowingly
(3)(a) attempting to provide,
    (b) conspiring to provide, or
    (c) actually providing
(4) material support or resources
(5) to a foreign terrorist organization
(6) 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 in *Humanitarian Law Project* upheld Section 2339B, as applied, against challenges that it was unconstitutionally vague and inconsistent with the First Amendment's freedom of speech and freedom of association requirements. Violations of Section 2339A are punishable by imprisonment for not more than 15 years; violations of Section 2339B by imprisonment for not more than 20 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 it is likely applicable overseas at least in cases in which its predicate offenses have extraterritorial reach. 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*, by Charles Doyle.

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Introduction

The two federal material support statutes have been at the heart of the Justice Department's terrorist prosecution efforts.[1] One provision outlaws providing material support for the commission of certain designated offenses that might be committed by terrorists, 18 U.S.C. §2339A. The other outlaws providing material support to certain designated terrorist organizations, 18 U.S.C. §2339B. They largely share a common definition of the term "material support."

Background

Since their inception in the mid-1990s, Congress has periodically expanded and sought to clarify the scope of Sections 2339A and 2339B. Section 2339A passed with little fanfare as part of a wide-ranging crime package, the Violent Crime Control and Law Enforcement Act of 1994.[2] 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).[3] As the House committee report explained, new Section 2339B reflected 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 the terrorist organization of running the ostensibly legitimate activities. This in turn frees an equal sum that can then be spent on terrorist activities.[4]

In 2001, 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

[1] *A Review of the Material Support to Terrorism Prohibition Improvements Act: Hearing Before the Subcomm. on Terrorism, Technology and Homeland Security*, 109th Cong., 1st 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*, 109th Cong., 1st 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 CAL. L. REV. 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").

[2] P.L. 103-322, §120005, 108 Stat. 2022 (1994). The Violent Crime Control and Law Enforcement 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.C.A.N. 1801 (1994), none which appear to have addressed §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).

[3] P.L. 104-132, §§323, 303, 110 Stat. 1255, 1250, respectively. Section 323 amended Section 2339A to 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 §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).

[4] H.Rept. 104-383, 81 (1995). AEDPA also eliminated a restriction on §2339A investigations which the report characterized as "effectively negat[ing] the efficacy of §2339A," *id*. at 82.

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.[5]

The Intelligence Reform and Terrorism Prevention Act of 2004 amended the definition of "material support or resources" that applies to both sections.[6] 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."[7] 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. At the same time, the predicate offense list of Section 2339A was expanded to cover any of the federal crimes of terrorism.[8]

In 2009, Congress added genocide and recruiting child soldiers to Section 2339A's predicate offense list [9] and adjusted Section 2339B's deadlines for the government's interlocutory appeals relating to classified information.[10] In 2015, it increased the maximum penalty for violations of Section 2339B from imprisonment for not more than 15 years to imprisonment for not more than 20 years.[11]

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

Section 2339A outlaws support or concealing support for the crimes a terrorist has committed or may be planning to commit. More precisely, Section 2339A outlaws:

(1) whoever
(2) [knowingly]
(3)(a) attempts to,
    (b) conspires to, or
    (c) actually
(4)(a) provides material support or resources, or
    (b) conceals or disguises
        i. the nature,
        ii. location,
        iii. source, or
        iv. ownership
    of material support or resources
(5) knowing or intending that they be used
    (a) in preparation for,
    (b) in carrying out,

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

[6] 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).

[7] 18 U.S.C. §2339A(b)(1).

[8] 18 U.S.C. §2339A(a).

[9] P.L. 111-122, §3(d), 123 Stat. 3481-82 (2009), codified at 18 U.S.C. §2339A(a).

[10] P.L. 111-16, §§3(6), (3)7, 3(8), 123 Stat. 1608 (2009), codified at 18 U.S.C. §§2339B(f)(5)(B)(ii), (f)(5)(B)(iii)(I), (f)(5)(B)(iii)(III).

[11] P.L. 114-23, tit. VI, §704, 129 Stat. 300 (2015).

(c) in preparation for concealment of an escape from, or
(d) in carrying out the concealment of an escape from
(5) an offense identified as a federal crime of terrorism.[12]

Whoever

"Whoever" usually means any legal entity or individual.[13] The Dictionary Act declares that "In determining the meaning of any Act of Congress, unless the context indicates otherwise … the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[14] Courts have looked to the statute in order to construe federal criminal cases.[15] Moreover, federal law now generally holds that corporations are criminally liable for crimes committed by their officers, employees, or agents within the scope of their employment and for the benefit of the corporation,[16] although at common law corporations could not be held criminally liable.[17]

Knowingly

At common law, every crime consisted of two essentials, one mental (*mens rea*) and the other physical (*actus reus*).[18] As Justice Jackson explained, "[c]rime, as a compound concept, generally constituted only from the concurrence of an evil-meaning mind with an evil-doing hand."[19] Thereafter, legislative bodies, Congress included, from time to time created criminal offenses which had no mental component, no *mens rea*.[20] This occurred most often for regulatory, "public welfare" misconduct, misconduct that did not constitute a common law crime.[21] These offenses

[12] More exactly, §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 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 ... "

[13] See generally CRS Report R43293, *Corporate Criminal Liability: An Overview of Federal Law*, by Charles Doyle.

[14] 1 U.S.C. §1.

[15] *E.g.*, United States v. A & P Trucking Co., 358 U.S. 121, 123 (1958); United States v. Polizzi, 500 F.2d 856, 907 (9th Cir. 1974).

[16] United States v. Agosto-Vega, 617 F.3d 541, 552-53 (1st Cir. 2010); United States v. Singh, 518 F.3d 236, 249-50 (4th Cir. 2008).

[17] I WILLIAM BLACKSTONE, COMMENTARIES 464 (1765) (transliteration provided) ("A corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may, in their distinct individual capacities").

[18] *Mens Rea*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("[Law Latin 'guilty mind'] The state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime; criminal intent or recklessness…. Mens rea is the second of two essential elements of every crime at common law, the other being actus reus"); *see generally* CRS Report R44464, *Mens Rea Reform: A Brief Overview*, by Richard M. Thompson II.

[19] Morissette v. United States, 342 U.S. 246, 251 (1952) ("Crime, as a compound concept, generally constituted only from the concurrence of an evil-meaning mind with an evil-doing hand …").

[20] *Id*. at 253-60.

