

Terrorist Financing

In This Issue

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Introduction

The Department of Justice's (Department) top strategic priorities are preventing terrorism and protecting the nation's security. Denying terrorists the funding and other resources necessary to carry out attacks, develop their infrastructure, and establish safe havens in which to operate, is an important part of our implementation of these objectives. Across the Department, we are committed to using the full range of legal tools to combat terrorist financing. The Federal Bureau of Investigation uses intelligence tools to track terrorist financing and disrupt terrorist plots, the Drug Enforcement Administration targets narco-terrorist groups that trade in illicit drugs to fund terrorist operations, and U.S. Attorneys' offices across the country prosecute cases involving terrorist financing, working closely with the Department's National Security and Criminal Divisions.

Congress enacted a number of statutes that the Department uses to target the funding of terrorist activities. These include the material support statutes, 18 U.S.C. §§ 2339A–C and 21 U.S.C. § 960a, which criminalize the provision of drug proceeds for terrorism, and the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–05, which criminalizes conduct in violation of executive orders prohibiting transactions with, among other things, nation-states that support international terrorism, designated terrorists, and terrorist groups. The Department actively uses these and other statutes to prosecute the knowing provision of assistance to terrorists, whether in the form of cash or other valuable items or services. Some terrorist groups rely on drug trafficking and kidnapping to generate funds in support of their operations, and the Department actively pursues those matters. The Department also aggressively pursues cases to prosecute individuals and corporate actors who willfully violate economic sanctions imposed on countries that have been designated as state sponsors of terrorism. These pursuits are an important part of the global strategy to cut the flow of funds to terrorists. The Department has also used forfeiture statutes to recover assets.

In the years since 9/11, the Department has successfully prosecuted hundreds of counterterrorism cases in the midst of a dynamic, evolving threat stream. The constant evolution of serious threats to the homeland and to peaceful nations worldwide drives intelligence and law enforcement priorities. Consequently, the cases that are marked for disruption are constantly changing. Our substantial record of success reflects our ability to adapt to the changing threat through training, effective allocation of resources, and application of intelligence and law enforcement tools.

In this issue of the U.S. Attorneys' Bulletin, we have included articles that we hope will provide you with practical information about the Department's recent efforts to disrupt the financing and facilitation of terrorist activity. We begin with an article titled "Trends in the Prosecution of Terrorist Financing and Facilitation," which surveys the cases targeting terrorist financing and facilitation that the Department has brought over the past 12 years, and seeks to categorize thematically the types of matters, defendants, and trends observed. "What to Charge in a Terrorist Financing or Facilitation Case" provides prosecutors with practical information about some of the nuances that exist when charging these cases. "Extraterritorial Jurisdiction and the Federal Material Support Statutes" describes the extraterritorial application of the material support statutes, the sound legal theories on which this jurisdiction is based, and several of the arguments that defendants commonly raise when charged with extraterritorial offenses. "The Holy Land Foundation for Relief and Development: A Case Study" illustrates important practice points with an in-depth look at a seminal terrorist financing case. "Application of the Terrorism Sentencing Enhancement to Material Support Convictions" provides a comprehensive review of the issues that a prosecutor may face when applying the terrorism sentencing enhancement to a material support conviction. "Parallel Criminal and Civil/Administrative Investigations in Terrorist Financing Cases" discusses the complexities that may arise when the Government's commitment to utilize "all tools" in counterterrorism matters involves parallel administrative and criminal proceedings. "Using Material Support Statutes as an Investigative Tool: A Case Study" discusses how material support

statutes can be used as an investigative tool to enhance our development of foreign intelligence information. Finally, “Using Criminal and Civil Forfeiture to Combat Terrorism and Terrorist Financing” describes the statutes that prosecutors should consider to forfeit the assets of terrorists and state sponsors of terrorism and highlights representative forfeiture matters.

We hope that this issue will be useful to you as you develop and prosecute terrorist financing and facilitation cases. As the shifting threat stream presents a steady flow of new paradigms and challenges, counterterrorism law and the nation’s experience continue to grow. As you move forward in your cases, we encourage you to reach out to the National Security Division early and often. Our subject matter experts stand ready to assist you fully in your efforts to stem the flow of money and other support to terrorists.

The authors would like to thank Mike Taxay, Virginia Vander Jagt, and Michael Mullaney for their assistance in the preparation of this issue of the USAttorneys’ Bulletin.

Trends in the Prosecution of Terrorist Financing and Facilitation

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I. Background

Following the September 11 attacks on the United States, the Department of Justice (the Department) worked to bring “all tools” to bear in order to disrupt terrorist plots and dismantle terrorist organizations. Criminal prosecution and civil enforcement actions targeting terrorist financing and facilitation have played an important role in the Government’s execution of a multi-agency strategy to cut off the flow of funds and other material support or resources to terrorists. These actions have frequently been at the forefront of counterterrorism efforts.

In the years since 9/11, we have seen a dynamic and shifting threat stream. The Government has made public statements, for example, about the relative decline in the number of “core” al-Qaeda members, the growth and lethal activities of other terrorist groups, and the export of terror from our shores. The constantly evolving threat stream has required adaptation by law enforcement and, when examined over time, teaches several fundamental lessons. First, just as there is no one type of terrorist, there is no one type of terrorist financier/facilitator. Second, a wide range of terrorist organizations have sought to draw upon the wealth and resources of the United States. Third, terrorist financiers/facilitators are creative and will seek to exploit vulnerabilities in our society to further their unlawful aims.

This article surveys cases the Department has brought over the past 13 years targeting terrorist financing and facilitation, and describes the types of matters, defendants, and trends we have observed.

II. Charities

In the aftermath of 9/11, the United States reconsidered many of the authorities and procedures that apply to terrorism investigations. Perhaps the single greatest change was to break down the “wall”

that had been erected between intelligence gathering and criminal investigation. Newly armed with intelligence information, prosecutors looked closely at charities that had connections to terrorists overseas. Over the years that followed, the Department brought a series of prosecutions against large charities and/or their principals, including the Benevolence International Foundation (BIF), the Holy Land Foundation for Relief and Development (HLF), the Islamic American Relief Agency (IARA) (self-described as the U.S. affiliate of the Islamic African Relief Agency), the Child Foundation, the Tamils Rehabilitation Organization, and Care International (Care).

Among the first of these cases was the prosecution of the director of BIF, Enaam Arnaout. BIF operated from the United States and elsewhere in the 1990s to supply financial and logistical support to mujahidin fighters. In the 1980s, Arnaout purportedly worked for Mekhtab al-Khidemat, which had been established a decade earlier by Osama bin Laden and Sheik Abdullah Azzam to raise funds and recruit foreign fighters for the war against the Soviets in Afghanistan. As much as any investigation, BIF highlights the effect that bringing down the “wall” had on the Government’s ability to utilize law enforcement tools to disrupt the infrastructure of terrorism. Prior to 9/11, the FBI had certain information indicating that BIF had ties to al-Qaeda and that it was supporting jihad and sending large amounts of money overseas. Due to the “wall,” this information could not be shared with criminal investigators, thereby limiting the Government’s ability to investigate and disrupt BIF’s activities. After new procedures were implemented to enable the sharing of information, the Department obtained criminal warrants authorizing the FBI to conduct searches of BIF headquarters in Illinois and Arnaout’s residence, and it prepared a Mutual Legal Assistance Treaty request facilitating the search of BIF’s office in Bosnia. The evidence gathered through these and other law enforcement efforts resulted in Arnaout’s indictment, his guilty plea to a racketeering conspiracy, and his admission that he and others had concealed from donors and federal and state governments in the United States that a material portion of the donations received by BIF was being used to support fighters overseas. *See United States v. Arnaout*, 282 F. Supp. 2d 838 (N.D. Ill. 2003). The district court declined to apply the terrorism sentencing enhancement under § 3A1.4 of the U.S. Sentencing Guidelines, finding that “Arnaout does not stand convicted of a terrorism offense. Nor does the record reflect that he attempted, participated in, or conspired to commit any act of terrorism.” *Id.* at 843.

One of the great success stories in the Department’s efforts to disrupt terrorist organizations was the investigation and prosecution of HLF and its principals. From 1993 through 2001, HLF operated as the chief fundraising arm of Hamas in the United States. As the Fifth Circuit concluded, “[t]he financial link between the Holy Land Foundation and Hamas was established at the foundation’s genesis and continued until it was severed by the Government’s intervention in 2001.” *United States v. El Mezain*, 664 F.3d 467, 484 (5th Cir. 2011). The proof at trial demonstrated that HLF intentionally cloaked its financial support for Hamas by funneling money through Zakat Committees and Charitable Societies in the West Bank and Gaza. In some cases, the defendants targeted financial aid specifically for families related to well-known Hamas operatives who had been killed or jailed. In this manner, the defendants effectively rewarded past and encouraged future terrorist activities. After a jury trial, HLF’s principals were convicted of providing material support to a foreign terrorist organization (FTO), as well as tax and money laundering violations. Each individual defendant received substantial terms of imprisonment (the longest being 65 years), and the organization was ordered to forfeit over \$12 million.

IARA and its principals were charged with a series of crimes including sending funds to Pakistan for the benefit of Specially Designated Global Terrorist (SDGT) Gulbuddin Hekmatyar, sending funds to Iraq in violation of economic sanctions, stealing U.S. government funds, misusing IARA’s charitable status to raise funds for unlawful purposes, and attempting to avoid government detection of their illegal activities. *See Second Superseding Indictment, United States v. Islamic African Relief Agency*, No. 07-00087-01/07-CR-W-NKL, at *15 (W.D. Mo. 2007). After bifurcation of the Iraq and Pakistan aspects of the case, all but one of the charged IARA principals pleaded guilty to conspiracy, violation of the International Emergency Economic Powers Act (IEEPA), and/or money laundering related to the

unlicensed transfer of cash into Iraq. Codefendant and SDGT Khalid Al-Sudanee, who helped IARA to move the cash, remains a fugitive.

Child Foundation and its principal were charged in connection with their unlicensed transfers of \$10.8 million into Iran. *See* Government's Sentencing Memorandum, *United States v. Mehrdad Yasrebi and Child Foundation*, No. 05-CR-00413-KI (D. Or. 2005). A large portion of the transferred funds were used for "non-charitable" purposes in Iran, including capital acquisitions and investment deposits in Iranian banks. Other funds were directed to a radical ayatollah in Iran who is a vocal supporter of Hizballah. The defendants were convicted of conspiracy to defraud the United States based on tax and economic sanctions violations.

In another significant case, two principals of the World Tamil Coordinating Committee, Karunakaran Kandasamy and Vijayshanthar Patpanathan, were convicted for providing material support or resources to Liberation Tigers of Tamil Eelam (LTTE), a designated terrorist organization. *See United States v. Thavaraja*, 740 F.3d 253, 254 (2d Cir. 2014). The LTTE, which seeks to establish an independent Tamil state in northern Sri Lanka, relies on sympathetic Tamil expatriates to raise and launder money and to smuggle arms, explosives, equipment, and technology into LTTE-controlled territory. To coordinate these activities, the LTTE established "branches" in at least 12 countries. Kandasamy was the director of the American branch of the LTTE, which operated through charitable front organizations including the Tamils Rehabilitation Organization (TRO). Kandasamy oversaw and directed the LTTE's various activities in the United States, raising millions of dollars for the LTTE and laundering these funds through the TRO. Patpanathan assisted Kandasamy and others in these activities.

The three principals of Care International (Care) were convicted of conspiracy to defraud the Internal Revenue Service (IRS) in order to maintain Care's status as a tax-exempt charity and thereby raise almost \$2 million in untaxed donations. Care was the successor to the al-Kifah Refugee Center, which had been connected publicly to the 1993 attack on the World Trade Center and was the American face of Mekhtab al-Khidemat (discussed above regarding BIF). To obtain tax-exempt status, Care was required to file an initial application demonstrating that it was organized and operated exclusively for a qualifying purpose. To maintain tax-exempt status, Care filed annual returns that were supposed to identify any activities that had not previously been reported to the IRS. Between 1993 and 2002, each of the three defendants signed at least one tax filing on Care's behalf wherein they failed to disclose that the organization's purposes included providing financial support to mujahidin and promoting violent jihad. As noted by the First Circuit, these omissions concerned "activities that were most likely to jeopardize Care's tax-exempt status," *United States v. Mubayyid*, 658 F.3d 35, 58 (1st Cir. 2011), including that Care had published a regular newsletter and Web site promoting violent jihad.

Another significant prosecution involved Abdurahman Alamoudi, who in 2004 pleaded guilty to criminal violations relating to his participation in a plot to assassinate Crown Prince Abdullah of Saudi Arabia. A naturalized U.S. citizen, Alamoudi founded the American Muslim Council and the American Muslim Foundation, and he was an influential member of other charitable organizations. In 2003 Alamoudi participated in meetings with Libyan government officials during which they discussed creating disruptions in Saudi Arabia. After learning that the actual objective was to assassinate the Crown Prince, Alamoudi introduced the Libyans to two Saudi dissidents in London who agreed to coordinate a murder-for-hire. Alamoudi then facilitated the transfer to them of hundreds of thousands of dollars to finance the plot. Alamoudi pleaded guilty to multiple crimes, including violation of IEEPA, based on his unlicensed travel to and commerce with Libya; false statements made in his application for naturalization; and a tax offense involving a long-term scheme to conceal from the IRS his financial transactions with Libya as well as his foreign bank accounts, and to omit material information from tax returns filed by his charities.

III. Corporations

Terror finance and related criminal charges have also been brought against many corporate defendants for violations of various sanctions regimes administered by the Department of the Treasury.

InfoCom Corporation and its principals were convicted based on their financial dealings with Hamas political leader, Mousa Abu Marzook, who had been designated in 1995 as a Specially Designated Terrorist (SDT) in connection with his actions to undermine peace in the Middle East. InfoCom was an Internet service provider owned and operated by brothers Ghasan and Bayan Elashi, both of whom were affiliated with HLF. Notwithstanding Marzook's designation as an SDT, InfoCom took on Marzook as an investor and furtively disbursed funds to him through his wife. After a jury trial, the two Elashi brothers and others were convicted of violating IEEPA by conspiring to deal in the property of a SDT and conspiring to commit money laundering. *See United States v. Elashyi*, 554 F.3d 480, 491 (5th Cir. 2008).

United States companies operating internationally are required by law not to make various types of payments that are against U.S. public policy, such as payments to designated terrorists. In 2003, Chiquita Brands International, Inc. disclosed to the Department of Justice that it had made regular payments, directly and indirectly, nearly every month to the paramilitary organization United Self-Defense Forces of Colombia (AUC). Responsible for many assassinations, kidnappings, and massacres, the AUC was designated in 2001 as an SDGT and a FTO. The payments were made by Chiquita's wholly owned subsidiary, Banadex, to AUC groups located in areas of Colombia where the company had banana producing operations. The payments began following a 1997 meeting between a Banadex official and AUC leader Carlos Castana, who conveyed an unspoken but clear message that failure to pay could result in harm to Banadex personnel and property. The money was routed entirely through intermediaries until in or about 2002, when a local AUC group demanded that Banadex pay it directly and in cash. Payments to this local group were then made following a special procedure established by senior executives of Chiquita. None of the company's direct or indirect payments to the AUC were recorded to reflect the actual and intended recipient of funds, namely the AUC. In 2007, Chiquita pleaded guilty to violating IEEPA based on 50 illegal payments to the AUC totaling over \$825,000. *See Defendant's Response to Government's Sentencing Memorandum, United States v. Chiquita Brands International, Inc.*, Cr. No. 07-055 (D.D.C. 2007).

Other corporations and/or their principals have been charged for various export and sanctions violations involving countries that have been designated as State Sponsors of Terror. For example, Weatherford International Limited entered into a deferred prosecution agreement (DPA) and agreed to pay \$100 million to resolve criminal and administrative export control and sanction violations under IEEPA and the Trading With The Enemy Act concerning the unauthorized transfer of drilling equipment and conducting business in Cuba, Iran, Sudan, and Syria. *See Complaint, Sec. and Exch. Comm'n v. Weatherford Int'l Ltd.*, No. 4:13-cv-03500 (S.D. Tex. 2013). HSBC Holdings plc and HSBC Bank USA N.A. entered into a DPA and agreed to forfeit \$1.256 billion for conducting illegal transactions on behalf of customers in Cuba, Iran, Libya, and Sudan. *See Memorandum and Order, United States v. HSBC Bank USA, N.A.*, Cr. No. 12-763 (E.D.N.Y. 2012). Academi LLC (formerly known as Blackwater Worldwide and Xe Services LLC) entered into a DPA and agreed to pay \$7.5 million for violating the Arms Export Control Act, IEEPA, and other laws by exporting satellite phones to the Sudan, proposing to provide security services to the Sudanese government, and exporting ammunition and body armor to Iraq and Afghanistan. *See United States v. Academi, L.L.C.*, No. 2:12-CR-14-1, at *1 (E.D.N.C. 2012).

Another illustrative matter involved ING Bank, N.V., which entered into a DPA and agreed to forfeit \$619 million to the Department and the New York County District Attorney's Office for conspiring to violate U.S. sanctions on Cuba and Iran, as well as New York state laws, by illegally moving more than \$2 billion (via more than 20,000 transactions) through the U.S. financial system on

behalf of sanctioned entities in Cuba and Iran. *See* Press Release, Dep't of Justice, ING Bank N.V. Agrees to Forfeit \$619 Million for Illegal Transactions with Cuban and Iranian Entities (June 22, 2012).

IV. Proceeds of criminal activity, money laundering, and asset forfeiture

Terrorist organizations have long sought to raise, move, and store assets by exploiting weaknesses in our economic system. Following 9/11 and continuing through more recent matters, the Department has brought both criminal and civil cases wherein the proceeds of criminal activity were destined for a terrorist organization.

For example, in several cases beginning in 2004 with the prosecution of Mohamad Youssef Hammoud and others, the Department has obtained convictions of Hezbollah supporters in connection with their sale of cigarettes on the black market. These cases involved the highly profitable but illegal business of smuggling cigarettes across state lines, from a state with a low cigarette tax to a state with a high cigarette tax. The *Hammoud* trial marked the first time that intelligence overhears were admitted into evidence in a criminal prosecution, representing a watershed moment for the Department and answering in the affirmative a question that had often been raised by the defense bar as to whether evidence collected pursuant to warrants obtained from the Foreign Intelligence Surveillance Court would be admissible in a criminal proceeding. *See United States v. Hammoud*, 381 F.3d 316, 331–34 (4th Cir. 2004) (conviction for providing material support or resources to Hezbollah).

