

NATIONAL SECURITY: THE IMPACT ON U.S.
FOREIGN POLICY ARISING FROM PRIVATE
ACTIONS INITIATED AGAINST FOREIGN
NATIONS FROM WITHIN THE UNITED
STATES.

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Abstract

This paper looks at the potential for private actions initiated from the United States and directed against foreign nations to have an effect upon the foreign policy of the United States. The paper looks at the obligations of a nation-state to prevent its sovereign territory to be used to stage private terrorist acts against a foreign nation. The paper summarizes the neutrality and anti-terrorism statutes of the United States, which can be used to meet our obligations under international law. The paper then takes the position that the United States should enforce aggressively the domestic laws designed to prevent those private actions, which are directed against foreign governments and their residents. The United States is required by international law to take steps to prevent such military and terrorist operations from originating in the United States, and a failure to do so can have an adverse effect on American foreign policy. In addition, it is in the best interests of the United States to aggressively enforce these laws. The paper takes a different position than those who argue that enforcement of neutrality and anti-terrorism laws involve impermissible anticipatory prosecutions, which trespass on fundamental values of liberty or compromise the traditional role of culpability in criminal law.

**NATIONAL SECURITY: THE IMPACT ON U.S. FOREIGN
POLICY ARISING FROM PRIVATE ACTIONS INITIATED
AGAINST FOREIGN NATIONS FROM WITHIN THE
UNITED STATES¹**

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Assume, for a moment, that a group of foreign nationals gets together in a foreign country and agree among themselves to train for and then carry out an act of terrorism against the United States, such as the complete destruction of the World Trade Center in New York City, and in the process kill approximately 3,000 Americans. Assume also that the domestic intelligence and law enforcement agencies of the foreign nation in which the conspirators met and trained, and from which the conspirators launched their terrorist act, were aware of the terrorists' plans and took no steps whatsoever to disrupt and dismantle the terrorist group, or prevent their attack on the United States. We can anticipate that the United States would respond militarily against any nation, which provides safe harbor to terrorists and does nothing to prevent a terrorist attack about which the host government was aware.

Now assume, for the sake of argument, that a group of American citizens and permanent residents get together in the United States and formulate a plan to engage in a terrorist attack in a foreign county, intending to kill and maim citizens of that country, and destroy public and private property. Assume that the group engages in training and preparations for the foreign attack in the United States, ships arms and other materials to staging areas overseas, and then carries out the terrorist attack in a foreign country. Assume also that officials of the United States government had knowledge of the terrorist plot, its target and timelines, and took no steps to disrupt and dismantle the terrorist cell, or otherwise prevent the terrorist attack in the foreign nation.

Would the nation victimized by the terrorist attack in the second example have any different rights to retaliate against the United States than the United States would have had in the first example? The facts are exactly the same. Only the location where the training took place and from which the attack originated, and the country in which the attack took place are different.

Now, let's assume that it simply *appeared* to the victim country that officials of the United States had actual knowledge of the terrorist plot, and took no steps to prevent the terrorist attack, but in fact the United States did *not* have actual knowledge of the plot. Do perceptions become reality for the decision-makers in the victim country with regard to that country's posture militarily and diplomatically vis-à-vis the United States?

This paper looks at the potential for private actions initiated from the United States and directed against foreign nations to have

an effect upon the foreign policy of the United States. The paper takes the position that the United States should enforce aggressively the domestic laws designed to prevent those private actions, which are directed against foreign governments and their residents. It is in the best interests of the United States to aggressively enforce these laws. In addition, the United States is required by international law to take steps to prevent such military and terrorist operations from originating in the United States, and a failure to do so can have an adverse effect on American foreign policy.

International Law

The Restatement (Third) of Foreign Relations Law of the United States provides that international law is that which has been accepted by the international community of States². International law “arises from international conventions or agreements, international custom, general principles of law recognized by civilized nations, and judicial decisions and the teachings of the most highly qualified publicists of various nations: . . . Customary Law is made up of two distinct elements ‘general practice’ and ‘its acceptance as law.’”³

Prevention of Terrorist Attacks from Home Territory

A nation is expected to be able to exercise dominion and control over its sovereign territory and citizens. A nation has an “international responsibility of government to prevent its territory from being used as a base for launching terrorist attacks against other countries.”⁴

This is due to the normative principle that States have an obligation to other states based upon their ‘claim to territorial

² See RESTATEMENT (THIRD) OF INTERNATIONAL RELATIONS LAW § 102(1) (1987) (stating:

(1) A rule of international law is one that has been accepted as such by the international community of states
(a) In the form of customary law;
(b) By international agreement; or
By derivation from general principles common to the major legal systems of the world.)

³ Mark Popiel, *Redrafting the Right of Self-Defense in Response to International Terrorism*, 6 GONZ. J. INT’L L. 1, 2 (2002-03), available at www.gonzagajil.org/content/view/91/26 (quoting Robert J. Beck and Anthony Clark Arend, “Don’t Tread on Us”: *International Law and Forcible State Responses to Terrorism*., 12 WIS. INT’L L. J. 153, 157 (1994).

⁴ *U.S. v. Duggan*, 743 F.2d 59, 74 (2d Cir. 1984) (citing S. Rep. No. 95-701, at 30 (1978)). See also *The Three Friends*, 166 U.S. 1, 5 (1897); *United States v. Johnson*, 952 F.2d 565, 572-73 (1st Cir. 1992); Jules Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 HARV. INT’L L. J. 1, 6 (1982).

sovereignty.’ ... [t]erritorial sovereignty... involves the exclusive right to display the activities of a State. This right has a corollary duty: the obligation to protect within the territory the rights of other States, in particular, their right to integrity and inviolability in peace and in war.’ It is well settled that a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people.⁵

The United Nations General Assembly and Security Council have repeatedly weighed in on the duty of States to ensure that their sovereign territory is not used by terrorists to plan attacks upon other nations.⁶ In 1985, the U.N. General Assembly indicated that it was the obligation of all member States to prevent the use of their territory to benefit terrorist acts. The General Assembly “[i]nvites all States to take all appropriate measures at the national level with a view to ... the prevention of the preparation and organization in their respective territories of (international terroristic) acts directed against other States.”⁷ General Assembly Resolution 40/61 also called upon all States to fulfill “their obligations under international law to refrain from ... acquiescing in activities within their territory directed towards the commission of such acts.”⁸

In 1987, the General Assembly enacted Resolution 42/159, which: Urges all States to fulfil their obligations under international law and to take effective and resolute measures for the speedy and final elimination of international terrorism and, to that end:

- (a) To prevent the preparation and organization in their respective territories, for commission within or outside their territories, of terrorist acts and subversive acts directed against the other States and their citizens;
- (b) To ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts.⁹

In 1992, the U.N. Security Council enacted Resolution 748, condemning Libya for not taking adequate and effective steps to prevent terrorism from originating in that country. In that

⁵ Popiel, *supra* note 3, at 12 (quoting Michael W. Reisman, “Symposium Legal Responses to International Terrorism: International Legal Responses to Terrorism,” 22 HOUS. J. INT’L L. 3, 50 (1999) (citing *Island of Palmas Case U.S. v. Netherlands*,) 2 R.I.A.A. 829, 839 (1928) and *S.S. Lotus (Fr. v. Turk.)* 1927 P.C.I.J. (ser. A) No. 10, at 4, 88 (Moore, J., *dissenting*)).

⁶ See John Altenburg, *Terrorism, State Responsibility, and the Use of Military Force*, 4 CHI. J. INT’L L. 97, 105-06 (2003) and Popiel, *supra* note 3, at 17-22.

⁷ G.A.RES. 40/61 ¶ 5, U.N. Doc. A/RES/40/61 (Dec. 9, 1985).

⁸ *Id.* at ¶ 6.

⁹ G.A. Res. 42/159, ¶5(a)-(b), U.N. Doc. A/Res/42/159 (Dec. 7, 1987).

Resolution, the Security Council affirmed that States have a duty to refrain from acquiescing in terrorist acts originating from its sovereign territory.¹⁰

In 2001, days after the al-Qaeda attack on September 11th, the United Nations Security Council enacted what it called a “Wide-Ranging Anti-Terrorism Resolution.”¹¹ The Security Council decided that States should prohibit their nationals or persons or entities in their territories from making assets available to terrorists, and that States must “take the necessary steps to prevent the commission of terrorist acts; deny safe haven to those who finance, plan, support, commit terrorist acts and provide safe havens as well.”¹² The Security Council also declared that States should ensure that anyone who has participated in financing, planning, preparation or perpetration of terrorist acts, or in supporting those terrorist acts is brought to justice, and that States should take steps to prevent and suppress terrorist acts.¹³

Several United States federal courts have held that the nation-states have an obligation under international law to ensure that its territory is not used by private terrorist organizations to initiate actions against a foreign nation.¹⁴ These courts recognized that States have an “international responsibility of government to prevent its territory from being used as a base for launching terrorist attacks against other countries.”¹⁵

To the extent that a private organization uses the territory of a nation-state, and receives the protection of that nation’s sovereignty to plan and organize military expeditions against another nation, an inference can be raised that the military operation either is sponsored by, or has at least the tacit approval of, the nation whose sovereign territory is being used to mount the expedition.¹⁶ The private venture has the potential to be seen as an act of war, sufficient to bring the

¹⁰ S.C. Res. 748, U.N. Doc. S/RES/748 (March 31, 1992) (quoting U.N. Charter art. 2, para. 4: Every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force. *Id.*).

¹¹ See S.C. Pres. Statement 2001/7158, U.N. Doc. S/PREST/2001/7158 (Sept. 28, 2001).

¹² *Id.*

¹³ S.C. Res. 1373, ¶ 2(b)-(e), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

¹⁴ *Duggan*, *supra* note 4, 743 F. 2d at 74; *Johnson*, *supra* note 4, 952 F.2d. at 572-73.

¹⁵ *Duggan*, *supra* note 4, 743 F. 2d at 74.

¹⁶ *United States v. Chhun*, 2008 WL 793386, at 2 (C.D. Cal., March 20, 2008).

host nation into armed conflict, or at least diplomatic difficulty, with the nation where the military action takes place.¹⁷

State of the World

There are a number of nations in the world today, which are either unwilling or unable to prevent terrorists and other private actors from using their territory to organize, plan, train, supply and initiate military style operations against the sovereignty and peoples of other nations. These include Sudan, Afghanistan, Algeria, the Palestinian Territories in Gaza and the West Bank, Lebanon, Syria, Iraq, Iran, and Pakistan.¹⁸

In several of these instances, the prevailing world view is that the host nation affirmatively is sponsoring the terrorist and military actions. All of those nations are in diplomatic difficulties with the nations which are victimized by the groups using their territory, and in some instances engaged in actual hostilities with the victimized nation. See, for instance, Israeli's 1982 occupation of southern Lebanon to prevent that area from being used to launch rocket and other terrorist attacks against northern Israel, and Israel's 2006 artillery and airstrikes in Lebanon in response to Hezbollah attacks on Israeli Defense Force positions in Northern Israel.¹⁹

The apparent failure of host nations to prohibit the use of their territories for terrorist activities is not limited to those states with which the United States has an adversarial relationship:

Yet Pakistani authorities deployed just several hundred poorly paid and equipped constabulary forces to Buner²⁰, who were repelled in a clash with the insurgents, The limited response set off fresh scrutiny of Pakistan's military, a force with 500,000 soldiers and a similar number of reserves."²¹

At the time of the above quoted article in 2009, the Pakistani response to actions of Taliban and *al Qaeda* operatives using its territory to train and harbor their military and terrorist forces set off

¹⁷ *Id.*

¹⁸ See Carlotta Gall and Eric Schmitt, *U.S. Questions Pakistan's Will to Stop Taliban*, N.Y. TIMES, April 24, 2009, at A1, A8.

¹⁹ See Scott Wilson, *Dual Crises Test Olmert as Leader* WASH. POST, Saturday, July 15, 2006; Charles J. Hanley, *Two Key Americans see 1982 in Lebanon 2006*, ASSOCIATED PRESS, July 23, 2006.

²⁰ Buner is an province in the Northern Territories of Pakistan, East of Peshawar and South of the Swat Valley. See Leon Panetta, Director of the CIA, remarks at the Pacific Council on International Policy (May 18, 2009).

²¹ Gall and Schmitt, *supra* note 18.

scrutiny of the political leadership of Pakistan, and raised the risk of direct military intervention into Pakistan.²² Fast-forward two years to the direct military intervention of U.S. forces on Pakistani soil to neutralize Osama bin Laden.²³ In that instance, the United States took direct and unilateral military action within the territorial limits of a country with which it was and is at peace. Public opinion around the world is not uniformly supportive of U.S. actions in Pakistan, which in turn affects U.S. foreign policy and endangers U.S. national security.

At least one commentator has offered the opinion that the language in declarations of the United Nations “leaves open the possibility for terrorist actions to be imputed onto States that deliberately turn a blind eye to terrorist activities within their borders, since that may be held as acquiescence to such actions or otherwise as ‘encouraging’ these deeds.”²⁴ Another commentator has suggested that “a variety of scholars and other writers have argued that substantial support of terrorists by a state can be sufficient to impute the actions of the terrorists to the supporting state.”²⁵

When a government provides weapons, technical advice, transportation, aid and encouragement to terrorists on a substantial scale it is not unreasonable to conclude that the armed attack is imputable to that government.²⁶

The United States Court of Appeals for the District of Columbia Circuit has observed that terrorist acts by private parties have been imputed to a number of different States.

State sponsors of terrorism include Libya, Iraq, Iran, Syria, North Korea, Cuba, and Sudan. These outlaw states consider terrorism a legitimate instrument of achieving their foreign policy goals. They have become better at hiding their material support for their surrogates, which includes the provision of safe havens, funding, training, supplying weaponry, medical assistance, false travel documentation, and the like.²⁷

²² Gall and Schmitt, *supra* note 18, at A1 and A8.

²³ Peter Baker, Helene Cooper, and Mark Mazzetti, *Bin Laden is Dead*, N.Y. TIMES, May 5, 2011.

²⁴ Popiel, *supra* note 3 at 6.

²⁵ Altenburg, *supra* note 6.