[21] *Id.* at 255; Staples v. United States, 511 U.S. 600, 616-17 (1994).

ordinarily carried fines or relatively short periods of incarceration.[22] Courts and commentators came to associate the absence of a *mens rea* with less severely punished offenses.[23]

The Supreme Court has stopped short of equating felony status with the intent to require a *mens rea* component. In *Staples*, however, it declared that where "dispensing with *mens rea* would require the defendant to have knowledge only of *traditionally lawful conduct*, a severe penalty is a further factor extending to suggest that Congress did not intend to eliminate a *mens rea* requirement. In such a case, the usual presumption that a defendant must know the facts that make his conduct illegal should apply."[24]

Section 2339A speaks to "whoever provides" material support. Unlike Section 2339B, it does not say "whoever knowingly provides" material support. Thus, on its face, it might be thought to envelop both those who knowingly provide support and those who unknowingly or inadvertently provide support. Yet, *Staples* suggests that the courts will reject such an interpretation in the absence of a clear congressional contrary intent. Section 2339A offenses are 15-year felonies. This seems to weigh heavily on the implied *mens rea* side of the ledger. The nature of the support provided might suggest a more mixed result. Some of the support, like providing lodging or training, is a form of "traditionally lawful conduct." Some, like providing false documentation, is not. The most telling indication of Congress's intent, however, appears later in the section where Congress has supplied an explicit mens rea requirement. Providing support only violates the section if it is provided "knowing or intending" that the support will be used to commit or prepare for the commission of a predicate offense. A defendant cannot unknowingly provide support or resources while at the same time "know[] or intend[] that they are to be used" for the commission of one of the predicate offenses.

As general rule, a "knowing" *mens rea* standard requires the government to prove that the defendant had "knowledge of the facts that constituted the offense."[25] The government need not prove that the defendant knew his conduct was unlawful.[26]

Provides

Little is said of the meaning of the word "provides" in Section 2339A or Section 2339B. When neither a statute's text, its context, nor its legislative history suggest otherwise, Congress is thought to have intended common words to have their common meaning.[27] The word "provide"

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[22] *Id.* at 616 ("Certainly, the cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary").

[23] *Id*. at 616-17 (internal citations omitted) ("As commentators have pointed out, the small penalties attached to such offenses logically complemented the absence of a *mens rea* requirement: In a system that generally requires a 'vicious will' to establish a crime, imposing severe punishments for offenses that require no *mens rea* would seem incongruous. Indeed, some courts justified the absence of *mens rea* in part on the basis that the offenses did not bear the same punishments an 'infamous crimes,' and questioned whether imprisonment was compatible with the reduced capability required or such regulatory offenses. Similarly, commentators collecting the early cases have argued that offenses punishable by imprisonment cannot be understood to be public welfare offenses…").

[24] *Id.* at 618-19 (emphasis added); *see also* United States v. Farah, 766 F.3d 599, 613 (6th Cir. 2014) (internal citations omitted) ("Where a statute is silent as to the means rea requirement the appropriate standard is whether the act is done knowingly"); Elonis v. United States, 135 S. Ct. 2001, 2009 (2015) (internal citations omitted) ("[O]ur cases have explained that a defendant generally must know the facts that make his conduct fit the definition of the offense").

[25] Dixon v. United States, 548 U.S. 1, 5 (2006) (quoting Bryan v. United States, 524 U.S. 184, 193 (1998)).

[26] *Id.; see also* United States v. Morosco, 822 F.3d 1, 20 (1st Cir. 2016).

[27] Sandifer v. U.S. Steel Corp., 134 S. Ct. 870, 876 (2014) (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)) ("[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning); (continued...)

ordinarily means "to supply something for sustenance or support."[28] Section 2339A has no explicit definition of the word "provide." At least two lower federal courts have indicated that the word "provide" in Section 2339A should be accorded its ordinary dictionary meaning.[29]

Concealing or Disguising Material Support

Section 2339A condemns both providing material support and concealing "the nature, location, source, or ownership" of such support. The concealing prong provision has been part of Section 2339A from the beginning[30] 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 redundant. In any event, concealment charges seem to have thus far been confined to those who have also been charged with providing support.[31]

Material Support

Section 2339A defines "material support" to encompass "any property, tangible or intangible, or service."[32] 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,

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Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 2002 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning").

[28] *Provide*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 2002).

[29] United States v. Sattar, 314 F. Supp. 2d 279, 297 (S.D.N.Y. 2004); United States v. Abu-Jihaad, 600 F. Supp. 2d 362, 399-400 (D. Conn. 2009).

[30] S. 266, §2101 (102d Cong.); P.L. 103-322, §120005(a), 108 Stat. 2022 (1994), 18 U.S.C. §2339A (1994 ed.).

[31] United States v. Stewart, 590 F.3d 93, 114 (2d Cir. 2009) ("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 (11th 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").

[32] 18 U.S.C. §2339A(b); 18 U.S.C. §2339B(g)(4).

- personnel (one or more individuals who may be or include oneself), and
- transportation.[33]

Section 2339B alone has a more explicit description of the "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.[34] The omission of a comparable provision from Section 2339A has led one court to conclude Section 2339A does not suffer the "working under the direction or control" limitation imposed on Section 2339B.[35] Because Section 2339A requires that the support be given while knowing or intending that it will be used in preparation for or in the commission of a specific terrorist offense, the section has survived challenges arguing that it is unconstitutionally vague.[36]

Use in Relation to a Federal Crime of Terrorism

Section 2339A outlaws providing or concealing support only when defendant knows or intends the support to be used in preparation for, commission of, or the escape following the commission of one or more of a list of predicate offenses. The predicate offense list consists of several specifically identified offenses, such as bombing a federal building or murdering a federal official in the performance of his duty.[37] Section 2339A's predicate offense list ends with a cross reference to the list of federal crimes of terrorism.[38] The predicate offenses, both those identified

[33] 18 U.S.C. §§2339A(b)(2) and (b)(3) supply respectively the precise definitions of "training" and "expert advice or assistance" noted above.

[34] 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").

[35] United States v. Abu-Jihaad, 600 F. Supp. 2d 362, 400 (D. Conn. 2009).

[36] *Stewart*, 590 F.3d at 117; United States v. Abu Khatallah, 151 F. Supp. 3d 116, 140 (D.D.C. 2015); 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).

[37] 18 U.S.C. §2339A(a) ("Whoever provides material support … knowing or intending that [it is] to be used … in carrying out a violation of section 32 [destruction of aircraft and aircraft facilities], 37 [violence at international airports], 81 [arson within the special maritime and territorial jurisdiction of the United States, 175 [biological weapons offenses], 229 [chemical weapons offenses], 351 [assassination, kidnapping, or assaulting Members of Congress, the Supreme Court, or the Cabinet], 831 [transactions involving nuclear material], 844(m) [importing or exporting plastic explosives without a detection agent], 842(n) [possession of a plastic explosive without a detection agent], 844(f) [bombing federal property], 844(i) [bombing property used in, or affecting, interstate or foreign commerce], 930(c) [killing a person in the course of an attack on a federal facility with a firearm or dangerous weapon], 956 [conspiracy to kill, kidnap, maim, or injure individuals, or to damage property, in a foreign country], 1091 [genocide], 1114 [killing a federal officer, employee, or member of the armed forces], 1116 [killing internationally protected individuals], 1203 [hostage taking], 1361 [destruction of federal property], 1362 [destruction of communication lines, stations or systems], 1363 [destruction of property in the special maritime and territorial jurisdiction of the United States], 1366 [destruction of an energy facility], 1751 [assassination, kidnapping, or assaulting of the President, Vice President, or senior White House staff members], 1992 [terrorist on mass transit), 2155 [destruction of national defense material], 2156 [production of defective national defense material), 2280 [violence against maritime navigation], 2281 [violence against maritime fixed platforms], 2332 [killing or assaulting a United States national outside the United States], 2332a [use of weapons of mass destruction], 2332b [multinational acts of terrorism], 2332f [bombing public places or infrastructure facilities], 2340A [torture abroad], or 2442 [recruiting or using child soldiers] of this title; section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284) [sabotage of nuclear facilities or fuel]; section 46502 [aircraft piracy] or 60123(b) [destruction of gas pipelines] of title 49 ... ").

