

RETHINKING EXTRATERRITORIAL PROSECUTION IN THE WAR ON TERROR: EXAMINING THE UNINTENTIONAL YET FORESEEABLE CONSEQUENCES OF EXTRATERRITORIALLY CRIMINALIZING THE PROVISION OF MATERIAL SUPPORT TO TERRORISTS AND FOREIGN TERRORIST ORGANIZATIONS

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INTRODUCTION

Terrorists are an elusive bunch. The ability to track and terminate the source of terrorists' funding is central to making large strides against international terrorism. But the United States has had only limited success—terrorists have proved themselves to be thoughtful and formidable enemies, able to frustrate the most sophisticated efforts of their enemies by using the unconventional combination of ancient guerilla warfare tactics and advanced technologies to accomplish their goals.¹ In response to the tragic attacks of September 11, 2001, Congress passed the United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, or USA Patriot Act (Patriot Act), and the United States' intelligence agencies refocused and redoubled their efforts to combat terror. Some of these efforts, however, may frustrate rather than further U.S. goals.

To avoid detection by global intelligence services resulting from the electronic, traceable trails of their financial transactions, terrorists often resort to a centuries-old form of unlicensed money transfer called *hawallah*.² This not only protects the identities of the terrorists themselves but also the identities of those who fund terrorists. Before September 11, 2001, Congress criminalized the financing of terrorism within the United States with section 2339A of Title 18 ("section

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1. TECHNICAL ANALYSIS GROUP, INSTITUTE FOR SECURITY TECHNOLOGY STUDIES AT DARTMOUTH COLLEGE, EXAMINING THE CYBER CAPABILITIES OF ISLAMIC TERRORIST GROUPS 3 (March 2004), available at <http://www.ists.dartmouth.edu/TAG/cyber-capabilities-terrorist.htm> (noting that terrorists are able to evade the detection of reconnaissance satellites, signals intelligence systems, and electronic and financial eavesdropping techniques of U.S. intelligence agencies by utilizing low technology means of communication and exchange, while employing technologically sophisticated methods when appropriate).

2. *Id.*

2339A").³ The Patriot Act, however, strengthened section 2339A's prohibition against the provision of material support to terrorists by permitting its extraterritorial application.⁴ In addition, the Patriot Act amended section 2339B of Title 18 ("section 2339B"), which directly proscribed the provision of material support not only to terrorists themselves but to foreign terrorist organizations ("FTOs"), and provided for lengthier prison sentences, up to life imprisonment.⁵

The United States is far from being the only nation to condemn the financing of terrorists and FTOs. On December 9, 1999, the United Nations General Assembly adopted the International Convention for the Suppression of the Financing of Terrorism ("the International Convention"). It was not until June 2002, however, that the United States ratified the International Convention. Shortly thereafter, Congress passed section 2339C of Title 18 ("section 2339C") which extraterritorially proscribed the provision or collection of funds for terrorists, fulfilling the United States' obligation under the International Convention. Specifically, the International Convention recalls the General Assembly resolution calling on all States to "take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organizations, whether such financing is direct or indirect through organizations which also have or claim to have charitable, social or cultural goals or which are also engaged in unlawful activities . . .".⁶ While the Department of Justice ("DOJ") has used sections 2339A and 2339B to prosecute the provision of material support to terrorists and FTOs, the DOJ has yet to prosecute an offender under section 2339C.⁷ Sections 2339A, 2339B, and 2339C provide the DOJ with ample authority to prosecute the financing of FTOs domestically and abroad. Their extraterritorial reach, however, is broad and controversial and the wisdom of their application is questionable.

This article will examine the extraterritorial application and efficacy of sections 2339A, 2339B, and 2339C. Part I of this article discusses the policies underlying sections 2339A, 2339B, and 2339C, their prohibited acts, mechanics, and jurisdictional predicates. Because of the complexity of section 2339C, this article explores section 2339C's operation and extraterritorial application in great detail. Part II of this article examines the principles of international law that permit the extraterritorial application of a nation's criminal laws, and attempts to place the application of sections 2339A, 2339B, and 2339C within those principles. Part III of this article examines whether extraterritorially prosecuting the provision of material support to terrorists and FTOs is a useful tool to combat terrorism in the context of intelligence agencies' obligation to protect sources and methods.

3. 18 U.S.C. § 2339A (2000).

4. 18 U.S.C. § 2339A (Supp. I 2003).

5. 18 U.S.C. § 2339B (Supp. II 2004).

6. International Convention for the Suppression of the Financing of Terrorism pmbl., Dec. 9, 1999, 39 I.L.M. 270, 270 [hereinafter International Convention].

7. See generally *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176 (C.D. Cal. 1998) (motion for preliminary injunction challenging constitutionality of provisions, and discussing the breadth of 2339A's material support prohibitions); see also *Boim v. Quranic Literacy Inst. & Holy Land Found.*, 291 F.3d 1000 (7th Cir. 2002) (discussing the application of section 2339B to acts that aid and abet terrorists).

Finally, in conclusion, this article provides recommendations designed to protect the efficacy of the United States intelligence community's operations with respect to the war on terror while also furnishing the DOJ with powerful tools to prosecute the provision of material support to terrorists and FTOs.

I. THE POLICY AND MECHANICS OF FEDERAL LAW CRIMINALIZING THE SUPPORT OF TERRORISTS

A. Section 2339A & Section 2339B

Unlike section 2339C, sections 2339A and 2339B are relatively simple and straightforward statutes. Section 2339A, defines "material support or resources," as used throughout section 2339, to include the provision of "currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials."⁸ The statute further states, "[w]hoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out . . ." any one of a number of enumerated terrorist acts, "or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act" violates section 2339A.⁹ A violation of section 2339A carries with it a possible fine, imprisonment not more than fifteen years, or both, and if the violation results in the death of any person, a maximum punishment of life imprisonment.¹⁰

Prior to the Patriot Act, section 2339A did not apply extraterritorially.¹¹ The Patriot Act, however, amended section 2339A by removing the jurisdictional qualifier: "Whoever, within the United States . . ." which now reads, "Whoever . . ." ¹² The Patriot Act's amendment of section 2339A evidences Congress' clear intent to have section 2339A apply extraterritorially.

While section 2339A concerns individual terrorists, section 2339B deals with FTOs.¹³ Section 2339B provides that, "[w]hoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so"

8. See 18 U.S.C. § 2339A(b) (2000) (during which period § 2339A still retained language limiting its application to the United States).

