



ONLINE TERRORISM ADVOCACY:
HOW AEDPA AND INCHOATE CRIME STATUTES
CAN SIMULTANEOUSLY PROTECT AMERICA'S
SAFETY AND FREE SPEECH

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INTRODUCTION

Dzhokhar Tsarnaev, a suspect in the April 15, 2013 Boston Marathon bombing, told investigators that online Al Qaeda extremist sermons influenced both him and his brother, and that the online jihadist magazine *Inspire* taught them bomb-making techniques.¹ Though the 1993 World Trade Center and 1995 Oklahoma City bombers used manuals to construct their bombs,² the Boston bombings are the most recent example of bombers using online information on American soil to great catastrophic effect.

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¹ Sari Horwitz, *Investigators Sharpen Focus on Boston Bombing Suspect's Wife*, WASH. POST (May 3, 2013), http://articles.washingtonpost.com/2013-05-03/world/39003173_1_law-enforcement-russell-s-brother.

² U.S. DEP'T OF JUSTICE, REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION 10 (1997) [hereinafter 1997 BOMBMAKING REPORT], *available at* <http://cryptome.org/abi.htm#II>.

Revelations similar to Tsarnaev's about online terror information are commonplace in foiled criminal plots. In late July 2011, authorities arrested a U.S. Army soldier with weapons, materials to make a bomb, and a copy of *Inspire's* article "Make a Bomb in the Kitchen of Your Mom."³ Also in July 2011, a grand jury in the Eastern District of Virginia charged Emerson Winfield Begolly with soliciting crimes of violence⁴ and distributing information relating to explosives⁵ for moderating the Ansar al-Mujahideen English Forum and encouraging others to engage in terrorism against U.S. infrastructure.⁶ Though the Boston tragedy graphically reiterates the threat, law enforcement has long known that online resources marrying terrorism advocacy with detailed and operational tactics, techniques, and procedures—abbreviated as "online terrorism advocacy" in this article—are dangerous tools for people motivated to deliver death and destruction.⁷

After events like the Boston bombings, it is natural for legislative, legal, and law enforcement professionals to examine if

³ Pierre Thomas, Martha Raddatz, Rhonda Schwartz & Jason Ryan, *Fort Hood Suspect Yells Nidal Hasan's Name in Court*, ABC NEWS (July 29, 2011), <http://abcnews.go.com/Blotter/fort-hood-suspect-naser-jason-abdo-yells-nidal-hasan/story?id=14187568>.

⁴ 18 U.S.C. § 373 (2012).

⁵ *Id.* § 842(p)(2)(A).

⁶ Grand Jury Indictment of Emerson Winfield Begolly, Criminal No 1:11 CR 326 [hereinafter Begolly Indictment], available at <http://www.lawfareblog.com/wp-content/uploads/2011/07/Begolly-Indictment.pdf>. Mr. Begolly subsequently pled guilty. Warren Richey, *American Muslim Pleads Guilty to Using the Internet to Solicit Terrorism*, CHRISTIAN SCI. MONITOR (Aug. 9, 2011), <http://www.csmonitor.com/USA/Justice/2011/0809/American-Muslim-pleads-guilty-to-using-the-Internet-to-solicit-terrorism>.

⁷ See Begolly Indictment, *supra* note 6, at 1, 2; 1997 BOMBMAKING REPORT, *supra* note 2, at 3 (discussing the need for additional laws relating to the dissemination of bomb-making information); John C. Richter, *Counter-Terrorism: A Federal Prosecutor's View*, 33 OKLA. CITY U. L. REV. 297, 326-28 (2008) (discussing a danger with websites that promote violent jihad and give "step-by-step instructions on how to build suicide vests and explosives"); Eric B. Easton, *Closing the Barn Door After the Genie Is Out of the Bag: Recognizing a "Futility Principle" in First Amendment Jurisprudence*, 45 DEPAUL. L. REV. 1, 45-46 (1995) (discussing Congress's acknowledgment of the threat in the debate on the Comprehensive Terrorism Prevention Act, which would later become the adopted Antiterrorism and Effective Death Penalty Act of 1996).

they could have done more to prevent the tragedy. In the spirit of that necessary reflection, this Article examines, in depth, the statutes available to federal prosecutors targeting online terrorism advocacy, the prosecutorial challenges those statutes create, and the way in which law enforcement and prosecutors can use the current law both effectively and constitutionally to prevent future attacks.

There are two primary avenues used to prosecute online terrorism advocacy: (1) the longstanding inchoate, or incomplete, crime statutes such as attempt, solicitation, and conspiracy,⁸ and (2) the relatively new Antiterrorism and Effective Death Penalty Act (“AEDPA”)⁹ statutes, which were passed in the wake of the 1995 Oklahoma City bombing.¹⁰ Each avenue provides law enforcement

⁸ 18 U.S.C. §§ 371, 373 (2012). See Martin J. King, *Criminal Speech Inducement and the First Amendment*, 77 FED. BUREAU OF INVESTIGATION LAW ENFORCEMENT BULL. 23, 24 (2008) available at <http://leb.fbi.gov/2008-pdfs/leb-april-2008> (stating the primary inchoate crimes are attempt, solicitation, and conspiracy). Cf. Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 669 (2009) (stating that free speech limitations have generally not been applied to threats, solicitations, criminal instructions, and conspiracy).

⁹ Though 18 U.S.C. § 842(p) was adopted subsequent to AEDPA due to it being removed from AEDPA for U.S. Attorney General review, 1997 BOMBAKING REPORT, *supra* note 2, at 3, 4, it is generally referred to as an AEDPA act because the statute is rooted in that act. 141 CONG. REC. 14,757-58 (1995), CR-1995-0605 (ProQuest Congressional). This article addresses three AEDPA statutes, 18 U.S.C. § 842(p)(2)(A), § 2339B, and § 844(n), but primarily deals only with the first two because § 844(n) is essentially a sentencing statute which concerns assigning the same penalty to the person conspiring to commit the crime as the person committing the actual offense. Aiding and abetting, 18 U.S.C. § 2, is also addressed with the AEDPA statutes, even though it is not an AEDPA statute, in order to analyze it in parallel with AEDPA’s § 2339B, which is a terrorism-specific aiding and abetting statute.

¹⁰ This comment will not address the civil rights-related statutes and doctrines because of the very significant prosecutorial challenges these statutes create. See 18 U.S.C. § 231 (2012); *Virginia v. Black*, 538 U.S. 343, 363 (2003) (creating “true threat” doctrine and defining cross burning as intimidation not protected by First Amendment); *United States v. Featherstone*, 461 F.2d 1119, 1122 (5th Cir. 1972) (highlighting the *mens rea* requirement of the incendiary devices use in civil disorder); *Nat’l Mobilization Comm. to End the War in Viet Nam v. Foran*, 411 F.2d 934, 937 (7th Cir. 1969) (stating the narrow scope of § 231(a)(1) (citing *Landry v. Daley*, 280 F. Supp. 938, 939 (N.D.Ill.1968)); Nina Pretraro, Comment, *Harmful Speech and True Threats: Virginia v. Black and the First Amendment in an Age of Terrorism*, 10 ST. JOHN’S J. C.R. & ECON. DEV. 531, 562-63 (2006) (noting the

and prosecutors certain advantages and disadvantages. For instance, courts hold that inchoate crimes are not required to meet *Brandenburg v. Ohio*'s¹¹ First Amendment requirement of "imminent lawless action," and, instead, apply a less rigorous "mere advocacy" of lawless action requirement.¹² Counterbalancing that prosecutorial advantage, however, are the inchoate crimes' higher *mens rea* requirements,¹³ which make it more difficult for a prosecutor to establish a speaker's intent to influence an inherently insulated online audience. In contrast to the inchoate crime statutes, the AEDPA statutes have a lower *mens rea* requirement, but often confront the higher *Brandenburg* First Amendment requirement of "imminent lawless action."¹⁴

These two sets of statutes—inchoate crimes and AEDPA—are perceived very differently by First Amendment proponents and those focused on prosecuting terrorism, national security, or criminal threats. First Amendment advocates generally believe prosecuting online terrorism advocacy improperly chills free speech, while prosecutors argue that *mens rea* requirements and *Brandenburg* challenges make existing statutes and case law inadequate for preventing online advocacy threats.¹⁵ Despite these disparate perceptions, the legal analysis conducted in this Article reveals that current statutes and cases actually offer a remarkable balance between the competing concerns by not only protecting most speech, but also facilitating necessary prosecutions under challenging scenarios such as online terrorism advocacy. In fact, analysis of AEDPA statute case law reveals the balance between constitutional and national security concerns that Congress sought after the Oklahoma City bombing has largely, albeit slowly, been implemented by both the federal district courts, circuit courts, and to some extent

dropping of charges against a person handing out leaflets near Ground Zero praising Osama Bin Laden's work immediately following the September 11, 2001 attacks, such conduct being the "outer limits" of a true threat).

¹¹ *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (per curiam).

¹² *Id.* at 448-49 ("[S]tatute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.").

¹³ *Mens rea* refers to an evil intent or a guilty mind. *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954).

¹⁴ *Brandenburg*, 395 U.S. at 447.

¹⁵ See *infra* Part I.C.

by the Supreme Court through abdication. Nevertheless, complete reconciliation of the free speech and prosecution priorities will not occur until online terrorism advocacy prosecutions build a stronger case law foundation by exploring the limits of *mens rea* and *Brandenburg* challenges. Without those prosecutions and court decisions, the long debated boundaries between permissible speech and prohibited online terrorism advocacy will remain a mystery.

Part I of this Article provides background on the First Amendment *Brandenburg* challenges to prosecuting online terrorism advocacy by examining the First Amendment considerations Congress made when originally passing the AEDPA statutes. Part II provides in depth statutory and case law analysis of the prosecution tools that are traditionally used against First Amendment challenges, including both traditional and AEDPA aiding and abetting statutes, 18 U.S.C. § 2¹⁶ and § 2339B (“§ 2” & “§ 2339B”),¹⁷ and also AEDPA’s material support and explosives information distribution statute, 18 U.S.C. § 842(p).¹⁸ Part III analyzes prosecutorial advantages and limitations of two of the inchoate crime statutes, solicitation and conspiracy, 18 U.S.C. § 373(a)¹⁹ and § 371²⁰ (“§ 373(a)” and “§ 371”) and the challenges they face even though *Brandenburg* traditionally does not apply.²¹ The Conclusion offers a brief summary of existing tools for prosecuting online terrorism advocacy, and a prescription for reconciling the ongoing conflict between America’s competing, but not mutually exclusive, First Amendment and national security priorities.

¹⁶ 18 U.S.C. § 2 (2012).

¹⁷ *Id.* § 2339B.

¹⁸ *Id.* § 842(p).

¹⁹ *Id.* § 373(a).

²⁰ *Id.* § 371.

²¹ This Article will not address the inchoate crime of attempt because online terrorism advocacy generally occurs at the earlier stages of criminal activity (i.e., solicitation and conspiracy) as opposed to a later stage (i.e., attempt). See Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 9 (1989) (“[C]onspiracy and solicitation can be viewed as early stages of an attempt to commit a completed offense.”).

I. *BRANDENBURG* IMMINENCE: THE PRIMARY CHALLENGE TO PROSECUTING ONLINE TERRORISM ADVOCACY

Congress passed the terrorism portions of the AEDPA statutes in 1996 in response to the 1995 Oklahoma City bombing.²² Nevertheless, terrorism related convictions are a remarkably small percentage of attempted prosecutions, even since September 11, 2001.²³ Given the overall prosecutorial record, it is slightly surprising that there is a split in the legal community over whether current statutes allow for adequate prosecution of terrorism.²⁴ However, an objective review of the applicable statutes and case law reveals that the First Amendment *Brandenburg* “imminence” requirement is a possible challenge to prosecuting online terrorism advocacy, and that Congress passed the AEDPA statutes with that challenge in mind.

A. *AEDPA Statutes and Congress’s First Amendment Concerns*

Prior to Congress passing the terrorism portions of the AEDPA legislation in 1996, Deputy Assistant Attorney General Robert Litt influenced the AEDPA legislation substantially by his testimony before the Senate Judiciary Committee.²⁵ Litt’s testimony

²² 1997 BOMBMaking REPORT, *supra* note 2, at 3, 4.

²³ Elizabeth M. Renieris, *Combating Incitement to Terrorism on the Internet: Comparative Approaches in the United States and United Kingdom and the Need for International Solutions*, 11 VAND. J. ENT. & TECH. L. 673, 690 (2009) (stating that of almost 400 terrorist suspects since September 11th, only thirty-nine were convicted of terrorism or national security crimes). *But see Fact Check: Terrorism and Terrorism Related Prosecutions by the Bush Administration More than 300 after 9/11*, U.S. DEP’T OF JUSTICE (July 2, 2014), <http://www.justice.gov/cjs/docs/terrorism-bush-admin.html> (stating how the Justice Department in its 2009 budget request “noted that more than 300 individuals had been convicted of terrorism or terrorism-related violations in federal court since 9/11.”). When talking about “terrorism related” prosecutions the quantities fluctuate wildly depending on whether the data collector defines the word “related” widely or narrowly. For the purposes of this article, assume the word “related” is defined narrowly.

²⁴ *See, e.g.*, Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN L. REV. 1095, 1106 (2005) (stating crime-facilitating speech should be protected except in extremely narrow circumstances). *But see, e.g.*, Alan F. Williams, *Prosecuting Website Development Under the Material Support to Terrorism Statutes: Time to Fix What’s Broken*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 365, 366 (2007-2008) (arguing new federal criminal legislation is needed to combat terrorism on the web).

²⁵ *See* 1997 BOMBMaking REPORT, *supra* note 2, at 3.

outlined the ease of obtaining information about creating explosives on the Internet, and asked Congress to create laws to allow the Department of Justice to prosecute those assisting terrorism online.²⁶ As a result, 18 U.S.C. § 303, dealing generally with aiding and abetting terrorism, and 18 U.S.C. § 701, dealing generally with conspiracy penalties involving explosives,²⁷ were immediately added to AEDPA, and became § 2339B and 18 U.S.C. § 844(n) (“§844(n)”)²⁸ respectively.

The section of the law regarding the distribution of information related to explosives, was proposed by Senator Feinstein on June 5, 1995,²⁹ but did not become law until 1999,³⁰ precipitated by the tragic shootings at Columbine High School.³¹ Significant Congressional concerns about inadvertently prohibiting “legitimate” publication of information on explosives caused the delay³² of what eventually became 18 U.S.C. § 842(p) (“§ 842(p)”)³³. Because of these and other concerns, Congress removed proposed § 842(p) from the AEDPA legislation and, instead, inserted language requiring the Department of Justice to conduct a study addressing the availability of information on explosives, the information’s use in terrorism, and First Amendment concerns.³⁴ The study requirement highlighted Congress’s focus on the threat that information on explosives posed, as well as their parallel concerns for First Amendment rights.

