



10-2003

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Nora V. Demleitner

Washington and Lee University School of Law, demleitner@wlu.edu

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### Recommended Citation

Nora V. Demleitner, *How Many Terrorists Are There? The Escalation in So-Called Terrorism Prosecutions*, 16 Fed. Sent'g Rep. 38 (2003).

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Citation: 16 Fed. Sent. R. 38 2003-2004

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# How Many Terrorists Are There? The Escalation in So-Called Terrorism Prosecutions



**NORA V. DEMLEITNER**

Co-Managing Editor,  
*Federal Sentencing Reporter*; Professor,  
Hofstra University  
School of Law

What is a terrorist? There seems to be national, perhaps even close to universal agreement, that the men involved in the attacks on September 11, 2001 are terrorists. However, beyond that the consensus may break down. Are Lee Malvo and John Muhammed, better known as the Washington, D.C., area snipers, terrorists or common criminals? Osama Bin Laden's Al-Qaeda network, widely held responsible for the attacks of September 11 and Lee Malvo and John Muhammed, systematically used fear—a characteristic of terrorism. But what about the originators of the “love bug” and “sobing” viruses? Are they terrorists, as some members of Congress claimed, or are they criminals, computer hackers, or perhaps all of the above?

Definitions of terrorism remain disputed under domestic and international law. Challenges to recent accountings of terrorism cases investigated and prosecuted by the federal government further raise questions about what should be classified as terrorism. This paper focuses on the over- and undercounts that result from our current amorphous definitions of the term, and the pressure within the government to produce successes in the hunt for (Al-Qaeda) terrorists.

## I. What Is a Terrorism Offense?

Terrorism prosecutions are nothing novel in the U.S. criminal justice system. For many decades, however, they were not labeled terrorism cases but instead were classified as treason and sabotage, as murders and bombings.<sup>1</sup> The hallmark of a terrorism offense is that it is politically motivated. Nevertheless, precise definitions vary, confusingly, even within federal law.

The most common approach under U.S. law is to focus on the intent “to intimidate or coerce a civilian population” or to influence the conduct or policy of a government through the use of coercion or mass destruction and other serious offenses.<sup>2</sup> A prison escape with hostage taking might be a terrorist event under this definition, as might be a bomb threat. The FBI's definition, on the other hand, focuses heavily on violence and force and highlights the purpose of such activity. It counts as terrorism “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any

segment thereof, in furtherance of political or social objectives.”<sup>3</sup> Another approach combines this definition with a list of terrorism-related statutory offenses, including crimes such as aircraft hijacking. Yet another way to count terrorism cases is to look solely at the list of offenses considered terrorism-related.

Title 18 of the U.S. Code has a chapter entitled “Terrorism.”<sup>4</sup> It includes offenses such as homicide and use of biological or nuclear weapons.<sup>5</sup> However, nothing in the definition of these offenses ties them to terrorism. In some cases it may, therefore, not be the elements of an offense but rather the placement or heading of the statute that defines whether a crime is deemed an act of terrorism. When no definition of terrorism is provided in the criminal statute, courts have relied on the definitions included in non-criminal legislation or administrative regulations. The Immigration and Nationality Act (INA), for example, sets out a detailed definition of terrorism, focusing on the types of activity employed and the offenses committed.

A terrorist purpose may be part of the mens rea, the actus reus—to measure the type of prohibited conduct, such as the use of weapons of mass destruction—or it may be a jurisdictional element. The latter has been relevant to distinguish between international and domestic terrorism. The classification depends on the origin of the terrorist group, the place from which they launch their attacks and the nationality of their victims. “The FBI defines domestic terrorism as the unlawful use, or threatened use, of force or violence by a terrorist group or individual based and operating entirely within the United States or its territories without foreign direction.”<sup>6</sup> The number of international terrorist attacks has declined overall since the mid-1980's—to 348 in 2001. However, today's attacks are more lethal, with the highest yearly casualty figure ever in 2001: 3,572 dead and 1,083 injured, most from the attacks on September 11, 2001.<sup>7</sup>

Even though states have passed anti-terrorism laws,<sup>8</sup> the primary authority and responsibility for the prosecution of terrorism offenses rests with the federal government. Modern anti-terrorism legislation goes back to the early 1960's, with the enactment of an air piracy statute implementing an international conven-

*Federal Sentencing Reporter*, Vol. 16, No. 1, pp. 38–42, ISSN 1053-9867, electronic ISSN 1533-8363. © 2003 by the Vera Institute of Justice. All rights reserved. Send requests for permission to reprint to: Rights and Permissions, University of California Press, Journals Division, 2000 Center Street, Suite 303, Berkeley, CA 94704-1223.

tion against air piracy. The international convention had been drafted as a response to the hijacking of commercial airliners by politically motivated individuals. In the following decades, international anti-terrorism treaties often responded to particular political events, as did the implementing domestic anti-terrorism legislation.

