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# **Terrorism and Extraterritorial Jurisdiction in Criminal Cases: Recent Developments**

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## Summary

A nation's criminal jurisdiction is usually limited to its own territory. In a surprising number of instances, however, federal criminal law applies abroad to U.S. citizens and foreign nationals. The USA PATRIOT Act and legislation implementing treaties on terrorist bombings and on financing terrorism enlarge the extent of federal extraterritorial criminal jurisdiction.

The USA PATRIOT Act's contributions involve credit cards, money laundering, and the special maritime and territorial jurisdiction of the United States. Congress has enacted laws proscribing various common law crimes such as murder, robbery, or sexual assaults when committed within the special maritime and territorial jurisdiction of the United States, *i.e.*, when committed aboard an American vessel or within a federal enclave. Whether federal enclaves in other countries are included within the special territorial jurisdiction of the United States is a question that divides the lower courts. The Act provides that the overseas establishments of federal governmental entities and residences of their staffs are within the special territorial jurisdiction of the United States for purposes of crimes committed by or against U.S. nationals.

Existing federal law prohibits fraud and other forms of misconduct involving credit cards, passwords, and other "access devices." The Act provides a statement of extraterritorial jurisdiction when the device is that of an American bank or other U.S. entity and the case involves some form of transmission, transportation, or storage in the U.S. It is not clear whether the amendment is intended to narrow or simply confirm the prior scope of extraterritorial coverage.

The Act's money laundering amendments permit federal prosecution for the overseas laundering of the proceeds of various federal crimes, as well as for the domestic laundering of the proceeds of various foreign crimes including foreign political corruption.

The legislation implementing the international conventions on terrorist bombings and on financing terrorism replicates existing federal law in many respects. It becomes fully effective when the conventions enter into force for the United States. At that point, it will authorize federal prosecution of overseas bombings or financing terrorism in other countries based solely upon the fact that the United States is able to obtain custody of the offenders.

This report appears in an abridged form, stripped of its footnotes and many of its citations to authority, as CRS Report RS21306, *Terrorism and Extraterritorial Jurisdiction in Criminal Cases: Recent Developments in Brief*.

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## Introduction

Most crime is territorial. It is proscribed, investigated, tried, and punished under the law of the place where it occurs. As a general rule, no nation's laws apply within the territory of another. Yet in a surprising number of instances, federal criminal law does apply overseas whether the accused is an American or a foreign national. As long as there is some nexus to the United States, federal law authorizes prosecution – practical, diplomatic, and procedural impediments notwithstanding.

The USA PATRIOT Act, P.L. 107-56, 115 Stat. 272 (2001), and the legislation implementing the international conventions on terrorist bombings and on financing terrorism, P.L. 107-197, 116 Stat. 721 (2002), have extended the substantive authority for federal prosecution of crimes occurring elsewhere.

## Extraterritorial Jurisdiction

The Constitution provides the power to enact criminal laws with extraterritorial application. It vests Congress with, among other things, the power “to regulate commerce with foreign nations . . . to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations . . .” and gives Congress legislative jurisdiction over places acquired “for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings,” U.S. Const. Art. I, § 8, cls. 3, 10, 17.

The Constitution limits the manner in which the authority may be exercised. The due process clause of the Fifth Amendment, for instance, bars the extraterritorial application of federal criminal laws in the absence of a connection between the crime, the defendant, and the United States. Prosecution requires personal jurisdiction over the defendant and subject matter jurisdiction over the crime.<sup>1</sup> Nevertheless, neither due process nor any other Constitutional limitation have posed any serious obstacle to the enactment and enforcement of federal law for crimes committed abroad. In fact, the extraterritorial application of federal law is frequently said to be a matter of intent rather than power, of statutory construction rather than constitutional limitation.<sup>2</sup>

When a statute contains a statement of its extraterritorial application, Congress's intent is clear. When the statute is silent, the courts begin with a presumption against extraterritorial application.<sup>3</sup> The nature of the statute, however, may be sufficient to overcome the presumption, so long as the application beyond the borders of the United States does not offend the principles of international law.<sup>4</sup> The courts will find no offense to international law as long as the application features reasonable contacts between the crime and the nation asserting jurisdiction. That standard is often judged by whether the case comes within one of five circumstances or

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<sup>1</sup> *United States v. Medjuck*, 156 F.3d 916, 198 (9<sup>th</sup> Cir. 1998); *United States v. Columba-Coella*, 604 F.2d 356, 360 (5<sup>th</sup> Cir. 1979); *United States v. Noriega*, 117 F.3d 1206, 1213-214 (11<sup>th</sup> Cir. 1997).

<sup>2</sup> *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (“Both parties concede, as they must, that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States. Whether Congress has in fact exercised that authority in this case is a matter of statutory construction”); *United States v. Kim*, 246 F.3d 186, 188 (2<sup>d</sup> Cir. 2001).

<sup>3</sup> *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 173 (1993); *Smith v. United States*, 507 U.S. 197, 203-204 (1993); *United States v. DeLeon*, 270 F.3d 90, 93 (1<sup>st</sup> Cir. 2001).

<sup>4</sup> *United States v. Bowman*, 260 U.S. 94, 97-8, 102 (1922) (federal statute proscribing fraud against the United States could be applied to a fraud committed in Brazil by Americans); *United States v. Plummer*, 221 F.3d 1298, 1303-307 (11<sup>th</sup> Cir. 2000) (overseas attempts to smuggling goods into the United States).

