Intelligence Reform and Terrorism Prevention Act of 2004

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Introduction

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On December 17, 2004, the President signed into law the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, 118 Stat. 3638. IRTPA consists of eight separate titles which address topics of vital interest to terrorism prosecutors and others engaged on the legal front of the war on terror. These topics include:

- Reform of the intelligence community.
- Improvements in the intelligence capabilities of the Federal Bureau of Investigation.
- Revamping and uniformity of security clearance procedures.
- Measures to enhance transportation security.
- Improvements in border protection.
- Immigration and visa procedures.
- New tools for terrorism prosecutors.
- Implementation of 9/11 Commission Recommendations.
- Establishment of interagency mechanisms concerning information and intelligence sharing, infrastructure protection and analysis, and civil rights and civil liberties.

This edition of the UNITED STATES ATTORNEYS' BULLETIN focuses on specific provisions of IRTPA useful to federal prosecutors investigating and prosecuting terrorism cases. We hope the following articles will provide needed information and be beneficial to our readership.

Yoel Tobin's article provides an overview of those provisions of IRTPA dealing with reform of the intelligence community and serves as context for the specific information-sharing provisions discussed in other articles. It relates these reforms to information-sharing provisions of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), recommendations of the 9/11 Commission and recent Presidential Orders. Yoel Tobin, *The Reorganization of the Intelligence Community*, 53 UNITED STATES ATTORNEYS' BULLETIN, July 2005, at 2.

Arnie Celnicker discusses changes to Rule 6(e) of the Federal Rules of Criminal Procedure, which permit greater disclosure of grand jury material, most notably to foreign officials. Arnie Celnicker, *Changes to Grand Jury Secrecy Made by the Intelligence Reform and Terrorism Prevention Act*, 53 UNITED STATES ATTORNEYS' BULLETIN, July 2005, at 7.

Eleven New Tools for Prosecutors serves as a quick reference to new prosecution tools in IRTPA, a number of which are more fully discussed in the articles that follow. Brenda Sue Thornton & Ranganath Manthripragada, *Eleven New Tools for Prosecutors*, 53 UNITED STATES ATTORNEYS' BULLETIN, July 2005, at 14.

Three Critical New Tools: Rebuttable Presumption of Detention, Training Offense, and Hoax Offense by Sylvia Kaser focuses on three critical provisions which facilitate charging and detaining terrorists. Sylvia Kaser, *Three Critical New Tools: Rebuttable Presumption of Detention, Training Offense, and Hoax Offense*, 53 UNITED STATES ATTORNEYS' BULLETIN, July 2005, at 19.

John De Pue discusses the changes IRTPA makes to these statutes, which of those changes have retroactive effect, and which are limited to prospective application. John De Pue, *Changes to 2339A and 2339B: Clarifying or Substantive—Ex Post Facto Implications*, 53 UNITED STATES ATTORNEYS' BULLETIN, July 2005, at 26.

Finally, *Jurisdiction for "Material Support" Crimes: Factual Illustrations* by Sharon Lever walks us through various brief fact patterns to illustrate the changes to, and expansion of, the jurisdictional reach of 18 U.S.C. § 2339B. Sharon Lever, *Jurisdiction for "Material Support" Crimes: Factual Illustrations*, 53 UNITED STATES ATTORNEYS' BULLETIN, July 2005, at 32.

A fuller discussion of those parts of IRTPA of greatest interest to federal criminal prosecutors can be found in Stephen Weglian, *Compendium of Measures of Interest to Federal Terrorism Prosecutors from the Intelligence Reform and Terrorism Prevention Act of 2004*. This publication is available from the Counterterrorism Section. The Policy, Legislation and Planning Unit of the Counterterrorism Section is a resource for additional guidance on the matters discussed in these articles and for other monographs and topics cited throughout this edition of the UNITED STATES ATTORNEYS' BULLETIN.❖

ABOUT THE AUTHOR

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The Reorganization of the Intelligence Community

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I. Introduction

On December 17, 2004, the President signed landmark legislation that dramatically restructured the intelligence community. The Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (Dec. 17, 2004) (Intelligence Reform Act or Act), is designed to improve the collection and dissemination of intelligence and the coordination of counterterrorism activity, while protecting sources and methods and respecting privacy and civil liberties. Implementation of the Act is in many respects very much a work in progress, and it is far too early to measure the precise effect of the reorganization on the government's counterterrorism efforts. The changes, however, are far-reaching and will likely have at least some impact on law enforcement and the investigation, preemption and prosecution of terrorists, and terrorist activity.

II. Reforming the intelligence community—key statutory provisions

Pursuant to the Act, the new Director of National Intelligence (DNI) will serve as the head of the intelligence community and the principal adviser to the President on intelligence issues. Intelligence Reform Act §1011, *available at* http://thomas.loc.gov/bss/d108/d108laws.html. The Central Intelligence Agency (CIA) Director will no longer wear a second hat as the Director of Central Intelligence (DCI) or have authority over the larger intelligence community.

In the words of President Bush, the fundamental job of the DNI will be to "ensure that our intelligence agencies work as a single, unified enterprise." Transcript of Presidential Press Conference, *available at* http://www.whitehouse.gov/news/releases/2005/02/print/20050217-2.html (Feb. 17, 2005). Generally speaking, the DNI will have the authority to order the collection of new intelligence, ensure the sharing of information among agencies, determine the annual budgets for all national intelligence agencies and offices, and direct how these funds are spent. Intelligence Reform Act § 1011,

available at http://thomas.loc.gov/bss/d108/d108 laws.html.

Another significant part of the Act is the establishment of a National Counterterrorism Center (NCTC or Center) within the Office of the DNI. *Id.* at §1021. The new Center is meant to achieve "seamless coordination" across departmental lines in the war on terrorism. H.R. Conf. Rep. No. 108-796 (2004).

The Center will have both an intelligence function and a planning function. The Center is to serve as the primary agency in the United States government for analyzing and integrating intelligence on terrorism, except for intelligence pertaining exclusively to domestic terrorism. The Center is to conduct strategic operational planning for counterterrorism activities, "integrating all instruments of national power," including law enforcement. The Center will assign roles and responsibilities to lead departments or agencies, but "shall not direct the execution of any resulting operations." Intelligence Reform Act §1021, *available at* http://thomas.loc.gov/bss/d108/ d108laws.html.

In discussing the role of the Center in strategic operational planning, Senator Lieberman analogized the powers of the individual agencies to

> lanes in a highway, each lane symbolizing an agency's expertise (e.g., special operations, espionage, and law enforcement). The NCTC will not tell each agency how to drive in its lane. But effective counterterrorism requires choosing which lane – meaning which type of activity, and thus which agency, to utilize in a particular situation. The NCTC would select the lane . . . .

150 Cong. Rec. S11972 (daily ed. Dec. 8, 2004). *See also* 150 Cong. Rec. E2208 (daily ed. Dec. 20, 2004) (remarks of Congressman Hunter) (NCTC can plan broad missions, but cannot override an agency's operational chain of command).

In addition to the NCTC, the Act also establishes a National Counter Proliferation Center, although the President has the authority to waive its establishment (a choice he does not have regarding the National Counterterrorism Center). The Act also gives the DNI discretion to establish national intelligence centers on other topics. Intelligence Reform Act §§1022-1023, *available at* http://thomas.loc.gov/bss/d108/d108laws.html.

Improving information sharing is a major focus of the new law. As already noted, the DNI has the authority to ensure the sharing of information among agencies. Furthermore, one of the missions of the new NCTC is to make certain that agencies receive the intelligence support they need to execute their counterterrorism plans. In addition, the Center is to serve "as the central and shared knowledge bank" on known and suspected terrorists and international terrorist groups. Other information sharing duties of the Center mentioned in the statute include disseminating current threat analysis to the Attorney General and other high officials and supporting the Department of Justice (Department) in the dissemination of terrorism information to state and local officials. *Id.* at § 1021.

Another section of the Act requires the President to create an "information sharing environment" (ISE) for the sharing of "terrorism information." As defined in the Act, "terrorism information" includes all information (including that collected by law enforcement) that relates to foreign, international, or transnational terrorists. *Id.* at § 1016.

The Act envisions the ISE as a network that ensures "direct and continuous online electronic access to information." The Act calls for a "culture of information sharing" and seeks to promote appropriate information sharing with the private sector and with state, local, and tribal entities, as well as within the federal government. At the same time, the ISE is to be designed so as not to compromise national security or violate applicable legal standards relating to privacy and civil liberties. *Id.*

Title II of the Act addresses the FBI's (or Bureau) intelligence capabilities. In addition to listing intelligence as one of four principal missions of the FBI (the others being counterterrorism and counterintelligence, criminal enterprises and federal crimes, and criminal justice services), the Act requires the FBI to develop and maintain a specialized "national intelligence workforce" consisting of agents, analysts, linguists, and surveillance specialists

who will ensure an institutional culture that is expert in and committed to the intelligence mission of the Bureau. Efforts to improve the FBI's intelligence capabilities are to be carried out "under the joint guidance of the Attorney General and the National Intelligence Director." *Id.* at § 2001. Also, the Bureau's Office of Intelligence was renamed the Directorate of Intelligence. *Id.* at § 2002.

In Congressional testimony, after the passage of the Act, Director Mueller stated that the FBI's Directorate of Intelligence is made up of a headquarters element plus Field Intelligence Groups (FIGs) in every FBI field office. He described the central mission of the Directorate as

- Allowing the FBI to proactively target threats to the United States before they become crimes.
- Providing helpful information and analysis to the national security, homeland security, and law enforcement communities.
- Building and sustaining FBI intelligence policies and capabilities.

Testimony of Director Mueller before the Senate Select Committee on Intelligence (Feb. 16, 2005).

The Act also contains provisions relating to the Foreign Intelligence Surveillance Act (FISA). On the one hand, Title I of the Intelligence Reform Act mandates that the DNI establish collection requirements and priorities under FISA. On the other hand, the Act also states that nothing in Title I is to be construed as affecting the role of the Department or the Attorney General under FISA. Intelligence Reform Act §1011, *available at* http://thomas.loc.gov/bss/d108/d108laws.html.

The Act also establishes a five-member Privacy and Civil Liberties Oversight Board within the Executive Office of the President. The purpose of the Board is to ensure that privacy and civil liberties concerns are taken into account by the executive branch in devising and implementing counterterrorism policy.

The Board's functions include providing both advice and oversight. Board members and staff will receive security clearances and, to the extent permitted by law, the Board is authorized to gain access to official records and to interview officers of any executive branch agency. In Congressional debate, Senator Lieberman described the Board as possessing investigative powers "similar to those of a government-wide inspector general." 150 Cong. Rec. S11974 (daily ed. Dec. 8, 2004). Nevertheless, the Act allows information to be withheld from the Board if necessary to protect national security, sensitive law enforcement or counterterrorism information, or ongoing operations. Intelligence Reform Act §1061, *available at* http://thomas.loc.gov/bss/d108/d108laws.html.

III. Putting the Act in context

Although the Act represents a dramatic restructuring of the intelligence community, it did not occur in a vacuum. There have been numerous attempts since the September 11 attacks to improve information sharing within the federal government and to restructure government counterterrorism efforts. Furthermore, there were two very significant developments in the summer of 2004 that were pertinent to the Act: the release in July 2004 of the final report of the National Commission on Terrorist Attacks Upon the United States (the 9/11 Commission), and the issuance by President Bush of four Executive Orders in late August 2004 that foreshadowed some of the legislative changes outlined above. *Cf.* H.R. Conf. Rep. No. 108-796 (2004) (the Act in part implements the recommendations of the 9/11 Commission but also responds to other studies and commissions).

The need to improve intelligence gathering and information sharing was recognized immediately after 9/11. For example, the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001), together with changes in Department policy and Attorney General guidelines and a landmark decision by the Foreign Intelligence Surveillance Court of Review (FISCR), revolutionized the sharing of information between the intelligence community and law enforcement. *See*, *e.g.*, §§ 203, 218, & 504, *available at* http://thomas.loc.gov/bss/d108/d108laws.html, of the USA PATRIOT Act (authorizing law enforcement to share grand jury and Title III information with intelligence and national security officials, clearly permitting consultation between law enforcement and intelligence personnel on FISA matters, and authorizing FISA wiretaps and searches so long as gathering intelligence is a "significant purpose," regardless of whether it is the "primary purpose"); *In re: Sealed Case*, 310 F.3d 717 (F.I.S.C.R. 2002).

The FBI also committed to strengthening its intelligence capabilities well before passage of the Act, *see* Testimony of Director Mueller before the Senate Select Committee on Intelligence (Feb. 16, 2005), while the Department of Homeland Security began operations on March 1, 2003, as part of the most extensive reorganization of the federal government in decades.

On May 1, 2003, the Terrorist Threat Integration Center (TTIC) was formed. TTIC was a forerunner of the National Counterterrorism Center and incorporated analysts from various government agencies. Its director told Congress that

> [f]or the first time in our history, a multi-agency entity has access to information systems and databases spanning the intelligence, law enforcement, homeland security, diplomatic, and military communities that contain information related to the threat of international terrorism . . . . enabling information sharing as never before in the U.S. Government. . . . . This integration of perspectives from multiple agencies and departments represented in TTIC is serving as a force multiplier in the fight against terrorism . . . . information and finished analysis are now fused in a multi-agency environment so that an integrated and comprehensive threat picture is provided.

Statement for the Record of John O. Brennan before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary Committee, *available at* http://judiciary.house.gov/Oversight Testimony.aspx.