Domestic legislation tends to be either narrowly focused on one terrorism issue, such as hostage-taking, or be part of an omnibus crime package that deals with various anti-terrorism measures. The criminalization of the support some terrorists enjoy, including through money laundering and other ways of financing, has followed the criminalization of traditional violent offenses as crimes of terrorism. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) aimed at interdicting aid for terrorist organizations, including criminalizing the giving of material support to a designated terrorist organization. The USA Patriot Act, passed in the fall of 2001, did not add any new crimes but instead focused on expanding the government's procedural tools in the investigation of offenses—terrorist and non-terrorist alike. The Act also provides a new definition of “domestic terrorism”.

Terrorism can also be used as a sentence enhancing factor under section 3A1.4 of the U.S. Sentencing Guidelines. If a crime of terrorism was involved or if the felony was intended to promote such an offense, 3A1.4 enhances the offense conduct by 12 levels or to 32 if below 32, but also moves an offender's criminal history category to level VI. If the offense at issue is not one of the federal crimes of terrorism referenced in the Commentary and AEDPA, Application Note 4 explicitly allows for an upward departure. However, such departure may not exceed the top of the guideline range had it been adjusted under 3A1.4.<sup>9</sup>

The confusing array of definitions of “terrorism” have led to disagreement over what is categorized and prosecuted as a terrorist event, and why.

## II. Prosecutions of Terrorists

Statistics published by the Department of Justice indicate that the number of terrorism-related prosecutions has gone up substantially since 2001. Does this imply that more terrorists have been prosecuted? How do these prosecutions measure up in the “war on terror”?

### 1. Domestic prosecutions

Only a few prosecutions of alleged terrorists have occurred under anti-terrorism legislation.<sup>10</sup> However, such suspects may also be prosecuted under an array of federal criminal statutes, including those for violent crimes as well as more regulatory offenses.

Among the major terrorism prosecutions in the United States have been the trials of the 1993 World Trade center bombers, of Timothy McVeigh and Terry Nichols for the Oklahoma City bombing, and of the

bombers of the U.S. embassies in Tanzania and Kenya in 1998, and the plea bargains of John Walker Lindh, Richard Reid and the Lackawanna Six—a group of Yemeni Americans around Buffalo, N.Y., alleged to be a so-called “sleeper cell”—and the preparations for the trial of Zacarias Moussaoui. In all of these cases terrorism offenses as well as traditional crimes were charged.

However, some charged under anti-terrorism statutes do not appear to fit the picture of these terrorists. Federal prosecutors have classified bank theft, drug violations and even the explosion of a pipe bomb, as terrorist cases. Why the need for increased terrorism prosecution figures? One explanation might be for individual U.S. Attorneys' Offices to appear “tough on terrorism”, which presumably leads to commendations and rewards. Another explanation might lie in the Congressional budget process which holds potential financial rewards for a Department of Justice focused on terrorism cases, which have after all turned into a national frenzy.

Overcounting of terrorism cases may not be the only problem. The planned prosecutions of so-called enemy combatants in front of military tribunals would not appear in official Justice Department statistics, as the Department of Defense runs the military tribunals.

### 2. International prosecutions

Terrorists could also be delivered to international tribunals. The International Criminal Court (ICC), which is now fully operational, has jurisdiction over crimes against humanity—a category that may encompass some particularly horrific and large scale terrorist attacks. However, since the United States has “unsigned” its initial approval of the statute, referral to the ICC by U.S. authorities is unlikely. *Ad hoc* tribunals trying terrorists may be more likely to receive U.S. support, though the only one ever established took years to come to fruition. It tried the two Libyans charged with the Lockerbie bombing—one of whom was convicted. While FBI statistics include investigatory assistance provided for such a prosecution, such support would not appear in the count of the Executive Office of U.S. Attorneys (EOUSA).