The use of drug money to fuel terror was demonstrated acutely through Operation White Terror. *See, e.g.*, Criminal Complaint, *United States v. Varela*, No. H-02-1008M (S.D. Tex. 2002). This joint FBI/Drug Enforcement Administration investigation began when a broker representing the AUC approached a source and asked to buy a large cache of weapons. The broker and his partner then proceeded to negotiate a deal with an undercover officer whereby the AUC would purchase shoulder-fired anti-aircraft missiles, 9,000 assault rifles, submachine guns, sniper rifles, rocket propelled grenade launchers, nearly 300,000 grenades, and 300 pistols. The \$25 million purchase price was to be paid in cocaine and cash. After inspection by the AUC of a sample cache in St. Croix, arrests occurred in three countries. The criminal complaint detailed statements made in March 2000 by the head of the AUC, Carlos Castana, that 70 percent of the AUC's financing came from drug trafficking with the remainder coming from sponsor "donations." Multiple AUC members, including two commandants, were extradited to the United States, where they and the brokers pleaded guilty to conspiracy to provide material support or resources to an FTO.

More recently, the Department has obtained multiple convictions for narco-terrorism under a new statute, 21 U.S.C. § 960a. That statute prohibits persons who have engaged in certain drug offenses from knowingly providing anything of pecuniary value to terrorists. The Department has used § 960a to obtain convictions for support or attempted support of several terrorist groups, including Fuerzas Armadas de Liberación Nacional (FARC), the AUC, the Taliban, and al-Qaeda in the Islamic Magreb (AQIM).

The Department has also utilized civil forfeiture proceedings for significant disruptive effect. In a case brought against Lebanese Canadian Bank (LCB), two Lebanese money exchange houses, a shipping company, and 30 U.S.-based car dealers, the Government alleged a massive international scheme involving the movement and conversion of criminal proceeds through Lebanon, the United States, and West Africa. The complaint alleged that from 2007 to 2011, at least \$329 million was wired from LCB and other overseas financial institutions to the United States. These funds were used to purchase used cars, which were then shipped to and sold in West Africa. Cash from the car sales, along with the proceeds of narcotics trafficking, were then funneled to Lebanon through Hezbollah-controlled money laundering channels. Funds were then transferred back to the United States for the purchase of additional cars, repeating the cycle. The Government's civil complaint alleged defendants' assets were forfeitable as proceeds of IEEPA violations and as property involved in money laundering. *See* Press Release, Dep't of

Justice, Manhattan U.S. Attorney Files Civil Money Laundering And Forfeiture Suit (Dec. 15, 2011). LCB settled its part of the case with an agreed forfeiture of \$102 million.

The Department has also utilized civil authorities to enforce economic sanctions on Iran. In a case captioned *In re 650 Fifth Avenue*, the Department obtained the forfeiture of multiple assets controlled by the Government of Iran (GOI). These assets included a 36-story office tower in Manhattan having an appraised value of \$525 million, other properties, and several million dollars in cash. *See In re Fifth Avenue*, No. 08 Civ. 10934 (KBF), 2013 WL 5178677, at *1 (S.D.N.Y. Sept. 16, 2013). As proven in the case, 40 percent of the office tower was owned by the GOI's Bank Melli Iran through shell companies Assa Corp. and Assa Ltd. The remaining interest was owned by the Alavi Foundation, which provided unlicensed services to Iran and was supervised by the GOI. Net proceeds of *In re 650 Fifth Avenue* will be distributed to persons holding judgments against the GOI based on terrorist attacks, including the 1983 bombings of U.S. Marine Barracks in Beirut and the 1996 bombing of the Khobar Towers in Saudi Arabia.

Criminal forfeiture has also been used to disrupt the infrastructure of terrorism, such as in the HLF case described above. A leading case involving an individual is *United States v. Saade*, No. S1 11 Crim. 111(NRB), 2013 WL 6847034, at *2–3 (S.D.N.Y. Dec. 30, 2013), wherein the court ordered the forfeiture of *all* of defendant's assets following his conviction for conspiracy to provide material support or resources to the Taliban and conspiracy to acquire and transfer anti-aircraft missiles.

V. “Grassroots” support and terrorist facilitation

Most of the cases cited above involved very large sums of money. However, we have also seen terrorists rely on smaller donors and “grassroots” support. The Department has therefore investigated and prosecuted a number of smaller dollar value cases, which increasingly have involved a nexus among financing and operations. One example is the prosecution of Kobie Williams, who was convicted for conspiring to engage in military training in preparation to join the Taliban (in violation of IEEPA and 18 U.S.C. § 922) and admitted that he had contributed several hundred dollars to the Taliban. *See* Press Release, Dep't of Justice, U.S. Citizen Taliban Supporter Sentenced to Prison (Aug. 7, 2009).

Operation Green Arrow was an FBI initiative aimed at stemming the flow of money from the United States to al-Shabaab and other insurgents in Somalia. This effort, which began with the observation that operational terrorists were in contact with grassroots fundraisers in the United States, marked the FBI's commitment to respond nimbly to new threat streams through nationally coordinated investigations and criminal disruptions. Flowing from Operation Green Arrow were terrorist financing prosecutions in San Diego, Minneapolis, and St. Louis. These cases resulted in material support convictions of multiple grassroots fundraisers including Mohamud Abdi Yusuf, Basaaly Saeed Moalin, and Amina Ali. *See United States v. Ali*, No. 0:10-CR-187, at *2 (MJD/FLN) (D. Minn. 2012); Government Response to Defendant's Sentencing Memorandum; *United States v. Yusuf*, No. 4:10-CR-00547-HEA (E.D. Mo. 2012), Government's Unclassified Memorandum; *United States v. Moalin*, No. 3:10-CR-4246 (JTM) (S.D. Cal. 2012).

Moalin and Yusuf were cab drivers in Minneapolis and San Diego, respectively, where each had raised money for al-Shabaab through local contacts. Ali ran a grassroots network in Minneapolis that conducted door-to-door solicitations, and she hosted telephone conference calls featuring guest speakers who promoted al-Shabaab. Although the amount of money transferred overseas by these defendants was not great by U.S. standards (each transferred less than \$16,000), in Somalia the money they provided had substantial buying power. According to the evidence at Moalin's trial, he told a convicted codefendant that al-Shabaab's titular leader, Ayden Ayrow, had said he could keep a fighter going on a dollar per day. The great value that al-Shabaab placed upon its grassroots fundraisers in the United States was perhaps best illustrated by the degree to which al-Shabaab leaders were in direct contact with the defendants. Moalin had many telephone discussions with Ayrow. Ali was in contact with al-Shabaab

spokesperson and military leader Mukhtar Robow. As for Yusuf, he was asked directly by al-Shabaab commanders to raise funds for the purchase of a tactical vehicle.

An outgrowth of Operation Green Arrow was Operation Rhino, wherein the FBI responded to the threat posed by persons traveling from the United States to join al-Shabaab in Somalia. In recent years, there has been alarming growth in the number of persons who have traveled from the United States to engage in violent jihad overseas. This trend is deeply troubling, both because it involves the export of terror from the United States and because of concern that “travelers” will return to the United States battle-hardened and fully indoctrinated in violent jihad. In 2007 through 2008, a wave of young men left Minnesota to join al-Shabaab in Somalia. One of these travelers, Shirwa Ahmed, became the first known American suicide attacker when he drove an explosives-laden truck into a Puntland Intelligence Service building during a coordinated series of lethal attacks. Travelers such as Ahmed require facilitators and, increasingly, we have seen such facilitation goes hand-in-hand with financing.

Operation Rhino resulted in charges against more than 20 travelers and their facilitators. To date, the Department has convicted nine defendants under this initiative, including facilitators Mahamud Said Omar, who provided funds to pay for travel and weapons in Somalia, and Omar Abdi Mohamed, who raised funds and booked tickets. *See Report and Recommendation, United States v. Omar*, No. 09-CR-242-MJD/FLN (D. Minn. 2012); Government’s Trial Brief, *United States v. Mohamed*, 09-CR-352-MJD/FLN (D. Minn. 2011).

Another example of the nexus between operations and financing involved Babar Ahmad, who was extradited from the United Kingdom to the United States in 2012. Ahmad established and operated a family of Web sites known as Azzam Publications. Through those sites, which espoused the rhetoric of violent jihad, Ahmad solicited the donation of funds, equipment, and personnel for terrorists, including the Taliban. *See Affidavit in Support of Request for Extradition, United States v. Ahmad*, No. 3:04M240 (WIG) (D. Conn. 2003). His codefendant, Syed Ahsan, did not dispute the Government’s evidence that with Ahmad’s assistance he traveled to and fought in Afghanistan, and that he had attended training camps run by al-Qaeda. Ahmed pleaded guilty in 2013 to conspiracy to provide and providing funds, physical items, and personnel to the Taliban.

Lawal Olaniyi Babafemi likewise pleaded guilty in 2014 for his assistance to al-Qaeda in the Arabian Peninsula (AQAP). At the direction of now-deceased AQAP commander Anwar al-Aulaqi, Babafemi was given almost \$9,000 worth of foreign currency to recruit English-speakers in Nigeria to join AQAP, and he assisted in AQAP’s publication of “Inspire” magazine. *See Charge, United States v. Babafemi*, No. 13-CR-109-JG (E.D.N.Y. 2013).

The Department is currently focusing considerable resources on the issue of persons traveling to Syria to join in the violent conflict there. The Department has charged a number of these cases, with the aim being to stem the flow of personnel and money to terrorists operating in that region. Similar to the Somalia cases discussed above, in these matters we have seen connections among fighters, facilitators, and financiers.

VI. Conclusion

In sum, we have seen that terrorist financiers and facilitators come in all shapes and sizes. Their activities span the gamut of possibilities, and they operate in both large and small districts across the United States. Our prosecutions have involved major charities, money launderers, business organizations, grassroots fundraisers, cab drivers, door-to-door solicitors, drug traffickers, and others. To disrupt the illegal activities of this broad range of actors, the Department has utilized, and will continue to utilize, all legal tools available. ♦

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What to Charge in a Terrorist Financing or Facilitation Case

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National Security Division

Prosecutors investigating terrorist financing and facilitation have a range of charging options available as they contemplate how best to frame their cases. All potential charges should be considered, including the many non-terrorism charges with which most prosecutors are very familiar. The primary statutes used to charge terrorist financing and facilitation are codified at 18 U.S.C. §§ 2339A–2339D (the material support and terrorist financing statutes), 50 U.S.C. §§ 1701–05 (the International Emergency Economic Powers Act (IEEPA)), and 18 U.S.C. § 1956(a)(2)(A) (international money laundering). Each of these statutes has a unique purpose and requirements, which should be considered carefully while a case is being built.

The most frequently charged of the terrorist financing statutes is § 2339B, concerning the provision of material support or resources to a designated foreign terrorist organization (FTO). Many Assistant U.S. Attorneys have now charged this violation. As discussed more fully below, the emergence of new terrorist groups in areas of regional conflict has resulted in an increasing number of cases charging conspiracy to provide material support or resources to as-yet undesignated terrorists in connection with a conspiracy to kill persons overseas.

This article seeks to provide a framework for prosecutors considering their charging options in terrorist financing and facilitation cases, and to highlight a few of the current “hot topics,” particularly with respect to the new wave of § 2339A prosecutions.

I. 18 U.S.C. § 2339A

The original terrorist financing statute, § 2339A, was enacted in 1994 in response to the 1993 bombing of the World Trade Center. It prohibits persons from providing material support or resources knowing or intending that they are “to be used in preparation for, or in carrying out” a violation of an enumerated predicate offense. 18 U.S.C. § 2339A(a) (2014). The list of predicate offenses includes over 30 crimes typically associated with terrorism, including those involving aircraft and airports; arson; chemical, biological, and nuclear weapons; murder; explosives; hostage taking; and damage to U.S. property, communications lines and systems, and energy facilities.

Congress has defined the phrase “material support or resources” broadly, to be any property, tangible or intangible, or service, including expert advice, training, personnel, lodging, documents, money, transportation or financial services other than medicine or religious materials. Courts have declined to limit the statute’s scope to the physical transfer of an asset, noting that to “provide” material support means “to furnish, supply, to make ready, to make available.” *United States v. Sattar*, 314 F. Supp. 2d 279, 297 (S.D.N.Y. 2004). Accordingly, loaning something of value or providing temporary lodging would also be prohibited.

“Personnel” is defined as “1 or more individuals who may be or include oneself.” 18 U.S.C. § 2339A(b) (2014). “Training” is defined as “instruction or teaching designed to impart a specific skill, as opposed to general knowledge.” *Id.* “Expert advice or assistance” is defined as “advice or assistance derived from scientific, technical or other specialized knowledge.” *Id.*

Section 2339A also proscribes attempts and conspiracies, the concealment of an escape from the commission of one of the enumerated predicate offenses, and concealment or disguise of the nature, location, source, or ownership of proscribed material support or resources. (To date, the concealment of an escape from the commission of one of the enumerated predicate offenses provision has not been charged.) The maximum sentence for a violation of § 2339A is 15 years’ imprisonment and, if death results, any term of years or life.

II. 18 U.S.C. § 2339B

Section 2339B was enacted in 1996 following the bombing of the Alfred P. Murrah Federal Building in downtown Oklahoma City. It prohibits persons from knowingly providing material support or resources to an FTO. At the foundation of this charge lies the FTO designation, which, as a practical matter, makes the FTO “radioactive” to persons within U.S. jurisdiction. A foreign organization (but not an individual) can be designated as an FTO by the Secretary of State. The list of designated FTOs includes approximately 59 terrorist groups.

Section 2339B reflects recognition by Congress that terrorist organizations can have multiple wings, to include military, political, and social, and that material support to any of these wings ultimately supports the organization’s violent activities. The Supreme Court upheld the statute’s broad prohibition, noting that any support to an FTO may ultimately be redirected for a violent purpose, and support utilized by the FTO even for peaceable ends “frees up other resources within the organization that may be put to violent ends. Importantly, it also helps lend legitimacy to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks.” *Holder v. Humanitarian Law Project*, 561 U.S. 1, 30 (2010).

Section 2339B contains a specific mens rea requirement, providing that the defendant must know the FTO is a designated terrorist organization or that it has engaged in, or engages in, “terrorist activity”

or “terrorism.” 18 U.S.C. § 2339B(a) (2014). The statute draws upon the Immigration and Nationality Act and the Foreign Relations Authorization Act to define these terms.

Section 2339B also incorporates the definitions codified in § 2339A concerning the phrase “material support or resources.” Notably, however, § 2339B limits the term “personnel” to situations where the person intends to work under the FTO’s “direction or control” or “to organize, manage, supervise, or otherwise direct the operation of [the FTO]. Individuals who act entirely independently of the [FTO] to advance its goals or objectives shall not be considered to be working under the [FTO’s] direction and control.” *Id.* § 2339B(h). Courts have generally observed that this narrowed scope concerning the provision of “personnel” applies only to § 2339B. *See United States v. Stewart*, 590 F.3d 93, 118 & n.21 (2d Cir. 2009) (observing that the definition of personnel provided by § 2339B(h) does not apply to § 2339A). *But see United States v. Augustin*, 661 F.3d 1105, 1121 (11th Cir. 2011) (“[E]ven if we assume that the principles contained in § 2339B(h) apply to § 2339A, we conclude that the evidence is sufficient to support the convictions[.]”). Section 2339B also further defines funds. *See id.* § 2339B(g)(3).

The statute also proscribes attempts and conspiracies. The maximum sentence of imprisonment for a violation of § 2339B is 15 years and, if death results, any term of years or life.

III. 18 U.S.C. § 2339C

Section 2339C implements the International Convention for the Suppression of the Financing of Terrorism. It proscribes the “unlawful[] and willful[]” provision or collection of funds with the intention or knowledge that they are to be used, in full or in part, to carry out a terrorist attack. 18 U.S.C. § 2339C(a) (2014). The predicate acts are offenses prohibited under international law by a counterterrorism treaty, *id.* § 2339C(a)(1)(A), (e)(6)–(7), or an 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[.]

Id. § 2339C(a)(1)(B).

Section 2339C covers concealment, applying to a person who “knowingly conceals or disguises the nature, location, source, ownership, or control of any material support or resources, or any funds or proceeds of such funds” if he or she knows or intends that the support or resources are to be provided in violation of §§ 2339B or 2339C. *Id.* § 2339C(c).

Section 2339C has been used infrequently for several reasons. It overlaps substantially with §§ 2339A and 2339B; its jurisdictional reach is limited compared to the other terrorist financing crimes; and it requires specific intent (proof of willfulness). Section 2339C also has a narrow scope of proscribed conduct, for example, applying only to the provision or collection of funds. Perhaps most significantly, § 2339C further requires intent that the funds be used to “carry out” an enumerated predicate offense. Presently, no case law interpreting this language can be found. It therefore remains an open question whether courts would find that § 2339C covers funds intended generally to support a terrorist group’s operational infrastructure.

Notwithstanding those issues, § 2339C is the only terrorist financing statute that specifically addresses the collection of funds, and, in the right case, prosecutors may want to emphasize in the charging instrument the defendants’ collection activity by charging § 2339C.

Section 2339C proscribes attempts and conspiracies. The maximum sentence of imprisonment is 20 years, except for concealment, which has a 10-year maximum.

IV. 18 U.S.C. § 2339D

Although not used historically to prosecute terrorist financing and facilitation, § 2339D may be a charging option in the increasing number of cases involving persons who travel overseas to engage in violent jihad.

The statute proscribes persons from knowingly receiving “military-type training” from, or on behalf of, an FTO. 18 U.S.C. § 2339D(a) (2014). Under an aiding and abetting theory, anyone who finances or facilitates another in the receipt of such training would be criminally liable as a principal.

The term “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 the use, storage, production, or assembly of any explosive, firearm or other weapon.” *Id.* § 2339D(c). The term “critical infrastructure” is defined to mean “systems and assets vital to national defense, national security, economic security, public health or safety including both regional and national infrastructure” and “may be publicly or privately owned.” *Id.*

Section 2339D contains the same mens rea requirement as § 2339B, requiring that the defendant know the FTO is a designated terrorist organization or that it has engaged in, or engages in, “terrorist activity” or “terrorism.”

Violations of § 2339D carry a mandatory sentence of 10 years’ imprisonment.

V. International Emergency Economic Powers Act (IEEPA)

IEEPA authorizes the President to declare the existence of an unusual and extraordinary threat to the national security, foreign policy, or economy of the United States. It further authorizes the President to preclude transactions and block property to address the threat. IEEPA establishes certain exceptions, for example, concerning transactions involving humanitarian aid.

Presidents have issued Executive Orders (EOs) designating terrorists and terrorist groups, most notably, EO 13224, titled Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism. Exec. Order No. 13,224, 31 C.F.R. 595 (2001). (Other EOs imposing sanctions, along with their implementing regulations, and declaring threats posed by certain foreign governments may also be relevant to your cases.) This EO designates a list of individuals and organizations as Specially Designated Global Terrorists (SDGTs) and permits further designations by the Secretary of the Treasury. Under the EO, U.S. persons may not engage in financial interactions with an SDGT, unless they have obtained a license from the Department of the Treasury, Office of Foreign Assets Control. They also may not engage in a transaction to circumvent the EO, or make or receive any contribution of funds, goods, or services to or for the benefit of an SDGT. In effect, SDGTs are foreclosed from the U.S. economic system.

