

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FILED

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UNITED STATES OF AMERICA,)
)
V.)
)
ERIC ROBERT RUDOLPH,)
)
)
Defendant.)

CR 00-S-422-S

COURT
ALABAMA

**DEFENDANT’S MOTION TO DISMISS COUNT ONE
AND/OR STRIKE THE DEATH NOTICE AND
RESTRICT SENTENCING PROVISIONS TO THOSE
PROVIDED UNDER THE FREEDOM OF ACCESS TO CLINIC ACT**

COMES NOW defendant, Eric Robert Rudolph, by and through counsel, and
moves this court to dismiss count one of the indictment, or alternatively to strike the death
notice and limit the sentencing options to those permitted under 18 U.S.C. §248(a)(3).

I. Introduction

Count One of the indictment alleges a violation 18 U.S.C. §844(i) (hereinafter, the
“Anti-Arson Act”). A violation of the Anti-Arson Act carries the possible imposition of
the death penalty.¹ However, the provision of Title 18 which Congress intended to punish
the bombing of a health clinic resulting in death or injury - the conduct alleged in Count

¹ 18 U.S.C. § 844(i) provides in relevant part:

“Whoever maliciously damages or destroys, or attempts to damage or
destroy, by means of fire or an explosive, any building, vehicle, or other real or
personal property *used in interstate or foreign commerce or in any activity
affecting commerce* shall be imprisoned for not less than 5 years and not more
than 20 years, fined under this title, or both; . . . and if death results to any person,
including any public safety officer performing duties as a direct or proximate
result of conduct prohibited by this subsection, shall also be subject to
imprisonment for any term of years, or to the death penalty or to life
imprisonment.”



One - is 18 U.S.C. §248(a)(3), the “Freedom of Access to Clinic Entrances Act” (hereinafter, the “FACE Act”), a violation of which carries a maximum penalty of life imprisonment only.² The government’s selection of the Anti-Arson Act, 18 U.S.C. §844(i), rather than the more specific FACE Act, 18 U.S.C. §248(a)(1), violates (a) the separation of powers doctrine set forth in the United States Constitution, (b) the legislative intent embodied in the FACE Act, and (c) accepted rules of statutory construction. For those reasons, Count One of the indictment must either be dismissed or, in the alternative, the penalty which Mr. Rudolph faces, if convicted, must be limited to that set forth in the FACE Act - any term of years or life imprisonment.

II. Separation of Powers

Article I, §1 of the United States Constitution provides that “[a]ll legislative powers herein granted shall be vested in a Congress of the United States.” U.S. Const. Art. I. §1. Under Article II, §3, the Executive branch of government is limited to “take care that the laws be faithfully executed.” Pursuant to these sections of the Constitution, the Supreme Court has repeatedly emphasized that the power to define what constitutes a crime and to determine the appropriate punishment is exclusively under the purview of Congress. *Ex Parte United States*, 242 U.S. 27, 42 (1916) (it is “indisputable” that “the

² 18 U.S.C. §248(a)(1) and (b) provide in relevant part:

“Whoever by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services ... and if death results, it shall be for any term of years or for life.”

authority to define and fix the punishment for crime is legislative”); *Gore v. United States*, 357 U.S. 386, 393 (1958) (“whatever views may be entertained regarding the severity of punishment, whether one believes in its efficacy or its futility ... these are peculiarly questions of legislative policy”).

Since the inception of our nation, the separation of powers has been seen as crucial to protecting individual liberty and our democratic system. The “accumulation of all powers of legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed or elective, may justly be pronounced the very definition of tyranny.” *Federalist No. 47*, p.324 (J. Cooke ed. 1961) (J. Madison). “Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.” *Clinton v. City of New York*, 524 U.S. 417, 450 (1998)(Kennedy, J., concurring). “It remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another.” *Loving v. United States*, 517 U.S. 748, 757 (1996). Although it may sometimes seem appealing and even immediately beneficial for one branch of government to cross into another’s allocated powers, such a desire that must be resisted. *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983) (“The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted”).

