

Bomb-Making Online: Explosives, Free Speech, Criminal Law and the Internet

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Summary

Subsection 842(p) of title 18 of the United States Code outlaws teaching, demonstrating, or distributing information on how to make or use explosives, destructive devices, or weapons of mass destruction either when the offender intends the instruction or information to be used to commit a federal crime of violence or when the offender knows that person to whom the instruction or information has been given intends to use it to commit a federal crime of violence.

Passage stretched over three Congresses, delayed in part by First Amendment concerns, but ultimately bolstered by submission of the Justice Department report. The report concluded that terrorists' "cookbooks" were readily available – on the Internet and elsewhere; that the information had been and would continue to be used for criminal purposes; that existing federal law provided incomplete coverage; and that a legislative fix would be possible without offending First Amendment free speech principles.

First Amendment concerns centered on the Supreme Court's *Brandenburg* decision which comes with a requirement that any proscription of the advocacy of crime must be limited to cases where incitement is intended to be and is likely to be acted upon imminently. Subsequent judicial developments have been thought to suggest greater flexibility where the advocacy takes the form of instructing particular individuals in the commission of a specific offense.

Complementary federal offenses include bans on instruction in the use of explosives in furtherance of a civil disorder and on providing material assistance to terrorists and terrorist organizations. Moreover, federal law outlaws aiding and abetting, or conspiring to commit any federal crime, or soliciting another to commit any federal crime of violence. Bomb-making instruction might be part and parcel of aiding and abetting, conspiring to commit, or soliciting the commission of a number of underlying federal crimes involving the misuse of explosives or weapons of mass destruction.

This report is available in an abridged version – without footnotes or appendix as CRS Report RS21616, *Bombs On Line: An Abridged Sketch of Federal Criminal Law*.

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Introduction ¹

Within hours of the tragedy in Oklahoma City, the recipe for concocting a similar homemade bomb had been posted on the Internet.² There followed an outpouring of explosives “cookbooks” and other “how to” manuals of destruction.³ This in turn triggered apprehension over how such potentially lethal information might be used by hate groups and other terrorists as well as by juveniles with exaggerated firecracker fascinations.⁴

In response, Congress ultimately passed 18 U.S.C. 842(p)(2) which outlaws instruction in making or use of bombs (A) with the intent that the information be used to commit a federal crime of violence⁵ or (B) with the knowledge that another intends to use the information to commit a federal crime.⁶ This is a brief examination of the legislation, of the process that lead to its enactment, of First Amendment issues, and of other related federal criminal laws that proscribe the dissemination, particularly by means of the Internet, of destructive information.

Overview of Subsection 842(p)

The elements of the two crimes proscribed in 18 U.S.C. 842(p) (2) might be parsed as follows:

I. It is unlawful for

A. any person to

B. (1) teach or

¹ This report was prepared with the assistance of Isaac Natter, a summer law clerk in the American Law Division.

² Romero, *Terror in Oklahoma City: Explosives Recipes Fill Books, Cyberspace* . . . LOS ANGELES TIMES 26 (April 23, 1995); see also, *The Availability of Bomb-Making Information on the Internet: Hearing Before the Subcomm. on Terrorism, Technology, and Government Information of the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. 2 (1995)(statement of Sen. Specter)(the hearings were originally announced and convened as *Mayhem Manuals on the Internet*, but never printed under that caption).

³ Carnahan, *Stores Increase Stock of Books on Killing, Bombs* . . . , ROCKY MOUNTAIN NEWS, 4A (Feb. 12, 1996); Romero, *Terror in Oklahoma City* . . . *There's No Secret to Making a Murderous Bomb, Just Browse in a Bookstore, or Surf the Internet*, LOS ANGELES TIMES, 26 (April 23, 1995).

⁴ *The Availability of Bomb-Making Information on the Internet: Hearing Before the Subcomm. on Terrorism, Technology, and Government Information of the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995); Bosworth, *Teen Bomb-Builders Lost Fingers* . . . *He Got Plans From Internet, Police Say*, ST. LOUIS POST-DISPATCH, 16A (Dec. 11, 1996); Horiuchi, *Bomb Building Made Easy on the Internet* . . . *Bomb Making: Teens Learn on Net Step by Step*, SALT LAKE TRIBUNE, A1 (Aug. 11, 1996); Scheets, *Derwood Teen-ager Held on Bomb Charges*, WASHINGTON TIMES, A10 (Feb. 15, 1997); Susman, *Hate, Murder and Mayhem on the Net*, U.S. NEWS & WORLD REPORT 62 (May 22, 1995).

⁵ “It shall be unlawful for any person – (A) to teach or demonstrate the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute by any means information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction, with the intent that the teaching, demonstration, or information be used for, or in furtherance of, an activity that constitutes a Federal crime of violence,” 18 U.S.C. 842(p)(2)(A).

⁶ “It shall be unlawful for any person . . . (B) to teach or demonstrate to any person the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute to any person, by any means, information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction, knowing that such person intends to use the teaching, demonstration, or information for, or in furtherance of, an activity that constitutes a Federal crime of violence,” 18 U.S.C. 842(p)(2)(B).

“Any person who . . . (2) violates subsection (p)(2) of section 842, shall be fined under this title, imprisoned not more than 20 years, or both,” 18 U.S.C. 844(a).

- (2) demonstrate or
- (3) distribute by any means information pertaining in whole or in part to

C. (1) making or

(2) using

D. (1) an explosive or

(2) destructive device or

(3) weapon of mass destruction

E. *with the intent that*

(1) the teaching, demonstration or information be used

(a) for or

(b) in furtherance of

(2) an activity that constitutes a federal crime of violence

II. It is unlawful for

A. any person to

B. (1) teach or

(2) demonstrate or

(3) distribute by any means information pertaining in whole or in part

C. *to any person*

D. (1) making or

(2) using

E. (1) an explosive or

(2) destructive device or

(3) weapon of mass destruction

F. *knowing such person intends*

(1) to use the teaching, demonstration or information

(a) for or

(b) in furtherance of

(2) an activity that constitutes a federal crime of violence.

The statute imposes potential criminal liability on “any person,” that is, on any individual as well as any nongovernmental, legal entity.⁷ The prohibited teaching, demonstrating or distributing of information may be accomplished by means other than the Internet, but it seems clear that Internet distribution is covered. In other contexts, “distribution” has been construed to include electronic distribution (e.g., e-mail).⁸ Perhaps more to the point, use of the Internet as a means of distribution was the focal point of Congressional discussion throughout its legislative history.⁹ Although the provision explicitly refers to only two types of instructions – how to *make* or how to *use* explosives and the like, a court might conclude that the prohibitions include instructions on where and how to obtain the necessary ingredients or on methods of escape following the forbidden use. In any event, the other elements having been satisfied, such instructions are likely to be prosecutable either as conspiracy, 18 U.S.C. 844(n), or as aiding and abetting, 18 U.S.C. 2, doctrines discussed at greater length below.