²⁶ *Id.* quoting Oscar Schachter, *The Lawful Use of Force by a State Against Terrorists in Another Country*, in Han, Henry H., Editor, Terrorism and Political Violence: Limits and Possibilities of Legal Control, p. 250 (Oceana 1993).

²⁷ *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1129 (D.C. Cir. 2004), quoting from H.R. Rep. No. 104-383 at p. 62 (1995).

In *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, the plaintiff's brother was an American citizen living and working in Beirut, Lebanon.²⁸ He was kidnapped by Hezbollah²⁹ and held hostage. While the American citizen was being held by Hezbollah, the United States engaged in airstrikes in Libya in retaliation for a Libyan attack on U.S. servicemen in Germany. Libya made it known that it wanted an American hostage to kill in retaliation for the airstrikes. The Arab Revolutionary Cell ("ARC"), which was tied to Libya, bought Kilburn from Hezbollah, tortured him and killed him. The D.C. Circuit actually went further than to merely impute ARC's actions to Libya. The Court found ARC to be an agent of Libya, such that the actions were not only those of private parties imputable to Libya, but actions by Libya itself.³⁰

In *Daliberti v. Republic of Iraq*,³¹ a district court judge in the District of Columbia also quoted the language in H.R. Rep. No. 104-383 to determine that acts of terrorism should be imputed to Iraq. The court noted that Iraq in the late 1990s "consider[ed] terrorism to be a legitimate instrument of achieving their foreign policy goals."³² The facts in *Daliberti* were somewhat different than in *Kilburn*. There were three sets of plaintiffs, but all three were seized by Iraqi border guards and subsequently imprisoned and treated poorly. In all instances, the Iraqi participants were government employees acting on behalf of the government of Iraq, so no imputation was necessary.

From the foregoing, it seems absolutely and unmistakably clear that all nations have a duty not only to refrain from sponsoring or supporting terrorist activities, but also to refrain from acquiescing in the use of its sovereign territory by terrorists to plan and prepare terrorist acts in other countries. This duty applies equally to the United States, as it does to Libya, Afghanistan, Sudan, Iraq, or other states.

Impact upon U.S. Foreign Policy

It also is clear that actions which are initiated from the United States, but executed against another state, have an impact upon American foreign policy. "[A] private individual's involvement in an armed attack on a foreign nation could trigger hostilities, as the foreign nation that perceives the individual's attack issuing from

²⁸ *Id.* at 1125.

²⁹ For an in-depth discussion and history of Hezbollah, see Norton, Augustus Richard, "Hezbollah," Princeton University Press, Princeton, NJ (2007).

³⁰ *Kilburn*, at 1130-1131.

³¹ *Daliberti v. Republic of Iraq*, 98 F. Supp.2d 38, 41 (D.C. Cir. 2000).

³² *Id.* at 52., quoting H.R. Rep. No. 104-383, at 181-83.

within the United States might conclude that it was sanctioned by the United States.”³³ Several United States Courts of Appeals also have held that private action within the United States has an impact on U.S. foreign policy.³⁴ The United States has taken the position in litigation that Congress’ intention in enacting the Neutrality Act³⁵ is “to prevent private citizens from interfering in foreign policy matters that were and are the exclusive domain of the government.”³⁶

In *United States v. Duggan, et al*, the evidence showed “defendants [to be] part of a network of men working clandestinely on behalf of [the Provisional Irish Republican Army] to acquire explosives, weapons, ammunition, and remote-controlled detonation devices in the United States to be exported to Northern Ireland for use in terrorist activities.”³⁷ The co-conspirators explained to a cooperating witness that they sought to purchase equipment for use against the British in Northern Ireland, including surface-to-air missiles (“SAMs”) in order to shoot down British helicopters.³⁸ The United States Court of Appeals for the Second Circuit specifically found that the national security interests of the United States are implicated by acts of terrorism conceived and planned within the United States for execution outside of the United States.³⁹

The government points out that if other nations were to harbor terrorists and give them safe harbor for staging terrorist activities against the United States, United States national security would be threatened. As a reciprocal matter, the United States cannot afford to give safe haven to terrorists who seek to carry out raids against other nations. *Thus, international terrorism conducted from the United States, no matter where it is directed, may well have a substantial effect on United States national security and foreign policy.*⁴⁰

The Second Circuit quoted language from Senate Report 95-701,⁴¹ pertaining to the enactment of the Foreign Intelligence Surveillance Act (“FISA”),⁴² in support of its position that domestic actions designed for foreign execution not only affect U.S. national

³³ *United States v. Chhun*, 513 F.Supp 2d 1179 (C.D. Cal. 2008).

³⁴ *Duggan, supra* note 4, 743 F.2d at 74, *United States v. Johnson*, 952 F.2d 565, 572-73 (1st Cir. 1991).

³⁵ Expedition Against Friendly Nation, 18 U.S.C. § 960 (1984), discussed at length *infra*.

³⁶ *U.S. v. Chhun*, 513 F. Supp. 2d 1179, 1184 (C.D. Cal. 2007).

³⁷ *Duggan, supra* note 4, 743 F.2d at 65.

³⁸ *Id.*

³⁹ *Id.* at 74.

⁴⁰ *Id.* (emphasis added).

⁴¹ S. REP. NO. 95-701, at 3973 (1978).

⁴² 50 U.S.C. § 1801 (2010), *et seq.*

security and foreign policy, but also that the United States has a legal obligation to prevent such activities.

The committee intends that terrorists and saboteurs acting for foreign powers should be subject to surveillance under this bill when they are in the United States, even if the target of their violent acts is within a foreign country and therefore outside actual Federal or State jurisdiction. This departure from a strict criminal standard is justified *by the international responsibility of government to prevent its territory from being used as a base for launching terrorist attacks against other countries. We demand that other countries live up to this responsibility and it is important that in our legislation we demonstrate a will to do so ourselves* (emphasis added).⁴³

A few years later, the United States Court of Appeals for the First Circuit adopted the Second Circuit's analysis in *United States v. Johnson, et al.*⁴⁴ In *Johnson*, the defendant acted primarily in a workshop in his parents' house in Harwich, Massachusetts. He "was engaged in the research and development of explosives for export to the Republic of Ireland and use by the Provisional Irish Republican Army (the PIRA) in its attacks against British civilian and military targets there."⁴⁵ Johnson and his co-defendants were convicted of conspiracy to violate the Arms Export Control Act,⁴⁶ manufacturing and exporting of devices and materials for the discharge of bombs,⁴⁷ conspiracy to injure and destroy British military helicopters based at an RAF station in Northern Ireland,⁴⁸ and possession and control of property used for the intended destruction of British military helicopters in aid of the IRA.⁴⁹

The particular issue at hand in *Johnson* was the applicability of FISA to allegations that the defendants had engaged in domestic activities in Harwich, Massachusetts and other locations in the United States as part of a plan to engage in terrorist activities directed against personnel and property of the United Kingdom located in England and Northern Ireland. The First Circuit had no difficulty disposing of that issue, citing the Second Circuit's decision in *Duggan*, and the applicable portion of Senate Report 95-701, holding that the "departure from a strict criminal standard is justified by the international responsibility of government to prevent

⁴³ S. REP. NO. 95-701.

⁴⁴ *Johnson*, 952 F.2d 565.

⁴⁵ *Id.* at 569.

⁴⁶ 22 U.S.C. § 2778(b)(2)&(c) (2010).

⁴⁷ *Id.*

⁴⁸ 18 U.S.C. § 956 (1996).

⁴⁹ 18 U.S.C. §§ 957 (1994).

its territory from being used as a base for launching terrorist attacks against other countries.”⁵⁰

The First Circuit also found that FISA surveillance of a United States citizen at locations within the United States was necessary to the ability of the United States to protect against international terrorism and to manage its foreign affairs.⁵¹ “International terrorism conducted from the United States, no matter where it is directed, may well have a substantial effect on United States national security and foreign policy.”⁵²

In *United States v. Elliot*,⁵³ the Southern District of New York observed: The court cannot help being aware of the delicacy of American foreign relations particularly in such areas as Africa. The offense charged, if consummated, clearly would have disrupted the economy of a nation. It is inconceivable that such an act, conceived in America and perpetrated by Americans, would not have seriously affected American relations with Zambia.⁵⁴

In *Elliot*, the defendants were charged with conspiring to destroy a railroad bridge in Zambia, and committing several overt acts in furtherance of the conspiracy within the United States. The destruction of the bridge would have halted the flow of Zambian copper on the world market, which was the defendants’ intention. The defendants would have profited economically from the copper shortage, which would have resulted from disabling the bridge.⁵⁵ Unlike many of the cases, the action to take place in the foreign country was not designed to accomplish any political result. Rather the action was intended for a business purpose.

Domestic Policy

There is a group of federal statutes designed to protect the United States from having its foreign policy and national security adversely affected by the actions of private persons. These statutes are collected under the heading of “Foreign Relations” in Title 18 of the United States Code.⁵⁶ In addition, a number of anti-terrorism and unlawful exportation laws⁵⁷ help fill any possible gaps in the foreign relations crimes in Chapter 45 of Title 18. Collectively all of

⁵⁰ *Johnson*, 952 F. 2d at 572-573, *Duggan*, 743 F. 2d at 74, S. REP. NO. 95-701 at 3999.

⁵¹ *Johnson*, 952 F.2d at 573.

⁵² *Id.* citing *Duggan*, 743 F.2d at 74, S. REP. NO. 95-701 at 3999.

⁵³ 266 F. Supp. 318, 323 (S.D.N.Y. 1967).

⁵⁴ *Id.*

⁵⁵ *Id.* at 321.

⁵⁶ 18 U.S.C. §§ 951-970.

⁵⁷ 18 U.S.C. §§ 2331-2339(c), 22 U.S.C. § 2778 (2010).

these laws could be referred to as “neutrality laws,” because they are designed to protect the foreign relations of the United States from private actions.

Enforcement of the United States’ neutrality laws is strictly a matter of domestic foreign policy and domestic law.⁵⁸ The object of American neutrality laws is to prevent the appearance that the United States either sponsors or acquiesces in terrorist or military expeditions against the sovereign territory and people of other nations.

The statute was undoubtedly designed, in general, to secure neutrality in wars between two other nations, or between contending parties recognized as belligerents, but its operation is not necessarily dependent on the existence of such state of belligerency.⁵⁹

From the earliest days of the United States, it has been the policy of this country to prohibit private military or naval expeditions or enterprises planned, initiated or supported against nation-states or peoples with whom the United States is at peace.⁶⁰ The purpose behind the policy is now, and always has been, to prevent private parties from taking actions on their own initiative and for their own purposes which actions have the effect of embroiling the United States in conflicts with the nations against whom the private parties take action.⁶¹

The United States historically has been very aggressive in ensuring that private groups do not use the United States as a staging area for military expeditions against the governments of other countries. For instance, even with a large Irish-American population, and substantial domestic opposition to what is at least perceived to be oppressive treatment and discrimination against Catholics in Northern Ireland, the United States has been firm in not allowing its territory to be used by the Irish Republican Army and

⁵⁸ *Wiborg v. United States*, 163 U.S. 632, 648 (1896); *See Duggan*, 743 F.2d at 74.

⁵⁹ *Id.* at 647.

⁶⁰ George Washington, President of U.S., Annual Address to Congress (December 3, 1793) James D. Richardson, *Messages and Papers of the Presidents*, 1, 131 (1896), *see also The Three Friends*, 166 U.S. at 53.

⁶¹ *Chhun*, 513 F.Supp.2d at 1182-83, *see also Wiborg* 163 U.S. at 648, *O'Brien*, 75 F. 900 (C.C.N.Y. 1896), *United States v. Nunez*, 82 F. 599 (C.C.N.Y. 1896), Jules Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 HARV. INT’L L. J. 1, 6 (1983).

sympathizers to mount military or terrorist operations against the U.K. and the home government in Northern Ireland.⁶²

In *United States v. McKinley*, the defendants were convicted in the District of Arizona for a number of explosives related charges arising from their conspiracy to obtain weapons and explosives for the Provisional Irish Republican Army.⁶³ They acquired 2,900 explosives detonators in Arizona, which then were shipped to the East Coast, and then on to the Provisional IRA in the United Kingdom.⁶⁴ At least 35 unexploded detonators were found at various bombsites in the UK. They also were charged in the Southern District of Florida with attempting to acquire Stinger Surface-to-Air missiles and .50 caliber firearms for use by the Provisional IRA.⁶⁵

In *United States v. Molle*,⁶⁶ the defendant attempted to purchase several firearms from undercover officers in Fairfax County, VA for use by the Provisional IRA in the United Kingdom.⁶⁷ He admitted that he previously shipped guns, ammunition, and bullet proof vests to the IRA.⁶⁸ Molle told officers that he specifically was looking for revolvers because the IRA preferred revolvers to semi-automatic handguns because revolvers don't leave shell casings behind.⁶⁹

In *United States v. Duggan* and *United States v. Johnson*, both discussed above, the defendants attempted to provide weapons and/or services to the Provisional IRA in the United Kingdom.⁷⁰ In each case, the activities originated in the United States and were intended to facilitate terrorist actions in the U.K. All of these cases demonstrate a commitment on behalf of the United States to prevent U.S. sovereign territory from being used as a staging area for terrorist attacks in foreign countries.

Foreign Relations and Anti-Terrorism Laws

The primary statutes used to prevent private actions from having an adverse impact upon U.S. foreign relations are Title 18,

⁶² *United States v. McKinley, et al*, 38 F.3d 428 (9th Cir. 1994), *United States v. Molle*, 2006 U.S. District Lexis 48749 (E.D. V.A. 2006), *Johnson*, 738 F. Supp. 594 (D. Mass 1990).

⁶³ *McKinley*, 38 F.3d at 429.

⁶⁴ *Id.*

⁶⁵ *Id.* at 429, citing *United States v. McKinley*, 995 F. 2d 1020 (11th Cir. 1993).

⁶⁶ *Molle*, 2006 U.S. District Lexis 48749 (E.D. V.A. 2006).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 4.

