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Material Support of Terrorists and Foreign Terrorist Organizations: Sunset Amendments in Brief

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Summary

Section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004 amends two federal terrorist assistance prohibitions. Those amendments were to expire on December 31, 2006, P.L. 108-458, 118 Stat. 3762-764 (2004). P.L. 109-160 extended their expiration date until February 3, 2006, 119 Stat. 2957 (2005); P.L. 109-170 extended it yet again until March 10, 2006, 120 Stat. 3 (2006). Section 104 of the USA PATRIOT Improvement and Reauthorization Act and Terrorism Prevention Reauthorization Act (H.R. 3199), made the amendments permanent, P.L. 109-177, 120 Stat. 195 (2006). In their present form the amendments, found in section 6603 of the act: (1) amend the definitions of "material support or resources," "training," and "expert advice or assistance" as those terms are used in 18 U.S.C. 2339A and 2339B, and of "personnel" as used in section 2339B; (2) add a more explicit knowledge requirement to section 2339B; (3) expand the extraterritorial jurisdiction reach of section 2339B; (4) enlarge the list of federal crimes of terrorism, 18 U.S.C. 2332b(g)(5); (5) add the enlarged list to the inventory of predicate offenses for 18 U.S.C. 2339A (material support for the commission of certain terrorist crimes) and consequently for 18 U.S.C. 2339B (material support for designated terrorist organizations); and (6) preclude prosecution for certain violations committed with the approval of the Secretary of State and concurrence of the Attorney General *(e.g.*, stings).

This is an abbreviated version of CRS Report RL33035, *Material Support of Terrorists and Foreign Terrorist Organizations: Sunset Amendments*, without the footnotes, appendix, and some of the citations to authority found in the longer, parent report.

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

material support or resources to a designated foreign terrorist organization or attempting or conspiring to do so.

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

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

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

Section 6603 may rely on its First Amendment disclaimer to answer the objection that the uncertainty of the two terms could chill or lead to prosecution of mere advocacy or other First Amendment protected activities — at least with regard to prosecutions under 2339B: "*Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States*," 18 U.S.C. 2339B(i).

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

> *No person may be prosecuted under this section in connection with the term "personnel" unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or*

> *control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control.* 18 U.S.C. 2339B(h).

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

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

The first court to pass upon the constitutionality of section 6603's clarifying amendments gave them a mixed grade: section 6603 did cure the vagueness problems associated with use of the term "personnel," but the terms "training" and "expert advice or assistance" remain unconstitutionally vague notwithstanding the amendments in section 6603, the term "service" which section 6603 added to the definition of prohibited support or resources is itself unconstitutionally vague, and the "boilerplate" First Amendment clause does nothing to supply greater clarity, *Humanitarian Law Project v. Gonzales*, __ F.Supp.2d __ , __ (C.D. Cal. July 25, 2005).

The First Amendment clause, in the court's view, is "inadequate to cure potential vagueness issues because it does not clarify the prohibited conduct with sufficient definiteness for ordinary people," *id.* at __ n.20. By the same token, the court felt that "for the average person with no background in law," use of a definition from the Federal Rules of Evidence would do little to clarify the mysteries of the term "expert advice or assistance," *id.* at __. And "[e]ven as amended [by section 6603], the term "training" is not sufficiently clear so that persons of ordinary intelligence can reasonably understand what conduct the statute prohibits," particularly when the term "easily encompasses protected speech and advocacy," *id.* at __. Since the term "service" is defined to include "training" and "expert advice or assistance," they pull the term down with them, *id.* at __ .

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

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

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

In its other modifications to jurisdiction, section 6603 arguably does no more than articulate more specifically the pre-existing reach of section 2339B. Prior to the enactment of section 6603, section 2339B applied to anyone who acted "within the United States or subject to the jurisdiction of the United States," when they provided material support to a foreign terrorist organization, 18 U.S.C. 2339B(a)(1)(2000 ed.). A person "subject to the jurisdiction of the United States" arguably referred to American citizens, residents of this country, and entities organized under our laws. Moreover, if extraterritorial jurisdiction existed over the underlying offense, it was said to exist over aiding and abetting the commission of the underlying offense or over conspiracy to commit it.