The provisions borrow the somewhat overlapping definitions of “explosives,” “destructive devices,” and “weapons of mass destruction” from existing law, 18 U.S.C. 842(p)(1). In doing so, they adopt the expansions, contractions, and duplications found there. The explosives definition, for instance, includes fire bombs.¹⁰ Destructive devices on the other hand are defined to include explosives and incendiaries but exclude those that are not designed to be used as weapons.¹¹

⁷ 1 U.S.C. 1 (“In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals”); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 61 (1989) (“in common usage, the term ‘person’ does not include the sovereign, and statutes employing the word are ordinarily construed to exclude it”).

⁸ *United States v. Simmons*, 262 F.3d 468, 471-72 (5th Cir. 2001). Because the provision in question once called for a sentencing enhancement for distribution of pornography including distribution for pecuniary gain, *Simmons* and several other cases involving Internet distribution focus on whether the enhancement could be imposed only in the face of distribution for gain, an issue that has only surfaced under the sentencing guidelines in pornography cases, *United States v. Brown*, 333 F.3d 850, 853-54 (7th Cir. 2003); *United States v. Probel*, 214 F.3d 1285, 1290-291 (11th Cir. 2000); *United States v. Hibbler*, 159 F.3d 233, 237-38 (6th Cir. 1998).

⁹ 145 *Cong. Rec.* H6771 (daily ed. Aug. 2, 1999) (remarks of Rep. McCollum) (“With the Internet, it has become all too easy to disseminate bomb-making information to anyone with a personal computer”); 142 *Cong. Rec.* S3448 (daily ed. Apr. 17, 1996) (remarks of Sen. Biden) (“We have all heard about the bone-chilling information making its way over the Internet, about explicit instructions about how to detonate pipe bombs and even, if you can believe it baby food bombs. Senator Feinstein quoted an Internet posting that detailed how to build and explode one of these things”).

¹⁰ “[T]he term ‘explosive’ means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this title, and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion,” 18 U.S.C. 844(j).

“The term ‘explosive or incendiary device’ means (A) dynamite and all other forms of high explosives, (B) any explosive bomb, grenade, missile, or similar device, and (C) any incendiary bomb or grenade, fire bomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and (ii) can be carried or thrown by one individual acting alone,” 18 U.S.C. 232(5).

¹¹ “The term ‘destructive device’ means – (A) any explosive, incendiary, or poison gas – (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses;

“(B) any type of weapon (other than a shotgun or a shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and

Destructive devices are also weapons of mass destruction along with chemical, nuclear, and biological weapons.¹²

An instructor or distributor can only be prosecuted under the provisions if he either (I) intends the instruction or information to be used for or in furtherance of a federal crime of violence or (II) knows that the person to whom the instruction or information is given intends it to be used for or in furtherance of a federal crime of violence. A federal crime of violence is one that (a) “has as an element the use, attempted use, or threatened use of physical force against the person or property of another,” or (b) “is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense,” 18 U.S.C. 16; *see also*, 18 U.S.C. 924(c)(3).

Offenders are punishable by imprisonment for not more than 20 years, and fine of not more than \$250,000 (\$500,000 if the offender is an organization), 18 U.S.C. 844(a)(2); 3571. Anyone who conspires to violate the provisions,¹³ or aids and abets a violation, is subject to the same penalties.¹⁴

“(C) any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.

“The term ‘destructive device’ shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10; or any other device which the Secretary of the Treasury finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational or cultural purposes,” 18 U.S.C. 921(a)(4).

¹² “[T]he term ‘weapon of mass destruction’ means – (A) any destructive device as defined in section 921 of this title; (B) any weapon that is designed or intended to cause death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals, or their precursors; (C) any weapon involving a biological agent, toxin, or vector (as those terms are defined in section 178 of this title); or (D) any weapon that is designed to release radiation or radioactivity at a level dangerous to human life,” 2332a(c)(2).

“[T]he term ‘biological agent’ means any microorganism (including, but not limited to, bacteria, viruses, fungi, rickettsiae or protozoa) or infectious substance, or any naturally occurring, bioengineered or synthesized component of any such microorganism or infectious substance, capable of causing – (A) death, disease, or other biological malfunction in a human, an animal, a plant, or another living organism; (B) deterioration of food, water, equipment, supplies, or material of any kind; or (C) deleterious alteration of the environment;

“[T]he term ‘toxin’ means the toxic material or product of plants, animals, microorganisms (including, but not limited to, bacteria, viruses, fungi, rickettsiae or protozoa), or infectious substances, or a recombinant or synthesized molecule, whatever their origin or method of production, includes – (A) any poisonous substance or biological product that may be engineered as a result of biotechnology produced by a living organism; or (B) any poisonous isomer or biological product, homolog, or derivative of such a substance;

* * *

“[T]he term ‘vector’ means a living organism, or molecule, including a recombinant or synthesized molecule, capable of carrying a biological agent or toxin to a host,” 18 U.S.C. 178(1), (2), (4).

¹³ “Except as otherwise provided in this section, a person who conspires to commit any offense defined in this chapter shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense the commission of which was the object of the conspiracy, 18 U.S.C. 844(n).

¹⁴ “(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal,” 18 U.S.C. 2.

Path to Passage

Passage did not come easily. Following the Senate hearings in the 104th Congress, the Senate approved a provision that focused on the problem of Internet bomb instruction as part of a comprehensive terrorism package, S. 735 (104th Cong.). Offered as an amendment by Senator Feinstein, as passed by the Senate it would have provided:

It shall be unlawful for any person to teach or demonstrate the making of explosive materials, or to distribute by any means information pertaining to, in whole or in part, the manufacture of explosives materials, if the person intends or knows, that such explosive materials or information will be used for, or in furtherance of, an activity that constitutes a Federal criminal offense or a criminal purpose affecting interstate commerce. §901, S. 735, 141 *Cong.Rec.* S7875 (daily ed. June 7, 1995).

The provision, which would have made violations punishable by imprisonment for up to twenty years, was not uniformly applauded. Beyond the reservations expressed on behalf of legitimate explosives manufacturers during Senate debate,¹⁵ commentators questioned the provision's constitutionality.¹⁶ The proposal, as amended, won Senate approval, 141 *Cong.Rec.* S7686 (daily ed. June 5, 1995), but was dropped from the bill that emerged from conference in favor of a study.¹⁷ More precisely, the Antiterrorism and Effective Death Penalty Act of 1996 in its final form did not outlaw Internet bomb making instructions but instead called upon the Attorney General to study the conflict between the First Amendment's protection of communication and the use of modern technology for instruction in the criminal use of explosives.¹⁸

From that point on, Senate backers sought a legislative vehicle to carry to passage their proposal outlawing bomb- making instruction. Later the same year, the Senate agreed to add it to the defense authorization bill, H.R. 3230 (104th Cong.),¹⁹ but again it was stripped out during conference.²⁰ In the first session of the 105th Congress, the Senate inserted it in the defense authorization bill for that year, H.R. 1211 (105th Cong.),²¹ only to have it removed once more during conference.²² In the second session, it was apparently added during Senate Judiciary

¹⁵ "There are a lot of explosives manufacturers and personnel who do teach others how to make explosives and how to use them legitimately," 141 *Cong.Rec.* S7684 (daily ed. June 5, 1995)(remarks of Sen. Hatch).