“principles” under which international law recognizes a nation’s prerogative to assert the application of its laws:

- the objective territorial principle where external conduct has a substantial effect within the country;
- the protective principal where the outside conduct is directed against the country’s national security;
- the nationality principle where the offender is one on the country’s nationals;
- the passive personality principle where the victim is one of the country’s nationals; and
- the universality principle where the conduct, such as piracy, is universally condemned and may be prosecuted by any country that can capture the offender.<sup>5</sup>

The inventory of federal crimes with extraterritorial application already includes prohibitions on crimes of violence committed against federal officials and employees, the theft or destruction of federal property, efforts to smuggle drugs or foreign nationals into this country, and aircraft hijacking, to name a few.<sup>6</sup> Legislation during the 107<sup>th</sup> Congress augments the store with authority to prosecute:

- crimes committed by or against Americans on military and diplomatic installations and residences overseas;
- fraud involving American credit cards or other “access devices” committed abroad;
- laundering the proceeds of various federal crimes in a foreign bank;
- laundering in this country of the proceeds of foreign political corruption and of an expanded list of other foreign crimes;
- terrorist bombings abroad; and
- the overseas financing of terrorism.

## **Common Law Crimes on American Facilities Overseas**

The term “special maritime and territorial jurisdiction of the United States,” as used in this title, includes:

\* \* \*

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

\* \* \*

(9) *With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act [8 U.S.C. 1101(22)]–*

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<sup>5</sup> *United States v. Bin Laden*, 92 F.Supp.3d 189, 195-96 (S.D.N.Y. 2000); *United States v. McAllister*, 160 F.3d 1304, 1308-309 (11<sup>th</sup> Cir. 1998).

<sup>6</sup> For a more detailed discussion of extraterritorial jurisdiction, see *Extraterritorial Application of American Criminal Law*, CRS Report 94-166 (Sept. 2, 2002).

*(A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and*

*(B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.*

*Nothing in this paragraph shall be deemed to supersede any treaty or international agreement with which this paragraph conflicts. This paragraph does not apply with respect to an offense committed by a person described in section 3261(a) of this title. 18 U.S.C. 7 (as amended by the §804 of the USA PATRIOT Act).*

Section 804 of the USA PATRIOT Act addresses a difference of opinion among the lower federal appellate courts over whether the federal laws that outlaw such crimes as murder, rape, and robbery when committed within federal enclaves in this country also apply on American governmental installations abroad. With the enactment of section 804, they do; at least when either the victim or the offender is a U.S. national.<sup>7</sup>

The essence of the dispute between the Fourth and Ninth Circuits, on one hand, and the Second Circuit on the other lies in the construction of 18 U.S.C. 7(3) which defines the special territorial jurisdiction of the United States. The Fourth and Ninth Circuits contend that the definition in subsection 7(3) includes areas in other countries over which the host nation has afforded the United States privileges akin to sovereignty. The Second Circuit argues that the subsection is intended to encompass only those areas over which Congress may exercise legislative jurisdiction of the kind ordinarily vested in the Several States.

The Second Circuit's argument is grounded in the evolution of subsection 7(3). Its language flows from the Constitution itself which authorizes Congress to exercise legislative jurisdiction over the District of Columbia and like authority "over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings."<sup>8</sup>

The First Congress used this authority to outlaw murder and various other common law crimes when committed in such places, referring to them as places within the sole and exclusive jurisdiction of the United States.<sup>9</sup> Congress used much the same approach when it gathered the Statutes at Large into the first code, the Revised Statutes, again referring directly or by cross-reference to the forts, arsenals, dock-yards and other places under the exclusive jurisdiction of the

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<sup>7</sup> Under section 101 of the Immigration and Nationality Act, "The term 'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States," 8 U.S.C. 1101(22).

<sup>8</sup> "The Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," U.S.Const. Art.I, §8, cls. 17, 18.

<sup>9</sup> E.g., "[I]f any person or persons shall, within any fort, arsenal, dock-yard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons on being thereof convicted shall suffer death," 1 Stat. 113 (1790).

United States.<sup>10</sup> In the revision of the federal criminal code in 1909, Congress established a separate chapter for offenses committed within this special territorial jurisdiction of the United States, introduced the chapter with a jurisdictional statement, and then went on to list the crimes proscribed in such places.<sup>11</sup>

In 1937, the United States Supreme Court held that, in the process of ceding legislative jurisdiction to the United States as part of its consent to the federal government's acquisition of a piece of property, a state might cede less than exclusive jurisdiction. A state might reserve some jurisdiction to itself, thus conveying no more than concurrent jurisdiction to the United States, *James v. Dravo Construction*, 302 U.S. 134, 148 (1937). Congress responded by qualifying the exclusivity language in the 1909 jurisdictional statement in subsection 7(3).<sup>12</sup> So it appears to this day.

After the Supreme Court found that civilian dependents of military personnel could not be tried by courts martial for crimes committed on military installations overseas, *Reid v. Covert*, 354 U.S.1 (1957); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960), there were occasional calls to bring overseas U.S. installations within the definition of territorial jurisdiction in section 7, e.g., H.R. 11244 (90<sup>th</sup> Cong.). Ultimately, the Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. 3261-3267, authorized the federal prosecution of military dependents and contractors for overseas misconduct that would be triable as a felony if it been committed within the territorial jurisdiction of the United States.

In the interim, however, the Fourth Circuit held that at least some areas located in other countries might be considered within the special territorial jurisdiction of the United States as described in subsection 7(3), *United States v. Erdos*, 474 F.2d 157 (4<sup>th</sup> Cir. 1973). *Erdos* upheld the conviction of an American diplomat for the crime of manslaughter committed in the American embassy in Equatorial Guinea. *Erdos* saw two grounds for territorial jurisdiction within subsection 7(3):

[1] “Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or”

[2] “any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.”

