

# United States Antiterror Law is Missing the Mark: Changing the Material Support Statute to Hit the Target

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# NOTES

## UNITED STATES ANTITERROR LAW IS MISSING THE MARK: CHANGING THE MATERIAL SUPPORT STATUTE TO HIT THE TARGET

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*“The fact is that terrorist groups behave much like deadly viruses. Their reach is global in nature, they are tenacious, and they adapt quickly to increase their chances of survival.”*<sup>1</sup>

## INTRODUCTION

The September 11 attacks in 2001 not only shocked the world, but also spurred vast change in the U.S. government’s strategy for fighting terror at home and abroad.<sup>2</sup> The U.S. Department of Justice (DOJ) realized that an approach focused on prevention—as opposed to reaction—was vital to protect national security in the future.<sup>3</sup> This prevention approach honed in on disrupting funding for terror groups.<sup>4</sup> At the core of the DOJ’s prevention approach was the “material support” legislation under the Antiterrorism and Effective Death Penalty Act of 1996.<sup>5</sup>

This legislation, specifically 18 U.S.C. § 2339B,<sup>6</sup> operates under the reality that money is “fungible.”<sup>7</sup> In other words, *any* kind of “material support or resources,”<sup>8</sup> even if given to a terror organiza-

1. U.S. DEP’T OF JUSTICE, STRATEGIC PLAN: FISCAL YEARS 2003-2008, at 2.9, <https://www.justice.gov/archive/mps/strategic2003-2008/chapter2.pdf> [<https://perma.cc/5GYM-U4Q3>].

2. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 361 (2004), <http://govinfo.library.unt.edu/911/report/911Report.pdf> [<https://perma.cc/7XUB-PB3Q>] (“The nation has committed enormous resources to national security and to countering terrorism.”).

3. See U.S. DEP’T OF JUSTICE, *supra* note 1, at 2.9-10.

4. See RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 19 (2008), <https://www.humanrightsfirst.org/wp-content/uploads/pdf/080521-USLS-pursuit-justice.pdf> [<https://perma.cc/BB3U-GBLQ>].

5. Antiterrorism and Effective Death Penalty Act of 1996 §§ 303, 323, 18 U.S.C. § 2339A-B (2012). This Note focuses on § 2339B, which states:

Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so shall be fined ... or imprisoned not more than 20 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.

18 U.S.C. § 2339B(a)(1) (Supp. III 2015); see also *Introduction*, U.S. ATTORNEYS’ BULL., Sept. 2014, at 1, 1, <https://www.justice.gov/sites/default/files/usao/legacy/2014/09/23/usab6205.pdf> [<https://perma.cc/76K8-WFHV>] (explaining that the DOJ uses the material support statutes to target funding of terror organizations).

6. 18 U.S.C. § 2339B(a)(1) (2012).

7. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 31 (2010).

8. 18 U.S.C. § 2339B(a)(1).

tion for political purposes or humanitarian aid, allows the organization to siphon other funds for the planning and commission of illegal acts.<sup>9</sup> Congress recognized “that terrorist organizations can have multiple wings, [including] military, political, and social, and that material support to any of these wings ultimately supports the organization’s violent activities.”<sup>10</sup>

Although § 2339B’s primary purpose is to target terror funding,<sup>11</sup> the statute proscribes other kinds of support as well.<sup>12</sup> The scope of § 2339B is found in § 2339A,<sup>13</sup> which encompasses practically any kind of aid imaginable.<sup>14</sup> Specifically, § 2339B criminalizes the act of knowingly providing “material support or resources” to “foreign terrorist organization[s]” (FTOs).<sup>15</sup> Because the definition of support

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9. See *United States v. Abdi*, 498 F. Supp. 2d 1048, 1058 (S.D. Ohio 2007) (“Congress made a specific finding that ‘foreign organizations that engaged in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.’” (quoting 18 U.S.C. § 2339B advisory note)); *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134, 1146 (C.D. Cal. 2005) (explaining Congress’s concern about terrorist organizations raising funds “under the cloak of a humanitarian or charitable exercise” (quoting H.R. REP. NO. 104-383, at 43 (1995))), *aff’d in part, rev’d in part*, 561 U.S. 1 (2010). *But see* Nina J. Crimm, *High Alert: The Government’s War on the Financing of Terrorism and Its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341, 1414-15 (2004) (arguing that a well-intentioned donor giving money to a “seemingly legitimate charitable organization” will probably not consider that money is fungible, or that the money might fund an FTO).

10. Michael Taxay et al., *What to Charge in a Terrorist Financing or Facilitation Case*, U.S. ATTORNEYS’ BULL., Sept. 2014, at 9, 9-10, <https://www.justice.gov/sites/default/files/usaol/legacy/2014/09/23/usab6205.pdf> [<https://perma.cc/76K8-WFHV>].

11. See Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 15 (2005) (explaining that Congress based § 2339B on the “finding ... that ‘the provision of funds to organizations that engage in terrorism serves to facilitate their terrorist endeavors regardless of whether the funds, in whole or in part, are intended or claimed to be used for non-violent purposes’” (quoting S. 390, 104th Cong. § 301 (1995))).

12. See 18 U.S.C. § 2339A(b)(1) (2012); ZABEL & BENJAMIN, JR., *supra* note 4, at 34.

13. Under this statute, “material support or resources” includes: “[A]ny property ... or service, including 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 ... and transportation, except medicine or religious materials.” 18 U.S.C. § 2339A(b)(1).

14. See Andrew Peterson, *Addressing Tomorrow’s Terrorists*, 2 J. NAT’L SECURITY L. & POL’Y 297, 299 (2008).

15. 18 U.S.C. § 2339B(a)(1); see *Foreign Terrorist Organizations*, U.S. DEP’T STATE, <https://www.state.gov/j/ct/rls/other/des/123085.htm> [<https://perma.cc/5FT3-9EAS>].

is so broad,<sup>16</sup> the FTO designation essentially “makes the [organization] ‘radioactive’ to persons within U.S. jurisdiction.”<sup>17</sup>

Under the Immigration and Nationality Act of 1965 (INA), the State Department is responsible for designating groups as FTOs.<sup>18</sup> Currently, the State Department has designated sixty-six organizations.<sup>19</sup> Unfortunately, the State Department’s FTO designation process is political and slow to adapt to changing circumstances.<sup>20</sup> For example, the State Department designated the group “Jam’at al-Tawhid wa’al Jihad” as an FTO in 2004.<sup>21</sup> The group’s leader, the infamous Abu Musab al-Zarqawi,<sup>22</sup> changed the name of the organization two days later.<sup>23</sup> It took the State Department approximately ten weeks to amend the FTO list to reflect the changed name.<sup>24</sup> This loophole is important: “If an organization is not designated as a[n] FTO at the time support is provided, there is no crime” under § 2339B.<sup>25</sup>

Fast forwarding to nearly two decades after the September 11 attacks, the government has used § 2339B more than any other statute to prosecute terrorism.<sup>26</sup> Despite inadequacies, § 2339B has

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16. See 18 U.S.C. § 2339A(b)(1).

17. Taxay et al., *supra* note 10, at 10.

18. Immigration and Nationality Act of 1965 § 219, 8 U.S.C. § 1189(a)(1) (2012). The INA enables the State Department to designate an organization as an FTO if three criteria are met: (1) the organization must be foreign; (2) the organization must engage in terrorist activity as defined by the INA or the Foreign Relations Authorization Act, or must “retain[] the capability and intent to engage in terrorist activity or terrorism”; and (3) the “terrorist activity or terrorism of the organization [must] threaten[] the security of [U.S.] nationals or the national security of the United States.” *Id.* The FTO designation remains in place for two years, after which the State Department has the option to redesignate the organization for another two-year period if the organization’s activities still fall under the statutory requirements. *Id.* § 1189(a)(4)(B).