¹⁶ *The Comprehensive Terrorism Prevention Act of 1995*, 20 SETON HALL LEGISLATIVE JOURNAL 201, 245 (1996); Eaton, *Closing the Barn Door After the Genie Is Out of the Bag: Recognizing a "Futility Principle" in First Amendment Jurisprudence*, 45 DEPAUL LAW REVIEW 1, 45-9 (1995).

¹⁷ H.Rep.No. 104-518 at 121 (1996); 142 *Cong.Rec.* H3336 (daily ed. April 15, 1996). During Senate consideration of the conference report, proponents tried unsuccessfully to have the report returned to the conference committee with instructions to include the Feinstein amendment, 142 *Cong.Rec.* S3448-450 (daily ed. April 17, 1996).

¹⁸ "Study. – The Attorney General, in consultation with such other officials and individuals as the Attorney General considers appropriate, shall conduct a study concerning –(1) the extent to which there is available to the public material in any medium (including print, electronic, or film) that provides instruction on how to make bombs, destructive devices, or weapons of mass destruction; (2) the extent to which information gained from such material has been used in incidents of domestic or international terrorism; (3) the likelihood that such information may be used in future incidents of terrorism; (4) the application of Federal laws in effect on the date of enactment of this Act to such material; (5) the need and utility, if any, for additional laws relating to such material; and (6) an assessment of the extent to which the first amendment protects such material and its private and commercial distribution," §709, P.L. 104-132, 110 Stat. 1297 (1996).

¹⁹ 142 *Cong.Rec.* S7271-274 (daily ed. June 28, 1996).

²⁰ H.Rep.No.104-724, at 801 (1996); 142 *Cong.Rec.* H9303 (daily ed. July 30, 1996).

²¹ 143 *Cong.Rec.* S5989-998 (daily ed. June 19, 1997).

²² H.Rep.No. 105-340, at 813 (1997); 143 *Cong.Rec.* H9405 (daily ed. Oct. 23, 1997).

Committee markup to a House-passed private bill for the relief of the Kerr-McGee Corporation, H.R. 1211 (105th Cong.), which was placed on the Senate calendar without a written report but which saw no further action.²³

Supporters' efforts were bolstered by the Justice Department's submission of the study it had been directed to conduct, *Report on the Availability of Bombmaking Information, the Extent to Which Its Dissemination Is Controlled by Federal Law, and the Extent to Which Such Dissemination May Be Subject to Regulation Consistent with the First Amendment to the United States Constitution: Prepared by the United States Department of Justice as Required by Section 709(a) of the Antiterrorism and Effective Death Penalty Act of 1996* (April 1997)(DoJ Report). The DoJ Report concluded that:

- "[A]nyone interested in manufacturing a bomb, dangerous weapon, or a weapon of mass destruction can easily obtain detailed instructions from readily accessible sources, such as legitimate reference books, the so-called underground press, and the Internet"
- "Circumstantial evidence suggests that, in a number of crimes involving the employment of such weapons and devices, defendants have relied upon such material in manufacturing and use of such items"
- "Law enforcement agencies believe that, because the availability of bombmaking information is becoming increasingly widespread (over the Internet and from other sources), such published instructions will continue to play a significant role in aiding those intent upon committing future acts of terrorism and violence"
- "While current federal laws – such as those prohibiting conspiracy, solicitation, aiding and abetting, providing material support for terrorist activities, and unlawfully furthering civil disorders – may, in some instances, proscribe the dissemination of bombmaking information, no extant federal statute provides a satisfactory basis for prosecution in certain classes of cases that Senators Feinstein and Biden have identified as particularly troublesome"
- "The Department of Justice agrees that it would be appropriate and beneficial to adopt further legislation to address this problem directly, if that can be accomplished in a manner that does not impermissibly restrict the wholly legitimate publication and teaching of such information, or otherwise violate the First Amendment"
- "The First Amendment would impose substantial constraints on any attempt to proscribe indiscriminately the dissemination of bombmaking information. The government generally may not, except in rare circumstances, punish persons either for advocating lawless action or for disseminating truthful information – including information that would be dangerous if used – that such persons have obtained lawfully. However, the constitutional analysis is quite different where the government punishes speech that is an integral part of a transaction involving conduct the government otherwise is empowered to prohibit; such 'speech acts' – for instance, many cases of inchoate crimes such as aiding and abetting and conspiracy – may be proscribed without much, if any, concern about the First Amendment, since it is merely incidental that such 'conduct' takes the form of speech"
- "Senator Feinstein's proposal can withstand constitutional muster in most, if not all, of its possible applications, if such legislation is slightly modified"
- "As modified, the proposed legislation would be likely to maximize the ability of the Federal Government – consistent with free speech protections – to reach cases where an individual

²³ 144 *Cong.Rec.* S6697 (daily ed. June 19, 1998); see also, 145 *Cong.Rec.* S2652 (daily ed. Mar. 15, 1999) (remarks of Sen. Nickles)(noting inclusion of the Feinstein amendment in H.R. 1211).

disseminates information on how to manufacture or use explosives or weapons of mass destruction either (i) with the intent that the information be used to facilitate criminal conduct, or (ii) with the knowledge that a particular recipient of the information intends to use it in furtherance of criminal activity,” DoJ Report, at i-ii.

In the 106th Congress, the proposal, modified to reflect Justice Department recommendations, returned as part of the Kerr-McGee private relief bill, S. 606 (106th Cong.).²⁴ It subsequently passed both Houses with little comment,²⁵ and was signed by the President.²⁶

First Amendment Considerations

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
U.S.Const. Amend.I.

The First Amendment speaks in absolute terms, but there is little dispute that Congress may enact laws that regulate and even prohibit speech under some circumstances. The difficulty has always been to identify those circumstances with precision. This task has been further complicated by the unique circumstances presented by the Internet and by the array of doctrines upon which the Supreme Court might rely to evaluate First Amendment compliance in different factual settings.

Under the current state of the law, it appears that Congress may only regulate and prohibit instruction on the means and methods of violence when the instructor intends the lessons to be acted upon or knows that they will be with some level of specificity.

In *Dennis v. United States*, 341 U.S. 494 (1951), the petitioner had been convicted of conspiring to teach and advocate the duty, necessity, desirability and propriety of the violent overthrow of the government. The Court observed that the “[o]verthrow of the Government by force and violence is certainly a substantial enough interest of the Government to limit speech. . . . If the Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required,” *Dennis v. United States*, 341 U.S. at 509.