[38] 18 U.S.C. §2339A(a) ("Whoever provides material support… knowing or intending that [it is] to be used… in (continued...)

individually and those included by virtue of their status as federal crimes of terrorism may, but need not, be calculated to serve terrorist purposes in most instances.[39]

Section 2339A bans attempts and conspiracies. Consequently a violation of Section 2339A may occur even if the anticipated federal crime of terrorism has not.[40] On the other hand, since the section also reaches support for concealment of an escape from a predicate offense, a violation of the section may occur even after commission of the predicate offense.

Several of the predicate offense statutes cover, or consist solely of, conspiracy to violate their proscription, 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.'"[41]

Attempt, Conspiracy, and Aiding and Abetting

Section 2339A outlaws attempts as well as conspiracies to violate its proscriptions.[42] As a general rule, 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.[43] Attempt has two elements: (1) an intent to commit the underlying offense;[44] and (2) some substantial step towards its completion.[45] Mere preparation is not enough.[46] "To constitute a

(...continued)

carrying out a violation of … any offense listed in section 2332b(g)(5)(B) ..."). The expansion attributable to the cross reference to federal crimes of terrorism consists of violations of the following statutes: (i) section 175b (to biological weapons), 175c (variola virus), 832 (participation in nuclear and weapons of mass destruction threats to the United States), 1030(a)(1) (protection of computers), 1030(a)(5)(A) resulting in damage as defined in 1030(c)(4)(A)(i)(II) through (VI) (protection of computers), 2156 (national defense material, premises, or utilities), 2281a (violence against maritime fixed platforms), 2332g (missile systems designed to destroy aircraft), 2332h (radiological dispersal devices), 2332i (acts of nuclear terrorism), 2339C (financing of terrorism), 2339D (military-type training from a foreign terrorist organization) of this title; (ii) section 92 (prohibitions governing atomic weapons) of the Atomic Energy Act of 1954 (42 U.S.C. 2122); (iii) the second sentence of section 46504 (assault on a flight crew with a dangerous weapon), section 46505(b)(3) or (c) (explosive or incendiary devices, or endangerment of human life by means of weapons, on aircraft), section 46506 if homicide or attempted homicide is involved (application of certain criminal laws to acts on aircraft) of title 49; or (iv) section 1010A of the Controlled Substances Import and Export Act (narco-terrorism).

[39] The terrorist sentencing enhancement, however, only applies for support provided in relation to a predicate offense calculated to serve terrorist purposes. U.S.G. §3A1.4, App. Note. 1; 18 U.S.C. §2332b(g)(5)(A).

[40] United States v. Hassoun, 476 F.3d 1181, 1188 (11th 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 ").

[41] United States v. Khan, 461 F.3d 477, 493 (4th Cir. 2006) (internal citations omitted).

[42] 18 U.S.C. §2339A(a).

[43] United States v. Rivera-Relle, 333 F3d. 914, 921 n.11 (9th Cir. 2003).

[44] United States v. Farhane, 634 F.3d 127, 145-46 (2d Cir. 2011).

[45] Braxton v. United States, 500 U.S. 344, 349 (1991); United States v. Mehanna, 735 F.3d 32, 53 (1st Cir. 2013); United States v. Bristol-Martir, 570 F.3d 29, 39 (1st Cir. 2009).

[46] United States v. Barlow, 568 F.3d 215, 219 (5th Cir. 2009); United States v. DeMarce, 564 F.3d 989, 998 (8th Cir. 2009).

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."[47] 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.[48] An attempt to provide material support in violation of Section 2339A 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).[49]

Conviction for conspiracy to violate Section 2339A requires the government to "prove (1) that [the defendant] entered into a conspiracy; (2) that the objective thereof was to provide support or resources; and (3) that he then knew and intended that such support or resources would be used in preparation for, or in carrying of [a predicate offense]."[50] No First Amendment violation occurs when the government introduces at trial evidence of the defendant's conspiratorial statements. "Forming an agreement to engage in criminal activities – in contrast with simply talking about religious or political beliefs – is not [First Amendment] protected speech."[51]

As a general rule, the offense of conspiracy to provide material support is complete upon assent; the support need only be planned, not delivered.[52] 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.[53] 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).[54] Unlike attempt, conspirators may be punished for both conspiracy and for actually providing material support should their scheme succeed.[55]

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[47] United States v. Mincoff, 574 F.3d 1186, 1195 (9th Cir. 2009); United States v. Morris, 549 F.3d 548, 550 (7th Cir. 2008).

[48] *Mehanna*, 735 F.3d at 53; *see also* United States v. Rehak, 589 F.3d 965, 970-71 (8th Cir. 2009); United States v. Coté, 504 F.3d 682, (7th Cir. 2007); *cf.*, United States v. Lakhani, 480 F.3d 171, 174-77 (3d Cir. 2007).

[49] 18 U.S.C. §§2339A(a), 3571.

[50] United States v. Hassan, 742 F.3d 104, 140 (4th Cir. 2014); United States v. Stewart, 590 F.3d 93, 114-16 (2d Cir. 2010); *see generally* JOSEPH F. MCSORLEY, A PORTABLE GUIDE TO FEDERAL CONSPIRACY LAW (1996); CRS Report R41223, *Federal Conspiracy Law: A Brief Overview*, by Charles Doyle.

[51] *Hassan*, 742 F.3d at 127 (quoting United States v. Amawi, 695 F.3d 457, 482 (6th Cir. 2012)).

[52] *Rehak*, 589 F.3d at 971; United States v. Schaffer, 586 F.3d 414, 422 (6th Cir. 2009).

[53] Pinkerton v. United States, 328 U.S. 640, 647 (1946); United States v, Nerkubi, 592 F.3d 22, 29 (1st Cir. 2010); United States v. Wardell, 591 F.3d 1279, 1291 (10th Cir. 2009).

[54] 18 U.S.C. §2339A(a), 3571.

