

13.4: End-of-Chapter Material

13.4.1 Summary

The federal government protects national security by primarily regulating crimes against the United States. One of the only crimes defined in the Constitution, treason, prohibits levying war against the United States, most likely with general intent or knowingly, or providing aid and comfort to the enemy with the specific intent or purposely to betray the United States, and is graded as a serious felony with all sentencing options available, including capital punishment. The Constitution specifies the evidentiary requirement that treason be proven by the testimony of two witnesses or the defendant's confession in open court. Sedition criminalizes the advocating, aiding, organizing, or teaching with general intent or knowingly, or publishing, printing, or circulating writings that advocate, aid, or teach with specific intent or purposely the forceful or violent overthrow of the US government and is graded as a serious felony that can prohibit the defendant from holding federal office for five years postconviction. Sabotage is destroying, damaging, or defectively producing specified property with specific intent or purposely, general intent or knowingly, or negligently to impede national defense and is graded as a serious felony. Espionage is gathering or transmitting defense information with general intent or knowingly or the specific intent or purposely to damage the United States or assist any foreign nation, during peace or war, and is graded as a serious felony with all range of sentencing options available, including capital punishment.

The federal government also primarily regulates terrorism and terroristic acts using the Omnibus Diplomatic Security and Antiterrorism Act of 1986, the Antiterrorism and Effective Death Penalty Act of 1996, and the USA PATRIOT Act. The Department of Homeland Security enforces criminal laws targeting terrorism. Terrorism is violent acts committed inside (domestic) or outside (international) the United States that appear to be intended to influence a civilian population or government by intimidation or to affect the conduct of government by mass destruction, assassination, or kidnapping. Currently prohibited as terrorism or terroristic conduct are murder, use of a weapon of mass destruction, bombing places of public use, financing terrorism, harboring a terrorist, and conspiracy or attempt to commit any of the foregoing. The USA PATRIOT Act expands government surveillance capabilities, so it is subject to a Fourth Amendment challenge as an unreasonable search, and also prohibits financing terrorism, so it is subject to a First Amendment challenge as a prohibition on free speech, freedom of religion, and freedom to associate.

The state and federal government both criminalize conduct that impedes the administration of justice, including perjury, bribery, and obstruction of justice. Perjury is typically defined as a false material oral or written statement made under oath or affirmation with the specific intent or purposely to deceive, or the general intent or knowingly that the statement is false, in a judicial or official proceeding or in a certified writing. The biggest issues encountered in a perjury prosecution are proving the validity of the oath, the defendant's criminal intent, the materiality of the false statement, and any requirement of corroborative evidence. One defense to perjury is retraction of the false material statement during the same judicial or official proceeding before it becomes manifest that the falsity will be exposed. Many jurisdictions also criminalize perjury committed by inconsistent statements made under oath or affirmation in an official or judicial proceeding and subornation of perjury, which is procuring another to commit perjury with specific intent or purposely. Perjury and subornation of perjury are typically graded as felonies. Bribery is conferring, offering, agreeing to confer, or soliciting, accepting, or agreeing to accept a benefit upon a public official, employee, legislator, participant in a judicial proceeding, or sports official with the specific intent or purposely, or the general intent or knowingly to influence the bribed individual's decision making. The most difficult bribery element to prove is the criminal intent element. Bribery is typically graded as a felony. Obstruction of justice crimes interfere with the orderly administration of justice. Examples of obstruction of justice offenses are giving false identification to a law enforcement officer, impersonating a law enforcement officer, refusing to aid a law enforcement officer when requested, giving false evidence, hiding or concealing oneself and refusing to give evidence, tampering with evidence, and tampering with a witness or juror, with specific intent or purposely, or general intent or knowingly. Obstruction of justice is graded as a misdemeanor or felony, depending on the offense.

13.4.2 YOU BE THE USA

You are an assistant US attorney starting your first day on the job. You have been presented with four case files and told to review them and recommend criminal prosecutions based on the facts. Read each one and then decide which **crime should be prosecuted**. Check your answers using the answer key at the end of the chapter.