9. *Id.* § 2339A(a).

10. *Id.*

11. Compare 18 U.S.C. § 2339A (2000) with 18 U.S.C. § 2339A (Supp. I 2003).

12. See United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, Pub. L. No. 107-56, § 805, 115 Stat. 272, 377 (2001) (amending 18 U.S.C. § 2339A to permit its extraterritorial application).

13. 18 U.S.C. § 2339B (Supp. II 2004).

commits a violation of section 2339B.¹⁴ Much like section 2339A, section 2339B violations carry with it a fine, a maximum sentence of up to fifteen years imprisonment, or both, and, if a violation causes the death of any person, imprisonment for any term of years or for life.¹⁵ Further, section 2339B requires that financial institutions that are aware that they are in "possession of, or [have] control over, any funds in which a foreign terrorist organization, or its agent, has an interest, shall" retain possession or control over such funds and report the existence of the funds to the Secretary of the Treasury.¹⁶

Until 2004, section 2339B contained the phrase, "subject to the jurisdiction of the United States. . . ."¹⁷ Whatever doubt this language may have cast on whether Congress intended section 2339B to apply extraterritorially, subparagraph (d) eliminates it. Congress amended subparagraph (d) of section 2339B to explicitly state, "[t]here is extraterritorial Federal jurisdiction over an offense under this section."¹⁸ Now, in much the same manner as section 2339C, subparagraph (d) sets forth the jurisdictional predicates necessary for the operation of extraterritorial jurisdiction. Such jurisdictional predicates include the offender being a U.S. national or stateless person with a residence in the United States; when an offender whose acts occur without the U.S. is subsequently found within the U.S.; when an offense occurs in whole or part within the U.S.; when an offense affects interstate or foreign commerce; when an offender assists another to commit an offense over whom the U.S. has jurisdiction.¹⁹

B. Section 2339C

Section 2339C, however, is a very involved and complicated statute. The International Convention intended to obligate signatory states to enact formidable and effective positive law prohibiting the direct or indirect financing of terrorism.²⁰ With the Suppression of the Financing of Terrorism Convention Implementation Act and the addition of section 2339C to Title 18, the United States duly fulfilled that obligation, giving the DOJ a powerful tool in the war on terrorism, able to reach domestic as well as international entities that knowingly finance terrorists.

Section 2339C permits the federal prosecution of anyone who:

by any means, directly or indirectly, unlawfully and willfully provides or collects funds with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part, in order to carry out--

14. *Id.* § 2339B(a)(1).

15. *Id.*

16. *Id.* § 2339B(a)(2).

17. *Id.* § 2339B(a)(1).

18. *Id.* § 2339B(d).

19. *Id.* § 2339B(d)(1).

20. See generally International Convention, *supra* note 6.

(A) an act which constitutes an offense within the scope of a treaty . . . as implemented by the United States, or

(B) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act²¹

Further, section 2339C criminalizes attempts or conspiracies to carry out the above terrorist acts.²² Most notably, however, for an act to constitute an offense in the subsection, “it shall not be necessary that the funds were actually used to carry out a predicate act.”²³ In other words, section 2339C makes it explicitly clear that the knowing provision of funds intended to finance terrorists or FTOs is a federal crime regardless of whether the funds ever in fact finance a terrorist act.

There is, however, a distinction based on jurisdiction over offenses within and without the United States, and based thereon section 2339C requires distinctive jurisdictional predicates.²⁴ For offenses occurring within the United States, there is federal jurisdiction when the offender is a national of another state or a stateless person; when an offender is on board a foreign vessel or aircraft registered in a foreign country; when an offender was on board a vessel operated by a foreign government; or, when an offender is subsequently found outside the United States.²⁵ Further, when an offense that occurs within the United States that “was directed toward or resulted in the carrying out of a predicate act against” foreign nationals, foreign governments (including embassies), or was designed to influence a foreign government or international organization to act or abstain from acting in any manner, section 2339C also authorizes jurisdiction.²⁶ Further still, there is jurisdiction when an offense occurred within the United States but “was directed toward or resulted in the carrying out of a predicate act (i) outside the United States; or (ii) within the United States, and either the offense or the predicate act was conducted in, or the results thereof affected, interstate or foreign commerce.”²⁷

When an individual knowingly finances FTOs within the United States, that the United States may exercise jurisdiction over the offender is not a contentious issue. When the criminal act occurs within its borders there is a clear nexus between the actual act of financing terrorists or FTOs and the intended terrorism-related results, regardless of whether the predicate act in fact occurs within or outside of the United States.

21. 18 U.S.C. § 2339C(a)(1) (Supp. II 2004).

22. *Id.* § 2339C(a)(2).

23. *Id.* § 2339C(a)(3).

24. *Id.* § 2339C(b).

25. *Id.* § 2339C(b)(1).

26. *Id.* § 2339C(b)(1)(E) to 2339C(b)(1)(F).

27. *Id.* § 2339C(b)(1)(G).

When an offense occurs outside the United States, the following jurisdictional predicates provide extraterritorial jurisdiction over an offender: when "a perpetrator is a national of the United States or is a stateless person whose habitual residence is in the United States" and when "a perpetrator is found in the United States."²⁸ Further, even though an offense occurred outside the United States, provided that it "was directed toward or resulted in the carrying out of a predicate act against" United States' property (including embassies and consular premises), persons or property within the United States, or any United States national or the property of any United States national or legal entity, section 2339C provides jurisdiction.²⁹ In addition, section 2339C provides jurisdiction over all offenses carried out on board a United States vessel or an aircraft registered under the laws of the United States or operated by the United States, as well as over offenses that were "directed toward or resulted in the carrying out of a predicate act committed in an attempt to compel the United States to do or abstain from doing any act."³⁰

For offenses concerning the knowledgeable financing of FTOs occurring without the United States that do not result in a predicate act of terrorism against the United States, section 2339C still provides extraterritorial federal jurisdiction. In this sense, the United States could prosecute a Syrian national who has previously funded Hezbollah, or any other designated FTO that intends to disrupt the United States' interests, even though such funding never actually resulted in an act of terrorism against the United States, so long as the Syrian national's funding financed efforts directed toward disrupting, damaging, or affecting United States' property, nationals, or interests. Moreover, section 2339C expressly authorizes the federal prosecution of a foreign national provided that the foreign national is found within the United States.³¹

In this sense, section 2339C's provisions authorizing its extraterritorial application designed to obstruct the financing of FTOs abroad provide the DOJ with a broad reach and powerful weapon in the war on terror. The DOJ, however, has yet to utilize section 2339C to prosecute domestic or extraterritorial offenses. For any federal statute to properly confer extraterritorial jurisdiction over criminal acts outside of the United States, the statute should comply with traditional principles of international law authorizing the extraterritorial application of a nation's criminal laws. Without compliance with such principles, even the most well-crafted and intentioned federal statute may be ineffective because unenforceable.