19. See *Foreign Terrorist Organizations*, *supra* note 15.

20. See Peterson, *supra* note 14, at 347 (“[T]he FTO approach is a fairly static approach to a very dynamic situation.”).

21. See *id.*

22. See Mary Anne Weaver, *The Short, Violent Life of Abu Musab al-Zarqawi*, ATLANTIC (June 8, 2006), <https://www.theatlantic.com/magazine/archive/2006/07/the-short-violent-life-of-abu-musab-al-zarqawi/304983/> [<https://perma.cc/XKS4-N95A>] (At one point in time, the United States offered twenty-five million dollars as a reward for turning in al-Zarqawi, because he was “one of the most wanted men in the world”).

23. Peterson, *supra* note 14, at 347.

24. *Id.*

25. *Id.*

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

been a relatively effective means of prosecuting supporters of terror.<sup>27</sup> Yet, the United States needs to recognize that as national security law has changed to accommodate the rise of terrorism in the world, terror networks have also evolved.<sup>28</sup> Although many of the greatest terror threats to the United States come from already designated FTOs,<sup>29</sup> many threats to national security come from amorphous and expansive terror networks and the trend of “home-grown violent extremists.”<sup>30</sup> Prosecutors now face difficulties because organizations use front companies, suborganizations, and “offshoots” with other names.<sup>31</sup> These fronts and offshoots are still a part of the larger terrorist network, and they work towards the same detrimental goals.<sup>32</sup> But if an individual gives support or resources to a terrorist organization that the State Department has not designated as an FTO, federal prosecutors cannot indict that individual under § 2339B.<sup>33</sup>

This Note argues that the language in § 2339B should be more inclusive. The language should read: “Whoever knowingly provides material support or resources to a foreign terror organization,”<sup>34</sup> *or other organizations that dominate and control, or are dominated and controlled by, or affiliated with a foreign terrorist organization,*<sup>35</sup> “or

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§ 2339B to prosecute terror supporters only four times prior to the September 11 attacks. See Chesney, *supra* note 11, at 19.

27. See ZABEL & BENJAMIN, JR., *supra* note 4, at 36.

28. Peterson, *supra* note 14, at 298.

29. For example, Hizballah is a designated FTO. See *Foreign Terrorist Organizations*, *supra* note 15. According to a U.S. intelligence threat assessment, Iran and its “primary terrorism partner,” the Lebanese Hizballah, will continue to threaten U.S interests and allies worldwide. *Worldwide Threat Assessment of the US Intelligence Community: Hearing Before the S. Select Comm. on Intelligence*, 115th Cong. 5 (2017) [hereinafter *Worldwide Threat Assessment*] (statement of Daniel R. Coats, Director of National Intelligence), <https://www.dni.gov/files/documents/Newsroom/Testimonies/SSCI%20Unclassified%20SFR%20-%20Final.pdf> [<https://perma.cc/PM6K-6B22>].

30. See Peterson, *supra* note 14, at 298; see also *Worldwide Threat Assessment*, *supra* note 29, at 5 (“[U.S.]-based homegrown violent extremists ... will remain the most frequent and unpredictable ... extremist threat to the [U.S.] homeland.”).

31. See Peterson, *supra* note 14, at 337, 347.

32. See *id.*

33. See *id.* at 347.

34. 18 U.S.C. § 2339B(a)(1) (2012).

35. This Note specifically argues that the phrase, “or other organizations that dominate and control, or are dominated and controlled by, or affiliated with a foreign terrorist organization” should be added into § 2339B. The language “dominated and controlled” is borrowed. See *Nat’l Council of Resistance of Iran v. Dep’t of State*, 373 F.3d 152, 158 (D.C. Cir. 2004).

attempts or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.”<sup>36</sup> Adding this language to the statute enables a more effective means to prosecute those who support terrorist organizations, and closes the loophole in U.S. law.<sup>37</sup>

Adding more inclusive language would still put the onus on the government to prove the defendant’s requisite *mens rea*.<sup>38</sup> Under this proposal, the government would have to prove two elements: first, that the defendant knowingly provided material support, and second, that the defendant knew the material support was going to an FTO,<sup>39</sup> or a group that (1) was dominated and controlled by an already designated FTO,<sup>40</sup> (2) dominated and controlled an FTO,<sup>41</sup> or (3) at the very least, was affiliated with the FTO.<sup>42</sup> This statutory reform would allow the government to prosecute members of front organizations and offshoots within the overarching terrorist network, regardless of whether the defendant provided material support to an *officially* designated FTO. Conversely, this inclusive approach would extend to individuals providing material support to an “umbrella” organization, if the State Department already designated the offshoot or smaller organization as an FTO.<sup>43</sup> This proposal creates a dynamic solution for a dynamic problem.<sup>44</sup>

Part I outlines why prosecution under the material support statutes is effective. Federal prosecutors bring most terrorism charges under § 2339B because the statute has a limited *mens rea* component,<sup>45</sup> allows prosecutors to act preemptively,<sup>46</sup> and has expansive

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36. 18 U.S.C. § 2339B(a)(1) (Supp. III 2015).

37. *See infra* Part III.

38. *See infra* notes 56-60 and accompanying text.

39. *See infra* Part I.A.

40. This language encompasses suborganizations and alias groups under the terror network.

41. This language includes a larger “umbrella” organization.

42. For an example of when a prosecutor would need to use the “affiliated” component, see *infra* Part II.B.

43. Part II.B discusses an example of an “umbrella” terrorist organization—the Afghan Taliban—that the State Department has not designated as an FTO. *See infra* Part II.B.

44. *See* Peterson, *supra* note 14, at 347.

45. *See infra* Part I.A.

46. *See infra* Part I.B.

extraterritorial jurisdiction.<sup>47</sup> Part II juxtaposes the current law and U.S. legal designations with the current reality of modern terror organizations, and shows how U.S. antiterror law is missing the mark. Specifically, this Part addresses the myth that terror groups are single, organized units. Instead, terror networks are massive, constantly changing organizations comprised of many smaller groups.<sup>48</sup> Next, Part III argues to reform the language of § 2339B. Finally, Part IV addresses counterarguments.

As terrorist organizations “adapt quickly to increase their chances of survival,”<sup>49</sup> U.S. antiterror law also needs to change. Thus, Congress should close the existing loophole, and add the phrase, *or other organizations that dominate and control, or are dominated and controlled by, or affiliated with a foreign terrorist organization*,<sup>50</sup> into § 2339B.

#### I. THE PROSECUTORIAL ADVANTAGES UNDER THE MATERIAL SUPPORT STATUTES

Overhauling the material support statutes is unnecessary. Section 2339B is a powerful prosecutorial tool,<sup>51</sup> and offers several advantages that this Note’s proposed statutory reform would not affect.<sup>52</sup> There are three main reasons prosecutors have widely used § 2339B. First, § 2339B has a unique mens rea component that does not require the prosecution to connect the “material support” to the criminal terrorist activity.<sup>53</sup> Second, § 2339B allows the government to prosecute preemptively if there is evidence of “material support” before a terror act has occurred.<sup>54</sup> Third, § 2339B has extensive jurisdictional reach.<sup>55</sup>

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47. See *infra* Part I.C.

48. See *infra* Part II.C.

49. U.S. DEP’T OF JUSTICE, *supra* note 1, at 2.9.

50. See *supra* notes 34-36 and accompanying text.

51. See Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT’L SECURITY L. & POL’Y 5, 7 (2005) (“[The material support] offenses constitute unusually potent prosecutorial weapons.”).

