

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,)
 Plaintiff,)
) Criminal No. 01-455-A
v.)
)
ZACARIAS MOUSSAOUI,)
 Defendant.)

MEMORANDUM OPINION

In his Motion to Strike Notice of Intent to Seek Sentence of Death as to Counts 1 and 2 (Docket #1314), the defendant argues that the plain language of two statutes that he has admitted conspiring to violate, 18 U.S.C. § 2332b (Acts of terrorism transcending national boundaries) and 49 U.S.C. § 46502 (Aircraft piracy), do not provide for the death penalty to be imposed for the act of conspiring.¹ Defendant's argument necessarily focuses on the text of these two statutes.

When construing a statute, the Court must first examine the plain language of the statute. Duncan v. Walker, 533 U.S. 167, 172 (2001). The Court will consider other evidence of Congressional intent in passing the law only if the statute, on

¹Counts 3 and 4 of the indictment charges the defendant with conspiracy to destroy aircraft in violation of 18 U.S.C. §§ 32(a)(7) & (34) and conspiracy to use weapons of mass destruction in violation of 18 U.S.C. § 2332a(a) respectively. The defendant does not dispute that his convictions under these statutes expose him to the death penalty. Accordingly, the resolution of this motion does not change the need for a sentencing trial.

its face, is ambiguous. Similarly, the Court will only apply the "rule of lenity," which requires the Court to adopt a criminal defendant's proposed statutory interpretation, if the language of the statute and all other evidence of Congressional intent leave the Court with the belief that the statute is "grievously ambiguous." Staples v. United States, 511 U.S. 600, 632 n.17 (1994).

I. Count 1 - 18 U.S.C. § 2332b

Title 18 U.S.C. § 2332b defines the crime of "Acts of terrorism transcending national boundaries." Defendant's motion focuses on two parts of the statute. Subparagraphs (a)(1)(A) and (B)² define the specific conduct that constitutes "acts of

²18 U.S.C. § 2332b(a):

(a) Prohibited acts.--

(1) Offenses.--Whoever, involving conduct transcending national boundaries and in a circumstance described in subsection (b)--

(A) kills, kidnaps, maims, commits an assault resulting in serious bodily injury, or assaults with a dangerous weapon any person within the United States; or

(B) creates a substantial risk of serious bodily injury to any other person by destroying or damaging any structure, conveyance, or other real or personal property within the United States or by attempting or conspiring to destroy or damage any structure, conveyance, or other real or personal property within the United States;

in violation of the laws of any State, or the United States, shall be punished as prescribed in subsection(c).

(2) Treatment of threats, attempts and conspiracies.--Whoever threatens to commit an offense under paragraph (1),

terrorism transcending national boundaries," with paragraph (a) (2) making clear that one who conspires to commit any of the acts prohibited by § 2332b(a) (1) (A) "shall be punished under subsection (c)."³ At issue in defendant's motion as to Count 1 is which clause within subsection (c) should determine the defendant's punishment in this case.

The defendant argues that he should be sentenced according to subparagraph (c) (1) (F), which provides that the punishment for "attempting or conspiring to commit an offense" is "any term of

or attempts or conspires to do so, shall be punished under subsection (c).

³18 U.S.C. § 2332b(c):

(c) Penalties.--

(1) Penalties.--Whoever violates this section shall be punished--

(A) for a killing, or if death results to any person from any other conduct prohibited by this section, by death, or by imprisonment for any term of years or for life;

(B) for kidnapping, by imprisonment for any term of years or for life;

(C) for maiming, by imprisonment for not more than 35 years;

(D) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than 30 years;

(E) for destroying or damaging any structure, conveyance, or other real or personal property, by imprisonment for not more than 25 years;

(F) for attempting or conspiring to commit an offense, for any term of years up to the maximum punishment that would have applied had the offense been completed; and

(G) for threatening to commit an offense under this section, by imprisonment for not more than 10 years.

years up to the maximum punishment that would have applied had the offense been completed.” (emphasis added). Based on this language, the defendant argues that the maximum punishment for a person convicted of conspiring to commit acts of terrorism transcending national boundaries is necessarily limited to “any term of years” and that a “term of years” is necessarily a sentence of a certain number of years in prison, not a sentence of death.

The government argues in response that subparagraph (F) applies only to conspiracies not resulting in death, and that because defendant plead guilty to a conspiracy resulting in death, defendant should be sentenced according to subparagraph (c) (1) (A), which provides as penalties “death, or [] imprisonment for any term of years or for life.” The question that this Court must now resolve is how to read subparagraphs (c) (1) (A) and (c) (1) (F) together.