[55] Iannelli v. United States, 420 U.S. 770, 777-78 (1975); United States v. Chandia, 514 F.3d 365, 372 (4th 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 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."[56] "Typically, the same evidence will support both a conspiracy and an aiding and abetting conviction."[57] Unlike conspiracy, however, liability under Section 2 only attaches if someone else commits the substantive offense.[58]

Consequences of Charge or Conviction

Section 2339A convictions carry a sentence of 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).[59] The Sentence Guidelines influence the sentence actually imposed below the statutory maximum.[60] Sentencing courts must begin the process by determining the sentence range recommended by the Guidelines.[61] Either the defendant or the government or both, may seek appellate court review of the sentence imposed to ensure that it is procedurally and substantively reasonable.[62] A sentence is procedurally unreasonable, among other things, if it is the result of a Guideline miscalculation.[63] A sentence is substantively unreasonable, if it is unduly lenient or severe based on the nature and severity of the offense and the defendant's circumstances.[64]

The Sentencing Guidelines treat Section 2339A convictions as if they were convictions for aiding and abetting and for being an accessory after the fact and set the Guideline range using that of the predicate offense.[65] In addition, the Guidelines feature a terrorism adjustment, U.S.G. §3A1.4, which can raise the Guideline sentencing level, for an offense that "involved or was intended to promote a federal crime of terrorism."[66] A federal crime of terrorism is one "calculated to

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[56] Nye & Nissen v. United States, 336 U.S. 613, 619 (1949); *see also* Rosemond v. United States, 134 S. Ct. 1240, 1245 (2014) ("As at common law, a person is liable under § 2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission"); United States v. Little, 829 F.3d 1177, 1184 (10th Cir. 2016).

[57] United States v. Vasquez, 677 F.3d 685, 695 (5th Cir. 2012); *see also* United States v. Boria, 592 F.3d 476, 481 n.8 (3d Cir. 2010).

[58] United States v. Cruickshank, 837 F.3d 1182, 1189 (11th Cir. 2016); United States v. Lange, 834 F.3d 58, 69 (2d Cir. 2016); United States v. Gaw, 817 F.3d 1, 7 (1st Cir. 2016).

[59] 18 U.S.C. §§2339A(a), 3571.

[60] See generally, CRS Report R41696, *How the Federal Sentencing Guidelines Work: An Overview*, by Charles Doyle.

[61] Gall v. United States, 552 U.S. 38, 49 (2007); United States v. Stewart, 590 F.3d 93, 134 (2d Cir. 2009).

[62] 18 U.S.C. §3742.

[63] *Gall*, 552 U.S. at 51; United States v. Hammadi, 737 F.3d 1043, 1047 (6th Cir. 2013).

[64] *Gall*, 552 U.S. at 51; *see also Hammadi*, 747 F.3d at 1047; United States v. Mohamed, 757 F.3d 757, 761 (8th Cir. 2014) ("[W]here a district court has sentenced a defendant below the advisory guidelines range, it is nearly inconceivable that the court abused its discretion" and imposed a substantively unreasonable sentence) (internal citations and omitted).

[65] U.S.G. §§2X2.1, 3X3.1.

[66] *Id.* §3A1.4 ("(a) If the offense is a felony that involved, or was intended to promote a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32. (b) In each such case, the defendant's criminal history category… shall be Category VI"). The recommended sentencing range for level 32, category VI is from 210 to 262 months imprisonment. The maximum sentence for a violation of 2339A is 15 years, 18 U.S.C. §2339A(a). Therefore the maximum sentence is imprisonment for 180 months, unless the defendant is convicted (continued...)

influence or affect the conduct of [a] government by intimidation or coercion, or to retaliate against government conduct." The standard "does not focus on the defendant but on his 'offense,' asking whether it was calculated, *i.e.*, planned – for whatever reason or motive – to achieve the stated object."[67]

Federal Crime of Terrorism

Section 2339A is among those statutes whose proscription is listed in the statute defining federal crimes of terrorism.[68] 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.[69] Federal crimes of terrorism are by definition predicate offenses for purposes of federal money laundering and RICO prosecutions.[70] Section 2339A prosecutions are subject to an eight-year statute of limitations, rather than the general five-year period.[71] An accused charged with a violation of a federal crime of terrorism faces an enhanced prospect of pre-trial detention.[72] 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.[73]

Extraterritorial Jurisdiction

Unlike Section 2339B, Section 2339A has neither a general nor a descriptive statement of extraterritorial jurisdiction. Traditionally, it would have been said 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.[74] Second, to

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of additional offenses. *See, e.g.*, United States v. Hassan, 742 F.3d 104, 147 (4th Cir. 2014) ("The court calculated Sherifi's advisory Guidelines ranges as follows: 180 months (the statutory maximum) for Count One [(18 U.S.C. §2339A)]; life in prison on Count Two [18 U.S.C. §956]… and life in prison on Count Eleven [18 U.S.C. §1117]. Rather than a life sentence, the court imposed an aggregate sentence of 540 months").

[67] *Mohamed*, 757 F.3d at 760 (quoting United States v. Awan, 607 F.3d 306, 317 (2d Cir. 2010)).

[68] 18 U.S.C. §2332b(g)(5)(B).

[69] 18 U.S.C. §981(a)(1)(G).

[70] 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).

[71] 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).

[72] 18 U.S.C. §§3142(f)((1)(A), (g)(1); United States v. Hir, 517 F.3d 1081, 1086 (9th Cir. 2008) ("Where, as here, there is probable cause to believe that the defendant has committed an offense identified as a 'federal crime of terrorism under 18 U.S.C. §2332b(g)(5)(B) for which a maximum term of imprisonment of ten years or more is prescribed, there is a rebuttable presumption that 'no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community.' 18 U.S.C. §3142(e). Although the presumption shifts a burden of production to the defendant, the burden of persuasion remains with the government.'"); *see also* United States v. Mehanna, 669 F. Supp. 2d 160, 164-65 (D. Mass. 2009).

[73] 18 U.S.C. §3583(j), (b).

[74] United States v. Felix-Gutierrez, 940 F.2d 1200, 1205 (9th Cir. 1991) (citations omitted) ("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 (continued...)

confine application to purely domestic violations would likely frustrate congressional intent and the purpose for its enactment.[75] 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).[76]

Today, the landscape has changed. Section 2339A's application abroad extends at least as far as the extraterritorial application of its predicate offenses.[77] How much further is more uncertain. The Supreme Court in *RJR Nabisco, Inc. v. European Community* declared: "Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application."[78] The Court explained that, "[t]he question is not whether we think 'Congress would have wanted' a statute to apply to foreign conduct 'if it had thought of the situation before the court,' but whether Congress has affirmative and unmistakably instructed that the statute will do so. When a statute gives no clear indication of an extraterritorial application, it has none."[79]

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."[80] The law provides as a general rule that conspiracy to commit an offense may be tried wherever an act in furtherance of the conspiracy occurs.[81] Crimes committed abroad may be tried where the accused is first brought into the United States.[82] Venue is also proper where the accused aided and

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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"); *see also* United States v. Abu Khatallah, 151 F. Supp. 3d 116, 138 D.D.C. 2015).

[75] 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 statue 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"); *see also* United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011); United States v. Georgescu, 148 F. Supp. 3d 319, 323-24 (S.D.N.Y. 2015).

[76] United States v. Clark, 435 F.3d 1100, 1106 (9th Cir. 2006); United States v. Yousef, 327 F.3d 56, 90-1 (2d Cir. 2003); United States v. McAllister, 160 F.3d 1304, 1308 (11th Cir. 1998).

[77] RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090, 2101 (2016) (Here, "we find that the presumption against extraterritoriality has bene rebutted – but only with respect to certain applications of the statute. The most obvious textual clue is that RICO defines racketeering activity to include a number of predicates that plainly apply to at least some foreign conduct").