### 3. Foreign prosecutions

Terrorism suspects may be summarily removed from the United States, without a trial. This could be done through extradition or rendition, if another country were interested in a domestic prosecution. A more frequently used avenue, however, is deportation of foreign nationals.

Usually terrorism suspects are not removed under the terrorism provisions of the Immigration and Nationality Act (INA)—in fact not a single individual held in the wake of the terror attacks of September 11, 2001, was deported on that ground. Instead they are

deported for other violations of the INA, such as overstaying a visa, entering without inspection or working without a permit. Because of these other avenues of dealing with terrorism suspects, DOJ referral and prosecution statistics do not provide a nearly complete picture of the government's anti-terrorism efforts and successes or failures. It may also be more difficult to assess whether such removal constitutes a successful law-enforcement action, as the individual is likely to be removed from a situation where he could cause harm and will be tried abroad, or an unsuccessful one—removal was the only available avenue since criminal proof was insufficient. Especially in the latter case the individual removed may not in fact be a terrorist, and his removal, while justified, would not have occurred except for that unjustified assumption. How Congress or others are to assess such law-enforcement activities, and whether they deserve reward or censure, remains, therefore, unclear.

#### 4. Non-prosecutions

The Department of Justice's brief in *North Jersey Media Group v. Ashcroft* alleged that a substantial number of individuals deported after Sept. 11 could have been prosecuted under anti-terrorism legislation. This was not done to protect national security so as to prevent other terrorism suspects from gleaning information about governmental investigations. This type of an allegation is virtually impossible to verify since it is based on internal information available solely to DOJ. It is troubling since it leaves many of the removed individuals under a cloud of suspicion while helping to defend the government's choice of secret detentions and hearings.

Even if the number of terrorism prosecutions not pursued in these and other cases may potentially be large, this may not differ from other criminal prosecutions, including very serious cases involved organized crime. Therefore, non-prosecutions in alleged terrorism situations should not prove a greater concern than in other cases, except that in the latter national attention is rarely focused on them. However, removal and non-prosecutions raise serious concerns about oversight of DOJ activities, as do classifications with regard to domestic prosecutions as terrorist.

#### III. The Making of "Terrorists"

In fiscal year 2002, federal prosecutors charged over 1,200 individuals with offenses that were alleged to be related to terrorism or internal security.<sup>12</sup> This figure constitutes an increase of over 100 percent as compared to the year before; the increase has been most pronounced in the "international terrorism" category while the number of "domestic terrorism" prosecutions has changed barely.

The data are based on an investigatory or prosecutorial assessment of which cases are terrorism-

related.<sup>13</sup> As an internal investigation by the Office of Inspector General indicated, a large number of cases has been classified incorrectly, especially with regard to the label of "international terrorism."<sup>14</sup> Classifications may depend to a large extent on the individual U.S. Attorney and the agency investigating the case. As most cases are now referred for prosecution to the U.S. Attorney's office in the Eastern District of Virginia, this problem may decrease as one office should be able to report more uniformly on terrorism-related prosecutions. However, other issues remain. Among them are who should exercise oversight with regard to such classificatory schemes.

The U.S. Attorney's Office in New Jersey, for example, classified the cases of foreign students who paid to have others take their English language proficiency exams as "international terrorism". It denied that these cases were mis-classified. The case exemplifies the lack of a clear standard in classifying offenses as terrorism- or non-terrorism related. Prior to fiscal year 2002, the EOUSA classified terrorism-related offenses based on the lead charge listed in the indictment or the offenses of conviction in light of a statutory list of terrorist activities. This, however, is no longer the case and the criteria for classification have been substantially relaxed. Whether the change will lead to more "truth in labeling" remains unclear. While lead charges may conceal the nature of the case, relaxed classification schemes may lead to the overcounting of alleged terrorism cases.

Changes in DOJ guidelines may help, though are unlikely to solve the entire classification problem, as U.S. Attorney's Offices and investigatory agencies have substantial financial and reputational incentives in overstating the number of terrorism-related cases. The GAO's finding of a lack of management oversight and internal controls that would ensure the reliability of the data is therefore particularly troubling.

