

THE HON. FRANKLIN BURGESS

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRIANA WATERS.

Defendant.

CAUSE NO. CR 05-5828 FDB

DEFENSE MEMORANDUM ON  
TERRORISM ENHANCEMENT

**1. Introduction**

The Government and the United States Probation Service argue that the so-called "Terrorism" enhancement of § 3A1.4 should apply. Ms. Waters is submitting this separate memorandum on the terrorism enhancement issues due to the legal issues involved.

The terrorism enhancement of § 3A1.4 increases the offense level to "32" and the criminal history to Category VI.<sup>1</sup> Because the enhancement has an extremely disproportionate effect on the sentence, the Government bears the burden of proving it by a clear and convincing evidence standard. See United States v. Pike, 473 F.3d 1053 (9<sup>th</sup> Cir. 2007). Such proof is lacking in the instant case. Additionally, the enhancement does not apply to a case involving an arson by fire of a building at the University of Washington. Finally, the enhancement itself is unconstitutional under

<sup>1</sup> As noted in Ms. Waters Sentencing Memorandum, the harshness of this enhancement can be ameliorated later by reducing the criminal history level because a Category VI over-represents Ms. Waters' criminal history and because a Category VI over-represents the likelihood that Ms. Waters would commit other crimes. United States v. Benkahla, 501 F. Supp.2d 748, 759 (E.D. Va. 2007).

1 the Fifth and Sixth Amendments, Apprendi v. New Jersey, 530 U.S. 466 (2000) and its  
2 progeny.

3 When the Court is deciding whether to apply this enhancement, the Court  
4 should be cognizant of the misuse of the term “terrorism.” The term clearly has been  
5 manipulated by those seeking to advance their own political agendas. It is the scare  
6 word of the day,<sup>2</sup> and the consequences of the expansion of the use of the term to brand  
7 defendants can lead to grave injustice.

8 Our nation does not confront this issue without the benefit of experiences  
9 elsewhere. For instance, a series of IRA bombings in England in the 1970s led to  
10 terrorism hysteria that resulted in the false imprisonment and wrongful convictions of  
11 dozens of people, people like Gerry Conlon, who were ultimately not exonerated for  
12 well over a decade and a half.<sup>3</sup> On the other hand, the term is usually reserved for  
13 those with whom the ruling party disagrees. The British considered Menachim Begin a  
14 “terrorist” when his paramilitary group, the Irgun, blew up the King David Hotel in  
15 Jerusalem in 1946, killing 91 people. Later, of course, Begin became prime minister of  
16 Israel and was awarded the Nobel Peace Prize. In the days of its resistance to  
17 apartheid in South Africa, the African National Congress was routinely branded as  
18 “terrorist” for its bombing campaigns, such as the 1983 Church Street car bombing that  
19  
20

---

21 <sup>2</sup> For instance, Judge Reinhardt recently noted how the “Antiterrorism and Effective Death Penalty  
22 Act of 1996” has an “imposing title” that “is somewhat of a misnomer” because it “has nothing to do with  
23 antiterrorism and little to do with the death penalty . . . . The title was, however, politically appealing in the wake of  
24 the bombing of the Oklahoma federal building, on which event President Clinton relied as justification for the bill  
of which § 2254(d)(1) was a part.” Crater v. Galaza, 508 F.3d 1261, 1261 n.1 (9<sup>th</sup> Cir. 2007) (Reinhardt, J.,  
dissenting from denial of en banc review).

25 <sup>3</sup> When one reads the news accounts of the sentencing hearings for accused IRA pub bombers from  
26 the 1970s, such as the Guilford Four and Maguire Seven, one sees the same moral outrage at “terrorism” that  
27 characterizes the Government’s current view of Ms. Waters. See, e.g. A. McHardy, “Life for a Life Sentences to  
Warn the IRA,” *The Guardian (Manchester)*, 23 October 1975 (Ex. 1) (“It was a callous crime, a cowardly crime  
28 and above all a completely pointless crime that will be remembered only for its infamy.”) Of course, what was  
infamous was that the Guilford Four and the Maguire Seven were innocent and it took years for the truth to come out.  
See G. Conlon, Proved Innocent (In the Name of the Father) (1994).

1 killed 19 people, bombings, one might add, that were ultimately the subject of amnesty  
2 decisions years later, when the apartheid regime was toppled.<sup>4</sup>

3 Our country's experiences are no different from those that other countries have  
4 endured, and we should be willing to learn the lessons those countries quite painfully  
5 learned.

## 6 **2. The Terrorism Enhancement Generally**

7 The 2000 version of the Sentencing Guidelines provide:

8 (a) If the offense is a felony that involved, or was intended to  
9 promote, a federal crime of terrorism, increase by **12** levels; but if the  
10 resulting offense is less than level **32**, increase to level **32**.

11 (b) In each such case, the defendant's criminal history category  
12 from Chapter Four (Criminal History and Criminal Livelihood) shall be  
13 Category VI.

14 § 3A1.4.