⁷⁰ *Duggan*, 743 F.2d 74, *The Three Friends*, 166 U.S. 1, *Johnson*, 952 F.2d 565, Lobel, *supra* note 16, *See supra* notes.

United States Code, § 956, conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country; Title 18, United States Code, § 960, Expedition against Foreign Countries, more commonly known as the Neutrality Act; Title 18, United States Code, § 2339A, B or C, Providing Material Support to terrorists or terrorist organizations; Title 22, United States Code, § 2778, the Arms Export Control Law; and Title 18, United States Code, § 371, Conspiracy to violate one of the foregoing. There also are a large number of other firearms and explosives statutes in Chapter 40 of Title 18,⁷¹ and other foreign relations related statutes in Chapter 45 of Title 18,⁷² which are used less frequently, or in combination with one of the major tools listed above.

Foreign Military and Terrorist Actions - 18 U.S.C., § 956

Perhaps the most prominent and useful statute to control private terrorist or military actions directed at foreign countries is Title 18, United States Code, Section 956. There actually are two separate crimes set forth in § 956. Sub-section (a) outlaws conspiracies to commit an act outside of the United States, which would constitute murder, kidnapping or maiming in the United States if any of the conspirators commits an act in furtherance of the conspiracy within the United States.

The full text of Title 18, United States Code, § 956(a)(1) is as follows:

Whoever, within the jurisdiction of the United States, conspires with one or more other persons, regardless of where such other person or persons are located, to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in the special maritime and territorial jurisdiction of the United States shall, if any of the conspirators commits an act within the jurisdiction of the United States to effect any object of the conspiracy, be punished as provided in subsection (a)(2).⁷³

The elements of a violation of § 956(a) are (1) agreement between two or more persons to commit murder (or kidnapping or mayhem) in a foreign country; (2) defendant joined the agreement with the intent to effectuate the agreement; (3) one of the co-conspirators committed at least one overt act in furtherance of the object of the conspiracy, and (4) at least one of the co-conspirators was

⁷¹ 18 U.S.C. §§ 841-848.

⁷² 18 U.S.C. §§ 951-970.

⁷³ 18 U.S.C. §§956(a)(1).

in the United States when the agreement was made, or accomplished one overt act within the United States.⁷⁴

Subsection (b) of § 956 prohibits conspiracies entered into in the United States to damage or destroy property which belongs to a foreign government and which is located in a foreign country with which the United States is at peace, so long as at least one co-conspirator engages in at least one overt act in furtherance of the conspiracy within the United States. The full text of Title 18, United States Code, § 956(b) is as follows:

Whoever, within the jurisdiction of the United States, conspires with one or more other persons, regardless of where such other person or persons are located, to damage or destroy specific property situated within a foreign country and belonging to a foreign government or to any political subdivision thereof with which the United States is at peace, or any railroad, canal, bridge, airport, airfield, or other public utility, public conveyance, or public structure, or any religious, educational, or cultural property so situated, shall, if any of the conspirators commits an act within the jurisdiction of the United States to effect any object of the conspiracy, be imprisoned for not more than 25 years.⁷⁵

There are several important differences between § 956(a) and § 956(b). First, § 956(a) pertains solely to actions against *people*, and not against property. The crime in § 956(b) pertains solely to actions against *property* and not against people. Second, the property involved in a violation of § 956(b) must belong to a foreign government or any subdivision thereof, or involve a railroad, canal, bridge, airport, public utility, public conveyance, public structure, or any religious, educational or cultural property. The clear focus of § 956(b) is on public property rather than private property. Third, and of some significance to cases involving § 956(b), the United States must be *at peace* with the country in which the impact of the action takes place, i.e., the bombing, damage, or destruction.

Killing, Maiming or Kidnapping - 18 U.S.C. § 956(a)

Title 18, United States Code, § 956(a) implements the strategy to prevent terrorism or private military expeditions abroad by specifically prohibiting and punishing the inevitable consequences of terrorism or of a private military or naval expedition or enterprise.

⁷⁴ *United States v. Wharton*, 320 F. 3d 526, 538 (5th Cir. 2003).

⁷⁵ 18 U.S.C § 956(b); *see also, Johnson*, 952 F. 2d at 575-576.

In almost every instance, terrorism or a private military enterprise against a foreign government would result in the death of people under circumstances which would constitute murder, or the type of grievous, seriously disfiguring injury which constitutes mayhem. In addition, certain acts of terrorism as well as insurgent-type military actions frequently involve kidnappings.

Section 956(a)(1) is an incredibly broad statute, designed to include any murder, kidnapping or seriously disfiguring injury which results from a plan to accomplish that result in any foreign country for any reason whatsoever, so long as at least one overt act in furtherance of the agreement to murder, kidnap or maim took place within the United States.⁷⁶ The agreement itself doesn't need to be formed in the United States so long as there is at least one overt act performed here.⁷⁷ No killing, kidnapping or maiming need ever take place. The essence of the crime is the agreement to kill, kidnap or maim in a foreign country.⁷⁸ As pointed out above, the country where the event is to take place need not be a country with which the United States is at peace.

Among the cases brought pursuant to § 956(a) are the *United States v. Arnaout*⁷⁹, in which the defendants were charged with conspiring to assist *al-Qaeda*, *Hezb-e-Islami*, the Sudanese Popular Defense Force and others engaged in terrorist acts in Bosnia, Chechnya, and the Sudan.⁸⁰ The indictment alleged that the defendants knew that their assistance would result in murdering, kidnapping, and/or maiming of persons in a foreign country.⁸¹

In *United States v. Hassoun, et al*,⁸² the defendants were charged with conspiring to murder, kidnap, and maim persons outside the United States by "participating in a 'support cell' with the aim of 'promoting violent jihad' as espoused by a 'radical Islamic fundamentalist movement'."⁸³ In *United States v. Stewart, et al*,⁸⁴ the court found that the evidence was sufficient to sustain the conviction of the defendant charged with a violation of § 956(a), "especially in light of testimony establishing that [the defendant] attempted to undermine a unilateral cease-fire by an Egyptian

⁷⁶ *U.S. v. Hassoun*, 476 F.3d. 1181, 1183 (11th Cir. 2007).

⁷⁷ *Supra* note 73.

⁷⁸ *U.S. v. Elliott*, 266 F.Supp. 318, 323 (S.D.N.Y. 1967).

⁷⁹ 236 F. Supp.2d 916, 917 (N.D. Ill. 2003).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² 476 F.3d 1181, 1183-84 (11th Cir. 2007).

⁸³ *Id.*

⁸⁴ 590 F.3d 93, 99 (2nd Cir. 2009), *cert. denied*, 130 S. Ct. 1924 (2010).

terrorist organization and to draft a *fatwa* calling for, *inter alia*, the killing of ‘Jews and Crusaders’.”⁸⁵

While most of the § 956(a) cases are terrorism or military type operations with an apparent political motive, such a motive is not required for prosecutions under § 956(a). In *United States v. Wharton*,⁸⁶ the defendant entered into a scheme with his [future] wife (Webb) and an accomplice in an insurance company in Shreveport, Louisiana, to obtain a large life insurance policy on wife’s life, and then go to Haiti to obtain a fake death certificate in order to cash in the policy.⁸⁷ The parties accumulated approximately \$2 million in life insurance policies on wife’s life over an 18-month period, on which Wharton and the accomplice in the Shreveport insurance company were named as beneficiaries.

Wharton and Webb then were married in the Dominican Republic, and then arranged to travel to Haiti to locate a dead body for which they could acquire a false death certificate. After acquiring the false certificate attesting to Webb’s death, she then would go into hiding in the Caribbean. Apparently there was a change in plans and the wife actually was murdered in Haiti. The defendant was convicted of a violation of § 956(a) and his conviction was upheld on appeal.⁸⁸

United States v. Elliot,⁸⁹ although it is a § 956(b) case involving destruction of property rather than murder, kidnapping or mayhem under § 956(a), also demonstrates that the statute extends to activities with private economic motives rather than a motive to punish or effect change in a foreign government. As discussed above, in *Elliot* the defendants conspired to destroy a railroad bridge in the Republic of Zambia.⁹⁰ The motive was not to create a terrorist act in Zambia, or to overthrow or otherwise influence the government of Zambia, but rather to corner the world market in copper by eliminating the supply of new Zambian copper, which would have had to flow across the bridge in question in order to get to market. The defendant’s motives were strictly economic, and in that regard differ from the *Arnaout*, *Hassoun* and *Stewart* cases discussed above.

The normal and intended use of § 956(a) is to prevent encroachment on U.S. foreign policy. It was enacted initially as part

⁸⁵ *Id.* at 99.

⁸⁶ 320 F. 3d 526 (5th Cir. 2003).

⁸⁷ *Id.* All the facts outlining the scheme in Wharton are taken from the Fifth Circuit’s opinion.

⁸⁸ *Id.* at 537-538. Wharton also was convicted of mail fraud and wire fraud in violation of Title 18, United States Code, §§ 1341 and 1343.

⁸⁹ *Elliot*, 266 F.Supp. 318.

⁹⁰ *Id.*

of the Neutrality Act of 1917, to “punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, ...”⁹¹ The “economic motive” cases discussed above, however, demonstrate that the code section has sufficient flexibility and applicability to address any situation in which an actor might attempt to infringe on foreign policy issues through the use of force and violence.

Destruction of Foreign Public Property - 18 U.S.C. § 956(b)

Section 956(b) prohibits conspiracies to damage or destroy public property in a foreign country. The property must either be owned by a foreign government, or be that type of property which has a public, quasi-governmental purpose such as railroads, canals, bridges, airports, airfields, or public utilities or public conveyances, or religious, educational, or cultural institutions.⁹² The motive of the military expedition to a foreign nation is immaterial so long as (1) at least two people enter into an agreement, (2) to damage specified property of a foreign government in that foreign country, (3) the United States is at peace with that country, and (4) at least one co-conspirator takes at least one overt action in the United States to accomplish the object of the agreement.⁹³

Like § 956(a), this provision implements the strategy to prevent terrorism or private military expeditions by specifically prohibiting and punishing the inevitable consequences of terrorism or of a private military or naval expedition or enterprise. In almost every instance, terrorism or a private military enterprise against a foreign nations would involve destroying or damaging buildings and/or property of the government against which the operation is directed, including railroads, canals, bridges, airports, airfields, or other public utilities, conveyances or structures, all of which specifically are within the scope of § 956(b).

Among the cases brought pursuant to § 956(b) are *United States v. Elliot*, *United States v. Johnson*, and *United States v. Chhun*.⁹⁴ As noted above, *Elliot* involved a plot to destroy a railroad

⁹¹ *United States v. Johnson*, 738 F.Supp. 591, 592 (D. Mass. 1990), *aff'd*, 952 F. 2d 565 (1st Cir. 1991), quoting the preamble of the Act at 40 Stat. 227 (1917).

⁹² 18 U.S.C. § 956(b)(1996).

⁹³ *Elliot*, 266 F.Supp at 323 (defendant conspired to destroy a bridge in Zambia in order to halt the supply of Zambian copper on the world market, and cause the defendant to profit economically in the ensuing copper shortage).

⁹⁴ *Elliot*, 266 F.Supp. 318 (S.D.N.Y. 1967), *Johnson*, 952 F.2d 565 (1st Cir. 1991); *Chhun*, 513 F.Supp. 2d 1179 (C.D. Cal. 2007).

bridge in Zambia for economic purposes. *Johnson* involved a plot to provide arms and services to the Provisional IRA. In *United States v. Chhun*, the defendants were alleged to have conspired to mount a military action against the government of Cambodia in order to conduct a *coup d'etat*.⁹⁵ While it is hypothetically possible to mount a military action to conduct a *coup d'etat* without damaging or destroying any public buildings, normally implicit in a *coup* attempt against a government is the intent to damage or destroy public buildings in the nation which is the subject of the *coup*. It is this damage or destruction of foreign government buildings and infrastructure that § 956(b) is designed to prevent and punish.

Challenges to § 956

There have been challenges to § 956 based upon allegations of vagueness and/or lack of specificity. In *United States v. Awan*,⁹⁶ the defendant claimed that the words “murder,” “maim,” and “kidnap” as used in § 956(a) were unconstitutionally vague.

The Court denied that claim, pointing out that the statute prohibits conspiracy to commit murder, mayhem or kidnapping if the facts were such that they would constitute those crimes “if ‘committed in the special maritime and territorial jurisdiction of the United States.’”⁹⁷ The United States Code applies to the special maritime and territorial jurisdiction of the United States, and all three of those offenses are defined in the United States Code.⁹⁸

“Murder” is defined in Title 18, United States Code, § 1111 as “the unlawful killing of a human being with malice aforethought.” “Mayhem,” or “maiming” is defined in Title 18, United States Code, § 114 as “whoever, ..., with intent to torture ..., maim, or disfigure, cuts, bits or slits the nose, ear, or lip, or cuts out or disables the tongue, or puts out or destroys and eye, or cuts off or disables a limb or any member of any person; or ... throws or pours upon another person, any scalding water, corrosive acid or caustic substance, ...” Kidnapping also is defined in the United States Code § 1201 as “Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, carries away and holds for ransom or reward, ... “in one or more of five circumstances provided within that code section. Accordingly, those terms are amenable to definition with sufficient definiteness to meet Due Process muster.

⁹⁵ *Chhun*, 513 F.Supp. 2d at 1180.

⁹⁶ 459 F.Supp. 2d 167 (E.D.N.Y. 2006).

⁹⁷ *Id.* at 181.

⁹⁸ *Id.*

In *United States v. Johnson*⁹⁹, the defendant was charged with violating § 956(b) by conspiring to destroy “specific property belonging to the government of the United Kingdom...to wit: one or more of a total of less than seventy military helicopters of the Lynx, Gazelle, Puma, Chinook and Wessex Class, based at the Royal Air Force Station at Aldergrove, Northern Ireland.” The defendants argued that the language in the indictment did not describe the property to be destroyed with sufficient particularity to meet the “specific property” requirement of § 956(b). The First Circuit affirmed the District Court’s decision finding that:

The specificity requirement in section 956 does not mean that the property which is the object of the conspiracy to destroy needs to be described in minute detail. Rather, consistent with the purpose and objective of section 956, ..., it is sufficient that the indictment state and describe the property definitely and with a reasonable degree of specificity.¹⁰⁰

The District Court went on to observe that to require the indictment to identify a piece of personal property by specific serial numbers or similar detail would render the statute meaningless.¹⁰¹

Lawful Combatant Immunity

“Lawful combatant immunity, a doctrine rooted in the customary international law of war, forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets.”¹⁰²

There is no “lawful combatant immunity” defense to most indictments alleging a violation of § 956 for at least two reasons. First, the killing, maiming or kidnapping in the case of a § 956(a) case, or the damage or destruction of property in a § 956(b) case, results from private action, not a state sponsored military expedition. Secondly, the defendants in a § 956 prosecution generally are not “legal combatants” as that phrase is used in international law.