It concluded that by virtue of “the practical usage and dominion exercised over the embassy or other federal establishment by the United States government. . . . 18 U.S.C. 7(3) is a proper grant

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<sup>10</sup> E.g., “Every person who commits murder – First. Within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States . . . shall suffer death,” Rev.Stat. §5339 (1878).

<sup>11</sup> “Sec. 272. The crimes and offenses defined in this chapter shall be punished as herein prescribed: . . . Third. When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dock-yard, or other needful building . . . . Sec. 273. Murder is the unlawful killing of a human being with malice aforethought . . . . Sec. 275. Every person guilty of murder in the first degree shall suffer death . . . .” 35 Stat. 1142-143 (1909).

<sup>12</sup> “The term ‘special maritime and territorial jurisdiction of the United States’, as used in this title, includes . . . (3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.”

of special territorial jurisdiction embracing an embassy in a foreign country acquired for the use of the United States and under its concurrent jurisdiction,” 474 F.2d at 159-60.<sup>13</sup>

Courts in the Second Circuit read subsection 7(3) differently. *United States v. Bin Laden*, 92 F.Supp.2d 189 (S.D.N.Y. 2000) involved the terrorist bombing of American embassies in Kenya and Tanzania. Unlike *Erδος*, it held that the American embassies abroad were not within the special territorial jurisdiction of the United States and that statutes outlawing murder and maiming within the territorial jurisdiction of the United States (18 U.S.C. 1111, 114) had no extraterritorial application, 92 F.Supp.2d at 204-16.<sup>14</sup>

The Court of Appeals for the Second Circuit came to much the same conclusion. It reversed a conviction under 18 U.S.C. 2243 (sexual abuse of a minor within the territorial jurisdiction of the United States) for a statutory rape which occurred in a housing complex on a U.S. military base in Germany, *United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000). *Gatlin* based its conclusion that subsection 7(3) has no extraterritorial application on three factors. First, a statute is presumed to have no extraterritorial application absent a clear indication to the contrary. Second, *Gatlin* read the subsection’s legislative history as an indication that Congress intended the subsection to apply solely within the United States. Third, it pointed out that after *Reid* and *Kinsella*, Congress, the Executive Branch, and commentators had all described as beyond federal jurisdiction those crimes committed by dependents and contractors on overseas military bases – all assuming that subsection 7(3) had no extraterritorial application, 216 F.3d at 214-22.

The Ninth Circuit could not agree, *United States v. Corey*, 232 F.3d 1166 (9<sup>th</sup> 2000). *Corey* involved the conviction of a civilian postal employee for sexual abuse committed in military housing in Japan and in a residence rented by the U.S. embassy in the Philippines. *Corey* found the presumption against extraterritoriality unpersuasive and not particularly relevant. In its mind, jurisdiction was territorial (not extraterritorial) no matter where the property was located as long as it was acquired for “needful” purposes and as long as U.S. legislative jurisdiction over the property was exclusive or concurrent, 232 F.3d at 1170-171. It found support in the history of

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<sup>13</sup> A later District Court held that an airport area assigned to U.S. Customs authorities in Nassau, Bahamas came within the territorial jurisdiction of the United States as defined by subsection 7(3), *Witten v. Pitman*, 613 F.Supp. 63, 65-6 (S.D.Fla. 1985).

Over the years references to the overseas application of 18 U.S.C. 7(3) appeared in dicta elsewhere: *Haitian Centers Council, Inc. v. McNary*, 969 F.3d 1326, 1342 (2d Cir. 1992), *vac’d on other grounds sub nom., Sale v. Haitian Centers Council, Inc.*, 509 U.S. 918 (1993) (“both United States citizens and aliens alike, charged with the commission of crimes on Guantanamo Bay, are prosecuted under United States laws. . . see also 18 U.S.C. 7”); *Persinger v. Islamic Republic*, 729 F.2d 835, 841-42 n.11 (D.C.Cir. 1984) (“But *Erδος* is inapposite. . . [in] that Congress did not intend the FSIA to apply to the case before us, whereas Congress did intend the special maritime and territorial jurisdiction of the United States to cover the case before the *Erδος* court”); *McKeel v. Islamic Republic*, 722 F.2d 582, 588-89 (9<sup>th</sup> Cir. 1983) (“In *Erδος*, a United States diplomat killed a fellow citizen within a United States embassy. Jurisdiction for the prosecution of *Erδος* upon his return to the United States was based on 18 U.S.C. 7, which grants special territorial jurisdiction over crimes committed in United States embassies”); *Talbott v. United States ex rel. Toth*, 215 F.2d 22, 27 (D.C.Cir. 1954), *rev’d on other grounds sub nom., United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (“No authority is cited to us to indicate that K-9 Air Base or any other land in South Korea used as an air base by the United States armed forces was or is, legally speaking, reserved for the use of the United States . . . or under its exclusive or concurrent jurisdiction, and our research has failed to reveal any authority to that effect. It does not appear, therefore, that the offenses with which *Toth* is charged could be tried as offenses against the United States within the jurisdiction of a District Court”).

<sup>14</sup> It found that various other federal statutes did have extraterritorial application, and that the terrorists might be charged under statutes that prohibited bombing federal property (18 U.S.C. 844(f)), carrying an explosive in relation to a federal violent crime (18 U.S.C. 924(c)), murder during the course of an armed attack on a federal facility (18 U.S.C. 930(c)), murder of federal employees during the performance of their duties (18 U.S.C. 1114), and the destruction of national defense material (18 U.S.C. 2155), 92 F.Supp.2d at 198-204.



subsection 7(3) which had been applied over time to territory beyond the confines of any admitted state or beyond the continental boundaries of the United States, 232 F.3d at 1173-176.