The plain language of the statute leads the Court to conclude that Congress intended that a defendant convicted of a conspiracy resulting in death under 18 U.S.C. § 2332b(a) (2) be sentenced pursuant to subparagraph (c) (1) (A) rather than subparagraph (c) (1) (F). Subparagraph (c) (1) (A) authorizes the death penalty not only when a defendant is convicted of killing, but also “if death results to any person from any other conduct prohibited by this section.” (emphasis added). Obviously, a

conspiracy to commit the acts prohibited under § 2332b(a) (1) (A) constitutes "other conduct prohibited by this section." If Congress had intended for subparagraph (A) not to apply to conspiracies, it could have drafted the statute to read, "if death results to any person from any other conduct prohibited by paragraph (a) (1) of this section." Such language would not have made the text unduly complicated or confusing, and would have compelled the conclusion sought by the defendant, that is, that one convicted under this statute of a conspiracy resulting in death, even though it involved conduct prohibited by paragraph (a) (2) of § 2332b, could not be sentenced to death under subparagraph (c) (1) (A). However, Congress did not use such language. By using the more general formulation "by this section," Congress clearly extended the death penalty to conspiracies to violate the statute. This conclusion is further supported by the statute's numerous internal references to particular "subsections," "paragraphs," and "subparagraphs."⁴ This precise draftsmanship establishes that if Congress had wanted to limit the death sentence only to those convicted of violating paragraph (a) (1), it certainly knew how to express that

⁴See, e.g., 18 U.S.C. § 2332b(a) (2) ("Whoever threatens to commit an offense under paragraph (1)"); 18 U.S.C. § 2332b(b) (2) ("if at least one of the circumstances described in subparagraphs (A) through (F) of paragraph (1) is applicable"); 18 U.S.C. § 2332b(b) (1) ("The circumstances referred to in subsection (a) are").

limitation. Based both on the structure and text of the statute, the Court concludes that subparagraph (c)(1)(A) extends the death penalty to conspiracies that result in death. For these reasons, the defendant's motion will be denied as to Count 1.

II. Count 2 - 49 U.S.C. § 46502

Title 49 U.S.C. § 46502 describes the crime of aircraft piracy. The portion of § 46502(a) relevant to defendant's motion provides that:

(2) An individual committing or attempting or conspiring to commit aircraft piracy-

(A) shall be imprisoned for at least 20 years; or

(B) ... if the death of another individual results from the commission or attempt, shall be put to death or imprisoned for life.

49 U.S.C. § 46502(a). The defendant argues that although paragraph (2) prohibits "committing or attempting or conspiring to commit aircraft piracy," subparagraph (2)(B) explicitly provides for a death sentence only if death resulted "from the commission or attempt," with no reference to conspiracy. The defendant argues that this omission of any reference to conspiracy in subparagraph (2)(B) indicates that Congress did not intend for a person convicted of conspiracy to commit aircraft piracy to be eligible for the death penalty.

The government responds to the defendant's straight-forward, literal reading of the statutory text by arguing that "the commission" in subparagraph (B) should be interpreted to include

commission of conspiracy, and that, "On its face, therefore, Section 46502 makes a death sentence the maximum penalty for any conspiracy to commit aircraft piracy the commission or attempted commission of which...resulted in death." (Gov.'s Opp'n to Def.'s Mot. To Strike at 5). This interpretation unnecessarily muddles Congress's choice of words in the statute. That Congress intended the word "commission" to refer in paragraph (a)(2) to the commission of aircraft piracy, but in (a)(2)(B) to the commission of conspiracy to commit aircraft piracy, is unlikely. It is more reasonable to presume that Congress intended that the same word, used in the same sentence, would have the same meaning - commission of aircraft piracy. See Reves v. Earnst & Young, 507 U.S. 170, 177 (1993) ("The word 'conduct' is used twice [once as a verb and once as a noun], and it seems reasonable to give each use a similar construction.").

In addition, the government's interpretation of "commission" would eliminate the need for the phrase "the commission or attempt." If "commission" includes commission of conspiracy to commit aircraft piracy, why would "commission" not also encompass the commission of attempt to commit aircraft piracy? If the word "commission" were indeed intended to take on this broader definition, there would have been no need for Congress to include the word "attempt" in subparagraph (2)(B). The Court therefore concludes that in the phrase "if the death of another individual

results from the commission or attempt," the "commission" means the commission of aircraft piracy and "attempt" means the attempted commission of aircraft piracy.