1. The defendant, an army intelligence analyst stationed near Baghdad, Iraq, downloaded thousands of classified Iraq and Afghanistan documents and confidential cables and released them to an ex-computer hacker who thereafter exposed them to the

public. **Which crime** should be prosecuted: **treason** or **obstruction of justice**? Read about this case at this link:

<http://coto2.wordpress.com/2011/03/02/bradley-manning-charged-with-22-crimes-including-capital-offense-aiding-the-enemy>.

2. The defendant typed up notes while her husband was analyzing sketches of a top-secret bomb's design for the purpose of passing the design on to another nation. **Which crime** should be prosecuted: **conspiracy to commit espionage** or **sabotage**? Read about this case at this link: http://law2.umkc.edu/faculty/projects/ftirls/rosenb/ROS_ACCT.HTM.
3. The defendant, a cosmetic company, paid Chinese officials to obtain direct licensing of its product in China. Which crime should be prosecuted: **harboring terrorists abroad** or **bribery**? Read about this case at this link: fashionablyjust.com/2011/05/avon-bribery-case-in-china-an-embarrassment.
4. The defendant, a corrections officer, lied to federal law enforcement during an investigation of her role in the assault of an inmate. Which crime should be prosecuted: **perjury** or **obstruction of justice**? Read about this case at this link: www.stltoday.com/news/local/crime-and-courts/article_3d7cd11a-8f67-11df-bc07-00127992bc8b.html.

13.4.3 Cases of Interest

- *Kawakita v. U.S.*, 343 U.S. 717 (1952), discusses a treason conviction based on the treatment of American POWs: http://scholar.google.com/scholar_case?case=14270191881160802490&q=%22treason%22&hl=en&as_sdt=2,5.
- *U.S. v. Rosen*, 445 F.Supp.2d 602 (2006), discusses prosecution under the Espionage Act: http://scholar.google.com/scholar_case?case=18013989744527722325&q=%2218+U.S.C.+793%22&hl=en&as_sdt=2,5.
- *Schultz v. Sykes*, 638 N.W. 2d 604 (2001), discusses the dismissal of a civil case based on subornation of perjury: http://scholar.google.com/scholar_case?case=3885876526561644390&q=%22subornation+of+perjury%22&hl=en&as_sdt=2,5&as_ylo=2000.

13.4.4 Articles of Interest

- Treason prosecutions in modern times: www.nysun.com/editorials/time-of-treason/41533
- The trial of Faisal Shahzad: <http://www.csmonitor.com/USA/Justice/2010/1005/Life-sentence-for-Faisal-Shahzad-could-join-shoe-bomber-in-Colorado>
- The extension of certain portions of the USA PATRIOT Act: www.washingtonpost.com/politics/patriot-act-extension-signed-into-law-despite-bipartisan-resistance-in-congress/2011/05/27/AGbVlsCH_story.html
- The famous perjury trial of Alger Hiss: <http://www.history.com/this-day-in-history/alger-hiss-convicted-of-perjury>
- High-profile bribery cases: www.reuters.com/article/2010/04/01/bribery-usa-cases-idUSN0121072820100401
- The criminal prosecution of a sitting president: www.justice.gov/olc/sitting_president.htm

13.4.5 Websites of Interest

- The *U.S. v. Lindh* case: notablecases.vaed.uscourts.gov/1:02-cr-00037/Index.html
- Information about terrorism: www.fema.gov/hazard/terrorism/index.shtm
- Information about the USA PATRIOT Act: <http://civilrights.uslegal.com/usa-patriot-act>
- The Department of Homeland Security: <http://www.dhs.gov/index.shtm>

13.4.6 Statistics of Interest

- Terrorism: www.fbi.gov/stats-services/publications
- Bribery: http://www.oecd.org/infobycountry/0,3380,en_2649_37447_1_1_1_1_37447,00.html

13.4.7 Answers to Exercises

From Section 13.1

1. Stephanie has not committed **sedition** because she did not advocate for the use of *force* or *violence* or the commission of an *unlawful* act. Stephanie's speech is most likely protected because she might be envisioning a peaceful government overthrow by legitimate means.
2. The US Court of Appeals for the Eighth Circuit upheld the defendants' convictions for **sabotage**, stating that the specific intent or purposely to impede the US national defense could be gleaned from the defendants' conduct in deliberately damaging the missiles.
3. The District of Columbia Court of Appeals upheld the defendant's disbarment based on convictions for crimes of moral turpitude, and stated that other than *treason*, no act was more base, vile, or depraved than an intentional act to breach the confidentiality of national defense secrets that have come into the hands of an individual.