15 The Guidelines themselves did not define what a "federal crime of terrorism"  
16 was, but rather the 2000 version of the Application Note 1 stated that a "'federal crime  
17 of terrorism' is defined at 18 U.S.C. § 2332b(g)."<sup>5</sup> This statute, entitled "Acts of  
18 Terrorism Transcending National Boundaries, defined "Federal Crime of Terrorism" as  
19 having two prongs. 18 U.S.C. § 2332b(g)(5). First, there was a motivational element  
20 – namely, that the offense is "calculated to influence or affect the conduct of  
21 government by intimidation or coercion, or to retaliate against government conduct."  
22 Second, the statute set out a list of various offenses which qualified. In May 2001, this

---

23 <sup>4</sup> See South African Truth and Reconciliation Commission AC/2001/003 (granting amnesty to  
24 members of Umkhonto weSizwe ("MK"), the military arm of the African National Congress, for dozens of bombings,  
25 including bombings of civilian targets that caused deaths).

26 <sup>5</sup> In November 2002, "without explanation or direction from Congress," the Sentencing Commission  
27 amended Application Note 1 to read:

28 "Federal Crime of Terrorism Defined." – For purposes of this guideline, "federal crime  
of terrorism" has the meaning given that term in 18 U.S.C. § 2332b(g)(5).

United States v. Salim, 287 F. Supp.2d 250, 321-22 (S.D.N.Y. 2003) (emphasis added)..

1 list included a violation of “844(f) or (i) (relating to arson and bombing of certain  
2 property).” Notably, in the US PATRIOT Act, adopted on October 26, 2001, Congress  
3 changed this definition to include violations of section “844(f)(2) or (3) (relating to  
4 risking or causing death)” or “844(i) (relating to arson and bombing of property used in  
5 interstate commerce.)” 107 P.L. 56, 115 Stat. 272 (October 26, 2001).

6 As noted, the effect of finding the terrorism enhancement results in a situation  
7 where someone’s offense level is bumped automatically up to Level 32, while the  
8 Criminal History Category is arbitrarily set at the highest level, Category VI. This  
9 enhancement could easily add 20 years or so to a sentence. Therefore, as noted, before  
10 a court can add such an enhancement (in the absence of a jury verdict or guilty plea),  
11 the Government must prove its applicability by clear and convincing evidence. United  
12 States v. Pike, *supra*.

### 13 **3. The Motivational Element is Lacking**

14 In the instant case, putting aside all of the other legal arguments that will be  
15 made below, the Government will not be able to meet its burden of proof on a key  
16 element of the “terrorism” enhancement: the motivational element.

17 In determining whether the government has demonstrated the motivational  
18 element required for the terrorism enhancement, courts have looked to facts established  
19 at trial or admitted by the defendant. For example, in United States v. Harris, 434 F.3d  
20 767 (5th Cir. 2005), the court held the motivational element was established based on  
21 the defendant’s testimony and other evidence in the uncontroverted record. The  
22 defendant admitted in connection with his plea that he threw a Molotov cocktail into a  
23 municipal building, and said he wanted to burn evidence connected to a case the city  
24 was pursuing against his father. The record also showed that the defendant had been  
25 arrested twice before in the days prior to the incident, charged with threatening to kill a  
26 police officer, and held in the very room he targeted for destruction. *Id.* at 774-75.  
27 The defendant’s own admissions, combined with other uncontroverted facts, were  
28 sufficient to show the motive to retaliate against the city government.

1 In United States v. Dowell, 430 F.3d 1100 (10th Cir. 2005), the court held the  
2 motivational element had been established because the jury convicted the defendant of  
3 forcibly interfering with IRS employees and administration, in addition to the arson of  
4 an IRS building. The jury's verdict on the forcible interference charge required a  
5 finding beyond a reasonable doubt that the defendant knowingly and intentionally  
6 endeavored to obstruct or impede the administration of the revenue laws by the use of  
7 force. This, the Court of Appeals held, sufficed to provide a sufficient factual basis to  
8 conclude that the defendant's offense was committed with the requisite motive for the  
9 enhancement. Id. at 1111. See also United States v. Mandhai, 375 F.3d 1243 (11th  
10 Cir. 2004) (conspiracy to force changes in government policy by blowing up public  
11 utility structures).

12 Similarly, courts reject the application of the terrorism enhancement when the  
13 evidence shows that the defendant's motivations were not focused on influencing or  
14 retaliating against the government. In United States v. Leahy, 169 F.3d 433 (7th Cir.  
15 1999), the defendant maintained a chemical laboratory in his garage, and worked on  
16 manufacturing ricin and devising ways to deliver it to his personal enemies, although  
17 he never did so. The district court did not impose a terrorism enhancement, and the  
18 Seventh Circuit supported that decision, noting that "there is absolutely no evidence in  
19 the record that Leahy sought to influence or affect the conduct of the government."  
20 Leahy, 169 F.3d at 446. See also United States v. Chandia, 514 F.3d 365, 376 (4<sup>th</sup> Cir.  
21 2008) (vacation of terrorism enhancement "because the basic facts supporting the  
22 conviction do not give rise to an automatic inference of the required intent.").