In the summer of 2004, the 9/11 Commission issued its report, which reviewed the government's counterterrorism efforts and made recommendations for improvement. The Commission analogized the various counterterrorism agencies to "a set of specialists in a hospital . . . . What is missing is the attending physician who makes sure they work as a team." *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, at 353 (W.W. Norton & Co., authorized ed.) *available at* http://www.9-11commission.gov/. The Commission found that, because of inadequate teamwork, information was not shared, analysis was not pooled, and effective operations were not launched. *Id.* The Commission also concluded that the Director of Central Intelligence, although the titular head of the intelligence community, had too many other roles and also lacked sufficient authority to effectively manage that community. *Id.* at 409-10. "A number of past studies have found that the current Director of Central Intelligence lacks sufficient authority to steward the Intelligence Community and transform it into an agile network to fight terrorist networks.") H. R. Conf. Rep. No. 108-796, at 241 (2004).

Further, despite the extensive government reorganizations and efforts that occurred after 9/11, the Commission found that the government's counterterrorism efforts were still lacking an effective "quarterback." *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, at 400 (W.W. Norton & Co., authorized ed.), *available at* http://www.9-11commission.gov. To counter the terrorist threat more effectively, it recommended the establishment of a NCTC as a center for joint operational planning and joint intelligence. The NCTC would build on the foundation established by TTIC and "would look across the foreign-domestic divide and across agency boundaries." *Id.* at 404. To improve the government's intelligence apparatus more generally, the Commission recommended the appointment of a strong National Intelligence Director to replace the Director of Central Intelligence. *Id.* at 411-15.

The Commission also concluded that there were too many barriers to the sharing of information within the government. It criticized overclassification and excessive compartmentation of information, and called for a shift in cultural paradigms in which the "need-to-share" replaces an overly restrictive "need-to-know." The Commission recommended that the President lead the way to a "trusted information network" that would operate across agency lines. *Id.* at 416-19.

The Commission also called for various measures to protect civil liberties, including guidelines on information sharing that would protect privacy and the creation of a civil liberties

board within the executive branch. *Id.* at 393-95. While it praised the efforts of the FBI to improve its intelligence capabilities under Director Mueller, it stated that the Bureau's shift to a more preventive counterterrorism posture needed to be fully institutionalized so that it lasts beyond Director Mueller's tenure. *Id.* at 425.

The Commission report was issued in July 2004. On August 27, 2004, the President issued several Executive Orders.

- An Executive Order strengthening the authority of the Director of Central Intelligence. *See* Exec. Order No.13,355, 69 Fed. Reg. 53,593 (Sept. 1, 2004).
- A second on information sharing. *See* Exec. Order No. 13,356, 69 Fed. Reg. 53,599 (Sept. 1, 2004).
- A third creating a National Counterterrorism Center. *See* Exec. Order No. 13354, 69 Fed. Reg. 53,589 (Sept. 1, 2004).
- A fourth order creating a civil liberties board within the Executive Branch. *See* Exec. Order No. 13,353, 69 Fed. Reg. 53,585 (Sept. 1, 2004).

Broadly speaking, the Executive Orders were in the same general spirit as the Commission recommendations and the subsequently enacted Intelligence Reform Act.

- More information sharing.
- A new National Counterterrorism Center.
- A stronger head of the intelligence community.
- Protection of civil liberties.

Because of Executive Order 13,354, 69 Fed. Reg. 53,589 (Sept. 1, 2004) the NCTC began operating even before passage of the Act. However, the statutory Counterterrorism Center will report to the DNI on intelligence matters and directly to the President on joint counterterrorism operations.

IV. Conclusion

As this article is being submitted for publication, we are in a transitional period. Title I of the Act, which contains most of the statutory changes to the intelligence community, is to take effect no later than June 17, 2005. On February 17, 2005, the President announced his nomination of Ambassador John Negroponte as the first DNI, and Ambassador Negroponte was confirmed by the Senate on April 21, 2005.

Meanwhile, on March 31, 2005, the President received a report from the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction. Although the report is beyond the scope of this article, its authors called for "dramatic change" in the intelligence community and offered seventy-four recommendations. Most of the recommendations relate to the DNI, but one recommendation would effect a significant reorganization of the Justice Department, resulting in the creation of a new National Security Division within the Department to handle terrorism, espionage, and intelligence investigations. The President welcomed the report, and its recommendations are being reviewed. *See* White House Press Briefing by Scott McClelland, *available at* http://www.whitehouse.gov/news/releases/2005/03/print/20050331-2html; *The Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction: Report to the President of the United States,* at 31-32; Transmittal Letter at 1-2.

The intelligence reform provisions of the Act are as complex as they are important. Senators and Congressmen did not totally agree on the meaning of various provisions. Senators Collins and Lieberman generally pushed in the direction of greater change and authority for the DNI, and Congressmen Hunter and Hoekstra sought to protect the authority of the existing departments and agencies. *See* 150 Cong. Rec. S11968-S11975 (daily ed. Dec. 8, 2004); 150 Cong. Rec. E2207-E2210 (daily ed. Dec. 20, 2004).

It remains to be seen whether giving the DNI greater authority over the intelligence community will be compatible with the line authority exercised over individual intelligence entities by the heads of the departments in which they are located, such as the Departments of Justice and Defense. There may also be a built-in tension between the laudable goal of increasing and improving information sharing and the need to protect national security and individuals' privacy.

As the Act is implemented, some of the issues that might be of special interest to prosecutors include:

- How will the FBI change and how will those changes affect our work with the Bureau?
- Will the law enforcement community receive the information it needs from the intelligence community in a timely and helpful way?
- Will sensitive law enforcement information be adequately protected by the new information-sharing procedures?
- How will NCTC strategic operational planning involve and affect law enforcement?
- How will the new structure affect our discovery obligations?
- What role, if any, will the NCTC play with regard to intelligence on purely domestic terrorist threats? *Cf.* Intelligence Reform Act §1021, which appears to envision the NCTC's receipt, retention, and dissemination of at least some intelligence pertaining exclusively to domestic counterterrorism.
- Will a National Counter Proliferation Center be created? Will national intelligence centers on other topics be established?
- How, if at all, will the new civil liberties board affect law enforcement or intelligence operations of interest to law enforcement?
- Finally, will the Act be successful in improving the intelligence and counterterrorism capabilities of the United States? Will it help us prevent another 9/11?❖

ABOUT THE AUTHOR

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Changes to Grand Jury Secrecy Made by The Intelligence Reform and Terrorism Prevention Act

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I. Introduction

The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. 108-458, 118 Stat. 3638, creates exceptions to grand jury secrecy that, among other things, allow the sharing of matters occurring before the grand jury with foreign governments under certain circumstances. One of the new exceptions authorizes disclosure of terrorism-related threat information to federal, state, state subdivision, Indian tribal, and foreign government officials in order to prevent or respond to hostile acts. The other new exceptions apply to all matters occurring before the grand jury—from antitrust to zoological destruction—and allow disclosure to

foreign governments where the attorney for the government seeks help from foreign government personnel to assist in a criminal investigation or where a foreign official will use the information to enforce a foreign criminal law. In short, any criminal investigation with an international aspect may be impacted by these changes.

Federal Rule of Criminal Procedure 6(e)(2)(B) prohibits the disclosure of "a matter occurring before the grand jury," subject only to exceptions listed in Rule 6(e)(3). Section 3.8 of *Federal Grand Jury Practice* describes "a matter occurring before the grand jury" as follows:

> Rule 6(e) does not cover all information developed during the course of a grand jury investigation, but only information that would reveal the strategy or direction of the investigation, the nature of the evidence produced before the grand jury, the views expressed by members of the grand jury, or anything else that actually occurred before the grand jury.

OFFICE OF LEGAL EDUCATION, U.S. DEP'T OF JUSTICE, FEDERAL GRAND JURY PRACTICE (Aug. 2000). It is important to note, however, that local variations in the interpretation and application of "a matter occurring before the grand jury" do exist.

As the Supreme Court has recognized, there are many purposes served by restricting disclosure of matters occurring before the grand jury, including encouraging witnesses' testimony, minimizing the risk of a target fleeing or corrupting the process, and protecting individuals from undue publicity. *See Douglas Oil v. Petrol Stops Northwest*, 441 U.S. 211, 219 (1979); *United States v. Procter & Gamble* 356 U.S. 677, 681-82 (1958). In the wake of 9/11, however, there has been a reexamination of the impact grand jury secrecy has on the government's ability to disseminate useful intelligence that may be gathered during a grand jury investigation. Congress initially addressed this issue in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. 107-56, 115 Stat. 272 (2001).

II. The USA PATRIOT Act of 2001

Analysis done in the aftermath of 9/11 has focused on the need for greater intelligence sharing. The potential value of information collected during grand jury investigations and the role of grand jury secrecy rules in preventing dissemination of that information has been highlighted. For example, a report of the Select Committee on Intelligence lamented that, during the decade preceding 9/11, grand jury investigations of the assassination of Rabbi Meier Kahane, the 1993 World Trade Center bombing, the 1996 Khobar Towers attack, the al Qaida Millennium Plot, and the USS Cole attack generated valuable intelligence, little of which was shared with the intelligence community. *Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001*, S. Rep. 107-351, H.R. Rep. 107-792, Dec. 20, 2002, at 89. Although Rule 6(e) may have prevented the disclosure of some of the information, the Committee noted that, "[s]adly, however, Rule 6(e) increasingly came to be used simply as an excuse for not sharing information." *Id*. Starting with the USA PATRIOT Act, Congress sought to address this issue.

Section 203(a) of the USA PATRIOT Act added a new exception, denominated as Rule 6(e)(3)(D), which allows a government attorney to disclose any grand jury matter involving foreign intelligence or counterintelligence information to federal officials to assist the recipients in the performance of their official duties. Such disclosure does not require a court order, only a notice filed with the court, under seal, subsequent to the disclosure.

On September 23, 2002, the Attorney General issued *Guidelines for Disclosure of Grand Jury and Electronic, Wire, and Oral Interception Information Identifying United States Persons, available at* http://www.cdt.org/security/usapatriot/020923guidelines203.pdf and *Guidelines Regarding Disclosure to the Director of Central Intelligence and Homeland Security Officials of Foreign Intelligence Acquired in the Course of a Criminal Investigation, available at* http://www.cdt.org/security/usapatriot/020923guidelines905a.pdf. The Guidelines, issued pursuant to sections 203(c) and 905(a) of the USA PATRIOT Act, specify the procedures that must be followed to disclose foreign intelligence acquired during a criminal investigation, including the procedures to be followed if the disseminated information identifies any "United States person," a term defined in section 101 of the Foreign Intelligence

Surveillance Act (FISA) of 1978, 50 U.S.C. § 1801.

The Guidelines also require that notice be promptly provided to the Criminal Division's Office of Enforcement Operations when any grand jury matter (as well as electronic, wire, and oral interceptions) involving foreign intelligence is disclosed to the intelligence community. *See Counterterrorism Resource Library*, Criminal Division's Counterterrorism Section, part III.B.3, for contents of the notice. This material is available from the Counterterrorism Section.

III. The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA)

The USA PATRIOT Act and the implementing guidelines removed legal impediments to the disclosure of foreign intelligence learned through grand jury investigations to federal law enforcement and intelligence personnel. Congress sought to further expand the exceptions to grand jury secrecy in the Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (2002), which was signed into law on November 25, 2002. Section 895 of the Homeland Security Act of 2002 would have allowed disclosure of grand jury matters to foreign governments in a number of circumstances. The Supreme Court, however, amended Rule 6 on April 29, 2002, making section 895 incapable of execution because it did not reference the then current version of Rule 6. *See* Rule 6, historical notes, codifications. Therefore, Congress reenacted the changes contemplated by section 895 two years later in the IRTPA.

Section 6501 of the IRTPA, which became effective on December 17, 2004, broadened three of the exceptions to grand jury secrecy contained in Rule 6(e)(3).

- Exception (A) allows disclosure to a foreign government when necessary to assist the attorney for the government.
- Exception (D) allows disclosure of a threat of terrorism or other hostile acts to federal, state, state subdivision, Indian tribal, and foreign government officials.
- Exception (E) allows the attorney for the government to seek a court order for disclosure to a foreign government for its criminal investigation, when disclosure is sought by either the foreign government or by the government attorney.

The IRTPA also amended the contempt provision, Rule 6(e)(7), making it contempt of court to knowingly violate the new guidelines concerning exception (D), which will be issued jointly by the Attorney General and the Director of National Intelligence (DNI).

A. Rule 6(e)(3)(A)—Disclosure to foreign government necessary to assist the attorney for the government

Rule 6(e)(3)(A)(ii) allows the government attorney to disclose a grand jury matter to any government personnel considered necessary to assist in the attorney's law enforcement duty. Prior to the amendment, the rule listed the government personnel who could receive the information as "including those of a state or state subdivision or of an Indian tribe." The IRTPA added government personnel of a "foreign government" to that list. Thus, Rule 6(e)(3)(A) now treats disclosure to Italian government personnel and to Utah government personnel equally.

The procedures in Rule 6(e)(3)(B) apply to any disclosure made under exception (A). The recipients may use the grand jury information "only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law." The government attorney must promptly provide the court with the names of the foreign government personnel who received the information and must certify that the recipients have been advised of their Rule 6(e) secrecy obligations. The Office of International Affairs (OIA) will be providing guidance as to the form of notice for use with foreign government personnel. Presumably the notice to be given to foreign officials will be similar to a 6(e) letter explaining the requirements of United States law.