In a subsequent construction of the statute at issue in *Dennis*, the Court held that the statute could not be construed to proscribe advocating and teaching the violent overthrow of the government as an abstract principle unrelated to any intent to stimulate action to that end, *Yates v. United States*, 354 U.S. 298 (1957).

Brandenburg v. Ohio, 395 U.S. 444 (1969), confirmed the reading of *Yates* for constitutional purposes. “[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. . . . [T]he mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it

²⁴ 145 *Cong.Rec.* S2651 (daily ed. Mar. 15, 1999). The final version differed somewhat from the Justice Department recommendations which would have been predicated upon an intent or knowledge that the instruction would be used in connection with a federal crime or with a state crime involving interstate commerce; the final version dropped the reference to state crimes involving interstate commerce.

²⁵ 145 *Cong.Rec.* S8193-194 (daily ed. July 1, 1999); 145 *Cong.Rec.* H6770-771 (daily ed. Aug.2, 1999),.

²⁶ P.L. 106-54, 113 Stat. 398 (1999).

to such action. A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments,” *Brandenburg v. Ohio*, 395 U.S. at 447-48.²⁷

Although *Brandenburg* seems the most logical point of reference in the Court’s First Amendment jurisprudence on questions involving bomb-making lessons on the Internet, its exclusive application is hardly inevitable. It is not beyond the realm of possibility that the Court would draw from some other of its First Amendment doctrines in order to judge “dangerous” speech available electronically. Certainly, both Members of the Court²⁸ and commentators²⁹ have questioned the wisdom of uniform application of *Brandenburg* to the Internet.

Of course, other First Amendment landmarks, such as content-based standards or public forum doctrines, may be even less forgiving than *Brandenburg*. A content-based standard, for instance, may impose more demanding criteria for legislative regulation than *Brandenburg*: the government has a compelling interest in protecting the safety of Americans and their property from violent injury or damage, but regulation would have to be narrowly tailored to service that interest.³⁰

²⁷ Shortly thereafter, a federal statute outlawing instruction in the use of explosives in furtherance of a civil disorder withstood First Amendment challenge in the lower federal courts, *United States v. Featherston*, 461 F.2d 1119 (5th Cir. 1972).

²⁸ “[A]s broadcast, cable, and the cyber-technology of the Internet and the World Wide Web approach the day of using a common receiver, we can hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others.

“Accordingly, in charting a course that will permit reasonable regulation in light of the values in competition, we have to accept the likelihood that the media of communication will become less categorical and more protean. Because we cannot be confident that for purposes of judging speech restrictions it will continue to make sense to distinguish cable from other technologies, and because we know that changes in these regulated technologies will enormously alter the structure of regulation itself, we should be shy about saying the final word today about what will be accepted as reasonable tomorrow. In my own ignorance I have to accept the real possibility that ‘if we had to decide today . . . just what the First Amendment should mean in cyberspace, . . . we would get it fundamentally wrong.’

“The upshot of appreciating the fluidity of the subject that Congress must regulate is simply to accept the fact that not every nuance of our old standard will necessarily do for the new technology, and that a proper choice among existing doctrinal categories is not obvious,” *Denver Area Ed. Comm. Consortium v. FCC*, 518 U.S. 727, 776-77 (1996) (Souter, J., concurring) (quoting, Lessig, *The Path of Cyberlaw*, 104 YALE LAW JOURNAL 1743, 1745 (1995)).

²⁹ “In the twenty-first century, however, incitement is not only possible on street corners and at political rallies. Individuals wishing to present inciting messages now have new avenues for communication in cyberspace. The Internet is no less dangerous and no more worthy of constitutional protection than a speaker who incites a riotous crowd to vandalize the streets or attack police officers. The difference, however, is that incitement over the Internet is often more difficult to assess. The unique speaker-audience relationship in cyberspace requires courts to clarify the imminence requirement and to devise an incitement standard that meets the new demands of the Internet.” Cronan, *The Next Challenge for the First Amendment: The Framework for an Incitement Standard*, 51 CATHOLIC UNIVERSITY LAW REVIEW 425, 466 (2002); *Planting the Seeds of Hatred: Why Imminence Should No Longer Be Required to Impose Liability on Internet Communications*, 29 CAPITAL UNIVERSITY LAW REVIEW 835, 855 (2002) (“Individuals should be held accountable for what they advocate . . . [T]hose who publicly advocate ideas through the Internet and other forms ought to bear some responsibility if a causal link can be shown between their advocacy and injuries that result to others”).

³⁰

Simon & Schuster, Inc. v. Crime Victims Bd., 502 U.S. 109 (1991), involving as it did an attempted content-based regulation on expressions of the means and manner of criminal conduct, might provide a nexus to the Court’s content-based regulation line of cases. *Simon & Schuster, Inc.* arose out of a New York statutory procedure for the confiscation of prisoner literary royalties. The proceeds were dedicated to victim compensation, but only the proceeds from those works that mentioned or described the commission of a crime were seized. This, the Court concluded, imposed a financial burden upon certain forms of expression based solely upon their content. Content-based regulation of speech

Another possible source of analytical support for resolution of First Amendment questions raised by the Internet is the public forum doctrine. The public forum doctrine refers to the First Amendment doctrine that describes the conditions under which the government may limit the use of certain public property because of the traditional use of such locations for public discourse. In the case of a public forum, the government's "right to limit protected expressive activity is sharply circumscribed: it may impose reasonable, content-neutral time, place and manner restrictions . . . but it may regulate expressive content only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest," *Capitol Square v. Pinette*, 515 U.S. 753, 761 (1995).

Although not publicly owned, the government has long regulated telephone communications, one of the essential components of the Internet. Moreover, there can be little doubt that under many circumstances, the Internet is just as likely to provide the forum for public political debate as the city park.³¹ A majority of the Members of the Court, however, has recently announced that the public forum doctrine does not apply to the Internet when access is provided through a public library.³² If the Internet entered from a public library cannot be considered a public forum, Internet entrance from a private home presumably cannot.

Some commentators have suggested that *Brandenburg* should be adjusted in an Internet context to mute its imminence demands. The *Brandenburg* line consists of cases involving the advocacy of a political philosophy with violent attributes. The First Amendment stands as one of the principal guardians of the robust political debate essential to the well being of a democracy. Some might argue that touching upon political discourse as they do, the principles these cases announce might not be as readily applicable to instruction in the means and methods of violence unrelated to any such political underpinnings.³³

can only survive First Amendment scrutiny if it is based upon a compelling state interest and if it is narrowly tailored to serve that interest. The New York statute failed because it was not narrowly tailored only to ensure victim compensation, *Simon & Schuster, Inc. v. Crime Victims Bd.*, 502 U.S. at 121-23.

³¹ See generally, Goldstone, *The Public Forum Doctrine in the Age of the Information Superhighway (Where Are the Public Forums on the Information Superhighway?)*, 46 HASTINGS LAW JOURNAL 335 (1995).