23 In the instant case, Ms. Waters has not been convicted of conspiracy. She was  
24 convicted simply of being an accomplice to the arson, with a variety of levels of  
25 purported involvement, ranging from obtaining a car to being a lookout. There was,  
26 though, no evidence whatsoever relating to Ms. Waters' alleged motivation for her  
27 charged involvement. She was not part of the broader charged ELF/ALF conspiracy.  
28

1 There was no evidence she chose the target or that she even knew about or cared about  
2 Prof. Bradshaw's research.

3 More importantly, simply targeting the research of one person, however  
4 misguided and heinous that might be, does not mean that the crime was intended to  
5 influence or affect the conduct of the government - the essence of the terrorism  
6 enhancement. Deciding to set a fire to destroy someone's research because one  
7 disagrees with that research is no different from deciding to set a fire at someone's  
8 house because of personal animosity (e.g., a belief that the victim is cheating  
9 romantically). Both cases involve arsons motivated by personal reasons, but neither  
10 constitutes "terrorism" because neither is intended to influence government.

11 In the Oregon cases where Judge Ann Aiken found the terrorism enhancement  
12 to apply, the defendants there had stipulated to facts in their guilty plea statements that  
13 supported the conclusion. For instance, in Daniel McGowan's plea agreement, he  
14 agreed:

15 The purpose of some of the conspirators was to influence and  
16 affect the conduct of government. The purpose of other conspirators was  
17 to influence and affect the conduct of commerce, private business, and  
18 others in the civilian population.

19 Ex. 2. It is only because of such uncontroverted facts about the defendant's  
20 motivations (or the motivations of people he admitted were co-conspirators) that a  
21 terrorism enhancement was possible. Of key significance also were the various  
22 communiques issued by the conspirators after the arsons, many of which revealed an  
23 intent to retaliate against governmental bodies or made threats of further damage if  
24 certain policies were not changed. By their pleas of guilty to the charge of conspiracy,  
25 which included the issuance of the communiques, the Oregon defendants essentially  
26 stipulated to the factual predicate for the terrorism enhancements in many of the cases.

27 In contrast, in the instant case, there was no evidence that *Ms. Waters*  
28 participated in the writing or distribution of the communique that issued after the  
Center for Urban Horticulture was destroyed – that distinction was left for Lacey

1 Phillabaum, Jennifer Kolar, and others, not including Ms. Waters. Ex. 3.<sup>6</sup> Since there  
 2 was no evidence that Ms. Waters wrote the communique, since Ms. Waters was not  
 3 convicted of conspiracy, and since Ms. Waters was convicted only of being an  
 4 accomplice (without a jury determination of her exact level of involvement), the  
 5 Government cannot demonstrate by clear and convincing evidence that Ms. Waters'  
 6 alleged involvement as an accomplice to arson was "calculated to influence or affect  
 7 the conduct of government by intimidation or coercion, or to retaliate against  
 8 government conduct." Ms. Phillabaum's, Mr. McGowan's, Mr. Block's, Ms. Savoie's,  
 9 Ms. Kolar's and Ms. Gerlach's subjective motivations are not pertinent in this process.

10 Again, the decision to apply the enhancement in § 3 A.1.4 must be supported by  
 11 clear and convincing evidence. Here, the Government cannot meet that burden, and  
 12 the "terrorism" enhancement cannot be applied.

13 **4. This Was Not a Crime Involving Transnational**  
 14 **Terrorism**

15 Application of the terrorism enhancement is deceptively simple. With the  
 16 guideline's reference to the definition of "federal crime of terrorism" in 18 U.S.C. §  
 17 2332b(g), it might seem obvious that if an offense is listed and the motivational  
 18 element is established, the enhancement may be applied. Yet as other judges have  
 19 observed, the statute to which the guideline refers has a lengthy and complex history,  
 20 and there is no compelling basis to conclude that Congress intended the definition of  
 21 "federal crime of terrorism" to be taken out of its statutory context, which clearly limits  
 22 its application to offenses transcending national boundaries.

---

23 <sup>6</sup> Significantly, Ms. Phillabaum testified that there was a conversation with Ms. Waters in a field before the  
 24 arson where they discussed a communique. Ms. Phillabaum stated that she did not want to use the name "Earth Liberation Front,"  
 25 because she did not know that any of the people she was working with "self-identified" as the Earth Liberation Front. Ms.  
 26 Waters, though, did not "back" Ms. Phillabaum's position. Later, when Ms. Phillabaum wrote the communique with Mr.  
 27 McGowan, Ms. Savoie, and Mr. Block (which was then disseminated either by Ms. Kolar or Ms. Gerlach), Ms. Phillabaum  
 28 learned for the first time exactly what took place at the Jefferson Poplar Farm action – she had not been told about it previously.

It is not clear if the jury believed Ms. Phillabaum's testimony about the meeting in the field, given the failure of the  
 jury to convict Ms. Waters of conspiracy. However, even if she was believed on this point, there is nothing about Ms.  
 Phillabaum's testimony that shows that *Ms. Waters* (if she was involved at all) was motivated by any of the language in the  
 communique that was issued after the arson. The only evidence was that there was a discussion about the use of the term "Earth  
 Liberation Front," not about the threats contained in the communique that Ms. Phillabaum later wrote.