When evaluating whether one branch of government is acting within its constitutionally defined boundaries, the Supreme Court has isolated two ways through which that branch may overstep its authority. First, “[o]ne branch may interfere

impermissibly with the other's performance of its constitutionally assigned function.” *Chadha*, 462 U.S. at 963 (Powell, J., concurring). Secondly, “the doctrine may be violated when one branch assumes a function that more properly is entrusted to another.” *Id.* “Where one branch has impaired or sought to assume a power central to another branch, the Court has not hesitated to enforce the doctrine” of separation of powers. *Chadha*, 462 U.S. at 962-963. Moreover, “[e]ven when a branch does not arrogate power to itself ... the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.” *Loving v. United States*, 517 U.S. 748, 757 (1996).

In this case, the prosecution has violated the separation of powers in both of the ways the Supreme Court has proscribed. The prosecution has abrogated its Constitutional duty to only ensure that the laws of the United States be faithfully executed. Furthermore, the prosecution has usurped the Congressional power to define what specific conduct constitutes a particular criminal activity and determine the appropriate sentence for that particular criminal activity. Both the text and legislative history of the FACE Act establish (1) that Congress intended for the FACE Act to provide the sole federal penalties for the very criminal activity with which Mr. Rudolph is charged, and (2) that the commission of this type of criminal activity does not warrant the imposition of the death penalty³.

³ It is significant that in the same year that Congress enacted the FACE Act, it also enacted the Federal Death Penalty Act of 1994. Under the Death Penalty Act, “[i]f no aggravating factor set forth in section 3592 is found to exist, the court shall impose a
(continued...)

The FACE Act specifically prohibits activity which, “intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services.” 18 U.S.C. §248(a)(3). It is beyond doubt that a bombing would facially constitute an activity that “intentionally damages or destroys.” Further, Congress specifically foresaw FACE as covering incidences where death results because the very language of the act states the penalty “if death results” from such activities: the punishment shall be from any term of years to life imprisonment. 18 U.S.C. §248(b)(2). Therefore, the very text of this legislation makes it clear that the intent of Congress was to punish violence, e.g., bombings at abortion clinics, including incidences in which a person was killed, according to the punishments prescribed in the FACE Act.⁴

Moreover, in addition to the text, the legislative history of the FACE Act

³(...continued)

sentence other than death authorized by law.” 18 U.S.C. § 3593 (d). Section 3592(c)(1) sets forth as an aggravating factor that the death occurred during the commission of twenty specified federal crimes, including section 844(d) (transportation of explosives in interstate commerce for certain purposes), section 844(f) (destruction of Government property by explosives), section 844(i) (destruction of property affecting interstate commerce by explosives), and section 2332a (use of weapons of mass destruction). Conspicuously absent from this list is a violation of the FACE Act.

⁴ The "Congressional Statement of Purpose" advises that the FACE legislation is

“to protect and promote the public safety and health and activities affecting interstate commerce by establishing Federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services.”

See Section 2 of Pub. L 103-259.

demonstrates that Congress intended for abortion clinic bombings to be tried and sentenced under the FACE Act. Indeed, a key focus of the congressional debate was the adequacy of existing federal law, with some members of Congress maintaining that statutes such as §844(i) were adequate and others urging they were not. Obviously, the latter argument prevailed.

The legislative history is replete with the purpose of the bill. It is explicit that the purpose of the legislation "is to prevent the use of blockades, violence, and other forceful or threatening tactics against medical facilities and health care personnel who provide abortion related services, and provide appropriate criminal penalties and civil remedies for such conduct when it occurs." S. Rep. No. 103-117, at 1 (1993) (emphasis added). Finding that "[t]he laws currently in place at the Federal, State and local levels have proved inadequate," S. Rep. No. 103-117, at 13 (1993), Congress passed the FACE Act to curb violence against abortion clinics, including bombings and murder. "Examples of damage or destruction of clinic property (or property of a building which a clinic is located) prohibited by §271(a)(2) would include arson fires, bombings, firebombings, chemical attacks, and other forms of vandalism, if committed because the targeted facility provides abortion related services." S. Rep. No. 103-117 at 17 (1993)(emphasis added). *See also*, 140 Cong. Rec. H. 3116, 3118 (1993) (statement of Rep. Maloney: "We need this Freedom of Access bill because throughout our country, there continues to be bombings, assaults, threats, and even murders by people trying to prevent people from working in or using medical facilities which offer reproductive health services")