Willful violation of an EO or implementing regulation issued pursuant to IEEPA is a criminal offense. *See* 50 U.S.C. § 1705(c) (2014). The Supreme Court held that to prove willful criminal conduct the Government must show that the defendant acted with knowledge that his conduct was unlawful, although it need not show the defendant knew precisely which law he or she was violating. *Bryan v. United States*, 524 U.S. 184, 191–97 (1998). This mens rea standard is higher than the “knowingly” standard of § 2339B. *See* COUNTERESPIONAGE SECTION, NAT’L SEC. DIV., MANUAL OF SELECTED EXPORT CONTROL LAWS OF THE UNITED STATES (2007).

Although IEEPA does have extraterritorial reach, it is limited in comparison to the reach of the material support statutes (discussed in another article in this [Bulletin](#)).

IEEPA proscribes attempts and conspiracies, as well as the causing of others to commit a violation of the statute. The maximum sentence for a criminal violation of IEEPA is 20 years' imprisonment.

VI. International money laundering

Another crime that is sometimes charged in terrorist financing cases is international money laundering under 18 U.S.C. § 1956(a)(2)(A). Sometimes called "reverse" money laundering, this offense involves the movement of "clean" money overseas for an improper purpose.

The statute proscribes the transportation, transmission, or transfer of funds from a place inside the United States to a place outside the United States "with the intent to promote the carrying on of specified unlawful activity" (SUA). 18 U.S.C. § 1956 (2014). The list of SUAs is extensive and includes the material support offenses, IEEPA violations, and many of the crimes commonly associated with terrorism.

Although on its face § 1956(a)(2)(A) would seem to have a broader proscription than § 2339A, at least one circuit has read into § 1956(a)(2) a requirement that the defendant also intend to further the progress of a SUA, which arguably goes beyond intent to promote the activity. *See, e.g., United States v. Trejo*, 610 F.3d 308, 314 (5th Cir. 2010).

A charge of international money laundering complements traditional terrorist financing charges by penalizing directly the defendant's efforts to send money overseas for an illicit purpose.

Section 1956(a)(2)(A) includes an attempt provision and carries a maximum sentence of 20 years' imprisonment.

VII. Charging considerations

When considering how to charge a terrorist financing or facilitation case, the first step is to determine the intended recipient of the material support or resources. The basic question is: What terrorist or terrorist group is involved? If the terrorist group is an FTO, prosecutors should consider a § 2339B charge. If the terrorist group is an SDGT (but perhaps not an FTO, for example, the Taliban), consider IEEPA. If no FTO or SDGT is involved, but the support was intended to help prepare for or carry out an enumerated predicate offense, then look to § 2339A and/or § 2339C. Finally, where there is evidence that the defendant sent, or attempted to send, funds overseas, a charge of international money laundering may also be appropriate.

Terrorist financing investigations should always include efforts to trace the money. The National Security Division can help you with the legal tools available to trace funds overseas. These include bilateral requests under a Mutual Legal Assistance Treaty or Letter Rogatory (issued by the court under 28 U.S.C. § 1782(a)). Should this process fail, next steps include so-called Bank of Nova Scotia grand jury subpoenas for overseas records held by banks that have branches in the United States, *see United States v. Bank of Nova Scotia*, 691 F.2d 1384, 1386 (11th Cir. 1982), and/or administrative subpoenas issued under the USA PATRIOT Act for overseas records held by foreign banks that maintain correspondent bank accounts in the United States. *See* 31 U.S.C. § 5318 (2014).

Commonly, the trail to trace this money will run cold overseas. To bridge the gap between domestic fundraising and operational terrorists overseas, the investigation team should look to whether it can prove that an intermediary in a transaction is a member, agent, or established conduit of a terrorist organization. If that is possible, a substantive terrorist financing count may be available. Otherwise, attempt and conspiracy may be charging options, and information returned from legal process seeking to trace the funds can often establish the substantial steps or overt acts essential to charge these inchoate offenses.

Section 2339B will generally be a prosecutor's best option where an FTO is involved because of its lesser intent requirement. Be careful, however, not to overlook § 2339B's unique knowledge requirement. As noted above, the Government will need to show beyond a reasonable doubt that the defendant knew of the intended recipient's designation as an FTO or of its engagement in "terrorist activity" or "terrorism." Over the years, we have seen cases where electronic intercepts, seized documents, and/or witness statements clearly show that the defendant knew of the FTO designation. More typically, knowledge is established circumstantially. In some cases, the manner in which the transactions were conducted had no legitimate explanation other than concealment. In other cases, defendants have used coded language to refer to the FTO, a particular terrorist leader, or the purpose of the transaction. Often, the best way to establish knowledge will be through evidence demonstrating that the defendant was well aware of, and tracking closely, the FTO's tactics and terrorist operations.

As noted above, a core element of the § 2339A charge is its mens rea requirement that the defendant know or intend for his support to be used to prepare for or carry out a listed predicate offense. Although this element was often difficult to establish in the charity cases that dominated the landscape of terrorist financing prosecutions in the years immediately following the 9/11 attacks, recent years have seen an increasing number of cases charging this offense.

The new wave of cases charging § 2339A sometimes involves the provision of material support or resources (for example, money or personnel) by persons within the United States to new, as-yet undesignated terrorist groups that have formed in connection with regional conflicts, for example, in Somalia, Syria, and elsewhere. Where the victims are not Americans, it may be that the most appropriate charge is a § 2339A conspiracy to provide material support or resources to a conspiracy to kill overseas. The predicate conspiracy to kill would require at least one overt act to have occurred in the United States. *See* 18 U.S.C. § 956 (2014).

Courts have held that such a layered conspiracy—where one conspiracy serves as the predicate for another conspiracy—is appropriate when the "[overarching] conspiracy and the predicate conspiracy are distinct offenses with entirely different objectives." *United States v. Pungitore*, 910 F.2d 1084, 1135 (3d Cir. 1990). Accordingly, the Fourth Circuit in *United States v. Khan*, 461 F.3d 477, 493 (4th Cir. 2006), rejected defendants' due process challenge to convictions for a § 2339A conspiracy that was predicated on a § 956 conspiracy, holding that the material support charge "represent[ed] a distinct offense with [a] different objective[] from the predicate conspiracy to kill"

Financiers may attempt to dismiss a § 2339A or § 956 conspiracy charge with an argument that they did not have operational responsibilities. However, § 956 does not distinguish between fighters and financiers, and courts have recognized that § 956 is a valid predicate for a § 2339A conspiracy where there is evidence that the defendants knew or intended that the funds they were raising or donating would be used to finance premeditated killings. *See, e.g., United States v. Awan*, 459 F. Supp. 2d 167, 183 n.31 (E.D.N.Y. 2006), *aff'd*, 384 F. App'x 9 (2d Cir. 2010) (affirming defendant's conviction under § 2339A for conspiracy to provide funds to a Sikh separatist group, knowing that the group would likely use the funds to pay for bombings and for attempting to recruit a government informant to travel to Pakistan for terrorist training).

Financiers of, and persons traveling to engage in violent jihad for, an undesignated regional terrorist group may also attempt to seek dismissal by asserting that the recipients of their support were lawful combatants whose actions were privileged from prosecution under the Geneva Convention. This defense will typically fail in a terrorism case because terrorist operatives do not possess the requisite indicia of lawful combatants. *E.g., United States v. Arnaout*, 236 F. Supp. 2d 916, 918 (N.D. Ill. 2003); *United States v. Lindh*, 212 F. Supp. 2d 541, 557 (E.D. Va. 2002) (citing Geneva Convention Relative to the Treatment of Prisoners of War, art. 4(A)(2), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135). (The requisite indicia of lawful combatants are: (1) hierarchical military structure, (2) distinctive military

uniforms or emblem recognizable at a distance, (3) combatant carried arms openly, and (4) operations conducted in accordance with the laws and customs of war.)

Finally, in cases involving the facilitation of overseas travelers who have received training by or on behalf of an FTO, prosecutors can consider § 2339D. With a mandatory 10-year sentence of imprisonment, this charge would set a sentencing floor in the case.

VIII. Conclusion

In sum, Congress enacted multiple statutes that can be used to prosecute terrorist financing and facilitation cases. These statutes have proven to be among our most powerful counterterrorism tools. One of the key lessons learned from past experience is that prosecutors should engage with investigators and the National Security Division early and often in order to ensure that the evidence meets the specific requirements of the most appropriate charges. ❖

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Extraterritorial Jurisdiction and the Federal Material Support Statutes

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I. Background

The material support statutes, codified at 18 U.S.C. §§ 2339A and 2339B, have been used hundreds of times in the Department of Justice's (Department) effort to stem the flow of assistance to terrorists and terrorist organizations. Following the 9/11 attacks, these tools were strengthened by Congress through amendments permitting the prosecution of defendants whose support for terrorist activities occurs entirely outside the United States. Although these amendments have rarely been the subject of litigation, in appropriate cases prosecutors should give serious thought to the worldwide reach of these powerful statutes.

This article describes the Congressional amendments establishing extraterritorial application of the material support statutes. It also discusses several of the arguments that defendants commonly raise when charged with extraterritorial offenses, namely, alleged violations of international law and due process and an assertion that Congress exceeded its authority to establish extraterritorial jurisdiction.

II. Section 2339B

In 2004, Congress clarified and expanded the extraterritorial scope of § 2339B to its present state. Specifically, subsection (d), labeled "Extraterritorial jurisdiction," provides that:

(1) In general.--There is jurisdiction over an offense . . . if--

(A) an offender is a national of the United States . . . or an alien lawfully admitted for permanent residence in the United States;

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

(C) after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States;

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

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

(F) an offender aids or abets . . . or conspires with any person over whom jurisdiction exists

(2) Extraterritorial Jurisdiction.--There is extraterritorial Federal jurisdiction over an offense under this section.

18 U.S.C. § 2339B(d) (2014).

Thus, in many instances where the provision of material support neither occurs within the United States nor is perpetrated by a U.S. national, § 2339B permits the exercise of extraterritorial jurisdiction.

Despite the addition of the extraterritorial jurisdiction provisions to § 2339B, it appears from a survey of judicial decisions and a review of recent prosecutions that they have remained largely unexploited. This may be the result of prosecutors' uncertainty as to the scope and application of these provisions or concern that their exploitation could result in an adverse judicial decision.

Several of the circumstances permitting the assertion of such jurisdiction are unexceptionable and permit no legitimate basis for challenge. In contrast, reliance upon others is almost certain to trigger litigation. For example, if prosecutors assert extraterritorial jurisdiction over a § 2339B offense, they are likely to be confronted by claims that the assertion of extraterritorial jurisdiction: (1) violates international law, (2) violates due process, or (3) exceeds Congress's authority under the Constitution. There are few judicial precedents directly on point, but such claims can generally be addressed by reference to the judicial disposition of similar arguments advanced in the context of other criminal statutes.

A. International law

Defendants who are subjected to extraterritorial jurisdiction, particularly if the alleged crime does not have a direct connection to the United States, commonly assert that their prosecution violates international law. The first response to such arguments is that where Congress has unequivocally addressed the extraterritorial application of a statute, the courts "must enforce the intent of Congress irrespective of whether the statute conforms to customary international law." *United States v. Yousef*, 327 F.3d 56, 93 (2d Cir. 2003); *see United States v. Ali*, 718 F.3d 929, 945 (D.C. Cir. 2013) ("Our duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law." (quoting *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991))). Through the amendment of § 2339B, Congress expressly provided for extraterritorial jurisdiction and enumerated the circumstances under which the statute has such application. Notwithstanding this clear legislative intent, it may nonetheless be prudent to assure the court that § 2339B's jurisdictional provision comports with international law.

When faced with an international law challenge, we may also want to argue that, in any event, the prosecution is consistent with international law. For several of the statutory bases of extraterritorial jurisdiction, this argument should be straightforward. International law customarily recognizes five bases upon which a nation may exercise criminal jurisdiction over an offense committed outside the prosecuting state and within the territory of another without violating the other's sovereignty. These include the following:

- The objective territorial principle, applying to offenses that occur in one country but have effects in another
- The nationality principle, applying where the offender is a citizen, domiciliary, or resident of the prosecuting state
- The protective principle, applying to crimes that offend the vital interests of the prosecuting state
- The passive personality principle, where the victim is a national of the prosecuting state, and
- The universality principle, permitting the prosecution of a crime (for example, piracy) that is universally condemned by the international community.

These principles provide ample bases to support assertions of extraterritorial jurisdiction under § 2339B. For example, the objective territorial and protective principles support jurisdiction over offenses that occur in, or affect, interstate or foreign commerce. The nationality principle supports U.S. prosecution of its own citizens or resident aliens. The most difficult category of extraterritorial material support offenses to fit within the template of customary international law is that in which the sole basis for the assertion of such jurisdiction is the offender's presence in the United States "even if the conduct

required for the offense occurs outside the United States.” *United States v. Yousef*, No. S3 08 Cr. 1213(JFK), 2010 WL 3377499, at *2 (S.D.N.Y. Aug. 23, 2010). Typically, such “thereafter found” jurisdiction is confined to offenses that implement multilateral agreements that require any nation having physical custody over the offender to either prosecute or to extradite him. *See, e.g., Yunis*, 924 F.2d at 1090–91. In such cases, the treaty provides a sufficient basis under international law for asserting extraterritorial jurisdiction. *See Yousef*, 327 F.3d at 94. Such reasoning, however, is inapplicable to § 2339B(d)(1)(C) because the statute does not implement any multilateral convention.

We believe that the protective principle supports jurisdiction where the offender is later brought into or found in the United States, based on the fact that the designation of a foreign terrorist organization (FTO) is predicated upon a determination by the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, that the FTO engages in terrorism or terrorist activity that “threatens the . . . security [or government functions] of the United States.” 8 U.S.C. § 1189(a) (2014). By providing material support to an FTO, a defendant thus engages in conduct that threatens the security of the United States. Protecting against this threat is consistent with the protective principle of international law, which permits prosecution of crimes that offend the vital interests of the prosecuting state. *See United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011) (analyzing jurisdictional challenge to prosecution under § 2339B, among other statutes, and holding that “[f]or non-citizens acting entirely abroad, a jurisdictional nexus exists when the aim of that activity is to cause harm inside the United States or to U.S. citizens or interests”) (citations omitted); *see also Yousef*, 327 F.3d at 112 (The prosecution of defendants did not violate due process because they conspired “to inflict injury on this country and its people and influence American foreign policy”); *United States v. Peterson*, 812 F.2d 486, 494 (9th Cir. 1987) (Analyzing a drug statute, the court stated that “[p]rotective jurisdiction is proper if the activity threatens the security or governmental functions of the United States.”).

B. Due process

Defendants, who are prosecuted for extraterritorial crimes, particularly if their crime is not directly linked to the United States, also commonly argue that their prosecution violates due process. Courts have several approaches to analyzing such due process claims. The basic inquiry is whether application of the law to the conduct would be arbitrary or fundamentally unfair. *See, e.g., United States v. Shi*, 525 F.3d 709, 723–74. (9th Cir. 2008) (exercise of extraterritorial jurisdiction under 18 U.S.C. § 2280 over foreign national did not violate due process); *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999); *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993).

Several courts, including the First and Eleventh Circuits, have held that if the assertion of extraterritorial jurisdiction comports with the principles of international law, there is no due process violation. *See, e.g., United States v. Ibarquen-Mosquera*, 634 F.3d 1370, 1378 (11th Cir. 2011) (“In determining whether an extraterritorial law comports with due process, appellate courts often consult international law principles”); *Cardales*, 168 F.3d at 553 (consulting international law principles for guidance in analyzing due process challenge to Maritime Drug Law Enforcement Act). However, the Second and the Ninth Circuits have both held, in the context of statutes other than the material support laws, that where Congress criminalizes extraterritorial conduct, the Due Process Clause requires that some nexus exist between the United States, or its vital interests, and the prohibition. *See Al Kassar*, 660 F.3d at 188 (rejecting defendant’s argument that there was insufficient nexus with United States when DEA conducted a sting operation abroad against foreign defendants and stating, “[t]he defendants’ conspiracy was to sell arms to FARC with the understanding that they would be used to kill Americans and destroy U.S. property; the aim therefore was to harm U.S. citizens and interests and to threaten the security of the United States”); *Yousef*, 327 F.3d at 110–12; *United States v. Davis*, 905 F.2d 245, 248–49 (9th Cir. 1990).

In later cases, the Ninth Circuit clarified that the nexus requirement applies only when the “‘rough guide’ of international law also requires a nexus,” *United States v. Shi*, 525 F.3d 709, 722 (9th

Cir. 2008) (quoting *United States v. Caicedo*, 47 F.3d 370, 372 (9th Cir. 1995), and further held that “[t]he Due Process Clause requires that a defendant prosecuted in the United States ‘should reasonably anticipate being hauled into court in this country.’ ” *Id.* (quoting *United States v. Moreno-Morillo*, 334 F.3d 819, 827 (9th Cir. 2003)).

C. Congressional authority

Even if a federal statute, such as § 2339B, plainly authorizes the exercise of extraterritorial jurisdiction, and the prosecution comports with due process, arguments still may be advanced that the statute exceeds Congress’s enumerated powers under Article I, § 8. For one jurisdictional basis, the response is straightforward: When the prosecution proceeds on the theory that the offense “occurs in or affects interstate commerce,” 18 U.S.C. § 2339B(d)(1)(E) (2014), that jurisdictional basis is plainly authorized by Congress’s power to regulate interstate or foreign commerce. *See* U.S. CONST. art. I, § 8, cl. 3.

Challenges to the other jurisdictional bases may present relatively new issues. The Constitution does not expressly authorize the Government to regulate the conduct of U.S. citizens and residents abroad. The argument can, however, be advanced that such authority need not be expressly vested in the Federal Government under the Constitution. Instead, it inheres in the concept of national sovereignty in governing external affairs, in particular the regulation of the conduct of its citizens abroad. *See United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 315–18 (1936) (distinguishing between “powers . . . specifically enumerated in the constitution” and those that are incidents of sovereignty and therefore do not depend upon the provisions of the Constitution, but upon the law of nations); *Blackmer v. United States*, 284 U.S. 421, 436–37 (1932) (Inherent in national sovereignty is the power to regulate the conduct of citizens or nationals abroad.). This theory, however, is not well-developed in the law.