1 United States v. Salim, 287 F. Supp. 2d 250, 332-354 (S.D.N.Y. 2003), provides  
2 the most detailed account of the legislative history, and it will not be repeated here.  
3 Suffice it to say that the analysis of the Salim case makes it clear that the same  
4 Congress that directed the Sentencing Guidelines Commission to amend § 3A1.4 so  
5 that it “only applies to Federal crimes of terrorism,” as defined in § 2332b(g),  
6 specifically defined the limited set of federal crimes of terrorism within a statutory  
7 framework of offenses transcending transnational boundaries. Salim, 287 F. Supp. 2d  
8 at 349, 351. That same Congress left untouched the definition of “international  
9 terrorism” in 18 U.S.C. § 2331. And it was not until the USA Patriot Act was passed  
10 in October 2001 that Congress defined “domestic terrorism.” 18 U.S.C. § 2331(5);  
11 USA PATRIOT Act of 2001, Pub.L. No. 107-56, 115 Stat. 272 (2001). The full  
12 course of the legislative history, and the Antiterrorism and Effective Death Penalty Act  
13 of 1996 in particular, make it clear that Congress was providing a new but narrow  
14 definition of terrorism that transcends national boundaries, and directing the  
15 Guidelines Commission to expand the terrorism enhancement to incorporate the new  
16 definition, which would effectively expand its scope from purely international  
17 terrorism to include transnational terrorism as well.

18 The court in Salim held that the terrorism enhancement could not apply without  
19 proof of some conduct beyond the borders of the United States. Salim, 287 F. Supp.  
20 2d at 354. Although some circuits have reached a different conclusion, see, e.g.,  
21 United States v. Harris, supra, the Second Circuit has not reversed Salim. This Court  
22 should follow the persuasive analysis of the Salim decision and hold that, absent clear  
23 and convincing evidence of conduct transcending the nation’s borders and directly  
24 related to the offense of conviction, the terrorism enhancement cannot be applied.

25 Here, there is no evidence of any crime transcending national boundaries. The  
26 arson of the Center for Urban Horticulture was purely a domestic offense. Therefore,  
27 the enhancement should not be applied.

1           **5.     The Enhancement Does Not Apply to a Non-Federal**  
2           **Governmental Entity**

3           To qualify as a “Federal crime of terrorism,” the offense must be “calculated to  
4 influence or affect the conduct of government by intimidation or coercion, or to  
5 retaliate against government conduct.” 18 U.S.C. § 2332b(g)(5)(A). Section  
6 2332b(g)(5) is more narrowly drafted in its use of the term “government” than  
7 are the related definitions of terrorism in the same Chapter 113B: the definitions of  
8 International Terrorism, § 2331(1), in effect before §2332b was enacted; and Domestic  
9 Terrorism, § 2331(5), added in October 2001 as part of same legislation that amended  
10 subsection § 2332b(g)(5). These related definitions in § 2331 refer to “a government”  
11 and to “laws . . . of any State,” as well as being motivated “to intimidate or coerce a  
12 civilian population,” whereas § 2332b(g)(5) refers only to “government,” refers only to  
13 federal laws, and is titled “Federal crime of terrorism.”

14           “‘[T]he title of a statute and the heading of a section’ are ‘tools available for the  
15 resolution of a doubt’ about the meaning of a statute.” Almendarez-Torres v. United  
16 States, 523 U.S. 224, 234 (1998) (internal cites and quotes omitted). Congress’ use of  
17 “a government,” in authoring the broader definitions of international and domestic  
18 terrorism contrasts with its use of “government” in the narrower definition of “Federal  
19 crime of terrorism.” “Where Congress includes particular language in one section of a  
20 statute but omits it in another section of the same Act, it is generally presumed that  
21 Congress acts intentionally and purposely in the disparate inclusion or exclusion.”  
22 Duncan v. Walker, 533 U.S. 167, 173 (2001) (internal quotes and cites omitted). “We  
23 assume that Congress used two terms because it intended each term to have a  
24 particular, non-superfluous meaning.” Bailey v. United States, 516 U.S. 137, 146 (1995).  
25 Additionally, if there is any ambiguity, the Rule of Lenity requires a construction of the  
26 statute in favor of the defendant. Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004).

27           The court in Salim, which exhaustively sets forth the entire legislative  
28

1 history leading to enactment of §3A1.4, noted that analysis of that history demonstrates  
2 “there was concern in Congress about avoiding the federalization of crimes the  
3 enforcement of which were more appropriately state or local responsibilities.” 287  
4 F.Supp.2d at 349. Additional support for limiting the enhancement to conduct  
5 intended to influence or retaliate against the federal government is found in § 2332b(f),  
6 the only section of § 2332b to employ the “Federal crime of terrorism” definition.  
7 Subsection (f) gives the Attorney General primary investigative responsibility for all  
8 Federal crimes of terrorism and requires the Secretary of Treasury to assist upon  
9 request. A broad interpretation of “government” to extend to all state and local  
10 governments would effectively designate the FBI and ATF as the primary investigators  
11 or arsons motivated solely against state or local entities.