³² *United States v. American Library Ass'n*, 123 S.Ct. 2297, 2304 (2003) ("Internet access in public libraries is neither a traditional nor a designated public forum") (Rehnquist, Ch.J, with O'Connor, Scalia, and Thomas, JJ.) (announcing the judgment of the Court); 123 S.Ct. at 2310 ("In determining whether the statute's conditions consequently violate the First Amendment, the plurality first finds the public forum doctrine inapplicable and then holds that the statutory provisions are constitutional. I agree with both determinations") (Breyer, J.) (concurring in the judgment).

³³ See e.g., Redlich & Lurie, *First Amendment Issues Presented by the "Information Superhighway"*, 25 SETON HALL LAW REVIEW 1446, 1456-457 (1995) ("Courts may have to grapple with the regulation of communications on the electronic superhighway that advocate illegal conduct. This issue has arisen recently in connection with the use of the Internet as an organizational and communications tool by anti-government militias. Existing Supreme Court precedents – read restrictively – preclude the regulation of speech advocating illegal activity absent the demonstration of a risk of 'imminent' wrongdoing accompanied by words of incitement. However, it may be difficult to establish such a risk of imminent harm arising from the electronic advocacy of criminal acts. It may be next to impossible to establish how the potentially vast, but anonymous, audience for a communication soliciting illegal conduct is likely to respond. Thus, communications such as the posting of bomb-making instructions on the Internet during the weeks prior to the Oklahoma City bombing might fall outside the government's regulatory power. On the other hand, the courts may find that the current First Amendment doctrine, fashioned to some extent as a reaction to the McCarthy era, must be modified to take into account the transformation of communications technology"). In this regard, however, it is difficult to see how the Internet is any different than a book, newspaper, pamphlet, each of which may ultimately have a vast audience spread over a considerable period of time.

The courts, however, seem to continue to acknowledge the prominence of *Brandenburg* even in an Internet context. As the Court observed when it found constitutionally wanting the Child Pornography Prevention Act's efforts to regulate "virtual" Internet pornography:

[T]he Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct. The government may not prohibit speech because it increases the chance an unlawful act will be committed at some indefinite future time. The government may suppress speech for advocating the use of force or a violation of law only if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such actions."

Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (*per curiam*). *There is here no attempt, incitement, solicitation, or conspiracy.* The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) (other internal citations omitted and emphasis added).

Consistent with the sentiment italicized above – that *Brandenburg* is different when there is conspiracy, attempt, incitement or solicitation – the lower federal courts have rejected First Amendment arguments grounded in *Brandenburg* that involve instruction knowingly directed to the commission of a specific, concrete offense: where the defendant's advocacy or instruction was coupled with direct assistance in the preparation of tax fraud,³⁴ where the instruction was directed to the efforts of a particular individual's manufacture of illicit drugs,³⁵ and where the defendant taught members of a particular group how to construct bombs for use in an anticipated civil disorder.³⁶

The DoJ Report summarizing its understanding of the state of the law as of 1997 seems to reflect a like view:

The distinction recognized in *Brandenburg* between advocacy of, and preparation for, unlawful conduct, was exemplified in *Scales v. United States*, 367 U.S. 203 (1961), a case in which the Court carefully distinguished between teaching of abstract doctrine – punishment of which is subject to substantial constitutional constraints – and the teaching of the *techniques* of unlawful conduct, which can much more easily be proscribed. *Id.* at 233-34. As to the former, the Court has developed the *Brandenburg* test, which asks whether the danger is intended, likely and imminent. But the constraints of the First Amendment do not apply when the teaching goes beyond the theory itself to explanation of basic strategy. *Scales*, 367 U.S. at 244. At that point, the teaching – if it is done with the purpose of preparing a group for unlawful action – is not much different than the information conveyed in a typical aiding and abetting case; accordingly, the *Brandenburg* protections should largely be inapposite. *See, Yates v. United States*, 354 U.S. 298, 331-33 (1957) (systematic teaching in classes to develop in the members of a group a readiness to engage

³⁴ *United States v. Fletcher*, 322 F.3d 508, 515 (8th Cir. 2003) ("There was ample evidence that Mr. Fletcher did not merely advocate, through speech violation of the tax laws. . . . [A]s a result of Mr. Fletcher's seminars (where he explained how to convert ordinary personal expenditures into [fraudulent] tax deductible business expenses) and his follow-up meetings with clients, his clients not only retain [his firm's] tax services for the current year, they began the process of filing amended tax returns for previous years. In these circumstances, Mr. Fletcher's speech is not entitled to first amendment protection"); *see also, United States v. Knapp*, 25 F.3d 451, 457 (7th Cir. 1994); *United States v. Rowlee*, 899 F.3d 1275, 1277-278 (2d Cir. 1990); *United States v. Kelley*, 769 F.2d 215, 217 (4th Cir. 1985); *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985); *United States v. Buttorff*, 752 F.2d 619, 624 (8th Cir. 1978); *United States v. Buttorff*, 761 F.2d 1056, 1066 (5th Cir. 1985) (noting that the tax instructions cases frequently involved false or misleading speech thus beyond the pale for that reason alone).

³⁵ *United States v. Barnett*, 667 F.2d 835, 842-43 (9th Cir. 1982).

³⁶ *United States v. Featherston*, 461 F.2d 1119, 1112 (5th Cir. 1972).

in unlawful conduct at the crucial time could be punished, even if that conduct was to occur only the time was ripe). DoJ Report, at xxxiii-xxxiv (internal quotation marks omitted).³⁷

As noted earlier, the DoJ Report concluded that “Senator Feinstein’s proposal can withstand constitutional muster in most, if not all, of its possible applications, if such legislation is slightly modified,” DoJ Report, at ii.

Complementary Prohibitions

Federal law has for some time prohibited instructing others in the use of explosives in furtherance of a civil disturbance, 18 U.S.C. 231.³⁸ More recently, Congress has outlawed providing material support to terrorists or terrorist organizations in language sweeping enough to include support in the form of instruction or information on how to make or use explosives, destructive devices and weapons of mass destruction, 18 U.S.C. 2339A, 2339B.

It is also a federal crime to command, aid and abet another in the commission of a federal offense, 18 U.S.C. 2,³⁹ to conspire with another to commit such an offense, 18 U.S.C. 371, or to solicit another to commit a crime of violence, 18 U.S.C. 373. Instruction in the construction or use of explosives may often occur under circumstances where it constitutes aiding or abetting, or conspiracy to commit, or solicitation to commit other federal crimes of violence.

