Terri Wood, OSB #88332
Law Office of Terri Wood, P.C.
730 Van Buren Street
Eugene, Oregon 97402
541-484-4171
fax: 541-485-5923
email: twood@callatg.com

Attorney for Stanislas Meyerhoff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, -VS- Stanislas Gregory Meyerhoff, Defendant	Case Nos. CR-06-60078-AA CR-06-60122-AA DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO APPLICATION OF THE TERRORISM ENHANCEMENT (Evidentiary Hearing Requested)

I. INTRODUCTION

Since its enactment in 1995, the courts have applied the "Terrorism Enhancement," U.S.S.G. §3A1.4, in only two cases where arson was the offense of highest severity, according to Guidelines Commission staff.

Neither of those two cases in the last 12 years involved arsons committed by defendants affiliated with the ELF or ALF, although there have been more than a couple arson prosecutions of ELF/ALF affiliated defendants during those years.

Not only has the Government not sought (or unsuccessfully sought) the Terrorism Enhancement against earlier ELF/ALF affiliated defendants, but prosecutors for the Western District of Washington are not seeking application

of the enhancement against co-defendants of Mr. Meyerhoff and the other *U.S. v. Dibee* defendants, who are similarly situated and pending sentencing.

The official policy of both the ELF and ALF, at all times material to these defendants, adhered to a code of nonviolence against people, according to an FBI Counterterrorism expert testifying before Congress. "From January 1990 to June 2004, animal and environmental rights extremists have claimed credit for more than 1,200 criminal incidents, resulting in millions of dollars in [property] damage and monetary loss . . . . [but] no deaths or injuries have resulted," that expert reported.

The current Terrorism Enhancement arose from the ashes of the Oklahoma City bombing, by Congressional mandate to the Guidelines Commission. Congress never intended it apply to defendants who adhere to a code of nonviolence against people in pursuing their political agendas, and whose criminal acts have not resulted in injury to a single person, much less a death.

By seeking application of the enhancement to Mr. Meyerhoff and his co-defendants in Oregon, the Government asks this Court to go where no court in the nation has ventured before. And without any law from this Circuit to guide it.

The Government has Attorney General Alberto Gonzales' political agenda to advance with this case, and nothing else to lose if the Court declines to impose the enhancement: With or without it, the Government's sentencing recommendations for Mr. Meyerhoff and the cooperating co-defendants stay the same.

But this is no idle battle of semantics for the defense. Branding defendants with the Terrorism Enhancement will officially label them "Terrorists" from the BOP's perspective, likely resulting in high security designations that will drastically increase the risk of physical and sexual assault against cooperating defendants like Mr. Meyerhoff.

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II. SUMMARY OF ARGUMENT

The original Terrorism Enhancement applied to any felony that involved or promoted "international terrorism." In 1995, Congress directed amendment of the enhancement "so that [it] only applies to Federal crimes of terrorism, as defined in section 2332b(g) of title 18, United States Code." The Commission, however, retained the earlier language that the enhancement apply to any "felony that involved, or was intended to promote, a federal crime of terrorism." §3A1.4 (emphasis supplied).

Some other Circuit courts have relied on this expansive language in the guideline to apply the enhancement to violations of the general conspiracy statute, 18 U.S.C. §371, so long as one object of the conspiracy was a "felony that involved, or was intended to promote, a federal crime of terrorism." That approach is erroneous, because this expansive language in the guideline violated the Congressional directive to limit application of the enhancement, rendering that language invalid.

Restricting application of the Terrorism Enhancement to the list of crimes in §2332b(g)(5) is only the first step in analyzing the reach of this enhancement. A closer look reveals that a dogmatic application of the enhancement to every listed crime, without further narrowing criteria, also violates the purpose of this legislation:

Incongruities result from literal adherence to the list of crimes in §2332b(g)(5) to determine application of the Terrorism Enhancement. A literal approach also contravenes clear Congressional intent to restrict the reach of the enhancement to the most dangerous types of offenses that threaten the fabric of our society. Finally, a literal approach conflicts with a fundamental policy of the Sentencing Guidelines: to look beyond the statutory charge to the real offense conduct.

To remedy these unintended consequences, this Court should interpret §2332b(g)(5) consistent with other provisions of the same Act, to require that listed crimes that penalize damage or destruction of property—including §844 arsons and §1366(a) damage of energy facilities—be further narrowed to those that "create a substantial risk of serious bodily injury," *see* §2332b(a)(1)(B). This interpretation is consistent with the types of terrorist activities catalogued by

Congress in support of the legislation—conduct knowingly dangerous to human life, if not outright deadly.

The Terrorism Enhancement should only be applied to defendants who knowingly created a substantial risk of serious bodily injury in carrying out arsons. This construction is required to effectuate Congress' intent that the enhancement reach only those truly deserving of its greatly increased penalties, and to harmonize the enhancement with related provisions of the guidelines.

The federal arson statutes, as well as the guidelines, have historically recognized and punished less severely those arsons that damaged only property, without substantial risk of injury or death. Mr. Meyerhoff, and his co-defendants pending sentencing, certainly intended no harm to human life, and did not knowingly create a substantial risk of serious bodily injury through any of their arsons, much less by toppling of a BPA electric tower in the wilderness.

They stand convicted only of arsons causing damage to property, not the aggravated arson crimes involving injury or death. Mr. Meyerhoff's PSR does not rank any of his arsons as having knowingly created a substantial risk of serious injury to any person. Thus, none of his arson offenses should qualify for the enhancement.

For the Terrorism Enhancement to apply to Mr. Meyerhoff and these co-defendants, the Court would have to additionally find that their conduct was "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." §2332b(g)(5)(A).

The meaning of these terms is subject to various interpretations, with little guidance from the statutory framework or legislative history. In such circumstances, the Court should apply the rule of lenity to narrowly construe the statute and related guideline in favor of the defendants. The Court should find that "government" means the federal government, and that the motivational element requires the qualifying offense to be directed primarily at intimidating, coercing or retaliating against the government.

A final consideration in interpreting and applying the Terrorism Enhancement must be the fundamental premise of the guidelines to achieve "certainty and fairness" in the federal sentencing process by eliminating "unwarranted disparity" among sentences for similar defendants committing

similar offenses. S.Rep. No. 225, 98th Cong., 1st Sess. 52, 56 (1984); 28 U.S.C. §991(b).

No court, in any reported case, has ever applied U.S.S.G. §3A1.4 to a defendant convicted solely of non-aggravated arson offenses or conspiring to commit such offenses. No court has ever applied U.S.S.G. §3A1.4 to defendants affiliated with the ELF/ALF in other arson prosecutions. Applying the Terrorism Enhancement to Mr. Meyerhoff and his co-defendants contravenes the Congressional directive to achieve fairness and prevent unwarranted disparity.

Using the PSR's guideline calculations, Mr. Meyerhoff's sentencing range without the enhancement would be a total of 70-87 months imprisonment; with the enhancement, it leaps to 30 years to life imprisonment. This huge increase in his potential sentence is NOT related to the dangerousness of his offense conduct, which the guidelines without the enhancement fully take into account. Surely individuals who resorted to arson in a vain and misguided attempt to save the environment are not, by that motive alone, rendered vastly more dangerous than individuals who engage in a series of arson for motives such as profit or revenge?

If the Court rejects defense arguments and concludes the enhancement applies, the Court should find that Category VI substantially overstates Mr. Meyerhoff's criminal conduct apart from this case, as well as the likelihood that he will re-offend, and exercise its authority to adjust his criminal history down to Category I.

III. THE TERRORISM ENHANCEMENT APPLIES TO OFFENSES LISTED IN 18 U.S.C. §2332b(g)(5) THAT DAMAGE OR DESTROY PROPERTY, WITHOUT RESULTING PHYSICAL INJURY, ONLY WHEN THE DEFENDANT'S CONDUCT KNOWINGLY CREATES A SUBSTANTIAL RISK OF SERIOUS BODILY INJURY, AND IS MOTIVATED TO INTIMIDATE OR RETALIATE AGAINST THE FEDERAL GOVERNMENT.

A. A Brief Look At The Historical Evolution Of The Terrorism Enhancement

The Guidelines first provided for increased punishment for crimes involving "terrorism" with the enactment of an upward departure policy statement in 1989, U.S.S.G. §5K2.15, without any directive from Congress. Only one decision in the 9th Circuit discussed this guideline, undertaking to determine

its reach, as the guidelines contained no definition of terrorism. See *United States v. Hicks*, 997 F.2d 594 (9th Cir. 1993).

The Court had little difficulty finding the departure provision embraced Hick's conduct: He was convicted of launching mortar attacks, and planting car bombs similar to Timothy McVeigh's, designed to damage four federal government buildings in three California cities between 1987 and 1991, as part of an ongoing effort to disrupt the functioning of the IRS.

The Commission repealed that guideline on its own initiative when it enacted the original version of the Terrorism Enhancement, U.S.S.G. §3A1.4, in 1995. The Commission acted in response to a Congressional directive in the Violent Crime Control and Law Enforcement Act of 1994, "to provide an appropriate enhancement **for any felony**, whether committed within or outside the United States, **that involves or is intended to promote international terrorism,** unless such involvement or intent is itself an element of the crime." Id., Sec. 120004 (emphasis supplied).

The Commission created §3A1.4, that set the minimum offense level at level 32, and, like the Career Offender guideline, prescribing a Category VI criminal history, "[I]f If the offense is a **felony that involved, or was intended to promote, an international crime of terrorism."** (emphasis supplied). The Commission chose the definition of "international terrorism" in 18 U.S.C. §2331 to define the same term in §3A1.4.

