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Material Support of Terrorists and Foreign Terrorist Organizations: Sunset Amendments

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Summary

Section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) temporarily amended two federal terrorist assistance prohibitions. Those amendments were to expire on December 31, 2006, P.L. 108-458, 118 Stat. 3762-764 (2004). P.L. 109-160 extended their expiration date until February 3, 2006, 119 Stat. 2957 (2005); P.L. 109-170 extended it yet again until March 10, 2006, 120 Stat. 3 (2006). Section 104 of the USA PATRIOT Improvement and Reauthorization Actand Terrorism Prevention Reauthorization Act (H.R. 3199), made the amendments permanent, P.L. 109-177, 120 Stat. 195 (2006).

In response to court decisions that found certain of their central terms unconstitutionally vague, section 6603 amended the federal statutes that outlaw assistance to terrorists and foreign terrorist organizations, 18 U.S.C. 2339A, 2339B. Initial judicial reaction suggests they may still be considered vague. Section 6603 temporarily rejected a narrow construction of the knowledge requirements under section 2339B, an interpretation which might have dissipated any vagueness problems.

Section 6603 expanded the overseas application of section 2339B as well. It permits federal prosecution of an act proscribed in section 2339B and committed entirely abroad by a foreign national if the offender can be brought to this country for trial.

Section 2339A outlaws providing material support or resources with the intent that they be used for the commission of certain predicate terrorism offenses. Section 6603 enlarged the list of predicate offenses to include any federal crime of terrorism (18 U.S.C. 2332b(g)(5)(B)) and added two crimes to the list, 18 U.S.C. 1361 (destruction of federal property) and 18 U.S.C. 2156 (production of defective national defense material).

Finally, section 6603 added an immunity provision under which an individual or entity who provides assistance in violation of section 2339B may not be prosecuted in certain instances if the offense was committed with the prior approval of the Secretary of State and the Attorney General.

This report appears in abridged form—without footnotes, appendix, and some citations to authority—as CRS Report RS22222, *Material Support of Terrorists and Foreign Terrorist Organizations: Sunset Amendments in Brief*.

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Introduction

Section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004 temporarily amends two federal terrorist assistance prohibitions, P.L. 108-458, 118 Stat. 3762-764 (2004). The amendments were to expire on December 31, 2006. P.L. 109-160 extended their expiration date until February 3, 2006, 119 Stat. 2957 (2005); P.L. 109-170 extended it yet again until March 10, 2006, 120 Stat. 3 (2006). Section 104 of the USA PATRIOT Improvement and Reauthorization Actand Terrorism Prevention Reauthorization Act (H.R. 3199), made the amendments permanent, P.L. 109-177, 120 Stat. 195 (2006). In their present form the amendments, found in section 6603 of the act:

- amend the definitions of "material support or resources," "training," and "expert advice or assistance" as those terms are used in 18 U.S.C. 2339A and 2339B, and of "personnel" as used in section 2339B;

- add a more explicit knowledge requirement to section 2339B;

- expand the extraterritorial jurisdiction reach of section 2339B;

- enlarge the list of federal crimes of terrorism, 18 U.S.C. 2332b(g)(5);

- add the enlarged list of federal crimes of terrorism to the inventory of predicate offenses for 18 U.S.C. 2339A (material support for the commission of certain terrorist crimes) and consequently for 18 U.S.C. 2339B (material support for designated terrorist organizations); and

- preclude prosecution for certain violations committed with the approval of the Secretary of State and concurrence of the Attorney General *(e.g.*, stings).

Material Support: Definitions

Sections 2339A and 2339B are proximity crimes. They proscribe certain conduct because of its proximity to other crimes, in this case terrorist offenses. Section 2339A outlaws providing, attempting to provide, or conspiring to provide, material support or resources for the commission of any of several designated federal crimes that a terrorist might commit;[1] section 2339B outlaws