28. *Id.* § 2339C(b)(2)(A) to 2339C(b)(2)(B).

29. *Id.* § 2339C(b)(2)(C).

30. *Id.* § 2339C(b)(3) to 2339C(b)(5).

31. *Id.* § 2339C(b)(2)(B).

II. PRINCIPLES OF INTERNATIONAL LAW PERMITTING EXTRATERRITORIAL APPLICATION OF A NATION'S CRIMINAL LAWS

Customary principles of international law must provide a jurisdictional basis for the extraterritorial application of a prosecuting State's criminal laws over an individual.³² Customary international law comprises practices and customs that States view as obligatory and that a preponderance of States accept and view as obligatory in a uniform and consistent fashion.³³

There are five well-recognized principles of international law upon which a State may extraterritorially exercise its criminal laws over a citizen or non-citizen for acts occurring outside of the State's borders.³⁴ The first is "the 'objective territorial principle,' which provides for jurisdiction over conduct committed outside a State's borders that has, or is intended to have, a substantial effect within its territory."³⁵ The second is "the 'nationality principle,' which provides for jurisdiction over extraterritorial acts committed by a State's own citizen."³⁶ The third is "the 'protective principle,' which provides for jurisdiction over acts committed outside the State that harm the State's interests."³⁷ The fourth is "the 'passive personality principle,' which provides for jurisdiction over acts that harm a State's citizens abroad."³⁸ The fifth is "the 'universality principle, which provides for jurisdiction over extraterritorial acts by a citizen or non-citizen that are so heinous as to be universally condemned by all civilized nations."³⁹

While United States' law is not necessarily subordinate to customary or treaty-based international law, the above principles must authorize the extraterritorial application of the United States' criminal laws.⁴⁰ There are, however, numerous bases of support for the exercise of extraterritorial jurisdiction depending on the factual situations underlying section 2339A and 2339B violations. Because of section 2339C's jurisdictional specificity, such principles must independently support each instance in which section 2339C's authorizes extraterritorial jurisdiction over an offender outside of the United States' borders.

A. Principles Underlying Sections 2339A & 2339B's Extraterritorial Application

As noted, in October 2001, when Congress passed the Patriot Act, it explicitly removed language from section 2339A preventing extraterritorial application, and

32. See *United States v. Yousef*, 327 F.3d 56, 90-91 (2d Cir. 2003) (discussing the United States' jurisdictional sufficiency over defendant Yousef for the terrorism-related bombing of Philippine Airlines flight 434).

33. *Id.* at 91 n.24; see also IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 5-7 (5th ed. 1999); *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 102(2) (1987).

34. *Yousef*, 327 F.3d at 91 n.24.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 91.

in so doing intended to permit section 2339A to apply extraterritorially.⁴¹ Section 2339B, on the other hand, applies directly to persons within the United States and now also contains language explicitly detailing Congress' intent that the statute apply extraterritorially as well.⁴²

Principles of international law provide ample support for sections 2339A and 2339B's extraterritorial application. The objective territorial principle would provide a sound basis for extraterritorial jurisdiction over the provision of material support to terrorists or FTOs that either has or is intended to have a substantial effect within the United States. In this sense, the objective territorial principle meshes well with sections 2339A and 2339B because just as these statutes criminalize even the provision of material support to terrorists and FTOs intended to support a terrorist action against the United States, without requiring an actual terrorist attack, the objective territorial principle contemplates and supports such hostile intentions without mandating that an attack actually occur.

Further, the nationality principle would provide a firm jurisdictional basis for sections 2339A and 2339B should a United States citizen provide material support to terrorists or FTOs abroad. Similar to the objective territorial principle, the protective principle would again provide a sound basis to exercise extraterritorial jurisdiction over the furnishing of material support to terrorists and FTOs when such support actually results in hostile action against the United States' interests abroad. These interests abroad, of course, would encompass United States Embassies and consular premises, and arguably could extend to any property owned or operated by the United States. The protective principle, unlike the objective territorial principle, appears to be limited to actual acts; therefore, while sections 2339A and 2339B criminalize the provision of material support to terrorists or FTOs that are intended to harm the United States, whether the protective principle would support extraterritorial jurisdiction in such a case is questionable.

The passive personality principle would also provide ample support to extraterritorial jurisdiction when the provision of material support to terrorists or FTOs results in harm to United States citizens abroad. As will be discussed in detail in connection with section 2339C, the universality principle, however, cannot currently provide support for sections 2339A and 2339B because the provision of material support to terrorists or FTOs is not a crime universally acknowledged by all nations.⁴³ Therefore, depending on the underlying factual basis and the intentions of offenders who have provided material support to terrorists or FTOs abroad, there are numerous jurisdictional bases of customary international law that permit the United States to exercise extraterritorial jurisdiction for section 2339A and 2339B violations.

41. See *supra* text accompanying note 11.

42. 18 U.S.C. § 2339B(d) (Supp. II 2004); see also *supra* text accompanying note 18.

43. See discussion *infra* Part II.B (discussing section 2339C's extraterritorial application and the various principles of international law supporting such jurisdiction).

B. Principles Underlying Section 2339C's Extraterritorial Application

Because of the numerous jurisdictional predicates required for section 2339C's extraterritorial application, whether customary principles of international law support such jurisdiction requires a careful analysis. Section 2339C permits extraterritorial jurisdiction when the offense takes place outside the United States and the "perpetrator is a national of the United States or is a stateless person whose habitual residence is in the United States."⁴⁴ The nationality principle of international law authorizing jurisdiction over the extraterritorial acts of a State's citizens outside of that State's borders therefore provides a sound jurisdictional basis for the extraterritorial prosecution of United States citizens who finance terrorists and FTOs abroad. There is a substantial likelihood that the nationality principle would also authorize the extraterritorial prosecution of a stateless person who habitually resides within the United States.