12 The Supreme Court has expressed concerns already about the reach of 18  
13 U.S.C. § 844(i) – one of the two crimes of conviction at issue here – given its  
14 jurisdictional basis in the Commerce Clause, and the supremacy accorded the States to  
15 define and enforce criminal laws. See Jones v. United States, 529 U.S. 848 (2000)  
16 (holding § 844(i) does not apply to arson of private residence). Given the traditional  
17 assignment to the States of the primary function of investigating and prosecuting  
18 intrastate crime, and given Tenth Amendment concerns, the Court should adopt an  
19 interpretation of the terrorism enhancement that restricts its use to cases involving acts  
20 directed at the federal government.

21 The Fifth Circuit in United States v. Harris, supra, upheld the district court’s  
22 application of the enhancement against a defendant who had used a Molotov cocktail  
23 to set fire to a municipal building housing the police station. Harris challenged  
24 application of the enhancement, but not on any of the grounds raised herein. In  
25 particular, Harris claimed he committed the arson intending to destroy evidence in the  
26 police locker, but the district court found his intent was to retaliate against the police.  
27 Harris never raised the issue of whether “government” extended to local government;  
28 nor did the Fifth Circuit comment on that issue. See 434 F.3d at 773-74.

1 On the other hand, the district court in United States v. DeAmaris, 406 F.  
 2 Supp.2d 748 (S.D. Texas 2005), held that the enhancement applied to conduct aimed at  
 3 “foreign governments,” finding that “government” was not limited to the federal  
 4 government. However, that court did not address many of the issues raised here,  
 5 including the constitutional deference to State enforcement of criminal laws that do not  
 6 transcend State boundaries, nor is that court’s decision controlling on this Court.  
 7 Moreover, it makes sense that in a statute entitled “Acts of Terrorism Transcending  
 8 National Boundaries” the word “government” would include “foreign governments,”  
 9 but not any of the 50 states within the U.S.

10 Accordingly, because the University of Washington is not the federal  
 11 government, the terrorism enhancement should not be applied.

12 **6. The Enhancement Does Not Apply in the Absence of Evidence**  
 13 **of a “Bombing”**

14 As noted above, prior to October 26, 2001, the enumerated crimes in §  
 15 2332b(g)(5)(B) included arsons under § 844(f) & (i) that related to “arson and  
 16 bombing of certain property.”<sup>7</sup> Both § 844(f) and § 844(i) differentiated between  
 17 arsons “by means of fire” and arsons “by means of explosive.” Thus, the reference in  
 18 § 2332b(g)(5)(B) to “bombing” is clearly connected to the use of the term “explosive”  
 19 in § 844(f) & (i).

20 In Ms. Waters’ case, though, the jury was instructed for the arson counts only  
 21 on the theory of the use of “fire.” Instructions Nos. 24 & 26. The jury was never  
 22 instructed on a theory of liability for arson that included “by means of explosive.” Ex.  
 23 4. Additionally, the jury did not return a verdict of guilty for the § 924(c) count, which  
 24 rested on an allegation of the use of an “incendiary bomb.”

25 Accordingly, given the manner that the jury was instructed in this case, and the  
 26 requirement that a “federal crime of terrorism” include only a violation of § 844(f) &

---

27 <sup>7</sup> In October 2001, this definition was changed to the current form, such that an arson under § 844(f)  
 28 only applied if the charged section was § 844(f)(2) or (3) (relating to arson and bombing of Government property  
 risking or causing death), or § 844(i) (relating to arson and bombing of property used in interstate commerce).

1 (i) that involved “*arson and bombing of certain property*,” (emphasis added), the  
2 terrorism enhancement by its very terms cannot be applied in this case.

3 7. **Applying the Terrorism Enhancement to Offenses that**  
4 **Did Not Create a Substantial Risk of Injury or Death**  
5 **Creates Unwarranted Sentence Disparity**

6 Under 18 U.S.C. § 3553(a)(6), the Court is to factor into any sentencing  
7 decision “the need to avoid unwarranted sentence disparities among defendants with  
8 similar records who have been found guilty of similar conduct.” Similarly, in  
9 promulgating the Guidelines, the Sentencing Commission was directed by Congress to  
10 establish sentencing policies and practices that would avoid these same unwarranted  
11 sentence disparities. See 28 U.S.C. §§ 991(b)(1)(B) and 994(f). Application of the  
12 terrorism enhancement to the facts of this case results in unwarranted sentence  
13 disparities. One way this occurs arises from the various outcomes under different  
14 applications of the arson guidelines with and without the terrorism enhancement.  
15 Under the guideline for arson, the base offense level is four points higher for an  
16 offense that “created a substantial risk of death or serious bodily injury,” if the risk was  
17 created knowingly. § 2K1.4(a). As the Ninth Circuit has explained, the analysis of  
18 whether the defendant created a substantial risk of death or injury requires two distinct  
19 inquiries. The first is an objective question, focusing on the circumstances surrounding  
20 the offense. A second, subjective inquiry may follow, which asks whether such a risk  
21 was created by the defendant knowingly or recklessly. United States v. Karlic, 997  
22 F.2d 564, 569 (9th Cir. 1993); United States v. Beardslee, 197 F.3d 378, 388 (9th Cir.  
23 1999). The Circuit further held that a defendant acts knowingly in the context of §  
24 2K1.4 if (1) it is practically certain that his actions would cause a substantial risk of  
25 death or serious injury, and (2) he was aware of that fact. See Karlic, 997 F.2d at 569;  
26 Beardslee, 197 F.3d at 388. If it was not a practical certainty that the defendant’s  
27 conduct would cause a substantial risk of death or serious injury, or if it was a practical  
28 certainty but the defendant was not aware of it, then the defendant has acted, at most,  
recklessly. Karlic, 997 F.2d at 570.