In 1996, the Commission amended §3A1.4, as an emergency measure responding to a new Congressional directive to "amend the sentencing guidelines so that the chapter 3 adjustment relating to international terrorism **only applies to Federal crimes of terrorism, as defined in section 2332b(g) of title 18, United States Code**." Sec. 730, Antiterrorism and Effective Death Penalty Act of 1996.

Rather than limit the enhancement to "Federal crimes of terrorism, as defined in section 2332b(g) of title 18, United States Code" as Congress had directed, the Commission simply replaced "an international crime of terrorism" with "a federal crime of terrorism," and changed the reference to the statutory definition accordingly, retaining the old language that applied the guideline if the offense "involved or intended to promote" a terrorism crime.

From November 1, 1996, to date, §3A1.4 has provided:

> (a) If the offense is **a felony that involved, or was intended to promote, a federal crime of terrorism,** increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32.
>
> (b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.
>
> * * * *
>
> Application Note 1. . . 'Federal crime of terrorism' is defined at 18 U.S.C. 2332b(g)(5)."
> (Changes from 1995 version underlined).

The Commission last amended this guideline's application notes in 2002, to provide for upward departure making it possible to impose punishment not greater than that authorized by the Terrorism Enhancement, "for offenses that involve terrorism but do not otherwise qualify" for the enhancement, due to failing to meet the definitional criteria of 18 U.S.C. §2332b(g)(5). Application Note 4, §3A1.4; see Appendix C, Amendment 637, U.S.S.G. Manual.

B. A Brief Look At The Relevant Historical Development Of Chapter 113B of Title 18—Terrorism.

In 1992, Congress enacted the definition of "International Terrorism" in this section of the Criminal Code, which the Commission later incorporated into the original version of §3A1.4. That definition has remained unchanged to date.

International terrorism means "activities that . . . involve violent acts or acts dangerous to human life," which "occur primarily outside the territorial jurisdiction of the United States . . . . " 18 U.S.C. §2331(1)[current citation; this provision has been renumbered since enactment].

In response to increasing acts of terrorism worldwide, involving murder and mayhem against American citizens overseas, and striking at home with the Oklahoma City bombing, Congress set out in 1995 to "deter terrorism, or when it takes place, to prosecute and punish such crimes." See, e.g., House Report 104-383, Committee Report 2 of 4 (H.R. 1710)(Background and Need for the Legislation).

In particular, Congress wanted new laws to reach domestic terrorism, i.e., acts committed primarily within the United States, as well as international

terrorism. *Id.* (Purpose and Summary). Congress also wanted the Guidelines Commission to "amend the guidelines so that the adjustment relating to international terrorism under §3A1.4 also applied to domestic terrorism," Section 206 of H.R. 1710. Congress did not complete its work on this legislation until 1996.

In the Antiterrorism and Effective Death Penalty Act of 1996 (hereafter AEDPA), Congress enacted 18 U.S.C. §2332b, Acts Of Terrorism Transcending National Boundaries. Subsections (a) & (c) provided increased penalties for a defendant who, in addition to other criteria not relevant here:

> (A) kills, kidnaps, maims, commits an assault resulting in serious bodily injury, or assaults with a dangerous weapon any person within the United States; or
> (B) **creates a substantial risk of serious bodily injury to any other person by destroying or damaging any** structure, conveyance, or other **real or personal property within the United States** or by attempting or conspiring to destroy or damage any structure, conveyance, or other real or personal property within the United States; . . . shall be punished as prescribed in subsection (c).

Subsection (g) provided definitions for §2332b, including (g)(3) which defined "serious bodily injury," the term used in subsection (a) cited above; and subsection (g)(5) which defined "Federal crime of terrorism." It provided, in pertinent part to the case at bar:

> **(5) the term "Federal crime of terrorism" means an offense that—**
>
> **(A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and**
>
> **(B) is a violation of—section . . . 844(f) or (i)(relating to arson and bombing of certain property) . . . 1366 (relating to destruction of an energy facility).**

While the background for and general purpose of what would become the AEDPA remained consistent as competing bills wound their way through both houses over the intervening months, efforts to define domestic terrorism, for

purposes of expanding U.S.S.G. §3A1.4 to reach it, involved a continual narrowing of the definition.

Earlier versions defined "terrorism" to encompass acts resulting in substantial property damage, without physical injury, that were in violation of any State, as well as Federal, law. See, e.g., "the use of force or violence in violation of the criminal laws of the United States or of any State . . . that appears to be intended to achieve political or social ends," Section 315 of H.R. 1710; "terrorist activity means any activity which is unlawful . . . under the laws of the United States or any State and which involves . . . the use of any—explosive or firearm (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property," amended Section 315 of H.R. 1710.

These earlier definitions did not survive.

Chairman Henry Hyde of the House Judiciary Committee, introduced a revised bill, H.R. 2706: "The new bill does the following . . . Deletes the overly broad definition of terrorism." Cong. Rec. December 5, 1995, H 13976. H.R. 2706 included Section 104, defining a "Federal crime of terrorism," that was later enacted unchanged as 18 U.S.C. § 2332b(g)(5).

The only place in §2332b where the term "Federal crime of terrorism" is used is in subsection (f), which mandates that "the Attorney General shall have primary investigative responsibility for all Federal crimes of terrorism, and the Secretary of the Treasury shall assist the Attorney General at the request of the Attorney General." This, in effect, gave primary investigative responsibility to the FBI, with assistance as requested from the ATF, over all "Federal crime[s] of terrorism."

The AEDPA did not include a definition of "domestic terrorism." That occurred with the USA PATRIOT Act of 2001, which added the term "domestic terrorism," and its definition, to the Definitional section for Chapter 113B–Terrorism of Title 18. Those definitions apply to the entire Chapter, including §2332b. See, 18 U.S.C. §2331 & §§(5).

Although the PATRIOT Act of 2001 also amended the definition of "Federal crime of terrorism" in §2332b, it did not make reference to "domestic terrorism." Instead, the amendment narrowed §2332b(g)(5)'s application to

§844(f) and §1366 offenses, as well as narrowing other listed offense. The only new crimes added to the list by this legislation concerned "9-11" type offenses aboard airplanes.

The 2001 amendment expressly omitted §844(f)(1)(arson of government property without risk of injury or death), by specifying the definition applied to "844(f)(2) or (3) (relating to arson and bombing of Government property risking or causing death)"; and likewise eliminated the general reference to §1366, specifying instead the most severe subsection of that offense, §1366(a)(destruction of energy facility exceeding $100,000).

There have been no changes to §2332b since 2001 that are relevant to the issues in the case at bar.

A chart summarizing the historical development of the Terrorism Enhancement and the related Congressional action, is included in the Appendix to this Memorandum, and may assist in following the arguments below. For a much more exhaustive analysis of these historical developments, see *United States v. Salim,* 287 F.Supp.2d 250 (S.D.N.Y. 2003), and *United States v. Graham*, 275 F. 3d 490 (6th Cir. 2001)(dissenting opinion).

C. The 2001 Amendment To §2332b(g)(5) That Narrowed Its Listings Of §844(f) And §1366 Offenses Applies To These Defendants.

As if legislative history relevant to the application of the Terrorism Enhancement to the case at bar was not already complicated enough, there is yet another maze to navigate:

Mr. Meyerhoff's and co-defendants' plea agreements call for use of the 2000 Guidelines Manual, which remained in effect through October 31, 2001.[1]

The guidelines in effect on the date of the last crime of conviction are used when application of the guidelines in effect at the time of sentencing would result in a higher guideline range, raising *ex post facto* problems. See U.S.S.G. 1B1.11. Absent any constitutional violation, Congress has directed that the

[1] See Meyerhoff's Plea Agreement Letter, page 2, ¶4 (Resolution of Sentencing Issues).

guidelines in effect on the date of sentencing control. See 18 U.S.C. §3553(b) & §3553(a)(4).

The last §844(f) crime that is relevant conduct for Mr. Meyerhoff and some of his co-defendants was an arson of BLM property occurring on October 15, 2001, and charged under §844(f)(1). That crime appears as an overt act in the conspiracy count in Mr. Meyerhoff's case, not as a separate count of conviction for him. On that date, October 15, 2001, the definition of "Federal crime of terrorism" in §2332b literally applied to "§844(f)" without further delineation of subsections, although §844(f) had been split into three subsections, with enhanced penalties based on aggravating facts, by a provision of the AEDPA.

On October 26, 2001, the PATRIOT Act amendment of §2332b that specified only §844(f)(2) & (f)(3) (arson of government property risking or causing death) came within the "Federal crime of terrorism" definition, became effective.

The conspiracy count of conviction for Mr. Meyerhoff "continu[ed] through October 2001," i.e., ended on October 31, 2001.

"In the case of conspiracy or other continuing offense, the courts have held that the date that controls the version of the Guidelines Manual to be applied is the date of the completion of the offense (or the date the defendant withdraws from the conspiracy)." Federal Sentencing Law And Practice, p. 154 & n. 31 (2007 ed.)(collecting cases); see, U.S.S.G. 1B1.11(b)(1) & Application Note 2. Therefore, the conspiracy count is the last crime of conviction, and the Guidelines Manual in effect on that date controls, i.e., the 2000 Guidelines Manual.

Thus, on October 31, 2001, the Terrorism Enhancement applied by its literal terms, based on the newly-amended §2332b(g)(5), only to §844(f)(2) & (3) offenses. Those §844(f) subsections are not charged against Mr. Meyerhoff or any of his co-defendants, either as substantive counts or as objects or overt acts of the conspiracy.