Though a deep legislative analysis is beyond the scope of this Article, an adequate understanding of the legislative intent of §

²⁶ *Id.*

²⁷ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 303, 110 Stat. 1214, 1250-53 (1996); § 701, 110 Stat. at 1291.

²⁸ 18 U.S.C. § 844(n) (2012). Specifically, § 844(n) concerns assigning the same penalty to the person conspiring to commit the crime as the person committing the actual offense.

²⁹ 141 CONG. REC. S7682 (daily ed. June 5, 1995).

³⁰ Relief of Global Exploration and Development Corporation, Pub. L. 106-54, § 2(a), 113 Stat 398, 398-99 (1999).

³¹ Leslie Kendrick, Note, *A Test for Criminally Instructional Speech*, 91 VA. L. REV. 1973, 2011-12 (2005).

³² 1997 BOMBMAKING REPORT, *supra* note 2, at 24-25.

³³ 18 U.S.C. § 842(p).

³⁴ *Id.* at 1.

842(p), § 2339B, and § 844(n) is possible by examining the evolution of § 842(p). As proposed by Senator Feinstein, § 842(p) required the “making of explosive materials” with intentional or knowing *mens rea* that the materials “will likely be used for . . . a Federal criminal purpose affecting interstate commerce.”³⁵ After their extensive study of the issue, the Department of Justice broadened the *actus reus*³⁶ to include the “making or use of an explosive,” but narrowed the *mens rea* by changing “intends or knows” to simply “intends” and eliminating “will likely,” leaving only “be used for.”³⁷ Finally, prior to adoption, Congress further limited the *actus reus* of the statute by replacing “a Federal criminal offense . . . affecting interstate commerce” with “an activity that constitutes a Federal crime of violence.”³⁸ The final § 842(q) states:

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,

³⁵ The Feinstein Amendment of § 842(q) states:

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 explosive materials, if the person intends or knows, that such explosive materials or information will likely be used for, or in furtherance of, an activity that constitutes a Federal criminal purpose affecting interstate commerce.

141 CONG. REC. S7875 (daily ed. June 5, 1995).

³⁶ *Actus reus* is the “wrongful deed that comprises the physical components of a crime.” BLACK’S LAW DICTIONARY 41 (9th ed. 2009).

³⁷ The DOJ’s proposed language of § 842(q) states:

It shall be unlawful for any person – (a) to teach or demonstrate the making or use of an explosive, 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 such an explosive, device or weapon, intending that such teaching, demonstration or information be used for, or in furtherance of, an activity that constitutes a Federal criminal offense or a State or local criminal offense affecting interstate commerce.

1997 BOMBMaking REPORT, *supra* note 2, at 51.

³⁸ 18 U.S.C. § 842(p)(2)(A) (2012).

demonstration, or information be used for, or in furtherance of, an activity that constitutes a Federal crime of violence.³⁹

Thus amended, § 842(p) protected the First Amendment more than proposed § 842(p) after both the Department of Justice and Congressional edits.

The context of the Congressional and Department of Justice efforts to narrow § 842(p) is very important. From even a casual read of the Congressional Record,⁴⁰ or the Department of Justice 1997 Report,⁴¹ it is clear that both organizations, in light of modern threats, worked hard to create legislation intended to survive First Amendment challenges.⁴² This is not surprising given that § 844(n) and § 2339B were drafted and passed in the wake of the Oklahoma City bombing, and § 842(p) was finalized and passed after the 1999 Columbine High School shootings.⁴³ Congress's intent to allow prosecutions, while simultaneously protecting the First Amendment, is largely realized in subsequent judicial decisions on these and related statutes.⁴⁴

B. First Amendment Challenges: Brandenburg and its Application

It is axiomatic in First Amendment speech law that statutes must protect free speech but simultaneously balance that protection

³⁹ *Id.*

⁴⁰ See 142 CONG. REC. H3336 (daily ed. Apr. 15, 1996) (requiring the Attorney General to render a legal analysis on the First Amendment issues).

⁴¹ See 1997 BOMBMAKING REPORT, *supra* note 2, at 51 (proposing modified statutory language that could “pass constitutional muster” after analyzing the First Amendment principles in context of dissemination of bomb-making information).

⁴² H. Brian Holland, *Inherently Dangerous: The Potential for an Internet-Specific Standard Restricting Speech That Performs a Teaching Function*, 39 U.S.F. L. REV. 353, 356 (2005) (“It took over four years, a full constitutional review, and the tragedies in Oklahoma City and Columbine to bring section 842(p) into law. The statute is thus inseparable from the seminal events, public perceptions, and politics that drove its enactment.”); Kendrick, *supra* note 31, at 2012.

⁴³ See Holland, *supra* note 42, at 356; Kendrick, *supra* note 31, at 2012.

⁴⁴ See *infra* Part II.

with other important priorities.⁴⁵ When someone believes this balancing inadequately protects speech, they may challenge a statute as: (1) facially overbroad;⁴⁶ (2) facially vague;⁴⁷ and, (3) overbroad as applied.⁴⁸ Facial challenges do not require a plaintiff to meet the traditional rules of standing and rarely succeed because the Supreme Court views them as an extreme, and often unnecessary, solution to the threat to speech.⁴⁹ In contrast, an applied challenge—now often known as a “*Brandenburg* challenge”—is generally more likely to succeed because of its more limited scope as well as the clear evidentiary record that allows the Court to evaluate real facts as opposed to innumerable and imprecise hypotheticals.⁵⁰ In *Brandenburg*, a Ku Klux Klan leader appealed his conviction under an Ohio criminal statute forbidding advocating for crime, violence, or terrorism to accomplish reform, or assembling with a group “to

⁴⁵ See *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.” (citing *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 439 (1911))).

⁴⁶ A law may be facially overbroad when “it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.” *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 574 (1987) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985)).

⁴⁷ A law is facially vague if persons of “common intelligence must necessarily guess as to its meaning” and differ as to its application. *Coates v. Cincinnati*, 402 U.S. 611, 615 (1971) (holding an ordinance saying people on the street could not “annoy” police or another person was unconstitutionally vague because no standard of conduct is specified).

⁴⁸ Although “the distinction between facial and as-applied challenges is not so well defined,” *Citizens United v. FEC*, 558 U.S. 310, 331 (2010), an as-applied challenge, unlike a facial challenge to a statute that seeks to invalidate it in its entirety, seeks to invalidate a particular application of the statute. See *States v. Coronado*, 461 F. Supp. 2d 1209, 1215 (S.D. Cal. 2006) (distinguishing facial challenges, which focus on the statute, indictment, and well-established overbreadth principles, from as-applied challenges, which include factual arguments involving the evidentiary record).

⁴⁹ See *Broderick v. Oklahoma*, 413 U.S. 601, 613 (1973) (stating facial attack “has been employed by the Court sparingly and only as a last resort”).

⁵⁰ See *States v. Coronado*, 461 F. Supp. 2d 1209, 1215 (S.D. Cal. 2006).

teach or advocate the doctrines of criminal syndicalism.”⁵¹ The Court stated in *Brandenburg*:

[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. As we said in *Noto v. United States*, 367 U.S. 290, 297-98 (1961), ‘the 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 to such action.’ . . . A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments.⁵²

The rule of *Brandenburg*, though open to debate,⁵³ focuses on “imminent lawless action” as opposed to “mere abstract teaching . . . for violent action.”⁵⁴ Thus, terrorism advocacy defendants often counter inchoate crime or AEDPA statute charges with First Amendment challenges⁵⁵ because the “advocacy” that *Brandenburg* defends is often largely tantamount to terrorism’s political and social ideas.⁵⁶

Applying *Brandenburg* First Amendment law to the advocacy of terrorism over the Internet invokes a significant debate over the Supreme Court’s *Brandenburg* decision and its various interpretations.⁵⁷ The opinion uses the terms “incitement to

⁵¹ *Brandenburg v. Ohio*, 395 U.S. 444, 444 (1969) (per curiam).

⁵² *Id.* at 447-48 (citations omitted).

⁵³ See *Rice v. Paladin Enters. Inc.*, 128 F.3d 233, 264-65 (4th Cir. 1997) (“[T]he Court distinguishes between ‘mere advocacy’ and ‘incitement to imminent lawless action,’ a distinction which, as a matter of common sense and common parlance, appears different from the first distinction drawn, because ‘preparation and steeling’ can occur without ‘incitement,’ and vice-versa.” (quoting *Brandenburg*, 395 U.S. at 448)).

⁵⁴ *Brandenburg*, 395 U.S. at 447-48.

⁵⁵ See, e.g., *People’s Mojahedin Org. of Iran v. Dep’t of State*, 327 F.3d 1238, 1244 (D.C. Cir. 2003) (petitioners arguing 18 U.S.C. § 2339B(a)(1) violates their rights of free speech).

⁵⁶ *Brandenburg*, 395 U.S. at 448-49.

⁵⁷ See Healy, *supra* note 8, at 663-68 (outlining numerous reasons for the significant confusion surrounding *Brandenburg*).

imminent lawless action” and “preparation and steeling” interchangeably.⁵⁸ These terms, however, do not mean the same thing; someone can “prepare and steel” for lawless action, without that lawless action being imminent.⁵⁹ The fact that the Court has only applied *Brandenburg* in two other cases,⁶⁰ neither particularly enlightening, compounds the difficulty of interpreting *Brandenburg*. Thus, lower courts faced with challenging speech-related criminal prosecutions and without the luxury of choosing their cases,⁶¹ have various interpretations of *Brandenburg*, many of which appear to conflict with the Supreme Court’s original interpretation.⁶²

Nuance pervades the Supreme Court’s *Brandenburg* decision, and a more in-depth analysis of its applicability to various statutes follows. However, a basic understanding of *Brandenburg* applicability to a speech-related crime is possible by asking three questions. Does the act constitute an inchoate crime?⁶³ Does the speech have some amount of political or social advocacy?⁶⁴ Is there a completed criminal act?⁶⁵ The answers to these three questions guide the required First Amendment analysis.

Question one is important because the inchoate crimes such as conspiracy, attempt, and solicitation are largely excluded from having to satisfy the *Brandenburg* requirement.⁶⁶ Their exclusion is

⁵⁸ See *Paladin*, 128 F.3d at 264 (highlighting the distinction between “incitement to imminent lawless action” and “preparation and steeling”).

⁵⁹ *Id.*

⁶⁰ See *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927-28 (1982).

⁶¹ Healy, *supra* note 8, at 668.

⁶² Holland, *supra* note 42, at 380.

⁶³ Healy, *supra* note 8, at 669 (stating that free speech limitations have generally not been applied to threats, solicitations, criminal instructions, and conspiracy).

⁶⁴ See *United States v. White*, 610 F.3d 956, 959-60 (7th Cir. 2010); *Paladin*, 128 F.3d at 264-65, 267 (stating that *Brandenburg* only applies to “advocacy-speech” and that requiring “imminence” whenever the predicating act took the form of speech would change and undermine the criminal law and that the book in *Paladin*, with its total lack of legitimate purpose outside of promoting murder, make the case unique).

⁶⁵ See *United States v. Freeman*, 761 F.2d 549, 551 (9th Cir. 1985); *United States v. Kelley*, 769 F.2d 215, 216-17 (4th Cir. 1985).

⁶⁶ Healy, *supra* note 8, at 669 (stating that free speech limitations have generally not been applied to threats, solicitations, criminal instructions, and conspiracy).

necessary to facilitate law enforcement intervention based on sufficient intent, not “imminent lawless action.”⁶⁷ Question two is important because advocating crime without some level of political or social promotion of ideas will likely strip the speech of *Brandenburg* protection.⁶⁸

The third question, concerning a completed act, highlights the distinction between complete and inchoate criminal acts. This distinction is important for two reasons. First, in trying to prevent terrorism by interdicting online terrorism advocacy and tactics, successful law enforcement means preventing a serious criminal act.⁶⁹ Second, a court is less likely to find a reason to punish online terrorism advocacy and tactics without a criminal act with which to anchor the “menial” charges.⁷⁰ A representative example of menial charges is where a juror referred to a defendant’s jihad preaching in a chat room as a lack of “hard evidence.”⁷¹

⁶⁷ See *Am. Commc’ns Ass’n, C.I.O. v. Douds*, 339 U.S. 382, 394-95 (1950) (“Government may cut him off only when his views are no longer merely views but threaten, clearly and imminently, to ripen into conduct against which the public has a right to protect itself.” (emphasis added)); King, *supra* note 8, at 24-25.

⁶⁸ See *Paladin*, 128 F.3d at 264-65, 267 (stating that *Brandenburg* only applies to “advocacy-speech” and that requiring “imminence” whenever the predicating act took the form of speech would change and undermine the criminal law and that the book in *Paladin*, with its total lack of legitimate purpose outside of promoting murder, make the case unique). However, it is important to note that the in-depth analysis in *Paladin* applies to an aiding and abetting charge which involved an actual murder, a completed (as opposed to inchoate) criminal act, and most of the case law cited by the court similarly applies to case law involving completed criminal acts. See also *Freeman*, 761 F.2d at 551; *Kelley*, 769 F.2d at 216-17. *But see* *Haig v. Agee*, 453 U.S. 280, 308-09 (1981) (holding a former CIA employee’s release of intelligence information was unprotected despite no indication in the opinion of subsequent crime related to that information, only potential problems associated with the information disclosure).

⁶⁹ See *Begolly Indictment*, *supra* note 6, at 1-2.

⁷⁰ See *Freeman*, 761 F.2d at 551-52; *Kelley*, 769 F.2d at 216-17. *But see* *Agee*, 453 U.S. at 308-09.

⁷¹ See *infra* Part II.A.2.

Applying the above three questions to 18 U.S.C. § 2, traditional inchoate crime aiding and abetting,⁷² demonstrates both the usefulness of the questions and the confusion *Brandenburg* analysis can create. First, is it an inchoate crime? On one side, the U.S. Department of Justice 1997 *Report on the Availability of Bombmaking Information* says aiding and abetting is an inchoate crime.⁷³ However, no federal case law clearly states that, though there are various cases cited in the Department of Justice report and elsewhere that suggest it.⁷⁴ Second, does the speech have some amount of political or social advocacy? Existing case law supports that speech with a complete lack of social value will not receive *Brandenburg* protections from the court.⁷⁵ But the question of how much social value is required to receive protection remains open. Third, is there a completed act? Since aiding and abetting requires an act,⁷⁶ why does speech aiding and abetting not necessarily require *Brandenburg* imminence?⁷⁷

⁷² The definition of principals in federal law adopts traditional inchoate crime 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. § 2 (2012).