[1] 18 U.S.C. 2339A(a)("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 [destruction of aircraft or aircraft facilities], 37 [violence at international airports], 81 [arson within special maritime and territorial jurisdiction], 175 [biological weapons offenses], 229 [chemical weapons offenses], 351 [congressional, cabinet, and Supreme Court assassination and kidnaping], 831 [nuclear material offenses], 842(m) or (n) [plastic explosives offenses], 844(f) or (i) [burning or bombing federal property or property used in interstate or foreign commerce], 930(c) [killing or attempted killing of another during an attack on a federal facility with a dangerous weapon], 956 [conspiracy to murder, kidnap, or maim overseas], 1114 [killing or attempted killing of federal officers and employees], 1116 [murder or manslaughter of foreign officials, official guests, or internationally protected persons], 1203 [hostage taking], 1361 [destruction of federal property], 1362 [destruction of communication lines, stations, or systems], 1363 [destruction of property within special maritime and territorial jurisdiction of the United States], 1366 [destruction of an energy facility], 1751 [presidential assassination or kidnaping], 1992 [wrecking trains], 1993 [terrorist attacks and other acts of violence against mass transportation systems], 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 [violence against Americans overseas], 2332a [weapons of mass destruction], 2332b [multinational terrorism], 2332f [bombing public places or facilities], or 2340A [torture] 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 pipeline facilities] 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

providing, attempting to provide, or conspiring to provide, material support or resources to a designated foreign terrorist organization.[2]

Section 6603 of the Intelligence Reform and Prevention of Terrorism Act made several amendments to section 2339A and 2339B in response to judicial decisions that either found them unconstitutionally vague or suggested a demanding mens rea (knowledge) requirement.[3] Section 2339A contains a definition of "material support or resources" that applies to both sections, 18 U.S.C. 2339A(b). Some courts had been particularly troubled by the uncertain sweep of the terms "training," "personnel," and "expert advice or assistance" used in the definition. The Ninth Circuit, for instance, had found the terms unconstitutionally vague, *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137-138 (9th Cir. 2000);[4] "personnel" because the term might be thought to envelope the efforts of a simple advocate;[5] "training" because the term might be thought to sweep in benign academic instruction;[6] and "expert advice or assistance" because, like "personnel" and "training," it might be read to include First Amendment protected pure speech and advocacy.[7]

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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. . .") (language temporarily added by section 6603 in italics).

[2] 18 U.S.C. 2339B(a)(1)("Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. . .").

[3] *A Review of the Tools to Fight Terrorism Act: Hearing Before the Senate Comm. on the Judiciary (Senate Hearing)*, 108th Cong., 2d Sess. (2004)(joint prepared statement of Assistant Attorney General Daniel J. Bryant and Counterterrorism Section Chief Barry Sabin), available on July 29, 2005 at http://judiciary.senate.gov/print_ testimony.cfm?id =1301& wit_id=3133.

[4] In *Humanitarian Law Project*, the District Court had granted a preliminary injunction which following the appeal it made permanent, a decision which again a panel of the Ninth Circuit affirmed, *Humanitarian Law Project v. United States Department of Justice*, 352 F.3d 382 (9th Cir. 2003). This second appellate decision was vacated in favor of an en banc decision which announced that "[w]ith respect to the appellants' First Amendment challenge to sections 302 and 303 of the Antiterrorism and Effective Death Penalty Act of 1996, we affirm the district court's order dated October 2, 2001, for the reasons set out in *Humanitarian Law Project v. Reno*. In light of Congress' recent amendment to the challenged statute, the Intelligence Reform and Terrorism Prevention Act of 2004, we affirm the judgment in part, as set forth above, vacate the judgment and injunction regarding the terms 'personnel' and 'training' . . ." *Humanitarian Law Project v. United States Department of Justice*, 393 F.3d 902, 902 (9th Cir. 2004)(internal citations omitted).

[5] "It is easy to see how someone could be unsure about what AEDPA prohibits with the use of the term 'personnel,' as it blurs the line between protected expression and unprotected conduct. Someone who advocates the cause of PKK could be seen as supplying them with personnel; it even fits under the government's rubric of freeing up resources, since having an independent advocate frees up members to engage in terrorist activities instead of advocacy. But advocacy is pure speech protected by the First Amendment. In order to keep the statute from trenching on such advocacy, the government urges that we read into it a requirement that the activity prohibited be performed 'under the direction or control' of the foreign terrorist organization. While we may construe a statute in such a way as to avoid constitutional questions, we are not authorized to rewrite the law so it will pass constitutional muster," 205 F.3d at 1137-138 (internal citations omitted).

[6] "The term 'training' fares little better. Again, it is easy to imagine protected expression that falls within the bounds of this term. For example, a plaintiff who wishes to instruct members of a designated group on how to petition the United Nations to give aid to their group could plausibly decide that such protected expression falls within the scope of the term 'training.' The government insists that the term is best understood to forbid the imparting of skills to foreign terrorist organizations through training. Yet, presumably, this definition would encompass teaching international law to members of the designated organizations. The result would be different if the term 'training' were qualified to include only military training or training in terrorist activities," 205 F.3d at 1138.