To the extent one might reach a contrary result, the October 26, 2001 amendment of §2332b(g)(5), which expressly narrowed that statute to arsons of government property risking or causing death, should be viewed as a

clarifying amendment to Guideline 3A1.4, and be given retroactive effect. *See* U.S.S.G. §1B1.11(b)(2)("The Guidelines Manual in effect on a particular date shall be applied in its entirety.... However, if a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes."); *United States v. Sanders*, 67 F.3d 855 (9th Cir. 1995).

There is no *ex post facto* problem with applying the 2001 amendment of §2332b(g)(5) to crimes charged in these defendants cases committed before October 26, 2001. *See, United States v. Smallwood*, 35 F.3d 414, 417-18 n. 8 (9th Cir.1994) (in holding that a subsequent amendment would not apply to an earlier crime, the court noted that "[t]he amendment changes the substantive law and the meaning and effect of the guidelines in this circuit . . . and, if [the amendment were] applied [it] would increase Smallwood's sentence substantially.").

Furthermore, the amendment of §2332b(g)(5) and its resulting effect on §3A1.4 did not change the substantive law of the Ninth Circuit concerning application of the Terrorism Enhancement, because there was—and still is—no law in this Circuit regarding application of the enhancement. *See, United States v. Innie*, 77 F.3d 1207 (9th Cir. 1996)(amendment is clarifying, not substantive, when it does not change the substantive law of the Circuit, and will decrease rather than increase defendant's sentence).

It is consistent with the Congressional intent that the definition of "Federal crime of terrorism" be narrow, to view the amendment of §2332b(g)(5) as one of clarification, rather than a substantive change of the law. Let it not be forgotten that the PATRIOT Act of 2001 was enacted less than two months after that fateful day of September 11th, hardly a time when Congress would set about to substantively shorten the reach of laws intended to punish terrorists.

D. <u>The Terrorism Enhancement Does Not Apply To 18 U.S.C. §371 Conspiracies.</u>

Mr. Meyerhoff and various co-defendants are charged with violations of 18 USC 844(f)(1), §844(i), §1366(a), and a §371 conspiracy to violate those

three statutes. No other statutes are charged in the Informations to which they entered guilty pleas.

The definition of "Federal crime of terrorism," §2332b(g)(5), incorporated in U.S.S.G. §3A1.4, does not and has never listed 18 USC §371, the generic conspiracy statute that carries a 5-year maximum penalty, as a qualifying offense. It also does not list and has never listed 18 USC §844(n), which punishes conspiracy to commit any arson the same as the underlying arson.

Equally significant is that the definition of "Federal crime of terrorism," §2332b(g)(5), effective as of the 2001 PATRIOT Act, specifically lists other conspiracy offenses. See, e.g., §956(a)(1)(relating to conspiracy to murder, kidnap, or maim persons abroad); §351(d)(conspiracy to assassinate or kidnap Congressional, Cabinet and Supreme Court members); §1751(d)(conspiracy to assassinate and kidnap Presidential and Presidential staff). Thus, if Congress intended §371-type conspiracies to fall within §2332b(g)(5), it would have expressly said so.

Congress directed: "The United States Sentencing Commission shall forthwith . . . amend the sentencing guidelines so that the chapter 3 adjustment relating to international terrorism only applies to Federal crimes of terrorism, as defined in section 2332b(g) of title 18, United States Code." Sec. 730, AEDPA.

When instead the Commission grafted §2332b(g)(5) into the existing Terrorism Guideline, retaining the old, expansive language "If the offense is a felony that involved, or was intended to promote, [a federal crime of terrorism]," it violated the Congressional directive. The Commission's "significant discretion . . . must bow to the specific directives of Congress," *United States v. LaBonte*, 520 U.S. 751, 757, 117 S.Ct. 1673 (1997) (citation omitted).

The defense acknowledges that other Circuit courts have held that §371 conspiracies to commit crimes listed in §2332b(g)(5) do qualify for the Terrorism Enhancement, based on the language in §3A1.4 that the guideline applies to any felony "involved or intended to promote a federal crime of terrorism." Those cases were wrongly decided and do not bind this Court. See also, *United States v. Graham, supra* (dissenting opinion).

Other than having retained this old verbiage from the original §3A1.4, the Commission has not provided Commentary extending the enhancement to conspiracies or attempts to commit the crimes enumerated in §2332b(g)(5), unlike other guidelines whose application notes specifically include conspiracies. See, e.g., U.S.S.G. §4B1.2, Application Note 1 (including conspiracies and attempts to commit crimes qualifying for Career Offender enhancement).

The 2002 addition of Application Note 4, which provides for an upward departure equal to the punishment provided by the Terrorism Enhancement for cases that do not technically fall within the enhancement itself, including offenses not listed in §2332b(g)(5) like the generic conspiracy statute, appears adequate to deal with conspiracies to commit the crimes enumerated in §2332b(g)(5).

E. The Terrorism Enhancement Applies To Listed Offenses That Only Damage Property When There Is, At Least, A Substantial Risk Of Serious Bodily Injury.

What is left in the list of crimes in §2332b(g)(5) that are charged against Mr. Meyerhoff and various co-defendants, after eliminating §844(f)(1) arsons and the §371 conspiracy, are only §844(i) (arson of non-government property) and §1366(a)(energy facility destruction). Literal application of the Terrorism Enhancement to these crimes would result in unintended anomalies, as demonstrated below, and offend Congressional intent that the enhancement be narrowly applied.

This Court should therefore reject a "plain language" reading that appears to dictate application of the enhancement to all §844(i) and §1366(a) crimes, and interpret the reach of §3A1.4 more narrowly to give effect to the manifest purpose of the §2332b definitional statute. *See,* 59 CJ, *Statutes* §575 (1932); Sutherland, Statutory Construction §363 (2d ed. 1904); 59 CJ, *Statutes* §573 (1932); *United States v. Gonzalez*, 262 F.3d 867, 869 (9th Cir.2001)(Courts "appl[y] the rules of statutory construction when interpreting the guidelines").

The "Plain Language" Approach And Unintended Consequences

Most irreconcilable with achieving internal consistency of the crimes listed in §2332b(g)(5) is the inclusion of all of §844(i) offenses, when the statute

rejects inclusion of the related §844(f)(1). The problem is more easily understood by first examining the statutes, side by side.

§844(f)	§844(i)
(1) Whoever maliciously damages or destroys, or attempts to damage of destroy, by means of fire . . . any building, vehicle, or other personal or real property in whole or in part owned or possessed by . . . the United States . . . shall be imprisoned for not less than five years and not more than 20 years	**(i)** Whoever maliciously damages or destroys, or attempts to damage of destroy, by means of fire . . . any building, vehicle, or other personal or real property used in interstate [commerce or affecting commerce] . . . . . shall be imprisoned for not less than five years and not more than 20 years
(2) . . . [if prohibited conduct] directly or proximately causes personal injury or creates a substantial risk of injury to any person, including any public safety officer performing duties, shall be imprisoned for not less than 7 years and not more than 40 years	**(i)** if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of [prohibited conduct] . . . shall be shall be imprisoned for not less than 7 years and not more than 40 years
(3) . . . [if prohibited conduct] directly or proximately causes the death of any person, including any public safety officer performing duties, shall be subject to the death penalty, or imprisoned for not less than 20 years or for life	**(i)** if death results to any person, including any public safety officer performing duties as a direct or proximate result of [prohibited conduct] . . . shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment

This comparison reveals that both §844(f) and §844(i) include enhanced penalties when the arson results in injury or death of any person; but unlike §844(f), §844(i) has no subsections delineating the enhanced penalty provisions.

None of the defendants in this case are charged under the enhanced penalty provisions of §844(i), which would require an allegation of injury or death in the charging document and notice of the higher penalties. *See Jones v. United States,* 526 U.S. 227 (1999)(holding provisions of carjacking statute that established higher penalties to be imposed when offense resulted in serious bodily injury or death set forth additional elements of offense, not mere sentencing considerations).

Congress limited the definition of "Federal crime of terrorism" to §844(f)(2)&(3), which provide for enhanced penalties when the arson of government property causes injury or death to any person, and excluded §844(f)(1), arson of government property committed without jeopardizing life or limb. It makes little sense for Congress to have intended the Terrorism Enhancement to apply to private property damaged by arson without resulting injury or death—the crimes of conviction for Mr. Meyerhoff and co-defendants—but NOT to apply to government property damaged by arson with no risk of injury or death.

This anomaly becomes greater when one considers the motive required by §2332(b)(g)(5) is to coerce or retaliate against government—not against private property owners. Why would Congress exclude §844(f)(1) arsons, when the motivational element of the Terrorism Enhancement could be accomplished by arsons that only damaged government property, without risking injury or death, unless Congress did not intend the enhancement reach any arson that did not risk injury or death?

Because §3A1.4 is an upward adjustment to be applied to every defendant who meets its criteria, this Court must consider the consequences of a literal application in circumstances beyond the facts of these defendants' cases.

Thus, for example, a literal reading of the enhancement would result in a guideline range of 210-268 months imprisonment for a defendant who doused gasoline on and set afire a large American flag used to attract business at an interstate truck stop, in violation of §844(i), for the stated purpose of retaliating against Congress for allowing oil companies to reap windfall profits.

With a more expansive view of "government," the same sentencing range would befall a defendant who used gasoline to set fire to an unoccupied county vehicle parked in a lot, in violation of §844(i), to retaliate against the Lane County Commission's enactment of an income tax.

The Court may not rely on the existence of prosecutorial discretion to not bring federal charges against such defendants; it is the duty of the courts to interpret the Terrorism Guideline so that it is applied fairly and consistently, not the discretion of prosecutors to seek it or not, that Due Process demands.