52. See *infra* Part III.

53. See *infra* Part I.A.

54. See *infra* Part I.B.

55. See *infra* Part I.C.



### A. Limited Criminal Intent Component

Section 2339B's first advantage is that it does not have an onerous mens rea component. This "limited criminal intent component"<sup>56</sup> requires the government to prove criminal liability through two knowledge elements: that the defendant (1) knowingly provided "material support" to the organization, and (2) knew that the organization was a designated FTO or engaged in terrorist activity.<sup>57</sup> In other words, Congress does not require specific intent under § 2339B.<sup>58</sup> The defendant only has to knowingly give "material support or resources" to an FTO, but does not have to intend for that aid to further the FTO's criminal enterprise.<sup>59</sup> Prosecutors do not have to prove that the defendant's aid actually helped materialize a criminal act.<sup>60</sup>

The Supreme Court considered this issue in *Holder v. Humanitarian Law Project*.<sup>61</sup> The case involved two designated FTOs: the Kurdistan Workers' Party, and the Liberation Tigers of Tamil Eelam.<sup>62</sup> Six domestic organizations sued, claiming that § 2339B criminalized their aid supporting the groups' "humanitarian and political activities."<sup>63</sup> The plaintiffs challenged § 2339B on the grounds that it was unconstitutionally vague under the Fifth Amendment, and that it violated their freedoms of speech and association under the First Amendment.<sup>64</sup>

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56. ZABEL & BENJAMIN, JR., *supra* note 4, at 35.

57. 18 U.S.C. § 2339B(a)(1) (2012); *United States v. Al Kassar*, 660 F.3d 108, 129 (2d Cir. 2011).

58. *See Chesney*, *supra* note 11, at 18 ("[Section 2339B] prohibit[s] the provision of ... aid under any circumstances *irrespective of the provider's intent* or belief about how the recipient will use it." (emphasis added)); *Peterson*, *supra* note 14, at 335 ("To violate §[2339B], one only has to know that a group is listed or has engaged in any terrorist activity in the past."); *see also United States v. Abdi*, 498 F. Supp. 2d 1048, 1058 (S.D. Ohio 2007) ("[Section] 2339B encompass[s] donors who, though contributing to FTOs, act[] *without the intent* to further federal crimes." (emphasis added)); *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134, 1144 (C.D. Cal. 2005) ("[Section 2339B] prohibits the conduct of providing material support or resources to an organization that *one knows* is a designated [FTO] or is engaged in terrorist activities." (emphasis added)).

59. 18 U.S.C. § 2339B(a)(1); *see ZABEL & BENJAMIN, JR.*, *supra* note 4, at 35.

60. *See ZABEL & BENJAMIN, JR.*, *supra* note 4, at 35.

61. 561 U.S. 1, 16-17 (2010).

62. *Id.* at 9.

63. *Id.* at 10.

64. *Id.* at 10-11.

The Supreme Court rejected the plaintiffs' claims, holding that "Congress plainly spoke to the necessary mental state for a violation of § 2339B, and it chose knowledge about the organization's connection to terrorism, *not specific intent* to further the organization's terrorist activities."<sup>65</sup> The Court further reasoned that "[m]aterial support" to an FTO in any form helps legitimize the organization.<sup>66</sup> In turn, legitimacy helps terror organizations recruit new members and raise more funds, ultimately allowing them to adapt and persevere.<sup>67</sup> Recognizing that terror organizations "systematically conceal their activities behind charitable, social, and political fronts," the Court held that the limited criminal intent component was justified because FTOs "do not maintain legitimate *financial* firewalls between those funds raised for civil, nonviolent activities, and those ultimately used to support violent terrorist operations."<sup>68</sup>

This limited criminal intent component is also unique to § 2339B.<sup>69</sup> For example, proving "material support" under § 2339A requires the government to prove that the defendant provided support with the intent or knowledge *that it will further terrorist activity*.<sup>70</sup> This requires the prosecution to connect the aid with the terrorist act, which is frequently difficult.<sup>71</sup> In reality, support can be "innocuous," such as money, food, and communication methods.<sup>72</sup> Section 2339B allows prosecutors to disrupt support to terrorist organizations without having to make the evidentiary connection that the defendant gave the particular aid with the intent to further an illegal act.<sup>73</sup> Simply stated, § 2339B's "list-based"<sup>74</sup> approach and

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65. *Id.* at 16-17 (emphasis added).

66. *Id.* at 30.

67. *Id.*

68. *Id.* at 30-31 (citations omitted).

69. See Peterson, *supra* note 14, at 335.

70. See Chesney, *supra* note 11, at 12-13 (describing § 2339A as more of an "aiding-and-abetting statute"); Peterson, *supra* note 14, at 335.

71. See Peterson, *supra* note 14, at 348 (explaining that the statute would reach in cases when there is "evidence of a specific terrorist plot," but that such evidence is difficult to obtain). Section 2339B served to fill the hole that § 2339A left open: the inability to criminalize support when the government could not prove that a defendant was supporting terror *with the specific intent* to further a terror act. See Chesney, *supra* note 11, at 13.

72. See Peterson, *supra* note 14, at 348.

73. See *supra* notes 56-60 and accompanying text.

74. See Peterson, *supra* note 14, at 297.

its limited mens rea component are greatly beneficial to prosecutors.<sup>75</sup>

### *B. Prevention Approach*

Section 2339B's second advantage is that it embodies the DOJ's prevention approach.<sup>76</sup> The "material support" legislation is unique because it potentially criminalizes a broad range of activities, including those that may otherwise not be associated with terror activity.<sup>77</sup> For example, the DOJ has prosecuted "major charities, money launderers, business organizations, grassroots fundraisers, cab drivers, door-to-door solicitors, drug traffickers, and others" under the material support statutes.<sup>78</sup> Ultimately, the "prevention approach" means that prosecutors do not have to sit and wait until a terrorist act occurs to indict an individual under § 2339B.

The Lackawanna Six case is one famous example of the prevention approach.<sup>79</sup> In that case, six Yemeni-American men trained under al Qaeda to "wage war against" the United States and Israel.<sup>80</sup> The U.S. government did not have hard evidence that the six defendants were planning to carry out a terror plot, but prosecutors proffered that the Lackawanna Six were waiting on instructions from Osama bin Laden to carry out a terror attack in the United

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75. See Abrams, *supra* note 51, at 7.

76. See Chesney, *supra* note 11, at 39-44 (discussing how the government may invoke the material support statutes to prosecute defendants before they commit a terrorist act).

77. See Peterson, *supra* note 14, at 301; see also H.R. REP. NO. 104-383, at 178-79 (1995) ("Because the activities of many 'controversial' political groups also have a large humanitarian component, the bill's restrictions on fundraising are likely to have a significant adverse impact on relief efforts in troubled parts of the world."). There are other examples of revenue sources. See, e.g., *ISIS Fast Facts*, CNN, <https://www.cnn.com/2014/08/08/world/isis-fast-facts/index.html> [<https://perma.cc/B947-NYQV>] (last updated Dec. 12, 2017). For instance, the Islamic State of Iraq and Syria (ISIS) raises revenue from a variety of sources, including "oil production and smuggling, taxes, ransoms from kidnappings, selling stolen artifacts, extortion and controlling crops." *Id.*

78. Michael Taxay, *Trends in the Prosecution of Terrorist Financing and Facilitation*, U.S. ATTORNEYS' BULL., Sept. 2014, at 2, 8, <https://www.justice.gov/sites/default/files/usao/legacy/2014/09/23/usab6205.pdf> [<https://perma.cc/76K8-WFHV>].

79. See Chesney, *supra* note 11, at 39-44.

80. Richard A. Serrano, *Last 'Lackawanna Six' Defendant Pleads Guilty*, L.A. TIMES (May 20, 2003), <http://articles.latimes.com/2003/may/20/nation/na-lackawanna20> [<https://perma.cc/UE9C-QCR3>].