The next jurisdictional predicate of section 2339C authorizing federal prosecution for extraterritorial acts is when the "perpetrator is found in the United States."⁴⁵ Whether customary principles of international law would authorize such jurisdiction when a perpetrator is found within the borders of a State requires further factual detail concerning the offense, but nonetheless may be supported by numerous principles. For example, the objective territorial principle may provide a basis for extraterritorial jurisdiction if the offender intended to affect the United States within its borders. It is important to note that the objective territorial principle does not necessarily require a predicate act to have effect upon a State. In this sense, the objective territorial principle provides a jurisdictional basis for section 2339C offenses that do indeed cause harm to the United States as well as section 2339C offenses that were merely intended to harm the United States. Further, the protective principle may provide a jurisdictional basis if the offender intended to harm the United States' interests abroad. Both the objective territorial principle and the protective principle provide jurisdictional authority to prosecute section 2339C offenders found within the United States.

The next series of jurisdictional predicates authorizing extraterritorial prosecution of offenses taking place outside of the United States is that the offender's financing of terrorism either resulted in or was directed toward a predicate act against various interests or persons of the United States. In particular, section 2339C authorizes jurisdiction when an offense results in an act against or is directed toward any property owned, leased, or used by the United States, including embassies, and diplomatic or consular premises.⁴⁶ Similarly, section 2339C provides jurisdiction over offenses directed toward or resulting in terrorist acts intended to harm persons or property within the United States.⁴⁷ Going even further, section 2339C provides for extraterritorial jurisdiction when offenses are

44. 18 U.S.C. § 2339C(b)(2)(A) (Supp. II 2004).

45. *Id.* § 2339C(b)(2)(B).

46. *Id.* § 2339C(b)(2)(C)(i).

47. *Id.* § 2339C(b)(2)(C)(ii).

directed toward or result in an act against any nationals of the United States or the property of such nationals.⁴⁸ Finally, when an offense is directed toward or results in an act against "any property of any legal entity organized under the laws of the United States, including any of its States, districts, commonwealths, territories, or possessions," section 2339C also provides extraterritorial jurisdiction.⁴⁹

Considering the above property interests section 2339C protects, the objective territorial principle again provides a sound basis for extraterritorial jurisdiction regardless of whether the financing of terrorism in fact affected the interests of the United States. Even more supportive of extraterritorial jurisdiction is the protective principle that specifically contemplates the ability for a State to exercise extraterritorial jurisdiction over offenses outside a State that harm a State's interests. States have an extraordinarily high interest in the protection of their property, this is especially true in the case of consular and diplomatic premises, but also applies to the protection of their citizens and their citizens' property. Finally, the passive personality principle provides a sound basis for extraterritorial jurisdiction when the financing of terrorism or FTOs is intended to facilitate acts against United States citizens abroad.

The universality principle also appears to bear heavily in favor of finding extraterritorial jurisdiction for section 2339C offenses. Originally, however, universal jurisdiction included only crimes of piracy because acts of piracy were carried out on the high seas and therefore necessarily outside any State's borders.⁵⁰ Modern international customs have extended the principle of universality to include war crimes and, after the Second World War, crimes against humanity.⁵¹ War crimes were thought to give rise to universal jurisdiction on the basis of the "chaotic condition or irresponsible leadership in time of war."⁵² The underlying reasoning of the historical restrictions on the exercise of universal jurisdiction gives rise to a two-prong test to determine whether customary international law supports such a basis for jurisdiction where the crimes "(1) are universally condemned by the community of nations, and (2) by their nature occur either outside of a State or where there is no State capable of punishing, or competent to punish, the crime (as in a time of war)."⁵³

That terrorism is heinous and that civilized nations universally condemn terrorism is hardly disputable. Federal courts, however, have thought differently.⁵⁴ In *United States v. Yousef*, the Second Circuit stated that unlike war crimes and crimes against humanity that have very specific definitions, "terrorism 'is a term as loosely deployed as it is powerfully charged.'"⁵⁵ The Second Circuit went on to

48. *Id.* § 2339C(b)(2)(C)(iii).

49. *Id.* § 2339C(b)(2)(C)(iv).

50. *Yousef*, 327 F.3d at 104.

51. *Id.*

52. *Id.* at 105 (citing Willard B. Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CAL. L. REV. 177, 194 (1945)).

53. *Id.*

54. See *id.* at 106–08 (discussing the various interpretations of terrorism, its political charge, and the lack of a universal consensus regarding terrorism's definition, purpose, and means).

55. *Id.* at 106.

note that while some nations unequivocally condemn all acts of terrorism, many nations are divisively split on the legitimacy of terrorism which makes it impossible to locate areas of harmony or universal consensus.⁵⁶ Further, the Second Circuit acknowledged the validity of other federal courts' statements that assigning culpability for terrorist acts is "non-justiciable" and outside the competency of the courts because such an issue is "inextricably linked with 'political question[s].'"⁵⁷ Because there is continuing disagreement between nations as to what actions constitute terrorism, and because of the cliché that "one man's terrorist is another man's freedom fighter," unlike war crimes and crimes against humanity that are universally recognized with a high degree of specificity, the Second Circuit concluded that terrorism does not provide a basis for universal jurisdiction.⁵⁸

Regarding whether the universality principle authorizes extraterritorial jurisdiction over terrorist acts, the Second Circuit in *Yousef* came to a very arguable conclusion. The fact that many nations disagree about what constitutes terrorism is a convincing factor that tends to favor a lack of universal jurisdiction, but does not necessarily compel that conclusion. Regarding the first prong of universal jurisdiction, what exactly constitutes the community of nations who must universally condemn a crime is debatable. All civilized nations condemn terrorism in its various, if not all, forms. The fact that there are some rogue or polemical nations that do not exactly subscribe to the majority of the world's views regarding the condemnation of terrorist acts should not be a dispositive factor in finding a lack of universal jurisdiction.

Moreover, the second prong of universal jurisdiction contemplates that when there may be some nations diametrically opposed to the rest of the civilized world, universal jurisdiction may still lie. Specifically, the second prong of the universal jurisdiction test states that jurisdiction may lie when a universally condemned crime occurs in a State that is either not competent or unable to prosecute an offender. Terrorist acts occur in many states that are not competent, are unwilling, or unable to prosecute terrorists, either because they do not have an evolved or effective legal system, because political pressures preclude a State from doing so, or because there is virtually no law enforcement power to abduct and subject terrorists to prosecution. In this sense, there may still be universal jurisdiction over terrorist acts without the unanimous consent of all nations on terrorism's definition.

