



Only Minimal Impact on Commerce Needed for Attempted Bombing

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The United States Court of Appeals for the Eleventh Circuit (Eleventh Circuit) recently [held](#) in *United States v. Suarez* that a minimal impact on commerce is sufficient to satisfy the jurisdictional requirement of the federal weapons of mass destruction statute. The decision seems to reflect a growing willingness of federal appellate courts to read broadly Congress's Commerce [Clause](#) powers.

Facts: Harlem Suarez, the defendant in the case, established a Facebook page on which he posted ISIS (Islamic State of Iraq and al-al-Sham) propaganda, recruited others, and sought bomb-making instructions. FBI informants befriended Suarez, helped him create an ISIS recruiting video, and agreed to make a bomb for him. Suarez supplied the FBI informants, one of whom he believed to be an ISIS representative, with some of ingredients for his bomb – two boxes of nails, a backpack, and a cellphone. He said he intended to detonate the device on a crowded beach using a cellphone. The FBI arrested Suarez after the informant handed him an inoperable “bomb.” At trial, a travel agent testified that a terrorist attack would adversely impact Key West’s tourist business. The federal district court convicted Suarez for attempt to use a weapon of mass destruction and for attempt to provide material support to a designated foreign terrorist organization. It sentenced him to 20 years on the material support charge and to life imprisonment on the weapons charge.

Statutes: The material support [statute](#) proscribes providing support, including personal services, to an organization designated by the Secretary of State as a foreign terrorist organization, which includes ISIS. The statute covers attempt and conspiracy, as well as, the completed substantive offense.

The weapons [statute](#) proscribes the unlawful use, threats to use, attempts to use, and conspiracy to use, weapons of mass destruction here and abroad. A conviction for [attempt](#) requires proof of intent and a substantial step, more than mere preparation, towards completion of the substantive offense. The line between mere preparation and substantial step is not easily discerned, but authorities need not wait until the last minute when the completed offense is potentially catastrophic. The weapons of mass destruction

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for purposes of the [statute](#) include chemical, biological, and nuclear weapons, as well as destructive devices, *i.e.*, missiles, grenades, mines, mortars, some high powered firearms, incendiary devices, and bombs. The jurisdictional element at issue in *Suarez* requires that “the offense, or the results of the offense ... in the case of ... attempt ... would have affected interstate or foreign commerce.”

Eleventh Circuit: Suarez’s counsel argued on appeal that the prosecution had offered insufficient evidence to show that Suarez’s conduct, if successful, would have affected commerce. The Supreme Court has explained that the Constitution’s Commerce and Necessary and Proper Clauses are not without [limit](#), but they do authorize Congress to regulate the instrumentalities of interstate commerce, the use of channels of interstate commerce, and activities that *substantially* affect interstate commerce. Moreover, as the Supreme Court [explained](#) in a [Hobbs Act](#) case, *Taylor v. United States*, Congress may regulate isolated activities under the Commerce Clause “as long as they substantially affect commerce in the aggregate, even if their individual impact on interstate commerce is minimal.” The lower federal courts have regularly [endorsed](#) a “*de minimis*” (minimal) commerce impact standard under the Hobbs Act. The Hobbs Act outlaws robberies that “in any way or degree” affect commerce, although some cases [recognize](#) a higher standard if the target of the robbery is a private individual rather than a business. One appellate court has suggested that Hobbs Act cases are unique. That *is, because* the “Hobbs Act prohibits robberies that affect interstate commerce ‘in any way or degree,’ the required showing of an effect on interstate commerce is *de minimis*.” The weapons statute has no such “in any or degree” language.

Nevertheless, several other federal appellate courts have approved use of the *de minimis* standard in [money](#) laundering, commercial [sex](#) trafficking, health care [fraud](#), [RICO](#) (racketeering), and [explosives](#) cases. In fact, the United States Court of Appeals for the Eighth Circuit (Eighth Circuit) [announced](#) in an earlier weapons of mass destruction case that where a statute contains “an express jurisdictional nexus to interstate commerce, violations that have merely a *de minimis* effect on interstate commerce satisfy the jurisdictional requirement.”

The *Suarez* court [cited](#) its own Hobbs Act precedents and the Eighth Circuit decision in support of its conclusion that the minimum impact standard applies in weapons of mass destruction cases. It also held that the travel agent’s testimony was sufficient to satisfy this “low bar” in *Suarez*.

Suarez’s counsel also challenged Suarez’s sentence without success. In *Graham v. Florida*, the Supreme [Court](#) acknowledged that the Eighth Amendment’s Cruel and Unusual Punishment Clause precludes imposition of a sentence of life imprisonment without the possibility of parole for a crime committed as a juvenile. Suarez’s counsel contended that the same rationale should apply to gullible, immature, not very bright defendants in their early twenties, like Suarez. The court was not persuaded. It pointed out that it had never upheld an Eighth Amendment challenge in a non-capital case and that Suarez could not claim the shelter of *Graham* because he was not a juvenile. As for Suarez’s Sentencing Guideline challenges, the court [found](#) his sentences both procedurally and substantially reasonable. A sentence is procedurally reasonable if the sentencing court navigates the Guidelines and the general sentencing statute without mishap. A sentence is substantially reasonable if it is not unfair.

Congressional Considerations: The *Suarez* and *Taylor* decisions seem to confirm that Congress enjoys exceptionally broad legislative powers under the Constitution’s Commerce and Necessary and Proper Clauses. The Supreme Court’s [Lopez](#) and [Morrison](#) decisions serve as reminders that those powers are not boundless.