States.<sup>81</sup> A federal grand jury indicted all six men for providing material support to an FTO.<sup>82</sup> All six defendants eventually pled guilty.<sup>83</sup>

Other cases illustrate how prosecutors can use the material support statutes as prevention tools when there is evidence that the defendant already began preparations to carry out a terror attack.<sup>84</sup> For example, Iyman Faris also pled guilty to providing material support to al Qaeda by plotting to destroy the Brooklyn Bridge.<sup>85</sup> Like the Lackawanna Six defendants, Faris had traveled to Pakistan and Afghanistan to meet with Osama bin Laden and other top al Qaeda leaders.<sup>86</sup> After returning to the United States, Faris planned to sever the Brooklyn Bridge's suspension cables with blowtorches.<sup>87</sup> Defendants such as the Lackawanna Six and Faris illustrate how prosecutors can be proactive under § 2339B. This kind of prosecution embodies the DOJ's vision for restructuring its reactionary approach to a preventative approach after the September 11 attacks.<sup>88</sup>

### C. *Jurisdictional Reach*

Section 2339B's third important advantage is its jurisdictional reach. Section 2339B contains two statements of extraterritorial jurisdiction.<sup>89</sup> First, § 2339B(d)(2) generally grants extraterritorial jurisdiction.<sup>90</sup> Second, the statute confers extraterritorial jurisdiction over any offender who is a (1) U.S. national or citizen, (2) "habitual"

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81. David Hancock, *Lackawanna Six' Indicted*, CBS NEWS (Oct. 22, 2002, 3:04 PM), <https://www.cbsnews.com/news/lackawanna-six-indicted/> [<https://perma.cc/4B5N-F735>].

82. *Id.* The State Department designated al Qaeda (spelled "al-Qa'ida") as an FTO on October 8, 1999. See *Foreign Terrorist Organizations*, *supra* note 15.

83. ZABEL & BENJAMIN, JR., *supra* note 4, at 18.

84. See, e.g., Eric Lichtblau, *Trucker Sentenced to 20 Years in Plot Against Brooklyn Bridge*, N.Y. TIMES (Oct. 29, 2003), <https://www.nytimes.com/2003/10/29/us/trucker-sentenced-to-20-years-in-plot-against-brooklyn-bridge.html> [<https://perma.cc/3PAY-BU46>].

85. *Id.*

86. *Id.*

87. *Id.*

88. See U.S. DEP'T OF JUSTICE, *supra* note 1, at 2.9.

89. 18 U.S.C. § 2339B(d)(1)-(2) (2012). Extraterritorial jurisdiction is when a state or court asserts "any form of jurisdiction over a person ... that is outside the physical jurisdiction of the state or the court asserting the jurisdiction." *Extraterritorial Jurisdiction*, BOUVIER LAW DICTIONARY (Stephen Michael Sheppard ed., 2012).

90. 18 U.S.C. § 2339B(d)(2).

resident, or (3) person who comes to the United States after committing an offense.<sup>91</sup> Further, extraterritorial jurisdiction attaches if the offense “occurs in whole or in part” in the United States, or if it “affects interstate or foreign commerce.”<sup>92</sup>

Notably, courts have required a “jurisdictional nexus” when the government charges a noncitizen acting entirely abroad under § 2339B.<sup>93</sup> These courts require that “the aim of [the prohibited] activity [must be] to cause harm inside the United States or to U.S. citizens or interests.”<sup>94</sup> Ultimately, this broad extraterritorial jurisdiction allows prosecutors to indict U.S. citizens or nationals, as well as foreign nationals, who have provided material support to FTOs under § 2339B.

In sum, there are several compelling advantages to the current system, rendering § 2339B a useful prosecutorial tool. Section 2339B’s mens rea component does not require prosecutors to prove that the material support actually aided criminal terrorist activity.<sup>95</sup> Rather, prosecutors must only prove that the defendant knowingly gave material support, and that the support was going to a designated FTO.<sup>96</sup> Further, § 2339B allows prosecutors to act with the information that an individual has provided material support to an FTO, rather than having to wait for a terrorist act to occur.<sup>97</sup> Lastly, § 2339B has expansive jurisdictional reach, permitting prosecutors to indict U.S. citizens and foreign nationals, if the support is connected to harming the United States.<sup>98</sup>

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91. *Id.* § 2339B(d)(1)(A)-(C).

92. *Id.* § 2339B(d)(1)(D)-(E).

93. *See, e.g.*, *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011); *United States v. Naseer*, 38 F. Supp. 3d 269, 272-73 (E.D.N.Y. 2014).

94. CHARLES DOYLE, CONG. RESEARCH SERV., R41333, TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18 U.S.C. §2339A AND §2339B, at 23 (2016) (citing *Al Kassar*, 660 F.3d at 118; *Naseer*, 38 F. Supp. 3d at 272-73).

95. *See supra* Part I.A.

96. *See supra* Part I.A.

97. *See supra* Part I.B.

98. *See supra* notes 93-94 and accompanying text.

## II. THE PROBLEM: UNITED STATES ANTITERROR LAW IS MISSING THE MARK

Although § 2339B is a useful prosecutorial tool, there is a substantial loophole in U.S. antiterror law.<sup>99</sup> This Part will explain why U.S. law is missing the mark. First, this Part will outline the State Department's available "weapons" against terror funding and support. These weapons include designating FTOs, as well as "Specially Designated Nationals and Blocked Persons" (SDNs).<sup>100</sup> The latter designation is a way that the State Department, along with the Treasury Department, can block individuals' and organizations' assets from the United States.<sup>101</sup> Second, this Part will explain why a politicized State Department, and their inherent dealings with delicate diplomatic situations, creates a legal inconsistency and undermines § 2339B's effectiveness. Lastly, this Part will explore why § 2339B's focus on static organizations is shortsighted, and discuss the reality of terror networks.

### A. *The Current Designation Processes*

U.S. federal agencies have two main processes to designate entities that are harmful to the United States's interests: the FTO designation and the SDN designation.<sup>102</sup> These designations carry consequences for individuals and organizations.<sup>103</sup> This Part delves into the distinction between the two designations, illustrating the politicization and discrepancies in U.S. antiterror law.

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99. See *supra* notes 20-25 and accompanying text.

100. See *infra* Parts II.A.1-2.

101. See *infra* note 119 and accompanying text.

102. See *infra* Parts II.A.1-2.

103. See *supra* notes 15-17 and accompanying text; *infra* notes 111-14, 119 and accompanying text.

### 1. *Foreign Terrorist Organization Designation*

The Immigration and Nationality Act authorizes the Secretary of State to designate FTOs.<sup>104</sup> The process takes three steps.<sup>105</sup> First, the Bureau of Counterterrorism identifies a group that the State Department should potentially designate as an FTO.<sup>106</sup> Second, if the Secretary of State finds sufficient evidence to designate the organization,<sup>107</sup> then the Secretary notifies Congress of the potential designation.<sup>108</sup> Congress then has seven days to stop the designation.<sup>109</sup> Third, if Congress fails to act, then the State Department publishes the designation in the Federal Register, which is when the designation becomes effective.<sup>110</sup>

It is noteworthy that when the State Department designates an organization as an FTO, the affected organization faces consequences<sup>111</sup> other than the potential criminal liability for providing “material support” under § 2339B.<sup>112</sup> First, FTO members and representatives cannot enter the United States.<sup>113</sup> Second, if a U.S. financial institution realizes that it possesses funds “in which a designated FTO or its agent has an interest,” the financial institution must freeze the assets and report the funds to the Office of Foreign Assets Control.<sup>114</sup>

Organizations can appeal an FTO designation to the United States Court of Appeals for the District of Columbia.<sup>115</sup> However, only the organization itself can challenge the designation.<sup>116</sup> Defendants charged under § 2339B are unable to challenge the FTO

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104. 8 U.S.C. § 1189(a)(1) (2012).

