

FBI GETS ITS LONE WOLF, JUST IN TIME FOR PATRIOT DEBATE

This morning, the FBI arrested 20-year old Saudi citizen Khalid Ali-M Aldawsari on one charge of attempted use of a weapon of mass destruction. According to the FBI, Aldawsari had allegedly purchased all the ingredients to make an IED using the explosive trinitrophenol, which also known as T.N.P., or picric acid. In addition, he had researched targets, including George W Bush's home in Dallas, not far from his own location in Lubbock, TX.

If the facts are as alleged, Aldawsari sounds like a potentially much more dangerous person than the number of aspirational terrorists the FBI has entrapped of late. So I am grateful that Con-Way freight officials alerted the Lubbock Police Department when Aldawsari attempted to have them receive his shipment of phenol, an ingredient in picric acid.

But I have two concerns. The first, as Robert Chesney lays out, this case seems to strain the meaning of "attempt" in the charge.

This could be an important case from a legal perspective, in the sense that it may turn on the anticipatory scope of attempt liability – an issue that just doesn't matter when it is possible to charge conspiracy, but which becomes central in the case of a lone wolf.

Absent a conspiracy, the prosecutors are instead relying on attempt as the inchoate charge (under 18 USC 2332a, the WMD statute; recall that "WMD" is defined very loosely to encompass more or less all bombs). The interesting question is whether the facts alleged below suffice to trigger "attempt" liability. It does not sound as if he had yet assembled a bomb, which would

have made for a much easier case. On the other hand, the many substantial steps that he had actually taken, if one credits the allegations below, leave no room for doubt as to what was going on. In any event, we can expect some interesting and important debate about the anticipatory scope of the attempt concept. If this proves problematic, and if this turns out to be a truly solo operation, it will serve to highlight a critical point about inchoate criminal law: criminal liability attaches far earlier in the planning process for groups than for individuals.

Unlike the case of Mohamed Osman Mohamud, the FBI doesn't have evidence of the suspect literally trying to trigger a bomb. Unlike Najibullah Zazi, they FBI doesn't have evidence of him trying to make the explosive he intended to use. They have, according to the affidavit, just evidence that he had purchased all the things he'd need to make an IED, and evidence that he had researched potential targets. Is that going to be enough to constitute an attempt?

But what I find more interesting is a point Chesney also alludes to.

Note too that this was not a "sting" case that might raise objections on entrapment grounds, at least according to these allegations. It is very much the real deal lone wolf scenario, or so it seems, and we were deeply fortunate that it was discovered in advance.

Unlike Zazi and Mohamud, who had contacts with people abroad, Aldawsari is portrayed to be someone who plotted this completely on his own using research available on the Internet. Also unlike Zazi and Mohamud, Aldawsari is not a US person; he's an F-1 student visa holder, meaning he qualifies for the Lone Wolf provision in the

PATRIOT Act. And it appears likely that the government used the Lone Wolf provision to collect evidence in this case.

It appears Aldawsari first came to the government's attention when Con-Way Freight contacted the Lubbock Police sometime on January 30 or February 1, 2011 to report Aldawsari's attempt to get them to receive the phenol he had ordered. It appears that the FBI in Greensboro, NC (either in response to the Con-Way alert or independently, the affidavit doesn't make clear) learned that the company from which Aldawsari ordered the phenol had had a suspicious attempted purchase of phenol. From there, the FBI agent in this case, Michael Orndoff, first had the chemical supply company call (on February 3) and then posed as an employee of that company to call (February 8) Aldawsari to find out more about why he intended to buy the phenol. The FBI conducted physical searches of Aldawsari's apartment on February 14 and February 17.

But the rest of the evidence against Aldawsari appears to come from what the affidavit repeatedly describes as "legally authorized electronic surveillance." The affidavit describes emails on three different accounts going back to October 2010 (though I assume these would have been accessible in archived storage).

Now, we don't know that the FBI used the Lone Wolf provision to get those emails. But DOJ has a habit of using expiring provisions just in time to demand their reauthorization. I suppose we'll learn whether they did when the debate over the PATRIOT Act heats up again in the coming weeks.

If Aldawsari is as he is alleged, the detective work here was responsive and thorough; it may have prevented a real attack. But I can't help but wonder whether the FBI triggered this "attempted use of a WMD" early so as to have its Lone Wolf in time for Congressional debates.