Another absurd result is reached through a literal application of the Terrorism Enhancement to the §1366(a) conviction in Mr. Meyerhoff's case. That statute applies to destruction of an energy facility, or damage to property of an energy facility, in an amount exceeding or intended to exceed $100,000. As part of his plea agreement, Mr. Meyerhoff has stipulated the Government can prove beyond a reasonable doubt that he committed this crime and did so to retaliate against government conduct.

Thus, this single count clearly qualifies for application of the Terrorism Enhancement, if the "plain language" of that enhancement controls.

These are the circumstances of that offense: BPA spokesman Perry Gruber said power service remained intact. No customers lost power. The tower was in a remote area. He said, "the sabotage was not an act of terrorism, but a malicious act of mischief. The net result of the incident was nothing since alternate lines were able to carry the rerouted power." Another BPA spokesman, Mike Berg, later reported, "The incident has cost the BPA about $126,000, which includes $92,397 in lost revenue, as well as about $32,800 for tower and line repairs." FBI Special Agent David Szady concluded, "The cause has been determined and has been reported as an act of malicious mischief."

It cannot be seriously contended that Congress intended the Terrorism Enhancement apply to such acts of criminal mischief, limited to property damage with no resulting injuries nor substantial risk of injury. This was not conduct aimed at "destruction of an energy facility," the words used to describe the crime in §2332(b)(g)(5), but rather the disruption of electric service by toppling a tower and downing some power lines, far away from the direct supply of electric power to any critical public services.

A literal application of the Terrorism Enhancement to every defendant convicted of one of the offenses listed in §2332b(g)(5) thwarts Congressional intent to arrive at a narrow definition "in order to keep a sentencing judge from assigning a terrorist label to crimes that are truly not terrorist . . . ." H. Rep. No. 104-383, at 114 (1995).

A "list of crimes" approach also runs afoul of a basic premise of the Sentencing Guidelines: to base punishment, as much as possible, on real offense conduct, not on the statutory crime of conviction. *See, United States. v. Booker*,

543 U.S. 220, 253-54, 125 S.Ct. 738 (2005)(Breyer, J., opinion of Court, in part)("Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity. That uniformity does not consist simply of similar sentences for those convicted of violations of the same statute . . . . It consists, more importantly, of similar relationships between sentences and real conduct, relationships that Congress' sentencing statutes helped to advance); *see also*, Breyer,J., "Federal Sentencing Guidelines Revisited," Univ. Nebraska College of Law speech (11/18/98)(Guidelines employ a modified "real offense" approach, rejecting a "charge offense" system that fails to take in to account that same statute can be violated in significantly different ways and cause significantly different harm).

A Common-Sense Approach To Interpreting The Terrorism Enhancement

In interpreting the Terrorism Enhancement, this Court should strive to give effect to what Congress intended, and to harmonize this guideline with other, related guideline provisions. See, e.g., *Hernandez v. Ashcroft*, 345 F.3d 824, 838 (9th Cir.2003)(Court interprets a federal statute by ascertaining the intent of Congress and by giving effect to its legislative will).

> For just as prior courts can have been skillful or unskillful, clear or unclear, wise or unwise, so can legislatures. And just as prior courts have been looking at only a single piece of our whole law at a time, so have legislatures.
> But a court must strive to make sense as a whole out of our law as a whole. It must . . . take the music of any statute as written by the legislature; it must take the text of the play as written by the legislature. But there are many ways to play that music, to play that play, and a court's duty is to play it well, and in harmony with the other music of the legal system.
> Norman J. Singer, *"Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed,"* 2A Sutherland Statutory Construction §48A:8 (6th ed.)

Congress intended that the Guidelines Commission expand the existing enhancement that applied to "international terrorism," i.e., crimes "dangerous to human life . . . [that] occur primarily outside the territorial jurisdiction of the United States," to crimes of terrorism that, like those committed by Timothy McVeigh, occurred entirely within the United States, i.e., "domestic terrorism."

See also, Deborah F. Buckman, Annotation, *Construction and Application of Federal Domestic Terrorism Sentencing Enhancement, U.S.S.G. §3A1.4,* 186 A.L.R Fed. 147 (2003).

No definition of "domestic terrorism" existed in the criminal code at that time. Various definitions were proposed, all less precise and therefore more expansive and subject to interpretation than what Congress ultimately placed in its directive to the Commission to amend §3A1.4. On the eve of enactment of the AEDPA, the definition changed a final time to the newly-created §2332b(g)(5). According to the amendment's sponsor, this change was necessary to narrow the overly broad definition of terrorism in H.R. 1710. See discussion in greater detail at §III.B, *supra*.

Congress' intent to narrowly define terrorism for purposes of the guideline enhancement remained consistent while the definition itself got pared down. Congress recognized that "terrorism" is a phrase that carries far-reaching connotations and thus should not be used indiscriminately. It therefore sought to carefully develop an accurate and narrow definition "in order to keep a sentencing judge from assigning a terrorist label to crimes that are truly not terrorist, and to adequately punish the terrorist for his offense." H. Rep. No. 104-383, at 114 (1995)(discussing H.R. 1710, with its definition later rejected as "over-broad").

None of the examples of terrorism given by Congress during the evolution of what is now §2332b(g)(5) involved acts confined to damage of property; virtually all examples involved mass murder, or attempted mass murder. See, e.g., H. Rep. No. 104-383 (1995)(listing, among others, the bombing of a German discotheque killing American military personnel; the bombing of the U.S. Embassy in Beirut; the bombing of Pan Am Flight 103; the hostage takings of Americans in the Middle East). However, the list of crimes in §2332b(g)(5) was broader than just offenses involving death or attempted murder.

Upon examining the list of qualifying crimes in §2332(b)(g)(5), they can be categorized as crimes that involve (1) acts that result in serious injury or death, or at least create a substantial risk of serious injury or death; (2) acts of substantial destruction of the country's infrastructure, e.g., mass transit, communication lines, energy facilities, that one would expect to at least create a

substantial risk of serious injury or death; and (3) acts designed to finance, harbor, or provide other material support to terrorists who commit the types of crimes described above. Copies of the statute as originally enacted in 1996, and as amended through the PATRIOT Act of 2001, are included in the Appendix to this Memorandum.

Additional guidance on just how narrow Congress intended the definition of "Federal crime of terrorism" to be when it comes to crimes that primarily cause property damage is found by examining other subsections of §2332b, all enacted by the same legislation.

It is proper to consider the whole Act, rather than just the definition of "Federal crime of terrorism," in isolation. *See, Bailey v. United States*, 516 U.S. 137, 145 (1995)("We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. '[T]he meaning of statutory language, plain or not, depends on context.'").

As previously discussed in this Memorandum, §III.B, Section 2332b as a whole dealt with domestic terrorism, i.e., terrorism crimes committed within the United States. Section 2332b(a), requires, at least, conduct that "**creates a substantial risk of serious bodily injury to any other person by destroying or damaging any . . . real or personal property within the United States**," to be a punishable offense. (Emphasis supplied).

In 2001, Congress enacted a definition of "domestic terrorism," and made it applicable to the entire Chapter 113B—Terrorism, which includes §2332b. 18 USC §2331(5) provides:

> [T]he term 'domestic terrorism' means activities that
> (A) **involve acts dangerous to human life** that are a violation of the criminal laws of the United States or of any State;
> (B) appear to be intended—
> (i) to intimidate or coerce a civilian population;
> (ii) to influence the policy of a government by intimidation or coercion; or
> (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
> (C) occur primarily within the territorial jurisdiction of the United States. (Emphasis supplied).

In the same 2001 legislation (the PATRIOT ACT of 2001), Congress enacted clarifying amendments to §2332b(g)(5). It did not alter the definition

of "Federal crime of terrorism" to include the new, broader "domestic terrorism" definition. However, it is proper to consider this related statutory definition, with its requirement that acts be "dangerous to human life," in interpreting the reach of §2332b(g)(5), given Congress' intent that the Terrorism Enhancement apply to domestic, as well as international, terrorism.

Congress' use of the phrase "acts dangerous to human life," to limit the type of activities that define this broader definition of "domestic terrorism," is further support for finding Congress intended its list of crimes in §2332b(g) that result only in property damage additionally "creat[e] a substantial risk of serious bodily injury."

The 2001 clarifying amendments to §2332b(g)(5) further support this Court finding Congress' intent to exclude crimes that only damage property without substantial risk of serious bodily injury from the reach of the Terrorism Enhancement.

There is, for example, the exclusion of §844(f)(1), discussed in detail above. That amendment did more than clarify the statutory citation to §844(f) offenses; it also modified the descriptive phrase from "(relating to arson and bombing of certain property)" to "(relating to arson and bombing of Government property **risking or causing death**)". See, *Ratzlaf v. United States*, 510 U.S. 135, 140–141, 114 S.Ct. 655 (1994)("Judges should hesitate to treat [as surplusage] statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense.").

Congress also clarified the reference to §1366 offenses, to be expressly limited to §1366(a), related to destruction of an energy facility in an amount exceeding $100,000 or causing a significant impairment of function of an energy facility. It is worth noting that Congress envisioned §1366 crimes could result in death, and provided for enhanced penalties in that event, §1366(d); thus, Congress believed that §1366 crimes, just as arson, are crimes that while targeting property, may in some cases prove deadly and rise to the level of a terrorist offense.

The 2001 amendments to other crimes listed in §2332b(g)(5) are of great significance in showing that Congress did not intend the Terrorism

Enhancement to apply to crimes that only resulted in personal injury, as opposed to serious injury, or at least created a substantial risk of serious bodily injury.