⁷³ 1997 BOMBMAKING REPORT, *supra* note 2, at 2 (“[S]uch ‘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.”).

⁷⁴ *United States v. Bell*, 414 F.3d 474, 482 n.8 (3d Cir. 2005) (“*Brandenburg* clearly does not apply to the kind of unprotected or unlawful speech or speech-acts (e.g. *aiding and abetting*, extortion, criminal solicitation, conspiracy, harassment, or fighting words) at issue. . . here.” (emphasis added)).

⁷⁵ *See Rice v. Paladin Enters. Inc.*, 128 F.3d 233, 267 (4th Cir. 1997) (stating that the book at issue in *Paladin*, with its total lack of legitimate purpose outside of promoting murder, makes the case unique).

⁷⁶ *See United States v. Sarracinao*, 131 F.3d 943, 946 (10th Cir. 1997) (stating that for an individual to aid and abet the commission of a crime, the proof must establish the commission of the offense by someone).

⁷⁷ *See United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985) (stating that “[T]he jury should have been charged that the expression was protected unless both the intent of the speaker and the tendency of his words were to produce or incite an imminent law-less act, one likely to occur.”); *see also United States v. Kelley*, 769

These ambiguities and nuances highlight both the obstacles and keys for a prosecutor facing a *Brandenburg* First Amendment challenge. The obstacles are surmountable given current case law, but the limited number of successful terrorism prosecutions also accurately reflects the difficulties facing prosecutors targeting online terrorism advocacy.⁷⁸

C. *Terrorism Prosecutions: Too Few or Too Many?*

Despite the perceived magnitude of the terrorism threat post-September 11, and the significant resources applied to terrorism in both prosecutorial manpower and statutes, of almost four hundred terrorism suspects since September 11, 2001, as of 2009, only thirty-nine were convicted of terrorism or national security crimes.⁷⁹ Even with the small percentage of convictions, scholars observe that prosecutors founded some of the successful convictions on the wrong doctrines and statutes, further confusing the appropriateness and applicability of various prosecution tools.⁸⁰ Given this large, checkered, and often contradictory prosecutorial record, it is not as surprising that academic analysis of the topic has called for change with significant numbers lining up at both ends of the spectrum.⁸¹ One side argues that existing law inappropriately restrains free

F.2d at 216-17 (“The cloak of the First Amendment envelops critical, but abstract, discussions of existing laws, but lends no protection to speech which urges the listeners to commit violations of current law.”).

⁷⁸ See Renieris, *supra* note 23 at 690.

⁷⁹ *Id.*

⁸⁰ Healy, *supra* note 8 at 670-71 (stating that the charges in *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999), though treated as solicitation, were actually more akin to advocacy).

⁸¹ However, supporters of the status quo do exist. Articles arguing that existing statutes are largely adequate. See, e.g., Brian P. Comerford, Note, *Preventing Terrorism by Prosecuting Material Support*, 80 NOTRE DAME L. REV. 723, 756 (2005) (stating that the material support statute serves as an effective and viable tool for successful prosecutions of individuals who support terrorist organization); Healy, *supra* note 8, at 669 (stating that threats, solicitations, criminal instructions, and conspiracy are ways of doing things, not saying things, and thus prosecution outside of *Brandenburg* is appropriate); Isaac Molnar, Comment, *Resurrecting the Bad Tendency Test to Combat Instructional Speech: Militas Beware*, 59 OHIO ST. L.J. 1333, 1335 (1998) (stating that existing First Amendment doctrines provide the tools necessary to determine what types of instructional speech should be protected).

speech and that even the very few recent convictions were ill founded.⁸² The other side, however, argues as vehemently that not only were the successful convictions required, but that Congress and courts must strengthen existing statutes and case law in order to facilitate more prosecutions.⁸³

⁸² See Holland, *supra* note 42, at 355 (stating a proposed public-danger doctrine would largely undermine free speech); see also Adam R. Kegley, Note, *Regulation of the Internet: The Application of Established Constitutional Law to Dangerous Electronic Communication*, 85 KY. L.J. 997, 999 (1997) (stating that publishing bomb-making information on the Internet should be protected under existing constitutional law); Chris Montgomery, Note, *Can Brandenburg v. Ohio Survive the Internet and the Age of Terrorism?: The Secret Weakening of a Venerable Doctrine*, 70 OHIO ST. L.J. 141, 144 (2009) (criticizing the weakening of *Brandenburg* through the government's use of Internet service providers to prosecute speech); Eugene Volokh, *supra* note 24, 1105-06 (2005) (stating crime-facilitating speech should be protected except in extremely narrow circumstances); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1285-86 (2005) [hereinafter *Speech as Conduct*] (dismissing *Giboney's* speech act doctrine and calling on courts to admit that speech restrictions are indeed speech restrictions).

⁸³ See Kendrick, *supra* note 31, at 1995 (proposing a new test for criminally instructional speech); see also Holly S. Hawkins, Note, *A Sliding Scale Approach For Evaluating the Terrorist Threat Over the Internet*, 73 GEO. WASH. L. REV. 633, 634 (2005) (calling for the Supreme Court to adopt a new test, the *Zippo* test, for regulating terrorist activity conducted over the Internet); Megan Anne Healy, *How the Legal Regimes of the European Union and the United States Approach Islamic Terrorist Web Sites: A Comparative Analysis*, 84 TUL. L. REV. 165, 165 (2009) [hereinafter Megan Healy] (suggesting a new approach for acting against developers of terrorist websites); Chelsea Norell, Note, *Criminal Cookbooks: Proposing a New Categorical Exclusion for the First Amendment*, 84 S. CAL. L. REV. 933, 934 (2011) (proposing "a new categorical exclusion from the First Amendment for speech that specifically details how to commit a crime"); Liezl Irelne Pangilinan, "When A Nation is at War": *A Context-Dependent Theory of Free Speech for the Regulation of Weapon Recipes*, 22 CARDOZO ARTS & ENT. L.J. 683, 685 (2004) (arguing for a clear and present danger test during wartime); Renieris, *supra* note 23 at 702-05 (outlining options for creating new Internet specific laws); Mark Rohr, *Grand Illusion? The Brandenburg Test and Speech That Encourages or Facilitates Criminal Acts*, 38 WILLAMETTE L. REV. 1, 75-85 (2002) (proposing a new test to clarify *Brandenburg*); Alec Walen, *Criminalizing Statements of Terrorist Intent: How to Understand the Law Governing Terrorist Threats, and Why It Should Be Used Instead of Long-Term Preventative Detention*, 101 J. CRIM. L. & CRIMINOLOGY 803, 804 (2011) (labeling the doctrine of true threats incoherent and outlining changes to the doctrine); S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, 41 WM. & MARY L. REV.

Those advocating for further protection of free speech argue that the Internet is a speech medium, and thus any prosecution based on information on the Internet should rightly run headlong into First Amendment challenges, primarily *Brandenburg*.⁸⁴ However, those advocating that the current statutory tools for prosecuting online terrorism advocacy are inadequate argue that the Internet is a speech medium that insulates the speaker from his or her audience, thus complicating the establishment of the criminal *mens rea* requirement but in no way reducing the threat.⁸⁵

Understanding the perspectives underlying these different opinions requires a deep analysis of the statutes and resulting case law currently applicable to prosecuting online terrorism advocacy. Part II begins the review by analyzing traditional statutory aiding and abetting, while focusing primarily on analyzing AEDPA's material support to terrorism statute (essentially an aiding and abetting statute) and its explosives information distribution statute.

II. REALIZING CONGRESSIONAL INTENT IN PROSECUTING AEDPA STATUTES

To prevent online terrorism advocacy, Congress passed two AEDPA statutes: § 2339B addressing material support of terrorism and § 842(p) addressing explosives information distribution.⁸⁶ In essence, Congress enacted § 2339B⁸⁷ specifically to address some of the prosecutorial shortcomings of the traditional aiding and abetting

1159, 1168 (2000) (advocating a new and unprotected category of speech, harm advocacy); Williams, *supra* note 24, at 366 (arguing new federal criminal legislation is needed to combat terrorism on the web).

⁸⁴ See *supra* note 82.

⁸⁵ See *supra* note 83.

⁸⁶ Relief of Global Exploration and Development Corporation, Pub. L. 106-54, § 2(a), 113 Stat 398, 398-99 (1999); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 303, 110 Stat. 1214, 1250-53 (1996).

⁸⁷ See Antiterrorism and Effective Death Penalty Act § 303, 101 Stat. at 1250-53 (“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 10 years, or both.”).

statute apparent in § 2.⁸⁸ Therefore, Section A of this Article analyzes § 2339B in conjunction with § 2, while AEDPA's distribution of information relating to explosives statute, § 842(p), is analyzed in Section B.

A. *The Aiding and Abetting Evolution of AEDPA — From 18 U.S.C. § 2 to § 2339B*

This Section will analyze both § 2, traditional aiding and abetting,⁸⁹ and AEDPA's § 2339B, material support to terrorism, in order to establish how effectively § 2339B has addressed § 2's shortcomings in prosecuting online terrorism advocacy. Applying traditional § 2 aiding and abetting to online terrorism advocacy faces three primary challenges: (1) "completed" crime challenges;⁹⁰ (2) *Brandenburg* challenges;⁹¹ and (3) *mens rea* challenges.⁹² Though existing case law expands the possibilities of § 2 aiding and abetting prosecution in the face of *Brandenburg* and *mens rea* challenges,⁹³ it provides no solution for the completed crime challenge. However, Congress tried to address the completed crime challenge in the terrorism context by passing § 2339B.⁹⁴ Under this provision, the intent (knowingly) and *Brandenburg* challenges of traditional aiding and abetting still apply, but the requirement for a crime charged

⁸⁸ See *United States v. White*, 610 F.3d 956, 959-60 (7th Cir. 2010) (illustrating cases in which § 2's requirement that a crime be charged against someone else was intended to address prosecutorial shortcoming).

⁸⁹ The federal statute adopting traditional aiding and abetting reads:

Principals (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 (2012).

⁹⁰ See *Colosacco v. United States*, 196 F.2d 168, 167 (10th Cir. 1952).

⁹¹ See *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (per curiam).

⁹² See *Rice v. Paladin Enter. Inc.*, 128 F.3d 233, 267 (4th Cir. 1997).

⁹³ See *Paladin*, 128 F.3d at 253-54 (expanding the possibilities of § 2 aiding and abetting prosecution in the face of *Brandenburg* and *mens rea* challenges).

⁹⁴ See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 303, 110 Stat. 1214, 1250-53 (1996).

against someone else is removed.⁹⁵ While a clear prosecutorial advantage over traditional aiding and abetting, this *actus reus* adjustment has not been the boon to prosecutions one might expect.⁹⁶

1. Prosecution Challenges and Solutions under § 2,
Traditional Aiding and Abetting

Aiding and abetting means assisting or facilitating the commission of a crime, or promoting its accomplishment.⁹⁷ Traditional aiding and abetting assigns “criminal responsibility for acts which one assists another in performing.”⁹⁸ It requires the defendant to “associate himself with the venture . . . participate in it as in something that he wishes to bring about,”⁹⁹ and there must be no reasonable doubt that an offense was committed by someone who was aided and abetted.¹⁰⁰ Understanding these requirements, there are apparent challenges in prosecuting online terrorism advocacy under traditional aiding and abetting. As § 2 suggests, and existing case law makes clear, for a prosecutor to charge someone with traditional aiding and abetting there must be a crime charged against

⁹⁵ See 18 U.S.C. § 2339B (2012); The Seventh Circuit also noted:

In the case of a criminal solicitation, the speech asking another to commit a crime is the punishable act. Solicitation is an in choate crime; the crime is complete once the words are spoken with the requisite intent, and no further actions from either the solicitor or the solicitee are necessary.

United States v. White, 610 F.3d 956, 960 (7th Cir. 2010).

⁹⁶ Megan Healy, *supra* note 83, at 182 (“On the one hand, the material support statutes, especially section 2339B, are ideal for cyber-related terrorist activities. . . . [O]n the other hand, federal prosecutors have only convicted one person under sections 2339A or 2339B for developing and operating extremist Web sites.”).

⁹⁷ BLACK’S LAW DICTIONARY 81 (9th ed. 2009).

⁹⁸ Nye & Nissen v. United States, 336 U.S. 613, 620 (1949).

⁹⁹ United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).

¹⁰⁰ Colosacco v. United States, 196 F.2d 165, 167 (10th Cir. 1952) (“While conviction of the principal is not a prerequisite to the conviction of the aider and abettor, the proof must establish beyond a reasonable doubt that the offense was committed by someone and that the person charged as an aider and abettor aided and abetted in its commission.”).

someone else.¹⁰¹ Thus, in trying to preempt the proliferation of terror advocacy, traditional aiding and abetting is of little help.¹⁰²

Preemption of online terrorism advocacy under § 2 is likely impossible, but if there is a chargeable offense against someone else it is probably more prosecutable now under § 2 aiding and abetting than ever before. The strongest support for this conclusion is the Fourth Circuit Court of Appeals decision in *Rice v. Paladin*.¹⁰³

The *Paladin* case involved a civil lawsuit for aiding and abetting against the publisher of a book entitled *Hit Man*, a very detailed “how to” manual for committing murder for hire.¹⁰⁴ A murder victim’s relatives brought the civil suit after learning that the killer used the manual extensively to prepare for the killings.¹⁰⁵ The bulk of the supporting cases analyzed and applied in *Paladin* are tax or drug related.¹⁰⁶ These cases are uniquely suited to the facts in *Paladin* because, like the *Hit Man* book in *Paladin*, courts in tax or drug cases can quickly dismiss any alleged First Amendment justification as a charade.¹⁰⁷ In contrast, terrorism websites often

¹⁰¹ See *id.*

¹⁰² See generally 1997 BOMBLAKING REPORT, *supra* note 2.

¹⁰³ See *Rice v. Paladin Enter. Inc.*, 128 F.3d 233, 266 (4th Cir. 1997) (“Admittedly, a holding that *Paladin* is not entitled to an absolute defense . . . may not bode well for those publishers . . . which are devoted exclusively to teaching techniques of violent activities that are criminal *per se*.”). See also Molnar, *supra* note 81, at 1366 (“Unfortunately, the Fourth Circuit’s approach towards instructional speech probably extends beyond the facts of the [*Paladin*] case.”).

¹⁰⁴ See *Paladin*, 128 F.3d at 233, 235-41.

¹⁰⁵ *Id.* at 241.