In such cases the government would be required to prove both the elements of instigational offense (conspiracy, solicitation, or aiding/abetting) as well as at least some elements of the underlying offense. Thus in order to aid and abet, one must “in some sort associate himself with the venture, participate in it as in something that he wishes to bring about, [and] seek by his action to make it succeed.”⁴⁰ One may be guilty of commanding or aiding and abetting any federal crime, including those involving the unlawful use of fire or explosives.⁴¹ Liability requires the commission of the crime by someone other than the defendant.⁴² Although one who aids and abets need not participate in all aspects of the underlying crime, he must “participate at some stage accompanied by knowledge of the result and intent to bring about that result.”⁴³ On the

³⁷ Soon after release of the DoJ Report, the Fourth Circuit found that a how-to-commit-murder-for-hire manual was not entitled to First Amendment protection where the publisher stipulated that it “intended to attract and assist criminals and would-be criminals who desire information and instruction on how to commit crimes” and that it “intended and had knowledge that [the publication] would be used upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire,” *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 241-49 (4th Cir. 1997).

³⁸ The texts of various existing prohibitions have been appended at the end of this report, arranged in the order in which they appear in the report.

³⁹ Section 2 actually outlaws aiding, abetting, commanding, and *counseling* the commission of an underlying federal crime, but the Justice Department has observed that it is “not aware of any modern case in which culpability under §2 was premised solely on counseling in the form of encouragement (or advocating that a crime be committed), without any actual aid or assistance to the principal,” DoJ Report, at xxxiii n.61.

⁴⁰ *Nye & New v. United States*, 336 U.S. 613, 619 (1949); *United States v. Hamilton*, 334 F.3d 170, 180 (2d Cir. 2003)(the government must prove that “the underlying crime was committed by a person other than the defendant, that the defendant knew of the crime, and that the defendant acted with the intent to contribute to the success of the underlying crime”).

⁴¹ *United States v. Duke*, 255 F.3d 656, 657 (8th Cir. 2001); *United States v. Arocena*, 778 F.2d 943, 949-50 (2d Cir. 1985); *United States v. Yost*, 24 F.3d 99, 104 (10th Cir. 1994).

⁴² *United States v. Hamilton*, 334 F.3d 170, 180 (2d Cir. 2003); *United States v. Lozano-Hernandez*, 90 F.3d 785, 790 (11th Cir. 1996).

⁴³ *United States v. Pasquantino*, 336 F.3d 321, 335 (4th Cir. 2003); *United States v. Bennett*, 75 F.3d 40, 45 (1st Cir. 1996).

other hand, mere presence or even knowledge is by itself insufficient, the defendant must somehow have acted to make crime enterprise succeed.⁴⁴

The criminal liability of a co-conspirator is comparable. A co-conspirator may be held vicariously liable for the reasonably foreseeable crimes committed in furtherance of the conspiracy.⁴⁵ The government must establish an agreement between the defendant and some other individual to commit a federal crime, an intent on the part of the defendant that the underlying crime be committed, and depending upon the statute perhaps an overt act in furtherance of the conspiracy committed by one of the conspirators.⁴⁶

In order to establish that an accused has committed solicitation in violation of 18 U.S.C. 373, the prosecution must show (1) that he intended that someone else commit a violent federal crime, and (2) that he induced or otherwise attempted to persuade the other person to commit the offense.⁴⁷ In doing so, it must present evidence that “strongly corroborates” the intent of the accused.⁴⁸ Like conspiracy and unlike aiding and abetting, the crime of solicitation does not require that the underlying offense have been committed.⁴⁹

Federal law contains a fairly wide range of statutes outlawing bombing, bomb threats and other misconduct involving explosives and weapons of mass destruction which might supply the underlying predicate offense for an aiding and abetting, conspiracy, or solicitation charge based on instructions in bomb construction or use. It is, for example, a federal crime

- to bomb or attempt to bomb federal property, 18 U.S.C. 844(f);
- to possess a bomb in an airport, 18 U.S.C. 844(g);
- to use explosives to commit any other federal felony, 18 U.S.C. 844(h)(1);
- to carry a bomb across state lines with the intent to injure person or property, 18 U.S.C. 844(h)(2);
- to bomb property that is part of or is used in interstate commerce, 18 U.S.C. 844(i); or
- to steal explosives from interstate commerce or from a licensed dealer, 18 U.S.C. 844(k),(l).

There are also federal laws covering materials capable of producing catastrophic results. It is, for example, a federal crime

- to develop or possess biological weapons, 18 U.S.C. 175;
- to develop or possess chemical weapons, 18 U.S.C. 229;

⁴⁴ *United States v. Downs-Moses*, 329 F.3d 253, 261 (1st Cir. 2003); *United States v. Griffin*, 324 F.3d 330, 357 (5th Cir. 2003).

⁴⁵ *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946); *United States v. Curtis*, 324 F.3d 501, 506 (7th Cir. 2003).

⁴⁶ *United States v. Ramirez-Velasquez*, 322 F.3d 868, 880 (5th Cir. 2003); *United States v. Dean*, 55 F.3d 640, 647 (D.C. Cir. 1995); *United States v. Josleyn*, 99 F.3d 1182, 1189 (1st Cir. 1996).

⁴⁷ *United States v. Talley*, 164 F.3d 989, 996 (6th Cir. 1999); *United States v. Polk*, 118 F.3d 286, 292 (5th Cir. 1997); *United States v. Rahman*, 34 F.3d 1331, 1337 (7th Cir. 1994); *United States v. Buckalew*, 859 F.2d 1052, 1053 (1st Cir. 1988).

⁴⁸ *United States v. Talley*, 164 F.3d at 996; *United States v. Rahman*, 34 F.3d at 1337; *United States v. McNeill*, 887 F.2d 448, 450 (3d Cir. 1989). This might include evidence that the accused sought commission of the underlying offense by offering payment, by threat or repeated solicitations, by providing tools or instrumentalities for commission of the underlying offense, or by directing the solicitations to one believed to have previously committed a similar crime, *United States v. McNeill*, 887 F.2d 1052, 1053 (1st Cir. 1988); *United States v. Gabriel*, 810 F.2d 627, 634 (7th Cir. 1987), both citing, S.Rep.No. 97-307 at 183 (1982).

⁴⁹ *United States v. Devorkin*, 159 F.3d 465, 467 (9th Cir. 1998).

- to possess nuclear material without official authorization, 18 U.S.C. 831; or
- to use weapons of mass destruction, 18 U.S.C. 2332a.

Of course, there are separate federal laws that proscribe murder and assault committed against federal officials or foreign dignitaries, *e.g.*, 18 U.S.C. 111, 112, 1114, 1116; committed during the course of a bank robbery, 18 U.S.C. 2113; or in violation of civil rights, 18 U.S.C. 241, 242, 245; or occurring in a host of other jurisdictional circumstances, any of which could be, but need not be, committed through the use of explosives.

Appendix

Complementary Offenses

18 U.S.C. 231. Civil Disorders

(a)(1) Whoever teaches or demonstrates to any other person the use, application, or making of any firearm or explosive or incendiary device, or technique capable of causing injury or death to persons, knowing or having reason to know or intending that the same will be unlawfully employed for use in, or in furtherance of, a civil disorder which may in any way or degree obstruct, delay, or adversely affect commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function; or

(2) Whoever transports or manufactures for transportation in commerce any firearm, or explosive or incendiary device, knowing or having reason to know or intending that the same will be used unlawfully in furtherance of a civil disorder; . . .