Likewise, nothing in the Constitution expressly authorizes Congress to punish acts of providing material support to FTOs based solely upon a defendant’s presence in the United States following the commission of the offense. Once again, however, it can be argued that the acts of terrorism that the material support advances present threats to the security and integrity of the United States. The Government’s inherent right to protect against such threats need not be expressly vested in the political branches of the Federal Government. It is inherent in the notion of national sovereignty. *See Curtiss-Wright*, 299 U.S. at 318; *United States v. Rodriguez*, 182 F. Supp. 479, 491 (S.D. Cal. 1960) (“[T]he concept of essential sovereignty of a free nation clearly requires the existence and recognition of an inherent power in the state to protect itself from destruction. This power exists in the United States government absent express provision in the Constitution, and arises from the very nature of the government which was created by the Constitution.”). This argument is also not well-developed in the law.

III. Section 2339A

A. Scope

As originally enacted, § 2339A prohibited a person “within the United States” from providing material support or resources knowing that it would be used for a terrorist crime. *See* Pub. L. No. 103-322, § 120005, 108 Stat. 2022 (1994). Thus, in its original form, § 2339A was not an extraterritorial offense. Jurisdiction over the offender was predicated upon a defendant’s presence in the United States at the time of the crime. As part of the USA PATRIOT Act, the phrase “within the United States” was deleted from the statute. Pub. L. No. 107-56, § 805, 115 Stat. 377 (2001). The plain implication of this amendment is that Congress intended to eliminate § 2339A’s jurisdictional restriction and to expand its scope to cover any act of providing material support to terrorism without regard to the locus of its occurrence. *See, e.g., Stone v. INS*, 514 U.S. 386, 397 (1995) (“When Congress Acts to amend a statute,

we presume it intends its amendment to have real and substantial effect.”).

Thus, the Government can argue that, with respect to offenses committed after enactment of the 2001 amendment, all that is necessary to establish jurisdiction over the offender is that the act of providing material support was committed knowing or intending that it would be used “in preparation for or in carrying out,” one of the offenses enumerated in the statute or “in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation,” or in an attempt or conspiracy to commit such an act. 18 U.S.C. § 2339A (2014).

However, despite the deletion of the jurisdictional limitation, the courts may interpret § 2339A’s extraterritorial scope more narrowly than that of § 2339B because, in contrast to that statute, § 2339A is not explicit as to its extraterritorial scope. The absence of such language may result in the application of the presumption against construing a statute to have extraterritorial effect where Congress has not explicitly provided for extraterritorial jurisdiction. *See United States v. Bowman*, 260 U.S. 94, 98 (1922); *see also Bond v. United States*, 134 S. Ct. 2077, 2088 (2014) (“[E]ven though [18 U.S.C. §] 229, read on its face, would cover a chemical weapons crime if committed by a U.S. citizen in Australia, we would not apply the statute to such conduct absent a plain statement from Congress.” (footnote omitted)).

A related presumption counsels that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains,” *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)—the so-called *Charming Betsy* canon. Because, as referenced above, international law itself limits a state’s authority to apply its laws beyond its borders, *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402–03 (1987), at least in the District of Columbia, courts have held that “the *Charming Betsy* [canon] operates alongside the presumption against extraterritorial effect to check the exercise of U.S. criminal jurisdiction.” *United States v. Ali*, 718 F.3d 929, 935 (D.C. Cir. 2013); *United States v. Carvajal*, 924 F. Supp. 2d 219, 239 (D.D.C. 2013) (“Analysis of any statute that purports to apply extraterritorially—that is, to conduct outside the United States—begins with two preliminary inquiries: (1) did Congress intend the statute to apply extraterritorially?; and (2) the *Charming Betsy* canon: should the Court give the statute a limited interpretation to comport with international law?”).

Nonetheless, in appropriate cases, the Government can and should argue that the 2001 amendment deleting the words “within the United States” indicated Congress’s intent that the statute apply extraterritorially. If adopted, such reasoning would trump both presumptions, which are nothing more than canons of legislative interpretation. *See Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (the presumption against extraterritoriality “represents a canon of construction, or a presumption about a statute’s meaning, rather than a limit upon Congress’s power to legislate”).

B. International law

It is well-settled that courts “must enforce the intent of Congress irrespective of whether the statute conforms to customary international law.” *Yousef*, 327 F.3d at 93. Although this principle provides a strong basis to support the application of extraterritorial jurisdiction under § 2339B, as explained, it is less clear how a court would address the issue under § 2339A because it lacks a jurisdictional provision similar to § 2339B(d).

In cases where the Government asserts that § 2339A has an extraterritorial reach, it should be prepared to argue not only that, by amending the statute, Congress intended such applications, but also that the assertion of extraterritorial jurisdiction conforms with customary international law. In most cases, the protective principle would support such exercises of extraterritorial jurisdiction. Virtually all of the crimes enumerated as predicate offenses for a violation of § 2339A have a severe and adverse impact upon the security of the United States and its citizens. Accordingly, the protective theory would appear to justify the exercise of extraterritorial jurisdiction over persons who provided, conspired to provide, or attempted to provide material support or resources to those who engage in the predicate offenses.

C. Due process

The due process analysis should be similar to that for § 2339B charges.

D. Congressional authority

The constitutional authority justifying the assertion of extraterritorial jurisdiction over the provision of material support to persons engaged in the commission of crimes of terrorism listed in § 2339A(a) resides in several sources. First, as in the context of offenses under § 2339B, it can be argued that such authority is inherent in our nation's sovereign right to protect its integrity from external threats.

Second, Congress's authority may derive from its authority to enforce the underlying terrorism offense. For instance, some of the terrorism offenses listed in § 2339A(a) are an exercise of Congress's interstate or foreign commerce authority. Congressional prohibition against providing material support to those same crimes constitutes a necessary and proper adjunct of its power to regulate the underlying offense. *See, e.g.*, 18 U.S.C. §§ 842(m), 844(i), 1992 (2014).

Third, other predicate offenses were enacted to implement multilateral treaties that require signatory nations to make punishable certain listed crimes, regardless of the locus of their commission. *See, e.g.*, 18 U.S.C. § 32 (2014) (enacted to fulfill obligations under the International Civil Aviation Organization (ICAO) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation); 18 U.S.C. § 1203 (2014) (enacted to fulfill obligations under the United Nations International Convention Against the Taking of Hostages); 49 U.S.C. § 46502 (2014) (enacted to fulfill obligations under the ICAO Convention on Offenses and Certain Other Acts Committed on Board Aircraft). Congress's authority to criminalize material support for these crimes arguably derives from its power under the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, to implement these treaties. *See Missouri v. Holland*, 252 U.S. 416, 432, 433 (1920) (holding that the Necessary and Proper Clause grants Congress the power to enact legislation necessary and proper to implement treaties; upholding legislation implementing Migratory Bird Treaty); *United States v. Arjona*, 120 U.S. 479, 487–88 (1887); *United States v. Lue*, 134 F. 3d 79, 83 (2d Cir. 1998) (upholding legislation implementing the Hostage-Taking Convention and holding that the Hostage Taking Act had a rational relationship to the Convention and so did not exceed Congress's authority under the Necessary and Proper Clause). It can be argued that material support for the treaty-listed offenses bears a rational relationship to a treaty commitment to penalize the underlying federal crime.

Finally, in some cases, the underlying offense listed in § 2339A may also fall within Congress's authority "[t]o define and punish . . . Offenses against the Law of Nations," U.S. CONST. art. I, § 8, cl. 10. *See United States v. Shi*, 525 F.3d 709, 720 (9th Cir. 2008), *cert. denied*, 555 U.S. 934 (2008). In those situations, the Government could argue that material support to those crimes is a necessary and proper adjunct of that constitutional power to define and punish law-of-nations offenses.

IV. Retrospective application of the amended jurisdictional provisions

Sections 2339A and 2339B were expanded in 2001 and 2004, respectively, to encompass extraterritorial offenses. While we anticipate relatively few new prosecutions of conduct predating these amendments, where there are such cases, the interpretation of the prior versions of the statutes becomes relevant.

As originally enacted in 1996, the persons embraced by § 2339B's prohibition against providing material support or resources were limited to those "within the United States or subject to the jurisdiction of the United States." *See* Pub. L. 104-132, § 303(a), 110 Stat. 1250 (1996). The precise scope of the phrase "subject to the jurisdiction of the United States" in this version of the statute was never settled. Subsection (d) of that enactment further provided that "[t]here is extraterritorial Federal jurisdiction over an offense under this section." *Id.* It was the Department's view that, when coupled with the

extraterritorial jurisdiction provision of subsection (d), the phrase “subject to the jurisdiction of the United States” embraced persons outside the United States who provided material support to an FTO as long as they were United States nationals. It was uncertain, however, whether the phrase included permanent resident aliens. The Department did not construe the language of the prior version of § 2339B to extend to defendants solely on the basis of their subsequent presence in the United States, without some other nexus to the United States. *See Hearing Before the Subcomm. on Terrorism, Technology and Homeland Security of the S. Comm. on the Judiciary*, 109th Cong. (2005) (joint statement of Daniel Meron, Principal Deputy Assistant Attorney General, Civil Division and Barry Sabin, Chief Counterterrorism Section, Criminal Division) (explaining that the 2004 amendment expanded § 2339B to reach aliens committing crimes outside the United States and subsequently brought to the United States).

There is good reason for eschewing such a construction. First, the syntax of the text, “[w]hoever, within the United States, or subject to the jurisdiction of the United States, knowingly provides material support or resources,” would appear to require that the defendant be subject to the jurisdiction of the United States at the time of the commission of the offense. Moreover, while subsequent legislation “does not establish definitively the meaning of an earlier enactment,” *Gozlon-Peretz v. United States*, 498 U.S. 395, 406 (1991) (internal quotation marks and citation omitted), “it does have persuasive value.” *Id.* As explained earlier, when § 2339B was amended in 2004, Congress provided for the assertion of extraterritorial jurisdiction on the basis of the defendant’s subsequent presence in the United States. If Congress were of the view that, as originally enacted, § 2339B permitted the assertion of extraterritorial jurisdiction on the basis of mere presence in the United States following commission of the offense, it is unlikely that Congress would have found it necessary to amend the statute to accomplish such results.

On several occasions, the question has arisen whether the revised jurisdictional language governing §§ 2339A and 2339B can be applied to reach offenses predating the effective dates of the amendments, when such offenses were not time-barred by the governing statute of limitations. Such an application of the revised jurisdictional provisions would be prohibited by the Ex Post Facto Clause, U.S. CONST. art. I, § 9, cl. 3, because, from a jurisdictional standpoint, it would “punish as a crime an act previously committed, which was innocent when done.” *Collins v. Youngblood*, 497 U.S. 37, 52 (1990). Thus, in the context of § 2339A, the revised jurisdictional provision cannot be applied to crimes completed prior to the October 26, 2001, enactment date of the USA PATRIOT Act. In the context of § 2339B, the revised jurisdictional provisions cannot be applied to offenses completed prior to the Intelligence Reform and Terrorism Prevention Act’s December 17, 2004, enactment date.

It is, however, “well-settled that when a statute is concerned with a continuing offense, the Ex Post Facto clause is not violated by [its] application . . . to an enterprise that began prior to, but continued after, the effective date of [the statute.]” *United States v. Harris*, 79 F.3d 223, 229 (2d Cir. 1996) (internal quotation marks and citation omitted). Thus, in some instances, where a statute of limitations constitutes no impediment to prosecution, the Government may take advantage of the revised jurisdictional provision by presenting evidence that the material support, whose inception predated the amendments, continued thereafter. In cases where the Government relies upon a continuing offense theory, both the prosecutor and the court must eliminate the risk that the jury will convict solely on the basis of pre-enactment conduct. That risk can be minimized by an instruction that the jury cannot return a judgment of conviction on the basis of pre-enactment conduct alone. *See, e.g., United States v. Marcus*, 560 U.S. 258, 263–64 (2010).

V. Conclusion

In sum, the Government’s reaction to the 9/11 attacks reflects a commitment to utilize all legal tools to disrupt terrorist plots and dismantle terrorist organizations. Congress’s amendments to the material support statutes providing extraterritorial jurisdiction over those offenses adds a significant tool to the prosecutor’s tool box. But, in the absence of judicial precedent, the precise contours of that

jurisdiction will be subject to future litigation. As you contemplate application of this tool in your cases, we encourage you to contact the National Security Division, which stands ready to assist in addressing the legal challenges we anticipate. ❖

ABOUT THE AUTHOR

❑ **John De Pue** presently serves as Senior Appellate Counsel in the Department of Justice's National Security Division. Mr. De Pue joined the Department of Justice as an appellate attorney in its Criminal Division where he litigated over 75 criminal appeals, participated in drafting over 30 briefs in the Supreme Court, and presented oral argument in that Court. In 1989, he became Senior Legal Advisor for terrorism matters in the Criminal Division, where he successfully litigated the Division's first criminal appeals in terrorism-related cases involving the assertion of extraterritorial jurisdiction. Prior to his employment with the Department, Mr. De Pue served as an officer in the U.S. Army Judge Advocate General's Corps. His military assignments included service in Viet Nam, teaching international law at the U.S. Military Academy, and serving as a government appellate attorney in Washington, D.C. Before retiring as a Brigadier General in the Army Reserve, Mr. De Pue served as the Chief Judge of the U.S. Army Court of Criminal Appeals. ❖

The Holy Land Foundation for Relief and Development: A Case Study

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In January 1993, a used car salesman from Chicago traveled to the Gaza Strip with over \$300,000 in his briefcase. Mohammed Salah, a naturalized U.S. citizen born in Jerusalem, claimed to be on a humanitarian mission. Shortly after his arrival, he was caught handing money to militants from the Islamic Resistance Movement, also known as Hamas. Salah admitted to his interrogators that he had provided substantial support to Hamas, including recruitment, military training, and financing. *See United States v. Marzook*, 435 F. Supp. 2d 708, 721–23 (N.D. Ill. 2006). He was not, however, the biggest fundraiser operating for Hamas in the United States. That honor belonged to the Holy Land Foundation for Relief and Development (HLF), a not-for-profit, tax-exempt, corporation based in Richardson, Texas.

I. Background

The FBI quickly opened an intelligence investigation. Hamas was not yet designated as a terrorist organization in the United States, but it had already established itself as an extremist organization willing to use violence against civilians. Started by the charismatic Sheik Ahmad Yassin, Hamas' charter states as its purpose the destruction of Israel and the creation of an Islamic state in its place. International agreements and negotiation are not an option, the charter states. Only through violent jihad can its objectives be attained. *See* HAMAS CHARTER (Muhamad Maqdsi trans., Islamic Association for Palestine (IAP) 1990). (The IAP, together with the Holy Land Foundation, was part of Hamas' support network in the United States.)

Hamas is organized into different wings: (1) a military wing called the Izz-al-Din-al Qassam Brigades, (2) a social wing that provides cradle-to-grave assistance for the local population in order to garner essential support for its activities, and (3) a political wing that sits atop both the social and military wings. As Hamas expert Matthew Levitt explained at the trial of the HLF and its leadership, Hamas' wings are interrelated and inextricable from one another.

Hamas' social network gives the organization its power to operate, its community support, its ability to recruit, and ultimately, its ability to commit violent acts. *See generally* MATTHEW LEVITT, *HAMAS: POLITICS, CHARITY, AND TERRORISM IN THE SERVICE OF JIHAD* (Yale University Press 2006). Adding to its appeal, as an Islamist organization, Hamas' social committees were reputed to be honestly run and corruption free. These social committees, including zakat committees and other charitable foundations, flourished in the West Bank and Gaza and became the principal recipients and dispensers of donations sent by Hamas' support network abroad. HLF was one such network; it was Hamas' fundraising arm in the United States.

As the Fifth Circuit concluded, “[t]he financial link between the Holy Land Foundation and Hamas was established at the foundation’s genesis and continued until it was severed by the Government’s intervention in 2001.” *See United States v. El Mezain*, 664 F.3d 467, 484 (5th Cir. 2011).

II. The Oslo Peace Accords

Based on information learned early in its intelligence investigation, the FBI discovered that, in late 1993, HLF leadership was to participate in an important meeting. This two-day conference took place in Philadelphia, at a hotel near the airport. Pursuant to a warrant issued by the Foreign Intelligence Surveillance Court under the Foreign Intelligence Surveillance Act (FISA), the FBI monitored the meeting. Although the meaning of what the agents heard and recorded over the course of the meeting was not fully understood at the time, the HLF's role as a fundraiser for Hamas was abundantly clear.

The conference opened with a statement that it was a meeting of the “Palestine Committee.” Its purpose was to discuss and develop a plan to help defeat the Oslo Peace Accords, a historic agreement between Israel and the Palestine Liberation Organization (PLO) that had been signed a few months earlier. The United States was heavily invested in this peace process, which was marked by the now famous handshake between Israel's Yitzhak Rabin and then-PLO leader Yasser Arafat at the White House with President Clinton. As part of the Oslo Peace Accords, Israel recognized the PLO and, in turn, the PLO recognized Israel's right to exist. The Accords, however, were not met with universal acceptance. Hamas proclaimed both its opposition to the Accords and its continued resistance to Israel's existence.

At the time of the Philadelphia meeting, it was not yet illegal for U.S. persons to provide assistance to Hamas. Nonetheless, given the central role the United States played in brokering the Accords, Hamas leaders in the United States determined that they needed to hide their affiliation with Hamas if they were to continue their activities on its behalf. At the Philadelphia meeting, conferees were cautioned not to refer to Hamas openly, but instead to speak in code and say “Samah”—Hamas spelled backwards. The head of HLF, Shukri Abu Baker, spoke directly about concealing the true purpose of their activities in the United States. “War is deception,” Baker said, explaining you have to pretend to be something that you are not.

The Philadelphia conference also featured an oral report from the “inside,” meaning inside the Palestinian territories. Attendees were told about certain zakat committees and social institutions in the West Bank that were “ours,” that is, controlled by Hamas. The Philadelphia meeting would be a key piece of evidence in the future trial of the HLF.

III. The criminal investigation

In January 1995, after a series of Hamas bus bombings and suicide attacks threatened the fragile Oslo peace process, President Clinton issued an Executive Order (EO) invoking the International Emergency Economic Powers Act (IEEPA) and declaring a national emergency with respect to persons and organizations who threatened the Middle East peace process. Hamas and its leaders were designated as Specially Designated Terrorists. The State Department further designated Hamas as a Foreign Terrorist Organization (FTO) in 1997.

In the wake of the 9/11 terrorist attacks on the United States, President Bush issued another EO declaring a national emergency with respect to terrorists who threatened the security of the United States. Under this EO, three purported U.S. charities were designated as Specially Designated Global Terrorists (SDGT), including the HLF, which was designated for its support of Hamas.

The HLF's designation effectively shuttered the operation. The HLF's property, including its records, were legally blocked and moved into storage by the Department of the Treasury (Treasury Department). The HLF bank accounts were frozen, and U.S. persons were precluded from doing business with the HLF.

Soon after the HLF's designation, the FBI converted its intelligence case concerning the HLF into a criminal investigation, and prosecutors were assigned from the Northern District of Texas and Main Justice.