When an attorney for the government wishes to seek assistance from a foreign government, there are both informal and formal mechanisms available. Informal mechanisms include police-to-

police requests and requests for public records. Formal mechanisms include letters rogatory and requests pursuant to a Mutual Legal Assistance Treaty (MLAT). The amendments to Rule 6(e) do not change the mechanisms available to deal with foreign officials. The amendments simply make it easier to disclose "a matter occurring before the grand jury" in the course of making the request for assistance. The same procedures that previously applied to obtaining foreign assistance, including working through OIA and maintaining adequate records, still apply.

B. Rule 6(e)(3)(D)—Disclosure of threat of hostile acts

The USA PATRIOT Act added the new exception (D), permitting disclosure of foreign intelligence to federal law enforcement and the intelligence community. The IRTPA further expands Rule 6(e)(3)(D) by allowing disclosure of grand jury matters involving terrorism or other international hostile acts to domestic or foreign officials to facilitate prevention or response. The new provision states:

> An attorney for the government may also disclose any grand jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate Federal, State, State subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

The "threat of attack" wording is modeled after the portion of the definition of "foreign intelligence information" contained in Rule 6(e)(3)(D)(iii)(a), which was added by the USA PATRIOT Act. On its face, there is no indication whether the threat must be imminent or specific. In light of Congress' desire to allow for increased disclosure, however, it would seem reasonable to interpret the language as authorizing disclosure without a showing of an imminent or specific threat.

Exception (D), like exception (A), does not require a court order. Within a reasonable time after disclosure, Rule 6(e)(3)(D)(ii) requires the attorney for the government to file, under seal, a notice with the court indicating departments, agencies, or entities that received the disclosure. *See Counterrorism Resource Library*, Criminal Division's Counterterrorism Section, part III.B.3, for a sample notice. This material is available from the Counterterrorism Section.

Recipients of the "threat" information are bound by three limitations on their use of the information. First, under Rule 6(e)(3)(D), the information is "for the purpose of preventing or responding to such threat or activities." Second, under Rule 6(e)(3)(D)(i), the information may be used "only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information." Third, Rule 6(e)(3)(D)(i) added a new limitation on the recipients' use of the information: "Any State, state subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only consistent with such guidelines as the Attorney General and the Director of National Intelligence shall jointly issue." As of this writing, the guidelines have not been issued. Regardless, note that the guidelines purportedly will impose controls on the use of the information by other sovereigns, including foreign government officials, rather than controls on government attorneys or other federal officials who provide the information. Moreover, the expanded contempt provision, Rule 6(e)(7), which is discussed below, makes knowing violations of these guidelines contempt of court. How such restrictions will be enforced is open to question.

C. Rule 6(e)(3)(E)(iii)—Disclosure when sought by foreign government for its criminal investigation

Unlike exceptions (A) and (D), exception (E) requires a court order authorizing disclosure. A new provision, Rule 6(e)(3)(E)(iii), provides that a court may authorize disclosure "at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation." This provision requires that the request emanate from a "foreign court or prosecutor," rather than, for example, foreign police or intelligence officials. Moreover, the information can only be sought for use in a foreign "official criminal investigation." Applying these terms to foreign legal systems may, in some

instances, be problematic. OIA's experience with bilateral MLATs and multilateral conventions may provide guidance.

Requests from a foreign court or prosecutor will normally arrive via letters rogatory or an MLAT request. An attorney from OIA will work with the government prosecutor during the process. Note that this provision allows a foreign court or prosecutor to seek grand jury information through an attorney for the government requesting a court order, but there is no parallel provision allowing state prosecutors the same prerogative.

D. Rule 6(e)(3)(E)(iv)—Disclosure when sought by an attorney for the government for a foreign government's criminal investigation

The original subpart (iii) of Rule 6(e)(3)(E) is now (iv). Previously, it allowed the government to request a court order if disclosure of the grand jury matter "may disclose a violation of state or Indian tribal criminal law, as long as the disclosure is to an appropriate state, state-subdivision, or Indian tribal official for the purpose of enforcing that law." The amended subpart (iv) adds foreign government officials enforcing foreign criminal law to the list of potential recipients.

Rule 6(e)(3)(E)(iv) is similar to the new subpart (iii), except that the impetus for the request is the attorney for the government rather than the foreign court or prosecutor. Under subpart (iv), the disclosure can be made to "an appropriate foreign government official," which may be broader than "a foreign court or prosecutor." Under Rules 6(e)(3)(E)(iii) and (iv), the attorney for the government is not seeking assistance to enforce United States law, but is providing information that will help the foreign official enforce foreign criminal law. Therefore, normally, it is not necessary to use a formal mechanism in providing the information. As with all contacts with foreign governments, the prosecutor should work with OIA.

Prior to the addition of foreign government officials to the list of possible recipients under Rule 6(e)(3)(E)(iv), disclosure could have been made to state officials for enforcement of state criminal law. In that situation, Department policy requires that the Assistant Attorney General of the Division that has jurisdiction over the matter authorize the application for disclosure to the state. For the Criminal Division, requests for authorization are sent through the Office of Enforcement Operations. *See* Criminal Resource Manual ¶ 157 (Oct. 1997). (Note that Rule 6(e)(3) has been amended and reorganized a number of times since October 1997. Therefore, the Criminal Resource Manual refers to the current Rule 6(e)(3)(E)(iv) as Rule 6(e)(3)(C)(iv)). Currently, there is no similar policy requiring AAG authorization for disclosures to foreign officials under the amended Rule 6(e)(3)(E)(iv).

E. Rule 6(e)(7)—Contempt of court

Rule 6(e)(7) previously made a knowing violation of Rule 6 a contempt of court. The IRTPA makes it contempt to knowingly violate the guidelines to be jointly issued by the Attorney General and the DNI pursuant to Rule 6. As discussed above, these guidelines are called for by Rule 6(e)(3)(D)(i), and will apply to any state, state subdivision, Indian tribal, or foreign government official who receives information under exception (D). Apparently, the guidelines will not relate to the use of information disclosed pursuant to the first sentence of exception (D), which had been added by the USA PATRIOT Act, because that sentence only covers disclosure of foreign intelligence to federal officials. It is the recipients of information about "a threat of attack," which was added by the IRTPA, who will be covered by the future guidelines and subject to contempt. This raises many jurisdictional, remedy, and policy issues as to the guidelines' enforcement, which, presumably, will be addressed in the guidelines or, as to foreign government officials, by OIA.

IV. Summary of IRTPA changes regarding disclosures to foreign government officials

A. Rule 6(e)(3)(A)

- Disclosures made to foreign government personnel.

- Disclosure must be necessary to assist in performing United States Attorney's duty to enforce federal criminal law.
- Recipient may use information only to assist an attorney for the United States in performing that attorney's duty to enforce federal criminal law.
- No court order is required.
- Must provide the court with the names of all persons to whom a disclosure has been made and certify that the attorney has advised those persons of their obligation of secrecy.

B. Rule 6(e)(3)(D)

- Disclosure is made to foreign government official.
- Disclosure involves threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent.
- Purpose of disclosure must be to prevent or respond to threat.
- Recipient may use the information only to conduct official duties subject to any limitations on the unauthorized disclosure of such information.
- Recipient may use the information only consistent with guidelines to be jointly issued by the Attorney General and the Director of National Intelligence.
- No court order is required.
- Must file, under seal, a notice with the court stating entities that received disclosure.

C. Rule 6(e)(3)(E)(iii)

- Court order, requested by government attorney, is required.
- Disclosure sought by foreign court or prosecutor.
- Foreign court or prosecutor must use information in official criminal investigation.

D. Rule 6(e)(3)(E)(iv)

- Court order, requested by government attorney, is required.
- Government attorney must show possible violation of foreign criminal law.
- Disclosure made to appropriate foreign government official.
- Disclosure must be for purpose of enforcing foreign criminal law.

V. Red-line version of exemptions contained in Rule 6(e)(3)

The following red-line version of Rule 6(e)(3) shows a comparison of the former text to the new text by striking the former text and underlining the new text.

(3) Exceptions.

(A) Disclosure of a grand-jury matter—other than the grand jury's deliberations or any grand juror's vote—may be made to:

(i) an attorney for the government for use in performing that attorney's duty;

(ii) any government personnel—including those of a state ~~or state subdivision or of an Indian tribe~~ , state subdivision, Indian tribe, or foreign government—that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or

(iii) a person authorized by 18 U.S.C. § 3322.

(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury.

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 401a), or foreign

intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate Federal, State, State subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any ~~federal~~ official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any State, state subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only consistent with such guidelines as the Attorney General and the Director of National Intelligence shall jointly issue.

(ii) Within a reasonable time after disclosure is made under Rule 6(e)(3)(D), an attorney for the government must file, under seal, a notice with the court in the district where the grand jury convened stating that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

(iii) As used in Rule 6(e)(3)(D), the term "foreign intelligence information" means:

(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against—

- actual or potential attack or other grave hostile acts of a foreign power or its agent;
- sabotage or international terrorism by a foreign power or its agent; or
- clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or

(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to—

- the national defense or the security of the United States; or
- the conduct of the foreign affairs of the United States.

(E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter:

(i) preliminarily to or in connection with a judicial proceeding;

(ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury;

(iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation;

(~~iii~~ iv) at the request of the government if it shows that the matter may disclose a violation of ~~state or Indian tribal~~ State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state-subdivision, ~~or Indian tribal official~~ Indian tribal, or foreign government official for the purpose of enforcing that law; or

(~~iv~~ v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

(F) A petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte—as it may be when the government is the petitioner—the petitioner must serve the petition on, and the court must

afford a reasonable opportunity to appear and be heard to:

(i) an attorney for the government;

(ii) the parties to the judicial proceeding; and

(iii) any other person whom the court may designate.

(G) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy. The transferee court must afford those persons identified in Rule 6(e)(3)(F) a reasonable opportunity to appear and be heard.

VI. Conclusion

Changes made to Rule 6(e) in the aftermath of 9/11 have authorized greater dissemination of matters occurring before the grand jury. The policy benefits of grand jury secrecy have not vanished, but are likely outweighed by the benefits of disclosure in regard to foreign intelligence and terrorism. The changes brought by the IRTPA, however, are not limited to those areas. They impact all international criminal investigations. The attorney for the government has certainly been given a useful option for easier and quicker disclosure of grand jury matters to foreign government officials, both for the benefit of the grand jury investigation and for the benefit of the investigation by foreign officials of a possible foreign criminal law violation. Still, prior to making any disclosure, prudence dictates a weighing of the risks and benefits from disclosure of grand jury matters in each particular case.❖

ABOUT THE AUTHOR

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Eleven New Tools for Prosecutors

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The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) gives federal prosecutors new tools to combat terrorism. Pub. L. No. 108-458, 118 Stat. 3638 (2004). Eleven of these new tools of interest to prosecutors are highlighted below.

1. The definition of "knowingly" is clarified for material support charges (18 U.S.C. § 2339B)

Numerous individuals have been charged with "knowingly" providing material support or resources to a foreign terrorist organization (FTO) in violation of § 2339B. Prior to the IRTPA, the term "knowingly" was not defined in the statute. New Subsection 2339B(a)(1) clarifies the

meaning of "knowingly." To violate this statute, a person must have knowledge that the organization is a designated FTO or that the organization has engaged or engages in terrorist activity or terrorism. The terms "engage in terrorist activity" and "terrorism" are defined in § 212(a)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. 1182 (a)(3)(B), and § 140(d)(2) of the Foreign Relations Authorization Act, Pub. L. No. 108-356, 118 Stat. 1416 (2004), respectively.

2. The jurisdictional basis for a material support charge is vastly expanded

Under prior jurisdictional provisions a § 2339B charge was limited to activity occurring within the United States and to overseas activity committed by persons "subject to the jurisdiction of the United States." The latter term included United States nationals and legal entities created under the laws of the federal government, as well as under the laws of a state, commonwealth, possession, or territory of the United States. Under the newly expanded § 2339B, there is jurisdiction for a violation if:

- The offender is a U.S. citizen or legal permanent resident alien.
- The offender is a stateless person whose habitual residence is in the United States.
- Immigration status notwithstanding, jurisdiction exists if after the conduct required for the offense occurred, the offender is brought into or found in the United States, even if the conduct required for the offense occurred outside the United States.
- The offense occurred in whole or in part within the United States.
- The offense occurred in or affects interstate or foreign commerce.
- The offender aided or abetted or conspired with any person over whom jurisdiction exists under any of the above-described circumstances.

18 U.S.C. § 2339B(d)(1).

One major expansion of jurisdiction is the "found in" provision, which extends jurisdiction to permit the prosecution of anyone who commits the crime of knowingly providing material support to an FTO anywhere, if he later enters or is brought into the United States. Another major expansion is that there is now jurisdiction over a material support offense where the proscribed activity affects interstate or foreign commerce. From a practice standpoint, however, these new jurisdictional bases are applicable only to material support or resources that are provided on or after December 17, 2004, the date of enactment of the ITRPA.

3. The definition of material support or resources is clarified and broadened for both §§ 2339A and 2339B charges

Material support or resources is defined in § 2339A and cross-referenced in § 2339B. This definition has been clarified in several ways. First, the definition was broadened to clearly encompass all property (whether tangible or intangible) and all services (except medicine or religious materials). Second, it is now clear that the term "personnel" includes providing oneself. 18 U.S.C. § 2339B. Third, the definitions of training and expert advice or technical assistance were clarified. The former includes "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." The latter means "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. § 2339A(b)(2)(3).

Note: Pursuant to a sunset provision in the ITRPA, the above delineated changes will no longer be in effect after December 31, 2006, absent additional legislation.