1 The arson in the Beardslee case occurred in a warehouse in the middle of the  
2 night. The building was not entirely isolated, but was in a non-residential area. The  
3 Ninth Circuit affirmed the district court's determination that the defendant's actions  
4 did not warrant the upward adjustment of four levels for creating a substantial risk of  
5 death or serious bodily injury. Beardslee, 197 F.2d at 389. In the Karlic case, on the  
6 other hand, the defendant used explosives to blast open the night depository boxes of  
7 banks on three separate occasions. Although each incident occurred in the pre-dawn  
8 hours, one bank was very close to an apartment building, and the court observed that  
9 the whole purpose of a night depository is to make overnight banking possible. Thus,  
10 the Ninth Circuit held it was not clear error to find the creation of a substantial risk.  
11 Karlic, 997 F.2d at 569. Taking these facts, and assuming the defendant in Beardslee  
12 had destroyed her warehouse with terroristic motivation, she would have a base  
13 offense level of 20 under guideline § 2K1.4, but would have a guideline range of 210-  
14 262 months after application of the terrorism enhancement. The defendant in Karlic,  
15 however, at a base offense level adjusted up to 24 for creating a substantial risk of  
16 death or injury to people by blowing up the night depository of a bank, would have a  
17 range of 51-63 months. Put another way, the defendant who created no risk of harm to  
18 other people would serve a sentence at least four times that of the defendant who put  
19 people at a substantial risk of injury or death.

20 This type of disparity is entirely unwarranted for similarly situated offenders  
21 whose actual conduct differed most importantly in the creation of risk of injury and  
22 death to other people. It amounts to a rejection of the statutory mission embodied in 28  
23 U.S.C. §§ 991(b)(1)(B) and 994(f) and the Court should not presume that Congress had  
24 any intention to impose such drastic sentence enhancements on offenders whose  
25 conduct did not create a substantial risk of injury or death to any person.

26 That there is no such Congressional intent is apparent in the statutes in which  
27 Congress has provided a definition of "terrorism" for purposes of criminalizing and  
28 punishing conduct or providing civil remedies. Title 18 U.S.C. § 2332b(a), the

1 prohibition on acts of terrorism transcending nation boundaries, criminalizes and sets  
2 forth the punishment for one who kills, kidnaps, maims, commits an assault resulting  
3 in serious bodily injury, or assaults with a dangerous weapon any person within the  
4 United States; or creates a substantial risk of serious bodily injury to any other person  
5 by destroying or damaging any structure, conveyance, or other real or personal  
6 property within the United States. Title 18 U.S.C. § 2331(1)(A), the section to which  
7 the terrorism enhancement originally referred, defines international terrorism to  
8 involve “violent acts or acts dangerous to human life that are a violation of the criminal  
9 laws of the United States ...” And finally, the Patriot Act defines “domestic terrorism”  
10 to involve “acts dangerous to human life,” in addition to meeting other criteria. 18  
11 U.S.C. § 2331(5)(A). Each of these other provisions is coupled with specific civil and  
12 criminal remedies. See, e.g. 18 U.S.C. § 2332b(a) & (c) (setting forth criminal  
13 penalties for acts of terrorism transcending national boundaries); 18 U.S.C §2333  
14 (setting forth civil remedies for U.S. nationals injured by acts of international  
15 terrorism.

16 Thus, Congress has repeatedly linked terrorism with purposeful violence toward  
17 persons. In light of this, and against the backdrop of the statutory mandate to avoid  
18 unwarranted sentence disparities between offenders who have committed similar  
19 crimes, the enhancement should not be applied to an arson that did not knowingly  
20 create a substantial risk of injury or death to other persons. Limiting the enhancement  
21 in this way will ensure that there is a logical progression of sentence ranges, beginning  
22 with lower ranges for defendants who committed arson and damaged property without  
23 knowingly creating a substantial risk of harm to other persons, moving upward to  
24 defendants who committed arson and did create such a risk, and reserving the highest  
25 ranges for defendants who both knowingly created this risk and harbored the terrorist  
26 motivation described in 18 U.S.C. § 2332b(g)(5).