One clarification to §2332b(g)(5)'s original reference to §351 offenses, listed that statute's subsections and expressly omitted the subsection concerning assault of Congressional, Cabinet and Supreme Court personnel, §351(e), limiting the list to "assassination and kidnapping" of these individuals.

Another clarification to the original reference to §1751 offenses, listed specific subsections of §1751, relating to Presidential and Presidential staff assassination and kidnapping, and expressly omitted assaults against these persons resulting in personal injury, §1751(e).

Surely Congress did not intend the Terrorism Enhancement to reach §844 or §1366 offenses not involving personal injury, while excluding crimes against its own members, and the highest representatives of the other branches of government, that resulted in personal injury. *See, Bailey v. United States, supra,* at 146("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme").

Comparison of the guideline provisions that apply to arsons, from the 2000 Guidelines Manual, is also instructive in interpreting the reach of the Terrorism Enhancement.

U.S.S.G. §2K1.4(a)(1) assigned the highest offense level for arsons that "created a substantial risk of death or serious bodily injury . . . and that risk was created knowingly," even though the defendant did not intend to cause death or serious bodily injury, and only property damage actually occurred. The corresponding offense level provided was 24. §3A1.4 requires a minimum offense level of 32—and a Criminal History Category VI—for arsons committed with the motive to intimidate or retaliate against government.

Without restricting the reach of §3A1.4 to offenders who "[knowingly] created a substantial risk of death or serious bodily injury," unwarranted disparity on a grand scale exists between those who commit the most dangerous form of arson for profit or personal revenge—facing a guideline range of 51-63 months for a first offender—and those who commit less dangerous arsons for political motives—facing a guideline range of 210-262 months under the Terrorism Enhancement.

The same analogy holds with the guideline provision for §1366, classified solely as a property crime, with the offense level determined by the value of loss. That guideline, in the 2000 Manual, provided a 2-level increase, or minimum offense level of 14, if the offense involved "the conscious or reckless risk of death or serious bodily injury." §2B1.1.

Mr. Meyerhoff's guideline range for toppling the BPA power, does not include "the conscious or reckless risk of death or serious bodily injury," and is 6-12 months imprisonment. His potential sentence on that count soars to 210-262 months with application of the Terrorism Enhancment, more than a twenty-fold increase.

The draconian impact of the enhancement, if applied not based on the dangerousness of the offense, but only on a defendant's motivation to commit an act of retaliation against the government, a crime committed as a symbolic act of political protest, raises First Amendment concerns that may invoke the doctrine of constitutional avoidance to further narrow the application of this enhancement. See, e.g, *Oregon v. Ashcroft*, 368 F.3d 1118 (9th Cir. 2004)("In divining congressional intent, it is a 'cardinal principle' of statutory interpretation that 'where an otherwise acceptable construction of a statute would raise serious constitutional problems, [federal courts shall] construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.' ").

F. Application Of The Terrorism Enhancement Requires That Defendants Knowingly Create A Substantial Risk Of Serious Bodily Injury.

"Federal crime of terrorism," §2332b(g)(5), is a definitional statute created for a few discrete purposes, one of which was to restrict the reach of the Terrorism Enhancement. Standing alone, it merely states a rule: that a federal crime of terrorism is one of its enumerated crimes, committed with its specified motivation.

> If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense.

> If a statute is to be merged into a going system of law, moreover, the court must do the merging, and must in so doing take account of the policy of the statute—or else substitute its own version of such policy. Creative reshaping of the net result is thus inevitable.
> Norman J. Singer, *supra*, 2A Sutherland Statutory Construction §48A:8 (6th ed.)

This Court must merge this statute into the framework of the sentencing guidelines, taking into account its purpose to restrict application of the Terrorism Enhancement to those most dangerous defendants committing violent acts that substantially risk or cause death. *See, United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003)("an act of terrorism represents a particularly grave threat because of the dangerousness of the crime and the difficulty of deterring and rehabilitating the criminal, and thus terrorists and their supporters should be incapacitated for a longer period of time")(discussing purpose of §3A1.4).

Limiting application of the Terrorism Enhancement to defendants who knowingly created a substantial risk of serious bodily injury although causing only property damage fulfills this purpose of §2332b(g)(5). "Interpreting [the statute] to encompass accidental or negligent conduct would blur the distinction between the "violent" crimes Congress sought to distinguish for heightened punishment and other crimes." *Leocal v. Ashcroft* 543 U.S. 1, 10–11 125 S.Ct. 377 (2004). (crime of violence requires conduct done knowingly).

Knowingly creating a substantial risk of death or serious bodily injury is an aggravating factor under the arson guideline, and there is ample law from the Ninth and other Circuits using the same test to applying that factor.

United States v. Karlic, 997 F.2d 564, 569 (9th Cir. 1993), the Court explained that determination of this issue under 2K1.4 "entails two distinct inquiries."

> First, the court must ask whether the defendant's actions created a substantial risk of death or injury. This is an objective question that focuses on the circumstances surrounding the offense. A finding that there was a substantial risk of death or injury is a necessary predicate to the second, subjective, inquiry, which asks whether the defendant acted knowingly . . . in creating that risk. *Id.*

Karlic held that a defendant acted "knowingly . . . only if the defendant was aware that a substantial risk of death or serious injury was 'practically certain' to result" from the arson. *Id.*

The Ninth Circuit went on to explain:

> A defendant is aware that his actions are practically certain to create a substantial risk if he is aware (1) that the factors that present a substantial risk of death or serious injury are practically certain to exist, and (2) that in view of those factors, it is practically certain that his actions will create a substantial risk. *Id*,. at 569-570.

Examples of facts found sufficient to meet this standard included a defendant who pipe-bombed a house that he knew to be occupied; a defendant who set fire with multiple points of origin within 35 feet from an inhabited apartment complex; and a defendant who attempted to blow up a store near public streets and other businesses with pedestrian access. *Id.*, at 570. The Ninth Circuit found Karlic met that standard because he used explosives he knew would blow up bank night-depository boxes, and had actual knowledge that persons made deposits at that time of night.

In contrast, the Court in *United States v. Beardslee*, 197 F.3d 378 (9th Cir. 1999), agreed with the district judge that this standard was not met when the defendant set fire to an unoccupied warehouse in the middle of the night, that was located in a non-residential area.

Although the adjustment may apply when the risk is to firefighters—rather than civilians in the targeted building or immediately adjacent properties—the Sixth Circuit has observed: "that risk must include something more than simply responding the to fire. If it did not, then virtually every fire would merit application of the [adjustment]." *United States v. Johnson*, 152 F.3d 553, 555 (6th Cir. 1998). Instead, "the arsonist must know that a specific fire for some reason poses a substantial risk of death or serious bodily injury to fire fighters and emergency personnel who may respond." *Id.* at 557 (quoting *United States v. Honeycutt,* 8 F.3d 785, 787-88 (11th Cir.1993)

In *United States v. Georgia*, 279 F.3d 384 (6th Cir. 2002), the Court found that the arson of an unoccupied church did not create a substantial risk of death or serious injury to responding firefighters, looking at factors including the

common hazards encountered by firefighters—which they are trained and equipped to avoid—and the statistical probability of actual injury under the circumstances. See 279 F. 3d at 387-391.

G. Mr. Meyerhoff And His Co-Defendants Pending Sentencing Did Not Knowingly Create A Substantial Risk Of Serious Bodily Injury.

Arson is dangerous to human life.

But "dangerous to human life" is too broad a concept for determining application of the Terrorism Enhancement; and as discussed above, Congress has rejected it. Driving an automobile under the influence is dangerous to human life. Exposure to second-hand cigarette smoke is dangerous to human life. These examples are not offered as hyperbole, but rather to focus attention on the real question: What is the real risk that any particular arson will cause serious bodily injury or death?

The FBI attributes 1200+ criminal incidents to animal and environmental rights extremists between 1990 and 2004, with no deaths or injuries.[2] Using data from the National Fire Protection Association, for all non-home structure fires occurring nationwide during the same period, the average number of fire responder deaths from any cause (including travel to the fire location) would be zero per 1200 fires, as the average for that 14-year period was 6 deaths per 100,000 fires. This average of 6 deaths per 100,000 fires includes catastrophic fires, such as night clubs and restaurants, and the Oklahoma City bombing and 9-11 terrorist events. "Fire responders" includes all emergency personnel, i.e., police, firefighters, and EMTs.

The average number of fire responders injured per 1200 non-home structure fires was 59, using the same criteria. "Injured" counts minor injuries, such as cuts, smoke inhalation, and bruising, as well as serious injuries.

The statistical probability of no injuries to fire responders in a random sample of 1200 such fires is astronomical—about 1 in 90 septillion (90 x 10 to

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[2] Congressional testimony of John E. Lewis, Deputy Assistant Director, Counterterrorism Division, FBI, before the Senate, available at www.fbi.gov/congress/congress05/lewis051805.htm.]

the 24th power). Those odds, put in layman's terms, mean the chances are ten-thousand-trillion times better that you would pick all 6 winning numbers in Powerball, than that there would be 1200 fires where no fire responders got hurt.

The average number of civilians injured per 1200 fires was 24 people, using the same criteria. The statistical probability of no injuries to civilians in a random sample of 1200 such fires is 1 in 13 billion.

In addressing Congress, the FBI terrorism expert failed to specify how many of the 1200 "criminal incidents" were arsons, but one assumes federal terrorism experts count something more serious than incidents of spray painting graffiti, gluing locks, stomping corn crops, or similar acts of monkey-wrenching in tallying up the crimes committed by what the Attorney General has called the leading "domestic terrorist" threat.