Congress resolved the dispute, or at least greatly mitigated its consequences, when it enacted section 804 of the USA PATRIOT Act and the Military Extraterritorial Jurisdiction Act of 2000. The Military Extraterritorial Jurisdiction Act treats felonies, committed anywhere overseas by members of the armed forces or those accompanying or employed by them, as if they were committed within the territorial jurisdiction of the United States, 18 U.S.C. 3261.

Section 804 of the USA PATRIOT Act creates a new territorial subsection in 18 U.S.C.7: the special territorial jurisdiction of the United States includes the overseas business premises of federal governmental entities and the residences of the members of their staffs, but only for crimes committed by or against Americans (other than those who come within the military extension of 18 U.S.C. 3261).

The split in the circuits remains of consequence for crimes committed in federal overseas facilities by foreign nationals who are not associated with the U.S. armed forces. In the Fourth and Ninth Circuits, such crimes may come within the territorial jurisdiction of the United States. In the Second Circuit, they do not.

## **Credit Card Fraud Overseas (Fraud and Related Activity in Connection with Access Devices Abroad)**

*(h) Any person who, outside the jurisdiction of the United States, engages in any act that, if committed within the jurisdiction of the United States, would constitute an offense under subsection (a) or (b) of this section, shall be subject to the fines, penalties, imprisonment, and forfeiture provided in this title if--*

*(1) the offense involves an access device issued, owned, managed, or controlled by a financial institution, account issuer, credit card system member, or other entity within the jurisdiction of the United States; and*

*(2) the person transports, delivers, conveys, transfers to or through, or otherwise stores, secrets, or holds within the jurisdiction of the United States, any article used to assist in the commission of the offense or the proceeds of such offense or property derived therefrom. 18 U.S.C. 1029(h), (added by §377 of the USA PATRIOT Act).*

Section 1029 of title 18 proscribes counterfeiting or trafficking in counterfeit or unauthorized “access devices” or attempting or conspiring to do so “if the offense affects interstate or foreign commerce.” Thus, prior to the addition of subsection (h), the section would have been thought to have extraterritorial application when the offense affected the interstate or foreign commerce of the United States, *United States v. Ivanov*, 175 F.Supp.2d 367, 374-75 (D.Conn. 2001)(use of the phrase “foreign commerce” reflects Congressional intent that 18 U.S.C. 1029 have extraterritorial application).

Subsection (h) might be construed to limit the overseas application of section 1029 to circumstances involving an American issuer of the depicted “access device” and some contact between the United States and the material used in the offense or the profits from it. Alternatively, it might be construed as an explicit confirmation that the section applies under these circumstances, but without intending to foreclose other circumstances justifying application abroad.

## Money Laundering

(c) As used in this section . . .

(6) the term “financial institution” includes -

(A) any financial institution, as defined in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder; and

(B) *any foreign bank, as defined in section 1 of the International Banking Act of 1978 (12 U.S.C. 3101).*<sup>15</sup>

(7) the term “specified unlawful activity” means . . .

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving . . .

(ii) murder, kidnaping, robbery, extortion, destruction of property by means of explosive or fire, or a crime of violence (as defined in section 16);

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978);

(iv) *bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official;*

(v) *smuggling or export control violations involving--*

(I) *an item controlled on the United States Munitions List established under section 38 of the Arms Export Control Act (22 U.S.C. 2778); or*

(II) *an item controlled under regulations under the Export Administration Regulations (15 C.F.R. Parts 730-774); or*

(vi) *an offense with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States. . . .*

(D) an offense under . . . *section 541 (relating to goods falsely classified), section 542 (relating to entry of goods by means of false statements) . . . section 922(1) (relating to the unlawful importation of firearms), section 924(n) (relating to firearms trafficking), section 956 (relating to conspiracy to kill, kidnap, maim, or injure certain property in a foreign country) . . . section 1030 (relating to computer fraud and abuse), 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution) . . . of this title . . . any felony violation of the Foreign Agents Registration Act of 1938, or any felony violation of the Foreign Corrupt Practices Act.” 18 U.S.C. 1956(c)(6),(7)(B), (7)(D) (as amended by §§318, 315 of the USA PATRIOT Act).*

The money laundering provisions of 18 U.S.C. 1956 proscribe money laundering or more exactly, “financial transactions” related in various ways to a “specified unlawful activity.” It creates several distinct crimes:

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<sup>15</sup> “For the purposes of this chapter . . . ‘foreign bank’ means any company organized under the laws of a foreign country, a territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands, which engages in the business of banking, or any subsidiary or affiliate, organized under such laws, of any such company. For the purposes of this chapter the term ‘foreign bank’ includes, without limitation, foreign commercial banks, foreign merchant banks and other foreign institutions that engage in banking activities usually in connection with the business of banking in the countries where such foreign institutions are organized or operating,” 12 U.S.C. 3101(7).

- laundering with intent to promote an illicit activity;<sup>16</sup>
- laundering to conceal or disguise;<sup>17</sup>
- smurfing;<sup>18</sup>
- international laundering;<sup>19</sup>
- laundering to evade taxes;<sup>20</sup> and
- laundering part of a law enforcement sting.<sup>21</sup>

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<sup>16</sup> “(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity (A)(i) *with the intent to promote the carrying on of specified unlawful activity*,” 18 U.S.C. 1956(a)(1)(A)(i)(emphasis added).

<sup>17</sup> “(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity . . . (B) *knowing that the transaction is designed in whole or in part (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity*,” 18 U.S.C. 1956(a)(1)(B)(i)(emphasis added).