While reasonable jurists may disagree whether universal jurisdiction encompasses acts of terrorism, it is important to note that sections 2339A, 2339B, and 2339C are an order removed from the terrorist acts themselves. They all proscribe the provision of material support to terrorists and FTOs. An important distinction to note for purposes of universal jurisdiction is that the provision of material support to terrorists and FTOs does not equal terrorism itself. The lack of

56. *Id.*

57. *Id.* (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 823 (D.C. Cir. 1984) (J. Robb concurring)).

58. *Id.* at 107-08.

consensus regarding whether terrorism is universally condemned does not bode well for finding that nations universally condemn the provision of material support to terrorists and FTOs. Unlike piracy, war crimes, and crimes against humanity, laws prohibiting the provision of material support to terrorists are relatively new. Universal agreement regarding exactly what constitutes material support, moreover, would certainly be surprising. Because the offenses contained within sections 2339A, 2339B, and 2339C are an order removed from terrorist acts themselves, and because there does not exist anything even resembling a universal consensus about the definition of material support, in all likelihood the universality principle alone will not support extraterritorial jurisdiction over such offenses.

There may, however, be an additional basis for jurisdiction over section 2339C offenses predicated on the universality principle. Some commentators argue that when an international treaty obligates a signatory State to condemn and punish particularly heinous acts, such as genocide and torture, a State may presumptively exercise extraterritorial jurisdiction on the basis of the universality principle.⁵⁹ This theory meshes well with, and may partly explain, the first prong of the test for support under the universality principle. That is, universal condemnation of particular crimes may not require unanimity but may be evidenced by substantial international consensus and effort in combating such crimes. Because section 2339C fulfills the United States' obligation under the International Treaty, some argue that section 2339C's exercise of extraterritorial jurisdiction over offenders on the basis of the universality principle may be presumptively valid.

C. Notwithstanding Principles of International Law, Section 2339C May Still Apply Extraterritorially

Even without reference to and support of the above customary principles of international law, well-settled common law principles regarding the power of Congress may still permit the United States to exercise extraterritorial jurisdiction over offenders. United States courts have an obligation "to give effect to an unambiguous exercise by Congress of its [power to grant jurisdiction to agencies or to courts] *even if such an exercise would exceed the limitations imposed by international law.*"⁶⁰ There is well-settled and historical support for such Congressional power. Chief Justice Marshall in *The Nereide* held that Congress may "manifest [its] will" to depart from the customary tenets of international law "by passing an act for the purpose."⁶¹ In 1963, the Court reaffirmed this Congressional authority in *McCulloch v. Sociedad Nacional de Marineros de Honduras* by explicitly "stating that Congress may enact laws superseding 'the law

59. See *id.* at 98 (citing various sources of authority to exercise jurisdiction on the basis of the universality principle of international law). Other commentators, however, prefer to narrowly limit the usage of the universality principle to those crimes that a majority of nations condemn.

60. *Id.* at 109 (citing *Federal Trade Comm'n v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1323 (D.C. Cir. 1980) (emphasis added)).

61. *Id.* at 109 n.44 (citing *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815)).

of nations.”⁶² In this sense, courts may be bound to give effect to Congressional actions regardless of whether principles of international law support Congress’ authority.

The above indicates that there are firm bases of customary international law that may support sections 2339A, 2339B, and 2339C’s extraterritorial application.⁶³ There is, however, even further support for section 2339C’s extraterritorial application because Congress’ action in enacting section 2339C is consonant with the overt law of nations: the International Treaty Convention. Congress fulfilled its obligation under the International Convention to pass laws criminalizing the provision of material support to terrorists and FTOs. Even in the absence of the support of customary principles of international law authorizing extraterritorial application of a nation’s laws, jurisdiction may be properly predicated on the United States’ obligations under an international treaty and the power and effect of its statutes conforming to an international treaty.⁶⁴ Thus, because the United States is a signatory state obligated under the International Convention, together with the inherent power of Congressional action and the duty of the courts to give effect to Congress’ will, even in contravention of the customary principles of international law, section 2339C may still apply extraterritorially.

D. Sections 2339A, 2339B, and 2339C Have Ample Support For Extraterritorial Application

While the exercise of universal jurisdiction for the provision of material support to terrorists and FTOs is doubtful, sections 2339A, 2339B, and 2339C have numerous bases of support for the extraterritorial application elsewhere. Regarding sections 2339A and 2339B, and for many of the offenses enumerated in section 2339C, several principles of customary international law firmly support their extraterritorial application. Further, the obligations of the United States as a signatory state of the International Convention and Congress’ inherent power to make federal law in contravention of the law of nations also provide additional support to section 2339C’s extraterritorial application. Because of the various principles and doctrines authorizing sections 2339A, 2339B, and 2339C’s extraterritorial application, and because they criminalize the knowledgeable support of terrorists and FTOs within and outside of the United States, in spite of whether such support in fact causes a predicate act of terrorism, sections 2339A, 2339B, and 2339C facially appear to be a robust tool in the war on terror, able to cut off terrorists’ funding and thereby prevent terrorist acts from occurring. Sections 2339A, 2339B, and 2339C may, however, be too powerful for their own good.

62. *Id.* at 109, n. 44 (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 1-, 21-22 (1963)).

63. See generally discussion *supra* Part III.

64. See *Yousef*, 327 F.3d at 110 (holding that extraterritorial jurisdiction may be based on the United States’ obligations as a signatory state of the Montreal Convention together with the force and effect of its own statutes giving effect to the Montreal Convention).

III. SECTION 2339C'S FORESEEABLE, YET UNINTENTIONAL EFFECTS ON THE WAR ON TERROR

As noted, the numerous principles and doctrines supporting sections 2339A, 2339B, and 2339C's extraterritorial operation criminalizing the provision of material support to foreign terrorists and FTOs, makes these statutes a puissant tool on the war on terror. But, because they criminalize the provision of material support to terrorists in such a broad manner, without requiring a predicate act of terrorism to confer jurisdiction, there may be undesirable consequences on the efforts of the United States' intelligence community to accurately, timely, and effectively collect foreign human intelligence concerning terrorists and terrorist organizations.