[78] *Id.* at 2100.

[79] *Id.* (citing Morrison v. National Australia Bank Ltd, 561 U.S. 247 (2010) and Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013)).

[80] 18 U.S.C. §2339A(a).

[81] Whitfield v. United States, 543 U.S. 209, 218 (2005); United States v. Lange, 834 F.3d 58, 70 (2d Cir. 2016); United States v. Romans, 823 F.3d 299, 309-10 (5th Cir. 2016); United States v. Razo, 782 F.3d 31, 42 (1st Cir. 2015). *See generally*, CRS Report RL33223, *Venue: A Legal Analysis of Where a Federal Crime May Be Tried*, by Charles Doyle.

[82] 18 U.S.C. §3228 ("The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more (continued...)

abetted the commission of a completed offense.[83] Section 2339A's reach, when based solely on the location of the completed predicate offense, 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.[84]

Civil Actions

Section 2339A creates no private cause of action. Nevertheless, 18 U.S.C. §2333 authorizes such suits for those injured in their person, property, or business by an act of international terrorism.[85] The courts have concluded that the violations of Section 2339A or Section 2339B may constitute "acts of international terrorism" for purposes of Section 2333.[86] They do so by construing violations of Section 2339A or Section 2339B as acts of "international terrorism" as defined in 18 U.S.C. §2331(1).[87]

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joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia").

[83] *Lange*, 834 F.3d at 69-70; United States v. Thomas, 690 F.3d 358, 370 (5th Cir. 2012); *cf*., United States v. Cabrales, 524 U.S. 1. 7 (1998) (holding that money laundering in Florida of the proceeds generated by a Missouri drug trafficking enterprise could not be tried in Missouri, but suggesting that venue might have been proper had the laundering be charged as aiding and abetting the Missouri trafficking: "Nor do they charge her as an aider or abettor in the Missouri drug trafficking").

[84] United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999); United States v. Cabrales, 524 U.S. 1, 6-7 (1998).

[85] 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 attorney's fees").

[86] Boim v. Quranic Literacy Institute, 291 F.3d 1000, 1015 (7th 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 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).

[87] Boim v. Holy Land Foundation, 549 F.3d 685, 690 (7th 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 fist 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(a) 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 (continued...)

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

Section 2339A condemns providing material support for crimes that may be committed in a terrorism context. Section 2339B condemns providing material support to foreign terrorist organizations that engage in such offenses.[88] In its present form, Section 2339B condemns:

(1) whoever
(2) knowingly
(3)(a) attempts to provide,
(b) conspires to provide, or
(c) provides
(4) material support or resources
(5) to a foreign terrorist organization
(6) knowing that the organization
(a) has been designated a foreign terrorist organization, or
(b) engages, or has engaged, in "terrorism" or "terrorist activity."[89]

Whoever

The law here for Section 2339B is the same as for Section 2339A. "Whoever" usually means any legal entity or individual.[90] The Dictionary Act declares that "In determining the meaning of any Act of Congress, unless the context indicates otherwise … the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[91] Courts have looked to the statute in order to construe federal criminal cases.[92] Moreover, federal law now generally holds that corporations are criminally liable for crimes committed by their officers, employees, or agents within the scope of their

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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)").

[88] Providing material support to foreign terrorist organizations is reminiscent of one of the elements of treason, "adhering to [the] Enemies" of the United States. U.S. CONST. art. III, §3, cl. 1 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court"). Congress added an additional element to the treason statute, 18 U.S.C. §2382. The offense can only be committed by one "owing allegiance to the United States," *id.*, which puts an end to the argument that §2339A and §2339B offenses must be tried as treason, United States v. Augustin, 661 F.3d 1105, 1117 (11th Cir. 2011) (citing in accord United States v. Rahman, 189 F.3d 88, 113 (2d Cir. 1999) and United States v. Rodriguez, 803 F.2d 318, 3290 (7th Cir. 1986) ("[W]e note that neither §2339A nor §2339B – the two statutes under which Augustine was convicted – include allegiance to the United States as an element of the offense. Thus we have not trouble concluding that these offenses, as defined by Congress do not fall within the ambit of the Treason Clause").

[89] 18 U.S.C. §2339B(a)(1).

[90] See generally CRS Report R43293, *Corporate Criminal Liability: An Overview of Federal Law*, by Charles Doyle.

[91] 1 U.S.C. §1.

[92] *See, e.g.*, United States v. A & P Trucking Co., 358 U.S. 121, 123 (1958); United States v. Polizzi, 500 F.2d 856, 907 (9th Cir. 1974).

employment and for the benefit of the corporation,[93] although at common law corporations could not be thus held criminally liable.[94]

Knowingly

Section 2339B has two knowledge elements.[95] The government must prove that the defendant was aware of the fact that he was providing something to an entity ("whoever knowingly provides material support or resources to a foreign terrorist organization").[96] It must also show that the defendant was aware of the fact that the entity was a designated terrorist organization or that the entity engaged in terrorism or terrorist activity.[97] The government does not have to demonstrate that the defendant "intended to further a foreign terrorist organization's illegal activities."[98]

Provides

Here too, the law is much the same as in the case of Section 2339A. When neither a statute's text, its context, nor its legislative history suggest otherwise, Congress is thought to have intended common words to have their common meaning.[99] The word "provide" ordinarily means "to supply something for sustenance or support."[100] Section 2339B has no explicit definition of the word "provide." Nothing in the context indicates Congress intended to attach any special meaning to the word. The legislative history is equally barren.[101] When the Supreme Court dissected Section 2339B in *Humanitarian Law Project*, it passed by the word without comment.[102] At least two lower federal courts construing the word "provide" in Section 2339B's companion, Section 2339A, concluded that the word should be accorded its ordinary dictionary meaning.[103]

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[93] United States v. Agosto-Vega, 617 F.3d 541, 552-53 (1st Cir. 2010); United States v. Singh, 518 F.3d 236, 249-50 (4th Cir. 2008).

[94] I WILLIAM BLACKSTONE, COMMENTARIES 464 (1765) (transliteration provided) ("A corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may, in their distinct individual capacities").

[95] United States v. Al Kassar, 660 F.3d 108, 129 (2d Cir. 2011).

[96] 18 U.S.C. §2339B(a)(1); *Al Kassar*, 660 F.3d at 129.

[97] *Id.*; *see also* United States v. Omar, 786 F.3d 1104, 1112 (8th Cir. 2015); United States v. Mehanna, 735 F.3d 32, 42 (1st Cir. 2013).

[98] Holder v. Humanitarian Law Project, 561 U.S. 1, 16 (2010); *Mehanna*, 735 F.3d at 42; *Al Kassar*, 660 F.3d at 129.

[99] Sandifer v. U.S. Steel Corp., 134 S. Ct. 870, 876 (2014) (quoting Perrin v. United States, 444 U.S. 37,42 (1979)) ("[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning); Taniguchi v. Kan Pacific Saipan, Ltd., 132 S. Ct. 1997, 2002 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning").