4. It is a crime to receive military-type training from or on behalf of a designated foreign terrorist organization

New 18 U.S.C. § 2339D makes it a crime to receive military training from or on behalf of a designated FTO. (A list of the designated FTOs can be found at http://www.state.gov/documents/organization/32749.pdf). The Department of Justice (Department) sought this provision in

order to ensure the ability to prosecute individuals who train to participate in terrorist acts or terrorist activity, regardless of where they undertake this training or whether they put this training into practice by participating in a specific act. There are several points to keep in mind about this provision.

- It only applies to individuals who receive military training on or after December 17, 2004, the date of enactment of the IRTPA.
- The training must have taken place after the date that the FTO was designated by the Secretary of State.
- It must be shown that, at the time of the training, the target knew either that the FTO had been designated or that it engaged in terrorist activity or terrorism.
- The statute extends to training provided by a third party (which could be a legal entity) so long as the training is undertaken for the benefit of the FTO.
- There is extraterritorial jurisdiction over this offense.

This new provision has the same expanded sweeping jurisdictional bases as § 2339B (see the delineation of those bases above), including the "found in" jurisdictional base. Accordingly, the United States can prosecute anyone who receives training from or on behalf of an FTO wherever the training occurs if the individual is subsequently "found in" the United States. No other tie with the United States is required. Consequently, any foreign citizen with the requisite scienter who received training from or on behalf of a designated FTO in a foreign country on or after December 17, 2004, is now subject to prosecution in the United States if "found in" the United States. *Id.*

5. 18 U.S.C. § 3142 extends the presumption of pretrial detention to terrorism-related offenses

One of the frustrations that prosecutors faced after charging a target with a terrorism offense dealt with the issue of detention. Title 18 U.S.C. § 3142 now creates a rebuttable presumption that pretrial detention is warranted for any person charged with an offense listed in 18 U.S.C. § 2332b(g)(5)(B)—which is part of the definition of "a federal crime of terrorism"—for which a maximum penalty of ten years or more is prescribed. Thus, for example, a U.S. citizen charged with donating blankets to a Hamas-run clinic in violation of 18 U.S.C § 2339B would now be subject to a presumption of detention.

6. Any alien who receives military-type training from or on behalf of a terrorist organization is deportable

In many instances, the evidence against the target of an investigation for an 18 U.S.C. § 2339D violation may not meet the criminal standard of proof of beyond a reasonable doubt. Nevertheless, your investigation will not be in vain. The IRTPA amended the Immigration and Nationality Act (8 U.S.C. § 1227(a)(4)) to make any alien who has received the type of training that would be the subject of a § 2339D violation deportable. The lower standard of proof in an immigration context, together with the possibility of detention, might make this an attractive option for prevention and disruption. For this purpose, a "terrorist organization" includes not only an organization that has been designated by the Secretary of State as an FTO, but also includes any listed organization on the lengthier State Department Terrorist Exclusion list, which covers domestic, as well as foreign groups. (A list of designated FTOs and a list of groups on the State Department's Terrorist Exclusion list can be found at http://www.state.gov/documents/organization/32749.pdf). Because immigration provisions generally have retroactive application, this deportation provision encompasses training received even before December 17, 2004, if the terrorist organization was designated by the Secretary of State at the time of the training.

7. There is a new provision for charging terrorism hoaxes

Another common problem that prosecutors have wrestled with is how to charge various terrorism hoax scenarios. In the aftermath of the anthrax mailings to the media and members of Congress in 2001, law enforcement authorities increasingly have been faced with a threat of a different type: hoax cases, which drain vital investigative and emergency resources and contribute to public terrorism fatigue. As a consequence, over the past three years,

prosecutors have used a panoply of existing statutes, which sometimes lack the proper factual fit or provide for a disproportionate punishment. Perhaps the most commonly used statutes have been 18 U.S.C. § 844(e), which criminalizes threats to persons or property, and 18 U.S.C. § 876, which criminalizes use of the mail to threaten injury to a person. Significantly, some terrorism hoaxes are simply false reports that cannot easily be characterized as outright threats at all. For example, calling law enforcement and falsely reporting the receipt of an envelope filled with anthrax would constitute a hoax, but it would not necessarily be a threat. In those situations, prosecutors sometimes have charged the conduct as a false statement under 18 U.S.C. § 1001, for which penalties may have been inadequate.

The new general hoax statute, 18 U.S.C. § 1038, created by Section 6702 of IRTPA, *available at* http://thomas.loc.gov, was passed to fill in these gaps in coverage. It allows a target to be charged with a felony if he engages in "*any conduct* with intent to convey false or misleading information under circumstances where such information may reasonably be believed and where such information indicates that an activity has taken, is taking, or will take place" that would constitute a violation of a list of delineated statutes. *Id.*

8. There are increased penalties for two commonly-used statutes in terrorism-related prosecutions: 18 U.S.C. §§ 1001 (false statements) and 1028 (document fraud)

Many targets of terrorism investigations entered the United States from other countries. One avenue of investigation is to evaluate their applications to enter the United States and to pursue, if warranted, a false statement or document fraud charge against these individuals. Unfortunately, the statutory penalties under these provisions never had enough of a bite to serve as an adequate penalty or to make cooperation a realistic option. These amendments, however, may change that calculation even though there is no corresponding guideline adjustment at this time. The maximum penalty for a violation of 18 U.S.C. § 1001 is now increased from five years to eight years if the offense involves international or domestic terrorism as defined in 18 U.S.C. § 2331, and the statutory maximum penalty for a violation of 18 U.S.C. § 1028(b)(4) has been increased from twenty-five years to thirty years if the offense involves international terrorism.

In order to obtain the higher penalty for conduct involving international or domestic terrorism under either statute, the indictment must allege that such conduct was involved and the trier of fact must determine such to be the case beyond a reasonable doubt.

9. The ITRPA amended Federal Rule 6(e) of the Federal Rules of Criminal Procedure to allow the sharing of grand jury information with a foreign government for three specified purposes

Prior to the passage of the IRTPA, federal prosecutors could not disclose grand jury information to a foreign government. The ITRPA amended Federal Rule 6(e) of the Federal Rules of Criminal Procedure to expressly allow, for the first time, the sharing of grand jury information with a foreign government for three specified purposes.

First, under new Rule 6(e)(3)(A), a government attorney can disclose a grand jury matter to a foreign government as necessary to assist in the government attorney's law enforcement responsibilities.

Second, under new Rule 6(e)(3)(D), a government attorney can disclose grand jury information to a foreign government if it falls into any one of following categories.

- If it involves "a threat of attack or other grave hostile acts of a foreign power or its agent."
- If it involves "a threat of domestic or international sabotage or terrorism."
- If it involves "clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent."
- If it is for "the purpose of preventing or responding to such threat or activities."

Id.

Third, new Rule 6(e)(3)(E)(iv) allows the government to request a court order for disclosure of grand jury information for the purpose of aiding foreign government officials in enforcing foreign criminal law. Sometimes, for legal or other reasons, a desired end-result would be the prosecution by a foreign government of a foreign national involved in terrorism. This new provision clearly allows a prosecutor to share grand jury information that may help a foreign government in their investigation or prosecution, if a court order allowing such disclosure is obtained. This is similar to prior rule 6(e)(3)(E)(iii) which allowed disclosure to state officials for enforcement of state criminal laws.

10. The Foreign Intelligence Surveillance Act (FISA) "lone wolf" provision

Previously, under the Foreign Intelligence Surveillance Act, the FISA court could authorize surveillance and searches based upon a showing that the target was "an agent of a foreign power." FISA coverage was not authorized for a target who was suspected of being involved in international terrorism, but *not* affiliated with a identifiable terror group. The new "lone wolf provision" allows the FISA court to order surveillance of a non-U.S. person when there is probable cause to believe that the target is involved in international terrorism. Note: Pursuant to a sunset provision in the IRTPA, this provision will not apply after December 31, 2005, absent further legislation. Pub. L. No. 108-356, 118 Stat. 1416 (2004).

11. The addition of seven offenses to the definition of a federal crime of terrorism—18 U.S.C. § 2332b(g)(5)

Seven new offenses have been added to the second prong of that definition.

- 18 U.S.C. § 175(c) (relating to smallpox virus).
- 18 U.S.C. § 832 (relating to participation in nuclear and WMD threats).
- 18 U.S.C. § 1361 (relating to government property or contracts).
- 18 U.S.C. § 2156 (relating to national defense materials, premises, or utilities).
- 18 U.S.C. § 2332g (relating to missile system designed to destroy aircraft).
- 18 U.S.C. § 2332h (relating to radiological dispersal devices).
- 42 U.S. C.§ 2122 (relating to prohibitions governing atomic weapons).

The listing of an offense in § 2332b(g)(5)(B) has several important consequences including:

- The crime is automatically a Racketeering and Corrupt Organizations (RICO) and money laundering predicate pursuant to 18 U.S.C. §§ 1961(1)(G) and 1956(c)(7)(A).
- The crime is a predicate offense under 18 U.S.C. § 2339A—providing material support to terrorists.
- The statute of limitation for these crimes is at least eight years, and there is no statute of limitations if the commission of the offense resulted in, or created a foreseeable risk of, death or serious bodily injury under 18 U.S.C. § 3286.
- The crime may be subject to the terrorism enhancement in Section 3A1.4 of the United States Sentencing Guidelines.❖

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Three Critical New Tools: Rebuttable Presumption of Detention, Training Offense and Hoax Offense

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I. Introduction

Title VI of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), enacted on December 17, 2004, gives prosecutors important new tools in the fight against terrorism, three of which will be discussed in this article. Significantly, the Act extends the rebuttable presumption of detention to certain terrorism crimes making it less likely that prosecutors will be forced to reveal crucial investigative and national security information at the earliest stages of these cases. It also explicitly criminalizes knowingly receiving military-type training from a foreign terrorist organization (FTO) and the perpetration of terrorism hoaxes regardless of the manner and means used by the perpetrator or whether an actual threat was made. Pub. L. No. 108-458, 118 Stat. 3638 (2004) *available at* http://thomas.loc.gov/bss/d108/d108laws.html.

II. Pretrial detention presumption extended to many terrorism crimes

Section 6951 of IRTPA, *available at* http://thomas.loc.gov/bss/d108/d108laws.html, amended 18 U.S.C. § 3142 by extending the presumption of pretrial detention to any offense listed in 18 U.S.C. § 2332b(g)(5)(B), for which a maximum term of imprisonment of ten years or more is prescribed. The pretrial detention statute now creates 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, if the judicial officer finds that there is probable cause

to believe that the defendant committed one of the specified offenses. Among the many offenses for which prosecutors may now rely upon the rebuttable presumption of detention are those regularly used in prosecuting terrorism cases.

- 18 U.S.C. §§ 2339A and 2339B, prohibiting the provision of material support to terrorists and FTOs.
- 18 U.S.C. § 956(a)(1), relating to conspiracy to murder, kidnap, or maim persons abroad.
- 18 U.S.C. § 1114, relating to killing or attempted killing of officers and employees of the United States.
- 18 U.S.C. § 1203, relating to hostage taking.
- 18 U.S.C. § 2332, relating to murder of U.S. nationals abroad.
- 18 U.S.C. § 2332a, relating to the use of weapons of mass destruction.

As in all other cases in which the presumption applies, this change in the law would not result in the automatic detention of terrorism defendants, but would allow the defense to overcome the presumption by presenting evidence favoring release.

Prior to the passage of this amendment, defendants accused of drug offenses and the use of firearms to commit certain drug and violent crimes, for example, were presumptively denied bail, while defendants charged with most terrorism crimes were not. This disparate treatment made little sense, as drug trafficking and terrorism offenses are, at a minimum, on an equal plane of potential violence and flight risk. As with drug traffickers, individuals accused of terrorism offenses are frequently part of a larger group or network with international connections, which are in a position to help these individuals flee or go into hiding if released. Even if they are not members of specific international terrorist organizations, these individuals frequently have overseas ties by virtue of citizenship or foreign national status. Moreover, the problems of intimidation of witnesses, disclosure of unindicted coconspirators, and destruction of evidence, posed by early disclosure of evidence, are particularly acute in the terrorism context.

What are the practical implications of this amendment in the context of terrorism cases? Application of the presumption may avoid premature disclosure of sensitive case information. In the Lackawanna Six case in the Western District of New York, seven defendants (one of whom remains a fugitive) were charged with providing material support to al Qaida under 18 U.S.C. § 2339B, based upon their attendance at the al Qaida-affiliated Al Farook training camp in the spring of 2001. The six apprehended defendants sought release on bond. Prosecutors were involved in a four-day detention hearing in which the defendants challenged prosecution proffers and asked for discovery of the government's evidence in support of detention. *United States v. Goba*, No. 02-CR-2145 (W.D.N.Y. Jan. 16, 2003).

Although all but one of the defendants were ultimately ordered detained (and the other defendant was unable to meet the conditions of release), the government was required to publicly reveal a substantial amount of its proof. With the benefit of the presumption, the government might not have been required to disclose until later in the discovery process and/or the disclosure might have been subject to restrictions on further dissemination imposed by protective order. In districts in which proffers are not acceptable and agent testimony is required, the possibilities for premature disclosure and early discovery through the agent-witness, as well as through *Jencks*, may now also be diminished by application of the presumption.

The presumption is also useful in quickly-developing cases where little contemporaneous information is available to substantiate the defendant's danger to the community or his flight risk, even though there may be sufficient information to arrest or indict. Similarly, where the prosecution's best evidence of a defendant's flight risk or danger to the community is classified national security information that cannot be disclosed, the presumption may allow prosecutors to obtain detention of the defendant despite this difficulty.