Assuming that at least 1 out of 4 of these 1200 "criminal incidents" counted by the FBI was an arson, i.e., 300 arsons, that smaller number of non-home structure fires over this same 14-year period results in an average number of 14 fire responders injured per 300 fires. The statistical probability of no injuries to fire responders in a random sample of 300 fires is 1 in 3.1 million. Stated simply, if only 300 of the 1200 "criminal incidents" the FBI attributes to the ELF/ALF between 1990 and 2004 are arsons, 14 fire responders should have been injured to some degree: the odds of no injuries having occurred is 1 in 3 million.[3]

Statistics from the ATF website,[4] available for arsons investigated by that agency since between 2000-2003, are also revealing in assessing whether it was just luck that no one was injured or killed in the arsons committed by these defendants. For the year 2000, when this group was active, the ATF investigated 1604 arsons that resulted in 338 injuries and 161 deaths. That works out to an

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[3] Prior to hearing on this motion, the defense will provide the Government and Court with copies of the statistical expert's full report, and the expert's credentials. The defense expects to offer brief testimony from the expert at the hearing on the Terrorism enhancement, to place these facts and report into evidence.

[4] www.atf.gov/aexis2/statistics.htm.

average of 1 injury per every 5 arsons, and 1 death per every 10 arsons. If those averages held for the years these defendants committed the 60+ arsons charged against Mr. Meyerhoff, their arsons should have resulted in 12 injuries and 6 deaths, on average.

Mr. Meyerhoff and his co-defendants undertook extensive surveillance and other precautions to ensure no person was inside or even likely to be inside any structure targeted for arson. They targeted non-residential structures. They intentionally selected particular days, and night-time hours, to start the fires when there was virtually no likelihood of any customers or employees coming onto these premises.

They set fires using gasoline and diesel fuel confined in plastic containers, that burned in place like a huge torch, nearly always positioned outside the structures. The devices were designed to damage or destroy the building through producing a long, steady flame that would catch an eave, windowsill, or wall on fire. They were not designed to explode, nor placed with intent to cause explosions of gas mains or propane tanks.

The Government has told the Court these crimes "involved extraordinarily sophisticated means of planning, preparation, execution, and intricate destructive devices."[5] It was not simply luck that no injuries occurred.

We are taught since childhood that fire is dangerous, and we are bombarded by popular television shows and movies where vehicles and buildings explode into fireballs in mere seconds. Perhaps that accounts for the Government routinely mischaracterizing the danger posed by these incendiary devices, often calling them "fire bombs," or "explosives." That may also account for the Government's repeated claims regarding the grave risks these arsons posed to emergency responders: We are pre-conditioned to believe that must be true, without resort to facts, science, or other evidence.

For example, the Government has often commented at court hearings about the extreme danger of explosion caused by placing an incendiary device in close proximity to a large propane tank at the Jefferson Poplar arson, where fortunately the device failed to ignite. The Government's opinions on danger

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[5] Transcript of *U.S. v. Kevin Tubbs* detention hearing, 1/17/07, p. 10.

seem reasonable, but are not supported by fact: Safety improvements required for propane tanks since the 1980s have dramatically reduced the risks of tanks exploding, as confirmed by a recently published study showing propane tanks remained stable even when exposed for more than 30 minutes to gasoline fires 100 feet in diameter and 300 feet high, adjacent to the tanks.[6]

The Government has also pointed to the risk of explosion created by an incendiary device placed near an outdoor gas meter and main gas line at Childers Meat Company. But, according to Northwest Natural Gas, it is a "myth" that natural gas explodes: "Natural gas doesn't explode. It will ignite, but only when there is a source of ignition."[7] Thus, if the line had ruptured outdoors, the gas would have provided additional fuel for the fire, but not an explosion.

Mr. Meyerhoff's PSR has not identified any of the arsons he was involved in as being the type where defendants knowingly created a substantial risk of serious injury, under §2K1.4. That, along with the extensive precautions Meyerhoff took to avoid causing any physical injury, and the statistical unlikelihood of ELF-trained arsonists causing physical injury, should end this inquiry.

H. The Terrorism Enhancement Requires The Defendant Committed The Offense With The Intent To Intimidate, Coerce, Or To Retaliate Against The Conduct Of The Federal Government.

For the reasons set forth above, the Terrorism Enhancement would not apply to Mr. Meyerhoff or co-defendants because none of the crimes of conviction qualify as a "Federal crime of terrorism," before even considering the additional, motivational element of the enhancement.

Congress intended "the necessary motivational element to be established at the sentencing phase of the prosecution." H.R. Conf. Rep. No. 104-518, at 123 (1996)(Conference Committee Report on Section 730 of the AEDPA that mandated the Terrorism Enhancement extend beyond international terrorism).

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[6] See, P.K. Raj, "Exposure of a liquefied gas container to an external fire," Journal of Hazardous Materials, A122(2005) 37-49. The defense will present brief testimony concerning this study at the hearing on the Terrorism Enhancement.

[7] www.nwnatural.com/content_safety.asp?id=298

If the Court agrees with the defense analysis, it will not need to reach the question of how to interpret the motivational element set forth in §2332b(g)(5)(A). However, all of the previously discussed reasons and authorities as to why the enhancement must be narrowly construed are relevant to consideration of this question.

To qualify as a "Federal crime of terrorism," the offense must be "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," §2332b(g)(5)(A). The meaning of "government" is an issue in this case. The defense contends that Congress intended "government" to mean the federal government, not state and local governments as well as the federal government.

The meaning of "government."

Section 2332b(g)(5) is more narrowly drafted in its use of the term "government" than are the related definitions of terrorism in the same Chapter 113B: the definition of International Terrorism, §2331(1), in effect before §2332b was enacted; and Domestic Terrorism, §2331(5), added in 2001 as part of same legislation that amended subsection §2332b(g)(5).

These related definitions in §2331 refer to "a government" and to "laws . . . of any State," as well as being motivated "to intimidate or coerce a civilian population," whereas §2332b(g)(5) refers only to "government," refers only to federal laws, and is titled "Federal crime of terrorism." "'[T]he title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute." *Almendarez-Torres v. United States*, 523 U.S. 224, 234, 118 S.Ct. 1219 (1998).

The following chart makes these comparisons graphically:

International terrorism	Domestic terrorism	Federal crime of terrorism
Involve acts "that are a violation of the criminal **laws** of the United States or **of any State**"	Involve acts "that are a violation of the criminal **laws** of the United States or **of any State**"	Is an offense that "is a violation of [list of enumerated **federal statutes**]'
Intended "to influence the policy of **a** government by intimidation of coercion"	Intended "to influence the policy of **a** government by intimidation of coercion"	"calculated to influence or affect the conduct of government by intimidation or coercion.
Intended "to intimidate or coerce **a civilian population**"	Intended "to intimidate or coerce **a civilian population**"	"calculated . . . to retaliate **against government** conduct"

Congress' use of "a government," in authoring the broader definitions of international and domestic terrorism contrasts with its use of "government" in the narrower definition of Federal crime of terrorism. "'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Duncan v. Walker*, 533 U.S. 167, 173 121 S.Ct. 212 (2001). "We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning." *Bailey v. United States*, 516 U.S. 137, 146, 116 S.Ct. 501 (1995).

According to the *Salim* decision, which exhaustively sets forth the entire legislative history leading to enactment of §3A1.4, analysis of that history demonstrates "there was concern in Congress about avoiding the federalization of crimes the enforcement of which were more appropriately state or local responsibilities." 287 F.Supp.2d at 349.

Additional support for limiting the enhancement to conduct intended to influence or retaliate against the federal government is found in §2332b(f), the only section of §2332b to employ the "Federal crime of terrorism" definition. Subsection (f) gives the Attorney General primary investigative responsibility for all Federal crimes of terrorism and requires the Secretary of Treasury to assist upon request. A broad interpretation of "government" to extend to all

governments would effectively designate the FBI and ATF as the primary investigators for arsons motivated solely against state or local entities.[8]

The Supreme Court has expressed concerns already about the reach of §844(i)—the predominant crime of conviction in the case at bar—given its jurisdictional basis in the Commerce Clause, and the supremacy accorded the States to define and enforce criminal laws. *See, Jones v. United States*, 529 U.S. 848, 120 S.Ct. 1904 (2000)(holding §844(i) does not apply to arson of private residence):

> Even when Congress has undoubted power to pre-empt local law, we have wisely decided that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349, 92 S.Ct. 515 (1971). For this reason, I reiterate my firm belief that we should interpret narrowly federal criminal laws that overlap with state authority unless congressional intention to assert its jurisdiction is plain. 529 U.S. at 859-860 (Stevens, J., with Thomas, J., concurring).

The definition and prosecution of local, intrastrate crime is reserved to the States under the Tenth Amendment to the Constitution. "The States possess primary authority for defining and enforcing the criminal law." *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993). "A healthy balance of power between the State and federal government will reduce the risk of tyranny and abuse from either front." *Lopez v. United States*, 514 U.S. 549, 551 (1995).

The courts limit the scope of federal criminal statutes dependent on the Commerce Clause, like §844(i), guided by two significant policy concerns:

First, courts must narrowly interpret federal criminal statutes derived from the Commerce Clause power because crimes are traditionally State matters. *See, United States v. Bass, supra,* 404 U.S. at 349.

