Negative: Terrorism Sentencing

By “Coach Vance” Trefethen

***The United States Federal Government should significantly reform its policies regarding convicted prisoners under federal jurisdiction***

Case Summary: The AFF plan mandates life sentence for federal terrorism conviction.

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Negative: Terrorism Sentencing

TOPICALITY

1. Not significant reform of policy

Link: Status Quo already takes federal terrorism charges very seriously

Carmichael, Ellis & Brock copyright 2022. (criminal defense law firm) (article is undated, material is copyright 2022) “Federal Terrorism Charges” <https://www.carmichaellegal.com/federal-terrorism-charges#:~:text=Federal%20terrorism%20penalties%20can%20include,in%20imprisonment%20for%2020%20years>. (accessed 2 Apr 2022)

Federal officials take terrorism charges very seriously, and a conviction involving terrorism could mean a life sentence or even the death penalty. Terrorism is not only limited to overseas groups. It can equally be applied to people who have never even stepped foot outside the country. Under the increasingly broad terrorism laws, the government can bring attempted terrorism charges, even when no one was ever harmed.

Link: Terrorism sentences are harsh in Status Quo

Carmichael, Ellis & Brock copyright 2022. (criminal defense law firm) (article is undated, material is copyright 2022) “Federal Terrorism Charges” <https://www.carmichaellegal.com/federal-terrorism-charges#:~:text=Federal%20terrorism%20penalties%20can%20include,in%20imprisonment%20for%2020%20years>. (accessed 2 Apr 2022)

Federal terrorism penalties can include a death sentence even where a state has banned the death penalty. Even if no one is harmed or killed, an individual can face a long prison sentence. A conviction for providing material support or resources to a terrorist organization can result in imprisonment for 20 years. If anyone was killed as a result, then the sentence can be life in prison.

Violation: Doing a little more of the Status Quo is not significant reform

Legalizing terrorism would have been a significant reform. Saying that already harsh sentences should, in a few and we don’t know how many cases, be even harsher is not significant reform. It’s just a little more of the Status Quo policy. Current policy is harsh sentences, and AFF policy is harsh sentences. There’s no substantial reform here.

Impact: No one affirming the resolution, so NEG ballot is the only option

Neither team is affirming significant reform of anything about federal prisoners, so there is effectively no Affirmative team in this round. No matter who wins, the Negative position carries the day, so you should circle “Negative” on the ballot no matter which team wins.

2. Not significant reform of prisoners

Link: Less than 700 prisoners affected. Less than 700 federal terrorism convictions between 9/11/2001 and 2018

Human Rights First 2018 (non-profit human rights advocacy group) Feb 2018 Trying Terror Suspects in Federal Courts <https://www.humanrightsfirst.org/sites/default/files/Trying-Terror-Suspects-In-Federal-Court.pdf> (accessed 2 Apr 2022)

Federal civilian criminal courts have convicted more than 660 individuals on terrorism-related charges since 9/11. Military commissions have convicted only eight. Federal court convictions include convictions resulting from investigations of terrorist acts and of criminal acts by those with an identified link to international terrorism.

Link: 151,000 federal prisoners

Dr. Ann Carson 2021 (PhD; statistician for the Bureau of Justice Statistics) Nov 2021 Federal Prisoner Statistics Collected under the First Step Act, 2021 <https://bjs.ojp.gov/library/publications/federal-prisoner-statistics-collected-under-first-step-act-2021#:~:text=The%20federal%20prison%20population%20decreased,to%20151%2C283%20at%20yearend%202020>. (accessed 2 Apr 2022)

The federal prison population decreased 13%, from 174,391 at yearend 2019 to 151,283 at yearend 2020.

Violation: Do the math. Plan affects 700 out of 151,000 prisoners, or 0.46%

There’s no way a reform of 0.46% of something is a significant reform.

Impact: Abuse justifies NEG ballot.