(emphasis added); 140 Cong. Rec. H. 3116, 3125 (1993) (statement of Rep. Schumer: “Rather, [a vote for the FACE Act] is a vote to stop the rapidly spreading pattern of grotesque and deadly violence against innocent women, innocent doctors, innocent nurses, and innocent workers at health facilities all across the nation. That is what this bill is about, stopping violence, plain and simple and nothing else. It is about the shooting and murder of Dr. David Gunn in Florida in March 1993. It is about the shooting and bodily injury of Dr. George Tiller in Kansas in August 1993. It is about the 33,000 incidents of violence, death threats, bomb threats, actual bombings, actual deaths, actual arson and actual murder that have occurred since 1997”) (emphasis added); 140 Cong. Rec. S. 5595, 5605 (1993) (statement of Sen. Campbell: “The FACE bill addresses attempted murder and murder, bombings, arson, vandalism and other violent acts”)(emphasis added); 140 Cong. Rec. S. 5595, 5603-4 (1993) (statement of Sen. Feinstein: “[The FACE Act] is a bill whose time has come and whose need has clearly been substantiated. In the last few years, and especially this past year, there has been a disturbing trend of increasing violence at family planning clinics across the country – threatening letters sent to doctors, patients blocked from safe access to clinics, clinics invaded or sprayed with toxic chemicals, clinics even burned to the ground and doctors shot and killed”).

The Department of Justice itself seems to have agreed that existing federal law was inadequate to remedy the problem of violence at abortion clinics. In addressing the Senate Appropriations Committee one year after passage of the FACE Act, then Deputy

Attorney General Jamie Gorelick testified when it appeared that “federal law was inadequate to address fully the problem” of the “plague of violence” that affected health clinics, Attorney General Reno instructed DOJ staff to work with Congress “to produce a new law” and that through those efforts “FACE was passed and signed into law.” *See* 1995 WL 293591 (statement of Deputy Attorney General Jamie S. Gorelick before the Senate Appropriations, Labor, Health and Human Services, Education, and Related Agencies, May 11, 1995).

A rule of construction in the FACE Act does provide that “[n]othing in this section should be construed to provide exclusive criminal penalties or civil remedies with respect to conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies.” 18 U.S.C. §248(d)(3). However, the legislative history illuminates this provision to make it clear that this rule of construction is meant only to not preclude action by the states. In the original Senate bill, this rule of construction read that nothing in the FACE Act would be construed to “provide exclusive authority to prosecute, or exclusive penalties for, acts that may be violations of this section and that are violations of other Federal law.” S. Rep. 103-117, at 34 (1993). Subsequently, the language indicating that one could be prosecuted under other federal laws was explicitly abandoned, and that rule of construction was replaced by the current language of 18 U.S.C. §248(d)(3). Although this dramatic shift in language is in itself enough to evince that Congress intended the FACE Act to provide the sole federal criminal penalties at the time of the bill’s passage, the legislative history also supports the

this conclusion. In the House Report, Congress explains the purpose of this rule of construction:

“Subsection 248(e) makes clear that the Act is not meant to preempt either State legislation or action with regard to reproductive health, nor to limit the remedies that may be sought by individuals aggrieved by the prohibited conduct under State law.”

H. Rep. 103-306, at 11. By specifically mentioning the non-preclusion of state action, while purposefully abandoning the language of non-preclusion of federal action, Congress clearly stated that its intent at the time of passage of the FACE Act was for the Act to provide the sole federal penalties for abortion clinic bombings. Were it Congress’s intent to allow prosecution under either (or both) the FACE Act and the Anti-Arson Act, which was passed long before the enactment of the FACE Act, Congress would not have discarded, and thereby rejected, the previous language that specifically stated that the FACE Act was not to prevent other federal prosecutions.