Second, Congress has recognized that federal criminal sanctions should be imposed only to the extent that misconduct obstructs a specific federal

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[8] See, e.g., 28 U.S.C. §509, "all functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General." The Federal Bureau of Investigation is an organizational unit within the Department of Justice. 28 C.F.R. §0.1.

function. When misconduct does not concern federal issues, punishment should be left to the State and local governments. *See*, Senate Comm. On The Judiciary, Criminal Code Reform Act of 1977, S.Rep. No. 95-605, 95th Cong., 1st Sess. 29 (1977).

The term "government" in §2332(b)(g)(5), incorporated without elaboration into §3A1.4, is subject to various interpretations. In such cases, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," *Jones, supra*, 529 U.S. at 858. "[W]hen a choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Id.*

The rule of lenity applies not only to interpretations of the substantive ambit of criminal prohibitions but also to the penalties they impose. *Bifulco v. United States*, 447 U.S. 381, 100 S. Ct. 2247 (1980). The rule applies to the sentencing guidelines. *United States v. Jolibois*, 294 F.3d 1110 (9th Cir. 2002).This rule of construction operates, if, after reviewing everything that can be looked at, the court can make no more than a guess as to what Congress intended. *Holloway v. United States*, 526 U.S. 1, 119 S. Ct. 966 (1999).

Where the text, structure and legislative history of the statute fail to establish that the government's interpretation is unambiguously correct, the rule of lenity operates to resolve the ambiguity in the defendant's favor. *United States v. Granderson*, 511 U.S. 39, 114 S. Ct. 1259 (1994).

Application of the rule of lenity is particularly appropriate when the punishment resulting from the government's interpretation is great, as illustrated by the PSR's sentencing calculations in Mr. Meyerhoff's case.

For example, the arson at the Eugene Police Department's substation, resulted in no injuries and less than $2,000 damage. Meyerhoff and others allegedly targeted the police station "based on prior confrontations between the police and activist community . . . [including an incident where] activists sitting in trees were pepper-sprayed by Eugene police." The PSR viewed the arson as conduct calculated "to retaliate against [this] government conduct," although no communiqué issued "because of the lack of damage".

The offense level for this arson was 20, resulting in a 33-41 month prison range, but application of the Terrorism Enhancement raises that range to 210-262 months imprisonment. *Cf., Jones v. United States*, 529 U.S. 848, 859)(Stevens, J., with Thomas, J., concurring)(expressing, in the case where a defendant threw a Molotov cocktail into his cousin's occupied residence, resulting in no injuries but over $77,000 damage, "our reluctance to 'believe Congress intended to authorize federal intervention in local law enforcement in a marginal case such as this.'").

The Fifth Circuit in *United States v. Harris*, 434 F3d 767 (2005), upheld the district court's application of the Terrorism Enhancement against a defendant who had used a Molotov cocktail to set fire to a Municipal building housing the police station. Harris challenged application of the enhancement, but not on any of the grounds raised by Mr. Meyerhoff. In particular, Harris claimed he committed the arson intending to destroy evidence in the police locker, but the district court found his intent was to retaliate against the police. Harris never raised the issue of whether "government" extended to local government; nor did the Fifth Circuit comment on that issue. See 434 F.3d at 773-74.

The district court in *United States v. DeAmaris*, 406 F. Supp.2d 748 (S.D. Texas 2005), held that the enhancement applied to conduct aimed at "foreign governments," finding that "government" was not limited to the federal government. However, that court did not address many of the issues raised by Mr. Meyerhoff herein, including the constitutional deference to State enforcement of criminal laws that do not transcend State boundaries, and the rule of lenity; nor is that court's decision in any way controlling on this Court.[9]

[9] There is a better argument for construing "government" to include foreign governments, given §2332b's emphasis on punishing acts of terrorism "transcending national boundaries," but that argument is not relevant to Mr. Meyerhoff's case.

The meaning of "calculated to influence or affect government conduct by intimidation or coercion, or to retaliate against".

A second issue in dispute is whether the enhancement applies to the §844(i) arsons charged against Mr. Meyerhoff and co-defendants when the primary motivation is to influence, intimidate, or retaliate against, the conduct of private enterprise perceived as harming the environment, with an underlying aim of (1) influencing the government to enforce existing laws or enact new laws against these perceived evils, or (2) symbolically "retaliate" against the government for failure to do so.

Such logic cannot control application of the enhancement, for at least two reasons:

First, §2332b(g)(5) requires the conduct be "calculated to influence or affect the conduct of government by intimidation or coercion." Arson of private property may arguably be calculated to influence the conduct of government—by calling public attention to the perceived evils of private business going unstopped by government—but not by intimidation or coercion of government.

To intimidate is "to make afraid"; to coerce is "to restrain by force." See generally, Webster's New World Dictionary (1998 ed.). In the context of what is commonly thought of as "terrorism," i.e., acts of mass murder or attempted mass murder of innocent civilians, it is not difficult to see how acts directed at private enterprise, such as the Twin Towers attack on 9/11, were calculated to intimidate or coerce our government, and thereby affect the conduct of government.

It takes considerable mental gymnastics to stretch that concept to fit a group committed to not harming life, engaged in arsons against private enterprise to attract media attention to their political cause of environmental protection.

Simply stated: Crimes calculated to generate publicity that may cause citizens to write their Congressmen to change government policies favoring business over the environment, is not "intimidation or coercion" of government.

The Court is not free to ignore the requirement that conduct calculated to influence government do so by "intimidation or coercion." *See, Duncan v.*

Walker, supra, 533 U.S. 167, 174 ("It is our duty 'to give effect, if possible, to every clause and word of a statute.' ").

Second, arson of private property by these defendants was directly motivated to retaliate against perceived wrong-doing by the targets of their arsons. Their communiqués establish these were not random acts targeting innocent civilians to retaliate against the United State's policies, but rather acts striking back with economic harm against those perceived to be committing environmental harm for profit.

"Retaliate" means "punishment in kind; to return like for like, especially injury for injury." Websters New World Dictionary (1998 ed.). Setting fire to private property did not injure the government, except in the broadest sense of harm befalling its citizens; those arsons were not calculated by these defendants to punish, injure, or "retaliate" against government.

Congress recognized a clear distinction between conduct intended to "intimidate or coerce a civilian population," and conduct intended to "influence the policy of a government by intimidation or coercion." See §2331(1)&(5). In defining "Federal crime of terrorism," Congress chose to reach only offenses calculated to "influence . . . by intimidation or coercion, or to retaliate against government."

Furthermore, while the broader definitions of terrorism in §2331 apply to conduct that "appear[s] to be intended" to intimidate or coerce government, Congress chose to use "calculated" to intimidate, coerce or retaliate against in §2332b. "Calculated" is more precise than "appear to be intended," leaving less room for subjectivity, and implies a direct correlation between the offense and the motivational element, analogous to a mathematical equation.

Expanding that phrase to encompass secondary, symbolic "retaliation" against government, not intended to punish or inflict harm on government, dilutes the restriction Congress intended for §2332b(g)(5). Once "retaliate against government" is expanded to include the primary goal of retaliation against private enterprise, any defendant who commits crimes as part of a political agenda that finds fault with the government falls within the motivational element of the enhancement.

The PSR employs this "constructive retaliation theory" to support the Terrorism Enhancement for most of Mr. Meyerhoff's arsons.

For example, the Vail arson communiqué, targeting Vail Company, Inc., states, "Putting profits before Colorado's wildlife will not be tolerated. This action is just a warning, we will be back if this greedy corporation continues to trespass into wild and unroaded areas." The PSR reasons the Vail arson "was intended to intimidate or retaliate against the government for allowing Vail Associates to expand their operations," because an unrelated group of environmentalists had tried unsuccessfully to enjoin the development, and its lawsuit claimed the U.S. Forest Service had failed to properly analyze the environmental impact on the Canadian Lynx population.

The Boise Cascade communiqué reads, "After ravaging the forests of the pacific northwest, Boise Cascade now looks towards the virgin forests of Chile. . . . Let this be a lesson to all greedy multinational corporations who don't respect their ecosystems." The PSR reasons this arson qualifies for the Terrorism Enhancement, because "Mr. Meyerhoff opposed logging of timber and retaliated against the government . . . because the government legally sold timber from federal lands to Boise Cascade, who harvested the timber."

A major problem with this constructive retaliation theory is that it only ensnares defendants who oppose certain government policies, not those who support certain government policies.

For example, a right-wing conservative militia group engages in a series of arsons damaging or destroying buildings that headquarter various anti-Iraq war organizations, authoring communiqués that warn the peace groups to stop holding rallies and start supporting President Bush and our troops. Clearly not conduct "calculated to intimidate . . . or retaliate against government." The same would be said about a group that set fire to an embryonic stem cell research facility, and who share the President's beliefs that such research is immoral.

The enhancement must not be construed in a way that allows its use as a tool to oppress defendants whose beliefs run contrary to the administration's policies, when their crimes are not motivated as an attack against the government, including an attack against citizens at large as representative of their government.

The strict application of the enhancement to offenses motivationally directed at the government, rather than civilians, is underscored by the 2002 Guideline amendment that added Note 4. That Application Note authorizes an upward departure not to exceed the guideline level arrived at by application of the Terrorism Enhancement, for cases where, for example, the offense of conviction falls within the list of crimes under §2332b, but the motivation was to influence or retaliate against conduct of civilian groups.

This amendment indicates the Commission, as well as Congress, intended a narrow construction of the motivational element of the Terrorism Enhancement, with a clear distinction between motivation directed against government, and motivation directed against civilians.