Shall be fined under this title or imprisoned not more than five years, or both. . . .

For purposes of this chapter:

(1) The term “civil disorder” means any public disturbance involving acts of violence by assemblages of three or more persons, which causes an immediate danger of or results in damage or injury to the property or person of any other individual.

(2) The term “commerce” means commerce (A) between any State or the District of Columbia and any place outside thereof; (B) between points within any State or the District of Columbia, but through any place outside thereof; or (C) wholly within the District of Columbia.

(3) The term “federally protected function” means any function, operation, or action carried out, under the laws of the United States, by any department, agency, or instrumentality of the United States or by an officer or employee thereof; and such term shall specifically include, but not be limited to, the collection and distribution of the United States mails.

(4) The term “firearm” means any weapon which is designed to or may readily be converted to expel any projectile by the action of an explosive; or the frame or receiver of any such weapon.

(5) The term “explosive or incendiary device” means (A) dynamite and all other forms of high explosives, (B) any explosive bomb, grenade, missile, or similar device, and (C) any incendiary bomb or grenade, fire bomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and (ii) can be carried or thrown by one individual acting alone.

* * *

(8) The term “State” includes a State of the United States, and any commonwealth, territory, or possession of the United States,” 18 U.S.C. 232.

18 U.S.C. 2339A. Providing material support to terrorists

(a) Offense. – 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 section 32, 37, 81, 175, 229, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 1993, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, or 2340A of this title, section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), or section 46502 or 60123(b) of title 49, or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, shall be fined under this title, imprisoned not more than 10 years, or both. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.

(b) Definition. – In this section, the term “material support or resources” means currency or monetary instruments or financial securities, financial services, lodging, training, expert advice and assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials. 18 U.S.C. 2339A.

18 U.S.C. 2339B. Providing material support or resources to designated foreign terrorist organizations

(a) Prohibited activities.– (1) Unlawful conduct.–Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both.

* * *

(g) Definitions. – As used in this section . . . (4) the term ‘material support or resources’ has the same meaning as in section 2339A.

18 U.S.C. 2. Aiding and Abetting

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. 371. Conspiracy

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 not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. 373(a). Solicitation

Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half of the maximum fine prescribed for the punishment of the crime solicited, or both; or if the crime solicited is punishable by life imprisonment or death, shall be imprisoned for not more than twenty years.

18 U.S.C. 844(f). Bombing Federal Property

Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other personal or real property in whole or in part owned, possessed, or used by, or leased to, the United States, any department or agency thereof, or any institution or organization receiving Federal financial assistance shall be imprisoned for not more than 20 years, fined the greater of the fine under this title or the cost of repairing or replacing any property that is damaged or destroyed, or both; and if personal injury results to any person including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not more than 40 years, fined the greater of the fine under this title or the cost of repairing or replacing any property that is damaged or destroyed, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

18 U.S.C. 844(g). Possession of a Bomb in an Airport

(g)(1) Except as provided in paragraph (2), whoever possesses an explosive in an airport that is subject to the regulatory authority of the Federal Aviation Administration, or in any building in whole or in part owned, possessed, or used by, or leased to, the United States or any department or agency thereof, except with the written consent of the agency, department, or other person responsible for the management of such building or airport, shall be imprisoned for not more than five years, or fined under this title, or both.

(2) The provisions of this subsection shall not be applicable to – (A) the possession of ammunition (as that term is defined in regulations issued pursuant to this chapter) in an airport that is subject to the regulatory authority of the Federal Aviation Administration if such ammunition is either in checked baggage or in a closed container; or (B) the possession of an explosive in an airport if the packaging and transportation of such explosive is exempt from, or subject to and in accordance with, regulations of the Research and Special Projects Administration for the handling of hazardous materials pursuant to chapter 51 of title 49.

18 U.S.C. 844(h). Use of a Bomb During the Commission of a Federal Offense

Whoever – (1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or

(2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States, including a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 5 years but not more than 15 years. In the case of a second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for 10 years but not more than 25 years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person

convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the felony in which the explosive was used or carried,” 18 U.S.C. 844(h).

18 U.S.C. 844(d). Interstate Transportation of a Bomb

Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property, shall be imprisoned for not more than ten years, or fined under this title, or both; and if personal injury results to any person including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not more than twenty years or fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

18 U.S.C. 844(i). Bombing Interstate Property

Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than 20 years, fined the greater of the fine under this title or the cost of repairing or replacing any property that is damaged or destroyed, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not more than 40 years, fined the greater of the fine under this title or the cost of repairing or replacing any property that is damaged or destroyed, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment. No person shall be prosecuted, tried, or punished for any noncapital offense under this subsection unless the indictment is found or the information is instituted within 7 years after the date on which the offense was committed.

18 U.S.C. 844(k),(l). Theft of Explosives

(k) A person who steals any explosives materials which are moving as, or are a part of, or which have moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(l) A person who steals any explosive material from a licensed importer, licensed manufacturer, or licensed dealer, or from any permittee shall be fined under this title, imprisoned not more than 10 years, or both,” 18 U.S.C. 844(k),(l).

18 U.S.C. 175. Biological Weapons

(a) In general. – Whoever knowingly develops, produces, stockpiles, transfers, acquires, retains, or possesses any biological agent, toxin, or delivery system for use as a weapon, or knowingly assists a foreign state or any organization to do so, or attempts, threatens, or conspires to do the same, shall be fined under this title or imprisoned for life or any term of years, or both. There is extraterritorial Federal jurisdiction over an offense under this section committed by or against a national of the United States.

(b) Additional offense. – Whoever knowingly possesses any biological agent, toxin, or delivery system of a type or in a quantity that, under the circumstances, is not reasonably justified by a

prophylactic, protective, bona fide research, or other peaceful purpose, shall be fined under this title, imprisoned not more than 10 years, or both. In this subsection, the terms “biological agent” and “toxin” do not encompass any biological agent or toxin that is in its naturally occurring environment, if the biological agent or toxin has not been cultivated, collected, or otherwise extracted from its natural source.

(c) Definition. – For purposes of this section, the term “for use as a weapon” includes the development, production, transfer, acquisition, retention, or possession of any biological agent, toxin, or delivery system for other than prophylactic, protective, bona fide research, or other peaceful purposes.

18 U.S.C. 229. Chemical Weapons

(a) Unlawful conduct. – Except as provided in subsection (b), it shall be unlawful for any person knowingly –

(1) to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon; or

(2) to assist or induce, in any way, any person to violate paragraph (1), or to attempt or conspire to violate paragraph (1).

(b) Exempted agencies and persons. –

(1) In general. – Subsection (a) does not apply to the retention, ownership, possession, transfer, or receipt of a chemical weapon by a department, agency, or other entity of the United States, or by a person described in paragraph (2), pending destruction of the weapon.