Running a case to reform 0.46% is abusive because Negative teams cannot possibly prepare for all possible cases that tiny. Having to prepare for 0.46% reforms wastes time away from debating real, significant reforms and abuses Negative teams that already have a lot of work to do to prepare for team policy debates. Teach the Affirmative not to do that by awarding a Negative ballot in this round.

INHERENCY

1. Extra years for terrorism – already in Status Quo

Status Quo sentencing policy already adds a lot of extra sentencing time if terrorism is involved in a federal crime

Prof. Pinky Wassenberg 2017. (Professor of Political Science and Legal Studies, University of Illinois at Springfield. Ph.D., Washington State University; J.D., Lewis and Clark School of Law) U.S. CIRCUIT COURTS & THE APPLICATION OF THE TERRORISM ENHANCEMENT PROVISION, Southern Illinois University Law Journal <https://law.siu.edu/_common/documents/law-journal/articles-2017/fall2017/9%20-%20Wassenberg%20%20-%20sm.pdf> (accessed 2 Apr 2022)

In a series of statutes beginning in 1984, Congress directed the Sentencing Commission to mandate an upward adjustment to sentences for defendants whose crimes were connected to terrorism. The terrorism adjustment, section 3A1.4 of the Guidelines, provides for an upward adjustment of twelve levels increasing the base level to at least a level thirty-two, “if the offense is a felony that involved, or was intended to promote, a federal crime of terrorism . . . .” The maximum offense level is forty-three. In addition, the terrorism enhancement requires increasing the defendant’s criminal history category to a category VI from whatever it would have been based on the individual’s actual history. Category VI is the highest criminal history category. Since it combines both a substantial increase in the base level offense and places the defendant in the maximum criminal history category, the terrorism adjustment represents a significant increase in the severity of punishment over and above what a defendant would be eligible for without its imposition.

Even minor crimes – if related to terrorism – get 17 to 21 years

Prof. Pinky Wassenberg 2017. (Professor of Political Science and Legal Studies, University of Illinois at Springfield. Ph.D., Washington State University; J.D., Lewis and Clark School of Law) U.S. CIRCUIT COURTS & THE APPLICATION OF THE TERRORISM ENHANCEMENT PROVISION, Southern Illinois University Law Journal <https://law.siu.edu/_common/documents/law-journal/articles-2017/fall2017/9%20-%20Wassenberg%20%20-%20sm.pdf> (accessed 2 Apr 2022)

As the above description shows, the enhancement can have a grave impact on the potential sentence of a defendant to whom it is applied. For example, a defendant with no actual criminal history whose conduct consists of obstructing an investigation into terrorism has a base offense level offense of ten which increases to a twenty-two if the terrorism enhancement is applied. In addition, even though the defendant has no criminal history and would otherwise be placed at a criminal history level of I, under the terrorism enhancement, they are qualify for a maximum criminal history level of VI, the same criminal history category as if they had a career of armed felony convictions. Had that defendant’s obstruction offense not been linked to terrorism, the sentence range under the Guidelines would have been from six to twelve months imprisonment assuming there were no other factors leading to a departure from the basic range. With the addition of the terrorism enhancement, the defendant’s range jumps from imprisonment for a year or under to imprisonment from 210-262 months, or from 17.5 years to over 21 years.

HARMS / SIGNIFICANCE

1. Not all “terrorism” convictions involve violence

Non-violent acts of support count as “terrorism” convictions under federal law, and get punished with harsh sentences, from 12 to 20 years

[144 months = 12 years. 180 months = 15 years. 240 months = 20 years]

Prof. Pinky Wassenberg 2017. (Professor of Political Science and Legal Studies, University of Illinois at Springfield. Ph.D., Washington State University; J.D., Lewis and Clark School of Law) U.S. CIRCUIT COURTS & THE APPLICATION OF THE TERRORISM ENHANCEMENT PROVISION, Southern Illinois University Law Journal <https://law.siu.edu/_common/documents/law-journal/articles-2017/fall2017/9%20-%20Wassenberg%20%20-%20sm.pdf> (accessed 2 Apr 2022)