<sup>18</sup> “(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity . . . (B) knowing that the transaction is designed in whole or in part . . . (ii) to avoid a transaction reporting requirement under State or Federal law,” 18 U.S.C. 1956(a)(1)(B)(ii). The most common form of this offense occurs when for example a defendant, in order to avoid the reporting requirements involved in financial transactions involving more than \$10,000, divides a \$20,000 bank deposit into ten “smurf” deposits of \$2,000.

<sup>19</sup> This is essentially the three of crimes just mentioned – promotion, deceptive laundering and smurfing – committed in an international environment.

“(2) *Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States --*

(A) *with the intent to promote the carrying on of specified unlawful activity; or*

(B) *knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part --*

(i) *to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or*

(ii) *to avoid a transaction reporting requirement under State or Federal law*,” 18 U.S.C. 1956(a)(2)(emphasis added).

<sup>20</sup> “(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity (A) . . . (ii) *with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986*,” 18 U.S.C. 1956(a)(1)(A)(ii)(emphasis added).

<sup>21</sup> This section permits prosecution of the successful results of a money laundering sting, where undercover law enforcement agents provide predisposed defendants with the opportunity to engage in money laundering but where the money used as bait may not in fact be the proceeds of an illicit activity such as an illegal gambling business.

“(3) *Whoever, with the intent --*

(A) *to promote the carrying on of specified unlawful activity;*

(B) *to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or*

(C) *to avoid a transaction reporting requirement under State or Federal law,*

*conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term “represented” means any representation made by a law enforcement officer or by another person at the direction of, or*

The extraterritorial aspects of section 1956 come in two forms. First, the statute prohibits transactions in this country related to certain crimes in other countries. Second, the section specifically asserts extraterritorial jurisdiction over transactions in other countries which involve more than \$10,000 and either the participation of an American or conduct occurring within the United States, 18 U.S.C. 1956(f).<sup>22</sup>

Section 318 of the USA PATRIOT Act expressly eliminates any requirement that the triggering financial transactions occur in an American bank or other American financial institution by changing the applicable definition of financial institution to include foreign banks. Whether this is intended as an implicit repeal of the requirements subsection 1956(f) is unclear. The amendment allows for extraterritorial application in instances where subsection 1956(f) would not. Subsection 1956(f), for example, does not reach transactions of less than \$10,000 or foreign transactions by a foreign national related to specified illegal activity committed in the United States. The report of the House committee in which this proposal originated makes it clear that the provision was crafted to fill in gaps in existing law.<sup>23</sup> On the other hand, the courts do not favor repeal by implication, *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 122 S.Ct. 593, 606 (2001) (“the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable”). Yet it is possible to read the amendment and subsection 1956(f) consistently, *i.e.*, each independently describes circumstances under extraterritorial jurisdiction may be asserted with reference to the other.

Section 315 of the Act supplements the 18 U.S.C. 1956 definition of “specified unlawful activity” to include (when the financial transaction occurs at least in part in the U.S.) a wider range of foreign crimes such as crimes of violence, foreign official corruption, various smuggling offenses, and crimes for which we have extradition obligations under a multinational treaty.<sup>24</sup>

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with the approval of, a Federal official authorized to investigate or prosecute violations of this section,” 18 U.S.C. 1956(a)(3)(emphasis added).

<sup>22</sup> “There is extraterritorial jurisdiction over the conduct prohibited by this section if - (1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and (2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding \$10,000,” 18 U.S.C. 1956(f).

<sup>23</sup> The report’s focus, however, appears to have been on the inadequacies of the elements of the offense to establish extraterritorial jurisdiction rather than on the provisions of subsection 1956(f), H.Rept. 107-250, at 38 (2001) (“The Committee’s review of current law regarding money laundering revealed a number of shortcomings. For instance, section 1956 of title 18, United States Code, makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, 18 U.S.C. §1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds ‘by, to or through a financial institution.’ For the purposes of both statutes, the term ‘financial institution’ is defined in 31 U.S.C. §5312. See 18 U.S.C. §1956(c)(6); 18 U.S.C. §1957(f).

“The definition of ‘financial institution’ in §5312 does not explicitly include foreign banks. Such banks may well be covered because they fall within the meaning of ‘commercial bank’ or other terms in the statute, but as presently drafted, there is some confusion over whether the government can rely on section 5312 to prosecute an offense under either §1956 or §1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad—say to a Mexican bank—and launders them through a series of financial transactions, the government conceivable could not rely on the definition of a ‘financial institution’ in §1956(c)(6) to establish that the transaction was a ‘financial transaction’ within the meaning of §1956(c)(4)9B)(defining a ‘financial transaction’ as a transaction involving the use of a ‘financial institution’), or that it was a ‘monetary transaction’ within the meaning of §1957(f) (defining ‘monetary transaction’ as, *inter alia*, a transaction that would be a ‘financial transaction’ under §1956(c)(4)(B))”.

<sup>24</sup> The term “specified unlawful activity” means . . . (B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving . . . (ii) murder, kidnaping, robbery, extortion,

It also adds sundry smuggling offenses, gun running, computer fraud and abuse, and felony violations of the Foreign Agents Registration Act of 1938 to the definition of the specified unlawful activity.<sup>25</sup>

## **Treaty Implementation**

Contemporaneous with Senate approval of the International Conventions for the Suppression of Terrorist Bombings and of the Financing of Terrorism, Congress enacted implementing criminal provisions that feature extraterritorial components.