[100] *Provide*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 2002).

[101] The House Judiciary Committee report's summary of the provision which ultimately became Section 2339B does use provide's ordinary synonym, "supply," perhaps offering some minimal credibility to the contention that the word "provide" has its ordinary meaning: H.Rept. 104-383, at 81 (emphasis added) ("Allowing an individual to *supply* funds, goods, or services to an organization ... helps defray the cost to the terrorist organization…").

[102] The Court in *Humanitarian Law Project* does point to the dictionary for the meaning of other words in the section, 561 U.S. at 23-4 ("'Service' similarly refers to concerted activity, not independent advocacy. See Webster's Third New International Dictionary 2075 (1993) (defining 'service' to mean…").

[103] United States v. Sattar, 314 F. Supp. 2d 279, 297 (S.D.N.Y. 2004); United States v. Abu-Jihaad, 600 F. Supp. 2d 362, 399-400 (D. Conn. 2009).

Material Support

The precise scope of the term "material support or resources" for purposes of Section 2339B prove controversial initially. With some additions, the section uses the definition found in Section 2339A(b) and thus covers "any property, tangible or intangible, or service."[104] The material support 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),
- safe houses,
- false documentation or identification,
- communications equipment, facilities,
- weapons,
- lethal substances,
- explosives,
- personnel (one or more individuals who may be or include oneself), and
- transportation.[105]

Section 2339B adopts Section 2339A's definition of "material support," and its accompanying definitions of "training" and "expert advice and assistance."[106] Section 2339B also supplies two amplifications of the word "personnel." One limits the word to those working under the direction of a designated terrorist organization.[107] The other provides limited immunity from prosecution for those who provide support with the approval of the Secretary of State and the Attorney General.[108]

Congress adjusted some of the definitions in the wake of First Amendment overbreadth and due process vagueness challenges that the Supreme Court ultimately addressed in *Holder v.*

[104] 18 U.S.C. §2339B(g)(4).

[105] 18 U.S.C. §2339A(b).

[106] 18 U.S.C. §2339B(g)(4).

[107] 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").

[108] 18 U.S.C. §2339B(i) ("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")).

Humanitarian Law Project.[109] The Humanitarian Law Project and other groups had argued that Section 2339B's 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.[110] In *Humanitarian Law Project*, the Supreme Court concluded that Section 2339B, as applied, was not unconstitutionally vague; did not constitute an abridgement of the First Amendment right to free speech; and did not impermissibly intrude on the right of free association.[111]

Chief Justice Roberts, speaking for the six member majority, noted early on that the lower court had interwoven First Amendment overbreadth into its due process vagueness analysis, and he explained that in both respects it "had contravened the rule that '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" [112]

The Chief Justice pointed out that due process bars the enforcement of a vague criminal statute. A statute is impermissibly 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."[113] 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.[114]

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, Chief Justice Roberts observed.[115] 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.[116]

As for free speech, the Chief Justice concluded that 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.[117] In the case at hand, "[a] foreign terrorist organization introduced to the structures of

[109] 561 U.S. 1 (2010).

[110] Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176, 1203-204 (C.D. Cal. 1998).

[111] Humanitarian Law Project 561 U.S. at 11; for a discussion of the case and others in an Internet context, see CRS Report R44626, *The Advocacy of Terrorism on the Internet: Freedom of Speech Issues and the Material Support Statutes*, by Kathleen Ann Ruane.

[112] *Humanitarian Law Project* 561 U.S. at 19-20, quoting Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982).

[113] *Id.*at 18, quoting United States v. Williams, 553 U.S. 285, 304 (2008).

[114] *Id.* at 18-9, citing *Hoffman Estates*, 455 U.S. at 495.

[115] *Id.* at 22.

[116] *Id.*

[117] *Id.* at 33-8.

the international legal system might use the information to threaten, manipulate, and disrupt."[118] An organization guide to and through the avenues to international relief might secure relief in the form of fungible monetary aid.[119]

The Chief Justice disposed of the groups' freedom of association argument with the notation that the section outlaws conduct, not membership.[120]

Terrorist Organizations

Providing material support is only a crime under Section 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."[121]

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.[122] Under the procedure, the Secretary may designate an entity if he finds that it is (A) a foreign organization; (B) that "engages in terrorist activity or terrorism, or retains the capacity and intent to engage in terrorist activity or terrorism"; and (C) "the terrorist activity or terrorism" of the entity "threatens the security of United States nationals or the national security of the United States."[123] An organization may challenge its designation,[124] and the Secretary may revoke the designation.[125] The organization may appeal the Secretary's decision to the United States Court of Appeals for the District of Columbia.[126]

A defendant, charged with providing material support to an organization, however, may not challenge the designation.[127] The courts have consistently held that a defendant's inability to challenge the designation does not offend due process;[128] nor does it constitute an unconstitutional delegation of legislative authority.[129]

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[118] *Id.* at 37.

[119] *Id.*

[120] *Id.* at 39.

[121] 18 U.S.C. §2339B(a).

[122] 8 U.S.C. §1189.

[123] 8 U.S.C. §1189(a)(1).

[124] 8 U.S.C. §1189(a)(4)(B),

[125] 8 U.S.C. §1189(a)(6).

[126] 8 U.S.C. §1189(c).

[127] 8 U.S.C. §1189(a)(8); United States v. Afshari, 426 F.3d 1150, 1155-159 (D.C. Cir. 2005); *Hammoud*, 381 F.3d at 331.

[128] United States v. Ali, 799 F.3d 1008, 1019 (8th Cir. 2015); *Afshari*, 426 F.3d at 1155-159; *Hammoud*, 381 F.3d at 331 (4th Cir. 2004); *Warsame*, 537 F. Supp. 2d at 1023; *Marzook*, 383 F.Supp.2d at 1071-72; United States v. Al-Arian, 329 F. Supp. 2d 1294, 1343-46 (M.D. Fla. 2004).

[129] *Ali*, 799 F.3d at 1020, citing in accord *Hammoud*, 381 F.3d at 311 and United States v. Taleb-Jedi, 566 F. Supp. 2d 157, 172-73 (E.D.N.Y. 2008) ("Congress may delegate its legislative power if it lays down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform…The statutory scheme governing the designation of foreign terrorist organizations provides an intelligible principle … [T]he statute permits the Secretary to make a designation only after making three discrete findings").

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."[130] The definition of an organization that "engages in terrorist activities" is more multi-faceted as noted in the margin.[131]

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:

> (I) The highjacking 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.

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[130] "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), codified at 22 U.S.C. §2656(f)(d)(2).

[131] For purposes of Section 2339B, the term "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)("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; (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").