105. See *infra* notes 106-10 and accompanying text.

106. See *Foreign Terrorist Organizations*, *supra* note 15.

107. See *supra* note 18 and accompanying text.

108. See *Foreign Terrorist Organizations*, *supra* note 15.

109. See *id.*

110. *Id.*

111. An extended discussion of these consequences is outside of this Note’s purview. Further, this Note’s argument does not extend these consequences to other organizations under its proposed statutory reform.

112. See *supra* notes 15-17 and accompanying text.

113. 8 U.S.C. §§ 1182(a)(3)(B)(i)(IV)-(V), 1227(a)(1)(A) (2012).

114. *Foreign Terrorist Organizations*, *supra* note 15; see also 8 U.S.C. § 1189(a)(2)(C) (2012).

115. 8 U.S.C. § 1189(c)(1).

116. See *id.* § 1189(a)(8), (c)(1).

designation<sup>117</sup> because courts have determined that the designation does not violate individual due process rights.<sup>118</sup>

## 2. *Specially Designated Global Terrorist Entities*

This Note has focused on FTO designations thus far. However, an FTO designation is not the only designation the U.S. government can use to impede terror funding. The State Department has an additional tool: Executive Order 13,224 “provides a means by which to disrupt the financial support network for terrorists and terrorist organizations by authorizing the U.S. government to designate and *block the assets of foreign individuals and entities that commit, or pose a significant risk of committing, acts of terrorism.*”<sup>119</sup>

In other words, labeling an “individual” or “entity” as an SDN is a way the State Department can designate terror-organization supporters and create legal consequences for them, but without the FTO label.<sup>120</sup> The Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, can designate foreign individuals or entities that pose a terror threat to the United States, or “assist in, sponsor, or provide financial *material*, or technological *support for*, or financial or other services to *or in support of*, acts of *terrorism* or individuals or entities.”<sup>121</sup> This definition is remarkably similar to § 2339B, which prohibits “knowingly provid[ing] material support or resources.”<sup>122</sup>

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117. *Id.* § 1189(a)(8) (“[A] defendant in a criminal action ... shall not be permitted to raise any question concerning the validity of the issuance of such designation as a defense.”).

118. *See, e.g.*, *United States v. Ali*, 799 F.3d 1008, 1019 (8th Cir. 2015).

119. Press Release, U.S. Dep’t of State, Executive Order 13224 (Sept. 23, 2001) (emphasis added), <https://www.state.gov/j/ct/rls/other/des/122570.htm> [<https://perma.cc/9FHG-CT9Z>]. President Bush signed Executive Order 13,224 in the wake of the September 11 attacks. *Id.* The Office of Foreign Assets Control lists individuals and entities affiliated with countries, but also individuals and entities “such as terrorists and narcotics traffickers” that are not “country-specific.” U.S. DEP’T OF THE TREASURY, SPECIALLY DESIGNATED NATIONALS AND BLOCKED PERSONS LIST (SDN) HUMAN READABLE LISTS, <https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx> [<https://perma.cc/S6SV-7WK6>] (last updated Aug. 24, 2018, 11:59 AM). These entities’ “assets are blocked and U.S. persons are generally prohibited from dealing with them.” *Id.*

120. The State Department collectively designates “individuals, groups, and entities” on the SDN list. *See* U.S. DEP’T OF THE TREASURY, *supra* note 119; *see also* Press Release, U.S. Dep’t of State, *supra* note 119.

121. Press Release, U.S. Dep’t of State, *supra* note 119 (emphasis added).

122. 18 U.S.C. § 2339B(a)(1) (2012).



### B. *The Legal Inconsistency*

Having both the FTO designation and the SDN designation creates a legal inconsistency in U.S. antiterror law. The SDN designation exists to provide the government an avenue to block entities' or individuals' assets, and prevent interaction between U.S. citizens and terrorist groups.<sup>123</sup> Yet, individuals that provide "material support or resources" to an entity designated as an SDN are not subject to criminal liability under § 2339B, because they may not be providing support to an FTO.<sup>124</sup> And there are organizations on the SDN list that should arguably be designated as an FTO for purposes of § 2339B.<sup>125</sup>

For example, the Tehrik-e Taliban of Pakistan is on the State Department's FTO list,<sup>126</sup> but Afghanistan's Taliban is not.<sup>127</sup> Yet, the Afghan Taliban fulfills the criteria for the State Department to designate it as an FTO, including "engag[ing] in terrorism and threaten[ing] the security of U.S. nationals or the national security of the United States."<sup>128</sup> The State Department has not designated the Afghan Taliban as an FTO because of a "concern that applying the terror label to the group would restrict U.S. and Afghan government diplomatic contacts with the Taliban, making peace talks more difficult."<sup>129</sup>

There is further damning evidence. The Haqqani Network's leader, Jalaluddin Haqqani,<sup>130</sup> and al Qaeda's leader, Ayman al

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123. See *supra* note 119 and accompanying text.

124. See 18 U.S.C. § 2339B(a)(1).

125. See, e.g., Ioannis Koskinas, *Call the Taliban What They Are—Terrorists*, FOREIGN POL'Y (Feb. 19, 2015, 10:16 AM), <https://foreignpolicy.com/2015/02/19/call-the-taliban-what-they-are-terrorists/> [<https://perma.cc/G6Q9-L6C2>].

126. See *Foreign Terrorist Organizations*, *supra* note 15.

127. See Masood Farivar, *Why Isn't Afghan Taliban on US List of Foreign Terror Groups?*, VOICE AM. (Feb. 20, 2017, 5:11 PM), <https://www.voanews.com/a/afghan-taliban-us-list-foreign-terror-groups/3732453.html> [<https://perma.cc/U5VM-RUTE>].

128. *Id.* (The Pakistan Taliban and the Afghan Taliban not only "call themselves the Taliban," but they also "regularly carry out deadly suicide bombings, kill civilians with impunity and ... behave like brutish terrorist groups"). The Afghan Taliban also controls large portions of Afghanistan territory, and aspires to govern the country. See *id.*

129. *Id.*

130. The Haqqani Network is infamously known for holding U.S. Sergeant Bowe Bergdahl in captivity for five years. See generally David Zucchino et al., *Bowe Bergdahl's Captors: Who, Where and Why?*, L.A. TIMES (June 14, 2014, 7:05 PM), <https://www.latimes.com/world/afghanistan-pakistan/la-fg-bergdahl-captivity-20140615-story.html> [<https://perma.cc/YE2S->

Zawahiri<sup>131</sup>—two leaders of two designated FTOs—“have repeatedly pledged allegiance to Mullah Mohammad Omar, the reclusive leader of the Afghan Taliban.”<sup>132</sup> In other words, the Haqqani Network, which is “officially subsumed under the larger Taliban *umbrella organization* led by Mullah Omar and his ... Taliban,” is a designated FTO, and the Afghan Taliban, the actual “umbrella organization,” is not.<sup>133</sup> The reality that organizations “pledg[ing] fealty to Mullah Omar are designated FTOs yet the Afghan Taliban [is] not simply defies logic.”<sup>134</sup> It seems that even if it walks like a duck, and quacks like a duck, the State Department will not call it a duck<sup>135</sup> if there are other diplomatic considerations at stake.<sup>136</sup>

This kind of politicization and legal inconsistency illustrates why the current “list-based approach” under § 2339B is inadequate. Under this scheme, the government could *not* indict an individual providing “material support” to the Afghan Taliban under § 2339B, because the State Department has not designated it as an FTO.<sup>137</sup> Yet, the government *could* indict an individual providing material

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KDQY]. In addition, U.S. officials linked a Pakistani-American named Faisal Shahzad to the Haqqani network. *Id.* Shahzad attempted to car-bomb Times Square in New York City, but his homemade bomb ultimately never exploded. *Id.*

131. Al Qaeda named Ayman al-Zawahiri as their new leader on June 16, 2011, after Osama bin Laden’s death. *See Al-Qaeda’s Remaining Leaders*, BBC NEWS (June 16, 2015), <https://www.bbc.com/news/world-south-asia-11489337> [<https://perma.cc/F87C-UDLA>].