⁹⁹ 952 F. 2d at 575.

¹⁰⁰ *U.S. v. Johnson*, 738 F.Supp. 591 (D. Mass. 1990), *aff’d*, 952 F.2d 565.

¹⁰¹ *Id.*

¹⁰² *U.S. v. Lindh*, 212 F.Supp. 2d 541 (E.D.Va. 2002), *see* Waldemar A. Solf & Edward R. Cummings, *A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949*, 9 CASE W. RES. J. INT’L L. 205, 212 (1977).

In *United States v. Arnaout*,¹⁰³ the defendant alleged that he was immune from prosecution because he was alleged to have aided persons who were lawful combatants in Bosnia, Chechnya and the Sudan. The District Court found that there were no lawful combatants involved, citing *United States v. Lindh*,¹⁰⁴ which in turn cited the *Geneva Convention Relative to the Treatment of Prisoners of War*, August 12, 1949.¹⁰⁵ There are four criteria to achieving lawful combatant status under international law:

- (1) Hierarchical military structure;
- (2) Distinctive military uniforms or emblems recognizable at a distance;
- (3) Carrying arms openly; and
- (4) Operations conducted in accordance with the laws and customs of war.¹⁰⁶

The Court in *Arnaout* found that the evidence did not establish that the organizations which Arnaout assisted, i.e., *al-Qaeda*, *Hezb-e-Islami*, or the Sudanese Popular Defense Force, met those criteria.¹⁰⁷ In *United States v. Lindh*, the case cited by the court in *Arnaout*, the court found that the Taliban also did not qualify for lawful combatant immunity for the same reason.¹⁰⁸

“At Peace”

Section 956(b) requires a nexus to a nation with which the United States is at peace, which is not required for prosecutions under § 956(a). There is no clear statutory definition nor Supreme Court precedent controlling what constitutes “at peace” within the meaning of the *Neutrality Act*. In many of the cases brought under the *Neutrality Act*, or under Title 18, United States Code, § 856, there has not been any significant doubt regarding whether the United States was “at peace.”

In *United States v. Elliot*, the Southern District of New York found that the words “at peace” in § 956 “conveys definite warning as to the proscribed conduct when measured by common understanding and practices. ... Determining whether we are at peace with Zambia

¹⁰³ 236 F.Supp. 2d 916 (N.D. Ill. 2003).

¹⁰⁴ 212 F.Supp. 2d 541, 557 (E.D.Va. 2002).

¹⁰⁵ August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Art. 4(A)(2).

¹⁰⁶ *Arnaout*, 236 F.Supp. 2d at 917-918, *Lindh*, 212 F.Supp. 2d at 557, Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Art. 4(A)(2).

¹⁰⁷ *Arnaout*, 236 F.Supp. 2d at 917.

¹⁰⁸ *Lindh*, 212 F.Supp. 2d. at 557.

poses a problem no more difficult for a court or a citizen than that posed in understanding any statute dealing with complex behavior and concepts.”¹⁰⁹

In *United States v. Abdi*,¹¹⁰ the defendant asked the district court to take judicial notice that the United States was not “at peace” with Somalia at the times relevant to the prosecution. Abdi was charged with conspiracy to violate § 956 and to provide material support to terrorism, in violation of 18 U.S.C. §§ 371, 956 and 2339A. In the process, he had provided false information on a passport application to facilitate his travel to a terrorist training camp.

In response to Abdi’s request for judicial notice, the court found that there was no evidence in the record to support the conclusion that the United States was not at peace with Somalia. “There is no declaration of war against Somalia nor is there any other evidence of open hostility between the United States and that of Somalia. At oral argument, Defendant did not adequately supplement the record with information sufficient to show that the United States was ‘not at peace’ with Somalia.”¹¹¹ The court then found that it was not judicially noticeable that the United States was not at peace with Somalia.¹¹²

Historically, courts used to consider whether the United States was “at peace” to be a matter of law to be determined by the Court.¹¹³ In 1995, however, the Supreme Court in *United States v. Gaudin* held that all elements of an offense had to be found by the jury unanimously beyond a reasonable doubt.¹¹⁴ It now is without dispute that whether the United States is “at peace” with the nation involved in cases brought under §§ 960 and 956 is an element of those offenses, and that this issue must be submitted to the jury during trial unless conceded by the defendant by way of stipulation. There are a significant number of reported court decisions over the years which taken together have developed a definition of the term “at peace.”

The rule which has emerged from these cases is that the United States is “at peace” with another nation for the purposes of §§ 960 and 956 if (1) there is no declared state of war between the United States and that nation, and (2) there are no active military

¹⁰⁹ *Elliott*, 266 F.Supp. at 322.

¹¹⁰ 498 F.Supp. 2d 1048, 1079-80 (S.D. Ohio 2007).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See *U.S. v. Terrell*, 731 F.Supp. 473, 475-478 (S.D. Fla. 1989), as well as most of the cases from the late 19th century cited in the previous section.

¹¹⁴ *Gaudin*, 515 U.S. 506, 511 (1995).

actions between the United States and that nation.¹¹⁵ Both conditions have to exist. If there is a formal state of war, then the United States is not “at peace” despite the absence of hostilities. Likewise, the United States is not at peace if there are active military actions with a nation despite the absence of a declaration of war.

A declared war is relatively easy to identify. The President asks Congress for a declaration of war, and Congress votes yes or no. The First World War and the Second World War were wars that were formally declared by Congress. There are several military actions in the past 50 years or so without formal declarations of war for which there is uniform agreement that the United States was “at war,” and therefore not “at peace. These include the Korean War and Vietnam, neither of which had the benefit of a formal declaration of war.¹¹⁶ The Korean War did have the benefit of United Nations resolutions, however, and the Vietnam War did have the *Tonkin Gulf Resolution*.¹¹⁷ In the *Tonkin Gulf Resolution*, Congress specifically stated that it “approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression. ...The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia.”¹¹⁸

An undeclared war, where there exists a state of active military operation, is not as easy to identify. It is with regard to these operations that there is the most contention regarding whether the United States is “at peace.” The most recent reported case on this issue is *United States v. Chhun*¹¹⁹ from the Central District of California. In *Chhun*, the defendant was involved in a failed coup attempt against the Cambodian government in 2000. He was convicted of violations of Title 18, United States Code, §§ 960 and 956(b). Key issues in the *Chhun* case were whether the issue of “at peace” was a matter of law to be determined by the court, or an element of the offense to be determined by the jury, exactly what constitutes “at peace,” and what evidence could be presented on that issue to the jury.¹²⁰

¹¹⁵ *Chhun*, 513 F.Supp. 2d 1179, 1184 (C.D. Cal. 2007), as expanded by the court’s subsequent order located at Case No. 2008 WL 793386, at 2 (C.D. Cal., March 20, 2008).

¹¹⁶ *Terrell*, 731 F. Supp. at 475.

¹¹⁷ H.J. Res. 1145, 88th Cong. (1964).

¹¹⁸ *Supra* note 117.

¹¹⁹ *Chhun*, 513 F.Supp. 2d at 1184, as expanded by the court’s subsequent order located at Case No. 2008 WL 793386, at 2 (C.D. Cal., March 20, 2008).

¹²⁰ *Id.*

The defendant in *Chhun* alleged that the United States was engaged in a covert war with Cambodia, and therefore the United States was not “at peace” with Cambodia so that the defendant could not be guilty as a matter of law. In furtherance of this approach, the defendant demanded discovery of secret government files regarding its military, intelligence and diplomatic relationship with Cambodia, and to introduce at trial evidence of alleged covert activities to establish the absence of peace with Cambodia. The United States sought to exclude evidence of covert action at trial as being irrelevant to the issue of being “at peace,” and to prohibit discovery of secret government files as being unlikely to lead to admissible evidence which was relevant to some issue at trial.

The district court in *Chhun II* held that a declared or undeclared war must be open and notorious to establish that the United States is not at peace with a foreign nation.¹²¹ “Active military operations are open and notorious. Covert activities, by definition, are not open and notorious. Therefore, the United States’ involvement in covert activities within a foreign nation does not establish a state of war such that the United States is not ‘at peace’ with the foreign nation.”¹²² As a result, the defendants were denied access to government files which might contain evidence of covert activities in Cambodia. Defendants also were denied authority to introduce evidence of alleged covert activities in Cambodia as being irrelevant to any issue in the case.¹²³

At first blush, there is a case from the Southern District of Florida which appears to be in conflict with the rule stated above. In *United States v. Terrell*,¹²⁴ the district court held that the United States was not “at peace” with Nicaragua in the 1980s, so the *Neutrality Act* was not applicable. Upon further examination, however, it is clear that *Terrell* actually falls within the scope of the rule outlined above.

The court in *Terrell* chose to analyze the issue in terms of “neutrality,” i.e., whether the United States is “at peace” with a nation is the same as whether the United States is politically “neutral.” “Neutrality” is a political term used in international relations theory to describe the status of alliances between states. Switzerland traditionally has been neutral, meaning not allied with any coalition in an international conflict. The question isn’t whether a nation is neutral. The question is whether the nation is “at peace”

¹²¹ Order Granting Mot. In Limine, Case No. 2008 WL 793386, at 2 (C.D. Cal., March 20, 2008).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Terrell*, 731 F.Supp. at 475-478 (S.D. Fla. 1989).

with another nation. A nation could maintain a position of political neutrality with regard to another nation, yet not be “at peace” with that nation.

Likewise, the United States is not a “neutral” nation. The United States is a member of NATO, has other treaty obligations, and is a member of United Nations peacekeeping operations. That does not mean that the United States is not “at peace” with nations that are not a member of NATO. No one would seriously allege, for purposes of the Neutrality Act, that the United States is not “at peace” with Russia and all the members of the former Warsaw Pact. Accordingly, neutrality is not the correct analysis.

The Southern District of Florida’s decision in *Terrell* otherwise is not in conflict with the Central District of California’s decision in *Chhun*. In *Terrell*, the United States was involved in open and notorious military activities against Nicaragua. It was in the newspapers and on network television every day. Congress was openly appropriating funds for operations against the Sandinista government. On at least three separate occasions those military operations specifically were authorized and funded by Congressional enactments. This is a very different situation than the relationship between the United States and other nations with whom we are not engaged in open and notorious military action. Therefore, the court in *Terrell* concluded that the United States was not “at peace,” with the government of Nicaragua.

In today’s world, the United States clearly is not at peace in Iraq or Afghanistan regardless of whether there has been a formal declaration of war. The United States is engaged in open and notorious military action in both countries; therefore, the United States is not “at peace” in Iraq or Afghanistan, and the *Neutrality Act* should not be held to be applicable regarding those countries.

Terrell also was decided before the Supreme Court’s decision in *Gaudin* in 1995, which clearly established that all elements of an offense have to be submitted to the jury, and found by the jury unanimously beyond a reasonable doubt. The court in *Terrell* took this issue away from the jury, and substituted it’s own judgment for that of the jury as required by the Supreme Court. Even so, however, the decision in *Terrell* is consistent with the decision in *Chhun* because the United States was involved in open and notorious military action in Nicaragua, which would have resulted in the same holding using the analysis set forth by the court in *Chhun*.

The analysis in *Chhun* is the approach which makes sense. The theory behind the *Neutrality Act* is that “a private individual’s

involvement in an armed attack on a foreign nation could trigger hostilities, as the foreign nation ... might conclude that it was sanctioned by the United States.”¹²⁵ The risk that a foreign nation might attribute private action to the United States government and therefore initiate hostilities against the United States is eliminated if there already exists open and notorious military action by the United States against that foreign nation. “[I]t is the prerogative of the federal government, not private individuals” to take military action against a foreign nation.¹²⁶

The Central District’s decision in *Chhun* also is consistent with the Southern District of Ohio’s decision in *United States v. Abdi*. In *Abdi*, the court was looking for evidence of a declaration of war or hostilities, or open and notorious military action, and finding none concluded that there was no evidence that the United States was not at peace with Somalia.

There are two Supreme Court cases discussing “at war” and “at peace” that do not disturb the rule stated above, but should be mentioned to demonstrate why they do not control resolution of this issue. They are not applicable because they interpret different provisions of federal law which were promulgated by Congress for very different reasons than the *Neutrality Act*. In addition, one of them interprets the term “at war” rather than “at peace.”

“Congress in drafting laws may decide that the Nation may be ‘at war’ for one purpose, and ‘at peace’ for another. It may use the same words broadly in one context, narrowly in another.”¹²⁷ In *Lee v. Madigan*,¹²⁸ the Supreme Court interpreted a portion of the United States Code that provided that no person could be tried by court-martial for murder or rape committed within the geographic limits of the United States *in time of peace* (emphasis added). Defendant Lee was convicted by court-martial in 1949 of conspiracy to commit murder, well after the close of hostilities of the Second World War, but also well before the wars with Germany and Japan formally were terminated by Joint Resolutions of Congress dated October 19, 1951 and April 28, 1952, respectively.¹²⁹ The Supreme Court determined that the court-martial of Lee took place “in time of peace” for the purposes of this particular statute despite the fact that the United States technically was at war until the Congressional Joint

¹²⁵ *Chhun*, 513 F.Supp. 2d at 1184, as expanded by the court’s subsequent order located at Case No. 2008 WL 793386, at 2 (C.D. Cal., March 20, 2008).

¹²⁶ *Id.* at 2.

¹²⁷ *Madigan*, 358 U.S. at 231.