[7] "[T]he Court concludes that the term 'expert advice or assistance,' like the terms 'training' and 'personnel,' is not sufficiently clear so as to allow persons of ordinary intelligence a reasonable opportunity to know what is prohibited. Defendants have failed to adequately distinguish the provision of 'expert advice and assistance' from the provision of 'training' and 'personnel' in a way that allows the Court to reconcile its prior finding that the terms 'training' and 'personnel' are impermissibly vague, with a finding that the term 'expert advice or assistance' is not. Furthermore,

Section 6603 supplied a new definition for "training"—"*the term 'training' means instruction or teaching designed to impart a specific skill, as opposed to general knowledge*," 18 U.S.C. 2339A(b)(2). As explained by Justice Department witnesses, "[the amendment] would also add a specific definition of 'training' in response to the Ninth Circuit's decision that this term too was unconstitutionally vague. . . As an example, the court opined that the term conceivably could include teaching members of foreign terrorist organizations to use international human rights laws to resolve conflicts in a peaceful manner. [The amendment] would alleviate such concerns by limiting the term 'training' to 'instruction or teaching designed to impart a specific skill, as opposed to general knowledge'. . ."[8] Critics might argue that the attempted fix appears to turn on the dubious premise that effective advocacy (e.g., peaceful conflict resolution through the use of human rights laws) is not a skill.

The same might be said of section 6603's new definition of "expert advice or assistance" plucked from the Federal Rules of Evidence—"*the term 'expert advice or assistance' means advice or assistance derived from scientific, technical or other specialized knowledge*," 18 U.S.C. 2339A(b)(3).[9]

In the case of both terms, however, section 6603 may rely on its section 2339B First Amendment disclaimer clause to answer the concern that the uncertain term might lead to prosecution of mere advocacy or other First Amendment protected activities—at least with regard to prosecutions under 2339B: "*Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States*," 18 U.S.C. 2339B(i).[10]

Defendants' contradictory arguments on the scope of the prohibition underscore the vagueness of the prohibition. The 'expert advice or assistance' Plaintiffs seek to offer includes advocacy and associational activities protected by the First Amendment, which Defendants concede are not prohibited under the USA PATRIOT Act. Despite this, the USA PATRIOT Act places no limitation on the type of expert advice and assistance which is prohibited, and instead bans the provision of all expert advice and assistance regardless of its nature. Thus, like the terms 'personnel' and 'training,' 'expert advice or assistance' could be construed to include unequivocally pure speech and advocacy protected by the First Amendment or encompass First Amendment protected activities," *Humanitarian Law Project v. Ashcroft*, 309 F.Supp.2d 1185, 1200-201 (C.D.Cal. 2004); see also, *United States v. Sattar*, 272 F.Supp.2d 348, 358-61 (S.D.N.Y. 2003).

[8] *Senate Hearing*, 108th Cong., 2d Sess. (2004)(joint prepared statement of Assistant Attorney General Daniel J. Bryant and Counterterrorism Section Chief Barry Sabin), available on July 29, 2005 at http://judiciary.senate.gov/print_testimony.cfm?id =1301& wit_id=3133.

[9] Rule 702 of the Federal Rules of Evidence states, "If *scientific, technical, or other specialized knowledge* will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case," (emphasis added).

[10] The decision to limit the disclaimer clause to section 2339B may have been influenced by the view that in some instances, the uncertainty of the terms used to describe "material support or resources" may be less troubling in section 2339A because of its more demanding knowledge requirement ("knowing or intending that [the support or resources] are to be used in preparation for, or in carrying out, a violation" of one or more expressly designated federal crimes) than in section 2339B which at least facially has no such knowledge requirement, *compare*, *United States v. Sattar*, 272 F.Supp.2d 348, 356-61 (S.D.N.Y. 2003)(dismissing indictment counts under section 2339B on vagueness grounds), *with*, *United States v. Sattar*, 314 F.Supp.2d 279 (S.D.N.Y. 2004)(declining to dismiss indictment counts under section 2339A on vagueness grounds); *see also*, *United States v. Al-Arian*, 308 F.Supp.2d 1322, 1334-335 (M.D.Fla. 2004)(noting in response to a vagueness challenge to section 2339B that, "if this court interprets [the statute] as requiring a specific intent to further the illegal activities [of the foreign terrorist organization], then no constitutional problems exist").