### ***Terrorist Bombings***

*Bombings of places of public use, government facilities, public transportation systems and infrastructure facilities*

\* \* \*

*(b) JURISDICTION.- There is jurisdiction over the offenses in subsection (a) if . . .*

*(2) the offense takes place outside the United States and -*

*(A) a perpetrator is a national of the United States or is a stateless person whose habitual residence is in the United States;*

*(B) a victim is a national of the United States;*

*(C) a perpetrator is found in the United States;*

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*destruction of property by means of explosive or fire, or a crime of violence (as defined in section 16); . . . (iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official; (v) smuggling or export control violations involving - (I) an item controlled on the United States Munitions List established under section 38 of the Arms Export Control Act (22 U.S.C. 2778); or (II) an item controlled under regulations under the Export Administration Regulations (15 C.F.R. Parts 730-774); or (vi) an offense with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States,” 18 U.S.C. 1956(c)(7)(B).*

The offenses covered by the extradite-or-try clause of 1956(c)(7)(B)(vi) include the foreign equivalents of 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 18 U.S.C. 37 (violence at international airports), 18 U.S.C. 112 (assault on internationally protected persons), 18 U.S.C. 831 (nuclear materials offenses), 18 U.S.C. 878 (threats to or extortion of internationally protected persons), 18 U.S.C. 1116 (murder or manslaughter of internationally protected persons), 18 U.S.C. 1117 (attempted murder of internationally protected persons), 18 U.S.C. 1201 (kidnaping an internationally protected persons), 18 U.S.C. 1203 (hostage taking), 18 U.S.C. 2280 (violence against maritime navigation), 18 U.S.C. 2281 (violence against fixed maritime platforms), 18 U.S.C. 2340A (torture), 49 U.S.C. 46502 (aircraft piracy), implementing the Convention for the Suppression of Unlawful Seizure of Aircraft, 22 U.S.T. 1641 (1971); the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 24 U.S.T. 564 (1973); the Convention for the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 28 U.S.T. 1975 (1977); the Convention on the Physical Protection of Nuclear Materials, T.I.A.S. 11080 (1987); the Convention Against the Taking of Hostages, T.I.A.S. 11081 (1985); the Convention Against Torture, 23 I.L.M. 1027 (1984); the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Treaty Doc. 100-19 (1988); the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Treaty Doc. 101-1 (1989); the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms, Treaty Doc. 101-1 (1989).

<sup>25</sup> “[T]he term ‘specified unlawful activity’ means . . . (D) an offense under . . . section 541 (relating to goods falsely classified), . . . section 922(1) (relating to the unlawful importation of firearms), section 924(n) (relating to firearms trafficking), . . . section 1030 (relating to computer fraud and abuse), . . . of this title . . . any felony violation of the Foreign Agents Registration Act of 1938, or any felony violation of the Foreign Corrupt Practices Act.” 18 U.S.C. 1956(c)(7)(D)).

(D) the offense is committed in an attempt to compel the United States to do or abstain from doing any act;

(E) the offense is committed against a state or government facility of the United States, including an embassy or other diplomatic or consular premises of the United States;

(F) the offense is committed on board a vessel flying the flag of the United States or an aircraft which is registered under the laws of the United States at the time the offense is committed; or

(G) the offense is committed on board an aircraft which is operated by the United States.

\* \* \*

(d) EXEMPTIONS TO JURISDICTION. -This section does not apply to -

(1) the activities of armed forces during an armed conflict, as those terms are understood under the law of war, which are governed by that law,

(2) activities undertaken by military forces of a state in the exercise of their official duties . . . 18 U.S.C. 2332f(b) (added by §102 of P.L. 107-197; effective on the date that the International Convention for the Suppression of Terrorist Bombings enters into force for the United States).

Subsection 2332f(a)<sup>26</sup> bans the unlawful use of nuclear materials, chemical weapons, explosives, or biological weapons against public places or governmental facilities and utilities or attempting or conspiring to do so.<sup>27</sup> Violations are punishable in the same manner as violations of 18 U.S.C. 2332a(a)(use of weapons of mass destruction against federal property or an American abroad), *i.e.*, imprisonment for any term of years or life and if death results from commission of the offense the offender may also be subject to the death penalty.

The extraterritorial reach of the new statute runs parallel to several existing statutes which prohibit international terrorism;<sup>28</sup> the unlawful use of chemical<sup>29</sup> or biological weapons,<sup>30</sup> nuclear

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<sup>26</sup> 18 U.S.C. 2332f(a)“(1) IN GENERAL. - Whoever unlawfully delivers, places, discharges, or detonates an explosive or other lethal device in, into, or against a place of public use, a state or government facility, a public transportation system, or an infrastructure facility - (A) with the intent to cause death or serious bodily injury, or (B) with the intent to cause extensive destruction of such a place, facility, or system, where such destruction results in or is likely to result in major economic loss, shall be punished as prescribed in subsection (c). (2) ATTEMPTS AND CONSPIRACIES. - Whoever attempts or conspires to commit an offense under paragraph (1) shall be punished as prescribed in subsection (c)”.

<sup>27</sup> The property protected includes “those parts of any building, land, street, waterway, or other location that are accessible or open to members of the public, whether continuously, periodically, or occasionally, and encompasses any commercial, business, cultural, historical, educational, religious, governmental, entertainment, recreational, or similar place that is so accessible or open to the public; [and], any permanent or temporary facility or conveyance that is used or occupied by representatives of a [government], members of Government, the legislature or the judiciary or by officials or employees of a [government] or any other public authority or entity or by employees or officials of an intergovernmental organization in connection with their official duties; [as well as,] any publicly or privately owned facility providing or distributing services for the benefit of the public, such as water, sewage, energy, fuel, or communications,” 18 U.S.C. 2332f(e)(6),(3),(5).

<sup>28</sup> 18 U.S.C. 2332 (killing or injuring an American overseas).

<sup>29</sup> 18 U.S.C. 229(c)(chemical weapons offenses)“(Conduct prohibited by subsection (a) is within the jurisdiction of the United States if the prohibited conduct . . . (2) takes place outside of the United States and is committed by a national of the United States; (3) is committed against a national of the United States while the national is outside the United States; or (4) is committed against any property that is owned, leased, or used by the United States or by any department or agency of the United States, whether the property is within or outside the United States”).