Even before the HLF's designation, however, the Government obtained a criminal warrant to search the offices of a company called Infocom. Located across the street from the HLF in Richardson, Texas, Infocom was an Internet service provider and export company that was owned and operated by HLF executive Ghassan Elashi and his brothers. The HLF stored many of its records at Infocom and, pursuant to the warrant, boxes of HLF records were seized from Infocom's office. *See United States v. Elashyi*, 554 F.3d 480, 490–491 (5th Cir. 2008). (prosecuting the Elashi brothers for exporting computers in violation of sanctions laws and for dealing in the property of designated Hamas leader Mousa Abu Marzook). After the HLF's designation, prosecutors sought a criminal warrant to seize the documents that the Treasury Department had removed from HLF's offices at the time of its designation and placed into storage.

The HLF challenged its designation in a civil action in the U.S. district court for the District of Columbia. Shukri Abu Baker submitted a declaration in support of this challenge, insisting that the organization had no connection to Hamas, but was instead engaged in purely humanitarian activities to assist Muslims in war-torn areas of the world. Abu Baker swore under penalty of perjury that he “rejected and abhorred Hamas,” words that would come back to haunt him in the criminal trial. In opposition to the civil lawsuit, the United States submitted an unclassified administrative record of over 3,000 pages demonstrating the factual basis on which the HLF was designated. The district judge ruled in favor of the Government in a decision that was affirmed by the D.C. Circuit. *See Holy Land Found. for Relief and Dev. v. Ashcroft*, 333 F.3d 156, 168 (D.C. Cir. 2003).

Meanwhile, on March 27, 2002, a Hamas suicide bomber disguised as a woman entered the Park Hotel in Netanya, Israel, where hundreds had gathered to celebrate the Passover holiday. The explosion killed 29 and injured 154, most of whom were elderly civilians and some of whom were Holocaust survivors. Outrage over the attack sparked Operation Defensive Shield, a series of Israeli raids in the West Bank that included charitable committees that Israel had long suspected of supporting Hamas activities. Many of these same committees had received substantial support from the HLF. Documents recovered from the raids, including posters, memoranda, photographs, and key chains promoting Hamas, were shared with the HLF prosecution team. They would also become important exhibits in the criminal trial.

To trace the flow of HLF's money, bank records were subpoenaed from U.S. banks showing abundant wire transfers from the HLF to foreign bank accounts held for Hamas-controlled committees in the West Bank and Gaza. Prosecutors were also able to use a variety of tools to obtain evidence from non-U.S. banks. The Government, for example, issued grand jury subpoenas to foreign banks that had branch offices in the United States. Under authority recognized in *United States v. Bank of Nova Scotia*, 691 F.2d 1384, 1391 (11th Cir. 1982), the United States was able to obtain from those foreign banks financial records reflecting transfers of funds from HLF to Hamas social committees overseas.

This legal process helped investigators piece together a big part, but not all, of the financial story. After Hamas was designated, the HLF changed its practice of wiring money directly to the committees' accounts. Instead, the HLF opened offices in the West Bank and Gaza, with accounts at the Bank of Palestine (BOP). HLF then wired money directly to itself through those overseas BOP accounts. As BOP had no U.S. branch office, *Bank of Nova Scotia* grand jury subpoenas could not be used to follow the money trail beyond the HLF. To help fill this gap, the Government, for the first time, used a new authority that had been enacted under the USA PATRIOT Act. This authority enabled the Government to issue administrative subpoenas to foreign banks that maintain a correspondent account in the United States and request records "related to such correspondent account, including records maintained outside of the United States relating to the deposit of funds into the foreign bank." 31 U.S.C. § 5318(k)(3) (2014). Most foreign banks hold correspondent accounts at U.S. banking institutions to enable them to engage in transactions utilizing U.S. dollars. The PATRIOT ACT subpoena was served on the BOP's registered agent in the United States, and records returned from the subpoena showed the transfer of funds out of the HLF's overseas accounts at the BOP to individuals connected to the same Hamas-controlled committees that HLF routinely funded.

Prosecutors generally use *Bank of Nova Scotia* and USA PATRIOT Act subpoenas only after other, bilateral efforts at obtaining the records, such as requests pursuant to a Mutual Legal Assistance Treaty (MLAT), have failed. Because the United States does not have such agreements with every country, however, a subpoena or Letter Rogatory (a request for documents issued by the court pursuant to 28 U.S.C. § 1781(b)(2)), may be required. Both *Bank of Nova Scotia* and USA PATRIOT Act subpoenas require prior approval from the Department of Justice's Office of International Affairs.

The investigation team also received substantial assistance from the government of Israel pursuant to requests issued under the MLAT between the two countries. Pursuant to the MLAT, prosecutors obtained records that the government of Israel had seized from HLF's offices in the West Bank, criminal histories, and the Operation Defensive Shield materials. Prosecutors also worked with Israeli government officials to develop a mutual trust that ultimately persuaded the Israeli government to allow two Israeli witnesses to testify in the United States.

In addition to the evidence gathered to support the material support and money laundering charges, IRS agents undertook a detailed review of the HLF's corporate tax submissions, which did not reflect the HLF's true purpose to provide assistance to Hamas. Coupled with financial records showing the HLF's support of Hamas, prosecutors developed evidence that HLF had obtained and maintained its tax-exempt status by misrepresenting its true purpose.

IV. The charges

On July 26, 2004, a grand jury returned a 42-count indictment against the HLF and 7 individuals, 2 of whom were fugitives. The charges included multiple counts of conspiracy, material support for a terrorist organization, violations of IEEPA for engaging in unlicensed transactions with an SDGT, international money laundering, tax offenses, and criminal forfeiture. The indictment identified numerous overt acts, each representing a separate transfer of HLF funds to Hamas-controlled social committees after Hamas was designated in 1995.

The indictment told the story of the HLF, beginning with its establishment as the Occupied Land Fund in 1987, at roughly the same time as the first Palestinian uprising (intifada) and the creation of Hamas. The HLF eventually became the largest Muslim charity in the United States. Using glossy brochures and sophisticated outreach, the HLF offered donors tax-deductible opportunities to support the HLF's programs, including orphan sponsorships, assistance to hospitals and clinics in impoverished areas of Gaza and the West Bank, and projects such as backpacks for school children, free summer camps, and kindergartens for youngsters. Undisclosed in these brochures was that the HLF was funneling money to Hamas through the Hamas social infrastructure and that the money donated to the HLF was used to support imprisoned Hamas operatives, families of Hamas suicide bombers, and the general needs of Hamas as a whole. Some evidence also indicated that donors who were looking to support Hamas were well aware that HLF was the place to send their money.

V. Discovery and pretrial motions

In any prosecution that arises from a multi-year intelligence investigation, discovery presents unique challenges. In this case, the FBI's intelligence investigation generated a large volume of classified material, including tens of thousands of hours of telephone calls and facsimile transmissions, many in Arabic, that were intercepted pursuant to court orders issued under FISA. Translators identified pertinent calls and prepared some English summaries. Some verbatim transcripts were also translated into English. Although the Government was able to declassify certain information, full declassification of all potentially discoverable material was not possible.

Accordingly, the Government devised a plan to provide the declassified discovery to the defendants and to produce classified materials to defense counsel with appropriate national security clearances. The Government further proposed that classified discovery would occur pursuant to a protective order issued under the Classified Information Procedures Act (CIPA), allowing defense counsel to share classified materials only as necessary with translators who also had national security clearances. Under the proposed protective order, counsel could not share classified material with defendants. Instead, the prosecution committed to promptly seek declassification of any specific intercept that defense counsel wanted to use for their defense. This plan was approved by the district court and ultimately affirmed by the Fifth Circuit. *United States v. El Mezain*, 664 F.3d 467, 518–25 (5th Cir. 2011).

Critically important were pretrial rulings regarding the conditions under which witnesses from the government of Israel would testify. One witness planned to authenticate materials collected during Operation Defensive Shield. Another, an expert, planned to testify about Hamas' social wing and its control of certain committees. The names of these witnesses were classified under Israeli law and, derivatively, under U.S. law, as were certain limited details about their organizations. In support of a request for special conditions to protect these witnesses, declarations were submitted attesting to Hamas's targeting of Israeli officials and the danger attendant to their testifying in a foreign country.

The court permitted the Israeli witnesses to testify under pseudonyms. Their faces were not obscured, but the courtroom was cleared (other than defendants' family members) and overflow rooms were equipped with real-time audio feed. The court also allowed an Israeli government lawyer to be present in the courtroom during the testimony of the Israeli witnesses in order to object if a question was likely to elicit a classified response. The defense objected to these procedures, citing CIPA and the Confrontation Clause. Analyzing the issues under *Roviaro v. United States*, 353 U.S. 53, 62–65 (1957), the court held that the proposed procedures properly balanced the defendants' need for effective cross-examination against the need to protect the witnesses' safety. The Fifth Circuit affirmed these procedures, noting that the defense had cross-examined the witnesses extensively and effectively.

The defendants also moved to suppress fruits of the FISA surveillance and for access to the classified FISA applications. Defendants alleged that the applications contained errors, which they

purportedly surmised from an inadvertent disclosure that occurred during discovery. After reviewing the relevant FISA dockets in camera and ex parte, the district court found that, to the extent there were errors, they were minor and not substantive. The district court, therefore, upheld the legality of the surveillance in an opinion, the analysis of which was praised and adopted by the Fifth Circuit.

The defendants also objected to the admission of what came to be known as the “Elbarasse Documents.” During the early 1990s, Ismael Elbarasse worked in the United States with Mousa Abu Marzook, who then was the top political leader of Hamas. Elbarasse and Marzook shared a bank account, and checks drawn on this account were paid to the HLF. After being designated together with Hamas as a Specially Designated Terrorist, Marzook was arrested in 1995 while trying to reenter the United States at JFK airport in New York. Marzook was eventually deported to Jordan and Elbarasse was thought to have left the United States voluntarily. Nearly a decade later, however, a Maryland State Trooper posted near the Chesapeake Bay Bridge made a routine traffic stop of a vehicle that happened to contain Elbarasse and his family. The Department of Justice’s Counterterrorism Section worked into the night to prepare a search warrant for Elbarasse’s house in Northern Virginia.

There, agents discovered a virtual treasure trove of historical materials documenting Hamas activities in the United States from the late 1980s into the early 1990s. The documents explained in detail the formation and activities of the “Palestine Committee,” one of many committees that were established around the world, including in the United States, to provide an infrastructure of support to Hamas. The documents explained that the Palestine Committee’s goal was to provide Hamas with media, money, and men. Organizations were therefore established under the Palestine Committee umbrella to provide propaganda, political support, and fundraising. The Elbarasse documents included schematics showing the structure and organization of the Palestine Committee, rosters of its members, annual reports, meeting agendas, minutes, financial records, and lists of affiliated personnel. The documents confirmed that HLF, referred to as “the Treasury,” was established and operated in accordance with instructions from the Palestine Committee to “[c]ollect donations for the Islamic Resistance Movement,” also known as Hamas. *El-Mezain*, 664 F.3d at 501–07 (internal quotation marks omitted).

One of the many key documents recovered from Elbarasse’s house was a letter to one of the defendants that began with “Dear Shukri [Abu Baker].” It went on to explain, in similar fashion to the Philadelphia meeting, which committees were “ours.” The letter named not only the specific committees, but the specific members on the committee who were “brothers” and whose presence made the committees controlled by Hamas. This document included the same committees discussed in Philadelphia. Moreover, the committees and individuals named in the document were the same committees and individuals to which HLF sent its money.

The defense objected to the Elbarasse documents as inadmissible hearsay, arguing that they predated the date on which it became a crime to support Hamas and were unreliable because their provenance was unknown. The court found otherwise, holding that the documents were created in furtherance of a joint venture and were admissible regardless of the venture’s criminality. These documents set the table for the first phase of trial.

VI. Trial I

The Government presented its case in roughly two halves. In the first part of the trial, an expert on Hamas introduced to the jury the organization and its key players. Case agents, relying on the documentary evidence, established the history of the Palestine Committee and the HLF, and the connections between the defendants and Hamas.

Videotapes showed defendants at HLF fundraisers, singing songs in praise of Hamas. Some of these videotapes showed Hamas leaders on stage. Other videotapes recovered from the HLF’s headquarters in Texas showed Hamas leaders making fiery speeches. One videotape, recorded from

Hezbollah television in Lebanon (Al-Manar), showed a kindergarten graduation ceremony at one of the Gaza committees supported by the HLF. On that broadcast, children dressed up like Hamas spiritual leader Ahmad Yassin and paraded around the stage with toy suicide belts and machine guns.

A homeowner from Northern Virginia testified about one particular stroke of good luck. While landscaping his backyard with a backhoe, he came across bags of videotapes buried deep in the dirt. A neighbor advised him that the house had been the target of an earlier FBI search. After retrieving the tapes from the garbage where he had originally deposited them, the homeowner gave the tapes to a friend at the Department of Homeland Security. In a bureaucratic miracle, the tapes found their way to the HLF case agents at the FBI, who sent them to the FBI laboratory. The tapes were restored and played at trial. They showed the band in which one of the defendants played performing pro-Hamas songs at HLF fundraisers.

Another witness, who worked in the office of Senator Orrin Hatch, testified about a letter that the Senator had received during the Marzook extradition proceedings. The letter was signed by a Hamas spokesperson and included the telephone and fax numbers of the Hamas offices in Jordan. Because the letter had been perceived as a threat, the witness both remembered it and had kept the original letter. He was therefore able to testify to its authenticity. In court, prosecutors compared the telephone and fax numbers on the letter to a list of overseas speakers found in HLF's computer. The speakers were used by the HLF to raise money on behalf of Hamas. The phone and fax numbers of the majority of overseas speakers matched the Hamas phone and fax numbers on the letter to Senator Hatch.

Marzook's extradition provided the Government with additional trial evidence. When Marzook was arrested at JFK airport, he and his wife were questioned by agents. Both denied having any diaries or address books. Upon a secondary search, however, agents found a phone book hidden under the clothing of Marzook's wife, who also happened to be the cousin of Ghassan Elashi, one of HLF's founders and officers. The phone book contained many of the defendants' names and contact information, as well as information on numerous high level Hamas officials both in the United States and abroad. It was, in essence, a Hamas phone book. The phone book was seized and introduced into evidence.

The historical evidence presented in the first half of the case established the defendants' close connections to Hamas and their state of mind. To the extent prosecutors could establish that the defendants were part of Hamas and that HLF was created to support Hamas, it would only be logical to assume that the places to which HLF sent its money were also Hamas. That was, after all, HLF's stated mission as established by the Elbarasse Documents. To reinforce that conclusion, the second half of the case focused on the evidence from overseas that further established that the committees to which HLF sent money were in fact controlled by Hamas. That evidence included posters of Hamas martyrs recovered from committees to which HLF gave money. Prosecutors also presented key chains found in HLF funded committees, with pictures of Hamas founder Sheik Yassin on one side and infamous Hamas bomb maker Yihya Ayash on the other side. One of the defendants, Abdulrahman Odeh, sponsored the children of Ayash through HLF. A videotape seized from another of the HLF funded committees showed a youth summer camp ceremony during which a senior member of Hamas was introduced. Documents seized from HLF showed extensive correspondence to this individual, including correspondence acknowledging the transfer of funds to his committee to support the "martyrs' families."

The financial evidence served as the bridge between the two halves of the case. After establishing the true purpose of HLF and the defendants' motives, the case agents testified to the financial evidence showing the movement of funds from HLF to the social committees named in the indictment, both before and after the designation of Hamas. This evidence included opening documents from bank accounts, wire transfers, and checks, which agents compiled into charts showing the dates and amounts of the money transfers, and from whom and to where the money was transferred.

The Government rested after about six weeks of testimony. In an attempt to counter the Government's narrative, the defense presented the testimony of a former U.S. diplomat based in Jerusalem and an expert on Palestinian civil institutions (among other witnesses). These witnesses sought

to establish that the social committees were unconnected to Hamas and were not themselves designated by the U.S. Government. The defense also argued that most of the Government's evidence connecting the HLF to Hamas predated Hamas's designation as an FTO, and that the HLF attempted to comply with the law following Hamas' designation. In an attempt to explain the incendiary videotapes glorifying Hamas, the defense presented an ethnomusicologist, who testified about how people living under occupation express themselves musically.

After nearly a month of deliberations, the jury mostly hung. Confident in the strength of the evidence, the Government stated its intention to retry all the defendants, a trial that occurred the following year.

VII. Trial II

To simplify the case, between trials, prosecutors dismissed the substantive charges against two of the defendants. That left pending against these defendants three conspiracy counts, charging conspiracies to provide material support to an FTO, to violate IEEPA, and to commit international money laundering. As to the other defendants, the indictment retained all the counts on which the jury hung.

At the second trial, the Government presented essentially the same evidence as in the first, with some adjustments and repackaging to make the case more digestible to the jury. Agents subtitled videotapes so that jurors could read translations without averting their eyes to a separate document with the translation. More summary exhibits and charts were created to explain the evidence. The Government also prepared additional demonstrative posters to reinforce the web of relationships. Exhibits were relabeled so that each exhibit identified its evidentiary source. Direct examinations were shortened.

The Government also added a cooperating witness, a former HLF representative in Georgia who had pled guilty in a separate case to providing material support to Hamas through the HLF. The Government, in addition, introduced documents that agents had discovered between trials through continued forensic examination of HLF computers. Internet cache files showed numerous photographs of Hamas suicide bombers, some of which matched photos found in the social committees during Operation Defensive Shield. Another expert witness briefly discussed the importance of a terrorist organization's social wing to the success and longevity of the organization.

The jury deliberated for just over a week before returning guilty verdicts on all counts. It also returned a special verdict finding forfeiture in the amount of \$12.4 million. Six months later, defendants were sentenced. Applying the terrorism enhancement, the sentences ranged from 15 to 65 years. Petitions for rehearing en banc and certiorari were denied. Petitions for relief under 28 U.S.C. § 2255 remain pending. ❖

ABOUT THE AUTHOR

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Application of the Terrorism Sentencing Enhancement to Material Support Convictions

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I. Introduction

This article provides an overview of the terrorism enhancement provision under U.S. Sentencing Guidelines (U.S.S.G.) § 3A1.4 and its application to terrorist financing convictions in recent years. The enhancement provides a 12-level increase in the offense level, with a minimum offense level floor of 32 and an increase in the criminal history category (CHC) to category VI if the offense involved, or was intended to promote, a federal crime of terrorism. The combination of offense level 32 and CHC VI provides a U.S.S.G. range of 210 to 262 months, which, when converted to years, provides a range from 17 years, 6 months, to 21 years, 10 months.