In any event, section 6603's new explanation of the scope of the prohibition against providing "personnel" in section 2339B seems far more specific and to correspond more closely the courts' concerns:

> *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.* 18 U.S.C. 2339B(h).

Finally, section 6603 addressed an ambiguity inherent in the earlier definition. In its earlier form, the definition of "material support or resources" in subsection 2339A included a mixture of tangible things and other things that might more properly be considered benefits or services (e.g., currency and training). Yet this defining mixture ended with the catch-all phrase, "and *other physical* assets," 18 U.S.C. 2339A)(b)(2000 ed.). Section 6603 responded with an amendment to section 2339A stating that "material support or resources" covers services and other intangible property, and that the specific types of property and services mentioned are simply examples.[11]

Critics might contend that by eliminating the ambiguity in favor of the more sweeping construction ("property, tangible or intangible, or services including" versus "property . . or other physical assets") the amendment is more likely to create than dissipate vagueness.

The first court to pass upon the constitutionality of section 6603's clarifying amendments gave them a mixed grade: section 6603 did cure the vagueness problems associated with use of the term "personnel," but the terms "training" and "expert advice or assistance" remain unconstitutionally vague notwithstanding the amendments in section 6603, the term "service" which section 6603 added to the definition of prohibited support or resources is itself unconstitutionally vague, and the "boilerplate" First Amendment clause does nothing to supply greater clarity, *Humanitarian Law Project v. Gonzales*, 380 F.Supp.2d 1134, 1146 n.20 (C.D. Cal. 2005).

The First Amendment clause, in the court's view, is "inadequate to cure potential vagueness issues because it does not clarify the prohibited conduct with sufficient definiteness for ordinary people," *id.* By the same token, the court felt that "for the average person with no background in law," use of a definition from the Federal Rules of Evidence would do little to clarify the mysteries of the term "expert advice or assistance," *id.* at 1147. And "[e]ven as amended [by section 6603], the term "training" is not sufficiently clear so that persons of ordinary intelligence can reasonably understand what conduct the statute prohibits," particularly when the term "easily encompasses protected speech and advocacy," *id.* Since the term "service" is defined to include "training" and "expert advice or assistance," they pull the term down with them, *id.* at 1148.

[11] "*(1)* the term "material support or resources" means *any property, tangible or intangible, or service, including* currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel *(1 or more individuals who may be or include oneself) and*, transportation, ~~AND OTHER PHYSICAL ASSETS~~, except medicine or religious materials," 18 U.S.C. 2339A(b)(1).

Material Support: Knowledge

Section 2339B outlaws "knowing" violations. Narrowly construed, this might serve as a counterbalance for the suspect reach of the "material support" element. The temporary amendment, however, added the caveat that, "[t]o violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989), 18 U.S.C. 2339B(a)(1)," 18 U.S.C. 2339B(a)(1).

Justice Department officials urged the adoption of the addition in order to avoid case law indicating that conviction would require either proof of knowledge of the specific facts that led to a particular entity being designated a terrorist organization or proof of knowledge that the assistance provided would be used for terrorist purposes.[12] The change seems to foreclose those problems, but it does little for any vagueness problems.

Material Support: Overseas Application

As a result of modifications by section 6603, section 2339B describes its overseas application more explicitly and more expansively than was once the case. It permits federal prosecution of an act proscribed in section 2339B and committed entirely abroad by a foreign national with no greater connection to the United States required than that we have been able to bring the offender to this country for trial, 18 U.S.C. 2339B(d)(1)(D)("There is jurisdiction over an offense under subsection (a) if . . . (D) after the conduct required for the offense occurs an offender is brought into or found in the Untied States, even if the conduct required for the offense occurs outside the United States").

In its other modifications to jurisdiction, section 6603 arguably did no more than articulate more specifically the pre-existing reach of section 2339B. Section 6603 removed the phrase "within the United States or subject to the jurisdiction of the United States," from section 2339B(a)(1) and provided a more explicit list of jurisdictional circumstances in section 2339B(d)(1), i.e., the offense is committed in whole or in part within the United States; the offender is a U.S. citizen, permanent resident alien, or habitual U.S. resident; the offense occurs in or affects U.S. interstate or foreign commerce; the offender is later found or brought to the U.S.; or the offender is an accomplice or (aider or abetter) or conspirator with respect to a violation of the section by another over whom the U.S. has subject matter jurisdiction.