¹⁰⁶ See *id.* at 245 (discussing *United States v. Kelley*, 769 F.2d 215 (4th Cir. 1985) (tax case); *United States v. Rowlee*, 899 F.2d 1275 (2d Cir. 1990) (tax case); *United States v. Moss*, 604 F.2d 569 (8th Cir. 1979) (tax case); *United States v. Buttorff*, 572 F.2d 619 (8th Cir. 1978) (tax case); and *United States v. Barnett*, 667 F.2d 835 (9th Cir. 1982) (drug case)).

¹⁰⁷ See *United States v. Fleschner*, 98 F.3d 155, 159 (4th Cir. 1996) (finding the First Amendment claim to be frivolous and that “no reasonable juror could conclude that the defendants’ words and actions were merely advocating opposition to the income tax laws.”); *but see United States v. Freeman*, 761 F.2d 549, 551-52 (9th Cir. 1985) (stating “[w]here there is some evidence, however, that the purpose of the speaker or the tendency of his words are directed to ideas or consequences remote from the commission of the criminal act, a defense based on the First Amendment is a legitimate matter for the jury’s consideration.”).

advocate more than just criminal conduct¹⁰⁸ and thus are likely entitled to some level of *Brandenburg* protection.¹⁰⁹

The extensive *Brandenburg* analysis done by the *Paladin* trial court was reviewed comprehensively in the Department of Justice's *1997 Report on the Availability of Bombmaking Information*.¹¹⁰ The Fourth Circuit, in turn, was not shy about integrating many arguments from the DOJ Report into their decision.¹¹¹ For example, the *Paladin* court explained:

Indeed, as the Department of Justice recently advised Congress, the law is now well established that the First Amendment, and *Brandenburg*'s "imminence" requirement in particular, generally poses little obstacle to the punishment of speech that constitutes criminal aiding and abetting, because "culpability in such cases is premised, not on defendants' 'advocacy' of criminal conduct, but on defendants' successful efforts to assist others by detailing to them the means of accomplishing the crimes."¹¹²

The Fourth Circuit's statement is consistent with the express finding of the DOJ Report that "[t]he question of whether criminal conduct is 'imminent' is relevant for constitutional purposes only where, as in *Brandenburg* itself, the government attempts to restrict advocacy, as such."¹¹³ Though the Fourth Circuit's analysis certainly does not end

¹⁰⁸ See The AQ Chef, *Make a Bomb in the Kitchen of Your Mom*, INSPIRE, Summer 2010, at 33-40 [hereinafter *Make a Bomb*], available at <http://azelin.files.wordpress.com/2010/06/aqap-inspire-magazine-volume-1-uncorrupted.pdf> ("[E]very Muslim is required to defend his religion and nation.").

¹⁰⁹ See *Freeman*, 761 F.2d at 552.

¹¹⁰ 1997 BOMBMAKING REPORT, *supra* note 2, at 28 n.43 ("[W]e think that the district court's First Amendment analysis in [*Paladin*] is, in some respects, open to question."). The report proceeds to provide ten pages of analysis countering the *Paladin* analysis.

¹¹¹ See *Paladin*, 128 F.3d at 244 (citing KENT GREENAWALT, *SPEECH CRIME & THE USES OF LANGUAGE* 85 (1989)); 1997 BOMBMAKING REPORT, *supra* note 2, at 36 n.60 (citing GREENAWALT, at 85)). However, Eugene Volokh takes some issue with Greenawalt's reasoning. See *Speech as Conduct*, *supra* note 82, 1326-35 (arguing that Greenawalt reaches many proper conclusions, but the reasoning is incomplete).

¹¹² *Paladin*, 128 F.3d at 246 (citing 1997 BOMBMAKING REPORT, *supra* note 2, at 37). See also GREENAWALT, *supra* note 111, at 261-65.

¹¹³ 1997 BOMBMAKING REPORT, *supra* note 2, at 37.

the confusion surrounding *Brandenburg*,¹¹⁴ it does highlight grey areas in *Brandenburg* that prosecutors should be aware of in online terrorism advocacy cases.¹¹⁵

Paladin interprets the decision in *Brandenburg* as recognizing three different categories for speech.¹¹⁶ One category is speech unprotected by the First Amendment, speech that “incite[s] to imminent lawless action.”¹¹⁷ The second category is speech protected by the First Amendment, relatively innocent speech, or “abstract advocacy,” and the third category is “preparation and steeling.”¹¹⁸ The *Paladin* court highlights that “‘preparation and steeling’ [for a criminal act] can occur without ‘incitement’ [to imminent lawless action], and vice versa.”¹¹⁹ These distinctions create ambiguities in the Supreme Court’s *Brandenburg* analysis. Per *Paladin*, the Court may have intended to protect “preparation and steeling” unless it resulted in “incitement to imminent lawless action.”¹²⁰ Another possible interpretation is that *Brandenburg* protects “abstract advocacy,” but “incitement to imminent lawless action” is unprotected, and “preparation and steeling” is a grey area somewhere in the middle.¹²¹ Though *Paladin*’s largely blanket endorsement of a more narrow interpretation of *Brandenburg* helps the prosecution possibilities under § 2, it is important to recognize that some of the case law cited to in *Paladin* has shortcomings when applied to terrorism.

Though *Brandenburg* and the lack of subsequent Supreme Court interpretation of the opinion leave open the debate about First

¹¹⁴ See *Paladin*, 128 F.3d at 264 (referring to the short *per curiam* opinion as “elliptical”).

¹¹⁵ *Id.* at 264-65.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* (“[T]he Court distinguishes between “mere advocacy” and “incitement to imminent lawless action,” a distinction which, as a matter of common sense and common parlance, appears different from the first distinction drawn, because “preparation and steeling” can occur without “incitement,” and vice-versa.” (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (*per curiam*))).

¹¹⁹ *Id.* at 264-65.

¹²⁰ See *Rice v. Paladin Enter. Inc.*, 128 F.3d 233, 264 (4th Cir. 1997).

¹²¹ See *id.*

Amendment protections,¹²² there is some evidence that the modern Supreme Court would be supportive of less protection for “preparation and steeling.”¹²³ Specifically, Justice Stevens, in his denial of the Petition for Writ of Certiorari of *Stewart v. McCoy*, noted that preparation and steeling “raises a most important issue concerning the scope of our holding in *Brandenburg*, for our opinion expressly encompassed nothing more than ‘mere advocacy.’”¹²⁴ Stevens offered that while imminence is required to prosecute for mere advocacy, the imminence requirement does not necessarily apply to speech that performs “a teaching function.”¹²⁵ These statements are especially telling considering the facts of the case. In *Stewart*, the defendant had prior gang experience and very casually and sporadically mentored young gang members on how to operate their gang.¹²⁶ Under no circumstances could Justice Stevens consider this counseling “imminent” for *Brandenburg* purposes, as most of it occurred at a barbecue where significant gang activity was highly unlikely to immediately erupt.¹²⁷ Though certainly not dispositive of a *Brandenburg* imminence challenge, the *Paladin* analysis combined with the statements of Justice Stevens in *Stewart*¹²⁸ are colorable arguments that could lead to a relaxed standard in the context of § 2 traditional aiding and abetting.

Another obstacle to prosecuting § 2 aiding and abetting—especially in an Internet-based aiding and abetting scenario—is establishing intent.¹²⁹ The *Paladin* analysis provides valuable analogous support for establishing criminal intent because the court suggests that the intent required in *Paladin*, a civil case, is even

¹²² The Court has only applied *Brandenburg* in two other cases. See *Hess v. Indiana*, 414 U.S. 105, 108 (1973) and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927-28 (1982).

¹²³ See *infra* Part II.A.2 for discussion of 18 U.S.C. § 2339B (2012).

¹²⁴ *Stewart v. McCoy*, 537 U.S. 993, 994-95 (2002) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (per curiam)).

¹²⁵ *Id.*

¹²⁶ *Arizona v. McCoy*, 928 P.2d 647, 648 (Ariz. Ct. App. 1996).

¹²⁷ *Id.*

¹²⁸ See *Rice v. Paladin Enter. Inc.*, 128 F.3d 233 (4th Cir. 1997); *Stewart*, 537 U.S. at 993.

¹²⁹ See *Paladin*, 128 F.3d at 247-48 (stating generally the challenge of establishing intent).

higher than that required in a criminal case.¹³⁰ Therefore, the intent necessary in a criminal case, even one factually similar to *Paladin* where a publisher is detached from their audience—like someone operating through the Internet—would be comparable and perhaps even less than that required in *Paladin*. The *Paladin* court acknowledged, however, that the facts of the case were somewhat unique because the speech at issue was void of any “legitimate purpose,”¹³¹ and because the book publisher stipulated their intent to assist criminal activity, a stipulation unlikely to be repeated in a contested online terrorism advocacy prosecution.¹³² Regardless, the court’s analysis in *Paladin* could nonetheless be very applicable for establishing criminal intent under similar facts.

The Fourth Circuit’s *Paladin* analysis correctly states that intent is a question for the jury, the trier of fact.¹³³ More importantly, the evidence the *Paladin* decision states could establish intent for a jury is equally applicable to the scenario of online terrorism advocacy. To demonstrate *Paladin*’s applicability, one need only consider how its intent analysis could apply to the online Summer 2010 issue of *Inspire* magazine that the U.S. Army soldier mentioned in the Introduction possessed when he was arrested.¹³⁴

First, the book *Hit Man* was, and declared itself to be, a technical manual for the purpose of murder.¹³⁵ Similarly, the Summer 2010 issue of *Inspire* magazine includes a section titled

¹³⁰ The *Paladin* court stated:

The first, which obviously would have practical import principally in the civil context, is that the First Amendment may, at least in certain circumstances, superimpose upon the speech-act doctrine a heightened intent requirement in order that preeminent values underlying that constitutional provision not be imperiled.

Id.

¹³¹ *Id.* at 267 (stating the book at issue in *Paladin*, with its total lack of legitimate purpose outside of promoting murder, does make the case unique).

¹³² However, though the case is factually similar, the analysis on intent is dicta because the book publisher stipulated their intent to assist criminal activity. *Id.* at 265.

¹³³ *Id.* at 253.

¹³⁴ Thomas et al., *supra* note 3.

¹³⁵ *Paladin*, 128 F.3d at 253.

“Open Source Jihad” which not only outlines specific instructions for making a pipe bomb, but also highlights possible targets with statements such as “every Muslim is required to defend his religion and nation,” and “[t]he Western governments today are waging a relentless war against Islam.”¹³⁶ Juxtaposing the *Paladin* court’s observations on the *Hit Man* book to *Inspire* magazine demonstrates the applicability of the court’s holding: “A jury need not, but plainly could, conclude from such prominent and unequivocal statements of criminal purpose that the publisher who disseminated the book intended to assist in the achievement of that purpose.”¹³⁷

Second, *Hit Man* not only instructed on murder, it also glamorized and promoted murder.¹³⁸ Although this type of promotion was clearly speech, it was still used as a basis for establishing the publisher’s intent.¹³⁹ Thus, although *Inspire* is a magazine largely filled with statements that are probably just abstract advocacy under *Brandenburg* (e.g., “every Muslim is required to defend his religion and nation”),¹⁴⁰ it is at least equally arguable that these abstract advocacy statements combine with other statements to promote and glamorize jihad. For example: “every Muslim is required to defend his religion and nation,” combined with “Nidal Hassan and Shahzad were imprisoned, but they have become heroes and icons that *are examples to be followed*” may move beyond abstract advocacy to promotion and glamorization.¹⁴¹

Third, the *Paladin* court highlighted that a particular marketing strategy can be indicative of intent.¹⁴² Admittedly, the parallels between *Hit Man* and *Inspire* in this prong of the analysis are not as direct. The *Paladin* court relies on the targeted nature of

¹³⁶ *Make a Bomb*, *supra* note 108, at 33-40.

¹³⁷ *Paladin*, 128 F.3d at 253.

¹³⁸ *Id.* at 254.

¹³⁹ *Id.* (“The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.” (quoting *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993))).

¹⁴⁰ *Make a Bomb*, *supra* note 108, at 33.

¹⁴¹ *See id.* (emphasis added).

¹⁴² *Paladin*, 128 F.3d at 254 (“[J]ury may infer intent to assist a criminal operation based upon a drug distributor’s marketing strategy” (quoting *Direct Sales v. United States*, 319 U.S. 703, 712-13 (1943))).

Hit Man's marketing, primarily the fact that the *Hit Man* text was available through advertisements in specialized magazines such as *Soldier of Fortune*, and therefore was not advocacy to the public.¹⁴³ The *Hit Man* marketing stands in sharp contrast to *Inspire* magazine, which is discoverable and obtainable online with no sort of filtering or gatekeeping through niche magazines or otherwise.¹⁴⁴ However, when discussing intent, the *Paladin* court clearly stated that they "d[id] not believe that the First Amendment insulates that speaker [who would, for profit or other motive, intentionally assist and encourage crime and then seek the First Amendment protection] from responsibility for his actions simply because he may have disseminated his message to a wide audience."¹⁴⁵ Further, the *Paladin* court also talked about the narrow focus of the subject matter in *Hit Man* as being evidence of marketing intent.¹⁴⁶ A narrow focus is also evident throughout *Inspire* magazine: jihad on the West.¹⁴⁷ Thus, although the marketing for *Inspire* is not equivalent to that for *Hit Man*, the dissimilarities would likely not extinguish intent.¹⁴⁸

Finally, the *Paladin* court stated that a jury could establish intent by finding that the only purpose of *Hit Man*'s speech was to facilitate murders.¹⁴⁹ This refers to the unique facts of the case, and

¹⁴³ *Id.* at 254-55.

¹⁴⁴ *Make a Bomb*, *supra* note 108, at 33-40.

¹⁴⁵ *Paladin*, 128 F.3d at 248.

¹⁴⁶ *Id.* at 254.

¹⁴⁷ There are numerous examples of this central jihad message throughout the issues of *Inspire*, and the degree to which this message is constant is impressive. In the "letter from the editor" section in the Summer 2010 issue, the very first paragraph outlines that the title of the magazine comes from the word "harid," which is commonly translated as "incite." *Letter from the editor*, INSPIRE, Summer 2010, at 2, available at <http://azelin.files.wordpress.com/2010/06/aqap-inspire-magazine-volume-1-uncorrupted.pdf>. The editor goes on to explain that the verb "harid" deals with inspiring someone to do something that, if they fail to act and follow through, they will perish. *Id.* More concretely, the editor introduces the next paragraph with the sentence, "This Islamic Magazine is geared towards making the Muslim a mujahid in Allah's path." *Id.*

¹⁴⁸ *Id.*; see *Paladin*, 128 F.3d at 254.