1           **8.     The Enhancement Violates *Apprendi***

2           The terrorism enhancement provides that if the offense of conviction was a  
3 felony that involved or was intended to promote a federal crime of terrorism, the  
4 defendant's criminal history category "shall be Category VI." § 3A1.4(b). Unlike  
5 adjustments to an offense level based on the wide variety of factors considered in the  
6 sentencing guidelines, a defendant's criminal history category is based, as the name  
7 suggests, entirely on the defendant's actual criminal history. The wholly arbitrary  
8 upward adjustment embodied in the terrorism enhancement, which is entirely  
9 untethered to any statutory mandate, violates the Fifth and Sixth Amendments and the  
10 holdings of Apprendi v. New Jersey, 530 U.S. 466 (2000), and United States v.  
11 Booker, 543 U.S. 220 (2005), which require that particular facts essential to  
12 punishment be determined by the jury, unless they have been admitted by the  
13 defendant.

14           The Sentencing Guidelines are promulgated by the Sentencing Commission  
15 pursuant to 28 U.S.C. § 994(a). Congress directed the Commission to establish  
16 guidelines that factored both the nature of the offense and the nature of the offender  
17 into the sentencing framework. See 28 U.S.C. § 994(b) & (c). As the Introduction to  
18 the 2000 Guidelines Manual indicates, "[t]he Commission is required to prescribe  
19 guideline ranges that specify an appropriate sentence for each class of convicted  
20 persons determined by coordinating the offense behavior categories with the offender  
21 characteristic categories." Paragraph 2, The Statutory Mission. The coordination of  
22 offense behavior categories with offender characteristics categories is reflected in the  
23 sentencing table, which lists Offense Levels on one side and Criminal History Score  
24 across the top.

25           A defendant's Criminal History Category is computed under the guidelines in  
26 Chapter Four, which details the prior offenses that count and those that do not. As  
27 explained in the Commentary to § 4A1.1, "[t]he total criminal history points from §  
28 4A1.1 determine the criminal history category (I-VI) in the Sentencing Table in

1 Chapter Five, Part A.” Chapter Four includes two guidelines that specifically provide  
2 for mandatory adjustments upward of criminal history category: the Career Offender  
3 guideline, § 4B1.1, and the Armed Career Criminal guideline, § 4B1.4. What  
4 distinguishes these guideline provisions from the terrorism enhancement is that they  
5 respond directly to Congressional mandates requiring the Sentencing Commission to  
6 fashion more punitive sentencing schemes for specific classes of offenders. See §  
7 4B1.1, Application Notes (noting that 28 U.S.C. 994(h) mandated that the Commission  
8 ensure certain career offenders are sentenced at or near the statutory maximum); §  
9 4B1.4, Application Notes (noting, in part, that the guideline applies only to offenders  
10 convicted of violating 18 U.S.C. § 924(e) and who have a minimum of three serious  
11 prior convictions).

12 The adjustment to the criminal history category in the terrorism enhancement  
13 stands on completely different footing. Nothing in the language of the guideline or any  
14 enabling statute explains the Commission’s purpose in adjusting the Criminal History  
15 Category to a Level VI in all cases involving a conviction of a federal crime of  
16 terrorism, without regard to the defendant’s actual criminal history score. There is no  
17 enabling statute or Congressional mandate tied to the terrorism enhancement that  
18 directed the Sentencing Commission to ensure that terrorists receive sentences at or  
19 near the statutory maximum for the offense of conviction.

20 In United States v. Meskini, 319 F.3d 88 (2d Cir. 2003), the Second Circuit  
21 considered and rejected the argument that the automatic elevation of the defendant’s  
22 criminal history to Category VI was a form of impermissible double-counting. The  
23 court reasoned that

24 Congress and the Sentencing Commission had a rational basis for  
25 creating a uniform criminal history category for all terrorists under §  
26 3A1.4(b), because even terrorists with no prior criminal behavior are  
unique among criminals in the likelihood of recidivism, the difficulty of  
rehabilitation, and the need for incapacitation.

27 Id. at 92.

1 Meskini pre-dates Booker, however. In the wake of Booker, the Ninth Circuit  
2 has held that the court may not engage in additional fact-finding to support an upward  
3 departure in criminal history without violating the Sixth Amendment. United States v.  
4 Kortgaard, 425 F.3d 602, 609-610 (9th Cir. 2005) (holding that court could not depart  
5 upward pursuant to § 4A1.3 after Booker, because issues such as whether the  
6 defendant's criminal history does not adequately reflect the seriousness of prior crimes  
7 or the likelihood of recidivism are factual in nature). To the extent that the criminal  
8 history adjustment in the terrorism enhancement is designed to reflect findings related  
9 to the likelihood of recidivism and difficulty in rehabilitation, it is uniquely a fact-  
10 related adjustment.

11 Moreover, Booker and its progeny emphasize the importance of the statutory  
12 mandate of 18 U.S.C. § 3553(a), which requires the Court to consider a number of  
13 factors in imposing sentence, including, among others:

- 14 \* the history and characteristics of the defendant, 18 U.S.C. §  
15 3553(a)(1), and
- 16 \* the sentencing range established for the applicable category  
17 of offense committed by the applicable category of  
18 defendant as set forth in the guidelines, 18 U.S.C. §  
19 3553(a)(4).