[12] "Recently, in the same decision in which it held the terms "personnel" and "training" to be unconstitutionally vague, the Ninth Circuit also held that an individual, to violate the material support statute, either must have knowledge of an organization's designation as a foreign terrorist organization or have "knowledge of the unlawful activities that caused the organization to be so designated." Humanitarian Law Project, 352 F.3d at 400. Unfortunately, one could interpret the latter part of this requirement to mean that a defendant must have knowledge of the facts contained in the generally classified, internal State Department documents, which form the basis for the Secretary of State's decision to designate an organization as a foreign terrorist organization. Additionally, the United States District Court for the Middle District of Florida earlier this year adopted an even stricter scienter standard concluding that the government must prove under the material support statutes that the defendant knew that his actions would further the illegal activities of an designated foreign terrorist organization. See United States v. Al-Arian, 308 F.Supp.2d 1322 (M.D.Fla. 2004)," *Senate Hearings*, (joint prepared statement of Assistant Attorney General Daniel J. Bryant and Counterterrorism Section Chief Barry Sabin).

Prior to the enactment of section 6603, section 2339B applied to anyone who acted "within the United States or subject to the jurisdiction of the United States," when they provided material support to a foreign terrorist organization, 18 U.S.C. 2339B(a)(1)(2000 ed.). A person "subject to the jurisdiction of the United States" arguably referred to American citizens, residents of this country, and entities organized under our laws.[13] Moreover, if extraterritorial jurisdiction existed over the underlying offense, it was said to exist over aiding and abetting the commission of the underlying offense or over conspiracy to commit it.[14]

Federal Crimes of Terrorism

Section 2339A outlaws providing material support or resources with the intent that they be used for the commission of certain designated violent crimes (predicate offenses). Section 6603 enlarged the list of predicate offenses to include any "federal crime of terrorism" cited in 18 U.S.C. 2332b(g)(5)(B). Section 2339A already covered assistance rendered for the commission of the following:

18 U.S.C. 32 (destruction of aircraft)
18 U.S.C. 37 (violence at international airports)
18 U.S.C. 81 (arson within a federal enclave)
18 U.S.C. 175 (biological weapons offenses)
18 U.S.C. 229 (chemical weapons offenses)
18 U.S.C. 351 (murder, kidnaping, or assault upon Members of Congress, etc.)
18 U.S.C. 831(nuclear material offenses)
18 U.S.C. 842(m) or (n) (plastic explosives offenses)
18 U.S.C. 844(f) or (i)(bombing federal property or property in or affecting commerce)
18 U.S.C. 930(c) (homicide with dangerous weapon in a federal facility)
18 U.S.C. 956 (conspiracy to commit certain violent crimes overseas)
18 U.S.C. 1114 (murder of a federal officer or employees)
18 U.S.C. 1116 (murder of a foreign dignitary)
18 U.S.C. 1203 (hostage taking)
18 U.S.C. 1361 (destruction of federal property)
18 U.S.C. 1362 (destruction of communications property)
18 U.S.C. 1363 (destruction of property within a federal enclave)
18 U.S.C. 1366 (destruction of an energy facility),
18 U.S.C. 1751 (murder, kidnaping or assault of the President, etc.),
18 U.S.C. 1992 (train wrecking)
18 U.S.C. 1993 (violent attacks on mass transit)
18 U.S.C. 2155 (destruction of national defense material)
18 U.S.C. 2156 (production of defective national defense material)
18 U.S.C. 2280 (violence against maritime navigation)
18 U.S.C. 2281 (violence against maritime fixed platforms)
18 U.S.C. 2332 (violence against Americans overseas)
18 U.S.C. 2332a (weapons of mass destruction offenses)
18 U.S.C. 2332b (multinational terrorism)
18 U.S.C. 2332f (bombing public places or facilities)

[13] *United States v. Brodie*, 403 F.3d 123, 128 (3d Cir. 2005); 31 C.F.R. §500.329. Given the courts' concerns of the vagueness of section 2339B noted earlier, they may have proven reluctant to apply the section broadly to the overseas conduct of foreign nationals even those who were residents of the United States.

[14] *United States v. Hill*, 279 F.3d 731, 739 (9th Cir. 2002); *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204-205 (9th Cir. 1991).