Because we are talking about a provision of the U.S.S.G., the terrorism enhancement provision was impacted by *United States v. Booker*, 543 U.S. 220 (2005), where the Supreme Court found that the Sixth Amendment prohibited the imposition of an enhanced sentence under the Sentencing Guidelines on the basis of facts not admitted by the defendant or found by the jury beyond a reasonable doubt. The net effect of this ruling was to make the Guidelines advisory in nature. In this respect, *Booker* also held that, while the Sentencing Guidelines were no longer mandatory, they must still be taken into account by the court pursuant to 18 U.S.C. § 3553(a) in fashioning an appropriate sentence. Consequently, rumors of the demise of the Sentencing Guidelines with *Booker* were greatly exaggerated. In the wake of *Booker*, prosecutors continue to have the responsibility to assist and advise the court in the formulation of an appropriate Guidelines sentence and, although courts are not required to impose a Guidelines sentence, sentencing courts are still required to consider the Guideline range adopted by the Sentencing Commission. As a result, at least with respect to the terrorism enhancement provision set forth in U.S.S.G. § 3A1.4, sentencing opinions today look very much like those that predated *Booker*.

II. Good news and bad news

The good news for prosecutors who are seeking to have the court apply the terrorism enhancement following an 18 U.S.C. §§ 2339A or 2339B conviction is that both crimes are enumerated in the definition of “federal crime of terrorism.” 18 U.S.C. § 2332b(g)(5) (2014). Even better, the terrorism enhancement, by its terms, does not require an actual conviction for these enumerated crimes. Rather, the defendant must have been convicted of an offense that either “involved” or “was intended to promote” such a crime. U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2011). In fact, the first published controversy over its applicability was in 1998, in a case involving an aggressive tax protestor who was not convicted of a terrorism crime. *See United States v. Wells*, 163 F.3d 889, 893 (4th Cir. 1998).

Being convicted of an offense that involves one of the enumerated federal crimes of terrorism is only the first part of the definition of “federal crime of terrorism.” In addition to an offense involving one of the enumerated crimes, the offense must be “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct” 18 U.S.C.

§ 2332b(g)(5)(A) (2014). Thus, a U.S.S.G. § 3A1.4 enhancement is not automatic following a § 2339A or § 2339B conviction as both elements must be met.

In other words, the intent element under § 2332b(g)(5)(A) often requires a higher level of knowledge than the level of knowledge for a § 2339B conviction. A conviction under 18 U.S.C. § 2339B requires the Government to prove that a person knowingly provided, attempted to provide, or conspired to provide material support or resources. In order to apply the U.S.S.G. § 3A1.4 terrorism enhancement, the Government must also demonstrate that the material support or resources were “calculated to influence or affect . . . or retaliate against government conduct.” The conviction of the § 2339B offense is not necessarily, by itself, sufficient for the application of the § 3A1.4 enhancement. As the court noted in *United States v. Banol-Ramos*, 516 F. App’x 43, 47 (2d Cir. 2013), “[n]ot all material support for terrorism is calculated to affect government conduct, nor does it always involve weapons.”

For example, in *United States v. Chandia*, 514 F.3d 365, 376 (4th Cir. 2008), a terrorist financing conviction, the Fourth Circuit vacated a sentence and remanded for resentencing because there were no factual findings on the intent element of the terrorism enhancement. The district court and the Presentence Investigation Report “appeared to assume (erroneously) that the enhancement automatically applies to a material support conviction.”

Indeed, where courts have reversed terrorism enhancements, it is often on the grounds of an insufficiency of proof of the terrorism intent element. See *United States v. Stewart*, 590 F.3d 93, 136–39 (2d Cir. 2009) (upholding denial of imposition of terrorism enhancement on material support conviction for translator where offense conduct was insufficient to show he intended to promote or was involved in a federal crime of terrorism). Importantly, several cases have specified that the defendant’s personal motivation is not the focus; the requirement is satisfied if the offense itself was calculated to influence the Government, even if the defendant claims he was motivated by glory or charity or other non-terrorism purposes. For example, in *United States v. Jayyousi*, 657 F.3d 1085, 1114 (11th Cir. 2011), the Eleventh Circuit rejected defendants’ argument that they had a “benign motive in assisting the oppressed Muslims,” and that motive precluded application of the enhancement. The court explained that “the Guidelines’s [sic] precise language focuses on the intended outcome of the defendants’ unlawful acts— i.e., what the activity was calculated to accomplish, not what the defendants’ claimed motivation behind it was.”

In *United States v. Awan*, 607 F.3d 306, 316 (2d Cir. 2010), the Second Circuit similarly rejected the district court’s reasoning that the enhancement did not apply because defendant acted with “private purposes” to gain prestige. The court of appeals held that “motive is simply not relevant.” *Id.* at 317. “ ‘Motive’ is concerned with the rationale for an actor’s particular conduct. . . . ‘Calculation’ is concerned with the object that the actor seeks to achieve through planning or contrivance.” *Id.* The enhancement “does not focus on the defendant but on his ‘offense,’ asking whether it was calculated, i.e., planned—for whatever reason or motive—to achieve the stated object.” *Id.* See also *United States v. Wright*, 747 F.3d 399, 408 (6th Cir. 2014) (“[A] defendant who provided material assistance to terrorist organizations, but claimed that his goal was to assist an oppressed group of Muslims, is eligible for the enhancement regardless of his purportedly benign motive.”); but see *United States v. Wright*, 747 F.3d 399, 418 (6th Cir. 2014) (“We now hold that this element requires the government to prove that the defendant specifically intended to influence or affect the conduct of government, and that a defendant has the requisite intent if he or she acted with the purpose of influencing or affecting government conduct and planned his or her actions with this objective in mind.” (internal quotations omitted)); *United States v. Banol-Ramos*, 516 F. App’x 43, 48 (2d Cir. 2013) (“Hence, to impose the terrorism enhancement, the district court was required to find that Ibarguen–Palacio committed (a) an enumerated offense, (b) with specific intent to influence government conduct.”).

In sum, for the court to apply the terrorism enhancement, a prosecutor must also prove by a preponderance of the evidence that the terrorism offense was “calculated to influence or affect the

conduct of government by intimidation or coercion, or to retaliate against government conduct.” 18 U.S.C. § 2332b(g)(5)(A) (2014).

III. Selected recent sentencing opinions

For prosecutors seeking to have the court impose the enhancement after a material support conviction, the best guidebook for what is required comes from court opinions from the last two years.

First, these cases show that achieving the terrorism enhancement for a material support-type conviction is a tricky proposition, especially when the convictions are by plea and where they do not involve other terrorism crimes beyond material support.

For instance, the Second Circuit in *United States v. Banol-Ramos*, 516 F. App’x 43, 50 (2d Cir. 2013), recently vacated the sentence of one defendant who pled guilty to conspiracy to provide material support to a designated terrorist organization in violation of 18 U.S.C. § 2339B, relating to activities involving Fuerzas Armadas Revolucionarias de Colombia (FARC). After describing Iburguen–Palacio’s involvement with FARC, the district court concluded that he agreed to help FARC in their activities, and that he “knew a good deal about the organization that he was joining.” *Id.* at 49. Taken alone, however, according to the Second Circuit, these facts were not sufficient to support a finding that Iburguen–Palacio had the specific intent to influence government conduct by intimidation or coercion, or to retaliate against the Government. In other words, his agreement to help FARC did not necessarily establish that he specifically intended to influence or retaliate against the Government. The court remanded for further proceedings, indicating that the district court would need to set forth additional findings to support the terrorism enhancement. *Id.* at 50.

On the other hand, in *United States v. Hassan*, 742 F.3d 104, 110 (4th Cir. 2014), a case that involved more than material support charges, the terrorism enhancement was upheld. Mohammad Omar Aly Hassan, Ziyad Yaghi, and Hysen Sherifi were tried jointly in the Eastern District of North Carolina and convicted of several offenses arising from plotting to wage “violent jihad” outside the United States, including conspiracy to kill a federal officer or employee, conspiracy to provide material support, conspiracy to murder, kidnap, maim, and injure persons in foreign country, and related crimes. They appealed their terrorism-enhanced sentences. The Fourth Circuit saw no clear error in the district court’s findings supporting the enhancements, which relied on evidence including the fact that one defendant sought out the ringleader “to learn more about [his] time in Afghanistan and presumably to learn more about traveling abroad to commit violent jihad,” a defendant’s travels in 2006 and 2007 to the Middle East seeking “to engage in violent jihad,” advocacy of violent jihad on the Internet “through raps and other postings,” a defendant’s hopes “that he would be able to secure farmland from which to launch various challenges against military occupation or intervention,” and the receipt of \$15,000 to support the mujahideen as evidence of “[a] specific intent to intimidate, coerce, or retaliate against government.” *Id.* 149–50. *See also United States v. Kaziu*, 559 F. App’x 32, 39 (2d Cir. 2014) (affirming application of terrorism enhancement following jury conviction for § 2339A and § 2339B offenses, rejecting defendant’s argument that the enhancement was “inherently unreasonable because automatic placement into the harshest Criminal History Category diverges sharply from the true facts” (internal quotations omitted)).

In a recent D.C. Circuit case, *United States v. Mohammed*, 693 F.3d 192, 201 (D.C. Cir. 2012), Khan Mohammed was convicted of narcoterrorism (18 U.S.C. § 960a), for providing support to the Afghanistan Taliban. The D.C. Circuit had no trouble affirming the imposition of the terrorism enhancement. It found sufficient the district court’s determination that the defendant “specifically intend[ed] to use the commission from the drug sales to purchase a car to facilitate attacks against U.S. and foreign forces in Afghanistan.”

Second, some courts have ameliorated the harshness of the terrorism enhancement in material support cases by applying downward departures or variances.

In *United States v. Nayyar*, No. 09 Cr. 1037(RWS), 2013 WL 2436564, at *9 (S.D.N.Y. June 5, 2013), a New York district court recently departed downward from a terrorism enhancement sentence in sentencing Patrick Nayyar, who was convicted of providing military equipment to Hizballah. The court, without much analysis, applied both the terrorism enhancement and the weapons enhancement of U.S.S.G. § 2M5.3(b)(1)(E). Then, when going through the 18 U.S.C. § 3553(a) factors, the court noted that there is “no claim here that the defendant is a terrorist. No one is arguing that the defendant was planning to blow anything up or commit any acts of violence.” *Id.* at *8. The court was disturbed that “[a]pplication of the Terrorism Enhancement to Nayyar’s sentence would have the ultimate effect of punishing him as harshly as someone who had actually committed acts of terroristic violence.” *Id.* It also noted that one of the rationales for the criminal history increase under the terrorism enhancement, the difficulty of rehabilitating a terrorist, “is wholly inapposite here, where even the Government has openly and expressly acknowledged that there is no claim here that the defendant is a terrorist. *Id.* (internal quotations omitted). For these reasons, the court downwardly departed from the Guidelines range and sentenced the defendant to 15 years. *Id.* at *9.

Finally, a Sri Lankan native who was the principal procurement officer for the Liberation Tigers of Tamil Eelam (LTTE), a foreign terrorist organization that targeted the Sri Lankan government, pleaded guilty to conspiracy to provide material support LTTE (under 18 U.S.C. § 2339B) and conspiracy to bribe public officials. *United States v. Thavaraja*, 740 F.3d 253, 255 (2d Cir. 2014). The district court sentenced him to 108 months’ imprisonment for the material support charge, with a concurrent 60-month sentence for a bribery conspiracy, a substantial downward variation from the Guidelines range. The Government challenged the substantive reasonableness of the sentence, contending that the sentence was unreasonably low and that the district court had erred in relying “on its subjective viewpoint [that] the LTTE’s goals are somehow less blameworthy than those of other designated foreign terrorist organizations.” *Id.* at 261.

The Second Circuit affirmed the sentence and explained that the district court properly considered “credible evidence of human rights violations by both the Sri Lankan security forces and the LTTE,” and the defendant’s motivation “to help people who were, at least in [LTTE’s] view, being persecuted by other authorities.” *Id.* at 261–62 (internal quotations omitted). ❖

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Parallel Criminal and Civil/Administrative Investigations in Terrorist Financing Cases

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I. Introduction

Following the 9/11 attacks on the United States, President Bush and each subsequent President decided that the United States will use all of the tools at its disposal to disrupt terrorist plots and dismantle terrorist organizations. The national security apparatus incorporates a wide array of tools, including criminal, administrative, intelligence, diplomatic, and military components. These tools may be used singularly or in tandem, as any particular case may require. Accordingly, national security prosecutors must understand that the tool they bring to the counterterrorism mission, criminal prosecution, is one of many available tools and that the development of a criminal disruption “option” commonly proceeds in parallel with the acquisition of intelligence and other counterterrorism activities. Cutting off the flow of funds and other support to terrorists and terrorist organizations is a critical counterterrorism objective. It is, therefore, the responsibility of national security prosecutors handling such matters to coordinate their actions closely with the actions of other governmental agencies engaged in the problem, so that all tools can be brought to bear in the most effective manner to choke off the flow of funds to terrorists and terrorist organizations. Quite simply, in the post-9/11 world, it will not suffice for prosecutors to instruct other agencies to stand down.

The terrorist financier prosecutor might ask, What is the Department of Justice’s (DOJ’s) role when someone of criminal investigative interest is considered for a Department of the Treasury (Treasury Department) designation? What are the risks and advantages of the administrative process to criminal prosecutions? Can and should prosecutors be heard on whether a particular designation is a good idea? Can Treasury Department designations be timed such that they do not put a potential defendant on notice of the Government’s interest in their activities? This article attempts to answer these questions.

II. The parallel authorities

Prosecutors who handle terrorist financing cases know that the United States has adopted a list-based solution to the problem. Under this approach, the United States designates publicly those people and entities involved in terrorist enterprises and precludes individuals and entities from providing material support or resources to, or engaging in financial transactions with, terrorists. For these purposes, there are two relevant lists: (1) the State Department’s list of Foreign Terrorist Organizations (FTOs), implemented pursuant to 18 U.S.C. § 2339B, and (2) the Treasury Department’s list of Specially Designated Global Terrorists (SDGTs), implemented pursuant to the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–05 and Executive Order (EO) 13224. While these lists have some overlapping purposes, they have in many ways very different applications. The FTO list, which includes approximately 50 designees, provides general notice as to the foreign organizations that the United States officially considers to be FTOs. Under § 2339B(a)(1), it is a crime for any person subject to the jurisdiction of the United States to knowingly provide to an FTO “material support or resources,” which is a phrase that is defined quite broadly. By contrast, the Treasury Department’s list of SDGTs includes

over 600 individuals, entities, and organizations, and the Treasury Department's enforcement mechanism on dealings with SDGTs is tightly focused on financial transactions. (Although most SDGTs are located overseas, there are occasional domestic persons and entities designated as SDGTs. All FTOs are also SDGTs, but not the inverse. SDGTs are added about every month.) Indeed, the Treasury Department maintains robust administrative compliance and enforcement programs that preclude individuals and organizations, particularly banks, from engaging in transactions with SDGTs. Among many other benefits, this program forces banks to freeze the assets of SDGTs and to block any transaction involving an SDGT, keeping the assets from flowing through the United States financial markets. Willful violations of the Treasury Department's program are punishable criminally.

As part of the Government's "all tools" approach, it is sometimes necessary for criminal material support investigations to run in parallel with the Treasury Department's administrative implementation of EO 13224. This situation would occur, for example, where intelligence channels or the Government learn that an individual, entity, or organization is acting as an agent for an FTO. In that circumstance, it makes abundant sense for the Government to bring criminal charges against this "person" under § 2339B. It also makes abundant sense for the Government to designate the criminal target as an SDGT in order to put others (including banks) on notice that they must freeze the target's assets and not engage in financial transactions with the target. Running such proceedings in parallel is particularly important in situations where the target is overseas and presently outside the reach of U.S. law enforcement, but has dealings or assets within the United States. Through execution of the Treasury Department's authorities, the Government can have a significant impact on the terrorist organization in a manner not achievable solely through criminal prosecution.

III. DOJ coordination in OFAC investigations

The Treasury Department component involved in the designations (or sanctions) business is the Office of Foreign Assets Control (OFAC). They have a number of programs designed to drive a wedge between international outlaws (organized crime members, weapons proliferators, drug kingpins) and the world's financial system. Pursuant to EO 13224, President George W. Bush, on September 23, 2001, declared a national state of emergency with respect to global terrorism. Thereafter, OFAC proposed for designation a number of individuals and entities which U.S. intelligence indicated were involved in terrorism. These persons and entities, whose names and aliases are published in a regularly-updated annex that is immediately disseminated to American financial institutions, are referred to as SDGTs. American banks—indeed, all American persons—are thereafter barred from having any financial relationship with them and, as a matter of law, all of the SDGT's U.S.-based assets are frozen.

How does OFAC make its case? It creates an Administrative Record, a document that marshals classified and unclassified intelligence into a single package that meets the approval of the Secretary of the Treasury. The question for the Secretary is whether the intelligence supports the theory that the proposed designee fits within the terms of EO 13224. If so, the subject becomes an SDGT by being named in the annex.

What is DOJ's role in this process? It is really two-fold. First, lawyers in the Civil Division review the Administrative Record for legal sufficiency because persons aggrieved by a particular SDGT designation have a right to sue the United States if they feel they were wrongly designated. The Federal Programs Branch (FPB) of the Civil Division defends Treasury Department's designation decisions when challenged through an Administrative Procedures Act lawsuit where the plaintiff must show the designation was "arbitrary and capricious." The government has generally won these actions. *See Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury*, 686 F.3d 965, 1001 (9th Cir. 2012); *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 739 (D.C. Cir. 2007); *Holy Land Found. for Relief and Dev. v. Ashcroft*, 333 F.3d 156, 167 (D.C. Cir. 2003); *Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748, 755 (7th Cir. 2002); *Benevolence Intern. Found., Inc. v. Ashcroft*, 200 F. Supp. 2d 935, 941 (N.D. Ill.

2002); *but see KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857, 918–19 (N.D. Ohio 2009). Due to the FPB’s role in defending these actions, it conducts pre-designation reviews for legal sufficiency of all proposed designees.

Secondly, lawyers from the National Security Division (NSD), pre-designation, are given notice of proposed designations in order to express any operational objections to a proposed SDGT designation. NSD then coordinates with the Assistant U.S. Attorney(s) assigned to the case to discuss the matter, focusing heavily on whether the timing of an OFAC designation might impact a criminal investigation or planned prosecution. For example, it could be that the public designation as an SDGT of a criminal target might impede the development of facts essential for the criminal case or cause the defendant to hide and thereby seek to avoid prosecution. Or, where the proposed designee is a domestic entity whose assets are going to be frozen, DOJ might want to suggest to OFAC that it time the designation to allow for the execution of a simultaneous search warrant and, thereby, enable prosecutors to access the physical records immediately (as discussed more below).