Section 6603 removed the phrase "within the United States or subject to the jurisdiction of the United States," from section 2339B(a)(1) and provided a more explicit list of jurisdictional circumstances in section 2339B(d)(1), i.e., the offense is committed in whole or in part within the United States; the offender is a U.S. citizen, permanent resident alien, or habitual U.S. resident; the offense occurs in or affects U.S. interstate or foreign commerce; the offender is later found or brought to the U.S.; or the offender is an accomplice or (aider or abetter) or conspirator with respect to a violation of the section by another over whom the U.S. has subject matter jurisdiction.

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

18 U.S.C. 32 (destruction of aircraft)
18 U.S.C. 37 (violence at international airports)
18 U.S.C. 81 (arson within a federal enclave)
18 U.S.C. 175 (biological weapons offenses)
18 U.S.C. 229 (chemical weapons offenses)
18 U.S.C. 351 (murder, kidnaping, or assault upon Members of Congress, etc.)
18 U.S.C. 831 (nuclear material offenses)
18 U.S.C. 842(m) or (n) (plastic explosives offenses)

18 U.S.C. 844(f) or (i) (bombing federal property or property in or affecting commerce)
18 U.S.C. 930(c) (homicide with dangerous weapon in a federal facility)
18 U.S.C. 956 (conspiracy to commit certain violent crimes overseas)
18 U.S.C. 1114 (murder of a federal officer or employees)
18 U.S.C. 1116 (murder of a foreign dignitary)
18 U.S.C. 1203 (hostage taking)
18 U.S.C. 1361 (destruction of federal property)
18 U.S.C. 1362 (destruction of communications property)
18 U.S.C. 1363 (destruction of property within a federal enclave)
18 U.S.C. 1366 (destruction of an energy facility),
18 U.S.C. 1751 (murder, kidnaping or assault of the President, etc.)
18 U.S.C. 1992 (train wrecking)
18 U.S.C. 1993 (violent attacks on mass transit)
18 U.S.C. 2155 (destruction of national defense material)
18 U.S.C. 2156 (production of defective national defense material)
18 U.S.C. 2280 (violence against maritime navigation)
18 U.S.C. 2281 (violence against maritime fixed platforms)
18 U.S.C. 2332 (violence against Americans overseas)
18 U.S.C. 2332a (weapons of mass destruction offenses)
18 U.S.C. 2332b (multinational terrorism)
18 U.S.C. 2332f (bombing public places or facilities)
18 U.S.C. 2340A (torture)
42 U.S.C. 2284 (atomic weapons offenses)
49 U.S.C. 46502 (air piracy)
49 U.S.C. 60123(b) (destruction of gas pipeline facilities)

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

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

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

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

Of course there are other consequences that flow from including sections 1361 and 2156 within the definition of federal crimes of terrorism under section 2332b(g)(5)(B). Prior to designation as federal crimes of terrorism, violations of section 2156 were subject to the general five year statute of limitations, 18 U.S.C. 3282; now they are subject to an eight year statute of limitations unless they involve the risk of death or serious bodily injury in which case they may be prosecuted at any time, 18 U.S.C. 3286. Violations of section 1361 which were already subject to an eight year statute of limitations, 18 U.S.C. 3286, may now be prosecuted at any time if they involve the risk of death or serious injury, id. Prior to designation as a federal crime of terrorism conviction and imprisonment for violation of either section carried a maximum term of supervised release of not more than three years; the maximum term is now supervision for life or any term of years following a conviction for violation of either section that involves the risk of death or serious injury, 18 U.S.C. 3583. Prior to designation as a federal crime of terrorism, suspects charged with a violation of either section were entitled to normal bail procedures; now they face the rebuttable presumption of pre-trial detention, 18 U.S.C. 3142. Prior to designation as a federal crime of terrorism, neither section appeared as a racketeering (RICO) predicate offense, 18 U.S.C. 1961 (federal racketeering statutes outlaw the patterned commission of a predicate offense or offenses to acquire or operate an enterprise in or affecting interstate commerce, 18 U.S.C. 1961-1962). By designation as a RICO predicate they also become money laundering predicate offenses under sections 18 U.S.C. 1956, 1957 (18 U.S.C. 1956(c)(7)(A), 1957(f)(3)), a status which section 1361 but not section 2156 already enjoyed, 18 U.S.C. 1956(c) (7)(D).

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

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