Equally troubling may be the category of prosecutions alleged to have disturbed terrorist activities when the criminal charge is unrelated to any terrorist activity. This category may justify classifying many non-violent offenses and technical violations, such as false statements on visa applications, forged identification papers and other documents, as terrorism-related crimes.

Even some of the cases currently "correctly" classified as terrorism-related should cause concern. DOJ, for example, classifies all bombings as terrorist events, including, for example, attempted bombings of schools by disgruntled students. It also includes terrorism-related hoaxes as terrorism offenses. Such cases do not reflect terrorism incidents but are usually the work of disturbed individuals or are largely reflective of a concern of our time which a few attempt to exploit. Such classifications that are in fact considered accurate raise the question of who develops such schemes, and who exercises oversight over them. After all the

classification of such events consists of a value judgment with very practical consequences, such as sentence enhancements for the offender and increased funding for a U.S. Attorney's Office.

While the shift in investigatory priorities must have affected the number of cases charged, prosecutors appear also to have decreased their declination rates. In fiscal year 2001 only one third of all terrorism-related referrals ended in prosecutions; in fiscal year 2002 it was two-thirds of such cases. Some have argued that the high rate of declination is indicative of the difficulties in establishing a terrorist case. The increase in charges may, therefore, reflect the minor nature of such cases and/or the availability of alternative dispositions, such as deportation. In addition, the time between an initial referral to the time of disposal declined from about twelve to two months, giving credence to the theory that most of these so-called terrorism prosecutions are of a minor nature.

These charging and case processing data lead to a set of important conclusions. Prosecutors are likely to charge more low-level offenses than before as terrorism-related. The increase in prosecutions as well as the decrease in processing time both lead to this conclusion, which the type of referring agency and the sentencing pattern further support. While the FBI had been the lead investigative agency in fiscal year 2001 for almost three quarters of all terrorism prosecutions, by the next fiscal year, this figure had dropped to one third, and the Immigration and Naturalization Service (INS) virtually rivaled the FBI,<sup>14</sup> followed closely by the Social Security Agency (SSA). The referring agencies account for the decreased disposition time as many of the cases referred are relatively easy to prove and do not require much additional investigation, quite in contrast to full-blown terrorist prosecutions. Many of the SSA cases, for example, involved undocumented airport workers who used false social security numbers and airport workers who had failed to disclose a prior conviction. None of these individuals were charged under an anti-terrorist statute. While terrorists may misuse social security numbers<sup>15</sup> – and most other identifying information and documentation – most individuals who use false or stolen identities are not terrorists. Therefore, arrests for identity fraud even in connection with an airport sweep are unlikely to be terrorism-related though they are counted in this manner, i.e., as efforts to prevent or disrupt terrorism activity. This creates an impression of more effective and efficient enforcement than is actually the case.

The median prison term for the offenses declared terrorism-related has dropped from twenty-one to two months. This is also indicative of the lesser nature of the crimes charged. INS- and SSA-referred cases in particular carry short terms of imprisonment – two and one month respectively. Some individuals, nevertheless, have received very long sentences, presumably for

criminal conduct more directly related to terrorism activities or for more serious offenses.

The geographic consolidation of “international terrorism” prosecutions in one district may also raise concerns, especially since investigations of and referrals for alleged terrorism cases have occurred virtually all over the country. While there are geographic clusters for “international” and “domestic” terrorism cases, only the prosecution of “international” cases has become concentrated in the Eastern District of Virginia. There are efficiency gains from focusing prosecutions in one district, but this has not been the policy with other cases which are generally tried in the district in which they arise. Greater national sentencing uniformity cannot be the justification for such consolidation since most of these cases are not tried under anti-terrorism statutes and since judges in other parts of the country, especially in New York, have had extensive experience sentencing terrorists.