18 U.S.C. 2340A (torture)
42 U.S.C. 2284 (atomic weapons offenses)
49 U.S.C. 46502 (air piracy)
49 U.S.C. 60123(b) (destruction of gas pipeline facilities)

With the addition of the federal crimes of terrorism not already among the enumerated, section 2339A now also condemns assistance relating to:

18 U.S.C. 175b (unlawful possession biological materials)
18 U.S.C. 175c (smallpox virus offenses)
18 U.S.C. 1030(a)(1), (5)(A)(i)(certain computer fraud and abuse offenses)
18 U.S.C. 2332g (anti-aircraft offenses)
18 U.S.C. 2332h (radiological dispersal device offenses)
18 U.S.C. 2339 (harboring terrorists)
18 U.S.C. 2339C (financing of terrorism)
42 U.S.C. 2122 (atomic weapons offenses)
49 U.S.C. 46504 (2d sentence) (assault on a flight crew with a dangerous weapon)
49 U.S.C. 46505(b)(3) or (c) (explosive or incendiary devices, or endangerment of human life by means of weapons, on an aircraft within U.S. jurisdiction)
49 U.S.C. 46506 (homicide or attempted homicide aboard an aircraft within U.S. jurisdiction).

In certain of the earlier versions of the intelligence reform legislation, and in various free standing bills devoted to a similar purpose, proponents would have brought any crime of "international or domestic terrorism" (18 U.S.C. 2331) rather than "any federal crime of terrorism" (18 U.S.C. 2332b(g)(5)(B)) within the circle of predicate offenses.[15] Use of the phrase "international or domestic terrorism"[16] has generated considerable debate in the context of the USA PATRIOT Act,[17] and it may be for this reason that the more narrowly and precisely defined "federal crime of terrorism" cross reference was ultimately selected.

Section 6603 also introduced two crimes—18 U.S.C. 1361 (destruction of federal property) and 18 U.S.C. 2156 (production of defective national defense material)—into the family of federal crimes of terrorism. Both crimes were already predicate offenses in section 2339A, so it was unnecessary to introduce them into section 2332b(g)(5)(B) in order to bring them within section 2339A.

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[15] *See e.g.*, Sec. 2043(a), H.R. 10, 150 *Cong. Rec.* H8742 (daily ed. Oct. 7, 2004), *also in*, H.Rept. 108-724, pt. 5, at 37 (2004); Sec. 2(a), H.R. 2858 (Rep. Green (Wis.)); Sec. 3(a), H.R. 4942 (Rep. Green (Wis.)); *cf.*, Sec. 114(a), S. 2679 (Sen. Kyl).

[16] 18 U.S.C. 2331("As used in this chapter—(1) the 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 kidnaping; 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 . . .

"(5) the term 'domestic terrorism' means activities that—(A) involve acts dangerous to human life that are a violation of the criminal laws 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 kidnaping; and (C) occur primarily within the territorial jurisdiction of the United States.")

[17] *See e.g.*, United States Department of Justice, *Dispelling the Myths: Dispelling Some of the Major Myths about the USA PATRIOT Act*, available on Dec. 17, 2004 at, http://www.lifeandliberty.gov/subs/add_myths.htm.

Of course there are other consequences that flow from including sections 1361 and 2156 within the definition of federal crimes of terrorism under section 2332b(g)(5)(B). Prior to designation as federal crimes of terrorism, violations of section 2156 were subject to the general five year statute of limitations, 18 U.S.C. 3282; now they are subject to an eight year statute of limitations unless they involve the risk of death or serious bodily injury in which case they may be prosecuted at any time, 18 U.S.C. 3286. Violations of section 1361 which were already subject to an eight year statute of limitations, 18 U.S.C. 3286, may now be prosecuted at any time if they involve the risk of death or serious injury, id.

Prior to designation as a federal crime of terrorism conviction and imprisonment for violation of either section carried a maximum term of supervised release of not more than three years; the maximum term is now supervision for life or any term of years following a conviction for violation of either section that involves the risk of death or serious injury, 18 U.S.C. 3583.

Prior to designation as a federal crime of terrorism, suspects charged with a violation of either section were entitled to normal bail procedures; now they face the rebuttable presumption of pre-trial detention, 18 U.S.C. 3142.