IV. The dilemma of the domestic designee

Although this does not happen much anymore, the early days of EO 13224 saw the Treasury Department designate a number of U.S.-based entities and persons as SDGTs. The Texas-based charity known as the Holy Land Foundation for Relief and Development, for example, was designated in December 2001. Mousa Abu Marzook, Hamas’ political chief and at one point a long-time U.S. resident, was designated, as was U.S. citizen Muhammed Salah. A couple of other charities with offices in the United States—al Haramain Foundation, Islamic African Relief Agency, and Benevolence International Foundation—were added to the SDGT list over the years.

The designation of domestic entities as SDGTs can present a dilemma to prosecutors, though not an insurmountable one. The designation ties up its assets, giving the designee who is eventually indicted no means to pay for their criminal defense, which can become a Sixth Amendment issue. OFAC can ameliorate this problem by licensing assets for legal fees, as it did in the *Holy Land Foundation* case.

Another problem occurs when a domestic entity is designated: OFAC freezes (“blocks”) all of its U.S. assets, including its files. OFAC post-designation enforcement actions look very much like a search warrant: Treasury-contracted trucks line up outside the SDGT’s office and remove every speck of paper from the premises. The problem is that these records cannot then be reviewed by law enforcement, which is what would happen with a search warrant. Instead, they are taken to a private contractor-leased warehouse, where they sit unexploited by law enforcement. The FBI, if it wants the records, must provide legal process (a subpoena or a search warrant), and be licensed by OFAC to look through the files. This can delay a fast-moving criminal investigation. The better practice, we have found, is to ask OFAC to delay the designation until the FBI obtains a search warrant, which is executed at the same time as the designation and blocking action. This is what happened in the *al Haramain* case. This way, the FBI can review the records immediately.

History shows that, when a domestic entity is designated as an SDGT, it is often indicted as well. When indictment becomes imminent, can prosecutors review the Administrative Record underlying the OFAC designation? Absolutely. It is clearly a good practice to do so. After all, the Administrative Record will be a consolidated, marshaled statement of the intelligence information that an SDGT has a demonstrable relationship with terrorists.

V. What does designation mean for criminal discovery?

Some prosecutors faced with an OFAC investigation of their criminal targets worry that the administrative proceeding will complicate their criminal discovery obligations. We have found this generally not to be the case. First and foremost, it is important to know and remember that OFAC does

not prepare any new intelligence. Rather, it is a consumer of information prepared by the Intelligence Community, and the Administrative Record it creates in support of designations is a compilation of materials it has received from the intelligence community. Although reviewing OFAC's Administrative Record might give the prosecutor a jump on the information he or she ultimately would receive and be required to review from the intelligence community, the fact that OFAC maintains an administrative record typically creates no additional discovery obligation for the prosecutor.

Indeed, the obligation of prosecutors handling national security cases to search for discoverable, classified materials exists independent of any activity undertaken by OFAC. Under the memorandum issued by Deputy Attorney General Gary Grindler on September 29, 2010, the Government has a duty to search when (among other circumstances) the prosecution knows or has a specific reason to know of discoverable information in the possession of the intelligence community.

Should a prosecutor's review of intelligence information identify potentially discoverable materials that are classified, the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3 §§ 1–16, may provide a procedural vehicle to obtain a court order to delete classified materials from discovery on the basis that the information is not relevant or helpful to the defense. Other time-tested techniques authorized by CIPA to protect sensitive sources and methods include the discovery of unclassified summaries from which information revealing sensitive sources and methods may be deleted, as well as factual stipulations. It is sometimes also possible to refine the criminal case to avoid the discovery obligation, to produce classified information to cleared defense counsel under protective order, or to obtain declassification of certain materials. These matters require substantial coordination with the intelligence community.

VI. Criminal investigations can be navigated in parallel with OFAC matters

Is OFAC's investigation of a prosecutor's criminal target a plus or a minus? From a good government standpoint, the designation of SDGTs is an important policy objective with significant national security benefits. Designation adds to the authorities by prospectively banning any person subject to U.S. jurisdiction from engaging in any financial transaction with the SDGT—for any purpose. SDGT funds are frozen, and SDGTs will not have access to U.S. financial markets. None of these important results are achievable through a § 2339B prosecution alone.

DOJ can be, and is, heard on the propriety of particular designations, which minimizes the overall adverse impact on criminal terrorist financing prosecutions. In the end, OFAC investigations and actions, while perhaps now used primarily for terrorist financing, are increasingly being undertaken in other criminal areas. They are certainly here to stay. The OFAC sanctions are part of the Government's commitment to bring "all tools" to bear on the problem of terrorist financing, and sanctions will buttress a prosecution by freezing assets so they will later be available for forfeiture.

It is therefore critically important for prosecutors to coordinate on matters of timing with OFAC. National Security Division attorneys are available to assist, and they can help you to work through all of the issues that arise from parallel proceedings that may be in play in your cases. ♦

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Using Material Support Statutes as an Investigative Tool: A Case Study

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When many prosecutors hear the term “terrorist financing,” their first thought may be of a complex financing scheme, such as the one uncovered in the U.S. prosecution of the Texas-based charity known as the Holy Land Foundation. However, as discussed in the article about terrorist financing trends appearing earlier in this issue, terrorist financing charges may arise in many other types of investigations. The material support statutes, 18 U.S.C. §§ 2339A and 2339B, proscribe individuals from providing, attempting to provide, or conspiring to provide material support or resources to terrorists or designated foreign terrorist organizations. The attempt prong of these statutes can be a powerful tool in undercover operations where there is information or evidence indicating a subject’s connection to terrorists or intent to conduct an attack.

As a case study, the prosecution of Waad Ramadan Alwan and Mohanad Shareef Hammadi in the Western District of Kentucky is an example of material support statutes being used successfully as an investigative tool in a lengthy investigation. In 2010, the FBI received information that Alwan had previously been incarcerated in Iraq from 2006 to 2007 for terrorism offenses. The FBI obtained copies of both a written statement made by Alwan as well as a videotaped statement in which Alwan admitted to participating in improvised explosive device (IED) attacks against U.S. and coalition troops in Iraq. Both statements were made in 2006 by Alwan while in custody in Iraq. Although Alwan admitted to having been involved with multiple IED attacks, the details as to dates, times, and locations of the attacks were somewhat vague.

When this information was received by the FBI in 2010, Alwan, an Iraqi citizen, was already residing in Bowling Green, Kentucky, after having entered the United States in 2009 through the United Nations Refugee Program. With an admitted operational terrorist residing in the United States, investigating Alwan’s background and determining the potential threat he posed in the United States was extremely important. However, the vague details in the written and recorded statements were hard to corroborate, and records from either the U.S. military or from Iraqi authorities linking Alwan to specific IED attacks in Iraq were difficult to find or nonexistent. The Washington Post reported that in the year 2007 alone, the peak of the Iraqi insurgency, approximately 23,000 IEDs were deployed in Iraq.

In August 2010, while still trying to corroborate the historical information regarding Alwan’s attacks, a confidential human source (CHS) was introduced into the investigation. Over the course of the next nine months, Alwan revealed to the CHS his past criminal activities as an Iraqi insurgent, and also committed new crimes by knowingly attempting to provide money and weapons to terrorists. During initial conversations with Alwan, the CHS explained that he was involved in sending money to Iraqi insurgents who were fighting against U.S. and coalition troops. Alwan advised that he was eager to assist in supporting the Iraqi insurgents. In September 2010, Alwan assisted the CHS in the purported effort to send money to the insurgents by transporting a package of cash that he believed would be ultimately sent to Iraq. The investigation continued over the course of several months with a series of similar material support operations in which Alwan believed he was sending money and weapons to insurgents in Iraq. The CHS initially told Alwan that the money was going to “the mujahidin” in Iraq. In a later meeting, the

CHS advised Alwan that the money and weapons they were sending would go to al-Qaeda and other groups.

The initial material support operation provided significant evidence for an attempted material support charge under 18 U.S.C. § 2339A, in that Alwan transported money with the belief and intention that the money was ultimately destined for insurgents in Iraq to support their continued fight against U.S. and coalition forces. Additional operations allowed the CHS to engage Alwan in detailed conversations about Alwan's past activities in Iraq. As they continued to meet, Alwan gradually began to discuss details of his background in Iraq more openly with the CHS. During various conversations between Alwan and the CHS over the course of several months, Alwan discussed how his cell had conducted IED and sniper attacks daily, and he gave several detailed explanations of how to build and use IEDs.

In order to corroborate Alwan's knowledge of IED construction, the CHS asked Alwan to draw several diagrams detailing how to construct IEDs. Alwan drew diagrams of several different types of IEDs and further explained how to use them. Explosives experts at the FBI later confirmed that Alwan's diagrams and instructions would produce operable IEDs. Based on information gathered during the course of the investigation, the FBI's Terrorist Explosive Device Analytical Center (TEDAC) was able to focus its search on the relevant evidence of IED attacks conducted by Alwan and his cell in Iraq, as well as the specific types of IEDs used in their attacks. (TEDAC analyzes all terrorist improvised explosive devices of interest to the United States and, to date, has received tens of thousands of IED submissions, primarily from Iraq and Afghanistan.)

In January 2011, TEDAC advised that they had obtained two latent fingerprints belonging to Alwan from an unexploded IED recovered in Iraq in or around September 2005. The prints were found on a cordless telephone base station marked with the brand name of the manufacturer, SENAQ. TEDAC also recovered a latent fingerprint of another identified individual on a separate unexploded IED. On several occasions during meetings with the CHS, Alwan discussed the other individual by name and detailed how they were part of the same cell in Iraq and how they had emplaced IEDs together. In one conversation with the CHS concerning the construction of IEDs, Alwan explained a remote detonation device for IEDs called "Seenow" (phonetic), stating that it was a telephone. This discussion matched the SENAQ brand base station containing Alwan's fingerprints.

The conversations with Alwan recorded by the CHS during the material support operations and the fingerprints obtained from the IEDs served as overwhelming evidence for charging Alwan with the crimes he committed in Iraq. Those charges include conspiracy to kill a U.S. national (18 U.S.C. § 2332(b)(2)) and conspiracy to use a weapon of mass destruction against a U.S. national (18 U.S.C. § 2332a(a)(1)). Both charges are punishable by a sentence of up to life imprisonment.

In addition to providing evidence for both historical and proactive criminal charges against Alwan, the sting operation also resulted in Alwan's recruitment of a second individual into the purported material support scheme. After participating in several purported material support operations, Alwan told the CHS about Mohanad Shareef Hammadi and advised that Hammadi has "experience." In fact, as it turned out, Hammadi was also a former operational terrorist in Iraq and had been part of al Qaida in Iraq. Hammadi, similarly, is an Iraqi citizen who entered the United States through the refugee program and was also living in Kentucky.

In late January 2011, Hammadi participated in his first purported material support operation by assisting Alwan in delivering money. Hammadi subsequently participated in several more operations with Alwan. The operations included the delivery of both money and weapons, such as rocket-propelled grenade launchers, C-4 plastic explosives, hand grenades, sniper rifles, and Stinger missile launchers. Prior to Hammadi's first delivery of weapons, the CHS discussed with Hammadi that the weapons would be going to al Qaida in Iraq. Alwan and Hammadi were arrested in May 2011, after making a final delivery of money and weapons to a waiting truck.

After being advised of his rights, Alwan consented to speak with FBI agents. Over the course of several days of interviews, Alwan admitted to his participation in the purported material support operations and also provided details of his terrorist activities in Iraq from 2003 to 2006. Hammadi similarly waived his rights and was interviewed for several days by the FBI. Hammadi also admitted his involvement in the purported material support operations and detailed his actions in Iraq. He admitted that he had joined the Jaysh al Mujahidin terrorist group in Iraq and had begun participating in attacks on U.S. troops in 2006. He provided information about numerous IED attacks he participated in and advised that his cell later became part of al Qaida.

Overall, the material support statutes provided critical legal tools in this undercover operation. In the 23-count indictment filed against Alwan, 19 of the counts charged attempts to provide material support or resources. For many of the money and weapons deliveries, Alwan was charged with violations of both §§ 2339A and 2339B, as both were applicable. Hammadi was also charged with nine counts of attempting to provide material support or resources under §§ 2339A and 2339B. Using material support statutes in this case resulted in not only substantial evidence for charging material support activities occurring in Kentucky, but also provided a significant amount of evidence relating to Alwan's previous crimes committed in Iraq. The material support activities in the investigation also directly led to Alwan's recruitment of Hammadi, another operational terrorist living in the United States. Furthermore, the overwhelming evidence collected throughout the investigation helped convince both defendants to speak with the FBI immediately after their arrests. Their post-arrest interviews resulted in admissions to many of the charged crimes. The substantial amount of evidence obtained during the investigation helped to bring about guilty pleas from both defendants and ultimately resulted in a life sentence for Hammadi and a recommended sentence of 40 years in prison for Alwan. ❖

ABOUT THE AUTHOR

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Using Criminal and Civil Forfeiture to Combat Terrorism and Terrorist Financing

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Asset forfeiture is one of the most powerful tools in a counterterrorism prosecutor's arsenal. Section 981 of Title 18 contains a series of provisions that can be used to deprive terrorists and their financiers of their assets. They can also be used to disrupt and dismantle the financial infrastructure that enables terrorist organizations to survive.

These statutory provisions enable law enforcement to not only seize and forfeit the assets belonging to those individuals who directly plan, participate, and perpetrate terrorism related-crimes, but also allow for the seizure and forfeiture of the assets of those individuals or entities who provide services or launder funds to known terrorist organizations. As discussed in more detail below, one forfeiture provision, § 981(a)(1)(G), allows for both criminal and civil forfeiture of all assets related to terrorism. Indeed, this forfeiture provision expressly enables law enforcement to seize and forfeit *all* assets, *wherever* located, of *anyone* engaged in planning or perpetrating acts of terrorism—regardless of whether the property was involved in the terrorist activity or is otherwise traceable to that activity, as required by most other forfeiture statutes. Another forfeiture provision allows for the forfeiture of funds traceable to predicate offenses, including violations of the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701–1707, and the money laundering laws. *See* 18 U.S.C. § 981(a)(1)(C) (2014). Another provision provides for the forfeiture of property involved in money laundering. *See id.* § 981(a)(1)(A). Finally, another subsection of § 981 allows for the forfeiture of funds in correspondent accounts to serve as a substitute for forfeitable funds held abroad. *See id.* § 981(k). (In order to transact in U.S. dollars, most foreign banks maintain accounts at U.S. banks. Such accounts are called “correspondent accounts.”)

As discussed herein, there are numerous forfeiture tools that can be used to punish, deter, and dismantle organizations that support terrorism. This article provides a general overview of both the criminal and civil forfeiture provisions that can be used in terrorism-related cases and discusses criminal and civil actions that have effectively used these forfeiture provisions to combat terrorism and terrorist financing.

I. The statutes

In its effort to combat terrorism, Congress enacted the USA PATRIOT Act in 2001, and with it, § 981(a)(1)(G). This statutory provision is arguably the most powerful forfeiture provision, providing in relevant part for the forfeiture of:

(G) All assets, foreign or domestic –

- (i) of any individual, entity, or organization engaged in planning or perpetrating any Federal crime of terrorism (as defined in section 2332b(g)(5)) against the United States, citizens or residents of the United States, or their property, and all assets, foreign or domestic, affording any person a source of influence over any such entity or organization;
- (ii) acquired or maintained by any person with the intent and for the purpose of supporting, planning, conducting, or concealing any Federal crime of terrorism (as defined in section 2332b(g)(5)) against the United States, citizens or residents of the United States, or their property;
- (iii) derived from, involved in, or used or intended to be used to commit any Federal crime of terrorism (as defined in section 2332b(g)(5)) against the United States, citizens or residents of the United States, or their property; or
- (iv) of any individual, entity, or organization engaged in planning or perpetrating any act of international terrorism (as defined in section 2331) against any international organization (as defined in section 209 of the State Department Basic Authorities Act of 1956 (22 U.S.C. 4309(b)) or against any foreign Government. Where the property sought for forfeiture is located beyond the territorial boundaries of the United States, an act in furtherance of such planning or perpetration must have occurred within the jurisdiction of the United States.

18 U.S.C. § 981(a)(1)(G) (2014). The plain text of the statute is extremely broad. In addition, it applies in both criminal and civil proceedings. Although the provision is codified as a civil forfeiture statute in 18 U.S.C. § 981, it applies with equal force in criminal cases pursuant to 28 U.S.C. § 2461(c). Under this section:

If a person is charged in a criminal case with a violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized, the Government may include notice of the forfeiture in the indictment or information pursuant to the Federal Rules of Criminal Procedure. If the defendant is convicted of the offense giving rise to the forfeiture, the court shall order the forfeiture of the property as part of the sentence in the criminal case pursuant to to [sic] the Federal Rules of Criminal Procedure and section 3554 of title 18, United States Code.

28 U.S.C. § 2461(c) (2014).

Section 981(a)(1)(A) allows for the forfeiture of any property involved in a money laundering offense. Under § 981(a)(1)(A), “property involved in” money laundering includes not just the proceeds of the offense, but also property that facilitates the offense, and in some circumstances may include legitimate funds knowingly commingled with crime proceeds.

Section 981(a)(1)(C) provides for the forfeiture of any property that constitutes or is derived from proceeds traceable to a lengthy list of predicate offenses. The list incorporates by reference all specified unlawful activity set forth at 18 U.S.C. § 1956(a)(7). Relevant for purposes here, violation of IEEPA is among these predicate offenses.

Finally, § 981(k) bolsters the enforcement mechanism of these powerful provisions by providing for the forfeiture of funds in correspondent accounts to serve as a substitute for forfeitable funds held abroad. *See* 18 U.S.C. § 981(k) (2014).

II. Criminal forfeiture

A. Material support cases

Through criminal forfeiture, the Government has successfully recovered assets belonging to individuals, entities, and organizations.

A leading case involving an individual is *United States v. Saade*, No. S1 11 Crim. 111(NRB), 2013 WL 6847034, at *2–3 (S.D.N.Y. Dec. 30, 2013), wherein the court ordered the forfeiture of *all* of the defendant’s assets following his conviction for conspiracy to provide material support or resources to the Taliban and conspiracy to acquire and transfer anti-aircraft missiles, in violation of 18 U.S.C. §§ 2339A and 2332g. By way of background, two of the defendants, Alwar Pouryan and Oded Orbach, were convicted after a bench trial for their efforts to acquire and transfer over \$25,000,000 in weapons sought by the Taliban, including surface-to-air missiles, which were weapons intended to be used to kill Americans in Afghanistan. Prior to sentencing, defendant Pouryan filed a motion opposing the Government’s proposed order of forfeiture, which sought of all of Pouryan’s identified assets, regardless of whether they had a nexus to his crimes. Pouryan argued that “by seizing assets with no reasonable nexus to his convictions, such forfeiture necessarily violates the Excessive Fines Clause and should be rejected.” *Id.* at *2.