Alternatively, the government argues that, "Congress omitted the word conspiracy from subsection (a)(2)(B) as a means of confining death sentences only to those conspiracies that have been carried out to commission, or attempted commission, and that include, moreover, an act resulting in death during the commission or attempted commission." (Gov.'s Opp'n to Def.'s Mot. To Strike at 5-6). That interpretation is not supported by either the statutory language or any legislative history.

Lastly, the government argues that Congress must have intended to expose defendants convicted of conspiracy to commit air piracy resulting in death to the death penalty because to find otherwise would result in the statute providing no statutory maximum for such conspirators. This argument would be persuasive if the statute provided a statutory maximum for all of the other crimes defined therein. The statute, however, contains no maximum punishment for defendants convicted of committing, attempting, or conspiring to commit aircraft piracy when the death of another person does not result. It only sets a minimum sentence. Thus, a desire to ensure that all defined crimes have a statutory maximum cannot be inferred from the language of this statute. Because such an intent cannot be inferred, the plain

language of the statute, which omits any mention of conspiracy in subparagraph (2) (B), must control.

The legislative history supports the Court's conclusion. The legislative history of this statute reveals that the "or conspiring" language was added to paragraph (a) (2) as part of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The House Conference Report that summarized the bill stated, with respect to this section,

Adding the conspiracy language to these criminal statutes will enable the government to prosecute and punish those offenders appropriately. Without a conspiracy element in the statutory language, the government must rely on title 18, United States Code, section 371, to prosecute conspiracies generally. Section 371 only carries a five year statutory maximum penalty, even if the underlying offense requires a much higher penalty. This section corrects this anomaly.

H.R. Rep. No. 104-518, at 122 (1996) (Conf. Rep.). Thus, the statute as originally written did not apply to conspiracies at all. In 1996, Congress decided to add the words "or conspiring" to 49 U.S.C. § 46502(a) (2) in order to increase the penalty that defendants convicted of conspiracy to commit aircraft piracy would face.

Although the legislative history demonstrates a clear intention on the part of Congress to increase the penalties for conspiracy to commit aircraft piracy, it does not demonstrate an intent to subject defendants convicted of such conspiracies to the death penalty. Inclusion of conspiracy in 49 U.S.C. §

46502(a)(2) raised the penalty for such conspiracies from a statutory *maximum* of five years imprisonment to a statutory *minimum* of twenty years imprisonment. Congress could certainly have thought that this change alone would “enable the government to prosecute and punish those offenders appropriately.” H.R. Rep. No. 104-518. This interpretation of Congressional intent is supported by the fact that Congress did not, at the time it amended paragraph (a)(2) to include conspiracy, also add the words “or conspiracy” to subparagraph (2)(B). Although the failure to add “or conspiracy” to subparagraph (a)(2)(B) could have been an oversight on the part of Congress, this Court instead presumes that Congress has chosen its words purposefully and intentionally.

Finally, two additional principles of statutory interpretation counsel against adopting the government’s interpretation. First, the rule of lenity requires that, “when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.” United States v. Bass, 404 U.S. 336, 347-48 (1971) (quoting United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22 (1952)). It is clear from our review of the statutory text and the circumstances surrounding the addition of conspiracy to this

section that Congress has not spoken in language that is “clear and definite” with regard to whether persons convicted of conspiracy to commit aircraft piracy may be sentenced to death. To the extent that the text and legislative history may be characterized as ambiguous, the rule of lenity requires that the Court reject the “harsher alternative,” in this case, death eligibility.

Second, the Supreme Court has recognized that questions of statutory interpretation sometimes implicate constitutional limitations on Congressional power. When this situation occurs, courts are inclined to require a clear and definite statement of Congressional intent.⁵ The Supreme Court has recognized that the Eighth Amendment’s prohibition against cruel and unusual punishment places limits on Congress’s power to subject defendants to the death penalty. Congress is undoubtedly aware of these limitations, and has crafted its legislation accordingly. The Supreme Court has also held that the penalty of death is qualitatively different than a term of imprisonment. “Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.” Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Given this

⁵See, e.g., United States v. Bass, 404 U.S. 336, 349 (1971) (“unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance”).

monumental difference, the wording of the statute at issue, and the lack of a clear intent on the part of Congress to subject defendants convicted of conspiracy to commit aircraft piracy, even where the conspiracy results in death, to a possible death sentence, this Court finds that the defendant cannot be exposed to the death penalty under this statute.

For these reasons, the defendant's Motion to Strike Notice of Intent to Seek Sentence of Death as to Count 2 will be granted by an Order to be issued with this opinion.

Entered this 3rd day of February, 2006.

/s/

Leonie M. Brinkema
United States District Judge

Alexandria, Virginia