132. Koskinas, *supra* note 125. Note that both organizations, the Haqqani Network and al Qaeda, are designated FTOs. *See Foreign Terrorist Organizations*, *supra* note 15. The State Department designated the Haqqani Network as an FTO on September 19, 2012, and al Qaeda (spelled “al-Qa’ida”) on October 8, 1999. *Id.*

133. *See* JEFFREY A. DRESSLER, *THE HAQQANI NETWORK: FROM PAKISTAN TO AFGHANISTAN* 2 (2010) (emphasis added), [http://www.understandingwar.org/sites/default/files/Haqqani\\_Network\\_0.pdf](http://www.understandingwar.org/sites/default/files/Haqqani_Network_0.pdf) [<https://perma.cc/DB63-J3ZF>]. Although the Haqqani Network is under the larger “Taliban umbrella,” Jeffrey Dressler explains that the Haqqani Network “maintain[s] distinct command and control, and lines of operations.” *Id.* In other words, under this Note’s paradigm, the Haqqani Network and the Afghan Taliban would be “affiliated” entities. *See supra* note 42 and accompanying text.

134. Koskinas, *supra* note 125.

135. Indeed, the U.S. government will only call the Afghan Taliban “armed insurgents.” *Id.*

136. *See id.* (“Obama’s national security team has been able to engage in low-key peace negotiations with the Taliban that would be more difficult to pursue if the Taliban were a designated FTO.”); *see also* Mushtaq Yusufzai et al., *Taliban Begins Secret Peace Talks with U.S., Afghan Officials: Sources*, NBC NEWS (Oct. 18, 2016, 10:45 AM), <https://www.nbcnews.com/news/world/taliban-begins-secret-peace-talks-u-s-afghan-officials-sources-n668131> [<https://perma.cc/452P-T6G3>] (discussing U.S. interests in promoting peace talks between the Afghans and the Taliban).

137. *See* 18 U.S.C. § 2339B(a)(1) (2012).

support to the Haqqani Network, a terror organization under the official “umbrella” of the Afghan Taliban,<sup>138</sup> under § 2339B.<sup>139</sup> This illustrates why U.S. antiterror law is missing the mark. Reforming the language of § 2339B would allow federal prosecutors to “bypass” the State Department’s politicized designation process, and prosecute those that truly present a terror threat to the United States.

*C. The Factual Inconsistency: Realities of Modern-Day Terrorism*

On top of the legal inconsistency, U.S. law does not align with reality. U.S. antiterror law focuses on discrete organizations.<sup>140</sup> However, this approach is misguided.<sup>141</sup> Scholar and attorney Andrew Peterson summarizes: “Terrorist groups are evolving. Today, fewer terrorists are still affiliated with structured organizations; instead, the greatest terrorist threat to the United States comes from a diffuse global network of terrorists. These individuals ... move between and among terrorist groups and causes without necessarily ever becoming ‘members’ of any particular organization.”<sup>142</sup>

Over the last two decades, terrorist groups have grown away from organizational and bureaucratic structures, and into networks.<sup>143</sup> For example, “[a] Qaeda is not a close-knit, hierarchical terrorist organization; it is a brand that represents the products of many different terrorists.”<sup>144</sup> Although the different sections within these terror networks sometimes work together, they often remain semi-autonomous.<sup>145</sup> Further, as terrorist networks have grown, so has their efficacy and dangerousness.<sup>146</sup> Whereas “[t]raditional, hierarchical organizations are extremely vulnerable to decapitation[,] ... [n]etworked organizations are resilient.”<sup>147</sup>

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138. See DRESSLER, *supra* note 133, at 2.

139. See 18 U.S.C. § 2339B(a)(1).

140. See Peterson, *supra* note 14, at 298.

141. See *id.*

142. *Id.*

143. See *id.* at 339-40.

144. *Id.* at 340.

145. *Id.*

146. See *id.* at 341.

147. *Id.*

One of the most recent examples of this phenomenon is the Islamic State of Iraq and Syria, commonly known as ISIS.<sup>148</sup> According to the U.S. intelligence community's threat assessment, "[o]utside Iraq and Syria, ISIS is seeking to foster interconnectedness among its global *branches and networks*, align their efforts to ISIS's strategy, and withstand counter-ISIS efforts. We assess that ISIS maintains the intent and capability to direct, enable, assist, and inspire transnational attacks."<sup>149</sup> In other words, ISIS is a terrorist network that resembles a "deadly virus[]." <sup>150</sup>

To make things even more complex, terror networks often receive support from a range of sources, including charitable organizations.<sup>151</sup> For example, the Holy Land Foundation for Relief and Development (HLF) posed as a charitable organization by "funneling money through Zakat Committees and Charitable Societies."<sup>152</sup> In reality, the HLF was Hamas's main fundraiser in the United States.<sup>153</sup> The illicit drug trade and sale of counterfeit goods are also large sources of funding for terror organizations.<sup>154</sup> Further, terrorist networks sometimes use front companies that "operate [as] legitimate businesses, which generate their own profits and can also be used as a front for money laundering."<sup>155</sup>

The reality is that terrorist networks are dynamically complex in their organizational and fundraising structures.<sup>156</sup> Terrorist networks are not stagnant hierarchical entities or singular groups of

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148. See *Worldwide Threat Assessment*, *supra* note 29, at 2, 5. ISIS has several different names, including the "Islamic State of Iraq and ash-Sham," the "Islamic State in Iraq and the Levant (ISIL)," and the "Islamic State." See *id.* at 2; *ISIS Fast Facts*, *supra* note 77.

149. See *Worldwide Threat Assessment*, *supra* note 29, at 5 (emphasis added).

150. See U.S. DEP'T OF JUSTICE, *supra* note 1, at 2.9.

151. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 10 (2010) (explaining that the plaintiffs were U.S. citizens and six domestic organizations, including a human rights organization and nonprofit groups); Eben Kaplan, *Tracking Down Terrorist Financing*, COUNCIL ON FOREIGN REL. (Apr. 4, 2006), <https://www.cfr.org/backgroundunder/tracking-down-terrorist-financing> [<https://perma.cc/QR4-UQA6>] (explaining that some organizations use *zakat*, a pillar of Islam requiring Muslims to give a portion of their wealth to charity, to finance jihad); *supra* notes 61-63, 78 and accompanying text.

152. Taxay, *supra* note 78, at 3.

153. See *id.* Eventually, the U.S. government convicted the principal agents of the HLF for providing material support to an FTO, among other crimes. *Id.*

154. See Kaplan, *supra* note 151.

155. *Id.*

156. See *supra* notes 142-47, 151-55 and accompanying text.

armed forces.<sup>157</sup> Instead, they are nebulous organizations that are often comprised of many smaller groups.<sup>158</sup> This reality calls for a change in U.S. law.

### III. THE SOLUTION: AN “INCLUSIVE APPROACH”

Adding language to § 2339B would maintain the current advantages and close the loophole in U.S. law. The organization-focused, “list-based approach” cannot effectively target all U.S. terror enemies.<sup>159</sup> Thus, the “list-based”<sup>160</sup> approach should be more inclusive. This proposed alteration to the statutory language is simple, but has the potential to make U.S. antiterror law more effective.<sup>161</sup> Congress should change § 2339B’s language to: “Whoever knowingly provides material support or resources to a foreign terrorist organization,”<sup>162</sup> *or other organizations that dominate and control, or are dominated and controlled by, or affiliated with a foreign terrorist organization,*<sup>163</sup> “or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.”<sup>164</sup> This approach would allow for the prosecution of those giving material support to “umbrella” organizations, front organizations, and offshoots of the larger terror network under § 2339B.<sup>165</sup>

This approach is beneficial in three ways. First, it keeps the advantageous aspects of § 2339B, including the limited criminal intent component,<sup>166</sup> the ability to prosecute before a terror act occurs,<sup>167</sup> and its expansive extraterritorial jurisdiction.<sup>168</sup> In other words, this proposed reform does not change the reasons why prosecutors

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157. See Peterson, *supra* note 14, at 298.