(2) Exempted persons.--A person referred to in paragraph (1) is – (A) any person, including a member of the Armed Forces of the United States, who is authorized by law or by an appropriate officer of the United States to retain, own, possess, transfer, or receive the chemical weapon; or (B) in an emergency situation, any otherwise nonculpable person if the person is attempting to destroy or seize the weapon.

(c) Jurisdiction. – Conduct prohibited by subsection (a) is within the jurisdiction of the United States if the prohibited conduct – (1) takes place in the United States;

(2) takes place outside of the United States and is committed by a national of the United States;

(3) is committed against a national of the United States while the national is outside the United States; or

(4) is committed against any property that is owned, leased, or used by the United States or by any department or agency of the United States, whether the property is within or outside the United States.

18 U.S.C. 831. Nuclear Material

(a) Whoever, if one of the circumstances described in subsection (c) of this section occurs –

(1) without lawful authority, intentionally receives, possesses, uses, transfers, alters, disposes of, or disperses any nuclear material or nuclear byproduct material and – (A) thereby knowingly causes the death of or serious bodily injury to any person or substantial damage to property or to the environment; or (B) circumstances exist, or have been represented to the defendant to exist, that are likely to cause the death of or serious bodily injury to any person or substantial damage to property or to the environment;

(2) with intent to deprive another of nuclear material, knowingly – (A) takes and carries away nuclear material or nuclear byproduct material of another without authority; (B) makes an unauthorized use, disposition, or transfer, of nuclear material or nuclear byproduct material belonging to another; or (C) uses fraud and thereby obtains nuclear material or nuclear byproduct material belonging to another;

(3) knowingly – (A) uses force; or (B) threatens or places another in fear that any person other than the actor will imminently be subject to bodily injury; and thereby takes nuclear material or nuclear byproduct material belonging to another from the person or presence of any other;

(4) intentionally intimidates any person and thereby obtains nuclear material or nuclear byproduct material belonging to another;

(5) with intent to compel any person, international organization, or governmental entity to do or refrain from doing any act, knowingly threatens to engage in conduct described in paragraph (2) (A) or (3) of this subsection;

(6) knowingly threatens to use nuclear material or nuclear byproduct material to cause death or serious bodily injury to any person or substantial damage to property or to the environment under circumstances in which the threat may reasonably be understood as an expression of serious purposes;

(7) attempts to commit an offense under paragraph (1), (2), (3), or (4) of this subsection; or

(8) is a party to a conspiracy of two or more persons to commit an offense under paragraph (1), (2), (3), or (4) of this subsection, if any of the parties intentionally engages in any conduct in furtherance of such offense;

shall be punished as provided in subsection (b) of this section.

(b) The punishment for an offense under –

(1) paragraphs (1) through (7) of subsection (a) of this section is – (A) a fine under this title; and (B) imprisonment – (i) for any term of years or for life (I) if, while committing the offense, the offender knowingly causes the death of any person; or (II) if, while committing an offense under paragraph (1) or (3) of subsection (a) of this section, the offender, under circumstances manifesting extreme indifference to the life of an individual, knowingly engages in any conduct and thereby recklessly causes the death of or serious bodily injury to any person; and (ii) for not more than 20 years in any other case; and

(2) paragraph (8) of subsection (a) of this section is – (A) a fine under this title; and (B) imprisonment – (i) for not more than 20 years if the offense which is the object of the conspiracy is punishable under paragraph (1)(B)(i); and (ii) for not more than 10 years in any other case.

(c) The circumstances referred to in subsection (a) of this section are that –

(1) the offense is committed in the United States or the special maritime and territorial jurisdiction of the United States, or the special aircraft jurisdiction of the United States (as defined in section 46501 of title 49);

(2) an offender or a victim is – (A) a national of the United States; or (B) a United States corporation or other legal entity;

(3) after the conduct required for the offense occurs the defendant is found in the United States, even if the conduct required for the offense occurs outside the United States;

(4) the conduct required for the offense occurs with respect to the carriage of a consignment of nuclear material or nuclear byproduct material by any means of transportation intended to go

beyond the territory of the state where the shipment originates beginning with the departure from a facility of the shipper in that state and ending with the arrival at a facility of the receiver within the state of ultimate destination and either of such states is the United States; or

(5) either – (A) the government entity under subsection (a)(5) is the United States; or (B) the threat under subsection (a)(6) is directed at the United States.

* * *

(f) As used in this section –

(1) the term “nuclear material” means material containing any – (A) plutonium; (B) uranium not in the form of ore or ore residue that contains the mixture of isotopes as occurring in nature; (C) enriched uranium, defined as uranium that contains the isotope 233 or 235 or both in such amount that the abundance ratio of the sum of those isotopes to the isotope 238 is greater than the ratio of the isotope 235 to the isotope 238 occurring in nature; or (D) uranium 233;

(2) the term “nuclear byproduct material” means any material containing any radioactive isotope created through an irradiation process in the operation of a nuclear reactor or accelerator;

(3) the term “international organization” means a public international organization designated as such pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288) or a public organization created pursuant to treaty or other agreement under international law as an instrument through or by which two or more foreign governments engage in some aspect of their conduct of international affairs;

(4) the term “serious bodily injury” means bodily injury which involves – (A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty;

(5) the term “bodily injury” means – (A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of a function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary;

(6) the term “national of the United States” has the same meaning as in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)); and

(7) the term “United States corporation or other legal entity” means any corporation or other legal entity organized under the laws of United States or any State, Commonwealth, territory, possession, or district of the United States.

18 U.S.C. 2332a. Weapons of Mass Destruction

(a) Offense against a national of the United States or within the United States. – A person who, without lawful authority, uses, threatens, or attempts or conspires to use, a weapon of mass destruction (other than a chemical weapon as that term is defined in section 229F) –

(1) against a national of the United States while such national is outside of the United States;

(2) against any person within the United States, and the results of such use affect interstate or foreign commerce or, in the case of a threat, attempt, or conspiracy, would have affected interstate or foreign commerce; or

(3) against any property that is owned, leased or used by the United States or by any department or agency of the United States, whether the property is within or outside of the United States, shall be imprisoned for any term of years or for life, and if death results, shall be punished by death or imprisoned for any term of years or for life.

(b) Offense by national of the United States outside of the United States.--Any national of the United States who, without lawful authority, uses, or threatens, attempts, or conspires to use, a weapon of mass destruction (other than a chemical weapon (as that term is defined in section 229F)) outside of the United States shall be imprisoned for any term of years or for life, and if death results, shall be punished by death, or by imprisonment for any term of years or for life.

(c) Definitions. – For purposes of this section – (1) the term “national of the United States” has the meaning given in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)); and

(2) the term “weapon of mass destruction” means – (A) any destructive device as defined in section 921 of this title; (B) any weapon that is designed or intended to cause death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals, or their precursors; (C) any weapon involving a biological agent, toxin, or vector (as those terms are defined in section 178 of this title); or (D) any weapon that is designed to release radiation or radioactivity at a level dangerous to human life.

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