In all these cases, the presumption's effect is to enhance the value of the evidence prosecutors are able to put on at that early stage. For example, of great concern to law enforcement are "sleeper" agents, who outwardly may manifest few signs of danger to the community or risk of flight. The presumption makes it more likely that the government will be able to detain such an individual, who may accelerate previously-planned activity if released on bond. In the Lackawanna Six case, the presiding magistrate

judge did, in fact, authorize the release of one defendant, who, it was later learned, had lied to the FBI about the fact that he had met with Usama Bin Laden in Afghanistan. Where there is uncertainty about the background and future intentions of a defendant, the presumption should—and now does— apply.

Flight from prosecution is also more likely to be prevented in the aftermath of the amendment. In 1998 in the Eastern District of Michigan, Fawzi Assi was the first individual to be charged with a violation of the material support statute, 18 U.S.C. § 2339B, based upon his alleged provision of equipment to Hizballah, an FTO. After a detention hearing, the magistrate judge ordered the defendant released over the government's objection, stating that she was obligated to impose the least restrictive conditions and that this was "not a presumption case." *United States v. Assi,* No. 98-80695 (E.D. MI.) (Transcript of July 24, 1998 Detention Hearing at 90). The government appealed the ruling and obtained a stay of the order, but the district court subsequently released Assi pending the conclusion of an adjourned detention hearing. Before the detention hearing resumed several days later, Assi had fled the country and lived as a fugitive for six years before surrendering to the FBI.

Finally, the presumption may prove particularly helpful in terrorist financing cases. Even though terrorist financing may be charged under the core terrorism statutes, 18 U.S.C. §§ 2339A and 2339B, financing defendants tend to have longer-term connections to the United States and their communities and may not outwardly appear to pose a flight risk or danger to the community, unlike individuals who provide operational and overtly violent forms of material support to terrorist groups. Application of the presumption to these types of defendants is consistent with the U.S. Government's view that financing is the indispensable foundation of operational acts of terrorist violence and should be dealt with as such by the courts.

III. New provision squarely addresses the receipt of terrorist training

Section 6602 of the IRTPA, *available at* http://thomas.loc.gov/bss/d108/d108laws.html, creates a new provision, 18 U.S.C. § 2339D, which explicitly criminalizes the knowing receipt of military-type training from, or on behalf of, an FTO designated by the Secretary of State under section 219 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1189. Military-type training includes "training in means or methods that can cause death or serious bodily injury, destroy or damage property, or disrupt services to critical infrastructure, or training on [sic] the use, storage, production, or assembly of any explosive, firearm or other weapon, including any weapon of mass destruction[.]" 18 U.S.C. § 2339D(c)(1).

Under this new provision, the government must prove the offender knew the organization from which he received training was a designated FTO as defined under the INA, or that the organization engages in "terrorist activity" as defined by 8 U.S.C. § 1182(a)(3)(B) or "terrorism" as defined by 22 U.S.C. § 2656f(d)(2). The scienter requirements of §§ 2339D and 2339B, the existing material support statute, are now the same. For a more in-depth discussion of the changes to 18 U.S.C. § 2339B made by IRTPA, *see* John DePue, *Changes to 2339A and 2339B: Clarifying or Substantive—Ex Post Facto Implications* 53 UNITED STATES ATTORNEYS' BULLETIN, July 2004 at 26.

Under this formulation, the government would not be required to prove the defendant knew that receiving military training from an FTO was prohibited by law or that the defendant knew of all the unlawful activities that caused the organization to be designated as an FTO. Likewise, if a defendant knew that the organization from which he received training was an FTO, it would not be a defense that the defendant did not intend to facilitate the organization's unlawful activities. As with § 2339B, a defendant charged under § 2339D may not challenge the validity of the underlying designation of the FTO. *See* 8 U.S.C.

§ 1189(a)(8) ("defendant in a criminal action . . . shall not be permitted to raise any question concerning the validity of the issuance of [an FTO] designation [or redesignation] as a defense or an objection at any trial or hearing"); *United States v. Afshari*, 392 F.3d 1031, 1036-37 (9th Cir. 2004) (validity of FTO designation is not an element of the offense under 18 U.S.C. § 2339B) (petition for rehearing *en banc* pending); *United States v. Hammoud,* 381 F.3d 316, 331 (4th Cir. 2004) (*en banc*) (same).

With respect to jurisdiction, § 2339D expansively applies to conduct: (1) undertaken within the United States, (2) occurring in or affecting interstate or foreign commerce, or (3) outside the United States engaged in by any U.S. national, permanent resident alien, stateless person who habitually resides in the United States or any person who is afterwards brought into or found in the United States. 18 U.S.C. § 2339D(b)(1)-(5). Jurisdiction also exists over an offender who aids or abets or conspires with any person over whom jurisdiction exists in committing the offense. *Id.* at § 2339D(b)(6). Violations of this provision are punishable by a fine or ten years' imprisonment, or both. *Id.* at § 2339D(a).

Section 2339D explicitly gives effect to U.S. Government policy to stem the flow of recruits to terrorist training camps. Various investigations, including the Lackawanna Six case, *United States v. Goba*, No. 02-CR-2145 (W.D.N.Y. Jan. 16, 2003), discussed above, and the Virginia Jihad Network case, *United States v. Royer*, No. 3-296-A (E.D. Va. Jun. 25, 2003), have uncovered individuals who have traveled overseas to training camps to receive military-style training. It stands to reason that such individuals receiving firearms and explosives training, for example, are readying themselves for participation in terrorist activity or violence. Indeed, individuals who have attended camps may maintain long-standing relationships with other training camp alumni who may later seek to recruit and utilize them in their terrorist activities.

Even in a more basic way, a trainee's participation in a terrorist organization's training camp benefits the organization as a whole. Trainees who are required to perform guard duty, for example, contribute to the overall security of the camp. A trainee's participation in group drills, at a training camp, helps to improve both the skills of his fellow trainees and the efficacy of his instructors' training methods. Additionally, by attending a terrorist training camp, an individual lends critical moral support to other trainees and the organization as a whole, support that is essential to the health and vitality of the organization. Consequently, an attendee at a military-style training camp provides value to the organization.

How, as a practical matter, does 18 U.S.C. § 2339D help the prosecutor, or differ from existing statutes? Section 2339D fills any arguable gap in 18 U.S.C. § 2339B, which criminalizes *providing* material support, including training, to an FTO, but it does not explicitly prohibit *receiving* training from an FTO, as § 2339D now does. Thus, for post-enactment conduct, the prosecutor has a charging option that is an easier, more specific fit.

Charging attendance at a training camp as a violation of 18 U.S.C. § 2339D may also avoid some of the confusion and uncertainty generated by several court decisions interpreting the meaning of "personnel," which is set forth in the definition of "material support or resources." 18 U.S.C. § 2339A(b). In the past, prosecutors have charged training camp cases, such as the Lackawanna Six case, under 18 U.S.C. § 2339B, on the theory that providing oneself to a camp for training constitutes the provision of personnel or material support to the organization running or sponsoring the camp. The Lackawanna defendants pled guilty, but in other cases where this theory has been used the government has had mixed results. *Compare United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002) (court rejected defendant's claim that he was improperly charged with providing personnel—himself—to al Qaida when he trained with the Taliban in an employee-like capacity) *with Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000) (the term personnel is likely to be held unconstitutionally vague) *and United States v. Sattar,* 272 F. Supp. 2d 348, 363-64 (S.D.N.Y. 2003) (rejecting government's argument that the transmission of communications on behalf of an FTO constituted providing personnel under § 2339B); *see also United States v. Khan*, 309 F. Supp. 2d 789, 821 (E.D. Va. 2004) (Virginia Jihad Network case in which court found defendant's fighting on behalf of al Qaida's protector, the Taliban, does not fit the statutory definition of "material support or resources"); and *see* Memorandum from Barry Sabin, Chief Counterterrorism Section, Criminal Division,

Department of Justice, to All ATAC Coordinators, "Prosecution of Material Support Cases," (undated) (collecting and discussing cases and policy) (on file with the author).

Section 6603 of IRTPA has clarified the term "personnel" under 18 U.S.C. § 2339B and expanded the definition of "material support or resources" in ways that should obviate some of these difficulties. However, the fact remains that, with the passage of 18 U.S.C. § 2339D, prosecutors need not shoehorn post-enactment "attendance" cases into § 2339B on the theory that providing oneself for training constitutes the provision of material support to a designated FTO under 18 U.S.C. § 2339B, as a more directly applicable provision is now available.

Moreover, § 2339D can be used even in those post-enactment cases in which attendees' suspected conduct violates the material support statute. This may eliminate some of the investigative and evidentiary difficulties associated with obtaining proof in remote locations of the world. It still bears noting, however, that § 2339D is not a panacea for all problems of proof. There are still significant issues of proof, for example, sponsorship of particular camps by designated organizations, likely requiring expert testimony. For more information see the *Compendium of Measures of Interest to Federal Terrorism Prosecutors from the Intelligence Reform and Terrorism Prevention Act of 2004* and the Counterterrorism Section's Monograph, *Al Qaeda Terrorist Training Camps* (Mar. 2005). These materials are available from the Counterterrorism Section.

In sum, the prosecutor should look first to 18 U.S.C. § 2339D when confronted with post-enactment conduct involving military-style training. For those cases involving preenactment conduct, however, the prosecutor should continue to consider the applicability of 18 U.S.C. § 2339B, as well as other provisions, such as 18 U.S.C. § 2339A and 50 U.S.C. § 1705(b). *See, e.g., United States v. Khan*, 309 F. Supp. 2d 789 (E.D. Va. 2004) (bench decision in Virginia Jihad Network case discussing various provisions that can be used to charge training camp conduct). As discussed more fully in *Changes to 2339A and 2339B: Clarifying or Substantive—Ex Post Facto Implications*, IRTPA has clarified the definition of "personnel." IRTPA § 6603 (to be codified as 18 U.S.C. §§ 2339A(b)(1)), 2339B(h)), *available at* http://thomas.loc.gov/bss/d108/d108laws.html; *see also Humanitarian Law Project v. Ashcroft,* 393 F.3d 902 (9th Cir. 2004) (vacating lower court's injunction as to "personnel" and remanding in light of IRTPA amendments). John DePue, *Changes to 2339A and 2339B: Clarifying or Substantive—Ex Post Facto Implications* 53 UNITED STATES ATTORNEYS' BULLETIN, July 2004 at 26. These clarifications may, therefore, ease the legal and factual burden on prosecutors confronted with conduct that cannot be charged under the new statute, but that should nevertheless constitute a violation of this nation's terrorism laws.

IV. Hoaxes can now be charged under a new provision

On January 4, 2005, a company providing security services at the Portland, Oregon airport received an anonymous phone call warning that an individual about to board a flight for Alaska was carrying a bomb in his laptop. The local Portland Police Department, Port of Portland Police Department, FBI, Transportation Security Administration, and the Metropolitan Explosives Disposal Unit all responded to the call. Law enforcement located the individual and determined that the call was a hoax, which was made to satisfy a grudge against the person carrying the laptop.

This has become an all-too-familiar scenario. In the aftermath of the anthrax mailings to the media and members of Congress in 2001, law enforcement has been faced with a threat of an increasing number of hoax cases. In response, the Department of Justice (Department) issued guidance to stem the tide of hoaxes and deter such conduct through vigorous prosecution. *See* EOUSA, *Guidance Relating to Prosecution of Terrorism-Related Hoaxes* (Oct. 19, 2001). This material is available from the Counterterrorism Section. As a consequence, over the past three years, prosecutors have used an assortment of existing statutes, which sometimes lack the proper factual fit or appropriate punishment. The

most commonly used statutes have been 18 U.S.C. § 844(e), threats to persons or property and 18 U.S.C. § 876, which criminalizes use of the mail to threaten injury to a person. In situations involving hoax phone calls that do not constitute an actual threat, prosecutors sometimes have charged the conduct as a false statement under 18 U.S.C. § 1001, for which penalties may have been inadequate. A sampling of illustrative cases follows.

On May 27, 2004, an American Airlines flight from Dallas to Boston was forced to make an emergency landing in Nashville after a note was found in a lavatory which read, "There is a bomb on board this [flight] to Boston in cargo. Live Sadaam!" President Bush had been in Nashville on the same day and Air Force One had to be cleared from the airport to allow military fighter jets to escort the diverted flight to the airport. An off-duty flight attendant admitted she wrote and planted the threatening note. Gay Wilson was charged with unlawful interference with a flight crew under 49 U.S.C. § 46504, which makes it a felony to assault or intimidate a flight crew member or flight attendant or interfere with the performance of the member's or attendant's duties, or lessen the ability of the member or attendant to perform those duties. She was also charged under 18 U.S.C. § 32(a)(6) (communicating false information that endangers the safety of an aircraft in flight) and 18 U.S.C. § 844(e) (conveying false information concerning, *inter alia*, an attempt to destroy an airplane by means of an explosive). *United States v. Wilson,* No. 3:04-00120 (M.D. Tenn. May 28, 2004).