13.4.8 Answers to Exercises

From Section 13.2

1. Whether or not this is an act of terrorism requires more information. Although the killing takes place in front of the Pakistani Embassy within the territory of the United States, this evidence is not enough to prove that Joshua intended his conduct to influence a civilian population or government by intimidation or to affect the government's conduct by assassination. The location of the shooting could be a pure coincidence, and Joshua could have a nonterroristic motive for the killing, such as a *personal* hatred or **malice** toward Khalid.
2. The US Court of Appeals for the Ninth Circuit upheld the statute, which was in place before September 11, 2001, and under AEDPA prohibited domestic material support to terrorists and terroristic organizations. The court held that the statute was not an unconstitutional prohibition on the right of free association or expression under the First Amendment, nor did it violate federal due process under the Fifth Amendment by granting the secretary of state unfettered and unreviewable authority to designate organizations as terroristic. However, the court affirmed the US District Court's decision that portions of the statute defining "personnel" and "training" were **unconstitutionally vague**.
3. The US Court of Appeals for the Ninth Circuit upheld the statute against a Fifth Amendment due process challenge by construing the statute to require proof that the defendant act with the general intent or knowledge of the terrorist organization's designation or of the unlawful activities that caused it to be so designated.

13.4.9 Answers to Exercises

From Section 13.3

1. The primary issue in Susannah's perjury prosecution is the **materiality** of her false statement made under oath in a judicial proceeding. While Susannah was asked her age during routine background questions, her lie might *still* be material if her advanced age affected her vision because Susannah is testifying about an important personal observation. In many jurisdictions, the trier of fact, which could be a **jury**, determines the materiality of this statement.
2. The Supreme Court of Connecticut upheld the defendant's bribery conviction, holding that offering gifts to state police officers is not a lesser included offense of bribery because it requires **specific** intent, and bribery under Connecticut law is *not* a specific intent crime.
3. The New York Supreme Court reversed the defendant's conviction because the defendant did not have a complaint filed against him, so the "witness" was not *about* to testify in a judicial proceeding, which is required under the witness tampering statute.

13.4.10 Answer to Law and Ethics Question

1. The criminal prosecution of a sitting president would set a good example for the citizens of the United States, but it would pose an immense disruption to the orderly functioning of the government without a leader or commander in chief of the armed forces and would also expose the nation to a **security risk**. The US Supreme Court decision to allow a civil lawsuit against the president forced him to spend time away from office attending depositions that were protracted and inordinately time consuming. If the case had not been dismissed, the president would have expended an additional amount of time and effort in preparing for and defending against the Jones lawsuit. A similar and even more time-consuming disruptive process would ensue if a sitting president were to be *criminally* prosecuted. Not only would the criminal prosecution require a series of procedures from arrest, indictment, and discovery through pretrial motions, hearings, and the trial itself, but if the president were to be **convicted**, the consequences to the nation would be *irreparable*. It might not be **ethical** to spare a sitting president a criminal prosecution when a "normal person" would not be spared, but the ethical concerns are *outweighed* by the important interests at stake, and most countries would protect their leaders from this type of legal action while in office.

13.4.11 Answers to You Be the USA

1. This conduct aids the enemy, rather than impeding the administration of justice by interfering with law enforcement procedure, criminal prosecution, or conviction, so the proper crime to prosecute is **treason**.
2. Copying a top-secret design and providing it to another nation is spying, rather than destroying, damaging, or producing defective property to impede national defense, so the proper crime to prosecute is **conspiracy to commit espionage**.
3. This payment is made for the purpose of influencing a public official's decision, rather than harboring a terrorist abroad, so the proper crime to prosecute is **bribery**.
4. The defendant was not under oath when she made the false statement. She was giving false evidence and impeding a law enforcement investigation, so the proper crime to prosecute is **obstruction of justice**.

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