(VI) A threat, attempt, or conspiracy to do any of the foregoing."[132]

Attempt, Conspiracy, Aiding and Abetting

Section 2339B outlaws both attempts and conspiracies to violate its substantive provisions.[133] As a general rule, attempt is the unfulfilled commission of an underlying offense. As noted earlier, if the attempt is successful, the offender cannot be prosecuted or punished for both the completed offense and the attempt to commit it.[134] Attempt has two elements: (1) an intent to commit the underlying offense; and (2) some substantial step towards its completion.[135] Mere preparation is not enough.[136] "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."[137] 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.[138] 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 20 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).[139]

Conspiracy to provide material support in violation of Section 2339B is the agreement to provide such support.[140] The offense is complete upon assent; the support need only be planned, not delivered.[141] 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.[142] Like attempt, conspiracy to provide material support carries the same penalties as the

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[132] "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).

[133] 18 U.S.C. §2339B(a)(1).

[134] United States v. Rivera-Relle, 333 F.3d 914, 921-22 n.11 (9th Cir. 2003); see generally CRS Report R42001, *Attempt: An Overview of Federal Criminal Law*, by Charles Doyle.

[135] Braxton v. United States, 500 U.S. 344, 349 (1991); United States v. Nguyen, 829 F.3d 907, 918 (8th Cir. 2016); United States v. Farhane, 634 F.3d 127, 145 (2d Cir. 2011); *cf.*, United States v. Mehanna, 735 F.3d 32, 53 (1st Cir. 2013).

[136] United States v. Garcia-Jimenez, 807 F.3d 1079, 1088 n.11 (9th Cir. 2015); United States v. Faust, 795 F.3d 1243, 1248 (10th Cir. 2015); United States v. Aldawsair, 740 F.3d 1015, 1019-20 (5th Cir. 2014).

[137] United States v. Mincoff, 574 F.3d 1186, 1195 (9th Cir. 2009); see also, United States v. Muratovic, 719 F.3d 809, 815 (7th Cir. 2013); United States v. Irving, 665 F.3d 1184- 1197 (10th Cir. 2011).

[138] United States v. Rehak, 589 F.3d 965, 970-71 (8th Cir. 2009); *see also Mehanna*, 735 F.3d at 53; United States v. Coté, 504 F.3d 682, (7th Cir. 2007); *cf.*, United States v. Lakhani, 480 F.3d 171, 174-77 (3d Cir. 2007).

[139] 18 U.S.C. §§2339B(a), 3571.

[140] 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. Orlando, 819 F.3d 1016, 1022 (7th Cir. 2016) ("To convict a defendant of conspiracy, the government prove beyond a reasonable doubt that the defendant knowingly and intentionally joined in an agreement with one or more other individuals to commit an unlawful act"); United States v. Morris, 817 F.3d 1116, 1119 (10th Cir. 2016); United States v. Valle, 807 F.3d 508, 515-16 (2d Cir. 2015)).

[141] United States v. Salahuddin, 765 F.3d 329, 341 (3d Cir. 2014); United States v. Vallone, 752 F.3d 690, 697-98 (7th Cir. 2014); United States v. Torres-Vazquez, 731 F.3d 41, 45 (1st Cir. 2014); United States v. Rehak, 589 F.3d 965, 971 (8th Cir. 2009).

[142] Pinkerton v. United States, 328 U.S. 640, 647 (1946); United States v. Nosal, 828 F.3d 865, 880 (9th Cir. 2016); United States v. Hare, 820 F.3d 93, 105 (4th Cir. 2016); United States v. Amawi, 695 F.3d 457, 499 (6th Cir. 2012).

completed substantive offense: imprisonment for not more than 20 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).[143] Unlike attempt, conspirators may be punished for both conspiracy and for actually providing material support should their scheme succeed.[144]

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.[145] "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."[146] "Typically, the same evidence will support both a conspiracy and an aiding and abetting conviction."[147] Unlike conspiracy, however, liability under Section 2 only attaches if someone else commits the substantive offense.[148]

Consequences of Charge or Conviction

Conviction for a violation of Section 2339B is punishable by imprisonment for not more than 20 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).[149] The Sentencing Guidelines assign a base offense level of 26 which translates, without more, to a sentencing range of 63 to 78 months imprisonment for offenders with a virtually pristine criminal record.[150] Section 2339B offenses, however, like those of Section 2339A, may trigger the Guidelines' terrorism adjustment. Section 3A1.4 raises the offense level to 32, criminal history category VI that translates to a sentencing range of 210 to 262 months imprisonment.[151] Constitutional challenges to Section 3A1.4, arguing adjustment constitutes a violation of the Sixth

[143] 18 U.S.C. §§2339B(a), 3571.

[144] Iannelli v. United States, 420 U.S. 770, 777-78 (1975); United States v. Chandia, 514 F.3d 365, 372 (4th 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)").

[145] In re Colon, 826 F.3d 1301, 1307 (11th Cir. 2016); see generally CRS Report R43769, *Aiding, Abetting, and the Like: An Overview of 18 U.S.C. 2*, by Charles Doyle.

[146] Nye & Nissen v. United States, 336 U.S. 613, 619 (1949); *see also* Rosemond v. United States, 134 S. Ct. 1240, 1245 (2014) ("As at common law, a person is liable under § 2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission"); United States v. Little, 829 F.3d 1177, 1184 (10th Cir. 2016).

[147] United States v. Vasquez, 677 F.3d 685, 695 (5th Cir. 2012); *see also* United States v. Boria, 592 F.3d 476, 481. N8 (3d Cir. 2010).

[148] United States v. Cruickshank, 837 F.3d 1182, 1189 (11th Cir. 2016); United States v. Lange, 834 F.3d 58, 69 (2d Cir. 2016); United States v. Gaw, 817 F.3d 1, 7 (1st Cir. 2016).

[149] 18 U.S.C. §§2339B(a)(1), 3571(b), (c).

[150] U.S.G. §2M5.3; U.S.G. Sentencing Table.

[151] U.S.G. §3D1.4; U.S.G. Sentencing Table.

Amendment right to a jury trial or a due process right to a sentence free of fear and prejudice, have yet to prevail.[152]

Sentencing courts may depart from the sentencing range recommended by the Guidelines, but are subject to review if the sentence they impose is procedurally or substantively unreasonable.[153] A sentence is procedurally unreasonable, among other things, if it is the result of a Guideline miscalculation.[154] A sentence is substantively unreasonable, if it is unduly lenient or severe based on the nature and severity of the offense and the defendant's circumstances.[155]

Federal Crime of Terrorism

Section 2339B violations constitute federal crimes of terrorism if they are "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct."[156] Classification as a federal crime of terrorism has several consequences. Property derived from, involved in, or used in, the commission of such an offense committed against the United States or any of its nationals is subject to confiscation.[157] Federal crimes of terrorism are by definition predicate offenses for purposes of federal money laundering and RICO prosecutions.[158] Prosecution of a Section 2339B offense is subject to an eight-year statute of limitations, rather than the general five-year period.[159] An accused charged with a violation of a federal crime of terrorism faces an enhanced prospect of pre-trial detention.[160] A defendant convicted for violation of a federal crime of terrorism faces a possible life-time term of supervised release, rather than the general five-year maximum term.[161]

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[152] United States v. Ali, 799 F.3d 1008, 1030-31 (8th Cir. 2015), citing United States v. Meskini, 319 F.3d 88, 92 (2d Cir. 2003) with regard to the due process contention.