Since the critique against the imposition of the terrorism enhancement focuses on its application to defendants convicted only of nonviolent acts of material support, the remainder of this discussion will focus on the sentences imposed in the three cases in which the defendants were only convicted of non-violent acts of material support—U.S. v. Chandia, U.S. v. Mohamed, and U.S. v. Ali. Among these three cases, sentences ranged from a high of 240 months in the Ali case to a low of 144 months in the Mohamed case. As discussed earlier in this paper, Chandia received a sentence of 180 months. It is important to note Mohamed’s sentence of 144 months fell within the range permitted by the Guidelines for a material support conviction without the addition of the terrorism enhancement. Chandia’s sentence of 180 months is above the range for a material support conviction without the enhancement but below the bottom number of months recommended with the terrorism enhancement, 210 months. Ali’s sentence of 240 months, the most severe sentence among the three cases, falls toward the upper end of the range specified with the imposition of the terrorism enhancement.

Not only are some convicted “terrorists” not violent, some of them might not really even be deserving to be called criminals

Prof. George D. Brown 2014. (Professor of Law, Boston College Law School) CORNELL JOURNAL OF LAW AND PUBLIC POLICY, PUNISHING TERRORISTS: CONGRESS, THE SENTENCING COMMISSION, THE GUIDELINES, AND THE COURTS (accessed 2 Apr 2022) https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1930&context=lsfp

After an initial flirtation with such alternatives as military tribunals and “national security courts,” the political system has settled on the Article III courts as the forum in which domestic terrorists will be tried as criminals under existing criminal statutes. Yet, when it comes to punishing those who have been found guilty, or who have pleaded guilty, courts send mixed messages. The problem is particularly acute in the case of “preventive prosecutions.” These somewhat problematic prosecutions involve defendants who have not yet committed, or attempted to commit, classic acts of terrorism such as attacking public buildings and events. Thus, rather than committing an act of terrorism, the defendants in these cases seem to have been preparing themselves to be the sort of person who would commit such acts. They are guilty of such actions as receiving military training, usually abroad, taking an “oath” to support a terrorist organization, and discussing (both generally and specifically) acts of terrorism. Treating such persons as “criminals” raises difficult questions. How to punish them raises others.

2. Very few terrorism cases (and even fewer with any impact)

977 federal terrorism prosecutions between 9/11/2001 and 2021. = average of 49 per year. Most were non-violent

THE INTERCEPT 25 Jan 2022 (Database compiled by journalists Trevor Aaronson and Margot Williams) “Trial and Terror” <https://trial-and-terror.theintercept.com/> (accessed 2 Apr 2022)

Since the 9/11 attacks, most of the 977 terrorism defendants prosecuted by the U.S. Department of Justice have been charged with material support for terrorism, criminal conspiracy, immigration violations, or making false statements — vague, nonviolent offenses that give prosecutors wide latitude for scoring quick convictions or plea bargains.

Very few of those charged with “terrorism” actually had the means or opportunity to hurt anyone

THE INTERCEPT 25 Jan 2022 (Database compiled by journalists Trevor Aaronson and Margot Williams) “Trial and Terror” <https://trial-and-terror.theintercept.com/> (accessed 2 Apr 2022)

Today, 358 people charged with terrorism-related offenses are in custody in the United States, including 57 defendants who are awaiting trial and remain innocent until proven guilty. Very few terrorism defendants had the means or opportunity to commit an act of violence. The majority had no direct connection to terrorist organizations. Many were caught up in FBI stings, in which an informant or undercover agent posed as a member of a terrorist organization. The U.S. government nevertheless defines such cases as international terrorism.