After the attacks of September 11, 2001, the U.S. government focused much of its law-enforcement efforts on immigrants, especially those from countries in the Middle East and with large Muslim populations. Immigration law became a crucial component of law-enforcement efforts. The only charges brought against these immigrants, however, were minor immigration violations or ordinary offenses. Apparently the choice between these two was random, or as the then-Assistant Attorney General for the Criminal Division Michael Chertoff indicated, depended on which was most “efficacious.”<sup>16</sup> Many immigration violations that would not have been prosecuted before 9/11, have now become cause for deportations or even criminal prosecutions.<sup>17</sup> Many of the later deportees were arrested because of chance encounters or tenuous connections to an alleged terrorism lead.<sup>18</sup> Despite some criminal prosecutions, most of the 9/11 detainees were charged with civil violations of immigration law, including overstaying their visas, entering without documentation or with invalid documents.<sup>19</sup>

This does not mean that immigration-related charges could not be a way to identify or develop criminal or terrorism-related charges. Al Capone was head of an organized crime syndicate even though ultimately he was convicted of tax evasion. Therefore, a terrorist could be convicted of an immigration violation. However, as most tax evaders are not members of organized crime, most immigration violators are not terrorists. On the other hand, once an individual is convicted of an offense classified as potentially terrorist or has been removed in connection with an alleged terrorist sweep, it might be difficult for him to defend himself against continued allegations of terrorism, a serious stigma in the worldwide “war against terrorism.” This is particularly the case as the government has indicated that many individuals who could have been prosecuted as terrorists were summarily removed, posing a potential

concern for their home countries whose police forces might be inclined to monitor them more carefully.

#### IV. Conclusion

The increase in the number of terrorism cases should not be interpreted as an increase in terrorism offenses, or in national security. Quite the contrary may occur as the increased application of the term may augment public insecurity and create unnecessary alarm over run-of-the-mill criminal activity. In addition, the increase in immigration and immigration-related social security prosecutions indicates an increasing focus on the foreigner as a potential terrorist, albeit with no direct charge but the stigma attached.

#### Notes

- <sup>1</sup> Most of the terrorist attacks directed against Americans in the last 15 years consisted of bombings. General Accounting Office (GAO), *Combating Terrorism: Interagency Framework and Agency Programs to Address the Overseas Threat* 18 (May 2003) [hereinafter GAO, *Combating Terrorism*].
- <sup>2</sup> See, e.g., 18 U.S.C. § 2331.
- <sup>3</sup> 28 C.F.R. 0.85 (2002).
- <sup>4</sup> U.S.C. Title 18, Part 1, Chapter 113B.
- <sup>5</sup> 18 U.S.C. §§ 2332, 2332a (2003).
- <sup>6</sup> GAO, *Combating Terrorism*, *supra* note 1, at 13.
- <sup>7</sup> *Id.* at 16–17.
- <sup>8</sup> See, e.g., Ark. Code Ann. § 5-54-205 (2003); Va. Code Ann. § 18.2-46.5 (2003).
- <sup>9</sup> In a case decided prior to the addition of this adjustment, the Third Circuit held that a Japanese terrorist planning a

major terrorist event on U.S. soil could reasonably receive an upward departure from a guideline range of 27–32 to 262 months. *United States v. Kikumura*, 918 F.2d 1084 (3d Cir. 1990).

- <sup>10</sup> Arrests under such statutes may not lead to trials or convictions. The number of people arrested in Great Britain under terrorism-related charges has been over 300 while only about fifteen percent of them have been charged with such crimes so far. Sean O'Neill & John Steele, *304 Terror Act Arrests But Few Face Charges*, *Telegraph*, Feb. 15, 2003.
- <sup>11</sup> The data in this section are provided by TRAC, available at [trac.syr.edu](http://trac.syr.edu).
- <sup>12</sup> The FBI and the EOUSA use different definitions of terrorism-related offenses, causing the FBI to list more such investigations in its annual report. U.S. General Accounting Office, Report to the Hon. Dan Burton, House of Representatives, *Justice Department: Better Management Oversight and Internal Controls Needed to Ensure Accuracy of Terrorism-Related Statistics* 3–4 (Jan. 2003).
- <sup>13</sup> *Id.*
- <sup>14</sup> The INS is now part of the Department of Homeland Security.
- <sup>15</sup> Statement of The Honorable James G. Huse, Jr., Inspector General, Social Security Administration, Before the Subcommittee on Social Security of the House Committee on Ways and Means, July 10, 2003 (tying September 11 to the misuse of social security numbers).
- <sup>16</sup> Office of the Inspector General (OIG), *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* 13 (April 2003).
- <sup>17</sup> *Id.*
- <sup>18</sup> *Id.* at 41–42.
- <sup>19</sup> *Id.* at 27.