



Terrorist Material Support: A Sketch of 18 U.S.C. 2339A and 2339B

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July 19, 2010

Congressional Research Service

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www.crs.gov

R41334

Summary

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

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

Section 2339B outlaws:

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

The sections use a common definition for the term “material support or resources:” any service or tangible or intangible property. The Supreme Court recently held that the forms of material support in the challenge before it were not unconstitutionally vague nor was their proscription inconsistent with the First Amendment’s freedom of speech and freedom of association requirements. Violations of either section are punishable by imprisonment for not more than 15 years. Although neither section creates a civil cause of action for victims, treble damages and attorneys fees may be available for some victims under 18 U.S.C. 2333. Section 2339B has two extraterritorial jurisdiction provisions. One is general (there is extraterritorial jurisdiction over an offense under this section) and the other descriptive (there is extraterritorial jurisdiction over an offender under this section if the offender is a U.S. national, etc.). Section 2339A has no such provisions, but is likely applicable at a minimum when an offender or victim is a U.S. national; the offense has an impact in the United States; the offense is committed against U.S. national interests; or the offense is universally condemned. This an abridged version of CRS Report R41333, *Terrorist Material Support: An Overview of 18 U.S.C. 2339A and 2339B*, without the footnotes, citations to authority, and appendixes found in the longer report.

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Introduction

The two federal material support statutes have been at the heart of the Justice Department's terrorist prosecution efforts. 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 share a common definition of the term "material support," some aspects of which have recently come under constitutional attack.

Since their inception in the mid-1990s, Congress has periodically expanded and sought to clarify the scope of sections 2339A and 2339B. It enacted Section 2339A with little fanfare as part of a wide-ranging crime package, the Violent Crime Control and Law Enforcement Act of 1994. 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). As the House committee report explained it, new Section 2339B reflects a recognition of

the fungibility of financial resources and other types of material support. Allowing an individual to supply funds, goods, or services to an organization, or to any of its subgroups, that draw significant funding from the main organization's treasury, helps defray the costs to the terrorist organization of running the ostensibly legitimate activities. This in turn frees an equal sum that can then be spent on terrorist activities.

The USA PATRIOT Act amended both sections, increasing the maximum term of imprisonment from 10 to 15 years (and to life imprisonment when commission of the offense resulted in death); adding "expert advice or assistance" to forms of proscribed material support or resources; and subjecting attempts and conspiracies to violate Section 2339A to the same maximum penalties as the substantive violation of the section. The Intelligence Reform and Terrorism Prevention Act of 2004 amended the definition of "material support or resources" that applies to both sections. 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." 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.

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

In its present form, Section 2339B outlaws:

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

Attempt, Conspiracy, Aiding and Abetting

Attempt is the unfulfilled commission of an underlying offense. If the attempt is successful, the offender cannot be prosecuted or punished for both the completed offense and the attempt to commit it. Attempt has two elements: (1) an intent to commit the underlying offense; and (2) some substantial step towards its completion. Mere preparation is not enough. The courts have said that “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.” 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. An attempt to provide material support in violation of Section 2339B and actually providing such assistance are punished the same: imprisonment for not more than 15 years (for any term of years or life, if death results from the commission of the offense), and/or a fine of not more than \$250,000 (not more than \$500,000 for an organization)(or not more than twice the amount of gain or loss associated with the offense).

Conspiracy to provide material support in violation of Section 2339B is the agreement to provide such support. The offense is complete upon assent; the support need only be planned not delivered. 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. 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). Unlike attempt, conspirators may be punished for both conspiracy and for actually providing material support should be their scheme succeed.

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. It is commonly understood that, “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.” “Typically, the same evidence will support both a conspiracy and an aiding and abetting conviction.” Unlike conspiracy, however, liability under section 2 only attaches if someone else commits the substantive offense.

Material Support

The precise scope of the term “material support or resources” for purposes of Section 2339B has been a source of controversy almost from the beginning. The section uses the definition found in Section 2339A(b) and thus covers “any property, tangible or intangible, or service,” 18 U.S.C. 2339B(g)(4). The term excludes medicine and religious materials, but includes currency or monetary instruments or financial securities, financial services, lodging, training (i.e., instruction or teaching designed to impart a specific skill, as opposed to general knowledge), expert advice or assistance (i.e., advice or assistance derived from scientific, technical, or other specialized knowledge), safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation.