A 1981 Executive Order sets forth the goals, direction, duties, and responsibilities respecting the United States' intelligence efforts,⁶⁵ and remains the most relevant charter document governing the activities of the intelligence community. Defining the purpose of the United States' intelligence efforts, Executive Order 12,333 states that intelligence agencies are to acquire "[t]imely and accurate information about the activities, capabilities, plans, and intentions of foreign powers, organizations, and persons and their agents" because such information "is essential to the national security"⁶⁶ In achieving this goal, "[a]ll departments and agencies shall cooperate fully"⁶⁷

The Central Intelligence Agency ("CIA") is the United States' premier intelligence agency charged with the responsibility to "[c]ollect, produce and disseminate foreign intelligence and counterintelligence, including information not otherwise obtainable."⁶⁸ Unlike other members of the intelligence community, like the National Security Agency or the National Geospatial-Intelligence Agency (formerly the National Imagery and Mapping Agency), that rely primarily on technological means to collect foreign intelligence, the CIA collects human intelligence, and therefore necessarily relies upon human beings and the fruits of actual human interaction to yield raw foreign intelligence. CIA analysts then refine this raw intelligence into finished and actionable foreign intelligence for U.S. policymakers.⁶⁹ The ultra-secret Directorate of Operations ("DO")⁷⁰ within the CIA is responsible for the planning and execution of the CIA's overseas operations concerning the collection of such human intelligence. Within the DO, the core collectors, or case officers, are those colloquially known as the CIA's "tip of the spear." Case officers are what traditional Hollywood has misnamed CIA agents:

65. Exec. Order No. 12,333, 46 Fed. Reg. 59941 (Dec. 4, 1981).

66. *Id.* pmb1.

67. *Id.* § 1.1.

68. *Id.* § 1.8(a).

69. CIA Careers: Analytical, <https://www.cia.gov/careers/analytical.html> (last visited Mar. 20, 2007).

70. Now the DO is commonly referred to as the National Clandestine Service. See Walter Pincus, *CIA Spies Get a New Home Base: Agency Will Set Up the National Clandestine Service*, WASH. POST, Oct. 14, 2005, at A6 (stating that NCS will replace "what has been called the Directorate of Operations").

they spend the majority of their careers overseas, undercover and in constant danger, attempting to clandestinely recruit and handle foreign nationals with access to sensitive information, and to ultimately reveal such information to the CIA.⁷¹

In essence, case officers recruit foreign nationals to spy on their own government, and therefore are, in many cases, asking foreign nationals to place not only their own lives on the line, but the lives of their families, for the sake of the foreign intelligence efforts of the United States. Because of the inherent danger to assets, and their families, within the intelligence community, there is a solemn obligation to protect assets as sources of foreign intelligence as well as the CIA's methods of obtaining such foreign intelligence.

In fact, the National Security Act of 1949 (as amended, 50 U.S.C. § 401g) charges the Director of Central Intelligence ("DCI")⁷² himself, in his role as head of the intelligence community, to facilitate the intelligence-related activities of the United States by "protect[ing] intelligence sources and methods from unauthorized disclosure."⁷³ In this sense, the DCI, in coordinating the efforts of the entire intelligence community, is responsible for ensuring that each intelligence agency has the proper security procedures in place necessary to protect the identity of foreign assets assisting the United States.

Because of the grave consequences unauthorized disclosure of an intelligence source may cause, the obligation to protect sources and methods is taken very seriously. Congress and the United States Supreme Court have acknowledged the significance of protecting intelligence sources by exempting the CIA's disclosure of the identities not only of actual sources, but even the names of institutional affiliations of sources and other seemingly innocuous information, in response to Freedom of Information Act ("FOIA") requests, where the DCI determines that such disclosure would lead to an unacceptable risk of disclosing sources' identities.⁷⁴

Even within the confines of the intelligence community itself, the identities of foreign intelligence sources are highly guarded and tightly compartmented information. As part of the DCI's obligation to ensure the intelligence community properly protects its sources and methods, information classified as Top Secret and above is revealed, even to intelligence agency employees, only on a need-to-know basis.⁷⁵ In other words, highly classified information must be relevant to an employee's ability to perform her duties in order to justify disclosure. The

71. CIA Careers: Clandestine, https://www.cia.gov/careers/jobs/core_collector.html (last visited Mar. 20, 2007).

72. Previously the DCI performed a dual role: overseeing the entirety of the CIA as well as overseeing the direction of the intelligence community. The Intelligence Reform Act of 2004 created a National Intelligence Director to oversee the operation of the intelligence community and restricts the DCI's responsibility to managing the CIA, effectively making the DCI the DCIA.

73. 50 U.S.C. § 403-1(i)(1) (2000).

74. See *Cent. Intelligence Agency v. Sims*, 471 U.S. 159 (1985).

75. See Exec. Order No. 13,292, 68 Fed. Reg. 15315 (Mar. 28, 2003) (providing guidelines for the general restriction of access to classified national security information, including the need-to-know basis, and detailing safeguards for handling such sensitive information).

identities and locations of foreign assets are among the most highly classified and compartmented information.

To obtain an asset's identity, an individual must possess the highest security clearance in the United States government: Top Secret with access to Sensitive Compartmented Information ("TS/SCI"). Obtaining TS/SCI clearance involves extensive and multiple background investigations, psychological examinations, and a full scope polygraph examination concerning an applicant's lifestyle and suitability for access to such classified information.⁷⁶ With TS/SCI clearance, an employee may obtain access to information regarded so sensitive that it is classified above the Top Secret level and segregated into special compartments to which an individual must be specifically cleared to access.⁷⁷ Asset identities are one such compartmented area. Ordinary employees of intelligence agencies often possess the highest levels of security clearance available, but asset identities are only available to very few employees with a firm need-to-know basis. Thus, the obligation to protect asset identities, even within the confines of the intelligence community itself, is taken very seriously.⁷⁸

While the intelligence community discharges its duties and responsibilities to collect foreign intelligence and protect its sources and methods, the intelligence community also has another obligation: to inform the DOJ of any violations of federal law it uncovers while collecting foreign intelligence. This obligation stems from what is commonly known as the federal crimes reporting statute.⁷⁹ The federal crimes reporting statute requires anyone with "knowledge of the actual commission of a felony cognizable by a court of the United States" to report the crime to either a judge or other person in civil or military authority under the United States.⁸⁰

Because of this general obligation, the CIA and DOJ are permitted to share such information. Potential intelligence agency employees, for example, when about to undergo a polygraph examination, are informed of the agency's obligation to inform the agency's Office of General Counsel ("OGC"), who in turn informs the DOJ, of any information concerning criminal conduct violative of federal law, and must execute an agreement acknowledging their understanding of this obligation.