¹⁴⁹ *Paladin*, 128 F.3d at 255.

Hit Man's lack of "legitimate purpose," mentioned previously.¹⁵⁰ *Inspire* is different than *Hit Man* because throughout the magazine it has an obvious religious, social, and political agenda.¹⁵¹ The distinction, however, may be surmountable by examining its purpose with a limited scope:¹⁵² for instance, a single article in *Inspire*, such as "Make a bomb in the kitchen of your Mom," rather than the entire magazine.¹⁵³ Taken in isolation, the article is very similar to the entire *Hit Man* text, which would create a significant challenge for someone advocating the legitimate uses of the information.¹⁵⁴ Specifically, statements about bomb sniffing dogs' inability to detect the recipe's ingredients, or that in one or two days a bomb could be made to kill roughly ten people, and in a month a bomb that could kill "tens of people," would be hard to innocently explain to a jury.¹⁵⁵

In the wake of the DOJ Report, *Paladin* did much to expand the possibilities of § 2 aiding and abetting prosecution in the face of *Brandenburg* and *mens rea* challenges. The *Paladin* court, however, provides no solutions for the first challenge mentioned in the beginning of this Part: the requirement of a criminal charge against someone else. Nevertheless, as recent events in Boston unfortunately demonstrate, there will be occasions where criminals' plans are successful, making § 2 aiding and abetting prosecutions possible, and under the *Paladin* analysis, more probable.

¹⁵⁰ See *id.* at 267 (stating the book at issue in *Paladin*, with its total lack of legitimate purpose outside of promoting murder, does make the case unique).

¹⁵¹ See INSPIRE, Summer 2010, available at <http://azelin.files.wordpress.com/2010/06/aqap-inspire-magazine-volume-1-uncorrupted.pdf>.

¹⁵² There is currently no statutory or legislative authority that would militate against such a limited examination.

¹⁵³ *Make a Bomb*, *supra* note 108, at 33-40.

¹⁵⁴ See *Paladin*, 128 F.3d at 255 ("The likelihood that *Hit Man* actually is, or would be, used in the legitimate manners hypothesized by *Paladin* is sufficiently remote that a jury could quite reasonably reject them altogether as alternative uses for the book.").

¹⁵⁵ *Make a Bomb*, *supra* note 108, at 33.

2. Reduced Prosecutorial Burden in AEDPA's Material Support to Terrorists Statute's

At the time of the *Paladin* decision, Congress had already tried to reduce the aforementioned “completed crime” requirement for terrorism. Congress passed § 2339B of AEDPA,¹⁵⁶ which forbids material support to terrorist organizations, specifically as a broader version of § 2 traditional aiding and abetting.¹⁵⁷ To find someone guilty of violating § 2339B, a prosecutor must prove the suspect knowingly provided material support or resources to a foreign terrorist organization.¹⁵⁸ Thus, the *mens rea* and *Brandenburg* challenges still apply, but unlike with prosecution under § 2, there is no requirement for a criminal act by someone else.¹⁵⁹ While it would be reasonable to think that § 2339B's requirements, which are essentially lower aiding and abetting requirements, would result in more § 2339B prosecutions, these prosecutions have in fact been rare for multiple reasons.¹⁶⁰

The scope of § 2339B was significantly broadened when the 2001 USA PATRIOT Act added the language “expert advice or assistance” to the definition of “material support or resources”

¹⁵⁶ The statute reads as follows:

- (a) Prohibited Activities. – (1) Unlawful conduct. – Whoever 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. . . .
- (g) Definitions. – As used in this section – . . . (4) the term “material support or resources” has the same meaning given that term in section 2339A (including the definitions of “training” and “expert advice or assistance” in that section)[.]

18 U.S.C. § 2339B (2012).

¹⁵⁷ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 303, 110 Stat. 1214, 1250-53 (1996).

¹⁵⁸ 18 U.S.C. § 2339B (2012).

¹⁵⁹ See *United States v. White*, 610 F.3d 956, 960 (7th Cir. 2010) (“Solicitation is an inchoate crime; the crime is complete once the words are spoken with the requisite intent, and no further actions from either the solicitor or the solicitee are necessary.”).

¹⁶⁰ Megan Healy, *supra* note 83, at 182 (“On the one hand, the material support statutes, especially section 2339B, are ideal for cyber-related terrorist activities. . . . [O]n the other hand, federal prosecutors have only convicted one person under sections 2339A or 2339B for developing and operating extremist Web sites.”).

provided in § 2339A.¹⁶¹ In addition to adding that language, the new § 2339A defined “expert advice or assistance” as “advice or assistance derived from scientific, technical or other specialized skill.”¹⁶² This broadening created possible constitutional challenges for the material support statute, including both facial and *Brandenburg* challenges.¹⁶³ Additionally, the “knowingly” *mens rea* required by § 2339B, as opposed to the “intending” *mens rea* for § 2339A, has created some confusion for those looking to apply § 2339B to online terrorism advocacy.¹⁶⁴ In order to maintain the statute’s constitutionality, prosecutors can only apply the “knowingly” *mens rea* to the organization’s designation as a foreign terrorist organization or the activities causing it to be designated a foreign terrorist organization.¹⁶⁵ Further compounding the confusion, prosecutors can only apply § 2339B to someone supporting a foreign terrorist organization,¹⁶⁶ while § 2339A applies to a broader terrorist population.¹⁶⁷ The constitutional challenges, as well as a complicated

¹⁶¹ 18 U.S.C. § 2339A (2012). The definition of “material support or resources” provided in § 2339A originally provided a list of things including property, service, financial securities, lodging, training, safehouses, false documentation or identification, but did not include the language “expert advice or assistance.” Williams, *supra* note 24, at 374-75.

¹⁶² 18 U.S.C. § 2339A (2012).

¹⁶³ See Williams, *supra* note 24, at 380-82; see also Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2712, 2718-19 (2010) (plaintiffs claimed that the “statute is too vague, in violation of the Fifth Amendment, and that it infringes their rights to freedom of speech and association, in violation of the First Amendment.”); People’s Mojahedin Org. of Iran v. Dep’t of State, 327 F.3d 1238, 1244 (D.C. Cir. 2003) (petitioner argued that “by forbidding all persons within or subject to the jurisdiction of the United States from ‘knowingly provid[ing] material support or resources,’ 18 U.S.C. § 2339B(a)(1), to it as a designated foreign terrorist organization, the statute violates its rights of free speech and association guaranteed by the First Amendment.”); United States v. Taleb-Jedi, 566 F. Supp. 2d 157, 177, 185 (E.D.N.Y. 2008) (defendant argued that § 2339B violates the Fifth Amendment’s Due Process Clause by permitting criminal liability to attach in the absence of personal guilt); United States v. Sattar, 272 F. Supp. 2d 348, 368 (S.D.N.Y. 2003) (defendant contended that the statute interfered with her First Amendment associational rights).

¹⁶⁴ See Williams, *supra* note 24, at 381-82.

¹⁶⁵ *Id.* at 381.

¹⁶⁶ 18 U.S.C. § 2339B (2012).

¹⁶⁷ See Williams, *supra* note 24, at 382.

mens rea requirement, have significantly dampened online terrorism advocacy prosecutions.¹⁶⁸

Reviewing prosecutors' application of § 2339B to online terrorism advocacy underscores the dampening. To date, federal prosecutors have only convicted one person with § 2339B. Though the conviction in *United States v. Kassir*¹⁶⁹ related to operations surrounding extremist terrorist websites,¹⁷⁰ that conviction's context is important because it involved setting up a jihad training camp in the United States in addition to the online activities.¹⁷¹ The acquittal in *United States v. Al-Hussayen*,¹⁷² with charges founded only on online terrorism advocacy, is a more representative § 2339B prosecution.

Prosecutors charged Al-Hussayen with two counts of § 2339A and one count of § 2339B.¹⁷³ The charges stemmed from four Internet-related activities: acting as webmaster for three Islamic websites, moderating and posting within an e-mail group advocating violent jihad and encouraging Muslims to donate money for jihad, setting up an online donation system for Hamas, and establishing websites for two Saudi clerics to publish violent jihad fatwas.¹⁷⁴ Al-Hussayen made numerous arguments in attempting to get the case dismissed, some of which had been previously successful against § 2339 charges.¹⁷⁵ The court, however, stood firm that whether Al-Hussayen provided material support to a terrorist organization was a

¹⁶⁸ See Megan Healy, *supra* note 83, at 185. As of November 2009, only one person has been convicted of materially supporting terrorism by operating a terrorist website. *Id.*

¹⁶⁹ *United States v. Kassir*, No. 04 Cr. 356 (JFK), 2009 U.S. Dist. LEXIS 83075, at *1 (S.D.N.Y. Sept. 11, 2009).

¹⁷⁰ See Megan Healy, *supra* note 83, at 182 (discussing the conviction of Oussama Kassir, convicted for material support under §2339B in connection with promoting terrorism and distributing terrorist manuals).

¹⁷¹ *Kassir*, 2009 U.S. Dist. LEXIS 83075, at *1.

¹⁷² Megan Healy, *supra* note 83, at 183. See *United States v. Al-Hussayen*, No. CR03-048-C-EJL, 2004 U.S. Dist. LEXIS 29793, at *9 (D. Idaho Apr. 6, 2004).

¹⁷³ Megan Healy, *supra* note 83, at 183.

¹⁷⁴ *Id.*

¹⁷⁵ See Williams, *supra* note 24, at 380-82 (discussing *United States v. Sattar*, 314 F. Supp. 2d 279, 301-02 (S.D.N.Y. 2004)).

question for the jury.¹⁷⁶ Al-Hussayen was ultimately found not guilty of the § 2339 charges, with one juror citing lack of “hard evidence.”¹⁷⁷

Al-Hussayen demonstrated that a § 2339B prosecution for online terrorism advocacy similar to *Inspire*'s could end in conviction. While Al-Hussayen advocated for jihad over the web and e-mail, his activity beyond that consisted only of facilitating websites and fundraising.¹⁷⁸ Although targeting this behavior is exactly what Congress intended when passing the statute,¹⁷⁹ it is not surprising that this low level of “terrorism” did not resonate with the jury. It is possible that advocacy similar to *Inspire*—a combination of advocating attacks on the West, idolizing Nidal Hassan, and extremely detailed tactical advice on explosives, weapons, and avoiding law enforcement detection—might constitute “hard evidence” for a jury.¹⁸⁰

While *Kassir* and *Al-Hussayen* raise interesting questions about § 2339B, the Supreme Court's 2010 case, *Holder v. Humanitarian Law Project* (“HLP”),¹⁸¹ likely signals a shift in § 2339B interpretation that limits the cases' applicability. In *HLP*, the Supreme Court found § 2339B constitutional as applied to defendants attempting to provide humanitarian and political support to two designated foreign terrorist organizations in the form of money, aid, legal training, and political advocacy, but reserved judgment on more difficult cases likely to arise.¹⁸² However, despite the opinion's insistence that the holding only applied to the specific

¹⁷⁶ *Al-Hussayen*, 2004 U.S. Dist. LEXIS 29793, at *9; see also *Rice v. Paladin Enter. Inc.*, 128 F.3d 233, 253 (4th Cir. 1997) (under similar circumstances, stating it was a question for the jury).

¹⁷⁷ Megan Healy, *supra* note 83, at 185.

¹⁷⁸ *Id.* at 183.

¹⁷⁹ Williams, *supra* note 24, at 377 (“Congress believed that § 2339A continued to leave open this source of terrorist funding, and Congress now had determined to close it.”).

¹⁸⁰ See *Make a Bomb*, *supra* note 108 at 33-40.

¹⁸¹ See generally *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

¹⁸² *Id.* at 2712.

facts at issue, it has generated significant bar¹⁸³ and academic commentary.¹⁸⁴ For example, the defense bar states that the Supreme Court's most recent interpretation of "material support" in § 2339B criminalizes activities that are not only desirable, but also legal and protected by the First Amendment, and their interpretation has textual support in the case.¹⁸⁵ Academia voiced different concerns, highlighting the Court's inordinate deference to the political branches' judgment.¹⁸⁶ Regardless of its source, the concern signals a newly reinvigorated § 2339B.

Prior to *HLP*, a Florida district court judge outlined the three possible *mens rea* interpretations under § 2339B as: (1) knowledge that a person is providing "material support" under the statute; (2) number one *plus* the knowledge "that the recipient is a Foreign Terrorist Organization ("FTO") or is an entity that engaged in the type of terrorist activity that would lead to designation as an FTO;" or, (3) number two *plus* knowledge "that the recipient could or would utilize the support to further the illegal activities of the entity."¹⁸⁷ Number three traditionally established "knowledge" under § 2339B, but *HLP* effectively reduced the standard to include number two, stating: "Congress plainly spoke to the necessary mental state for violation of § 2339B, and it chose knowledge about the organization's connection to terrorism, not specific intent to further the organization's terrorist activities."¹⁸⁸ Though this is by no means strict liability, the reduction of *mens rea* is significant. For instance, in the case of *Al-Hussayen*, Al-Hussayen was setting up online

¹⁸³ See, e.g., Michael Price, *Mens Rea and Material Support of Terrorism: How Congress Should Respond to Holder v. Humanitarian Law Project*, 34 CHAMPION 53, 53 (2010).

¹⁸⁴ See, e.g., *The Supreme Court, 2009 Term—Constitutional Law, Freedom of Speech and Expression, Material Support for Terrorism*, 124 HARV. L. REV. 259, 259 (2010) [hereinafter *The Supreme Court, 2009 Term*].

¹⁸⁵ Price, *supra* note 183, at 53.

¹⁸⁶ Note a seemingly significant shift from *Hamdi v. Rumsfeld* and *Boumediene v. Bush*. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Boumediene v. Bush*, 553 U.S. 723 (2008). See also *The Supreme Court, 2009 Term, supra* note 185, 266 (2010) (criticizing the Supreme Court's broad deference to the political branches for a First Amendment issue as raising a serious problem because "uncritically relying on such judgments does not seem consistent with the application of heightened scrutiny.")

¹⁸⁷ *United States v. Al-Arian*, 329 F. Supp. 2d 1294, 1298 (M.D. Fla. 2004).

¹⁸⁸ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2717 (2010).

donations for Hamas, a designated foreign terrorist organization.¹⁸⁹ Applying § 2339B as interpreted in *HLP* would have probably led to a successful prosecution.¹⁹⁰ While there are still prosecutorial challenges under *HLP*'s § 2339B interpretation, the odds of conviction have increased.