¹²⁸ *Id.*

¹²⁹ *Id.* at 279.

Resolutions a few years later. The Court found that in practical terms the United States was in a time of peace in 1949, and the important constitutional right to trial by jury outweighed application of the Articles of War, most of which already had been repealed by 1949.¹³⁰ As a result, the conviction by court-martial was invalid, and the accused had to be convicted by a civilian court. The Supreme Court's decision in *Lee v. Madigan* is consistent with the above discussion in that open and notorious military action had ceased in 1945, and the United States was "at peace" in the everyday interpretation of that phrase. More importantly, the Court was not interpreting provisions of the *Neutrality Act* or related statutes.

In *Ludecke v. Watkins*,¹³¹ the Supreme Court reached a seemingly inconsistent result in a case in which it interpreted a provision of the Alien Enemy Act¹³² authorizing the United States to deport an enemy alien dangerous to the public peace and safety of the United States in a time of war. Ludecke defended, saying that hostilities had ceased in 1945, and therefore the Alien Enemy Act no longer applied. The Supreme Court held that the authority began when war was declared but was not exhausted at the cessation of hostilities. A state of war technically still existed at the time of Ludecke's deportation.¹³³ While Ludecke appears to be inconsistent with *Lee v. Madigan*, it is consistent with the *Neutrality Act* cases. The most important factor to remember, however, is that the Supreme Court was interpreting a statute very different from the *Neutrality Act*.

Material Support for Terrorism – 18 U.S.C. § 2339

Title 18, United States Code, §§ 2339A, 2339B and 2339C prohibit providing material support for terrorism. While the general focus of these three statutes is upon preventing terrorism directed *at* the United States, these statutes also prohibit providing material support for terrorism originating in the United States and directed at foreign nations.

18 U.S.C. § 2339A

Section 2339A provides in material part –

(a) Whoever 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, a violation of [a number of sections

¹³⁰ *Id.*

¹³¹ *Ludecke v. Watkins*, 335 U.S. 160 (1948).

¹³² 50 U.S.C. § 21 (1918).

¹³³ *Ludecke*, 335 U.S. 160.

of the United States Code, including 956,¹³⁴ 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, [shall be punished as provided therein].

“Material Support or resources” is defined as “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 (one or more individuals who maybe or include oneself), and transportation, *except medicine or religious materials*”¹³⁵

The primary application of § 2339A to U.S. citizens initiating terrorist acts or military enterprises in the United States for execution abroad is with reference to 18 U.S.C. § 956. Anyone who provides material support as defined above to another person who conspires with others to murder, maim or kidnap a third party outside of the United States, in violation of § 956(a), or to one who conspires with another person to damage or destroy public property in a nation with which the United States is at peace, in violation of § 956(b), is guilty of providing material support for terrorism in violation of § 2339A.

Section 2339A was enacted initially in 1994,¹³⁶ so it was not in existence at the time of the *Duggan*, *Johnson* and *Elliot* cases discussed above. Using those fact patterns as examples, however, we can see how § 2339A would apply to actions of U.S. citizens and residents acting within the United States to plan and initiate terrorist or military type operations in a foreign country. In *Duggan* and *Johnson*, the defendants collected weapons to be provided to the Provisional IRA to be used in Northern Ireland and England to murder, maim and/or kidnap people there, and to destroy government owned property of a nation with which we were and are at peace. In each case, the defendants provided weapons, lethal substances and

¹³⁴ The full list of offenses referenced in § 2339A is as follows: 32, 37, 81, 175, 229, 351, 831, 842 (m) or (n), 844 (f) or (i), 930(c), 956, 1091, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, 2340A, or 2442 of this title [18 USC § 32, 37, 81, 175, 229, 351, 831, 842 (m) or (n), 844 (f) or (i), 930(c), 956, 1091, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, 2340A, or 2442], section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), section 46502 or 60123(b) of title 49, or any offense listed in section 2332b(g)(5)(B) [18 USC § 2332b(g)(5)(B)] (except for sections 2339A and 2339B [18 USC §§ 2339A and 2339B]).

¹³⁵ 18 U.S.C. § 2339A(b)(2009).(emphasis added).

¹³⁶ Pub. L. No. 103-322, Title XII, § 120005(a), 108 Stat. 2022.

explosives in aid of the conspiracy to murder and maim and/or to destroy public property of the U.K. At the time, the defendants knew that the weapons, explosives and other lethal substances were going to be used in violation of § 956. It is clear that the actions in *Duggan* and *Johnson* also meet the elements of § 2339A as it now exists.

In *Elliot*, it is clear that there was a conspiracy to destroy a rail road bridge in Zambia, and that the United States was at peace with Zambia. It is not clear from the reported decision whether the defendants provided explosives, currency or financial instruments to persons involved in the scheme to destroy the bridge, so it is impossible to tell if the actions in *Elliot* also would have violated § 2339A if it existed at the time.

In *United States v. Khan*¹³⁷, three defendants were convicted of violations of § 2339A in connection with a plan to assist an international terrorist organization known as *Lashkar-e-Taiba* (“LET”) to conduct military and terrorist activities in the Kashmir region of India and Pakistan. It was established at trial that the defendants had provided material support to a conspiracy to murder, maim or kidnap persons in a foreign country, in violation of § 956(a)¹³⁸. The defendants all lived in Fairfax County, Virginia, where they conducted war games training to prepare them to fight jihad in Kashmir. The defendants engaged in training exercises with paint ball guns, both before and after September 11, 2001. After 9/11, however, at least one member of the conspiracy openly advocated fighting for *al-Qaeda* and other militant Islamic groups in various areas of the world. Two of the conspirators actually went to *Lashkar-e-Taiba* training camps in Pakistan where they learned military and terrorist operations, and then returned to the United States and resumed their military training.¹³⁹ Their challenges to conviction, based upon the argument that they merely were engaging in recreational paintball games, was rejected by the U.S. Court of Appeals for the Fourth Circuit.¹⁴⁰

In *United States v. Lakhani*,¹⁴¹ the defendant attempted to provide a shoulder fired “Stinger” missile to a Somali terrorist group named *Ogaden Liberation Front* (“OLF”), which conducted terrorist actions in the Middle East. Lakhani was put into contact with an

¹³⁷ *U.S. v Khan*, 461 F.3d 477 (4th Cir. 2006), corrected, amended on other grounds, 2006 US App LEXIS 22748, (4th Cir. 2006), *appeal after remand, remanded on other grounds*, 2006 US App LEXIS 22791 (4th Cir. 2006), and *cert. denied*, 127 S Ct 2428, 167 L Ed 2d 1130 (2007), and *cert. denied*, 127 S Ct 2428, 167 L Ed 2d 1130(2007).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Lakhani*, 480 F.3d at 177-78.

FBI undercover operative who told him that he was a representative of the OLF, that the OLF was a terrorist group operating in the Middle East, and that OLF needed to acquire weapons.¹⁴² Lakhani travelled frequently to the Ukraine, where he attempted to locate Stinger missiles for the undercover operative.

At one point, an Israeli tourist flight was fired upon with a shoulder fired missile, and Lakhani congratulated the undercover operative based upon his mistaken assumption that attack was committed by the undercover operative and OLF.¹⁴³ In the process of consummating the Stinger deal, Lakhani laundered the down payment for the missile through a jeweler in New York and accounts in Hong Kong and Switzerland. Unfortunately for Lakhani, his search for missiles in the Ukraine drew the attention of the Russian Security Services, which then cooperated with the FBI and provided Lakhani with a fake Stinger missile.¹⁴⁴ Lakhani was convicted of attempting to provide material support to terrorists in violation of 18 U.S.C. § 2339A, illegal munitions brokering in violation of 22 U.S.C. § 2778, money laundering in violation of 18 U.S.C. § 1956, and attempted importation by means of false statements in violation of 18 U.S.C. § 542. He was sentenced to 47 years in prison.¹⁴⁵

There has been substantial litigation regarding the meaning and legitimacy of several terms contained within the definition of “material support or resources” in § 2339A, particularly “training,” “personnel,” and “expert advice or assistance.” In *Humanitarian Law Project v. Mukasey*¹⁴⁶, the plaintiffs sought an injunction prohibiting enforcement of the material support laws against them for activities they wished to perform to assist the Kurdistan Workers Party (“PKK”) and the Liberation Tigers of Tamil Eelam (“Tamil Tigers”).¹⁴⁷ This actually is a § 2339B case, but it is discussed here because Congress adopted the definition of “material support or

¹⁴² *Id.* All the facts about the *Lakhani* case are taken from the published decision at 480 F.3d 171.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Humanitarian Law Project v. Mukasey*, 552 F.3d 916 (9th Cir. 2007), *aff'd in part, remanded in part sub nom Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

¹⁴⁷ “The plaintiffs supporting the PKK wanted to train members of PKK how to use humanitarian and international law to peacefully resolve disputes, to engage in political advocacy on behalf of Kurds living in Turkey and teach PKK members how to petition various representative bodies such as the United Nations for relief.”

Plaintiffs supporting the [Tamil Tigers] want to train members to present claims for tsunami related aid to mediators and international bodies, to offer their legal expertise in negotiating peace agreements between the [Tamil Tigers] and the Sri Lankan government, and engage in political advocacy on behalf of Tamils who live in Sri Lanka.” 552 F.3d at 921, fn. 1.

resources,” set forth in § 2339A when it enacted § 2339B.¹⁴⁸ After 11 years of litigation, during which this case went back and forth between the Central District of California and the Ninth Circuit several times,¹⁴⁹ the Ninth Circuit held in 2007 that the term “training” as used in §2339A(b) was unconstitutionally vague because the term could be read to include speech which is protected under the First Amendment.¹⁵⁰ The Court also held the term “specialized knowledge or assistance” was unconstitutionally vague because its definition included the phrase “other specialized knowledge” which could encompass protected speech.¹⁵¹ The Court held the phrase “service” to be unconstitutionally vague because its definition included the phrases “training” and “specialized knowledge or assistance,” which it already had held to be unconstitutionally vague.¹⁵² The plaintiffs’ claim that the statute was facially overbroad was denied by the Ninth Circuit.¹⁵³

The Supreme Court granted *certiorari* under the name of *Holder v. Humanitarian Law Project*¹⁵⁴ and reversed the Ninth Circuit, holding that § 2339A is constitutional as applied to the particular defendants in the case.¹⁵⁵ The Supreme Court found that the plaintiffs were not “asking us to interpret § 2339B, but to revise it.”¹⁵⁶ In addressing the plaintiffs’ vagueness allegation, the Supreme Court affirmed that the applicable test is whether “the statute under which [the conviction] is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”¹⁵⁷

In applying that test to the actions in which the plaintiffs wished to engage, the Supreme Court found that the terms were sufficiently clear to give them fair notice of what was prohibited. In reversing the Ninth Circuit, the Supreme Court held that the lower court had violated the rule “that a plaintiff cannot complain of the

¹⁴⁸ See 18 U.S.C. § 2339B(g)(4).

¹⁴⁹ See *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1205 (C.D. Cal. 1998), *aff’d* in an unpublished decision, and remanded to the district court, then re-affirmed by the C.D. Cal. at 2001 U.S. District Lexis 16729 (C.D. Cal. 2001), then *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185 (C.D. Cal. 2004), *aff’d* 352 F. 3d 382, *vacated*, 393 F. 3d 902 (9th Cir. 2004), *en banc review granted*, 382 F. 3d 1154, *remanded for further proceedings*, 393 F. 3d 902 (9th Cir. 2004), then 380 F. Supp. 2d 1134 (C.D. Cal. 2005).

¹⁵⁰ *Reno*, 552 F.3d at 929.

¹⁵¹ *Reno*, 552 F. 3d at 930.

¹⁵² *Id.*

¹⁵³ *Id.* at 932.

¹⁵⁴ *Holder v. Humanitarian Law Project*, 557 U.S. 966, 130 S. Ct. 48 (2010).

¹⁵⁵ *Holder*, 130 S. Ct. at 2712.

¹⁵⁶ *Id.* at 2718.

¹⁵⁷ *Id. citing Williams*, 553 U.S. at 304 (2008).

vagueness of the law as applied to the conduct of others.”¹⁵⁸ In other words, just because there might be a hypothetical situation unrelated to the facts in the plaintiffs’ case in which the terms could be construed to be vague, that does not invalidate the statute as applied to plaintiffs in a situation in which the statute clearly is not vague.

In *United States v. Farhane*¹⁵⁹, the Second Circuit found that the phrases “training,” “personnel,” and “expert advice and assistance” were neither void for vagueness nor overly broad as applied to the defendants in that case. One of the defendants in *Farhane*, a medical doctor named Sabir, agreed to provide medical assistance to members of *al-Qaeda* who were wounded in Saudi Arabia.¹⁶⁰ Sabir and his friend Tarik Shah agreed that they would join *al-Qaeda* as a team, with Shah providing instruction in martial arts using deadly weapons and lethal fighting techniques and Sabir providing medical services to wounded *al-Qaeda* members. Sabir travelled to Saudi Arabia regularly, working at a Saudi military hospital in Riyadh, Saudi Arabia.

Sabir and Shah met with an undercover FBI agent in New York City while Sabir was home, and the undercover agent told them that, “our war ... our jihad is to [e]xpel the infidels from the Arabian peninsula...”¹⁶¹ Sabir and Shah then swore allegiance to *al-Qaeda*:

Sabir and Shah then participated in *bayat*, a ritual in which each swore an oath of allegiance to *al-Qaeda*, promising to serve as a “soldier of Islam” and to protect “brothers on the path of *Jihad*” and “the path of *al-Qaeda*.” The men further swore obedience to “the guardians of the pledge,” whom [the undercover agent] expressly identified as “Sheikh Osama,” i.e., Osama bin Laden, and his second in command, “Doctor Ayman Zawahiri.”¹⁶²

Sabir alleged that the statutory terms of “training,” “personnel,” and “expert assistance and advice,” were too vague to provide the notice required by due process.¹⁶³ The Second Circuit found that such a general claim was foreclosed by the Supreme Court’s decision in *Holder v. Humanitarian Law Project*. The Second

¹⁵⁸ *Holder*, 130 S.Ct. at 2719.