In addressing the constitutional challenge raised by Pouryan, which appears to be the first constitutional challenge to § 981(a)(1)(G), the court recognized the statute’s punitive nature and acknowledged Congress’s intent to authorize the Government to forfeit all of the defendant’s property, regardless of the nexus to the crimes committed. In reaching this conclusion, the court applied the four-factor test set forth in *United States v. Varrone*, 554 F.3d 327, 331 (2d Cir. 2009), which the Second Circuit previously applied to determine whether a punitive forfeiture is grossly disproportional under *United States v. Bajakajian*, 524 U.S. 321, 328 (1998). Finding that all factors weighed against a finding of gross disproportionality, the court concluded that there was no gross disproportionality in *Saade*.

Further, the court expressly recognized a key principle in criminal (*in personam*) versus civil (*in rem*) forfeiture provisions, noting that where “ ‘the Government has sought to punish [a defendant] by proceeding against him criminally, *in personam*,’ the property’s role in the offense is ‘irrelevant’ to an excessiveness inquiry.” *Id.* at *2 (quoting *Bajakajian*, 524 U.S. at 333).

Another case emphasizing the power of forfeiture is *United States v. Holy Land Found. for Relief and Dev. (HLF)*, No. 3:04-CR-0240-P, 2011 WL 3703333, at *1 (N.D. Tex. Aug. 19, 2011). Discussed in another article in this issue of the [U.S. Attorneys’ Bulletin](#), HLF was a Texas-based corporation that once operated in the United States as the chief fundraising arm for Hamas. After a jury found HLF and its principals guilty of multiple terrorist financing crimes (including the provision of material support or resources to a designated foreign terrorist organization, as well as tax, IEEPA, and international money laundering violations), the jury returned a special verdict forfeiting \$12.4 million in assets determined to have been derived from proceeds traceable to the money laundering offenses. The forfeiture order was entered under 18 U.S.C. § 982(a)(1) (providing for criminal forfeiture of funds involved in or traceable to money laundering) rather than § 981(a)(1)(G), because the conduct preceded passage of § 981(a)(1)(G) through the USA PATRIOT Act.

The *HLF* case was also significant from a forfeiture standpoint because third party claimants sought to enforce judgments against the assets of HLF under the Terrorism Risk Insurance Act of 2002 (TRIA), and trump the Government’s forfeiture order. Significantly, the Fifth Circuit held that the third party claimants lacked any basis in the forfeited property, either under 21 U.S.C. § 853(n) (allowing for ancillary proceedings) or TRIA (making assets available for attachment and execution if the assets are deemed “blocked” under the terms of the statute). See *United States v. Holy Land Found. for Relief and*

Dev. (HLF), 722 F.3d 677, 684–85 (5th Cir. 2013). Thus, the assets of HLF were forfeitable to the United States.

B. IEEPA cases

IEEPA violations can also result in significant forfeiture penalties. Under § 981(a)(1)(C), the United States can forfeit “[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to” numerous violations set forth in the statute, as well as those defined in 18 U.S.C. § 1956(c)(7), which includes violations of IEEPA. *See* 18 U.S.C. § 981(a)(1)(C) (2014).

The Government recently brought a criminal action against BNP Paribas S.A. (BNPP), a global financial institution headquartered in Paris, for violations of IEEPA, as well as the Trading With The Enemy Act (TWEA), and successfully obtained more than \$8 billion in criminal forfeiture using these provisions. *See* Press Release, Dep’t of Justice, BNP Paribas Pleads Guilty In Manhattan Federal Court To Conspiring To Violate U.S. Economic Sanctions (July 9, 2014). The criminal action resulted from an investigation that revealed that over the course of 8 years, BNPP conspired with banks and other entities located in or controlled by countries subject to economic sanctions, including Cuba, Iran, and Sudan (sanctioned entities), to knowingly and willfully move more than \$8.8 billion through the U.S. financial system on behalf of sanctioned entities. It included more than \$4.3 billion in transactions involving entities designated by the United States as Specially Designated Nationals.

BNPP engaged in this criminal conduct through various sophisticated schemes designed to conceal from U.S. regulators the true nature of the illicit transactions. For example, BNPP routed illegal payments through third party financial institutions to conceal not only the involvement of the sanctioned entities but also BNPP’s role in facilitating the transactions. BNPP also instructed other financial institutions not to mention the names of sanctioned entities in payments sent through the United States, and removed references to sanctioned entities from payment messages to enable the funds to pass through the U.S. financial system undetected.

BNPP agreed to plead guilty to conspiring to violate IEEPA and TWEA by processing billions of dollars through the U.S. financial system on behalf of Cuban, Iranian, and Sudanese entities subject to U.S. economic sanctions. As part of the plea agreement, BNPP agreed to pay financial penalties of approximately \$9 billion, including forfeiture of \$8.8 billion and a fine of \$140 million.

In accepting the guilty plea of the bank, which was the first time a financial institution had agreed to plead guilty based on large-scale, systematic violations of U.S. economic sanctions laws, the court commented on the significant and record-setting forfeiture triggered by the violations in this case.

The defendant’s actions not only flouted U.S. foreign policy, but also provided support to governments that threaten both our regional and national security. And in the case of Sudan, a government that has committed flagrant human rights abuses and has known links to terrorism. I find that the severity of the defendant’s conduct more than warrants the criminal charge to which it has pleaded. . . . The forfeiture amount will surely have a deterrent effect on others that may be tempted to engage in similar conduct, all of whom should be aware that no financial institution is immune from the rule of law.

Sentencing Transcript at 34–35, *United States v. BNPP*, No. 1:14-cr-00460-LGS (S.D.N.Y July 9, 2014).

III. Civil forfeiture

Terrorists and State Sponsors of terrorism have used our robust economy to generate funds and store assets. Particularly where the putative defendant is overseas, civil forfeiture can provide a powerful tool for disruption. Unlike criminal forfeiture, which is *in personam* after the defendant’s conviction, a

civil forfeiture complaint is brought *in rem*, that is, against the asset. Two civil actions prosecuted by the U.S. Attorney's Office for the Southern District of New York (SDNY) recently demonstrate how federal prosecutors can use the civil forfeiture laws to seize and forfeit significant assets that would otherwise be used to provide support for terrorist organizations.

In *United States v. Lebanese Canadian Bank et al.*, No. 11 Civ. 9186 (PAE) (S.D.N.Y. Feb. 10, 2011), the Government filed a civil forfeiture and money laundering action against Lebanese Canadian Bank (LCB), two Lebanese money exchange houses, a shipping company, 30 U.S.-based car dealers, and their assets, alleging that these were forfeitable under § 981(a)(1)(A) and (C) as proceeds of IEEPA violations and property involved in international money laundering. The Government alleged a massive international scheme involving the movement and conversion of criminal proceeds through Lebanon, the United States, and West Africa, as follows. From 2007 to 2011, at least \$329 million were wired from LCB and other financial institutions (primarily the two Lebanese money exchange houses) to the United States for the purchase of used cars. These cars were then shipped to and sold in West Africa. Cash from the sale of the cars, along with the proceeds of narcotics trafficking, were then funneled to Lebanon through Hezbollah-controlled money laundering channels, with substantial cash being paid to Hezbollah. Funds from LCB were then transferred back to the United States for the purchase of additional cars, repeating the cycle. The complaint alleged that the assets of LCB, the Lebanese exchange houses, along with the assets of the U.S. car dealers and a shipping company were forfeitable as proceeds of IEEPA violations and as property involved in money laundering.

Prior to the filing of the civil complaint on February 10, 2011, the Department of the Treasury, Financial Crimes Enforcement Network (FinCEN), issued a finding and proposed rule, pursuant to the USA PATRIOT Act, that LCB was a financial institution of primary money laundering concern based on, among other things, FinCEN's determination that there was reason to believe that LCB had been routinely used by drug traffickers and money launderers operating in various countries in Central and South America, Europe, Africa, and the Middle East. *See* Notice of Finding, 76 Fed. Reg. 9403 (Feb. 17, 2011) (published on FinCEN Web site on February 10, 2011). FinCEN also determined that there was reason to believe that LCB managers were complicit in the network's money laundering activities. *Id.* at 9404–05.

After the FinCEN action, another Lebanese financial institution, Société Générale de Banque au Liban (SGBL), acquired most of the assets of LCB. In connection with the purchase, \$150 million was placed in an escrow account at Banque Libano Française SAL (BLF) in Lebanon. Through the investigation, the Government located the escrow account at BLF and obtained a warrant pursuant to 18 U.S.C. § 981(k) to seize up to \$150 million from BLF's five correspondent accounts in the United States, as assets of LCB. In August 2012, the Government seized \$150 million from the BLF correspondent accounts as a substitute for the funds held in escrow in Lebanon (the BLF Funds).

The civil action was resolved through settlements. *See United States v. Lebanese Canadian Bank et al.*, No. 11 Civ. 9186 (PAE) (S.D.N.Y. June 21, 2013) (Stipulation and Order of Settlement). Under the terms of its settlement, LCB was required to forfeit \$102 million to the United States. (The remainder of the seized BLF funds was paid to SGBL.) Pursuant to separate settlement agreements, the Lebanese exchange houses forfeited in excess of \$720,000. The U.S.-based car dealers forfeited additional funds and vehicles and, under the terms of their settlement agreements, were required to institute Know Your Customer and Anti-Money Laundering Policies. Through this civil action, the Government was able to expose this money laundering scheme to the public and dismantle a significant money laundering channel used by a terrorist organization.

In another significant civil forfeiture, *In re 650 Fifth Avenue and Related Properties*, No. 08 Civ. 10934 (KBF), 2013 WL 5178677, at *1, *38 (S.D.N.Y. Sept. 16, 2013), the United States obtained the forfeiture of substantial assets controlled by the Government of Iran (GOI). These assets, which were owned by Assa Corporation and its parent (collectively, Assa), the Alavi Foundation (Alavi), and a partnership between these organizations, included a commercial building in Manhattan valued in excess

of \$525 million, as well as seven additional properties and bank accounts. At the same time as the forfeiture complaint was filed, OFAC designated Assa Corporation and Assa Company Ltd. for being controlled by, and for acting for, or on behalf of, Bank Melli Iran, which had previously been designated on the basis that it is controlled by the GOI. SDNY filed its *in rem* action and sought forfeiture of these properties under two theories. First, Assa, Alavi, and the partnership engaged in violations of IEEPA and certain Iranian Transaction Regulations banning the provision of services with the GOI. Thus, the assets were proceeds traceable to such violations and subject to forfeiture under 18 U.S.C. § 981(a)(1)(C). Second, the assets were subject to forfeiture pursuant to 18 U.S.C. § 981(a)(1)(A) as property involved in the promotion, concealment, and international money laundering.

At its core, the complaint alleged that Assa, Alavi, and their partnership provided services to, and for the financial benefit of the GOI, in willful violation of economic sanctions that had been imposed on the GOI pursuant to a Presidential Executive Order and implementing regulations. These services included concealing GOI-controlled Bank Melli Iran's ownership interest in the building, managing the building for Bank Melli Iran, sending revenues to the GOI via Assa and Bank Melli Iran, and Alavi's disbursement of charitable funds pursuant to the direction of GOI representatives.

On the eve of trial, the court granted the Government's motion for summary judgment against Assa, the Alavi Foundation, and the partnership concerning the building and bank accounts related to the building. The court had previously granted partial summary judgment against Assa. Specifically, the court found that Assa's assets are "blocked assets" as defined in § 201 of Terrorism Risk Insurance Act and that Assa's assets constitute "blocked assets" of Bank Melli Iran, an instrumentality of the GOI. *See* Terrorism Risk Insurance Act, Pub. L. No. 107-297, § 201, 116 Stat. 2322 (2002). As such, Assa's interests in the 650 Fifth Avenue properties were subject to execution by judgment creditors in possession of valid terrorism-based judgments against Iran.

In an 82-page opinion, the court held, among other things, that there were no triable issues of fact as to: (1) whether Assa engaged in violations of the Iranian Transaction Regulations that had been promulgated under IEEPA, (2) whether Assa engaged in both promotion and concealment money laundering and international money laundering, in violation of 18 U.S.C. § 1956, and (3) Assa being owned and controlled by Bank Melli Iran, and Bank Melli being owned and controlled by Iran. *See In re 650 Fifth Avenue and Related Properties*, No. 08 Civ. 10934 (KBF), 2013 WL 5178677, at *2, *22 (S.D.N.Y. Sept. 16, 2013). As to Alavi and the partnership, the court found no triable issues of fact regarding their violations of IEEPA and the Iranian Transaction Regulations banning the provision or export of services to Iran, and it found that they had provided such services. The court specifically found that Alavi had provided services to Assa by managing the partnership and the building and that Assa was a front for Bank Melli Iran, and thus also a front for the GOI. Notably, the court found that Alavi committed a "broader" IEEPA violation, providing services to the GOI by shielding and concealing Iranian assets. The court stated, "there is simply no way to erase the stark fact that Alavi was present at the creation and birth of Assa (its midwife): along with Bank Melli, it directly participated in the plan to create Assa as a company (in fact, two companies—a U.S. Assa and a Channel Islands Assa) to act on behalf of Bank Melli." *Id.* at *18. The court found there was "no doubt that Assa began its existence as the brainchild of the Mostazafan Foundation—now Alavi—and Bank Melli; and there is no evidence that it ever made a break with its ultimate owner." *Id.* at *22. Accordingly, on September 16, 2013, the court ruled that the building and bank accounts related to the building were forfeited to the United States. *Id.* at *38. On October 7, 2013, the Government filed for summary judgment against the remaining seven real properties located in California, Maryland, Queens, Texas, and Virginia in the Alavi Foundation's name, which were severed from the court's earlier summary judgment opinion in favor of the Government. On March 28, 2014, the court granted the Government's motion.

Parties holding terrorism-related judgments against Iran have sought writs of attachment to enforce their judgments against the forfeited assets. These "Judgment Creditors" include families and estates of victims of the 1983 bombings of U.S. Marine Barracks in Beirut, the 1996 bombing of the

Khobar Towers in Saudi Arabia, and other attacks. Under an April 2014 settlement agreement, signatory Judgment Creditors will receive apportioned net proceeds from the sale of the forfeited properties.

Through the *In re 650 Fifth Avenue* litigation, the Government effectively shut down a steady income stream that funneled back to Iran. Alavi has appealed.

IV. Parallel civil and criminal forfeiture proceedings

The Government may pursue civil forfeiture in parallel to a criminal proceeding. Moreover, under the fugitive disentitlement doctrine, persons who have refused to appear in a criminal case pending against them may not claim or otherwise challenge the civil forfeiture of seized funds. *See* 28 U.S.C. § 2466 (2014); *United States v. Technodyne LLC*, 753 F.3d 368, 373 (2d Cir. 2014).

A recent case brought by the SDNY illustrates the significance of the Government's ability to pursue both criminal and civil forfeiture for IEEPA violations. In *United States v. Li Fangwei*, No. 14 Cr. 144 (LAP) (S.D.N.Y. Apr. 2014), the defendant was indicted for participating in a scheme to commit IEEPA violations and to launder the proceeds of IEEPA violations through the U.S. financial system. *See* Press Release, Dep't of Justice, *Li Fangwei Charged In Manhattan Federal Court With Using A Web Of Front Companies To Evade U.S. Sanctions* (Apr. 29, 2014). Li Fangwei was the principal and commercial manager of a metallurgical production company in Dalian, China, called LIMMT. For years prior to the filing of the indictment, Fangwei's actions supported the proliferation of weapons of mass destruction, which included selling banned weapons material to the Iranian military. Accordingly, the Department of the Treasury's Office of Foreign Asset Controls (OFAC) prohibited Fangwei and LIMMT from conducting transactions through the U.S. financial system.

The investigation revealed that in response to OFAC's designation, Fangwei and LIMMT used aliases and other shell companies to make an end-run around the OFAC designations and continue to conduct his business in direct contravention of IEEPA. Because it was likely that Fangwei would not be physically found in the United States or brought to the United States for prosecution, the Government employed various civil forfeiture tools to seize his crime proceeds.

First, the Government used 18 U.S.C. § 981(k) to seize the equivalent value of the IEEPA proceeds Fangwei had on deposit at Shanghai Pudong Development Bank (SPDB) in China from SPDB's interbank or correspondent bank accounts in the United States. On December 19, 2013, the Government obtained warrants to seize approximately \$7 million in funds held at correspondent accounts in the United States on behalf of the SPDB in China, at which Fangwei and LIMMT held accounts under their own names and through several aliases and shell companies.

Specifically, § 981(k) provides:

(1) In general.--

(A) For the purpose of a forfeiture under this section or under the Controlled Substances Act (21 U.S.C. 801 et seq.), if funds are deposited into an account at a foreign financial institution (as defined in section 984(c)(2)(A) of this title), and that foreign financial institution (as defined in section 984(c)(2)(A) of this title) has an interbank account in the United States with a covered financial institution (as defined in section 5318(j)(1) of title 31), the funds shall be deemed to have been deposited into the interbank account in the United States, and any restraining order, seizure warrant, or arrest warrant in rem regarding the funds may be served on the covered financial institution, and funds in the interbank account, up to the value of the funds deposited into the account at the foreign financial institution (as defined in section 984(c)(2)(A) of this title), may be restrained, seized, or arrested.

* * *

(2) No requirement for Government to trace funds.--If a forfeiture action is brought against funds that are restrained, seized, or arrested under paragraph (1), it shall not be necessary for the Government to establish that the funds are directly traceable to the funds that were deposited into the foreign financial institution (as defined in section 984(c)(2)(A) of this title), nor shall it be necessary for the Government to rely on the application of section 984.

See 18 U.S.C. § 981(k) (2014). After the indictment, the Government also seized, pursuant to § 981(k), an additional \$400,000 from another correspondent account in the United States held in the name of Bank of China.

Because § 981(k) permits funds in a U.S.-based correspondent account to serve as a substitute for the forfeitable funds being held abroad, the Government was able to target and seize the proceeds of Fangwei's criminal scheme. On April 29, 2014, in connection with the unsealing of the indictment against Fangwei, the Government filed a civil forfeiture complaint against the seized funds. Under the fugitive disentitlement doctrine, Fangwei is unable to file a claim or otherwise challenge the forfeiture of the seized funds because a criminal defendant cannot assert an interest in a civil forfeiture case while simultaneously refusing to appear in the criminal case pending against him. *See* 28 U.S.C. § 2466 (2014); *Technodyne LLC*, 753 F.3d at 373.

Thus, the parallel civil forfeiture action will enable the Government to obtain the forfeiture of Fangwei and LIMMT's assets as well as disrupt his scheme to violate U.S. sanctions, even if Fangwei remains a fugitive and avoids prosecution and criminal forfeiture.

V. Conclusion

Criminal and civil forfeiture statutes are powerful tools to punish and deter terrorism and terrorist financing and to dismantle organizations that support and fund terrorism. These provisions can be used singularly or in parallel proceedings to effectively combat terrorism and terrorist financing. ❖

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