Another interesting part of the *HLP* majority opinion is its conspicuous failure to mention *Brandenburg*.¹⁹¹ As the dissent highlights, precedent seems to dictate that *Brandenburg* and its imminence requirement applies;¹⁹² however, in eight pages of discussion, the majority does not once mention *Brandenburg*.¹⁹³ In justifying its upholding of § 2339B, the Court focuses instead on the narrowness of who the statute applies to,¹⁹⁴ what the statute applies to,¹⁹⁵ general deference to Congress and the Executive,¹⁹⁶ Congress and the Executive's unique qualifications regarding foreign policy and terrorism,¹⁹⁷ and Congress's "stated intent not to abridge First Amendment rights."¹⁹⁸ Though the Court's majority heavily qualified its holding by stating that independent speech regulation would not pass constitutional muster even if the prohibited speech

¹⁸⁹ Megan Healy, *supra* note 83, at 183; *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE (Sept. 28, 2012) <http://www.state.gov/j/ct/rls/other/des/123085.htm>.

¹⁹⁰ Megan Healy, *supra* note 83, at 182-83.

¹⁹¹ *Humanitarian Law Project*, 130 S. Ct. at 2722-30.

¹⁹² *Id.* at 2733 (Breyer, J., dissenting) ("Here the plaintiffs seek to advocate peaceful, lawful action to secure political ends; and they seek to teach others how to do the same. No one contends that the plaintiffs' speech to these organizations can be prohibited as incitement under *Brandenburg*.").

¹⁹³ *Id.* at 2722-30.

¹⁹⁴ Chief Justice Roberts' majority opinion explained:

Rather, Congress has prohibited 'material support,' which most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.

Id. at 2710.

¹⁹⁵ *Id.* at 2724 ("[P]laintiffs' speech is not barred if it imparts only general or unspecialized knowledge.").

¹⁹⁶ *Id.* at 2727 (stating Congress considered whether aid intended for peaceful purposes would have effect and justifiably rejected that view, and that the Executive, like Congress, is entitled to deference).

¹⁹⁷ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2728 (2010).

¹⁹⁸ *Id.*

benefited foreign terrorist organizations, litigants in lower courts are already experiencing the results of the *HLP* decision.¹⁹⁹

The legal academic community may still be undecided about the wisdom of *HLP*'s *mens rea* standard and the lack of *Brandenburg* analysis, but this lack of legal consensus is not stopping prosecutors from applying *HLP*'s results in the lower federal courts. Indeed, the effect of the June 2010 *HLP* decision on § 2339B prosecutions was already evident in the January 2011 case *United States v. Mustafa*.²⁰⁰ There, the government accused Oussama Kassir, a co-defendant of Mustafa and the same Kassir discussed previously in *United States v. Kassir*, of providing training in how to conduct violent jihad, and hosting on the Internet terrorist training manuals unavailable from other sources.²⁰¹ Kassir appealed the § 2339B charges²⁰² against him as unconstitutionally vague, overly broad, and infringing on his First Amendment rights.²⁰³ The Second Circuit affirmed the district court's conviction, citing directly to *HLP*.²⁰⁴ Further, the Second Circuit imitated the Supreme Court by not mentioning *Brandenburg*, thereby avoiding the issue as done in *HLP*.²⁰⁵

Though challenges remain in applying § 2 or § 2339B to the online advocacy of terrorism, clearly the case law interpreting the statutes is now more favorable to prosecutors. Specifically, *Rice v. Paladin*, though not eliminating *Brandenburg* and *mens rea* challenges, has provided some precedent that can likely be applied equally as effectively to either § 2 or § 2339B prosecutions. Additionally, though online terrorism advocacy § 2339B prosecutions have historically been infrequent and unsuccessful, *Paladin* and *Al-Hussayen* affirm that aiding and abetting is a question for the jury, and that more compelling facts would likely reap a different result. Finally, *HLP* is both a *mens rea* and

¹⁹⁹ *Id.* at 2730.

²⁰⁰ *United States v. Mustafa*, 406 F. App'x 526 (2d Cir. 2011).

²⁰¹ *Id.* at 529-30.

²⁰² Ousaama Kassir was convicted of violating § 2339A, § 2339B, and § 2, as well as conspiring to violate § 2339A, § 2339B and § 2. *Id.* at 528, 530.

²⁰³ *Id.* at 528.

²⁰⁴ *Id.* at 530.

²⁰⁵ *Id.*

Brandenburg application sea change for § 2339B, the effect of which will likely be more online terrorism advocacy prosecutions, albeit limited to designated foreign terrorist organizations.

B. *AEDPA's Distribution of Information Relating to Explosives Statute — Past is Not Prologue*

The AEDPA statute designed to deal with the distribution of information relating to explosives, § 842(p)(2)(A), faces stiff prosecution challenges despite the statute's clear legislative intent. More significantly, it seems that the *Brandenburg* "incitement to imminent lawless action" requirement should apply to this statute because the criminal act, distributing information, does not fall under an established inchoate crime exception.²⁰⁶ Additionally, the intentional *mens rea* requirement is the highest requirement applied in criminal law. These are largely the same challenges faced by § 2 and § 2339B, with the important caveat that § 842(p) has "intentional" as opposed to the lower "knowing" *mens rea* afforded to § 2339B as a result of *HLP*. Finally, and somewhat surprisingly based on the controversy surrounding it,²⁰⁷ the one unique but surmountable challenge that § 842(p)(2)(A) faces is based on the relatively innocuous final term in the statute, "federal crime of violence."²⁰⁸

To find someone guilty of violating § 842(p)(2)(A)—distribution of information relating to explosives—a prosecutor must

²⁰⁶ However, to date there have been no *Brandenburg* challenges to the statute. See *Stewart v. McCoy*, 123 S. Ct. 468, 469-70 (2002); *Haig v. Agee*, 453 U.S. 280, 308-09 (1981); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); *Rice v. Paladin*, 128 F.3d 233, 266 (4th Cir. 1997); *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985); and *United States v. Moss*, 604 F.2d 569, 571 (8th Cir. 1979).

²⁰⁷ Circuit Judge Ackerman noted in his dissent:

If this Court were to consider the full course of the continuing offense of possession of a pipe bomb, I believe it would be compelled to conclude, as so many other courts have done already, that when a person unlawfully possesses a pipe bomb, there is a substantial risk that that person may intentionally use force against another.

United States v. Hull, 456 F.3d 133, 147 (3rd Cir. 2006) (Ackerman, J. dissenting).

²⁰⁸ 18 U.S.C. § 16 (2012). See *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004); *Hull*, 456 F.3d at 139.

prove that the suspect: (1) conveyed information; (2) about a destructive device or explosive; (3) intentionally; and, (4) in furtherance of a federal crime of violence.²⁰⁹ The legislative intent behind § 842(p)(2)(A) is much clearer when analyzed in the light of § 842(p)(2)(B). When compared, there are two key differences. First, § 842(p)(2)(B) requires that the teaching or demonstration occur “to any person,”²¹⁰ whereas § 842(p)(2)(A) does not require direct interaction.²¹¹ Second, § 842(p)(2)(A) has “intentional” *mens rea*, while § 842(p)(2)(B) has “knowing” *mens rea*.²¹² Thus, while § 842(p)(2)(A) does not require a direct interaction between the speaker and audience, lowering the *actus reus* does require the greater *mens rea* of intentional instead of knowing.²¹³ The opposite is true for § 842(p)(2)(B).²¹⁴ Because establishing the direct interaction between teacher and student via the Internet offers a more significant challenge for prosecution than establishing *mens rea*, § 842(p)(2)(A) has more potential for prosecuting online terrorism advocacy, and indeed, § 842(p)(2)(A) is the primary choice used by federal prosecutors in similar cases.²¹⁵

Given the legislative history surrounding § 842(p)(2)(A), two facts are striking: first, the extremely small number of prosecutions in the twelve years since Congress passed the statute,²¹⁶ and second, a

²⁰⁹ 18 U.S.C. § 842(p)(2)(A) (2012).

²¹⁰ *Id.* § 842(p)(2)(B).

²¹¹ *Id.* § 842(p)(2)(A).

²¹² *Id.* § 842(p)(2). See Kendrick, *supra* note 31, at 2013.

²¹³ 18 U.S.C. § 842(p)(2)(A) (2012).

²¹⁴ *Id.* § 842(p)(2)(B).

²¹⁵ See United States v. Austin, No. CR-02-884-SVW (C.D. Cal. Aug. 4, 2003); United States v. El-Hindi, No. 3:06CR719, 2009 WL 1373270, at *2 n.2 (N.D. Ohio May 15, 2009) *aff'd sub nom.* United States v. Amawai, 695 F.3d 47 (6th Cir. 2012). But see United States v. Mahon, No. CR 09-712-PHX-DGC, 2010 WL 4038605, at *1 (D.Ariz. 2010) (appears defendant could have been charged with § 842(p)(2)(B) based on direct contact with one of his “students”); Press Release, DOJ, Dennis Mahon Sentenced To 40 Years In Prison For Scottsdale Bombing Case (May 22, 2014) (on file with Department of Justice), available at <http://www.atf.gov/press/releases/2012/05/052212-pho-dennis-mahon-sentenced-to-40-years-in-prison-for-scottsdale-bombing-case.html>.

²¹⁶ See United States v. Delaema, 583 F. Supp. 2d 104, 105 (D.D.C. 2008) (§ 842(p)(2)(A) dismissed on plea); United States v. Hull, 456 F.3d 133, 137 (3rd Cir.

distinct lack of constitutional challenges. *United States v. Coronado*²¹⁷ is the only case addressing the constitutionality of § 842(p)(2)(A). In *Coronado*, the defendant challenged the statute as facially overbroad²¹⁸ and facially vague,²¹⁹ but both challenges failed.²²⁰ The facially overbroad challenge was dismissed based on the *mens rea* requirement in § 842(p)(2)(A),²²¹ and the facially vague challenge was dismissed based on the statute having little deterrent effect on legitimate expression.²²² However, the court did not decide whether the statute was overbroad as applied, ultimately a *Brandenburg* question, instead stating that this was an issue best solved by proper jury instructions.²²³

More than seven years after § 842(p)(2)(A) became law, the first issue arose with interpreting § 842's term "federal crime of violence" in the case *United States v. Hull*.²²⁴ Though § 842 does not define "federal crime of violence" within the statute,²²⁵ the Supreme Court in *Leocal v. Ashcroft*²²⁶ specifically mentioned using 18 U.S.C. § 16²²⁷ ("§ 16") to define the term as used in 18 U.S.C. § 842(p).²²⁸ To

2006) (actual trial); *United States v. Jordi*, 418 F.3d 1212, 1213-14 (11th Cir. 2005) (§ 842(p)(2)(A) dismissed); *El-Hindi*, WL 1373270, at *2 (actual trial).

²¹⁷ *States v. Coronado*, 461 F. Supp. 2d 1209 (S.D. Cal. 2006).

²¹⁸ *Id.* at 1212.

²¹⁹ *Id.* at 1216.

²²⁰ *Id.* at 1213, 1217.

²²¹ *Id.* at 1213 ("The specific focus of the statute is not on mere teaching . . . but upon teaching . . . with the specific intent that the knowledge be used to commit a federal crime of violence.").

²²² *Id.* at 1216-17. See *Hill v. Colorado*, 530 U.S. 703, 733 (2000) ("[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on the statute when it is surely valid 'in the vast majority of its intended applications.'" (quoting *United States v. Raines*, 362 U.S. 17, 23 (1960))).

²²³ *Coronado*, 461 F. Supp. 2d at 1216. See *supra* Part II.A.1 for discussion of *Rice v. Paladin's Brandenburg* analysis.

²²⁴ The Third Circuit noted:

Hull's first argument presents a matter of first impression in this Court, and to our knowledge, in any court of appeals . . . Hull alleges that simple *possession* of a pipe bomb, as opposed to the *use* or detonation of a pipe bomb, cannot qualify as a 'Federal crime of violence' under § 842(p)(2)(A).

United States v. Hull, 456 F.3d 133, 137 (3rd Cir. 2006).

²²⁵ *Id.* at 138.

²²⁶ *Leocal v. Ashcroft*, 543 U.S. 1, 6-7 (2004).

²²⁷ 18 U.S.C. § 16 (2012).

establish a federal crime of violence under § 16, the prosecuting attorney must prove that elements of a charged offense include use (or attempted or threatened use) of physical force against the person or property of another, or is a felony 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.²²⁹ Looking at these two elements, it is not readily apparent that there is a *mens rea* requirement associated with 18 U.S.C. § 16. In *Leocal*, however, the Court established the requirement.²³⁰

In *Leocal*, the government wanted to establish that Leocal's injury-causing DUI conviction was a "crime of violence" under § 16, and thus an "aggravated felony," in order to use the crime as a basis for deportation proceedings.²³¹ The Supreme Court focused on the phrase in § 16(a), "use . . . of physical force against the person or property of another," which the Court reasoned, "suggests a higher degree of intent than negligent or merely accidental conduct."²³² The Court held that because both § 16(a) and (b) require intent greater than negligent or merely accidental conduct, a DUI would not satisfy the requirements of either, even when one considers that a conviction under § 16(b), unlike § 16(a), does not require the defendant to have used physical force.²³³ Thus, "federal crimes of violence" for the purposes of 18 U.S.C. § 842(p) must have a *mens rea* greater than negligent or merely accidental.

In addition to *Leocal* establishing the connection between § 16 and § 842(p), that connection's application to *Hull* contains an important, albeit largely semantic, lesson for federal prosecutors. In *Hull*, the defendant was charged with possession of a pipe bomb, and the § 16(b) interpretation developed in *Leocal* was applied to

²²⁸ See *Leocal*, 543 U.S. at 7 n.4.

²²⁹ See *Hull*, 456 F.3d at 139-41.

²³⁰ See *Leocal*, 543 U.S. at 9.

²³¹ *Id.* at 3.

²³² *Id.* at 9-11 (stating that though § 16(b) is broader than § 16(a), it has the same "use" formulation).

²³³ *Id.* Though the question of accidental or negligent conduct seems solved, it appears a question about reckless conduct remains. That question, however, is beyond the scope of this Article.

§ 842(p).²³⁴ Citing *Leocal*, the *Hull* court stated that § 842(p) requires looking at “the elements and nature of the offense of conviction, rather than the particular facts relating to petitioner’s crime.”²³⁵ Thus, presumably focusing on the “use” language it read as important to the analysis in *Leocal*,²³⁶ the court in *Hull* held that the danger of a pipe bomb comes from using it, not possessing it, and reluctantly stated it was limited by the superseding indictment—possession—which under *Leocal* was not a federal crime of violence.²³⁷ The court, however, was clear in stating that had the indictment charged that the federal crime of violence was the *use* or detonation of a pipe bomb, rather than possession, then there would not have been an issue charging Hull with violating § 842(p), regardless of whether Hull actually used the pipe bomb.²³⁸ That is, one cannot even be charged with violating § 842(p) unless he is first charged with a federal crime of violence.