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

The Supreme Court in *Holder v. Humanitarian Law Project* overturned a Ninth Circuit decision which had found unconstitutionally vague some of the terms used to define material support and found application to some forms of support contrary to the First Amendment's protection of free speech. The Ninth Circuit had inappropriately merged vagueness and First Amendment concerns, the Court found. Section 2339B survived scrutiny under each of those challenges when considered separately. A statute is impermissibly vague, in the words of the Court, 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." 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.

The Court held that Section 2339B is not unconstitutionally vague as applied to the type of support at issue—coordinated advocacy on behalf of a terrorist organization and training such organization's members to use international law to resolve disputes and to petition for the United Nations and other similar entities for relief. A reasonable person would realize, the Court concluded, 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.

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

In the Ninth Circuit and elsewhere, the section has been challenged to no avail on overbreadth, free speech, and due process grounds.

Terrorist Organizations

Providing material support is only a crime under 2339B if the known beneficiary is a foreign terrorist organization. That is, the government must show either that (1) the defendant knows that the organization has been designated a foreign terrorist organization or (2) the defendant knows that the organization is or has engaged in "terrorism" or in "terrorist activities." 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. Under the procedure, an organization may challenge its designation, and the Secretary may revoke the designation. The organization may appeal the Secretary's decision to the United States Court of Appeals for the District of Columbia. A defendant, charged with providing material support to an organization, however, may not challenge the designation.

Consequences of Charge or Conviction

Conviction for a violation of Section 2339B is punishable by imprisonment for not more than 15 years (for any period of years or for life if death results from commission of the offense) and/or a fine of not more than \$250,000 (not more than \$500,000 for an organizational defendant). Strictly speaking, the U.S. Sentencing Guidelines are not binding. Yet, they are an indispensable part any sentencing decision. Section 2339B is classified as a “federal crime of terrorism,” and the Sentencing Guidelines contain a special terrorism enhancement that, if it applies, can have the effect of requiring a sentence at the statutory maximum, because it calls for a minimum sentencing range that exceeds the statutory maximum of 15 years. 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. Federal crimes of terrorism are by definition predicate offenses for purposes of federal money laundering and RICO prosecutions. Prosecution of a Section 2339B offense is subject to an eight-year statute of limitations, rather than the general five-year period. An accused charged with a violation of a federal crime of terrorism faces an enhanced prospect of pre-trial detention. 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.

Extraterritorial Jurisdiction

As a general rule, U.S criminal law is territorial, unless Congress indicates otherwise. Congress has used one of two methods to signal overseas application of a criminal statute. In some instances, it states in general terms that a particular statute will have extraterritorial application. In others, it describes the circumstances under which a criminal proscription will have extraterritorial application. A general declaration of overseas application relies upon the principles of international law under which a claim of extraterritorial jurisdiction might be recognized. Those principles are usually referred to as the territorial principle (crimes that occur in or have an effect in a country’s territory); the nationality principle (crimes committed by a country’s nationals); the passive personality principle (crimes committed against a country’s nationals); the protective principle (crimes that have an impact on a country’s national interests); and the universal principle (crimes which are universally condemned).

Section 2339B has both a descriptive and a general statement of extraterritorial jurisdiction. The general statement declares,

There is extraterritorial Federal jurisdiction over an offense under this section.” The descriptive statement provides, “there is jurisdiction ... 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 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).

The general statement has been part of the section since its inception. The descriptive statement appeared as part of the Intelligence Reform and Terrorism Prevention Act of 2004. The legislative

history of the 2004 Act provides no explanation of why the apparently overlapping descriptive statement was thought necessary. Had the general statement been dropped at the time, it would be clear Congress intended extraterritorial application to be confined to situations found in the descriptive statement. The inclusion of both suggests Congress intended extraterritorial application in any situation that falls within either provision.