Prior to designation as a federal crime of terrorism, neither section appeared as a racketeering (RICO) predicate offense, 18 U.S.C. 1961 (federal racketeering statutes outlaw the patterned commission of a predicate offense or offenses to acquire or operate an enterprise in or affecting interstate commerce, 18 U.S.C. 1961-1962). By designation as a RICO predicate they also become money laundering predicate offenses under sections 18 U.S.C. 1956, 1957 (18 U.S.C. 1956(c)(7)(A), 1957(f)(3)), a status which section 1361 but not section 2156 already enjoyed, 18 U.S.C. 1956(c) (7)(D).

Prosecutorial Forbearance

Section 6603 also added an immunity provision under which an individual or entity who provides "personnel," "training," or "expert advice or assistance" in violation of section 2339B may not be prosecuted if the offense was committed with the prior approval of the Secretary of State and the Attorney General as long as the support cannot be used to carry out the various violent acts of terrorism described in 8 U.S.C. 1182(a)(3)(B)(iii) (hijacking, sabotage, hostage taking, assassination and the like), 18 U.S.C. 2339B(j).

The provision is presumably designed to encourage "stings" and other undercover investigations. It is not clear why it is necessary. No prosecution of 18 U.S.C. 2339B, or any other federal crime for that matter, is possible without the Attorney General's approval, ordinarily exercised through the various United States Attorneys, F.R.Crim.P. 7(c)(indictments must be signed by the attorney for the government). Of course, the State Department is more likely to be involved in activities abroad.

Appendix.

18 U.S.C. 2332b(g)(5)(B)

* * *

(g) Definitions.—As used in this section . . .

(5) the term "Federal crime of terrorism" means an offense that . . .

(B) is a violation of—

(i) section 32 (relating to destruction of aircraft or aircraft facilities), 37 (relating to violence at international airports), 81 (relating to arson within special maritime and territorial jurisdiction), 175 or 175b (relating to biological weapons), 175c (relating to variola virus), 229 (relating to chemical weapons), subsection (a), (b), (c), or (d) of section 351 (relating to congressional, cabinet, and Supreme Court assassination and kidnaping), 831 (relating to nuclear materials), 842(m) or (n) (relating to plastic explosives), 844(f)(2) or (3) (relating to arson and bombing of Government property risking or causing death), 844(i) (relating to arson and bombing of property used in interstate commerce), 930(c) (relating to killing or attempted killing during an attack on a Federal facility with a dangerous weapon), 956(a)(1) (relating to conspiracy to murder, kidnap, or maim persons abroad), 1030(a)(1) (relating to protection of computers) , 1030(a)(5)(A)(i) resulting in damage as defined in 1030(a)(5)(B)(ii) through (v) (relating to protection of computers), 1114 (relating to killing or attempted killing of officers and employees of the United States), 1116 (relating to murder or manslaughter of foreign officials, official guests, or internationally protected persons), 1203 (relating to hostage taking), *(Sec. 6603)* 1361 (relating to government property or contracts), 1362 (relating to destruction of communication lines, stations, or systems), 1363 (relating to injury to buildings or property within special maritime and territorial jurisdiction of the United States), 1366(a)(relating to destruction of an energy facility), 1751(a), (b), (c), or (d) (relating to Presidential and Presidential staff assassination and kidnaping), 1992 (relating to wrecking trains), 1993 (relating to terrorist attacks and other acts of violence against mass transportation systems), 2155 (relating to destruction of national defense materials, premises, or utilities), *(Sec. 6603)* 2156 (relating to national defense material, premises, or utilities), 2280 (relating to violence against maritime navigation), 2281 (relating to violence against maritime fixed platforms), 2332 (relating to certain homicides and other violence against United States nationals occurring outside of the United States), 2332a (relating to use of weapons of mass destruction), 2332b (relating to acts of terrorism transcending national boundaries), 2332f (relating to bombing of public places and facilities), 2332g (relating to missile systems designed to destroy aircraft), 2332h (relating to radiological dispersal devices, 2339 (relating to harboring terrorists), 2339A (relating to providing material support to terrorists), 2339B (relating to providing material support to terrorist organizations), 2339C (relating to financing of terrorism, or 2340A (relating to torture) of this title;

(ii) sections 92 (relating to prohibitions governing atomic weapons) or 236 (relating to sabotage of nuclear facilities or fuel) of the Atomic Energy Act of 1954 (42 U.S.C. 2122 or 2284); or

(iii) section 46502 (relating to aircraft piracy), the second sentence of section 46504 (relating to assault on a flight crew with a dangerous weapon), section 46505(b)(3) or (c) (relating to explosive or incendiary devices, or endangerment of human life by means of weapons, on aircraft), section 46506 if homicide or attempted homicide is involved (relating to application of certain criminal laws to acts on aircraft), or section 60123 (b) (relating to destruction of interstate gas or hazardous liquid pipeline facility) of title 49.