On July 6, 2004, local sheriff's officials in Wisconsin received a series of calls stating that there was a bomb on board an Amtrak train en route from Seattle to Chicago. The caller also stated, "letting train go … I don't know why," and "better stop that train." As a result of the calls, all passengers were removed from the train in Portage, Wisconsin and the train was moved to a secure location where law enforcement searched for a bomb. No explosive device was discovered. The calls were traced to train passenger Michael David Conwill, who admitted he made the calls after he attempted to have the phone company put his account in the name of his former employer. On July 14, 2004, Conwill was charged with a violation of 18 U.S.C. § 844(e), which makes it a felony to willfully make a threat concerning an attempt to unlawfully damage or destroy a vehicle through, *inter alia,* use of a telephone. *United States v. Conwill,* No. 04-CR-108-C (W.D. WI. July 14, 2004).

In November of 2004, on three occasions, Vassalo Russell made taped verbal threats to blow up the U.S. Courthouse in Detroit, Michigan. His motive was to disrupt operations so as to avoid supervised release testing and hearing obligations he had at the courthouse. On November 4, 2004, he was indicted on three counts of threatening to use a weapon of mass destruction—a bomb—against U.S. Government property in violation of 18 U.S.C. § 2332a. *United States v. Russell*, No. 00-80343 (E.D. MI. Feb. 23, 2005).

In November and early December of 2004, Ahmed Allali falsely provided to the FBI the names of individuals he claimed were members of al Qaida. He also falsely told the FBI that he had traveled to the United States with four members of al Qaida in 1998, that he had resided overseas with members of al Qaida in the 1990s, and that he had learned of an al Qaida plot to detonate bombs at government facilities in five U.S. cities in 2005. Allali fabricated this story in an attempt to avoid deportation. Allali was indicted on February 16, 2005 on three counts of making false statements under 18 U.S.C. §1001. *United States v. Allali*, No. IP 05-23-CR-01 M/F (S.D. Ind. Feb. 16, 2005).

The new general hoax statute, 18 U.S.C. § 1038, created by Section 6702 of IRTPA, was passed to fill gaps in coverage under the existing statutes. It provides that a person shall be guilty of a felony if he or she engages in "*any conduct* with the intent to convey false or misleading information under circumstances where such information may reasonably be believed and where such information indicates that an activity has taken, is taking, or will take place" that would constitute a violation of the following predicate statutes. 18 U.S.C. §§ 32 and 33 (destruction of aircraft and motor vehicles), §§ 175-178 (biological weapons), §§ 229-229F (chemical weapons), § 831 (nuclear or radiological materials), §§ 841-847 (explosives), §§ 921-931 (firearms), §§ 2271-2281 (shipping), §§ 2331-2339C (terrorism); Title 42, chapter 236 (sabotage of nuclear facilities), § 46502 (aircraft piracy); and 49 U.S.C. §§ 46504-46506 (assaults against an aircraft crew) and 60123(b) (interstate gas pipelines). Therefore, the government must show three elements.

- The defendant engaged in conduct with an intent to convey false or misleading information.
- Under circumstances where such information could reasonably be believed.
- Concerning an activity that would constitute a violation of a predicate offense.

The range of penalties varies from five years to life depending upon the consequences of the conduct. Thus, the new hoax provision covers any type of conduct, whether it is written, verbal, or *physical,* and it gives additional flexibility with respect to penalties.

Prosecutors in Portland, Oregon were able to utilize 18 U.S.C. § 1038 to charge Kyle Gregory Nonneman, an individual who made an anonymous call to the Portland airport as a means of avoiding payment of a debt to an individual he falsely implicated in a bomb scenario. Nonneman's case falls squarely into the gap that preceded the passage of the new hoax provision. He did not directly make a threat, rather he falsely stated that another individual was to board a plane with a bomb. The fact pattern also satisfies the elements of § 1038 in that Nonneman implicated an individual to whom he owed money and had defrauded—demonstrating the intent to convey false or misleading information. The reporting of this information and its content established circumstances in which such information could reasonably be believed to constitute a violation of 18 U.S.C. § 32 relating to destruction of aircraft. *United States v. Nonneman,* Cr 05-142-BR (D. Or. Feb. 4, 2005).

The new statute also criminalizes knowingly making false reports about the death, injury, capture, or disappearance of a member of the armed forces, 18 U.S.C. § 1038(a)(2); provides for a civil action for expenses incurred incident to any emergency or investigative response, *id.* § 1038(b); and requires a convicted defendant to reimburse any party that incurred expenses related to an emergency or investigative response to the false report. *Id.* § 1038(c). For more information on prosecuting hoax cases under the new and existing statutes, see the Counterterrorism Section Monograph entitled *Prosecuting Terrorism Hoaxes* (Feb. 2005). This material is available from the Counterterrorism Section.❖

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Changes to 2339A and 2339B: Clarifying or Substantive—Ex Post Facto Implications

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I. Introduction

This article addresses the extent to which amendments to 18 U.S.C. § 2339B and closely related statutes in Title 18 Chapter 113B, effected by the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, 118 Stat. 3638 (Dec. 17, 2004) (IRTPA), can be retroactively applied. Although a number of the amendments effect substantive changes in the scope of § 2339B and its allied statutes, which cannot, consistently with the *ex post facto* clause, be applied retroactively, others merely clarify Congress' original intent. Clarifying amendments are entitled to retroactive application just as though they had been enacted as part of the original legislation. *See e.g., United States v. Monroe,* 943 F.2d 1007 (9th Cir. 1991).

II. Background

As a predicate for this discussion, it is helpful to summarize the events and concerns that prompted IRTPA's amendments to § 2339B and related statutes. Senior officials of the Department of Justice (Department) have repeatedly stressed that the statutory prohibition against providing "material support or resources" to a foreign terrorist organization (FTO) is a key weapon in the Department's arsenal for combating international terrorism. This is because the material support statutes enable the Department to aggressively prosecute individuals who supply terrorists with the support or resources they need to survive. This tool also permits the incapacitation of budding terrorists and those bent upon fostering their activities before they can effectuate their plans. Thus, since its enactment in 1996, § 2339B has become a mainstay in the U.S. government's prosecution of persons who provide aid and comfort to foreign terrorist groups.

Unfortunately, however, the value of § 2339B was eroded by certain conflicting judicial decisions that found that portions of the statute impermissibly constrained expressive activity, were unconstitutionally vague, or imposed upon the government the burden of demonstrating that the defendant specifically intended to foster the unlawful activities of terrorists. Perhaps the most notable example of these developments is a sequence of court decisions in the Ninth Circuit. These cases addressed the claims of a group of civil plaintiffs who sought to enjoin the Attorney General from enforcing § 2339B with respect to certain activities they wished to pursue on behalf of specific FTOs.

In *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (2000) [hereinafter *HLP II*], a panel of the Ninth Circuit, affirming the decision of a district court (9 F. Supp. 2d 1176 (C.D. Cal. 1998)), indicated that a vagueness claim was likely to succeed against the portion of § 2339B that defines "material support" to include the provision of "personnel" or "training" to an FTO. *Id.* at 1137. The panel expressed the view that these terms could reasonably be construed to embrace mere advocacy on behalf of an FTO or training the members of such an entity to lobby on its behalf. The panel therefore determined that the district court had acted within its discretion in issuing a preliminary injunction against enforcement of § 2339B insofar as it involved the provision of such forms of support. *See also United States v. Sattar,* 272 F. Supp. 2d 348, 359 (S.D.N.Y. 2003) (noting that "[i]t is not clear . . . what behavior constitutes an impermissible provision of personnel to an FTO[ ]" and adopting, in part, the reasoning in *HLP* II).

Relying upon *HLP II*, another Ninth Circuit panel subsequently affirmed the decision of the district court granting a permanent injunction against the enforcement of § 2339B insofar as it involved the provision of material support in the forms of "personnel" and training." *Humanitarian Law Project v. Department of Justice*, 352 F.3d 382, 403-04 (2003) [hereinafter *HLP III*]. On

December 24, 2004, however, the en banc Ninth Circuit, which earlier had vacated the panel decision in *HLP III*, also vacated the judgment and injunction of the district court regarding the terms "personnel" and "training." It remanded the case to the district court for further consideration in light of the developments addressed in this discussion—Congress' definition of those terms in the IRTPA. *Humanitarian Law Project v. Department of Justice*, 393 F.3d 902 (9th Cir. 2004) (en banc).

In contrast to the reasoning in *HLP II,* in *United States v. Lindh*, 212 F. Supp. 2d 541, 573 (E.D. Va. 2002), the court rejected the defendant's argument that the term "personnel" was impermissibly vague in the context of his indictment for providing himself to al-Qaida as a combatant. The *Lindh* court reasoned that *HLP II*'s vagueness holding was neither binding nor persuasive as, properly understood, the term "personnel" refers to persons who function as employees or quasi employees of an FTO and operate under its direction or control. Consequently, in the *Lindh* court's view, the term "gives fair notice to the public of what is prohibited and the provision therefore is not unconstitutionally vague." *Id.* at 574. In so holding, it construed the term "personnel" consistently with the manner in which the Department construed the term in the *United States Attorneys Manual (USAM). See* USAM § 9-9-91.100 (2001).

In a related vein, the same district judge who granted injunctive relief in *HLP*, also held that insofar as the term "material support" in § 2339B includes "expert advice and assistance," it is, once again, impermissibly vague. He reasoned that the government "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 findings that [such] terms are impermissibly vague with the finding that the term expert advice or assistance is not." *Humanitarian Law Project v. Ashcroft*, 2004 WL 112760 at *14 (C.D. Cal., Jan. 22, 2004).

The courts have also expressed disagreement as to the nature and scope of the scienter element of the material support statute, *i.e.* that a defendant "*knowingly* provide[ ] material support or resources" to an FTO. *See* 18 U.S.C. § 2339B(a)(1). The Ninth Circuit panel decision in *HLP III* construed the "knowingly" requirement to impose upon the government the burden of demonstrating either that the defendant knew of the FTO's designation or that he knew of the "unlawful activities that caused it to be so designated." *HLP III*, 352 F.3d at 400, *vacated*, 393 F.3d 902 (9th Cir. 2004) (en banc). In *United States Hammoud*, 381 F.3d 316, 342 (2004), *vacated and remanded for resentencing,* 125 S.Ct. 1051 (2005), the en banc Fourth Circuit ruled that videotapes depicting Hizballah as a violent organization were properly admitted into evidence. It reasoned that under § 2339B the government had the burden of demonstrating that the defendant "knew of Hizballah's ... [terrorist] activities [and that] the contents of the videos were probative evidence of ... [such] knowledge."

In contrast, in *United States v. Al-Arian,* 308 F. Supp. 2d 1322 (M.D. Fla. 2004), a district court adopted a stricter scienter standard. It held that the "knowingly" requirement imposed upon the government the burden of proving that the defendant provided material support for the express purpose of furthering the terrorism activities of the FTO. Of course, a construction of § 2339B that requires proof of the provider's specific intent to advance the *unlawful* activities of an FTO is fundamentally inconsistent with Congress' express finding in enacting the statute that *any* contribution to an FTO—no matter how benign its purpose—facilitates the organization's ability to engage in acts of terrorism. *See* 18 U.S.C. § 2339B n. (a)7. Thus, such a construction both thwarts legislative intent and substantially decreases the utility of the statute.

In addition to judicially-wrought obstacles and uncertainties degrading the efficacy of § 2339B, Department officials have determined that the statutory scheme, itself, warranted revision in several ways to enhance its objectives. Thus, although § 2339B prohibited the provision of "material support" in the form of providing training to an FTO, it did not explicitly prohibit *receiving training* from an FTO, such as by journeying to Afghanistan to attend an al-Qaida training camp. Such cases generally had to be prosecuted as providing "personnel" to an FTO. *See e.g., Lindh*, 212 F. Supp. 2d at 545-46.

Further, as enacted in 1996, § 2339B was limited in its jurisdictional scope to activity occurring within the United States and to overseas activity committed by persons, such as U.S. nationals, who were "subject to the jurisdiction of the United States." Such jurisdictional constraints did not fully account for the fact that, regardless of the nationality of the offender or the locus of the material support, its provision to an organization designated as an FTO by the Secretary of State, inevitably fosters activity that "threatens the security of United States nationals or the national security of the United States." 8 U.S.C. § 1189(a)(1)(C). Finally, the definition of "material support" was, itself, determined to warrant expansion, to make clear that it encompassed *all property*, whether tangible or intangible, as well as all services, save medicine and religious materials.

III. The IRTPA Amendments

The IRTPA contains legislative solutions to these judicially-wrought ambiguities and prosecutive concerns. The Counterterrorism Section has detailed the amendments to § 2339B in its *Compendium of Measures of Interest to Federal Prosecutors From the Intelligence Reform and Terrorism Prevention Act of 2004* (Jan. 2005), and therefore, they are merely summarized here to facilitate further discussion of their potential for retroactive application.

- IRTPA amended the definition of "material support" (18 U.S.C. § 2339A(b)) to broaden the definition to encompass *any* property, whether "tangible or intangible."
- IRTPA amended the definition in § 2339A to define the term "training" to mean "instruction or teaching designed to impart a specific skill, as opposed to general knowledge," and the term "expert advice or assistance " to mean "advice or assistance derived from scientific, technical or other specialized knowledge."
- IRTPA defined the meaning of the term "knowingly" as employed in § 2339B. Specifically, the amendment provided that:

  > To violate this paragraph, a person must have knowledge that the organization is a designated terrorism 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 has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

Immigration and National Act, 8 U.S.C. §§1101-1537; Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 108-356, 101 Stat. 1331 (1987).