3. Real threat is elsewhere

Domestic extremist groups, whose actions are not legally classified as “terrorism,” are much more threat than “terrorism”

NEW YORK TIMES 2020. (journalist Neil MacFarquhar) As Domestic Terrorists Outpace Jihadists, New U.S. Law Is Debated 25 Feb 2020 <https://www.nytimes.com/2020/02/25/us/domestic-terrorism-laws.html> (accessed 2 Apr 2022)

When the New Jersey Office of Homeland Security and Preparedness issued its terrorism threat assessment for 2020 last week, it noted a marked shift. The threat level from violent, homegrown extremists, and specifically white supremacists, was marked in red as the top category: “High.” The threat from the Islamic State, Al Qaeda and their ilk was demoted to third, in green: “Low.” Terrorism experts believe that holds true for the entire United States. “In the U.S., more people are killed by far-right extremists than by those who are adherents to Islamist extremism,” said Mary McCord, a Georgetown University law professor and a former senior Justice Department official for national security. Her comments came at a discussion last week at the 9/11 Memorial and Museum, which commemorates victims of the most notorious attack by international terrorists on American soil. Even as the menace from homegrown extremists grows more explicit, however, law enforcement is wrestling with how to combat it. That challenge has spawned a fervent debate over whether the United States needs a new law to specifically criminalize domestic terrorism, or whether such a statute would threaten basic First Amendment rights. Proponents argue that a domestic terrorism law would streamline and clarify the patchwork of charges now used against homegrown extremists, charges that often avoid even mentioning terrorism.

4. Miniscule threat from terrorism

More likely to be killed by your furniture than by a terrorist

WASHINGTON POST 2015. (journalist Andrew Shaver) 23 Nov 2015 You’re more likely to be fatally crushed by furniture than killed by a terrorist <https://www.washingtonpost.com/news/monkey-cage/wp/2015/11/23/youre-more-likely-to-be-fatally-crushed-by-furniture-than-killed-by-a-terrorist/> (accessed 2 Apr 2022)

You, your family members, your friends, and your community are all significantly more at risk from a host of threats that we usually ignore than from terrorism. For instance, while the Paris attacks left some 130 people dead, [roughly three times that number of French citizens died](http://ec.europa.eu/eurostat/statistics-explained/index.php/Causes_of_death_statistics) on that same day from cancer. In the United States, an individual’s likelihood of being hurt or killed by a terrorist (whether an Islamist radical or some other variety) is negligible. Consider, for instance, that since the attacks of Sept. 11, 2001, Americans have been no more likely to die at the hands of terrorists than being [crushed to death by unstable televisions and furniture](http://blogs.cfr.org/zenko/2012/02/24/america-is-a-safe-place/). Meanwhile, in the time it has taken you to read until this point, at least one American has [died from a heart attack](http://www.cdc.gov/dhdsp/data_statistics/fact_sheets/docs/fs_heart_disease.pdf). Within the hour, a fellow citizen will have [died from skin cancer](http://health.usnews.com/health-news/articles/2012/05/23/1-in-5-americans-will-get-skin-cancer-will-it-be-you). Roughly five minutes after that, [a military veteran will commit suicide](http://www.reuters.com/article/2013/02/02/us-usa-veterans-suicide-idUSBRE9101E320130202). And by the time you turn the lights off to sleep this evening, [somewhere around 100 Americans will have died throughout the day in vehicular accidents](http://www.webmd.com/news/20050202/most-dangerous-day-to-drive) – the equivalent of “a plane full of people crashing, killing everyone on board, every single day.” Daniel Kahneman, professor emeritus at Princeton University, [has observed](https://books.google.com/books?hl=en&lr=&id=SHvzzuCnuv8C&oi=fnd&pg=PP2&dq=thinking+fast+and+slow&ots=NRslLE4hHE&sig=N54AshuY8DKNmSaWBSbqgpnUdFQ#v=onepage&q=thinking%20fast%20and%20slow&f=false) that “[e]ven in countries that have been targets of intensive terror campaigns, such as Israel, the weekly number of casualties almost never [comes] close to the number of traffic deaths.” No one in the United States will die from ISIS’s —or anyone’s — terrorism today.