158. See *id.*

159. *Id.*

160. *Id.*

161. See *supra* note 35 and accompanying text.

162. 18 U.S.C. § 2339B(a)(1) (2012).

163. This is the phrase that this Note proposes to add into § 2339B. See *supra* note 35.

164. 18 U.S.C. § 2339B(a)(1) (Supp. III 2015).

165. See *supra* notes 39-44 and accompanying text.

166. See *supra* Part I.A.

167. See *supra* Part I.B.

168. See *supra* Part I.C.

charge terrorism defendants under § 2339B more than any other antiterror law.<sup>169</sup>

Second, this change will allow prosecutors to indict terrorists that are not per se “members” of an already designated FTO. The government will still have to prove that the defendant aided an organization that is (1) acting under the domination and control of an already designated FTO; (2) dominating and controlling an FTO (an “umbrella” organization); or (3) affiliated with an FTO.<sup>170</sup> In other words, the proposed reform would encompass donors and terrorists that the United States would otherwise prosecute if the State Department had already designated an organization as an FTO. If the government can prove that the defendant provided “material support or resources” to an organization that is connected to the FTO in at least one of the three ways outlined above, that proof will be sufficient to satisfy § 2339B’s “foreign terror organization” requirement under the “list-based approach.”<sup>171</sup>

Finally, the “inclusive approach” is realistic. Congressional reforms throughout the last two decades have produced the “material approach” statute.<sup>172</sup> Yet, terror groups have evolved from organizational structures to networks during that period,<sup>173</sup> leaving a loophole in the law.<sup>174</sup> U.S. antiterror law needs to evolve with the times in order to stay ahead of terrorist networks. Yet, just because the current law is lacking does not mean Congress should completely revolutionize it.<sup>175</sup> Congress may be more likely to take a smaller step in the right direction, as opposed to suddenly instituting massive reform.<sup>176</sup>

This “inclusive approach” also finds support in the United States Court of Appeals for the District of Columbia case, *National Council*

169. See *supra* note 26 and accompanying text; *supra* Part I.

170. See *supra* notes 38-42 and accompanying text.

171. See 18 U.S.C. § 2339B(a)(1) (2012); Peterson, *supra* note 14, at 297-98.

172. Peterson, *supra* note 14, at 298 (“Congress has taken incremental steps, and built on the material support-based system that it put in place in the mid-1990s.”).

173. See *supra* notes 142-47 and accompanying text.

174. See *supra* notes 20-25, 31-33 and accompanying text.

175. See Peterson, *supra* note 14, at 353 (“Although broad reform of the material support statutes may be preferable to the status quo, such radical reform is, in reality, unlikely to be adopted.”). *But see id.* at 349-53 (arguing for broad reform).

176. See *id.* at 353.

*of Resistance of Iran v. Department of State*.<sup>177</sup> In that case, a dispute arose when the State Department redesignated the Mojahedin-e Khalq (MEK) and its “alias,” the National Council of Resistance of Iran (NCRI), as FTOs.<sup>178</sup> The NCRI appealed, arguing that it was merely an MEK member organization, and not an “alias.”<sup>179</sup> Thus, the NCRI argued that they should not be subject to the FTO designation.<sup>180</sup> The court rejected the NCRI’s claim, holding that “the grant of authority to designate FTOs ‘implies the authority to so designate an entity that commits the necessary terrorist acts under some other name.’”<sup>181</sup> The court illustrated this concept with the mathematical idea of “transitive property,” finding that “if A equals B and B equals C, it follows that A equals C. If the NCRI is the [MEK], and if the [MEK] is a foreign terrorist organization, then the NCRI is a foreign terrorist organization also.”<sup>182</sup>

The court further held that the “alias” concept should be construed broadly under the doctrine of agency law.<sup>183</sup> In other words, it was just as implausible for Congress to intend that an FTO could evade designation by “giv[ing] itself a new name” and “happily resum[ing]” its prior status, as it was for Congress to intend that an FTO could “marshal[] ... support via juridically separate agents subject to its control.”<sup>184</sup> The court in *National Council of Resistance of Iran v. Department of State* recognized that modern terror networks forged a new reality.<sup>185</sup> Although the court considered the FTO designation issue,<sup>186</sup> its reasoning has important implications for prosecution under § 2339B. The State Department may designate “alias” organizations of FTOs.<sup>187</sup> However, if the State

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177. 373 F.3d 152 (D.C. Cir. 2004).

178. *Id.* at 153-54.

179. *Id.* at 156.

180. *Id.*

181. *Id.* (quoting *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 200 (D.C. Cir. 2001)).

182. *Id.* (alteration in original) (quoting *Nat'l Council of Resistance of Iran*, 251 F.3d at 200).

183. *Id.* at 157.

184. *Id.* at 157-58.

185. *See id.*

186. The court considered whether the State Department properly designated the NCRI as an “alias” of the MEK, and thus as an FTO, but did not consider issues regarding criminal liability or prosecution under § 2339B. *See id.* at 154.

187. *Id.* at 157-58.

Department fails to designate an alias organization or a group within a larger network, then U.S. antiterror law is still missing the mark.<sup>188</sup>

The D.C. Circuit aptly used this example: “[T]he Government could designate XYZ organization as an FTO in an effort to block [U.S.] support to that organization, but could not, without a separate FTO designation, ban the transfer of material support to XYZ’s fundraising affiliate, FTO Fundraiser, Inc.”<sup>189</sup> Federal prosecutors’ hands should not be tied when they have information that a potential defendant aided a terror organization simply because the State Department has not designated a terror organization as an FTO. Thus, a more inclusive approach seeks to allow the prosecution of terror supporters if they provide “material support or resources” to an FTO’s network.<sup>190</sup>

#### IV. COUNTERARGUMENTS AND RESPONSES

Critics may point to two key arguments against this Note’s proposal. First, critics may argue that adding more inclusive language to § 2339B will expand potential criminal liability to too many people.<sup>191</sup> Second, critics may assert that expanding prosecutorial power under § 2339B will undermine the State Department’s diplomacy efforts.<sup>192</sup>

##### A. *Expanding Criminal Liability*

A concern with § 2339B is that it criminalizes humanitarian aid.<sup>193</sup> The argument follows that the proposed revision of § 2339B would give the government the opportunity to prosecute those who do not actually threaten U.S. national security, such as well-meaning donors to humanitarian organizations.<sup>194</sup> Scholar Nina Crimm

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188. See *supra* notes 20-25, 31-33 and accompanying text.

189. *Nat’l Council of Resistance of Iran*, 373 F.3d at 158.

190. 18 U.S.C. § 2339B(a)(1) (2012).