- IRTPA amended § 2339B(d) to expressly provide for the assertion of extraterritorial jurisdiction over certain additional categories of persons and offenses. These include: (1) a permanent resident alien; (2) a stateless person whose habitual residence is in the United States; (3) an offender who is "brought into or found in the United States even if the conduct required for the offense occurs outside the United States;" (4) "the offense occurs in or affects interstate or foreign commerce;" or (5) the offender aids and abets or conspires with a person over whom jurisdiction otherwise exists.
- To eliminate possible First Amendment issues, as identified in *HLP III*, IRTPA added a new section, § 2339(h), to Chapter 113B of Title 18, to define the phrase "providing personnel." It provided that:

  > [n]o 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 one 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.

- Finally, to reach persons who *receive* military-type training from an FTO, IRTPA amended Title 18 Chapter 113B by the addition of § 2339D, which makes it unlawful for a person to receive military-type training from a designated FTO following such

designation. As in the case of § 2339B, the recipient must have knowledge at the time of the training that the FTO has been designated as such or that it engages in terrorism or terrorist activities.

IV. Retroactivity concerns—the *ex post facto* clause and substantive revisions

Which, if any, of these amendments are susceptible to retroactive application to offenses *consummated* prior to their December 17, 2004 effective date? The Constitution's two *ex post facto* clauses, U.S. Const. Art 1, § 9 cl. 3 & § 10 cl. 1, prohibit both the federal and state governments "from enacting laws with certain retroactive effects." *Stogner v. Californa*, 539 U.S. 607, 610 (2003). In *Carmell v. Texas*, 529 U.S. 513, 525 (2000), the Supreme Court reiterated the four categories of legislation that violate the *ex post facto* prohibition as first articulated by Justice Chase in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 389-90 (1798). These include:

- Every law that makes criminal an action done before the passing of the law, which was innocent when done.
- Every law that aggravates a crime or makes a crime greater than it was when committed.
- Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed.
- Every law that alters the legal rules of evidence, and receives less or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

See also Collins v. Youngblood, 497 U.S. 37, 42 (1990).

The first *Calder* category—penalizing actions that were innocent when done—embraces the core purpose of the prohibition against *ex post facto* laws: "to assure that legislative Acts give fair warning of their effects and permit individuals to rely on their meaning until explicitly changed." *Graham v. Weaver*, 450 U.S. 24, 28-29 (1981). As the Supreme Court explained, that prohibition

> rests upon the notion that laws, whatever their form, which purport to make innocent acts criminal after the event, . . . are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused.

Beazell v. Ohio, 269 U.S. 167, 170 (1925).

This category of *ex post facto* law does not extend to acts which, although innocent when initially undertaken, continue after the effective date of a statute criminalizing such activity. In such cases, as long as the newly-criminalized activity continues after the effective date of the statute or is consummated thereafter, it can be prosecuted under the newly-enacted statute. *See, e.g.*, *United States v. Blumeyer*, 114 F.3d 758, 766 (8th Cir. 1997) (a continuing offense that spans the date of enactment of a statute prohibiting such activity poses no *ex post facto* problem); *United States v. Torres*, 901 F.2d 205, 226 (2d Cir. 1990) (the application of a statute to a crime that began prior to, but continued after the effective date of the statute does not violate the *ex post facto* clause).

Insofar as the definition of the phrase "material support or resources," (18 U.S.C. § 2339A(b)), has been expanded to include "intangible" property of a nature not embraced within the preceding definition of the phrase, the amendment effectively criminalizes antecedently innocent conduct. Accordingly, violations of § 2339B *completed* prior to December 17, 2004, should be predicated upon the provision of "material support or resources" as defined in § 2339A(b) prior to the amendment of that date.

The same analysis governs the newly-enacted § 2339D, which prohibits the receipt of military-type training from an FTO. As this statutory prohibition did not exist *in haec verba,* prior to December 17, 2004, it should not be employed as the basis for charging such activities where the defendant's receipt of training took place entirely prior to that date. However, such conduct should be analyzed to see whether it would qualify as "providing personnel" to an FTO in the form of

the defendant himself. *See Lindh*, 212 F. Supp. 2d at 577 (noting that "Lindh's conduct in the [al Qaeda] training camp and battlefield falls squarely within Section 2339B's proscription against providing . . . 'personnel'").

Retroactive application of the jurisdictional amendments relating to extraterritorial offenses (18 U.S.C. § 2339B(d)) presents a somewhat more complex question. Insofar as these provisions embrace entirely new classes of defendants—stateless persons—or expand the scope of the statute to reach offenses that occur in or affect interstate or foreign commerce, they plainly expand the legal definition of the offense. Such amendments should therefore be applied *prospectively* only. In contrast, where federal jurisdiction is predicated solely upon the fact that the "offender is brought into or found in the United States," an argument can be made that, in cases where the provision of material support is completed *prior to* the date of the amendment, but where the defendant does not come to be present in the United States until after that date, the offense is not truly consummated until that time. Consequently, in such cases, a prosecution for a violation of § 2339B would arguably not offend the *ex post facto* clause under the continuing offense rationale discussed earlier. *See United States v. Alkins*, 925 F.2d 541, 549 (2d Cir. 1991) (prosecution does not violate the *ex post facto* clause where the jurisdictional element occurred after the effective date of the statute, even though the *actus reus* preceded enactment of statute).

The Department's Office of Legal Counsel has advised the Criminal Division that, as a matter of prudence, prosecutions under § 2339B based solely upon the defendant's presence in the United States should not be undertaken for acts of providing material support that predate the amendment's December 17, 2004 effective date. This policy is, in part, the result of recognition that, as least in some cases, the government will be responsible for bringing the defendant into the United States and, therefore, could orchestrate (or be perceived as orchestrating) that jurisdictional predicate so as to defeat an *ex post facto* claim. *Cf. Alkins*, 925 F.2d at 549, where the court rejected a "continuing offense" analysis to an *ex post facto* claim where the timing of the jurisdictional requirement was not within the defendant's control.

Several other revisions to § 2339B concerning extraterritorial jurisdiction do not, in our view, preclude retroactive application. First, insofar as the amendment purports to reach offenses that "occur[ ] in whole or in part in the United States" (§ 2339B(d)(D)), it is not materially different from its precursor which criminalizes such activity committed "[w]ithin the United States." Similarly, while the amendment reaches aiders and abettors of persons over whom jurisdiction exists, as well as persons who conspire with such individuals (§ 2339B(d)(F)), the precursor § 2339B(a)(1) likewise reached conspirators. Title 18 U.S.C. § 2 reached aider and abettors, treating them as "principals" in the commission of the predicate crime. Therefore, to the extent that, prior to the December 17, 2004 amendment, the person or persons actually providing the material support was subject to prosecution, the *ex post facto* clause poses no bar to the prosecution of conspirators and aiders or abettors as well.

V. Retroactivity concerns—clarifying amendments

In contrast to legislation that effects a substantive amendment to a criminal statute, such as an expansion in its scope, an amendatory statute that merely *clarifies* Congress' original intention in enacting the legislation can be applied retroactively to predating violations. For example, in *United States v. Monroe,* 943 F.2d 1007 (9th Cir. 1991), the defendants were indicted, *inter alia*, for the transportation of monetary funds with the intent to carry out unlawful activity. The term "transport" was not then defined by the statute, arguably creating uncertainty as to whether it embraced wire transfers—the mode of transmission of the funds employed by the defendants. Subsequent to the defendants' indictment, the statute was amended to reach the transportation, transmission or transference of monetary instruments or funds. In divining Congress' original intent in enacting the statute under which the defendants had been indicted, the court observed that "[a] subsequent amendment to a statute may serve to clarify, rather than change, the existing law" and that such an "amendment and its legislative history, though not controlling, are entitled to substantial weight in construing the earlier law." *Id.* at 1016 (citation omitted). Proceeding from this premise, the court reasoned that "[t]he legislative history of the [ ] amendment made clear that Congress intended to clarify pre-

existing law" and noted that such purpose was explicit from the legislative history of the amendment. *Id.* In holding that the pre-amendment version of the statute should therefore be construed to reach wire transfers, it expressly rejected the defendants' argument that its reliance upon the postoffense clarifying amendment violated the *ex post facto* clause. *Id. See also United States v. Butler*, 389 F.3d 956, 958 (9th Cir. 2004) (holding that an amendment to the Sentencing Guidelines that effects a "clarification" to a preceding Guideline is to be given retroactive effect in construing that Guideline); *United States v. Tapert*, 625 F.2d 111, 120-21 (6th Cir. 1980) (applying amendment defining the term "kickback" to charged conduct preceding enactment of the clarifying amendment).

From this perspective, it is apparent that other amendments to § 2339B effected by IRTPA were intended to be clarifications of language employed in the original version of the statute in the wake of adverse judicial decisions, rather than as legislative expansions of its scope. Thus, in presenting testimony concerning the legislation that was to become part of IRTPA, the Assistant Attorney General for the Office of Legal Policy and the Chief of the Criminal Division's Counterterrorism Section explained that, in the wake of adverse court decisions finding key terms in the definition of "material support or resources" to be unconstitutionally vague, the proposed legislation "improves current law by *clarifying* several aspects of the material support statutes." In particular, it "amends the definition of 'personnel,' 'training' and 'expert advice and assistance' . . . in a way that addresses the concerns about vagueness and at the same time maintains the statutes' effectiveness." *Hearings Before the United States Senate Judiciary Committee, Subcommittee on Terrorism, Technology, and Homeland Security: "A Review of the Tools to Fight Terrorism Act"* at 3-4 (Sept. 13, 2004) (italics added) [hereinafter *Senate Hearings*.]. Echoing this testimony, when IRTPA was on the brink of enactment, the Conference Committee explained that the inclusion of the definitions was intended as clarification in response to concerns expressed in recent court decisions. *See* Statement of Senator Kyl on the Conference Report to S. 2845/H.R. 10, Intelligence Reform and Terrorism Prevention Act at 32 (Dec. 8, 2004) [hereinafter *Conference Committee Statement*], *available at* http://thomas.loc.gov.

Similarly, the same Department officials testified that, in their view, several courts construed the "knowingly" requirement in § 2339B in a manner neither compelled by the statute nor intended by Congress. They proposed that "to remove any possible ambiguity with respect to § 2339B's scienter requirement, [the legislation] would clarify that the statute requires only knowledge by the defendant of either the underlying 'foreign terrorist organization' designation, or of the fact that the organization engages in terrorist activity, as defined by relevant provisions of federal law." *Senate Hearings* at 5-6. Again, the Conference Committee endorsed this position, noting that the new section defining the term "knowingly" "clarifies the knowledge required to violate the statute." *Conference Committee Statement* at 32.

It is therefore clear from the legislative record that neither the proponents of these amendments, nor those in Congress responsible for husbanding their enactment, perceived them as anything other than clarifications of Congress' original intent, in the wake of expressions of judicial concern. Consequently, under the governing jurisprudence, it is perfectly permissible for prosecutors to rely upon the definitions for the purpose of divining Congress' original intent in employing the defined terms—even with respect to offenses that were completed prior to enactment of the definitional amendments. In such cases, a defendant can hardly argue that he has suffered prejudice as the result of the application of a definitional provision that effectively *narrows* the range of conduct falling within the offense with which he is charged.❖

ABOUT THE AUTHOR

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Jurisdiction for "Material Support" Crimes: Factual Illustrations

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I. Introduction

The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, 118 Stat. 3638 (2004) enacted on December 17, 2004, reflects the latest changes in the evolving nature of jurisdiction for the two main "material support" statutes, 18 U.S.C. § 2339A and § 2339B. Unlike other IRTPA changes to § 2339B, which are designed to clarify certain terms encompassed within the definition of "material support or resources," the jurisdictional amendments represent a change in the substantive law, as explained in the article written by John DePue *Changes to 2339A and 2339B: Clarifying or Substantive—Ex Post Facto Implications,* 53 UNITED STATES ATTORNEYS' BULLETIN at 26. They are, therefore, subject to the *ex post facto* clause. Accordingly, whether prosecutors may charge people under § 2339A and § 2339B will depend on who is being charged, the nature of the conduct, the activities of coconspirators and when and where the relevant conduct occurred. This article seeks to illustrate these changes through factual scenarios.

The intent of this article is to address the jurisdictional aspects of 18 U.S.C. §§2339A and 2339B. Other charges which may be available under the factual scenarios presented are not addressed. Moreover, the scenarios assume that jurisdiction is the only issue which needs to be resolved. The myriad of other issues, such as whether we would assert jurisdiction in matters occurring wholly outside the United States, the intelligence equities, evidentiary questions, scienter requirements, and venue issues to name a few, which can arise and which must be addressed before initiating a "material support" prosecution, have been resolved in favor of the prosecution for the purpose of this article.

II. Relevant dates in the evolving "material support" jurisdiction

To understand the evolution of the jurisdiction elements of the "material support" statutes, there are four pivotal dates to consider.

- September 13, 1994: The enactment of § 2339A, which criminalized the conduct, *within* the United States, of providing "material support or resources," knowing or intending that they are to be used in preparation for or in carrying out certain terrorist crimes. 18 U.S.C. § 2339A.
- October 7, 1997: The announcement of the first round of designated foreign terrorist organizations (FTOs). This marked the effective date of § 2339B which, at the time, criminalized knowingly providing material support or resources to FTOs *by a person within the United States or anyone subject to the jurisdiction of the United States*. (Note that § 2339B differs from § 2339A in that it does not require the defendant to know or intend that the material support be used for

terrorism. That is, a humanitarian donation to Hamas is actionable under § 2339B, but not under § 2339A). 18 U.S.C. § 2339B.