DISADVANTAGES

1. Unjustly harsh sentences for non-violent offenders

Life sentence for “all” terrorism-related convictions would be unjust because some non-violent terrorism related sentences even today are too harsh

Prof. Pinky Wassenberg 2017. (Professor of Political Science and Legal Studies, University of Illinois at Springfield. Ph.D., Washington State University; J.D., Lewis and Clark School of Law) U.S. CIRCUIT COURTS & THE APPLICATION OF THE TERRORISM ENHANCEMENT PROVISION, Southern Illinois University Law Journal <https://law.siu.edu/_common/documents/law-journal/articles-2017/fall2017/9%20-%20Wassenberg%20%20-%20sm.pdf> (accessed 2 Apr 2022)

As mentioned above, critics of the terrorism enhancement argue the magnitude of the upward departure leads to disproportionate sentences in cases where defendants are convicted of conspiracy to provide material support to foreign terrorist organizations. Under the Guidelines, the base level offense for “Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose” is at least a level twenty-six. A defendant convicted of an offense with a base level twenty-six is eligible for a sentence of from 63 to 150 months imprisonment. The addition of the terrorism enhancement would increase the potential sentence to from 210 to 262 months.

Terrorism definition is vague: Some non-violent offenders who weren’t directly involved still get convicted of “terrorism”

Prof. George D. Brown 2014. (Professor of Law, Boston College Law School) CORNELL JOURNAL OF LAW AND PUBLIC POLICY, PUNISHING TERRORISTS: CONGRESS, THE SENTENCING COMMISSION, THE GUIDELINES, AND THE COURTS (accessed 2 Apr 2022) https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1930&context=lsfp

The issue of intent gets a little harder if a defendant’s offense of conviction is not a federal crime of terror at all, but is “intended to promote” one. We are now dealing with three apparent intent requirements: the intent to commit the crime of conviction; the intent to promote a further crime; and the “calculated” element of that second crime. It makes sense to read intention to promote more broadly than involvement,147 even though the result can be application of the terrorism enhancement to conduct that is not a federal crime of terror.148 One might conclude that the calculated requirement is satisfied by the future intent of others—whose future crime has already been imputed to the defendant—or one can say that by intending to promote the future crime which would affect government conduct, the defendant simultaneously intended that effect. Either way, the terrorism enhancement casts a “broad net.”

2. Lost bargaining chip

Link: AFF removes all discretion for any reason for anyone charged with terrorism

That means prosecutors can’t make deals for lighter sentences in exchange for cooperation.

Link: Small-time offenders connected to terrorist organizations can be given light sentences if they rat out the big guys

THE INTERCEPT 25 Jan 2022 (Database compiled by journalists Trevor Aaronson and Margot Williams) “Trial and Terror” <https://trial-and-terror.theintercept.com/> (accessed 2 Apr 2022)

A large proportion of the defendants who did have direct connections to terrorist groups were recruited as informants or cooperating witnesses and served little or no time in prison. At present, there have been 34 such cooperators. By contrast, many of the 350 defendants caught up in FBI stings have received decades in prison because they had no information or testimony to trade. They simply didn’t know any terrorists.

Impact: Bad guys get away. Informant testimony in exchange for lighter sentencing is key to prosecuting terrorists

United Nations Office on Drugs and Crime 2009. “Handbook on Criminal Justice Responses to Terrorism” <https://www.unodc.org/documents/terrorism/Handbook_on_Criminal_Justice_Responses_to_Terrorism_en.pdf> (accessed 2 Apr 2022)

Because of the importance of “accomplice testimony” in cases involving terrorism, plea bargaining and offers of immunity or leniency often play a crucial role in the gathering of evidence and the successful prosecution of these cases. Therefore, in practice, witness protection measures, as a means of eliciting cooperation from criminal informants, are intertwined with other measures such as plea bargaining, immunity from prosecution and reduced sentences.