¹⁵⁹ *U.S. v. Farhane*, 634 F.3d 127 (2d Cir. 2011), cert. denied sub nom *Sabir v. U.S.*, 132 S. Ct. 833 (2011).

¹⁶⁰ All of the facts pertaining to the *Farhane* case are taken from the Court of Appeals decision, 634 F. 3d. 127.

¹⁶¹ *Id.* at 133.

¹⁶² *Id.* (internal citations deleted).

¹⁶³ *Id.* at 140.

Circuit also found that the terms were not vague as applied to Sabir's conduct.

First, Sabir and Shah agreed to jointly provide services to *al-Qaeda*, including Shah's martial arts training. There could be no doubt that a person of "ordinary intelligence" would understand that providing martial arts training to *al-Qaeda* fell within the definition of "training" as used in § 2339A. In addition, Sabir agreed to provide medical service to terrorists wounded during the execution of terrorist acts, in effect becoming the "Surgeon-General" of *al-Qaeda*. "No reasonable person with a common understanding of *al-Qaeda*'s murderous objectives could doubt that such material support fell squarely with the prohibitions of § 2339B."¹⁶⁴

Sabir also alleged that he fell within the "medical or religious materials" exception to the definition of "material support or resources" definition in §2339A. The Second Circuit found that the "medicine" exception applied only to the medicine itself, and not to the practice of medicine.¹⁶⁵ The Court quoted the House conference report pertaining to the legislation, which stated that the "word 'Medicine' should be understood to be limited to the medicine itself, and does not include the vast array of medical supplies."¹⁶⁶ In addition, in 1996 Congress amended the definition of "material support or resources" by striking the phrase "but does not include humanitarian assistance to persons not directly involved in such violations," and substituting in its place "except medicine or religious materials."¹⁶⁷ The legislative history, combined with the 1996 amendment, make it clear that Congress intended to exempt only the medicine and the act of distributing the medicine, and not the practice of medicine.

In *Rux et al. v. Republic of Sudan*,¹⁶⁸ the plaintiffs were survivors of sailors killed in the *al-Qaeda* attack on the U.S.S. Cole in Aden Harbor, Yemen in 2000. They sued the Republic of Sudan for providing a "safe harbor" for *al-Qaeda* to train, plan and initiate the attack on the Cole.¹⁶⁹ Sudan defended the suit, arguing that the allegations were "not sufficient to state material support under the 'safehouses' provision because the term should be limited to discrete buildings or structures."¹⁷⁰ The Fourth Circuit disagreed, and quoted

¹⁶⁴ *Id.* at 141.

¹⁶⁵ *Id.* at 143.

¹⁶⁶ *Id.* quoting H.R. CONF. REP. NO. 104-518, at 144 (1996) (Conf. Rep.).

¹⁶⁷ *United States v. Abu-Jihad*, 600 F.Supp. 2d 362 (D. Conn. 2009), *aff'd* 630 F.3d 102 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 3062 (2011).

¹⁶⁸ 461 F.3d 461 (4th Cir. 2006).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 470.

language from the District Court for the District of Columbia in another case involving the Republic of Sudan:

[I]nsofar as the government of the Republic of Sudan affirmatively allowed and/or encouraged al Qaeda and Hizbollah to operate their terrorist enterprises within its borders, and thus provided a base of operations for the planning and execution of terrorist attacks... Sudan provided a “safehouse” within the meaning of 18 U.S.C. § 2339A, as incorporated in 28 U.S.C. § 1605(a)(7).¹⁷¹

Courts uniformly have been willing to apply everyday common-sense interpretations of the words contained in § 2339A in order to effectuate the Congressional intent to prevent people from assisting terrorist organizations carrying out their missions.¹⁷²

18 U.S.C. § 2339B

Section 2339B provides, in material part: Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so [will be punished as provided]. ... To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization [...], that the organization has engaged or engages in terrorist activity, [...] or that the organization has engaged or engages in terrorism.¹⁷³

Section 2339B, which is entitled “Providing Material Support or Resources to Designated Foreign Terrorist Organizations,” was enacted in 1994 to supplement § 2339A, which was enacted two years before.¹⁷⁴ Section 2339B was designed to fill the gap for those persons who contributed, or otherwise provided aid, to a terrorist organization, but there was no proof that they actually intended to aid any particular terrorist act.¹⁷⁵

¹⁷¹ *Rux et al v. Republic of Sudan*, 461 F. 3d at 471, quoting *Owens v. Republic of Sudan*, 412 F.Supp. 2d 99, 108 (D. D.C. 2006).

¹⁷² Robert Chesney, *Beyond Conspiracy: Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425 (2007).

¹⁷³ Anti-terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 303, 110 Stat. 1214, 1250 (1996).

¹⁷⁴ *Farhane*, 634 F 3d 127, at 135, n.6., see Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 12005(a), 108 Stat. 1796, 2022 (1994).

¹⁷⁵ Tom Stacy, *The “Material Support” Offense: The Use of Strict Liability in the War Against Terror*, 14 KAN. J.L. & PUB. POL’Y 461, 462 (2005).

[T]he legislative history indicates that Congress enacted § 2339B in order to close a loophole left by § 2339A. Congress, concerned that terrorist organizations would raise funds “under the cloak of humanitarian or charitable exercise,” sought to pass legislation that would severely restrict the ability of terrorist organizations to raise much needed funds for their terrorist acts within the United States. As § 2339A was limited to donors intending to further the commission of specific federal offenses, Congress passed § 2339B to encompass donors who acted without the intent to further federal crimes (internal citations omitted).¹⁷⁶

The primary difference between §§ 2339A and 2339B is that § 2339A requires proof of a specific intention to assist in the violation of another anti-terrorism statute, whereas § 2339B does not require such a specific intent. Section 2339A requires that the government prove that a defendant provided material support which he/she knew would be used in connection with a violation of a specified violation, such as 18 U.S.C. § 956. Section 2339B requires only that the government provide that a defendant knowingly provided material support to an organization which has been designated by the Secretary of State as a foreign terrorist organization, or which the defendant knew had engaged in terrorist acts.

It is not necessary for the government to prove in the context of a § 2339B prosecution that the defendant intended to assist the terrorist organization in any terrorist act.¹⁷⁷ It is necessary, however, for the government to prove beyond a reasonable doubt that the defendant had personal knowledge that the organization at issue had formally been designated by the Secretary as a “foreign terrorist organization,” or that the organization was engaged in or had engaged in “terrorist activity” or “terrorism” as defined by law.¹⁷⁸

A “designated terrorist organization” is an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act.¹⁷⁹ The Secretary of State is granted the authority to designate an entity as a “foreign terrorist organization” pursuant to Title 18, United States Code, § 1189(a)(1) and (d)(4). “She may, in consultation with the Secretary of the Treasury and the Attorney General, so designate an organization upon finding that it is foreign, engages in ‘terrorist activity’ or ‘terrorism,’ and thereby ‘threatens the security of United States

¹⁷⁶ H.R. Rep. No. 104-383, at 43 (1995), *quoting U.S. v. Assi*, 414 F.Supp. 2d 707, 722 (E.D. Mich. 2006).

¹⁷⁷ *U.S. v. Chandia*, 514 F.3d 365, 371 (4th Cir. 2008).

¹⁷⁸ *Farhane*, 634 F. 3d at 135, *citing Holder*, 130 S. Ct. at 2709.

¹⁷⁹ 18 U.S.C. § 2339B(g)(6) (codified at 8 U.S.C. § 1189).

nationals or the national security of the United States.”¹⁸⁰ “National security” means the national defense, foreign relations, or economic interests of the United States.¹⁸¹ An entity designated as a foreign terrorist organization may seek review of the Secretary’s designation before the United States Court of Appeals for the District of Columbia Circuit within 30 days of the designation.¹⁸²

“Terrorism activity” and “terrorism” are defined in § 212(a)(3)(B) of the Immigration and Nationality Act,¹⁸³ and § 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989.¹⁸⁴ “Terrorism” is defined in 22 U.S.C. § 2656f(d)(2) to mean “premeditated, politically motivated violence perpetrated against non-combatant targets by subnational groups or clandestine agents.”¹⁸⁵ “Terrorist activity” is defined in 8 U.S.C. § 1182, and says in substance that “terrorist activity” is any act which either is or would be unlawful under the laws of the United States or any state which involves:

1. Highjacking or sabotage of a conveyance;
2. An act of extortion involving the seizing or detaining, or threatening to kill or injure someone;
3. A violent attack on an internationally protected person described in 18 U.S.C. § 1116(b) (essentially a foreign official or member of his or her family);
4. An assassination;
5. The use of any nuclear, biological, or chemical weapon, or explosive, firearm or other dangerous device to endanger the safety of one or more persons or to damage property; or
6. A threat, attempt or conspiracy to do any of the foregoing.¹⁸⁶

¹⁸⁰ *Holder*, 130 S. Ct. at 2713, *see also*, *U.S. v. Afshari*, 426 F.3d 1150, 1153-54 (9th Cir. 2005), *U.S. v. Marzook*, 383 F.Supp. 2d 1056 (N.D. Ill. 2005).

¹⁸¹ 18 U.S.C. § 1189(d)(2)(2004).

¹⁸² *Supra* note 181, *see also Holder*, 130 S. Ct. at 2713.

¹⁸³ 8 U.S.C. § 1182 (2010).

¹⁸⁴ 18 U.S.C. § 2339B(a)(1), *see also* 22 U.S.C. § 2656f(d)(2) (2004).

¹⁸⁵ 22 U.S.C. § 2656f(d)(2).

¹⁸⁶ 8 U.S.C. § 1182(a)(3)(I)(3)(B)(iii) (2010). The full text is as follows:

(iii) "Terrorist activity" defined. As used in this Act, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following: (I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle). (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental

The terms “material support or resources” have the same meaning as set forth in § 2339A.¹⁸⁷ The definition of “material support or resources” was amended in 2001 by the USA PATRIOT Act¹⁸⁸ and in 2004 by the Intelligence Reform and Terrorism Prevention Act (“IRTPA”).¹⁸⁹ The definition of “personnel” was modified to read, “Personnel (one or more individuals who may be or include oneself).” In addition, IRTPA modified § 2339B (but not § 2339A) to provide no one could be prosecuted for providing “personnel” unless that person has:

[k]nowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction and control.¹⁹⁰

The term “personnel” is used in both §§ 2339A and 2339B as part of the definition of “material support or resources” set forth in § 2339A, which then was incorporated in § 2339B, but Congress added the limitation in § 2339B(h) only to § 2339B, but not in § 2339A. The reasonable inference to be drawn is that Congress intended to limit the scope of § 2339B, but not § 2339A.¹⁹¹

organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained. (III) A violent attack upon an internationally protected person (as defined in [section 1116\(b\)\(4\) of title 18, United States Code](#)) or upon the liberty of such a person. (IV) An assassination. (V) The use of any-- (a) biological agent, chemical agent, or nuclear weapon or device, or (b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property. (VI) A threat, attempt, or conspiracy to do any of the foregoing.

¹⁸⁷ 18 U.S.C. § 2339B(g)(4) (2009).

¹⁸⁸ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 805, 115 Stat. 272, 377 (2001).

¹⁸⁹ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603(b), 118 Stat. 3638 (2004).

¹⁹⁰ 18 U.S.C. § 2339B(h) (2009).

¹⁹¹ *U.S. v. Abu-Jihaad*, 600 F.Supp. 2d 362, 399 (D. Conn. 2009), *aff’d* 630 F. 3d 102 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 3062 (2011), *Assi*, 414 F. Supp. 2d at 723 (E.D. Mich. 2006).

Both Congress and the courts have determined that any contribution to an organization which has been designated as a foreign terrorist organization by the Secretary is so harmful to the national interests of the United States that all knowing contributions are illegitimate, have no valid public purpose, and should be treated as a crime. “[F]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct. Terrorist organizations use funds for illegal activities regardless of the intent of the donor, and Congress thus was compelled to attach liability to all donations to foreign terrorist organizations.”¹⁹²

Material support meant to “promot[e] peaceable, lawful conduct,” can further terrorism by foreign groups in multiple ways. “Material support” is a valuable resource by definition. Such support frees up other resources within the organization that may be put to violent ends. It also importantly 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. “Terrorist organizations do not maintain organizational ‘firewalls’ that would prevent or deter ...sharing and co-mingling of support and benefits.” (internal citations omitted)¹⁹³

Section 2339B does not prohibit the *mere association* with a designated terrorist organization, or an organization which the defendant knows has engaged in terrorist acts. What the statute prohibits is the conduct of providing material support to such an organization.¹⁹⁴ “The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group. ... What [§ 2339B] prohibits is the act of giving material support.”¹⁹⁵ The Seventh Circuit has been even more explicit in what conduct is outside the scope of § 2339B: A defendant “may, with impunity, become [a] member of Hamas, praise Hamas for its use of terrorism, and vigorously advocate the goals and philosophies of Hamas.”¹⁹⁶ But, the Seventh Circuit continued, “there is no constitutional right to provide weapons and explosives to

¹⁹² *Boim v. Quranic Literary Inst. and Holy Land Found. for Relief and Dev.*, 291 F. 3d 1000, 1026-27 (7th Cir. (2002), *see also* Pub. L. 104-132, § 301, *U.S. v. Hammoud*, 381 F. 3d 316, 329 (4th Cir. 2004), *Assi*, 414 F. Supp. 2d at 713 (E.D. Mich. 2006), *Marzook*, 383 F. Supp. 2d at 1063 (N.D. Ill. 2005).

¹⁹³ *Holder*, 130 S. Ct. at 2725, *see also* *Abdi*, 498 F. Supp. 2d at 1058.

¹⁹⁴ *Chandia*, 514 F. 3d at 371, *citing Hammoud*, 381 F.3d at 329, *see also*, *Farhane*, 634 F. 3d at 138.

¹⁹⁵ *Holder*, 130 S. Ct. at 2730, quoting the Ninth Circuit in its earlier decision in this case, 205 F.3d 1130, at 1133 (9th Cir. 2000), *Marzook*, 383 F. Supp. 2d at 1063.