<sup>30</sup> 18 U.S.C. 175(a)(biological weapons)“(There is extraterritorial Federal jurisdiction over an offense under this section committed by or against a national of the United States”).

materials,<sup>31</sup> explosives,<sup>32</sup> or weapons of mass destruction,<sup>33</sup> or attacks on aircraft,<sup>34</sup> airports,<sup>35</sup> mass transit,<sup>36</sup> diplomatic officials,<sup>37</sup> or federal employees.<sup>38</sup> It is somewhat distinctive in that it may be enforced when the offense is committed overseas and subsequently the offender is found here or has been brought here. No other connection to the United States is needed. The section does not become effective, however, until the treaty provisions it implements come into effect for the United States – a limitation without which any claim to legislative jurisdiction in some instances might be suspect.

## ***Financing Terrorism***

### *Prohibitions against the financing of terrorism*

\* \* \*

*(b) JURISDICTION. - There is jurisdiction over the offenses in subsection (a) in the following circumstances. . . (2) the offense takes place outside the United States and -*

*(A) a perpetrator is a national of the United States or is a stateless person whose habitual residence is in the United States;*

*(B) a perpetrator is found in the United States; or*

*(C) was directed toward or resulted in the carrying out of a predicate act against*

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<sup>31</sup> 18 U.S.C. 831(nuclear material offenses)(“(1) the offense is committed in . . . the special maritime and territorial jurisdiction of the United States, or the special aircraft jurisdiction of the United States (as defined in section 46501 of title 49); (2) an offender or a victim is - (A) a national of the United States; or (B) a United States corporation or other legal entity; (3) after the conduct required for the offense occurs the defendant is found in the United States, even if the conduct required for the offense occurs outside the United States; (4) the conduct required for the offense occurs with respect to the carriage of a consignment of nuclear material or nuclear byproduct material by any means of transportation intended to go beyond the territory of the state where the shipment originates beginning with the departure from a facility of the shipper in that state and ending with the arrival at a facility of the receiver within the state of ultimate destination and either of such states is the United States; or (5) either - (A) the governmental entity under subsection (a)(5) is the United States; or (B) the threat under subsection (a)(6) is directed at the United States”).

<sup>32</sup> 18 U.S.C. 844(f),(i)(bombing federal property or property used in or used in an activity that affects the foreign commerce of the U.S.).

<sup>33</sup> 18 U.S.C. 2332a (weapons of mass destruction including explosives but not chemical weapons)(offenses committed outside the U.S. by or against Americans; offenses committed against federal property).

<sup>34</sup> 18 U.S.C. 32(b)(aircraft sabotage)(“There is jurisdiction over an offense under this subsection if a national of the United States was on board, or would have been on board, the aircraft; an offender is a national of the United States; or an offender is afterwards found in the United States”).

<sup>35</sup> 18 U.S.C. 37(b) (violence at international airports)(“There is jurisdiction over the prohibited activity in subsection (a) if . . . (2) the prohibited activity takes place outside the United States and (A) the offender is later found in the United States; or (B) an offender or a victim is a national of the United States (as defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22))”).

<sup>36</sup> 18 U.S.C. 1993 (terrorist attacks on mass transit)(offense committed against a carrier whose activities affect the foreign commerce of the U.S.).

<sup>37</sup> 18 U.S.C. 1116(c) (killing internationally protected persons)(“If the victim of an offense under subsection (a) is an internationally protected person outside the United States, the United States may exercise jurisdiction over the offense if (1) the victim is a representative, officer, employee, or agent of the United States, (2) an offender is a national of the United States, or (3) an offender is afterwards found in the United States”); similar provisions appear in 18 U.S.C. 112 (assaults on internationally protected persons).

<sup>38</sup> 18 U.S.C. 1114 (killing federal employees) and 18 U.S.C. 111 (assaulting federal employees)in the performance of their duties; case law suggests both apply overseas

- (i) any property that is owned, leased, or used by the United States or by any department or agency of the United States, including an embassy or other diplomatic or consular premises of the United States;*
- (ii) any person or property within the United States;*
- (iii) any national of the United States or the property of such national; or*
- (iv) any property of any legal entity organized under the laws of the United States, including any of its States, districts, commonwealths, territories, or possessions;*
- (3) the offense is committed on board a vessel flying the flag of the United States or an aircraft which is registered under the laws of the United States at the time the offense is committed;*
- (4) the offense is committed on board an aircraft which is operated by the United States; or*
- (5) the offense was directed toward or resulted in the carrying out of a predicate act committed in an attempt to compel the United States to do or abstain from doing any act. 18 U.S.C. 2339C (added by §202 of P.L.107-197; effective upon enactment except that paragraph 2332C(b)(2)(B) becomes effective on the date upon which the International Convention for the Suppression of Financing of Terrorism enters into force for the United States and the proscriptions predicated upon violation of the International Convention for the Suppression of Terrorist Bombing become effective on the date on which that Convention enters into force for the United States).*

Newly enacted section 2339C condemns (1) providing or collecting funds to be used for terrorist purposes or (2) concealing information concerning funds used to support terrorism. Subsection 2339C(a), the financing provision which also outlaws attempts and conspiracies, applies where the funds are to be used in support of the commission of either an offense covered in any of the various specified anti-terrorism treaties or an act of terrorism intended to cause death or serious injury.<sup>39</sup>

The underlying treaty offenses include the following federal crimes and their foreign equivalents:

- 18 U.S.C. 32 (destruction of aircraft or aircraft facilities)
- 18 U.S.C. 37 (violence at international airports)
- 18 U.S.C. 112 (assault on internationally protected persons)
- 18 U.S.C. 831 (nuclear materials offenses)
- 18 U.S.C. 878 (threats to or extortion of internationally protected persons)
- 18 U.S.C. 1116 (murder or manslaughter of internationally protected persons)
- 18 U.S.C. 1117 (attempted murder of internationally protected persons)

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18 U.S.C. 2339C(a)(“(1) IN GENERAL. - Whoever, in a circumstance described in subsection (c), by any means, directly or indirectly, unlawfully and willfully provides or collects funds with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part, in order to carry out - (A) an act which constitutes an offense within the scope of a treaty specified in subsection (e)(7), as implemented by the United States, or (B) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act, shall be punished as prescribed in subsection (d)(1). (2) ATTEMPTS AND CONSPIRACIES. - Whoever attempts or conspires to commit an offense under paragraph (1) shall be punished as prescribed in subsection (d)(1). (3) RELATIONSHIP TO PREDICATE ACT. - For an act to constitute an offense set forth in this subsection, it shall not be necessary that the funds were actually used to carry out a predicate act”).



- 18 U.S.C. 1201 (kidnaping an internationally protected persons)
- 18 U.S.C. 1203 (hostage taking)
- 18 U.S.C. 2280 (violence against maritime navigation)
- 18 U.S.C. 2281 (violence against fixed maritime platforms),
- 49 U.S.C. 46502 (aircraft piracy), 18 U.S.C. 2339C(e)(7).

Violations are punishable by imprisonment for not more than 20 years, a fine of not more than \$250,000 for individuals or not more than \$500,000 for organizations, and/or a civil penalty of at least \$10,000, 18 U.S.C. 2339C(d)(1),(f).

The financing subsection applies overseas if the offender is an American, if the target of the underlying terrorism is the United States government, an American, or an American entity, or (when the Financing Convention becomes effective for the U.S.) if the offender is subsequently found in the United States, 18 U.S.C. 2339C(c).

The subsection has several counterparts elsewhere in federal law, most notably 18 U.S.C. 2339B (providing material support to terrorists organizations), 18 U.S.C. 2339A (providing material support to terrorists), and 18 U.S.C. 2 (aiding and abetting). The extraterritorial reach of subsection 2339C(a) when it may be based on the presence of the offender of the United States is more sweeping than the most expansive of these. Section 2339B proscribes aid to groups designated foreign terrorist organizations by the Secretary of State as threats to U.S. national security or the national security of U.S. nationals and has a general extraterritorial jurisdiction provision, 18 U.S.C. 2339B(d) (“There is extraterritorial federal jurisdiction over an offense under this section”). Subsection 2339C(a) is limited neither to designated terrorist organizations nor to terrorism directed against American national security interests – the subsequent presence of the financier in the U.S. is enough.

Section 2339A prohibits aid to a terrorist in the commission of any of a list designated for federal predicate offenses. It has no explicit extraterritorial provisions but almost certainly has extraterritorial application by virtue of the extraterritorial features of its predicate offenses. Subsection 2339C(a)’s predicate offense list is more extensive<sup>40</sup> than that of section 2339A and consequently its extraterritorial reach is greater.

Section 2 imposes the same criminal liability upon those who aid and abet the commission of a crime as those who actually commit it. It carries the extraterritorial reach of the underlying offenses. Although more extensive than the predicate offense list of section 2339A, section 2 cannot stand on the full range of foreign law offenses available to subsection 2339C(a). Moreover, this section requires a completed predicate federal crime. There is ordinarily no crime to attempt to aid and abet nor to aid and abet an unsuccessful criminal effort. Subsection 2339C(a) suffers from neither limitation.

Prior to the Convention for the Suppression of the Financing of Terrorism entering into force for the United States, however, subsection 2339C(a) will not reach those overseas acts of financial support for terrorism offenses whose only connection to the United States is the subsequent presence of the offender in this country.

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<sup>40</sup> 18 U.S.C. 2339C(a)(1)(B) (“any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act”).

## **Concealment**

(c) *CONCEALMENT. - Whoever -*

*(1) . . . (B) is outside the United States and is a national of the United States or a legal entity organized under the laws of the United States (including any of its States, districts, commonwealths, territories, or possessions); and*

*(2) knowingly conceals or disguises the nature, location, source, ownership, or control of any material support, resources, or funds -*

*(A) knowing or intending that the support or resources were provided in violation of section 2339B of this title; or*

*(B) knowing or intending that any such funds or any proceeds of such funds were provided or collected in violation of subsection (a),*

*shall be punished as prescribed in subsection (d)(2).*

Section 2339C contains a concealment offense with extraterritorial application.

Offenders are punishable by imprisonment for not more than 10 years, a fine of not more than \$250,000 for individuals or not more than \$500,000 for organizations, and/or a civil penalty of at least \$10,000, 18 U.S.C. 2339C(d)(2),(f).

Subsection 2339C(c)(concealment) only extends to those violations abroad that are committed by U.S. nationals or American entities. Section 2 appears to offer broader extraterritorial coverage, since its parallel prohibition on aiding and abetting violations of subsection 2339C(a)(financing terrorism) and 2339B enjoys the benefit of their extraterritorial application without any offender citizenship requirement. On the other hand, where their proscriptions overlap subsection 2339C(c) provides an additional penalty option since section 2 carries the same criminal penalties as the underlying offense (*i.e.*, imprisonment for not more than 20 years plus fine) while section 2339C(c) offers the possibility of a less severe criminal sanction (*i.e.*, imprisonment for not more than 10 years plus fine) as well as the option of a civil penalty.

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