Applying the lessons of *Leocal* and *Hull* to online terrorism advocacy provides prosecutors with important guidance. For example, under *Leocal* and *Hull*, the charges filed in the July 28, 2011 incident against the Army soldier (discussed in the Introduction) would be examined by the Supreme Court for compliance with both the *mens rea* and use requirements. The complaint only deals with possession, which, considering *Hull*, would be inadequate for § 842(p).²³⁹ As stated in *Hull*, to satisfy § 842(p) the court only looks at the elements and nature of the offense in the indictment or conviction and not the crime itself.²⁴⁰ Applying this reasoning to the Army soldier, whatever federal crime of violence could be conceived of from the information that *Inspire* provided—such as use of an

²³⁴ *Hull*, 456 F.3d at 138-39.

²³⁵ *Id.* at 139.

²³⁶ 18 U.S.C. § 16(a) (2012) (“use . . . of physical force against the person or property of another”).

²³⁷ *Hull*, 456 F.3d at 139, 141.

²³⁸ *Id.* at 141.

²³⁹ Complaint at 2, *United States v. Abdo* (W.D. Tex. July 28, 2011) (No. 11CR182).

²⁴⁰ *Hull*, 456 F.3d at 139. Additionally, though there is case law other than *Leocal* and *Hull* that suggests possession could be construed as a federal crime of violence, because online terrorism advocacy is not prohibitively restricted by the *Leocal* and *Hull* requirement to establish a “federal crime of violence” with adequate *mens rea* and use, it is unnecessary to examine that case law.

explosive device—could be used to satisfy the § 16(b) requirements, thus making § 842(p) charges viable.²⁴¹ While the § 16(b) hurdle is definitely not high, awareness that the hurdle even exists is critical to successful § 842(p) online terrorism advocacy prosecutions.

As the court in *Hull* recognized, § 842(p)(2)(A) “has been applied only sparingly across the country,”²⁴² and most of these applications have resulted in pleas that did not ultimately involve § 842(p)(2)(A) charges.²⁴³ Thus, § 842(p)(2)(A) has not had the effect that Congress intended. However, § 842(p)(2)(A)’s past performance as a prosecution tool is not prologue, as the challenges faced in prosecuting under this statute are only slightly greater than those faced with § 2339B. Constitutional challenges based on being overbroad and vague have already failed,²⁴⁴ and to date there has not been an “as applied” *Brandenburg* challenge to the statute. The primary hurdle for § 842(p)(2)(A) prosecutions is the intentional *mens rea*, which, obviously, when applied to online terrorism advocacy facts, is a significant hurdle.

But could the intentional *mens rea* in § 842(p)(2)(A) be interpreted by courts as less than traditional criminal law intent? This possibility is not without some support at both the Supreme Court and circuit court levels. In *HLP*, a case with strong terrorist threat undercurrents, the Supreme Court reinterpreted “knowledge” to a lesser *mens rea*, citing Congress’s own aims in creating the statute.²⁴⁵ While not guaranteed, the Court’s review of the legislative history of § 842(p)(2)(A) could lead to a looser interpretation of “intentional” *mens rea*, similar to the looser interpretation of “knowledge” in *HLP*.²⁴⁶ Further, in *Paladin*, the Fourth Circuit undertook a flexible analysis of the intentional *mens rea* in the context of a *Brandenburg* imminence challenge to charges of civil

²⁴¹ See *id.*

²⁴² *Id.* at 137.

²⁴³ See *Delaema*, 583 F. Supp. 2d at 105 (§ 842(p)(2)(A) dismissed on plea); *Hull*, 456 F.3d at 137 (actual trial); *Jordi*, 418 F.3d at 1213-14 (§ 842(p)(2)(A) dismissed); *El-Hindi*, WL 1373270, at *2 (actual trial).

²⁴⁴ *Coronado*, 461 F. Supp. 2d at 1215, 1217.

²⁴⁵ *Humanitarian Law Project*, 130 S.Ct. at 2717.

²⁴⁶ 1997 BOMBMaking REPORT, *supra* note 2, at 25-26.

aiding and abetting.²⁴⁷ These flexible interpretations of the *mens rea* requirement in the face of First Amendment concerns have one thing in common: compelling facts. Thus, prosecutions undertaken on compelling facts, like those in the Introduction involving the U.S. Army soldier arrested with *Inspire* magazine,²⁴⁸ could possibly succeed even in the face of intentional *mens rea*.²⁴⁹

III. INCHOATE CRIMES — PROVEN PROSECUTION TOOLS APPLICABLE TO ONLINE TERRORISM ADVOCACY

The three major challenges in prosecuting online terrorism advocacy break down to two classics of criminal law, *mens rea* and *actus reus*, and a third challenge, the strong likelihood of a First Amendment, “as applied” *Brandenburg* challenge.²⁵⁰ Inchoate crimes generally escape the possibility of a *Brandenburg* challenge,²⁵¹ and the removal of this hurdle makes them powerful prosecution tools. Nonetheless, the *mens rea* and *actus reus* challenges remain.

Inchoate crimes cannot exist without an underlying crime as the objective of the conspiracy or solicitation, though the objective crime need not occur.²⁵² Prosecuting an inchoate crime requires careful selection of the underlying law because it supplies the *mens rea* required for the inchoate crime.²⁵³ Simply, the more difficult to prove the underlying criminal statute, the more difficult it will be to establish an inchoate crime to violate that statute. For example, if someone were advocating terrorism and teaching terror tactics over the Internet, it would likely be easier to prosecute them for solicitation or conspiracy to violate § 2339B than § 842(p) because

²⁴⁷ *Rice v. Paladin Enter. Inc.*, 128 F.3d 233, 248 (4th Cir. 1997); see *supra* Part II.A.1 for discussion of *Rice v. Paladin*.

²⁴⁸ Thomas et al., *supra* note 3.

²⁴⁹ See *United States v. Amawi*, No. 3:06CR719, 2011 WL 1373154, at *3-5 (N.D. Ohio May 15, 2009).

²⁵⁰ See *United States v. Coronado*, 461 F. Supp. 2d 1209, 1215-16 (S.D. Cal. 2006).

²⁵¹ *United States v. White*, 610 F.3d 956, 960 (7th Cir. 2010).

²⁵² *Mizrahi v. Gonzales*, 492 F.3d 156, 161 (2d Cir. 2007).

²⁵³ *Id.*

§ 2339B's "knowing" *mens rea* is lower than § 842(p)'s "intentional" *mens rea*.²⁵⁴

Though the *mens rea* for the inchoate crimes is provided by the underlying statute, each inchoate crime has its own *actus reus*, with attempt generally being the most difficult to prosecute,²⁵⁵ conspiracy less so,²⁵⁶ and solicitation the easiest.²⁵⁷ This relationship is similar to the differing *actus reus* requirements of § 2 aiding and abetting and AEDPA aiding and abetting, § 2339B.²⁵⁸ Though the *actus reus* requirement of the underlying statute does not establish the required *actus reus* for the inchoate crime, it is still important, especially when prosecuting a conspiracy. For example, it is easier to conspire to achieve something with a simple *actus reus* (e.g., conspiracy to commit § 2339B aiding and abetting) than something with a complicated *actus reus*. Hence, solicitation and conspiracy can be applied interchangeably to 18 U.S.C. § 2339B.²⁵⁹

Parts A and B below analyze the solicitation and conspiracy statutes, as well as the case law most applicable to prosecuting online terrorism advocacy.

A. *Solicitation to Commit a Crime of Violence, 18 U.S.C. § 373(a)*

Solicitation has been an effective tool to prosecute online advocacy of terrorism.²⁶⁰

²⁵⁴ See *supra* Part II.B.

²⁵⁵ Attempt generally requires a substantial step. MODEL PENAL CODE § 5.01 (1985) ("Criminal Attempt"). There is not a specific federal statute for attempt, only specific statutes such as attempted homicide, etc. See 18 U.S.C. § 1113 (2012) ("Attempt to commit murder or manslaughter").

²⁵⁶ Conspiracy does not require a substantial step, only collaboration. See 18 U.S.C. § 371 (2012).

²⁵⁷ Larry Alexander & Kimberly D. Kessler, *Criminal Law: Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1174 (1997) (explaining that the *actus reus* of solicitation is "conduct that encourages another to commit a crime.").

²⁵⁸ See *supra* Part II.

²⁵⁹ See *United States v. Mustafa*, 406 F. App'x 526, 528-29 (2d Cir. 2011).

²⁶⁰ See *United States v. White*, 610 F.3d 956, 959 (2010).

To prosecute solicitation the government must establish: “(1) with strongly corroborative circumstances that a defendant intended for another person to commit a violent federal crime, and (2) that a defendant solicited or otherwise endeavored to persuade the other person to carry out the crime.”²⁶¹ Corroborative circumstances include, but are not limited to, a defendant’s repeated solicitations, belief that the person solicited was capable of such offenses (evidenced by previous commission, etc.), and “whether the defendant acquired the tools or information suited for use by the person solicited.”²⁶²

Applying the *actus reus* standard in the statute to the various cases’ facts highlights its built-in prosecutorial flexibility. In *United States v. White*, defendant White called for the assassination of people involved in the Nathan Hale trial on his website, *Overthrow.com*.²⁶³ In 2008, over three years later, White posted specific personal information about a jury member including a picture, an address, and home and office phone numbers.²⁶⁴ When the hosting site shut down the links he posted, White reposted the information.²⁶⁵ Analyzing these facts under § 373, the Seventh Circuit found White’s indictment sufficient.²⁶⁶ Interestingly, the court did not take issue with the more than three-year gap between the post calling for harm to people involved with the trial and the post providing specific juror information; instead, the court focused on the adequacy of past links and postings being contemporaneously

²⁶¹ See *United States v. White*, 610 F.3d 956, 959 (7th Cir. 2010). Solicitation under 18 U.S.C. § 373(a) requires:

Whoever, with intent that another person engage in conduct constituting a felony that has 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.

18 U.S.C. § 373(a) (2012).

²⁶² See *White*, 610 F.3d at 959.

²⁶³ *Id.* at 957; see *infra* notes 270-72 (discussing the facts of *United States v. Hale*, 448 F.3d 971 (7th Cir. 2006)).

²⁶⁴ *White*, 610 F.3d at 957-58.

²⁶⁵ *Id.* at 958.

²⁶⁶ *Id.* at 959.

available.²⁶⁷ Additionally, the court viewed White's reposting as corroborative of his intent, and viewed the government's argument that "White knew the persons solicited were prone to violence" as enough to satisfy the indictment.²⁶⁸

White and other recent cases involving solicitation demonstrate that myriad facts can corroborate intent. An extreme example of this is *United States v. Hale*.²⁶⁹ The court in *Hale* upheld a solicitation conviction despite multiple statements by Hale designed to obscure his involvement in the activity.²⁷⁰ The court gave significant deference to the jury's ability to infer Hale's intentions despite his attempts at obfuscation.²⁷¹ *United States v. Sattar*²⁷² provides another example of the broad latitude in solicitation prosecutions. In *Sattar*, the defendant helped draft and distribute a fatwa calling for Muslims to kill Jews, the Islamic Group, and the government of Egypt.²⁷³ Despite the fatwa's generic statements such as urging "[b]loodshed of Israelis [e]verywhere" and "fight the Jews and to kill them," the court held the alleged acts sufficient to support possible conviction under § 373.²⁷⁴

The *White*, *Hale*, and *Sattar* courts' analyses demonstrate the broad list of corroborative facts under § 373. Though applying it to online terrorism advocacy would present unique challenges, facts could exist that a court or jury would find corroborative of solicitous intent. Specifically, websites advocating terrorism do not just solicit their offenses merely once, but rather, a site's jihad solicitation generally is constant and repetitive, making it much more constant

²⁶⁷ *Id.* at 957 ("At the time of the posting, Overthrow.com was an active website, and as such, each link and posting was contemporaneously accessible. So, a reader of this September 11 posting would have had access to the past posts about Hale, Hale's trial, and other calls for violence against 'anti-racists.'").

²⁶⁸ *Id.* at 959.

²⁶⁹ *United States v. Hale*, 448 F.3d 971 (7th Cir. 2006).

²⁷⁰ *Id.* at 979.

²⁷¹ *Id.* at 984-85.

²⁷² *United States v. Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003).

²⁷³ *Id.* at 374.

²⁷⁴ *Id.*

and repetitive than the three-year plus gap that occurred in *White*.²⁷⁵ For example, the articles in *Inspire* have a constant jihad theme: the Summer 2010 issue of *Inspire* featuring “Open Source Jihad: Make a Bomb in the Kitchen of your Mom;”²⁷⁶ the Fall 2010 issue featuring “The Ultimate Mowing Machine” (about using an automobile as a weapon);²⁷⁷ and the Winter 2010 issue featuring both “Destroying Buildings”²⁷⁸ and “Training with the AK.”²⁷⁹ Additionally, *Inspire*’s practical teaching of explosives is the quintessential example of the “tools or information suited for use by the person solicited” outlined in *White*.²⁸⁰

The challenge that online terrorism advocacy provides is possible insulation between the information’s transmitter and receiver. For example, it is possible for someone posting the aforementioned information not to have any interaction at all with the actual consumer of the information, thereby failing to establish corroborative circumstances with knowledge about the solicited person’s capabilities to commit the crime.²⁸¹ The facts of *Sattar* suggest that an indictment can go forward with little to almost no interaction between the information transmitter and receiver, but this does not confirm that such an indictment would eventually lead to a prosecution. While the proximity requirement could challenge prosecutions, transmitter-receiver insulation *ex ante* isolates solicitous terrorist advocates from their possible actors, possibly increasing deterrence. However, this may not be the case

²⁷⁵ See INSPIRE, Summer 2010, available at <http://azelin.files.wordpress.com/2010/06/aqap-inspire-magazine-volume-1-uncorrupted.pdf>; INSPIRE, Fall 2010, available at <http://azelin.files.wordpress.com/2010/10/inspire-magazine-2.pdf>; INSPIRE, November 2010, available at <http://azelin.files.wordpress.com/2010/11/inspire-magazine-3.pdf>; INSPIRE, Winter 2010, available at <http://azelin.files.wordpress.com/2011/01/inspire-magazine-4.pdf>; INSPIRE, Spring 2011, available at <http://azelin.files.wordpress.com/2011/03/inspire-magazine-5.pdf>.