¹⁹⁶ *Boim*, 291 F3d at 1026.

terrorists, nor is there any right to provide the resources with which the terrorists can purchase weapons and explosives.”¹⁹⁷ In *United States v. Assi*,¹⁹⁸ the defendant attempted to provide night vision goggles, global positioning satellite modules, and a thermal imaging camera to Hezbollah.¹⁹⁹ His First Amendment freedom of speech argument was rejected on appeal.²⁰⁰

Defendants in a § 2339B prosecution are not entitled to litigate whether the designated foreign terrorist organization actually is a terrorist organization. The defendant is only entitled to hold the government to its burden of proving that the organization has been designated as a foreign terrorist organization by the Secretary of State. “[A] criminal defendant’s inability to challenge the [Foreign Terrorist Organization] designation does not violate his constitutional rights because ‘the *fact* of an organization’s designation as an FTO is an element of § 2339B, but the *validity* of the designation is not.”²⁰¹ (emphasis in original).

Attempts by defendants to challenge the Secretary’s designation in the context of their own criminal cases have uniformly been rejected by the courts. “Congress clearly chose to delegate policymaking authority to the President and Department of State with respect to designation of terrorist organizations, and to keep such policymaking authority out of the hands of United States Attorneys and juries. ... If defendants provide material support for an organization that has been designated a terrorist organization under § 1189, they commit the crime, and it does not matter whether the designation is correct or not.”²⁰²

18 U.S.C. § 2339C

Section 2339C prohibits the financing of terrorism. It provides, in relevant part, that whoever, ... by any means, directly or indirectly, unlawfully and willfully provides or collects funds with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part, in order to carry out-

A. An act which constitutes an offense within the scope [of one of severally specifically listed international treaties], or

¹⁹⁷ *Id.*

¹⁹⁸ *Assi*, 414 F.Supp. 2d at 713.

¹⁹⁹ *Id.* at n. 11, *see* 62 Fed. Reg. 52650 (Oct. 8, 1997), 68 Fed. Reg. 56860-61 (Oct. 2, 2003).

²⁰⁰ *Id.*

²⁰¹ *Chandia*, 514 F.3d at 371.

²⁰² *Afshari*, 426 F.3d at 1155-56.

B. Any other act intended to cause death or serious bodily injury to a civilian, or [a non-combatant], 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 abstain from doing any act, Shall be punished as prescribed....²⁰³

It is not required that the funds actually be used to carry out one of the predicate acts.²⁰⁴ The maximum penalty for a violation of this section is either imprisonment for 20 years, or imprisonment for 10 years, depending upon whether the violation is of the substantive charge or of concealing the substantive charge, respectively.²⁰⁵ This section became effective on June 25, 2002, except the extra-judicial applications set forth in §§ 2339C(b)(1)(D) and (2)(B), which did not become effective until the date the International Convention for the Suppression of Financing of Terrorism became law in the United States.²⁰⁶

There are very few reported cases under this statute, and all those cases are civil cases between private litigants. In *Linde v. Arab Bank, PLC*,²⁰⁷ terrorist victims' families successfully alleged that the defendant bank knowingly and intentionally agreed to provide services to organizations which it knew to be terrorist organizations, and that the families were injured as a result. In *Goldberg v. UBS AG*,²⁰⁸ the Eastern District of New York found that a civil action could be brought against a foreign bank pursuant to §§ 2339B and 2339C because the foreign bank was a large, sophisticated company with a full time active service within the United States. The court also found that the bank knew that the ultimate recipient of the money was a foreign terrorist organization.

18 U.S.C. § 2339D

Section 2339D prohibits receiving of military-type training from a foreign terrorist organization. The statute provides, in material part:

Whoever knowingly receives military-type training from or on behalf of any organization designated at the time of the training by the Secretary of State [...] as a foreign terrorist organization shall be [...] imprisoned for ten years[...]To violate this

²⁰³ 18 U.S.C. § 2339C(a)(1) (2006). See Pub. L. No. 107-177, Title II, 116 Stat. 727.

²⁰⁴ 18 U.S.C. § 2339C(a)(3) (2006).

²⁰⁵ 18 U.S.C. § 2339C(d) (2006).

²⁰⁶ See the statutory history contained in 18 U.S.C.A. § 2339(C) (2002).

²⁰⁷ 384 F.Supp. 2d 571 (E.D.N.Y. 2005).

²⁰⁸ 660 F.Supp. 2d 410 (E.D.N.Y. 2009).

subsection, a person must have knowledge that the organization is a designated foreign terrorist organization, [...], that the organization has engaged or engages in terrorist activity, [...], or that the organization has engaged or is engaged in terrorism....²⁰⁹

The terms “terrorist activities” and “terrorism” in § 2339D have the same definitions as outlined above. There is extraterritorial jurisdiction for this statute.²¹⁰

This statute was enacted in 2004,²¹¹ and appears to be designed to resolve the question raised in §2339A or 2339B cases whether an individual who personally engaged in training in a foreign terrorist organization’s training camp provided “material support or resources” within the meaning of those statutes. As of January 2012, there were no reported cases under this code section.

Arms Export Control Act - 22 U.S.C. § 2778

The Arms Export Control Act²¹² gives the President the authority to designate items which are considered to be “defense articles and defense services” and to promulgate regulations governing the export and import of such items.²¹³ The President, acting through the U.S. Department of State, promulgated a regulation establishing the U.S. Munitions List.²¹⁴ In 1979, Congress passed the Export Administration Act,²¹⁵ which authorized the President, acting through the Secretary of Commerce, to place additional commodities on the U.S. Munitions List.

No defense article or defense service designated by the President and included on the U.S. Munitions List can be exported or imported without a license issued pursuant to the Act.²¹⁶ Violation of the export provisions set forth in 22 U.S.C. §§ 2778 or 2779, or the

²⁰⁹ 18 U.S.C. § 2339D(a) (2004).

²¹⁰ 18 U.S.C. § 2339D(b) (2004). *See also* “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, including any weapon of mass destruction. 18 U.S.C. § 2339D(c) (2004).

²¹¹ Pub. L. No. 108-458, Title VI, Subtitle G, § 6602, 118 Stat. 3761 (2004).

²¹² Pub. L. No. 90-629 (1968) (codified 22 U.S.C. §§ 2751, *et seq.* (1997)).

²¹³ 22 U.S.C. §2778(a)(1)(2008).

²¹⁴ 22 C.F.R. 121.1 *et seq.* (2009).

²¹⁵ Pub. L. No. 96-72, 93 Stat. 503 (1979) (codified at 50 U.S.C. App. §§ 2401, *et seq.*). The regulations promulgated by the Secretary of Commerce are located at 15 C.F.R. §§ 730.1 *et seq.*

²¹⁶ 22 U.S.C. § 2778(b)(2)(2008).

regulations promulgated pursuant to the Act is punishable by imprisonment for twenty years.²¹⁷

The Munitions List covers approximately 45 pages of federal regulations, and is both very lengthy and very specific. There are 21 different categories²¹⁸ of defense articles contained in the Munitions List, and include many of the things which immediately would come to mind: automatic weapons, howitzers, mortars, cannons, ammunition for military weapons, rockets and rocket propelled grenades, Stinger missiles, warships, tanks, fighter planes and bombers, body armor, night vision scopes, spacecraft, submarines, directed energy weapons, and all classified material.²¹⁹ The last category on the Munitions List covers all miscellaneous articles not specifically included in the Munitions List, but “which has substantial military applicability and which has been specifically designed, developed, configured, adapted, or modified for military purposes.”²²⁰

²¹⁷ 22 U.S.C. § 2778(c)(2008).

²¹⁸ See 22 C.F.R. § 121.1 et seq (*listing* the following categories of munitions):

- Category I- Firearms, Close Assault Weapons and Combat Shotguns
- Category II- Guns and Armament
- Category III- Ammunition/Ordnance
- Category IV- Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, etc
- Category V- Explosives and Energetic Materials, Propellants, Incendiary Agents
- Category VI- Vessels of War and Special Naval Equipment
- Category VII- Tanks and Military Vehicles
- Category VIII- Aircraft and Associated Equipment
- Category IX- Military Training Equipment and Training
- Category X- Protective Personnel Equipment and Shelters
- Category XI- Military Electronics
- Category XII- Fire Control, Range Finder, Optical and Guidance and Control Equipment
- Category XIII- Auxiliary Military Equipment
- Category XIV- Toxicological Agents, including Chemical, Biological and associated Equipment
- Category XV- Spacecraft Systems and Associated Equipment
- Category XVI- Nuclear Weapons, Design and Testing Related items
- Category XVII- Classified Materials, Technical Data and Defense Services not otherwise Enumerated
- Category XVIII- Directed Energy Weapons
- Category XIX- Miscellaneous Equipment
- Category XX- Submersible vessels, Oceanographic and Associated Equipment
- Category XXI- Miscellaneous Articles).

²¹⁹ See *supra* note 218 for the full list of categories on the Munitions List.

²²⁰ United States Munitions List, 22 C.F.R. § 121.1 Category XXI(a)(2009).

Conviction of a violation of § 2778 requires proof that the defendant knowingly and willfully exported, or attempted to export articles included on the U.S. Munitions List.²²¹ The government must prove the defendant's specific intent to export munitions without a license. "It is not necessary, however, for the munitions to reach a point of irrevocable commitment to cross a national border in order to be guilty of the section."²²² The intent can be proved circumstantially, such as by the defendant using a circuitous shipment route for replacement parts for military aircraft.²²³

There have been a number of § 2778 cases over the years challenging the sufficiency of circumstantial evidence of the defendant's intent. In *United States v. Muthana*,²²⁴ the defendant had told employees who prepared the waybill that the parcels contained only honey, when in fact they contained ammunition, and the employee asked the defendant to check the waybill for accuracy after it was prepared at defendant's direction. In *United States v. Covarrubias*,²²⁵ the defendant concealed weapons in the gas tank of a truck which he owned and which crossed the border to Mexico at least five times, where there were large signs detailing the requirements for export of munitions to Mexico. In *United States v. Pulungan*, 569 F.3d 326 (7th Cir. 2009),²²⁶ the defendant's conviction was reversed because the evidence was insufficient to show that he knew that the rifle scopes that he shipped were "defense articles" that required export licenses.

Whether or not the President acted correctly in placing a particular item on the Munitions List has been held to be a "political question," and therefore non-justiciable.²²⁶

Neither the courts nor the parties are privy to reports of the intelligence services on which this decision, or decisions like it, may have been based. The consequences of uninformed judicial action could be grave. Questions concerning what perils our nation might face at some future time and how best to guard against those perils are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to

²²¹ *U.S. v. Oriz-Loya*, 777 F.2d 973 (5th Cir. 1985).

²²² *Id.*

²²³ *U.S. v. Malsom*, 779 F.2d 1228 (7th Cir. 1985).

²²⁴ *U.S. v. Muthana*, 60 F.3d 1217 (7th Cir. 1995).

²²⁵ *U.S. v. Covarrubias*, 94 F.3d 172 (5th Cir. 1996).

²²⁶ *U.S. v. Martinez*, 904 F.2d 601 (11th Cir. 1990), *U.S. v. Helmy*, 712 F.Supp. 1434, 1429-30 (E.D.CA. 1989), *aff'd on other grounds*, 951 F. 2d 988 (9th Cir. 1992), *cert. denied*, 504 U.S. 945 (1992). *See also*, *U.S. v. Zhen Shou Wu*, 680 F.Supp. 2d 281 (D. Mass. 2010), making a similar determination about decisions of the Secretary of Commerce placing commodities on the U.S. Commodities Control List pursuant to the Export Administration Act, 50 U.S.C. App. §§ 2501, et seq.

the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.²²⁷

As a result, criminal defendants charged with violations of the Arms Export Control Act cannot challenge the administrative action placing a particular item on the Munitions List.²²⁸

The Arms Export Act and the Export Administration Act clearly are tools created to assist in preventing private actions within the United States from having an adverse impact of U.S. foreign policy and national security. Congress made a specific finding that the Arms Export Act was intended to be “[i]n furtherance of world peace and the security and foreign policy of the United States...”²²⁹

The Neutrality Act – 18 U.S.C. § 960

The *Neutrality Act*, 18 U.S.C. 960, prohibits any military or naval expedition which is planned, supported or initiated from the United States against any nation with whom the United States is at peace. The predecessor to the modern Neutrality Act was passed in 1794 as a response to protests of the French and British governments that the United States was not taking steps to prevent raids on foreign government assets by Americans.²³⁰ The full text of Title 18, United States Code, § 960 is as follows:

Whoever, within the United States, knowingly begins or sets on foot or provides or prepares or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined under this title or imprisoned for not more than three years, or both.²³¹

A violation of the *Neutrality Act* is a felony, for which the maximum penalty is imprisonment for three years and a fine of \$250,000.²³² The federal conspiracy statute, 18 U.S.C. § 371,

²²⁷ *Martinez*, 904 F. 2d at 602. (internal citations deleted).

²²⁸ *Id.*

²²⁹ *Id.* at n. 2, citing 22 U.S.C § 2778 (2010).

²³⁰ *The Three Friends*, 166 U.S. at 52 (1897).

²³¹ 18 U.S.C. § 960 (1948).

²³² *Id.* Although § 960 specifies that the maximum fine is \$3,000, the alternative fines provision of Title 18, United States Code, § 3571 provides that except where Congress passes a statute after 1984 either increasing the

prohibits any agreement to violate the *Neutrality Act*, or any other provision of federal law, so long as at least one overt act to effect the violation of federal law takes place somewhere within the United States.²³³ It is not necessary that a military expedition actually be mounted against a foreign country. It only is necessary to form the agreement to engage in such an enterprise and take a single overt act to accomplish the mission.²³⁴

The original statute was passed on June 5, 1794, and is almost verbatim with the current wording of §960. The full text of the relevant portion of § 5 of the Act of June 5, 1794 is as follows:

Sec. 5. Every person who, within the territory and jurisdiction of the United States, begins or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on thence against the territory and dominions of any foreign prince or State, or of any colony, district or people, with whom the United States is at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years.²³⁵

Of importance, both the 1794 statute and the current version of the statute incorporate the language “with whom the United States is at peace.”²³⁶

There are two primary legal issues involving the Neutrality Act. The first is what constitutes “any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state...”²³⁷ The second is what constitutes “with whom the United States is at peace...”²³⁸ Traditional legislative principles provide that when Congress uses words of art in a new statute, or uses the same words in two different code sections, particularly if they are enacted the same day or are

existing fine, or imposing a new fine, the statutory fine for any felony will be \$250,000. Congress is able under § 3571 to increase the fine for any given section above \$250,000, or to pass a new statute with a fine above \$250,000, but in the absence of such action all fines for felonies included in the United States Code as of 1984 were increased to \$250,000.