Because sections 2339A, 2339B, and 2339C are federal criminal laws, the violation of which constitutes a felony, intelligence agencies therefore have a duty

76. See CIA Careers: Clandestine, *supra* note 71 (noting the minimum requirements to obtain a security clearance).

77. *About Military Security Clearances*, available at <http://usmilitary.about.com/cs/generalinfo/a/security.htm> (last visited May, 18, 2007) (describing the extra levels of protection afforded to TS/SCI information).

78. See COMMISSION OF THE INTELLIGENCE CAPABILITIES OF THE UNITED STATES REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT ch. 7 (2005), available at http://www.globalsecurity.org/intell/library/reports/2005/wmd_report_25mar2005_chap07.htm (last visited Apr. 5, 2007) (noting, at recommendation nine, that the intelligence community needs to limit both the authorized and unauthorized disclosure of assets).

79. 18 U.S.C. § 4 (2000).

80. *Id.*

to report offenses to the DOJ. This may have a deleterious effect on the ability of the CIA to collect accurate and reliable human intelligence to support the United States' efforts in the war on terror. As noted, case officers rely on actual human interaction with foreign nationals to establish contacts with assets who have access to information that is valuable to the United States. This human interaction with foreigners involves the deliberate, slow, and methodical establishment of rapport and trust with contacts that, with careful planning, should lead to contacts with potential assets. When contact with a potential asset is made, the process is again the slow and deliberate creation of a trusting relationship. Eventually, case officers "pitch" the asset to assist the CIA and the United States by providing information that the United States ultimately uses as foreign intelligence.⁸¹

Should an asset agree to provide such information, usually for a sum of money or in exchange for other consideration, because of the danger inherent in such an arrangement, the transaction itself is a closely guarded secret.⁸² The asset then becomes a formal source whose identity is safeguarded by the intelligence agencies' obligation to protect its sources and methods.⁸³

Historically, the occupations or lifestyles of assets did not clash with federal law. During the cold war, assets were usually foreign nationals in positions of power or influence that were, other than the fact they were covertly committing treason for personal gain, generally upstanding citizens. It is, however, an entirely different situation when it comes to relations with sources providing foreign intelligence on terrorists and FTOs.

Because intelligence targets have changed, intelligence sources must also change. Terrorists are not government officials or disillusioned bureaucrats interested in personal monetary gain—terrorists are now the ideological opposite of historical intelligence targets. Further, while historically intelligence agencies could track a number of potential assets with access to governmental information and pitch the assets most likely to cooperate, the terrorist cell structure purposefully limits the number of individuals with access to highly valuable information, and often operates very similarly to the intelligence agencies' need-to-know policy regarding highly classified information. There are, in short, a very limited number of targets.

Ingratiating oneself with a target or a target's contacts has not surprisingly also changed considerably since the cold war. No longer can a case officer rely on her natural affability at embassy cocktails parties to make contact with a target. Frequently, the ideal terrorism-related targets are fundamentalist Muslims, quite probably indigent, living in closely-knit communities, and also quite probably not

81. Edward G. Shirley, *Can't Anybody Here Play This Game?*, THE ATLANTIC MONTHLY, Feb. 17, 1998, available at <http://www.theatlantic.com/issues/98feb/cia.htm> (discussing the CIA's use of "cold pitches" to foreign nationals of Iran and Iraq whereby case officers "'pitch' a clandestine relationship with the CIA in exchange for money"). Edward G. Shirley is a pseudonymous former case officer in the CIA's Directorate of Operations.

82. See *id.* (discussing the consideration provided to foreign nationals in exchange for their clandestine relationship with the U.S. intelligence community).

83. See *supra* text accompanying notes 71–73.

very well educated. Therefore, the target pool is understandably slim and even contacting a potential asset is a formidable task in itself.

Targets outside of these closely-knit communities usually do not have the access to provide credible terrorism-related information, and may be motivated by personal gain to provide unreliable and inaccurate information. The ideal assets are closely associated with the terrorists, or may even be terrorists themselves. Further, the ideal asset may be a trusted person who is knowledgeable of the whereabouts of terrorists or their plots because the asset has previously provided safe harbor or support to terrorists or FTOs.

Because the most credible and trustworthy assets are those closely connected with terrorists themselves, the ideal assets have probably violated sections 2339A, 2339B, or 2339C. In fact, violating sections 2339A, 2339B, or 2339C in some form or another could almost be seen as a prerequisite to becoming a valuable and credible asset able to provide timely and accurate terrorism-related information. Because of their firm extraterritorial application, when the CIA develops a relationship with an asset who either has or currently does provide material support to terrorists or FTOs, because of the federal crimes reporting statute, the duty arises to inform the DOJ of the violation of such federal criminal laws.⁸⁴ This obligation could result in two different yet equally unfavorable situations.

The first situation may occur when the DO reports the violation of federal law to the CIA's OGC. OGC, cognizant of the overriding obligation to protect sources and methods and succumbing to internal agency pressures to safeguard the valuable information that an asset has or has the potential to provide, may rigidly interpret 2339A, 2339B or 2339C such that the duty to report violations to the DOJ would not arise frequently. In this situation, Congress' intent behind the statutes as well as the general efficacy of the statute has to be seriously questioned.

A second situation occurs when the DO reports a section 2339C violation to CIA's OGC, and OGC does disclose the violation to the DOJ. Disclosure would most likely require the CIA to release the certain specific details of the DO's relationship with the asset, the nature of the intelligence the asset provided or will provide, possibly the asset's identity, and the asset's location. Based on this information, the DOJ will exercise its discretion regarding whether to prosecute the asset, by rendering the asset to the United States or by some other means obtaining jurisdiction over the asset's person.

Should the DOJ exercise its discretion not to seek extradition and prosecute an offender, there are still negative repercussions. Firstly, the duty to disclose the violation of federal law has compromised the asset's personal safety by causing the release of the asset's identity and the nature of the asset's relationship with the CIA outside the very limited confines of those members of the intelligence community with a need to know. Secondly, should assets become aware that those cooperating with the CIA when they have or are providing material support to terrorists or FTOs may be subject to federal prosecution in the United States at the whim of the DOJ, many potential assets will refuse to cooperate with the CIA, and much of the

84. See *supra* text accompanying note 80.

slow, methodical work of case officers cultivating terrorism-related contacts in the Middle East will be for naught. Moreover, even if disclosure to the DOJ is not a strong enough deterrent to continue cooperation with the CIA, assets will be wary of being completely candid and disclosing the actual nature of their relationship with terrorists or FTOs.