²⁷⁶ *Make a Bomb*, *supra* note 108, at 33.

²⁷⁷ See Yahya Ibrahim, *The Ultimate Mowing Machine*, INSPIRE, Fall 2010, at 53, available at <http://azelin.files.wordpress.com/2010/10/inspire-magazine-2.pdf>.

²⁷⁸ See The AQ Chef, *Destroying Buildings*, INSPIRE, Winter 2010, at 39, available at <http://azelin.files.wordpress.com/2011/01/inspire-magazine-4.pdf>.

²⁷⁹ See Abu Salih, *Training with the AK*, INSPIRE, Winter 2010, at 42, available at <http://azelin.files.wordpress.com/2011/01/inspire-magazine-4.pdf>.

²⁸⁰ *United States v. White*, 610 F.3d 956, 959 (7th Cir. 2010).

²⁸¹ *Id.*

considering that there is no doubt that the Tsarnaev brothers were isolated from the author of *Inspire's* support because the author was killed in Yemen by a U.S. CIA-led counterterrorism drone in September 2011.²⁸²

The facts in cases like *Hale* and *Sattar* show that calls for violence usually require much more than an anonymous post,²⁸³ but as the *White* case demonstrates, not soliciting a specific person does not necessarily preclude prosecution.²⁸⁴ In *White*, it was enough that White knew that the network of people who would view that post possibly included someone capable of executing the crime.²⁸⁵ Further, in this element of solicitation the prosecution can apply the sheer vastness of the Internet combined with the popularity of the defendant's web page as tools against the defendant. A defendant with a large audience and significant web page traffic is much more likely to be a successful solicitor, and therefore easier to prosecute.

In addition to the favorable rule for solicitation and test for corroborating circumstances, and unlike the AEDPA statutes analyzed in Part II above, § 373 is considered an inchoate crime, and thus removed from heightened level of *Brandenburg* intent.²⁸⁶ Numerous lower courts in recent cases have confirmed the lower intent standard required—even though it is speech—in deciding solicitation cases,²⁸⁷ and the Supreme Court recently confirmed this in both *United States v. Williams*²⁸⁸ and *HLP*.²⁸⁹ The *Williams* Court

²⁸² Hakim Almasari, Margaret Coker & Siobhan Gorman, *Drone Kills Top Al Qaeda Figure*, WALL ST. J. (May 19, 2012), http://online.wsj.com/article/SB10001424052970204138204576602301252340820.html?mod=WSJINDIA_hpp_LEFTTopStories.

²⁸³ See *United States v. Hale*, 448 F.3d 971, 984-85 (7th Cir. 2006); see also *United States v. Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003).

²⁸⁴ *United States v. White*, 610 F.3d 956, 960 (7th Cir. 2010).

²⁸⁵ *Id.* at 959, 962.

²⁸⁶ See *id.* at 960.

²⁸⁷ See *United States v. Khan*, 309 F. Supp. 2d 789 (E.D. Va. 2004); see also *United States v. Chandia*, 514 F.3d 365 (4th Cir. 2008); *United States v. Hale*, 448 F.3d 971 (7th Cir. 2006); *United States v. Salameh*, 152 F.3d 88 (2d Cir. 1998); and *United States v. Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003).

²⁸⁸ See *United States v. Williams*, 535 U.S. 285, 298 (2008) (“In sum, we hold that offer to provide or requests to obtain child pornography are categorically excluded from the First Amendment.”).

stated, “Many long established criminal proscriptions—such as laws against conspiracy, incitement, and solicitation—criminalize speech (commercial or not) that is intended to induce or commence illegal activities.”²⁹⁰ In *Williams*, the Court also emphasized that there is “an important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality,” but did not take the opportunity to further explain where that line is exactly drawn.²⁹¹ Given that the Supreme Court excludes solicitation from *Brandenburg* challenges, and the lower court’s application of the principle to numerous cases, it is safe to state that § 373 is outside of the *Brandenburg* requirements.

Solicitation under § 373 is likely the most powerful prosecution tool against online terrorism advocacy due to not only a function of the lack of *Brandenburg* requirements, but also the favorable elements of the statute and the highly flexible corroborating circumstances test.²⁹² Additionally, the proof of the validity of this statute as a prosecution tool is not only in abstract analysis, but it also rests with the actual successfully prosecuted cases.²⁹³ While prosecuting under the AEDPA statutes is possible, prosecutors have had more historical success prosecuting online advocacy of terrorism issues similar to the ones outlined in the Introduction of this Article with § 373 than under § 2339B or § 842(p).

B. *Online Conspiracy and 18 U.S.C. § 371*

Under 18 U.S.C. § 371 (“§ 371”), conspiracy requires two or more persons to collaborate to commit an offense against the United States, and one or more of those persons to act to accomplish the

²⁸⁹ See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2733 (2011) (Breyer, J., dissenting) (“‘Coordination’ with a group that engages in unlawful activity also does not deprive the plaintiffs of the First Amendment’s protection under any traditional ‘categorical’ exception to its protection. The plaintiffs do not propose to solicit a crime.”).

²⁹⁰ *Williams*, 553 U.S. at 298.

²⁹¹ *Id.* at 298-99.

²⁹² See *United States v. White*, 610 F.3d 956, 959-60 (7th Cir. 2010).

²⁹³ See *supra* note 288.

object of the conspiracy.²⁹⁴ To prosecute conspiracy, the government must establish: “1) an agreement by two or more persons to perform some illegal act, 2) willing participation by the defendant, and 3) an overt act in furtherance of the conspiracy.”²⁹⁵ Conspiracy requires a slightly greater *actus reus*—collaboration, compared to solicitation—but there are greater prosecution challenges because of the relative lack of clarity in distinguishing criminal collaboration from normal day-to-day activities. Solicitation is a distinguishable crime, even if conducted over the Internet. By comparison, conspiracy is inherently more difficult to distinguish and often even more difficult to distinguish when conducted via the Internet.

However, like all the statutes and case law analyzed thus far, conspiracy-related case law has evolved in response to online terrorism advocacy. The modern foundational case involving conspiracy and terrorism is *United States v. Rahman*.²⁹⁶ There the Second Circuit could not broaden the *actus reus* requirement for conspiracy because the facts of the case were so compelling that a broader interpretation of *actus reus* was unnecessary.²⁹⁷ For instance, Rahman’s acts included directing fellow conspirators that they should assassinate the President of Egypt, bomb the United Nations Headquarters, and inflict damage to the American Army.²⁹⁸ Importantly though, *Rahman* holds that *Brandenburg* requirements only apply to the advocacy of force, not conspiring to use force.²⁹⁹ This clear statement interpreting the non-applicability of *Brandenburg* is particularly valuable precedent to prosecutors given the significant political and social underpinnings of Rahman’s acts.³⁰⁰

²⁹⁴ 18 U.S.C. § 371 (2012) (“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 . . .”).

²⁹⁵ *United States v. Khan*, 309 F. Supp. 2d 789, 818 (E.D. Va. 2004).

²⁹⁶ *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999).

²⁹⁷ *Id.* at 108-09.

²⁹⁸ *Id.* at 117.

²⁹⁹ *Id.* at 115.

³⁰⁰ Abdel Rahman challenged his conviction contending it rested solely on his political and religious views. *Id.* at 114.

The more significant challenge in proving conspiracy is establishing *actus reus*. However, since September 11, 2001, a series of cases have systematically lowered this requirement by finding collaboration on facts far less compelling than *Rahman's*. This evolution began with *United States v. Khan*.³⁰¹ In that case, multiple defendants participated in paintball games as a way to practice for jihad, and a few of the defendants bought supplies to transfer to a known terrorist organization.³⁰² The powerful precedent for future prosecutors provided by *Khan's* holding is that one of the convicted defendants, Abdur-Raheem, only participated in the paintball games, not the supply shipments, but was still convicted of conspiracy to violate § 2339A and B.³⁰³ The court stated that though Abdur-Raheem did not participate in the technology transfer to the terrorist organization, his “stated intent to help militant Muslims fighting against India, prove[d] his participation in the conspiracy to provide material support.”³⁰⁴

A subsequent case, *United States v. Chandia*,³⁰⁵ demonstrates the prosecutorial power and perhaps the overreach of the *Khan* decision. Chandia was involved in the paintball training program discussed in *Khan*, but was separately charged in September 2005.³⁰⁶ Chandia was charged with conspiracy to violate § 2339B for the assistance he provided Khan, including picking Khan up at the airport, providing him e-mail access, and helping him ship paintballs to Pakistan.³⁰⁷

Chandia and Abdur-Raheem's conspiracy acts are not as isolated as online terrorism advocacy, but two recent cases suggest that the holdings in *Khan* and *Chandia* paved the way for online terrorism advocacy prosecutions. One such case is *United States v. Mustafa*.³⁰⁸ In that case, prosecutors charged co-defendant Kassir

³⁰¹ *United States v. Khan*, 309 F. Supp. 2d 789 (E.D. Va. 2004).

³⁰² *Id.* at 803.

³⁰³ *Id.* at 822.

³⁰⁴ *Id.*

³⁰⁵ *United States v. Chandia*, 514 F.3d 365 (4th Cir. 2008).

³⁰⁶ *Id.* at 370.

³⁰⁷ *Id.*

³⁰⁸ *See supra* Part II.A.2.

with conspiracy to violate § 2339B by creating and maintaining terrorist websites.³⁰⁹ The conspiracy charges were in addition to the § 2339B charges discussed in Part II.A.2. Kassir appealed these charges arguing insufficient evidence of coconspirators.³¹⁰ However, the government's evidence that the websites were updated while Kassir was in prison without Internet access, along with the fact that people posting content on the website thanked Kassir for his assistance, was adequate to establish conspiracy.³¹¹ These facts, though not identical, are very similar to what is occurring on terrorist advocacy websites every day.³¹² Thus, prosecuting conspiracy by establishing *actus reus* comparable to that established in *Mustafa* and the requisite *mens rea* for § 2339B is probable under existing precedent.

Even with the *Mustafa* holding, however, questions remain about how much collaboration is required to establish a conspiracy. Under *Mustafa*, the requirement may be consistent support in maintaining terrorist websites, as opposed to infrequent or solitary support.³¹³ The Sixth Circuit's decision in *United States v. Amawi*³¹⁴ addressed these possibilities. In *Amawi*, the defendant provided explosives information to an undercover federal agent with the intent that it be used for jihad.³¹⁵ Though Amawi had only one contact with one of the collaborators in the conspiracy charge, the judge stated, "[a] single encounter suffices to create a conspiracy."³¹⁶ Additionally, it did not matter that Amawi did not explain the explosives information to the collaborator or that the collaborator read the

³⁰⁹ *United States v. Mustafa*, 406 F. App'x 526, 528-29 (2d Cir. 2011).

³¹⁰ *Id.* at 529.

³¹¹ *Id.*

³¹² See *Inspire Responses*, INSPIRE, Spring 2011, at 11-12, available at <http://azelin.files.wordpress.com/2011/03/inspire-magazine-5.pdf> ("I live in the East and greatly desire *hijrah* to the lands of jihad such as Afghanistan or Yemen . . . The problem is that I don't have any contact to meet the juhahidin. What do you recommend that I do?").

³¹³ See *United States v. Kassir*, No. S2 04 Cr. 356, 2008 U.S. Dist. LEXIS 52713, at *3 (S.D.N.Y. July 9, 2008).

³¹⁴ *United States v. Amawi*, No. 3:06-CR-719, 2009 WL 1373155 (N.D. Ohio 2009), *aff'd*, 695 F.3d 457 (6th Cir. 2012).

³¹⁵ *Id.* at *1.

³¹⁶ *Id.* at *1,3.

manual.³¹⁷ Based on the holding in *Amawi*, prosecutors could reasonably conclude that virtually any interaction between any terrorism advocacy website, beyond simply posting the information, would be adequate to establish conspiracy to provide material support under § 2339A.

For over ten years the trend in these cases shows that courts are loosening the *actus reus* requirement for conspiracy and the *mens rea* requirements from the underlying inchoate crime and the AEDPA statutes to combat terrorism. While to date there has not been a conspiracy case based solely on online terrorism advocacy as opposed to some level of in-person interaction, the emerging precedent above forms a plausible foundation for such a prosecution.

IV. CONCLUSION

Any attempts to preemptively prosecute online terrorism advocacy like that in *Inspire* magazine will obviously be a product of the current statutes and case law available to prosecutors. Though many in the legal community argue that current statutes are inadequate, the inchoate crime and the AEDPA statutes outlined in this Article do in fact give federal prosecutors significant tools. These statutes as a whole, combined with recent case law interpreting them, are probably adequate to support prosecutions under challenging online terrorism advocacy scenarios, like *Inspire* magazine. It is true that the AEDPA statutes have historically been much more difficult to prosecute because, unlike the inchoate crime statutes, they do not sidestep the *Brandenburg* requirement. However, it seems that many federal courts are beginning to interpret these statutes and their *Brandenburg* component in light of the terrorist threat and Congress's original AEDPA legislative intent. This is a reasonable result considering the significant evolution of the Internet as a terrorist tool in the years immediately following the enactment of AEDPA. Additionally, two of the inchoate statutes, the solicitation and conspiracy statutes, are possible tools that lie outside the *Brandenburg* imminence requirement, providing prosecutors yet another option.

³¹⁷ *Id.* at *2-3.

Since long before the Oklahoma City Bombing and the resulting AEDPA statutes, members of the American legal community have been divided on where to draw the line between protecting free speech and thwarting speech for the safety and security of Americans. The revelation that the alleged Boston bombers got their bomb-making information online from a known online terrorist source has reinvigorated this ongoing debate for legislative reform. However, such reform is not necessary. Like civil rights and physical security before it, the trajectory of the law surrounding online terrorism advocacy again demonstrates that the law can and will evolve to demands placed on it. Prosecutions in front of judge and jury that attempt to stop online terrorism advocacy before a crime occurs and preemptively reduce the advocacy's influence are necessary for this natural evolutionary process of effective deterrence to continue. To this end, new statutes and tests would be redundant to existing law and only confuse and further complicate the issue. By utilizing existing AEDPA and inchoate crime statutes and their associated case law, prosecutors currently have the tools to explore and better evolve the legal boundaries that Congress intended based on the threat. Free speech concerns about these prosecutions are valid, but to argue that prosecutions under existing statutes are inappropriate shows a lack of faith not only in Congress, but also, much more importantly, in the American jury system. As cases like *United States v. Al-Hussayen* demonstrate, American juries are effective protection against government overreach when speech is at issue. Ultimately, more prosecution attempts will not only better define current statute boundaries, but also demonstrate that online terrorism advocacy prosecutions will not threaten critical First Amendment rights.