[153] Gall v. United States, 552 U.S. 38, 51 (2007).

[154] *Gall*, 552 U.S. at 51; *see also* United States v. Hammadi, 737 F.3d 1043, 1047 (6th Cir. 2013).

[155] *Gall* 552 U.S. at 51; *see also Hammadi*, 747 F.3d at 1047 ("[W]e examine the substantive reasonableness of the sentence, reversing if the §3553(a) factors considered together do not justify the sentence imposed"); *Ali*, 799 F.3d at 1033 (A court imposes a substantively unreasonable sentence "when it fails to consider a relevant and significant factor, gives significant weight to an irrelevant or improper factor, or considers the appropriate factors but commits a clear error of judgment in weighing those factors. However, when a district court varies downward from the advisory sentencing guidelines range … it is nearly inconceivable that the court abused its discretion in not varying downward still further").

[156] 18 U.S.C. §§2332b(g)(5)(B)(i), (g)(5)(A),

[157] 18 U.S.C. §981(a)(1)(G)(iii); see generally CRS Report 97-139, *Crime and Forfeiture*, by Charles Doyle.

[158] 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). *See generally*, CRS Report 96-950, *RICO: A Brief Sketch*, by Charles Doyle, and CRS Report RL33315, *Money Laundering: An Overview of 18 U.S.C. 1956 and Related Federal Criminal Law*, by Charles Doyle.

[159] 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).

[160] 18 U.S.C. §§3142(f)((1)(A), (g)(1); *see e.g.*, United States v. Omar, 107 F. Supp. 3d 1008, 1009 (D. Minn. 2015) ("Because the Defendant has been charged under 18 U.S.C. §2339B, and because the Magistrate Judge found probable cause exists to support these charges, there is a rebuttable presumption that no condition or combination of conditions will reasonably assure the appearance of the Defendant and the safety of the community… (18 U.S.C. § 2339B is a crime listed in 18 U.S.C. § 2332b(g)(5))") (internal citations omitted); United States v. Sheikh, 994 F. Supp. 2d 736, 739-41 (E.D.N.C. 2014).

[161] 18 U.S.C. §§3583(j), (b). A term of supervised release is a period of time during which a defendant, having been released from prison, is subject to the supervision of the Probation Service and a number of conditions which may (continued...)

Extraterritorial Jurisdiction

As a general rule, federal criminal law is territorial, unless Congress indicates otherwise.[162] Congress has used one of two methods to signal overseas application of a criminal statute. In some cases, the statute states in general terms that it has extraterritorial application.[163] In others, it describes the circumstances under which it reaches offenses committed overseas.[164]

Section 2339B has both a descriptive and a general statement of extraterritorial jurisdiction.[165] The general statement declares, "There is extraterritorial Federal jurisdiction over an offense under this section," [166] 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;
>
> (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)."[167]

The general statement has been part of the section since its inception.[168] The descriptive statement appeared as part of the Intelligence Reform and Terrorism Prevention Act of 2004.[169] The legislative history of the 2004 legislation provides no explanation of why the apparently overlapping descriptive statement was thought necessary.[170] Had the general statement been dropped at the time, it would be clear Congress intended extraterritorial application to be

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(...continued)

restrict his travel, employment, associations, or use of the Internet, among other things, 18 U.S.C. §§3583(c), (d); *see generally* CRS Report RL31653, *Supervised Release (Parole): An Overview of Federal Law*, by Charles Doyle.

[162] Smith v. United States, 507 U.S. 197, 203 (1993); Small v. United States, 544 U.S. 385, 388-89 (2005); *cf.*, RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090 (2016); *see generally* CRS Report 94-166, *Extraterritorial Application of American Criminal Law*, by Charles Doyle.

[163] 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... ").

[164] 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").

[165] 18 U.S.C. §§2339B(d)(1), (d)(2).

[166] 18 U.S.C. §2339B(d)(2).

[167] 18 U.S.C. §2339B(d)(1).

[168] P.L. 104-132, §303, 110 Stat. 1250 (1996), 18 U.S.C. §2339B(d) (2000 ed.).

[169] P.L. 108-458, §6603(d), 118 Stat. 3763 (2004).

[170] H.Rept. 108-724, Pt. V, at 172-73; Pt. VI, at 173-74 (2004).

confined to situations found in the descriptive statement. The inclusion of both suggests Congress may have intended extraterritorial application in any situation that falls under either provision. At least one court, however, seems to have reached a different conclusion.[171]

In response to the contention that Section 2339B prosecutions violate due process constraints, the courts have stated that "[f]or non-citizens acting entirely abroad, a [due-process-required] jurisdictional nexus exists when the aim of that activity is to cause harm inside the United States or to U.S. citizens or interests."[172]

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 treble damages for those injured in their person, property, or business by an act of international terrorism.[173] Acts of international terrorism are violent crimes or crimes dangerous to human life, committed overseas.[174] The courts have concluded that the violations of Section 2339A or Section 2339B may constitute "acts of international terrorism" for purposes of Section 2333.[175] They do so by construing violations of Section 2339A or Section 2339B as acts of "international terrorism" as defined in 18 U.S.C. §2331(1).[176]

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[171] United States v. Ahmed, 94 F. Supp. 3d 394, 411 (E.D.N.Y. 2015) ("Defendants are mistaken that the statute has 'boundless' extraterritorial reach … [T]he statute includes an 'extraterritorial jurisdiction' element, which provides a disjunctive list of circumstances under which the statute has extraterritorial reach … thus, any extraterritorial application of the statute is limited by this list"). The court refers to the extraterritorial list in §2339(b)(1), but does not mention the general extraterritorial statement in §2339(b)(2).

[172] United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011); *see also* United States v. Naseer, 38 F. Supp. 3d 269, 272-73 (E.D.N.Y. 2014).

[173] 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 attorney's fees").

[174] 18 U.S.C. §2331(a)(1) ("[T]he term 'international terrorism' means activities that - (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended- (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum"). As a consequence, conduct which is neither violent nor dangerous to human life nor criminal, such as a violation of 18 U.S.C. §2339B(a)(2) – that establishes civil liability for a financial institution that fails to disclosure the existence of an accounts of a foreign terrorist organization – is not covered, Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 267-68 (E.D.N.Y. 2007).

[175] Boim v. Quranic Literacy Institute, 291 F.3d 1000, 1015 (7th 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"); Linde v. Arab Bank, PLC, 97 F. Supp. 3d 287, 322 (E.D.N.Y. 2015) ("I agree with those courts that have held that a violation of 18 U.S.C. §2339B is itself an act of international terrorism …Violations of 18 U.S.C. § 2339B and § 2339C are recognized as international terrorism under 18 U.S.C. §2333(a)") *see also* Abecassis v. Wyatt, 785 F. Supp. 2d 614, 649 (S.D. Tex. 2011).

[176] Boim v. Holy Land Foundation, 549 F.3d 685, 690 (7th 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 (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.[177]

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.

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section 2333. The ground involves a chain of explicit statutory incorporations by reference. The fist 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 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(a) 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)").

[177] 18 U.S.C. §2339B(b).