Civil Actions

Section 2339B(c) authorizes the Attorney General or the Secretary of the Treasury to bring a civil suit in district court to enjoin violation of the section. Although neither Section 2339B nor Section 2339A creates a private civil cause of action, 18 U.S.C. 2333 authorizes such suits for those injured in their person, property, or business by an act of international terrorism. The courts have concluded that the violations of sections 2339A or 2339B may constitute “acts of international terrorism” for purposes of Section 2333. 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).

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

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

- (1)(a) attempting to,
 - (b) conspiring to, or
 - (c) actually

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

Attempt, Conspiracy, and Aiding and Abetting

The law of attempt, conspiracy, and aiding and abetting is the same for sections 2339A and 2339B. As we said of Section 2339B, in the case of Section 2339A, attempt is the unfulfilled commission of an underlying offense. If the attempt is successful, the offender cannot be prosecuted or punished for both the completed offense and the attempt to commit it. Attempt has two elements: (1) an intent to commit the underlying offense; and (2) some substantial step towards its completion. Mere preparation is not enough. 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. An attempt to provide material support in violation of Section 2339B and actually providing such assistance are punished the same: imprisonment for not more than 15 years (for any term of years or life, if death results from the commission of the offense), and/or a fine of not more than \$250,000 (not more than \$500,000 for an organization)(or not more than twice the amount of gain or loss associated with the offense).

Conspiracy to provide material support in violation of Section 2339B is the agreement to provide such support. The offense is complete upon assent; the support need only be planned not delivered. 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. 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). Unlike attempt, conspirators may be punished for both conspiracy and for actually providing material support should be their scheme succeed.

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. It is understood that “[i]n 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.” “Typically, the same evidence will support both a conspiracy and an aiding and abetting conviction.” Unlike conspiracy, however, liability under section 2 only attaches if someone else commits the substantive offense.

Material Support

Section 2339A uses roughly the same definition of “material support” as does Section 2339B, but to a somewhat different effect. Both use the definition found in 2339A(b) which covers “any property, tangible or intangible, or service.” The term excludes medicine and religious materials, but includes currency or monetary instruments or financial securities, financial services, lodging, training (i.e., instruction or teaching designed to impart a specific skill, as opposed to general knowledge), expert advice or assistance (i.e., advice or assistance derived from scientific, technical, or other specialized knowledge), safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation. Section 2339B alone has a more explicit description of “personnel” covered by its proscription, which confines the term to those provided to a foreign terrorist organization to direct its activities or to work under its direction or control. The omission of a comparable provision from Section 2339A has led one court to include within the term those provided to work in a coordinated way for preparation or commission of a federal crime of terrorism.

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

Concealing or Disguising Material Support

Section 2339A condemns either providing material support or concealing “the nature, location, source, or ownership” of such support. The provision has been part of Section 2339A from the beginning 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.

Use in Relation to a Federal Crime of Terrorism

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

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

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

Consequences of Charge or Conviction

Conviction for a violation of Section 2339A is punishable by imprisonment for not more than 15 years (for any period of years or for life if death results from commission of the offense) and/or a fine of not more than \$250,000 (not more than \$500,000 for an organizational defendant). Although strictly speaking the U.S. Sentencing Guidelines are not binding, they weigh heavily in any sentencing decision. Section 2339A is classified as a federal crime of terrorism, and the Sentencing Guidelines contain a special terrorism enhancement that, if it applies, can have the effect of requiring a sentence at the statutory maximum, because it calls for a minimum sentencing range that exceeds the statutory maximum of 15 years.

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. Federal crimes of terrorism are by definition predicate offenses for purposes of federal money laundering and RICO prosecutions. Prosecution of a Section 2339A offense is subject to an eight-year statute of limitations, rather than the general five-year period. An accused charged with a violation of a federal crime of terrorism faces an enhanced prospect of pre-trial detention. 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.

Extraterritorial Jurisdiction

Unlike Section 2339B, Section 2339A has neither a general nor a descriptive statement of extraterritorial jurisdiction. Nevertheless, it seems likely that the courts would find its provisions applicable overseas for any of several reasons. First, extraterritorial jurisdiction is thought to apply to overseas accomplices to crimes with extraterritorial application. Second, to confine application to purely domestic violations would likely frustrate Congressional intent and the purpose for its enactment. 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).

Civil Actions

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

Venue

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

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