- October 26, 2001: The enactment of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), which amended § 2339A to omit the language "within the United States" and added conspiracy and attempt provisions. The amendment made § 2339A extraterritorial in its reach. It did not impact the jurisdictional provision of § 2339B ("within the United States or subject to the jurisdiction of the United States").
- December 17, 2004: The enactment of IRTPA which expanded the jurisdictional basis of § 2339B to allow for the prosecution of non-U.S. persons whose "material support" conduct occurred entirely overseas. Specifically, prosecutors can now assert jurisdiction over certain aliens "found in" the United States whose material support of an FTO occurred entirely abroad. Previously, the "found in" jurisdiction was limited to terrorism offenses that were established by laws implementing our international treaty obligations. Pub. L. No. 108-458, 118 Stat. 3638 (2004).

The IRTPA changes establishes § 2339B jurisdiction for conduct occurring after December 17, 2004, under the following circumstances:

- The offender is a U.S. citizen or legal permanent resident alien.
- The offender is a stateless person whose habitual residence is in the United States.
- After the conduct required for the offense occurred, the offender is brought into or found in the United States, even if the conduct required for the offense occurred outside the United States.
- The offense occurred in whole or in part within the United States.
- The offense occurred in or affects interstate or foreign commerce.
- The offender aided or abetted or conspired with any person over whom jurisdiction exists under any of the above-described circumstances.

III. Factual scenarios and appropriate charges

The best way to understand the practical impact of the evolving nature of §§ 2339A and 2339B jurisdiction is by considering hypothetical scenarios that straddle the dates described above. These hypotheticals are only intended to be illustrative of some of the jurisdictional issues that can arise using 18 U.S.C. §§ 2339A and 2339B. They do not purport to cover all the issues raised by these types of prosecutions. Furthermore, as previously stated, they do not address the other statutes that may be applicable to the conduct described below. As such they should not be considered comprehensive or authoritative.

A. Conduct straddling September 1994

Scenario 1: In April 1994, John Phantom, a U.S. citizen living in Boston, sends a $12,000 check written on his Boston account to the military wing of the Irish Republican Army in Belfast, along with a note instructing them to apply the funds towards the purchase of weaponry to kill British soldiers.

Phantom's conduct is not redressable through the material support statutes, since his conduct occurred before September 1994, when § 2339A was first enacted.

Scenario 2: In June 1995, Joe Brass, a U.S. citizen living in Baltimore, wires $15,000 from his bank account in Baltimore to certain persons in Lebanon. Intercepted telephone calls indicate that the funds were intended to support suicide bombings and weapons procurement by Hizballah.

Brass can be charged under § 2339A because his acts occurred within the United States and he can be shown to know or intend that the funds he wired would be used to maim or kill people overseas, in violation of 18 U.S.C. § 956. He cannot be charged under § 2339B because

Hizballah was not designated as an FTO until October 1997.

B. Conduct straddling October 1997

Scenario 3: In January 1997, Jane Cheetah, a U.S. citizen living in Miami, wires $15,000 from her bank account in Miami to certain persons in Yemen. Intercepted telephone calls indicate that the funds were designed to support the humanitarian work of Hamas.

Cheetah cannot be charged under § 2339A because the evidence suggests that she did not intend the funds she wired to be used for violence. She cannot be charged under § 2339B because Hamas was not designated as an FTO until October 1997.

Scenario 4: In March 1997, Kim Carrot, a U.S. citizen living in London, wires $15,000 from her British bank account to certain persons in Syria. Intercepted telephone calls indicate that the funds were intended to support suicide bombings and weapons procurement by the Palestinian Islamic Jihad (PIJ).

Carrot cannot be charged under § 2339A because her acts did not occur "within the United States." She cannot be charged under § 2339B because PIJ was not designated as an FTO until October 1997.

Scenario 5: In November 1997, Lloyd Copper, a U.S. citizen living in Houston, wires $15,000 from his bank account to certain persons in Iraq. Intercepted telephone calls indicate that the funds were designed to support the humanitarian work of the Abu Nidal Organization (ANO).

Copper cannot be charged under § 2339A because the evidence suggests that he did not intend the funds he wired to be used for violence. He can, however, be charged under § 2339B because ANO had been designated as an FTO the previous month (October 1997).
Copper's § 2339B culpability is not affected by his humanitarian objective.

Scenario 6: In December 1997, Lucy Firestarter, a U.S. citizen living in Tokyo, wires $15,000 from her Japanese bank account to certain persons in Lebanon. Intercepted telephone calls indicate that the funds were intended for Hizballah for its humanitarian work.

Firestarter can be prosecuted under § 2339B. She wired funds to Hizballah two months after its FTO designation. It does not matter that her goals were humanitarian. It also does not matter that her conduct occurred in Japan, since at that time § 2339B reached conduct "within the United States or subject to the jurisdiction of the United States." As a U.S. citizen living abroad, she is "subject to U.S. jurisdiction."

Scenario 7: In January 1998, Joe Giraffe, a Jordanian national living in New Orleans, wires $11,000 from his bank account in New Orleans to certain persons in Jordan. Intercepted telephone calls indicate that Joe Harvester, another Jordanian living in Geneva, Switzerland solicited the funds for Hamas from Giraffe and provided Giraffe with the names of the persons to whom the money should be sent. Giraffe intended to support the humanitarian work of Hamas. Harvester has never set foot within the United States.

Giraffe can be prosecuted under § 2339B. His conduct occurred within the United States. Harvester can also be charged under § 2339B, despite the fact that he has never been to the United States, for he conspired with Giraffe to provide material support to Hamas and the overt acts (the phone call and the wire transfers) occurred within the United States. Since Giraffe intended the funds be used to support humanitarian efforts, he cannot be charged under § 2339A.

Scenario 8: In January 1998, John Iguana, a Palestinian national living in Charlotte, wires $13,000 from his bank account in Charlotte to certain persons in Lebanon. Intercepted telephone calls—in which Iguana discusses the transaction with Jack Jelly, another Palestinian living in Frankfurt, Germany—indicate that the funds were intended to support the violence to be committed by an unidentified group in Chechnya. Jelly

has never set foot within the United States.

Iguana cannot be prosecuted under § 2339B, since there is no evidence that the recipient was an identifiable FTO. However, he can be prosecuted under § 2339A because it can be shown he knew or intended his funds would be used for overseas violence (in violation of § 956). Jelly, however, cannot be charged under § 2339A because the statute did not include a conspiracy provision in January 1998 and, until October 2001, only applied to conduct "within the United States."

Scenario 9: In February 1998, Rod Karva hosts a fund-raiser in Chicago to raise funds to support the Islamic fighters in Chechnya, Bosnia, and Kosovo. The fund-raiser is not as successful as Karva anticipated, and he is forced to use all of the money raised to pay the hotel for use of the conference room and for catering.

Karva cannot be prosecuted under § 2339B because the intended beneficiary of his efforts was not an identifiable FTO. Although he arguably attempted to violate § 2339A, the statute did not have an attempt provision until the enactment of the USA PATRIOT Act in October 2001.

Scenario 10: In February 1998, Tracy Silvershoe hosts a fund-raiser in Dallas to raise funds to support Aum Shinrikyo. The fund-raiser is not as successful as she anticipated, and all of the money raised is used to pay the hotel for use of the conference room and for catering.

Silvershoe is chargeable under § 2339B because she intended to raise funds for Aum Shinrikyo, an FTO, and took a substantial step in that direction—hosting the fund-raiser. The fact that the event was not as successful as she anticipated does not exonerate her, since it is a crime to attempt to violate § 2339B.

C. Conduct straddling October 2001

Scenario 11: In June 2001, Ken Moose, a U.S. citizen living in Buffalo, wires $17,000 from Buffalo to persons in Yemen. Intercepted telephone calls include conversations in which Moose discusses with a Yemeni sheik named John Nightingale the need to support violent *jihadists* seeking to expel the infidels from the holy places of Medina and Mecca.

Because there is no identifiable FTO, Moose would have to be charged under § 2339A (in violation of § 956) rather than § 2339B. His conduct occurred before the USA PATRIOT Act added an attempt and conspiracy offense to § 2339A. By causing the wire transfer, he has arguably completed the act of "providing material support," since his telephone discussions suggest that he knew and intended the funds to be used for overseas violence. However, § 2339A's absence of a conspiracy provision and the lack of extraterritorial application would prevent us from charging Nightingale under § 2339A.

Scenario 12: In August 2001, Mark Goldfinger, a U.S. citizen, is caught on surveillance helping raise funds in Paris for Islamic violence in Afghanistan. The surveillance further indicates that Goldfinger knew some of the funds would be used to organize an attack on the United States Agency for International Development office in Kabul. The evidence shows that Goldfinger was not interested in these causes until after he had been living in France for several months.

Before the PATRIOT Act, § 2339A did not have an extraterritorial jurisdiction provision and since Goldfinger's conduct did not occur within the United States, he cannot be charged under it. He cannot be charged under § 2339B unless the beneficiary is a designated FTO (which the above facts do not suggest).

Scenario 13: In January 2002, Ken Moose engages in the same conduct described in *Scenario 11*.

Moose and Nightingale are chargeable under § 2339A (in violation of § 956), as their conduct occurred after the establishment of a conspiracy provision.

Scenario 14: In March 2002, Mark Goldfinger (from *Scenario 12*) holds another fund-raiser in Paris, for the same cause and in the same circumstances.

Goldfinger is chargeable under § 2339A (in violation of 18 U.S.C. § 844(f)(2)), notwithstanding the fact that his conduct occurred entirely abroad, since the PATRIOT Act expanded the jurisdictional scope of § 2339A to reach extraterritorial offenses.

D. Conduct occurring after December 2004

Scenario 15: In February 2005, an Internet Service Provider (ISP) in Indonesia agrees to host a fund-raising Web site for Jemaah Islaymia. The site, which is in English, but designed and managed from Jakarta, is run by several non-Americans, describes violent *jihad* as the goal of every Muslim and contains explicit instructions on how to transmit American dollars to Jemaah Islaymia's cause. There is no information that anyone associated with the Web site has ever been to the United States, however, there is evidence that the site was directed to and monies were sent from the United States.

The persons associated with the Web site can be charged under § 2339B because they directed the site at and raised money from individuals in the United States for Jemaah Islaymia, a designated FTO. Therefore, "the offense occurred in part within the United States."

Scenario 16: In March 2005, Joe Chemist, a legal permanent resident of the United States, travels to Lebanon. While there, Chemist agrees to provide technical advice to Hizballah operatives interested in developing a chemical weapon.

Chemist can be prosecuted under § 2339B for providing material support in the form of expert advice to Hizballah, a designated FTO, because he is a lawful permanent resident of the United States. Moreover, under an aiding and abetting or conspiracy theory, the recipients of his training could also be prosecuted under § 2339B even though their conduct did not occur within the U.S.

Scenario 17: John Fundraiser, a citizen of South Africa, has been raising money for al Qaida in South Africa. Between October 5, 2001 and February 5, 2005, he raised approximately ten million dollars to aid al Qaida in purchasing weapons and explosives. On February 7, 2005 he entered the United States.

Fundraiser can be prosecuted under § 2339B for providing material support to al Qaida, a designated FTO, for the fund-raising acts which occurred on or after December 17, 2004, since he was "found in" the United States after December 17, 2004.

Scenario 18: Joe Yak, a Palestinian national, (a designated stateless person for immigration and treaty purposes) who lives in the United States traveled to the Middle East on February 16, 2005. While there he drafted instructions on bomb making for a Hamas training manual, which is discovered during an Israeli raid in Gaza.

Yak can be prosecuted under § 2339B for material support in the form of expert advice or assistance to Hamas, a designated FTO, because he is a stateless individual who habitually resides in the United States, and he made his trip to draft the instructions after the passage of the IRTPA.

Scenario 19: On March 3, 2005, al Qaida operatives detonate a bomb at an American-owned hotel in Mali. No Americans are killed. The investigation reveals that on December 31, 2004, John Warthog, a German national living in Hamburg, sent the

monies used to pay for the bomb components to Mali. Electronic surveillance shows him discussing the bomb plot with other members of al Qaida. The hotel is owned and run by a well-known chain based in Las Vegas, Nevada. The hotel receives at least 40% of its supplies from the United States, has substantial clientele from the United States, sends its profits to Las Vegas, and receives money from Las Vegas to keep it going during the off season. As a result of the attack the Las Vegas chain and its overseas suppliers suffered a significant financial loss. Warthog has never been to the United States.

Warthog could arguably not be prosecuted under the foreign commerce prong of § 2339B because his conduct—providing material support in the form of financial resources—had no nexus to the United States as required to establish jurisdiction for conduct occurring in or affecting foreign commerce. It is possible, if the courts were to interpret the commerce prong very broadly, that the effect of the material support could be used to establish the requisite foreign commerce nexus. Warthog could be prosecuted under § 2339A with a predicate offense of 18 U.S.C. § 844(i) because the hotel was operating in or affecting foreign commerce with the United States.

IV. Conclusion

The jurisdictional reach of 18 U.S.C. §§ 2339A and 2339B has been significantly expanded since they were first enacted. The expansion reflects the evolution of the reach of terrorist organizations and the United States' desire to effectively deal with terrorists and those who support them. However, as noted in this and the other articles in this *Bulletin*, the jurisdictional reach of 18 U.S.C. §§ 2339A and 2339B adds a number of complex issues to the material support prosecutions of certain individuals. Therefore, in order to avoid legal and diplomatic pitfalls and to effectively use all the jurisdictional provisions of 18 U.S.C. §§ 2339A and 2339B, there should be coordination between United States Attorneys' Offices, the Counterterrorism Section, the Joint Terrorism Task Forces, and the various other entities, including in some instances foreign governments, who may have a stake in the prosecution.❖

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Notes

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