

For Lesson 4 on September 7, 2011, please review assignment #3, then read the following:

Most Americans would be surprised to learn that there is no crime of terrorism in the federal criminal code, at least not one with a penalty. In 1996, Congress passed the Anti-terrorism and Effective Death Penalty Act – commonly known as the AEDPA – which added Section 2332b to Title 18 of the Federal criminal code. Subsection (g)(5) states that “the term ‘Federal crime of terrorism’ means an offense that ... is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and ...” is a violation of any one of a list of offenses that includes such things as destroying aircraft, taking hostages, and using a weapon of mass destruction. Presumably, these particular offenses were listed because Congress believed them to be the sort of things that terrorists do.

But, what some academics call the “dirty little secret of Section 2332b” is that Congress did not impose any penalty for committing such a defined “federal crime of terrorism.” No where. What the section actually prohibits is conduct that transcends national boundaries and is a violation of one of a wholly separate and substantially shorter list of offenses contained in subsection (a). No where in the entire 106 pages of the AEDPA is the term “federal crime of terrorism” used except in its own definition.¹ Apparently, having trouble agreeing on a definition of terrorism, Committee members drafting the bill adopted the concept of “transcending national boundaries” as a surrogate for a definition of terrorism. They altered the “prohibited acts” portion of the statute so that it referred to “conduct transcending national

¹ WCS note: I personally loaded the entire text of the AEDPA into one Word document and searched for that term. The only match was in the Section 702 creating Title 18, USC, 2332b(g)(5), the definition itself.

boundaries” instead of to a “federal crime of terrorism,” but no one thought to remove the now orphaned definition from the statute.

Since 1996, others have made use of the definition in 2332b(g)(5). The United States Sentencing Commission has adopted that definition by reference in determining when an enhancement to a sentence should be applied for an offense involving terrorism. Also, the Bail Reform Act adopts the definition by reference in determining when a defendant may be held without bond before trial, and another law bans the use of chemical, biological, nuclear or radioactive materials to commit an offense listed in 2332b(g)(5). But, to this day, there is no penalty for committing the offense of “terrorism” as such.

The only actual crime of “terrorism” as such is in the Military Commissions Act. Section 950v(b)(24) of the MCA creates an offense named simply “Terrorism,” which prohibits an unlawful combatant from intentionally killing or inflicting great bodily harm upon protected persons if they do so in a manner calculated to influence or affect the conduct of a government or civilian population by intimidation or coercion or to retaliate against government conduct.

There are at least 14 definitions of terrorism in the United States Code. Sometimes the law defines it by the **purpose** for which an act is committed, such as to coerce a government. Sometimes Congress defined it by simply providing a **list of offenses** that are deemed to be terrorism-related. And, sometimes the definition combines **both** the purpose and a list of offenses. Still other offenses are generally deemed to be terrorism because of the **conduct** involved – such as using a biological weapon – without any specific mention of the word terrorism. A fifth definitional approach employs a **surrogate** concept, such as “transcending national boundaries.” One statute, Title 18, Section 2332, although in a chapter entitled “Terrorism” does not use that word at all, but attempts to limit its otherwise very broad scope by

providing that “[n]o prosecution for any offense described in this section shall be undertaken by the United States except on written certification of the Attorney General or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions that, in the judgment of the certifying official, such offense was intended to coerce, intimidate, or retaliate against a government or a civilian population.” Apparently, Congress decided it was better to assign the determination of whether an act is terrorism to the Attorney General rather than to a jury.

To be sure, Congress is not alone in finding it difficult to define “terrorism.” There is no agreed definition under international law or in academia, either. Much academic literature defines terrorism as the **unlawful targeting of non-combatants**, a concept generally absent from legal definitions. And, of course, the parameters of a definition may vary by the use to which the term is put. Still, the many, varied, and inconsistent definitions in the United States Code reflect the lack of a unified legal theory for identifying just what conduct should be prohibited.

- William C. Snyder, 2008 ©