If the Court remains in doubt about what Congress intended, it should narrowly construe the statute and related guideline in favor of the defendants. *See, Holloway v. United States, supra; Jones v. United States, supra.*

IV. APPLICATION OF THE TERRORISM ENHANCEMENT TO THESE DEFENDANTS WOULD CONTRAVENE THE CONGRESSIONAL DIRECTIVE TO THE COMMISSION THAT THE GUIDELINES ACHIEVE FAIRNESS IN SENTENCING AND PREVENT UNWARRANTED DISPARITIES.

Congress directed the Commission to promulgate guidelines "with particular attention . . . for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities." 28 U.S.C. §994(f). This Court should give consideration to those fundamental premises in arriving at its interpretation of the Terrorism Enhancement.

Since its enactment in 1995, the courts have applied the "Terrorism Enhancement," U.S.S.G. §3A1.4, in only two cases where arson was the offense of highest severity.[10] Neither of those two cases involved arsons committed by defendants affiliated with the ELF or ALF, although Mr. Meyerhoff's case is far from the first such defendant prosecuted for arson.

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[10] According to the USSG Commission staff, responding to a query submitted by US Probation at the defense request to obtain this information, within the last 60 days.

For example, three "ELF" defendants were sentenced on March 17, 2006 for a string of arsons and attempted arsons committed in Placer County, California, in late 2004 and early 2005; the prosecuting U.S. Attorney described them as "domestic terrorists." The three received sentences ranging from 2 to 6 years imprisonment.

The defense has found only two reported cases where the enhancement was applied, and arson was the offense of highest severity: *United States v. Mandhai*, 375 F.3d 1243 (11th Cir. 2004), and *United States v. Dowell*, 430 F.3d 1100 (10th Cir. 2005). Neither of these cases involved non-aggravated arson crimes, i.e., those that did not involve creating a substantial risk of serious injury.

Mandhai planned to blow up electrical power sites and then demand the release of Muslim prisoners and changes to the U.S. Middle East policy, 375 F.3d at 1246. He was convicted of conspiracy to commit arson under §844(i) & §844(n)(providing that conspiracy to commit arson is punished the same as the underlying arson).

Dowell and his co-defendants, members of a right-wing militia group, the Army of the American Republic, used an incendiary device to set fire to an IRS office and created a substantial risk of injury, in violation of §844(f)(1)&(2).

Commission data available on-line, provides statistics for the number of times the Terrorism Enhancement has been applied to offenses, and the number of times it has been applied to specific guidelines, like the arson guideline, for fiscal years 2002-2006.[11] The Commission notes that "it is possible for multiple guideline calculations for each case," so the numbers are likely higher than the actual number of defendants who received the enhancement.

Those statistics reveal a total of 73 applications of the Terrorism Enhancement to various offenses for that time period. Of those 73, the enhancement applied a total of 6 times to §2K1.4 Arson (and in only 2 cases

[11] www.ussc.gov/gl_frequencies.htm

was arson the highest severity offense)[12]; and there were a total of 523 arson offenses during that period. So the chance of an arson defendant getting hit with the Terrorism Enhancement is a little like getting struck by lightning.

Given that Mr. Meyerhoff and some co-defendants face potential sentences of 30 years to life if the enhancement applies, it is worth taking a brief look at Commission information regarding sentences imposed under the Biological Weapons Antiterrorism Act, 18 U.S.C. §175, from a report published in December 2000[13]:

Section 511(b)(1) of the Act expanded the prohibition against development, production, stockpiling, transfer, acquisition, retention, or possession of any biological agent, toxin or delivery system for use as a weapon or knowingly assisting a foreign state or any organization to do so, to include attempts, threats, or conspiracies to do so. *See* 18 U.S.C. §175(a). The criminal penalties provide that violators may be fined or imprisoned for life or any term of years, or both. This statute is listed as a "Federal crime of terrorism," §2332b(g)(5).

A review of the four available case files follows:

Case #1

Offense Conduct: Defendant Baker, who professed violent, anti-government sentiments, was found in possession of .7 gram of 5% pure ricin (enough to kill 126 people), which had been manufactured by his co-defendant, Wheeler.

Sentence: The district court reasoned that ricin was a poisonous substance, analogous to a destructive device under §2K2.1(a), the firearms guideline. The base offense level was 18, sentencing range 27-33 months. The defendants were sentenced to 33 months.

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[12] The Commission staff explained that the 6 times the enhancement applied to arson offenses included cases where arson received the enhancement, along with another more serious offense that received the enhancement, in the same case.

[13] "Nuclear, Biological and Chemical Weapons Policy Team: Report to the Commission," pp. 20-23 (December 4, 2000)(Available on the U.S.S.C. website, www.ussc.gov).

Case #2

Offense Conduct: Defendants Olerich and Henderson had supplied Baker with the ricin. They were convicted by a jury of violating 18 U.S.C. §175.

Sentence: The district court followed the reasoning of the judge in Baker and Wheeler's case, applying §2K2.1. Both received sentences of 37 months.

Case #3

Offense Conduct: Defendant Leahy was found in possession of .67 gram of 4.1% pure ricin, (enough to kill 125 people). He pled guilty to a violation of 18 U.S.C. §175.

Sentence: His adjusted offense level was 21 (41-51 months). The court departed upward based on the seriousness of the offense, analogizing to the terrorism guideline at §3A1.4, and sentenced him 151 months imprisonment. The Court of Appeals reversed, and he was later sentenced to 78 months.

Case #4

Offense Conduct: Defendant Mettetal was found in possession of quantity of ricin sufficient to kill 3,600 people. A jury found him guilty of one count of violating 18 U.S.C. §175.

Sentence: The district court reasoned that the most analogous guideline was guideline 2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants), with a base offense level of 24 (sentencing range 51-63 months). The court departed upward based on the extreme lethality and potential for mass casualties associated with ricin, and imposed a sentence of 120 months.

Applying the Terrorism Enhancement to Mr. Meyerhoff and his co-defendants contravenes the Congressional directive to achieve fairness and prevent unwarranted disparity.

Using the PSR's guideline calculations, Mr. Meyerhoff's sentencing range without the enhancement is 70-87 months imprisonment (after reduction for acceptance of responsibility); with the enhancement, it increases to 30 years to life imprisonment (with acceptance). If Mr. Meyerhoff had been convicted of attempted murder, not resulting in injury, for every incident of arson scored by the PSR (8 separate incidents), based on some grossly-exaggerated hypothetical

risk of death created by these arsons,[14] his guideline range would be 87-108 months (with acceptance).

V. THE GOVERNMENT MUST PROVE APPLICATION OF THE TERRORISM ENHANCEMENT AGAINST MR. MEYERHOFF BY CLEAR AND CONVINCING EVIDENCE.

The Ninth Circuit has held the "clear and convincing evidence" standard applies in numerous cases where the effect was less disproportionate than the effect of applying the Terrorism Enhancement is to Mr. Meyerhoff and his co-defendants. See, e.g.:

> "[W]hen a sentencing factor has an extremely disproportionate effect on the sentence relative to the offense of conviction, due process requires that the government prove the facts underlying the enhancement by clear and convincing evidence."

United States v. Jordan, 256 F.3d 922, 927-28 (9th Cir. 2001). This issue has been briefed in greater detail in co-defendants' filings against the Terrorism Enhancement. Mr. Meyerhoff joins in those arguments.

VI. IF THIS COURT DETERMINES THE TERRORISM ENHANCEMENT APPLIES TO MR. MEYERHOFF, IT SHOULD ADJUST HIS CRIMINAL HISTORY TO A CATEGORY I.

If the Court rejects defense arguments and concludes the enhancement applies, the Court should find that Category VI substantially overstates Mr. Meyerhoff's criminal conduct apart from this case, as well as the likelihood that he will re-offend, and exercise its authority to adjust his criminal history down to Category I. *See, e.g., United States v. Meskini*, 319 F.3d 88, 92 (2nd Cir. 2003)("A judge determining that §3A1.4(b) over-represents 'the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes' always has the discretion under §4A1.3 to depart downward in sentencing."); *United States v. Aref*, 2007 WL 804841 (N.D.N.Y.

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[14] As the previously-discussed statistics show, the risk of death from any given fire is extremely low, and could not be fairly equated to "one attempted murder" per arson.

2007)(departing downward to criminal history I, finding the terrorism enhancement substantially over-represents the seriousness of defendant's criminal history and his mitigating personal characteristics); *see also, United States v. Mandhai*, 375 F.3d 1243, 1249 (11th Cir. 2004)("We agree with the district court, however, that the 12 level increase to Mandhai's offense level required by the terrorism enhancement prevents the penalty from fitting the crime"; Mandhai's goal was to bomb public utilities in the hopes that power outages would lead to upheaval on the streets of Miami; he sought weapons, money, and explosives, and he staked out targets to bomb.).

The defense will present evidence and additional arguments to support a downward adjustment of Mr. Meyerhoff's criminal history as part of his separate memorandum in mitigation of sentence.

VII. CONCLUSION

Mr. Meyerhoff and his co-defendants adhered to a code of non-violence against people, and their many criminal acts resulted in no injuries. Their crimes targeted unoccupied property only, and did not knowingly create a substantial risk of serious injury or death. Congress did not intend for the Terrorism Enhancement to apply in such circumstances. The law is clear that the Court's duty is to interpret the enhancement to implement the legislative will, not bend it to the will of the current administration.

For the reasons set forth above, and those grounds raised by Mr. Meyerhoff's co-defendants in which he joins, the Court should find the Terrorism Enhancement does not apply.

DATED this 4th day of May, 2007.

_____/S/_____
Terri Wood, OSB 88332
Attorney for Stanislas Meyerhoff

_____/S/_____
Richard Fredericks, OSB 83203
Attorney for Stanislas Meyerhoff