18 U.S.C. 2339A. Providing material support to terrorists (underlined provisions expire and strike out provision are revived after December 31, 2006)

(a) Offense.—Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section 32, 37, 81, 175, 229, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 1993, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, or 2340A of this title, section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), *(Sec. 6603)* ~~or~~ section 46502 or 60123(b) of title 49, *(Sec. 6603)* or any offense listed in section 2332b(g)(5)(B) (except for sections 2339A and 2339B)[,] or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.

(b) Definition.—*(Sec. 6603)* As used in ~~In~~ this section~~,—~~

(Sec. 6603) (1) the term "material support or resources" means *(Sec. 6603)* any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel *(Sec. 6603)* (1 or more individuals who may be or include oneself) and, transportation, *(Sec. 6603)* ~~and other physical assets,~~ except medicine or religious materials.

(Sec. 6603) (2) the term "training" means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and

(Sec. 6603) (3) th term "expert advice or assistance" means advice or assistance derived from scientific, technical or other specialized knowledge.

18 U.S.C. 2339B. Providing material support or resources to designated foreign terrorist organizations

(a) Prohibited activities.—

(1) Unlawful conduct.—Whoever, *(Sec. 6603)* ~~within the United States or subject to the jurisdiction of the United States,~~ knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. *(Sec. 6603)* To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

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

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

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

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

(A) $50,000 per violation; or

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

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

(d) Extraterritorial jurisdiction.—*(Sec. 6603)* ~~There~~ (1) In General.—There is jurisdiction over an offense under subsection (a) if—

(Sec. 6603) (A) an offender is a national of the United States (as defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22))) or an alien lawfully admitted for permanent residence in the United States (as defined in section 101(a)((2) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20))));

(Sec. 6603) (B) an offender is a stateless person whose habitual residence is in the United States;

(Sec. 6603) (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;

(Sec. 6603) (D) the offense occurs in whole or in part within the United States;

(Sec. 6603) (E) the offense occurs in or affects interstate or foreign commerce;

(Sec. 6603) (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 subjection (a).

(Sec. 6603) (2) Extraterritorial jurisdiction.—There is extraterritorial Federal jurisdiction over an offense under this section.

(e) Investigations.—

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

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

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

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

(3) Referral.—Any evidence of a criminal violation of this section arising in the course of an investigation by the Secretary or any other Federal agency shall be referred immediately to the Attorney General for further investigation. The Attorney General shall timely notify the Secretary

of any action taken on referrals from the Secretary, and may refer investigations to the Secretary for remedial licensing or civil penalty action.

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

(1) Discovery of classified information by defendants.—

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

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

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

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

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

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

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

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

(i) Copies of items from which classified information has been redacted.

(ii) Stipulations admitting relevant facts that specific classified information would tend to prove.

(iii) A declassified summary of the specific classified information.

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

(3) Taking of trial testimony.—

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

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

(i) permitting the United States to provide the court, ex parte, with a proffer of the witness's response to the question or line of inquiry; and

(ii) requiring the defendant to provide the court with a proffer of the nature of the information that the defendant seeks to elicit.

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

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

(5) Interlocutory appeal.—

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

(i) authorizing the disclosure of classified information;

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

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

(B) Expedited consideration.—

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

(ii) Appeals prior to trial.—If an appeal is of an order made prior to trial, an appeal shall be taken not later than 10 days after the decision or order appealed from, and the trial shall not commence until the appeal is resolved.

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

(I) shall hear argument on such appeal not later than 4 days after the adjournment of the trial;

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

(III) shall render its decision not later than 4 days after argument on appeal; and

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

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

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

(g) Definitions.—As used in this section—

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

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

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

(Sec. 6603) (4) the term "material support or resources" has the same meaning as in section 2339A (including the definitions of "training" and "expert advice or assistance" in that section);

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

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

(Sec. 6603) (h) Provision of Personnel.—No person may be prosecuted under this section in connection with the term "personnel" unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control.

(Sec. 6603) (i) Rule of Construction.—Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States.

(Sec. 6603) (j) Exception.—No person may prosecuted under this section in connection with the term[s] "personnel", "training", or "expert advice or assistance" if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General. The Secretary of State may not approve the provision of any material support that may be used to carry out terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act).

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