²³³ See 18 U.S.C. § 371. The full text of § 371, in part, is as follows: “If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned for not more than five years, or both.”

²³⁴ *Jacobsen v. U.S.*, 272 F. 399, 402 (7th Cir. 1920).

²³⁵ § 5 of the Act of June 5, 1794.

²³⁶ *Id.*

²³⁷ 18 U.S.C. § 960 (1948).

²³⁸ *Id.* See also 18 U.S.C. § 956(b)(1948).

located in the same chapter of the same title of the United States Code, that those words have the same meaning in both places. Legislative drafting principles, as well as the reported cases, establish that the words, “with whom the United States is at peace,” have the same meaning in § 956(b) as they do in § 960. Accordingly, the discussion above regarding the “at peace” element of 18 U.S.C. § 956(b) is equally applicable with regard to the Neutrality Act.

Military or Naval Expedition or Enterprise

This issue is not as clear as one may think. For instance, it is not a violation of § 960 in and of itself to travel to a foreign country by one’s self for the purpose of taking part in an existing insurgency against a government with which the United States is at peace.²³⁹ Likewise, it is not a violation of § 960 in and of itself to ship arms to a foreign country to assist an insurgency in that country.²⁴⁰

That is not to say that it always is legal to ship arms to a foreign country; it’s just not a violation of 18 U.S.C., § 960. Congress filled this gap by implementing the Arms Export Control Act and the Export Administration Act discussed above to prohibit shipping certain items such as automatic weapons, hand grenades, rocket propelled grenades, Stinger missiles, etc., or weapons grade technology, to a foreign country without an export permit from the Department of Commerce or Department of State.

What then is a “military expedition or enterprise?”

A military expedition is a journey or voyage by a company or body of persons, having the position or character of soldiers, for a specific warlike purpose; also the body and its outfit; and that a military enterprise is martial undertaking, involving the idea of a bold, arduous, and hazardous attempt.²⁴¹

In *Wiborg v. United States*²⁴², the defendant was a Danish National who was the captain of a Danish merchant vessel. He entered into an agreement in Philadelphia to deliver a small company of men and ammunition to Cuba to fight in the Cuban Revolution against the Government of Spain. He sailed out the Delaware River and turned north into international waters off the coast of New Jersey. There he met with another merchant vessel in international waters, and took on board men and boxes of rifles and ammunition and two small boats. He then turned south and sailed to Cuba, along the coast of which he sailed for several days, before proceeding to

²³⁹ *U.S. v. O’Brien*, 75 F. 900, 903 (C.C.S.D.N.Y. 1896), *Nunez*, 82 F. 599.

²⁴⁰ *Id.* at 907, *U.S.v.Nunez*, 82 F. 599.

²⁴¹ *Wiborg*, 163 U.S. at 650 (1896).

²⁴² *Id.*

Jamaica. While along the coast of Cuba, Wiborg off-loaded the company of men, along with the rifles and ammunition which were in the boxes, in the two boats which he took on-board off the coast of New Jersey. Wiborg was convicted, and his conviction upheld by the United States Supreme Court.²⁴³

The Court in *Wiborg* held that “For the purposes of this case, it is sufficient to say that any combination of men organized here to go to Cuba to make war upon its government, provided with arms and ammunition, we being at peace with Cuba, constitutes a military expedition.”²⁴⁴ Several other criminal cases arose from this endeavor.²⁴⁵

In *Jacobsen v. United States*,²⁴⁶ a group entered into an agreement in Chicago to assist Germany against the United Kingdom in the First World War by inducing a revolution in India against the authority of the British government. In *Jacobsen*, one co-conspirator went from Chicago to Japan to buy arms and ammunition to be taken to India.²⁴⁷ Other co-conspirators went to India via Manila and Southeast Asia to train troops in India.²⁴⁸ The defendants were convicted of conspiracy to violate the *Neutrality Act*, and their convictions upheld on appeal.

In *United States v. Khan*,²⁴⁹ the defendants organized a military style training operation in the United States using paintballs as a tool to practice military tactics. The group planned to go to Kashmir and fight against the Indian government. Khan and at least two co-conspirators went to Pakistan and trained in a camp operated by Lashkar-e-Taiba (“LET”). Khan and others were convicted of violations of the *Neutrality Act* for their agreement to train and go to Kashmir as a team and engage in military actions against India. Their convictions were upheld on appeal.²⁵⁰

The resolution of what constitutes “a military expedition or enterprise” is an extremely fact-intensive determination. See for example, Mr. Justice Harlan’s dissent in *Wiborg*, in which he concluded that the operation was not a military enterprise because it

²⁴³ *Id.*

²⁴⁴ 163 U. S. at 655. See also, *U.S. v. Sander*, 241 F. 417 (S.D.N.Y. 1917).

²⁴⁵ See *U.S. v. Hughes*, 75 F. 267 (U.S.D.C., D. S.C. 1896), *U.S. v. Hart*, 78 F. 868 (U.S.D.C., E.D. PA 1897). But see, *O’Brien*, 75 F. at 903 (C.C.S.D.N.Y. 1896) (jury not able to agree on a verdict of guilty); *Nunez*, 82 F. 599 (C.C.S.D.N.Y. 1896) (jury not able to agree on a verdict of guilty).

²⁴⁶ 272 F. at 402, see also, *U.S. v. Chakrabarty*, 244 F. 287 (U.S.D.C., S.D.N.Y. 1917) (Co-defendant of Jacobson prosecuted in the Southern District of New York rather than the Northern District of Illinois).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ 461 F.3d 477 (4th Cir. 2006).

²⁵⁰ *Id.*

had no commanding officer; was a small group of people, no one of which was recognized as having authority over anyone else; and had the objective of reaching Cuba as individual people, not as a body, to engage in the civil war then ongoing.²⁵¹

Federal trial and appellate courts have fleshed out somewhat the criteria to determine what constitutes a military or naval expedition. In *United States v. Nunez*,²⁵² the district judge stated that, “the essential features of military operations are evident enough. They are concert of action, unity of action, by a body organized and acting together, by means of weapons of some kind, acting under command, leadership.”²⁵³ The most comprehensive summary may be in *United States v. Murphy*.²⁵⁴

Where a number of men, whether few or many, combine and band themselves together, and thereby organize themselves into a body, within the limits of the United States, with a common intent or purpose on their part at the time to proceed in a body to foreign territory, there to engage in carrying on armed hostilities, either by themselves or in cooperation with other forces, against the territory or dominions of any foreign power with which the United States is at peace, and with such intent or purpose proceed from the limits of the United States on their way to such territory, either provided with arms or implements of war, or intending and expecting and with preparation to secure them during transit, or before reaching the scene of hostilities, such case all the elements of a military enterprise exist.²⁵⁵

Conclusion

In the American constitutional form of government, the President is charged with conducting foreign affairs,²⁵⁶ and the Congress is charged with the responsibility to raise Armies, to provide and maintain a Navy, and to declare war.²⁵⁷ The President and Congress cannot allow the foreign policy of the United States to be determined by private parties, organizations and groups, or to allow those private parties to take actions, which have the potential to commit the United States to war.

²⁵¹ *Wiborg*, 163 U.S. at 661-662.

²⁵² 82 F. at 601.

²⁵³ *Id.*

²⁵⁴ 84 F. 609, (U.S.D.C., D. Del. 1896).

²⁵⁵ See also *United States v. The Mary N. Hogan*, *United States v. The City of Mexico*, *United States v. The Laurada*, and *United States v. The Carondelet* for a discussion of cases forfeiting merchant vessels for having engaged in violations of the Neutrality Act.

²⁵⁶ U.S. CONST. art. II, §§ 1-2.

²⁵⁷ U.S. CONST. art. I, § 8.

The potential for private parties to affect the foreign policy of the United States has been apparent from the earliest days of the Nation. President George Washington called upon Congress on December 13, 1793²⁵⁸ to enact legislation to prohibit such private actions.

Where individuals shall, within the United States, array themselves in hostility against any of the powers at war, or enter upon military expeditions or enterprises within the jurisdiction of the United States, ..., these offenses cannot receive too early and close an attention, and require prompt and decisive remedies.²⁵⁹

Congress responded on June 5, 1794, by enacted what has come to be known as the *Neutrality Act*.

Not all commentators are happy with the public policy to use the code sections discussed above²⁶⁰ as a tool to minimize adverse effects on U.S. national security and foreign policy arising from private actions within the United States.²⁶¹ “The prevention paradigm, along with its centerpiece, the conspiracy charge, challenges the rule of law in significant ways that the celebration [of successful anti-terrorism prosecutions] overlooks.”²⁶² Some argue that use of the neutrality and anti-terrorism laws results in “anticipatory” prosecutions before the crime actually is completed, and as a result, “begin[...] to trespass on fundamental values of liberty”²⁶³ and “compromise the traditional role of culpability in criminal law.”²⁶⁴

²⁵⁸ *Supra* note 60.

²⁵⁹ *Id.*

²⁶⁰ I.e., 18 U.S.C. §§ 371, 956, 960, 2339A, B, C, & D, and 22 U.S.C. § 2778 and 2779.

²⁶¹ See Tom Stacy, *The “Material Support” Offense: The Use of Strict Liability in the War Against Terror*, 14 KANSAS L.J. & PUB. POL’Y 461 (2005); Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT’L SECURITY L & POL’Y 5 (2005); Peter Margulies, *Guantanamo By Other Means: Conspiracy Prosecutions and Law Enforcement Dilemmas after September 11*, 43 GONZAGA LAW REVIEW 513 (2007).

²⁶² See Margulies, *Guantanamo By Other Means*, *supra* at 514.

²⁶³ Abrams, *The Material Support Terrorism Offenses*, *supra* at 7. “The government is also using these offenses as a basis for early intervention, a kind of criminal early-warning and preventive-enforcement device designed to nip the risk of terrorist activity in the bud. Yet we need to ask whether and to what extent the residual and preventive uses of these sections are beginning to trespass on fundamental values of liberty.”

²⁶⁴ Stacy, *The “Material Support” Offense*, *supra* at 462. “By establishing what is essentially a strict liability offense carrying a very grave punishment, the material support offense compromises the traditional role of culpability in the criminal law.”

It is important to keep in mind the distinction between a completed crime and a completed terrorist act. There certainly will be one or more crimes committed when the terrorist act has been consummated. It does not follow, however, that crimes will not be completed and finalized before the consummation of the terrorist act. There are some who argue that the crimes which have been completed should not be prosecuted unless and until they are followed by a consummated terrorist act.

The civilian jury plays an extraordinary role in our constitutional form of government. These neutrality and anti-terrorism cases do not involve unilateral governmental action. The United States must prove to a civilian jury, unanimously, beyond a reasonable doubt that the defendant actually had entered into an agreement to mount a military expedition and taken steps to carry out that agreement, or actually intended that persons be killed or maimed in a foreign country, or intended that a terrorist act actually be carried out. If the jury is not convinced unanimously beyond a reasonable doubt that the defendant actually was engaged in the activity involved, then the defendant is not guilty. On the other hand, if the evidence does convince a civilian jury unanimously beyond a reasonable doubt that the defendant was actually engaged in the terrorist conduct, then what public policy objective would be served by not convicting the defendant?

An argument can be made that statutes such as 18 U.S.C. § 2339B, 18 U.S.C. § 956, or 22 U.S.C. § 2778 don't actually address criminal conduct, but rather are prophylactic measures to prevent real terrorist crimes. Those arguments simply evidence a policy disagreement with Congress, however. Congress has decided, as a matter of national security policy, to make the knowing contribution to foreign terrorist organizations, or knowingly conspiring to kill or maim civilians in a foreign country, or the knowing export of items on the U.S. Munitions list without a license, or conspiracy to mount a military expedition against a foreign government, to be crimes.

Congress has determined that anyone who contributes any money to a foreign terrorist organization aids the terrorist objectives of that organization even if the contributor does not personally support acts of terrorism. Those acts also endanger U.S. national security and adversely affect U.S. foreign policy and foreign relations.

Providing foreign terrorist groups with material support in any form also furthers terrorism by straining the United States' relationships with its allies and undermining cooperative efforts between nations to prevent terrorist attacks. ... The material support statute furthers this international effort by prohibiting aid for foreign terrorist groups

that harm the United States' partners abroad: A number of designated foreign terrorist organizations have attacked moderate governments with which the United States has vigorously endeavored to maintain close and friendly relations," and those attacks "threaten the social, economic and political stability" of such governments.²⁶⁵

What sense does it make to not prosecute criminals, who have finalized their criminal acts, until after they add to their existing crimes by consummating a terrorist act? It is correct that *after* the terrorist act we would have confirmation of the primary actor's intent, and we may even have additional evidence which could enhance the likelihood of conviction. How do we tell the parents or spouses or children of the people who are killed in the terrorist act, however, that "yes, we knew the terrorists were planning an act; we knew generally when and where they were going to commit the act; and yes, we knew that people were going to be killed, but we didn't intervene because we wanted to strengthen an already provable case against the terrorists?" How would Americans react if we were to receive this explanation from a foreign government after the execution of a terrorist act on our soil?

The federal statutes discussed above are among the tools which the United States uses to implement its national security strategy. The United States must be committed to war only when authorized by Congress pursuant to its power under Article I, Section 8 of the Constitution. U.S. foreign policy should be determined by the President. The United States should enforce the neutrality and anti-terrorism statutes very aggressively in order to ensure that private parties do not embroil the United States in foreign adventures for their own private interests and motives.

²⁶⁵ *Holder v. Humanitarian Law Project, supra*, 130 S. Ct. at 2726 (2010), quoting the affidavit of a State Department Official.