191. See *infra* Part IV.A.

192. See *infra* Part IV.B.

193. See Crimm, *supra* note 9, at 1414.

194. See *id.* (“[W]ell-intentioned donors still may be exposed to liability.”).



argues that, even absent more inclusive language, § 2339B bestows “tremendous” prosecutorial power.<sup>195</sup>

There are two main responses to this argument. First, § 2339B’s mens rea requirement inherently checks prosecutorial power.<sup>196</sup> This Note’s proposed statutory revision undoubtedly depends on responsible prosecutorial power. However, prosecutors still must prove that the defendant *knowingly* gave “material support or resources”<sup>197</sup> to an FTO or a related entity.<sup>198</sup> For example, if an individual donates money to what the individual *believes* is a charitable organization, and the individual honestly does not *know* that the aid supports terrorist activity in reality, then the mens rea requirement protects that individual, and the individual is not subject to criminal liability.<sup>199</sup>

The Supreme Court in *Holder v. Humanitarian Law Project* emphasized that “Congress ... settled on ... a natural stopping place: The statute reaches only material support coordinated with or under the direction of a designated [FTO].”<sup>200</sup> This “stopping place”<sup>201</sup> is still applicable if Congress revises § 2339B to add more inclusive language.<sup>202</sup> Even though the revision expands the FTO’s definition under § 2339B to reflect the expansion of terrorist networks,<sup>203</sup> prosecutors must still prove their case.<sup>204</sup> The proposed statutory reform removes the potential blockade of the politicized FTO designation process, and allows prosecutors to indict those within the statute’s true spirit, *only* if there is sufficient evidence to prove the defendant’s knowledge mens rea.<sup>205</sup>

Second, Congress and the Supreme Court both recognized that money is fungible.<sup>206</sup> Congress considered that § 2339B could have

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195. *See id.* at 1414 n.338.

196. *See supra* notes 38-42, 56-60 and accompanying text.

197. 18 U.S.C. § 2339B(a)(1) (2012).

198. *See supra* notes 38-42, 56-60 and accompanying text.

199. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 16-17 (2010).

200. *Id.* at 31.

201. *Id.*

202. *See supra* notes 162-64 and accompanying text.

203. *See supra* Part II.C.

204. *See supra* notes 38-42, 56-60 and accompanying text.

205. *See supra* notes 38-42 and accompanying text.

206. *See H.R. REP. NO. 104-383*, at 178-79 (1995); *supra* note 7 and accompanying text.

a chilling effect on humanitarian aid.<sup>207</sup> Ultimately, Congress accepted that consequence.<sup>208</sup> Congress recognized that even if someone donated one million dollars to a terror organization *specifically* for humanitarian purposes, that the donation would provide the terror organization one million dollars to organize and carry out acts of terror.<sup>209</sup> Further, the Supreme Court reasoned in *Holder* that because support is “fungible,” any aid or material support ultimately helps organizations further their criminal enterprise and strengthen their legitimacy.<sup>210</sup>

This counterargument’s reasoning, if followed, undermines the entire purpose of the material support legislation, and inherently the legal method Congress chose to disrupt terror funding via the U.S. criminal justice system.<sup>211</sup> Under this argument, defendants could merely contend that they gave “material support” to an organization, but that the aid was only meant to go towards humanitarian or political purposes.<sup>212</sup> Congress expressly eliminated this defense.<sup>213</sup>

### *B. Undermining Diplomacy Efforts*

A second counterargument is that a more inclusive approach will undermine the State Department’s diplomatic abilities. The proposed statutory reform undoubtedly removes some State Department authority and allows the DOJ to “bypass” the State Department’s politicized FTO designation process.<sup>214</sup> Ultimately, the DOJ will have the authority to indict supporters of groups connected to an already designated FTO that the State Department has failed to designate.<sup>215</sup>

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207. See, e.g., H.R. REP. NO. 104-383, at 178-79.

208. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16-17 (2010).

209. See *id.* at 31.

210. See *id.* at 30.

211. See *supra* notes 5-10 and accompanying text.

212. This is exactly what the plaintiffs argued in *Holder v. Humanitarian Law Project*. See 561 U.S. at 10.

213. See *supra* notes 58, 65 and accompanying text.

214. See *supra* Part II.B.

215. See *supra* Part III.

The State Department is inevitably politicized,<sup>216</sup> and diplomatic situations can be fragile, at best.<sup>217</sup> Scholar Andrew Peterson has argued that the State Department's politicization hinders terrorism prosecution.<sup>218</sup> Peterson also acknowledged that the State Department has "expertise in international affairs and counterterrorism, [but that] its interests go beyond prosecution" and "foreign policy interests should not be the only factors considered in the [designation] process."<sup>219</sup>

Either diplomacy efforts with terrorist organizations should take a back seat to terror prosecution, or the United States should rethink its diplomatic strategy.<sup>220</sup> The United States should aim for consistency in its foreign policy, increasing U.S. credibility abroad, and pursuing the "prevention approach" towards terrorist organizations.<sup>221</sup> To continue with the Afghan Taliban example,<sup>222</sup> the White House Press Secretary Josh Earnest once said that the group "pursue[s] *terror* attacks in an effort to try to advance their agenda."<sup>223</sup> Yet, the United States will only call the Afghan Taliban an "armed insurgents," presumably so that the United States can negotiate with the organization without running afoul of a long-standing policy of noncooperation with terror groups.<sup>224</sup> Yet, the United States has only undermined its own credibility,<sup>225</sup> and negotiated with an organization that "pursue[s] *terror* attacks."<sup>226</sup>

216. See, e.g., Farivar, *supra* note 127.

217. See, e.g., Yusufzai et al., *supra* note 136 ("The Taliban and the Afghan government have restarted talks aimed at ending that country's 15-year war.").

218. See Peterson, *supra* note 14, at 353.

219. *Id.*

220. See, e.g., Alicia P.Q. Wittmeyer, *What Went Wrong in Afghanistan?*, FOREIGN POL'Y (Mar. 4, 2013, 1:13 AM), <https://foreignpolicy.com/2013/03/04/what-went-wrong-in-afghanistan/> [<https://perma.cc/PJ2Q-T86G>] ("[T]he United States should [have] recognize[d] the Taliban and open[ed] diplomatic missions in Afghanistan.... to moderate their behavior.").

221. See *supra* notes 3-4 and accompanying text.

222. See *supra* Part II.B.

223. Jonathan Karl, *Taliban Are Not Terrorists, or So Says the White House*, ABC NEWS (Jan. 29, 2015, 4:24 PM) (emphasis added), <https://abcnews.go.com/Politics/taliban-terrorists-white-house/story?id=28588120> [<https://perma.cc/5LFM-DYNT>].

224. *Id.*

225. See *Taliban Tells New U.S. President Trump to Quit Afghanistan*, REUTERS (Jan. 23, 2017, 10:45 AM), <https://www.reuters.com/article/us-usa-trump-afghanistan-taliban/taliban-tells-new-u-s-president-trump-to-quit-afghanistan-idUSKBN157255> [<https://perma.cc/M7W9-KRSQ>] ("[T]he United States ha[s] lost credibility.").

226. See Karl, *supra* note 223 (emphasis added).

Perhaps it is time for the United States to take a more realistic approach to situations such as the one in Afghanistan. If the United States truly wants to follow the “prevention approach,” then it should focus more on starving terrorist organizations’ financial lifeblood and use its prosecutorial power at the negotiation table. An inclusive approach would put the United States in a position of relative strength, instead of a position gingerly skirting around U.S. policy and undermining the United States’s credibility in its global war on terror.<sup>227</sup>

### CONCLUSION

Congress has the ability to further impair the “deadly viruses” of terror networks through the U.S. criminal justice system.<sup>228</sup> As terror networks adapt and manipulate loopholes in U.S. law, the United States must react appropriately by giving federal prosecutors the tools to stop not just supporters of finite groups, but the tools to combat terror *networks*.<sup>229</sup> Revising § 2339B would enable federal prosecutors to bypass the State Department’s politicized FTO designation process<sup>230</sup> and prosecute those who truly support terrorist organizations under § 2339B.<sup>231</sup> Because U.S. antiterror law is currently missing the mark, Congress should reform it to hit the target.

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227. See *Taliban Tells New U.S. President Trump to Quit Afghanistan*, *supra* note 225.

228. See U.S. DEP’T OF JUSTICE, *supra* note 1.

229. See *supra* Part II.C.

230. See *supra* Part II.B.

231. See *supra* notes 170-71 and accompanying text.

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