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# Bomb-Making Online: An Abridged Sketch of Federal Criminal Law

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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 a 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 a Justice Department report. The report concluded that terrorist "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 an abridged version – without footnotes or appendix – of CRS Report RL32074, *Bombs On Line: Explosives, Free Speech, Criminal Law & the Internet*.

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**Introduction.** Within hours of the tragedy in Oklahoma City, the recipe for concocting a similar homemade bomb had been posted on the Internet. There followed an outpouring of explosives "cookbooks" and other "how to" manuals of destruction. 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.

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 violence or (B) with the knowledge that another intends to use the information to commit a federal crime. This is a brief examination of the legislation, of the process that led to its enactment, of First Amendment issues raised during its consideration, 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
  - (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. 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). 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. 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 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. Destructive devices on the other hand are defined to include explosives and incendiaries but exclude those that are not designed to be used a weapons. Destructive devices are also weapons of mass destruction along with chemical, nuclear, and biological weapons.

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 offense is an organization), 18 U.S.C. 844(a)(2); 3571. Anyone who conspires to violate the provisions, or aids and abets a violation, is subject to the same penalties.

**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, commentators questioned the provision's constitutionality. 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. 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.

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.), but again it was stripped out during conference. 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.), only to have it removed once more during conference. In the second session, it was apparently added during Senate Judiciary 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. Supporters' efforts were bolstered by the Justice Department's submission of a study which endorsed a modified proposal.

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.). It subsequently passed both Houses with little comment, and was signed by the President.

**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 specificity.

*Brandenburg v. Ohio*, 395 U.S. 444 (1969), confirmed that the 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.

Consistent with the sentiment 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.

The DoJ Report summarizing its understanding of the state of the law as of 1997 seems to reflect a like view: the Court has developed the *Brandenburg* test, which asks whether the danger is intended, likely and imminent. But the protections of the First Amendment do not apply when the teaching goes beyond the theory itself to explanation of basic strategy. 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. The DoJ Report concluded that "Senator Feinstein's proposal can withstand constitution muster in most, if not all, of its possible applications, if such legislation is slightly modified."

**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. 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 or aid and abet another in the commission of a federal offense, 18 U.S.C. 2, 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." One may be guilty of commanding or aiding and abetting any federal crime, including those involving the unlawful use of fire or explosives. Liability requires the commission of the crime by someone other than the defendant. 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." On the other hand, mere presence or even knowledge is by itself insufficient, the defendant must somehow have acted to make crime enterprise succeed.

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. 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.

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. In doing so, it must present evidence that "strongly corroborates" the intent of the accused. Like conspiracy and unlike aiding and abetting, the crime of solicitation does not require that the underlying offense have been committed.

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, to possess a bomb in an airport, to use explosives to commit any other federal felony, to carry a bomb across state lines with the intent to injure person or property, to bomb property that is part of or is used in interstate commerce, or to steal explosives from interstate commerce or from a licensed dealer.

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, to develop or possess chemical weapons, to possess nuclear material without official authorization, or to use weapons of mass destruction.

Of course, there are separate federal laws that proscribe murder and assault committed against federal officials or foreign dignitaries; committed during the course of a bank robbery or in violation of civil rights; or occurring in a host of other jurisdictional circumstances, any of which could be, but need not be, committed through the use of explosives.

## Author Information

Charles Doyle
Senior Specialist in American Public Law

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