Should the DOJ decide to prosecute assets who have or provide support to terrorists, there would be disastrous effects on the CIA's terrorism-related intelligence gathering operations. The federal prosecution of foreign nationals based on their cooperation with the CIA would most likely result in many current assets severing their ties with the United States' intelligence agencies and provides a major disincentive for continuing to cooperate. Not only would prosecution of assets cause a tremendous rift between the DOJ and the intelligence community, but prosecution may irreparably harm the DO's human intelligence operations. Extraterritorial enforcement of such laws may severely affect the DO's ability to provide credible terrorism-related intelligence to U.S. policymakers. In these nascent stages of the war on terror, this is a consequence that the United States cannot afford. While the President has called for the CIA to recruit more case officers and provide more actual boots on the ground in the war on terror, the close-knit nature of fundamentalist Muslim communities that harbor terrorists prevents case officers from easily infiltrating and integrating into such communities without substantial groundwork. As things stand now, assets within such communities are the only source of timely and accurate terrorist-related foreign intelligence.

No matter what may personally motivate an asset to cooperate with a case officer, whether it be monetary gain or a moral imperative, assets will not assist the United States if they do not believe that the United States can ensure their safety. Firstly, the release of assets' identities and relationships with the CIA to the DOJ inevitably compromise assets' security. The larger the circle of persons with knowledge of an asset's cooperation with the United States, the more danger the asset is in. If the CIA cannot assure assets that their identities and relationships will be kept completely confidential, assets may not feel comfortable assisting the United States. Further, if the CIA cannot ensure that the DOJ will not prosecute assets, the threat of federal prosecution in the United States is a major deterrent to cooperation.

In short, the great reach of sections 2339A, 2339B, and 2339C extraterritorially criminalizing the support of terrorists and FTOs, while potentially providing a strong tool in the war on terror, could also significantly undermine the United States' most effective and pervasive weapon in combating global terror: the entire U.S. intelligence community.

CONCLUSION

On one hand, sections 2339A, 2339B, and 2339C, because of the firm bases upon which the United States may exercise extraterritorial jurisdiction, provide a formidable tool in the war on terror. Should there be public and well-known federal prosecutions for their violations, they may even provide a strong deterrent

for individuals to provide material support to terrorists or FTOs. On the other hand, sections 2339A, 2339B, and 2339C may be more of a hindrance than a help in the overall war on terror.

In these early stages of the war on terror when credible intelligence concerning terrorists and terrorist-related activities is rare, and where the most technologically advanced intelligence collection methods are wholly ineffective against terrorists, anything that undermines the CIA's ability to obtain accurate and timely human intelligence concerning terrorism may have costs far outweighing its benefits.

Because neither sections 2339A, 2339B, nor 2339C require a predicate act of terrorism to constitute an offense, their reach arguably extends too far. The definition of material support applicable to all section 2339 offenses encompasses acts ranging from mere lodging to furnishing advice to the provision of explosive materials. Because they apply to such a wide range of activities and support, sections 2339A, 2339B, and 2339C will necessarily apply to those individuals able to provide the United States with the most timely and accurate terrorism-related intelligence. The mere possibility of federal prosecution alone, regardless of whether the DOJ will or will not prosecute an offender, will deter assets' cooperation with the CIA, and knowledge that assets' identities must be revealed to the DOJ is an even further deterrent to cooperation.

As sections 2339A, 2339B, and 2339C stand now, the DOJ rarely enforces them, and because of this, they are not currently being utilized as an effective tool on the war on terror. Sections 2339A, 2339B, and 2339C, are merely *potentially* powerful tools on the war on terror. Potential prosecution, however, should not be at the expense of the ability of the intelligence community to make large strides in the war on terror. While prohibiting the provision of material support to terrorists and FTOs could serve to prevent terrorist acts from occurring, enforcing such broad prohibitions extraterritorially would undoubtedly have a deleterious effect on the ability of the CIA to recruit, maintain, and protect assets who provide the United States with the most useful and actionable terrorism-related intelligence available.

To prevent such injurious consequences to terrorism-related intelligence efforts, Congress should amend sections 2339A, 2339B, and 2339C in two different but equally effective ways. Firstly, Congress should narrow the definition of material support to encompass only such support as may substantially advance the intentions of terrorists or FTOs. Material support should not be defined so broadly as to encompass even mere acts of lodging terrorists.⁸⁵ Persons who merely lodge terrorists may be able to provide the most time-sensitive and actionable intelligence regarding a terrorist's whereabouts, and any deterrent to such a person's cooperation with the United States may come at too high a cost.

85. See 18 U.S.C. § 2339A(b) (Supp. II 2004) (defining "material support or resources" and including lodging); see also *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1138 (9th Cir. 2000) (discussing the definition of material support and focusing on the inclusion of the broad term "training." Ultimately, the court concluded that the inclusion of training is overbroad because it necessarily encompasses protected activity, such as instructing members of a foreign terrorist organization on matters of international law and how to petition the United Nations for aid).

Secondly, Congress should limit the extraterritorial application of sections 2339A, 2339B, and 2339C, to those instances where the provision of material support to terrorists or FTOs has a definite nexus with the United States. Doing otherwise extends too far the reach of the United States' prosecutorial power and does so to such an extent that it may negatively affect potential intelligence sources. Requiring such jurisdictional predicates ensures that the statutes can effectively thwart terrorist plots and activities that imminently threaten the United States without negative consequences on current human intelligence operations providing the United States with the most actionable and effective terrorist-related intelligence relevant to the war on terror.

As powerful and well-intentioned tools in the war on terror as sections 2339A, 2339B, and 2339C may currently be, the lack of enforcement causes them to be mere *potential* tools capable of thwarting terror. That sections 2339A, 2339B, and 2339C, as they stand now, may provide the DOJ with the authority to thwart global terror, by way of federal prosecution in the United States, undeniably provides a greater sense of security than there would otherwise be. It is, however, a false sense of security—and it is better to not have the false security that such statutes provide when they may in fact undermine the efficacy of the intelligence community's best efforts in the war on terror. With intelligence reform being as prominent a political topic as it now is, the effects of federal laws on the ability of the intelligence community to effectively gather terrorist-related intelligence should give Congress pause. Until the United States is able to more effectively infiltrate terrorist cells, communities, and organizations, and until assets cease to provide the most timely and actionable terrorism-related intelligence, because what is at stake is nothing short of national security, the extraterritorial prosecution of providing material support to terrorists and FTOs merits serious reconsideration.