18 It is impossible for the Court to honor the statutory mandates of § 3553(a) if  
19 consideration is given to a guideline range computed under the terrorism enhancement.  
20 A defendant's actual criminal history, which is specifically referenced in both of these  
21 subsections is eclipsed by the effect of the terrorism enhancement's adjustment to the  
22 criminal history category. And unlike the adjustments to criminal history category  
23 related to armed career criminals and career offenders, the adjustment in criminal  
24 history category found in the terrorism enhancement does not reflect a Congressional  
25 mandate of any kind. Indeed, the enhancement overrides both Congress' express  
26 mandate in § 3553(a)(1) and the Supreme Court's mandate in Booker that  
27 enhancements based on facts that go beyond the fact of a prior conviction must be  
28 decided by a jury.

1 The Court should reject the argument that any unwarranted effect of the  
2 Category VI criminal history adjustment may be resolved by departing downward on  
3 the basis that it overstates the defendant's actual criminal history. See Meskini, 319  
4 F.3d at 92. In fact, this argument exposes the underlying problem with the criminal  
5 history adjustment, which is that it necessarily represents fact-finding beyond that  
6 which is involved in computing the defendant's actual criminal history category – fact-  
7 finding that contravenes the Sixth Amendment. Imagine for example an offender  
8 convicted of the mass murder of U.S. citizens overseas, such as at U.S. embassies in a  
9 foreign country, and assume that the offender had no prior criminal history, was young  
10 and unwavering in his conviction that the actions were justified, and had many prior  
11 arrests but no convictions for assaulting Americans overseas. Under the reasoning of  
12 Meskini, the court would adjust the criminal history category up to Category VI  
13 pursuant to the terrorism enhancement, and then consider a downward departure under  
14 § 4A1.3 to a Category between II and IV to reflect the fact that the offender had no  
15 priors. This process, however, is indistinguishable from a process in which the court  
16 sets the offender's true criminal history at Category I and departs upward under §  
17 4A1.3 on the grounds that the offender poses a serious risk of reoffending and has a  
18 criminal background more serious than his criminal history category reflects. Either  
19 way, the process that the court actually engages in, as the courts applying the terrorism  
20 enhancement to defendants with very low criminal history categories have recognized,  
21 involves a nuanced factual determination focused on the seriousness of the defendant's  
22 priors and his risk of reoffending.

23 This is precisely what the Ninth Circuit held the court cannot do after Booker.  
24 In United States v. Kortgaard, *supra*, the court held that the ultimate determinations  
25 underlying upward departures under § 4A1.3 – determinations of the “seriousness” of a  
26 defendant's past misconduct and a defendant's “likelihood” of recidivism – are factual.  
27 Thus, a sentence imposed on the basis of such an upward departure was  
28 unconstitutional. The Kortgaard court also explained that “[i]t is inconsequential to

1 our Sixth Amendment analysis that upward departures under § 4A1.3 are discretionary  
2 . . . Whether the judicially determined facts *require* a sentence enhancement or merely  
3 *allow* it, the verdict alone does not authorize the sentence.” *Id.* at 606 (internal quotes  
4 and citations omitted).. The same reasoning applies here, where the decision to depart  
5 from the terrorism-enhanced Category VI is discretionary ultimately turns not on  
6 whether the defendant’s “true” criminal history category as calculated under Chapter 4  
7 overstates his criminal history, but on whether the defendant’s criminal history  
8 category should be set at a value higher than what would be calculated under Chapter  
9 4, but less than the Category VI prescribed in the enhancement. The verdict or plea  
10 alone does not authorize a sentence determined based on a criminal history category  
11 established in this manner.

12 Thus, adjusting the criminal history category to Category VI violates the Sixth  
13 Amendment and cannot be remedied by departing downward under § 4A1.3.

14 **9. Conclusion**

15 For the foregoing reasons, the Court should not impose an enhancement for  
16 “terrorism.”

17 Dated this 27<sup>th</sup> day of May 2008.

18 Respectfully submitted.

19 /s/Neil M. Fox  
20 NEIL M. FOX  
21 WSBA NO. 15277  
22 Attorney for Defendant  
23 Cohen & Iaria  
24 1008 Western Ave. Suite 302  
25 Seattle WA 98104  
26 Telephone: 206-624-9694  
27 Fax: 206-624-9691  
28 e-mail: nmf@cohen-iaria.com

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

CERTIFICATE OF SERVICE

I hereby certify that on the 27<sup>th</sup> day of May 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to attorney of record for the Plaintiff and all other parties.

\_\_\_\_\_  
/s/Neil M. Fox  
NEIL M. FOX  
WSBA NO. 15277  
Attorney for Defendant  
Cohen & Iaria  
1008 Western Ave. Suite 302  
Seattle WA 98104  
Telephone: 206-624-9694  
Fax: 206-624-9691  
e-mail: nmf@cohen-iarial.com