Therefore, both the text and the legislative history of the FACE Act make it plain that Congress intended the crime with which Mr. Rudolph is charged to be prosecuted and sentenced exclusively under the FACE Act on the federal level. The text of the Act covers the allegations in question, and the legislative history shows that Congress foresaw abortion clinic bombings and murder as criminal actions that would be prosecuted under the FACE Act.

Indicting Mr. Rudolph under the Anti-Arson Act violates separation of powers by both impermissibly interfering with Congress’s ability to perform its constitutionally delegated duties, *Chadha*, 462 U.S. at 963 (Powell, J., concurring), and by assuming a

power that is “more properly is entrusted to another” branch. *Id.* The prosecution in this case has supplanted its own view for the judgment of our elected officials of what activity constitutes a specifically defined crime and what the appropriate penalty for that crime. While the Department of Justice may find an indictment of Mr. Rudolph under the Anti-Arson Act convenient and desirable, the FACE Act does not provide the government any option or opportunity to seek death as a sentence here.

III. Rules of Statutory Construction

Count One of the indictment also stands in opposition to well established rules of statutory construction. First, it is a long held canon of statutory interpretation that “a specific statute controls over a general one ‘without regard to priority of enactment.’” *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) (quoting *Townsend v. Little*, 109 U.S. 504, 512 (1883)); *see also*, *Busic v. United States*, 446 U.S. 398, 406 (1980) (“A more specific statute will be given precedence over a more general one, regardless of their temporal sequence”); *Preiser v. Rodriguez*, 411 U.S. 475, 489-490 (1973), *overruled on other grounds*, *Stone v. Powell*, 428 U.S. 465 (1976) (same); *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) (“It is a basic principle of statutory construction that a specific statute...controls over a general provision”); *United States v. Beer*, 518 F.2d 168, 172 (5th Cir. 1975) (same); *United States v. Torres-Echavarria*, 129 F.3d 692, 699 (2d Cir. 1999) (same); *United States v. Ware*, 161 F.3d 414, 423 (6th Cir. 1998) (same); *United States v. Singleton*, 165 F.3d 1297, 1305 (10th Cir. 1999) (same); *United States v. Brown*, 483 F.2d 1314, 1322 (D.C. Cir. 1973) (same). As Norman

Singer, a professor at the University of Alabama School of Law, explains:

“Where one statute deals with a subject in general terms, and another deals with a part of the subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling.... These rules come into play in order to determine the intent of the legislature.”

Norman J. Singer, *Statutes and Statutory Construction* §51.05 (6th ed. 2000).

While the Anti-Arson Act criminalizes the bombing of “any building” that is “used in interstate commerce,” 18 U.S.C. §844(i), the FACE Act specifically addresses and provides the “appropriate criminal penalties,” S. Rep. No. 103-117 at 1 (1993), for the bombing of an abortion clinic. Further, these statutes cannot be “harmonized” as a violation the Anti-Arson Act resulting in death carries with it the possible imposition of the capital punishment, whereas a similar violation of the FACE Act does not. Therefore, the rule of statutory interpretation mandating that the specific statute prevail over the more general one should apply in this case, and Mr. Rudolph should be tried and, if convicted, sentenced under the specific FACE Act rather than the general Anti-Arson Act.

Furthermore, the current indictment violates the well established rule of lenity for criminal defendants. *See, United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952) (“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”); *Ladner v. United States*, 358 U.S. 169, 177-178 (1958) (“This policy of lenity means that the

Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended”); *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (“In past cases the Court has made it clear that this principle [the rule of lenity] of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose”). Far from having “clear and definite” language of Congress’s intent, *Universal C.I.T. Credit Corp.*, 344 U.S. at 221-222, to punish under the Anti-Arson Act and let the defendant possibly face a death sentence, there is every indication from the text and legislative history of the FACE Act that Congress’s intent was for the alleged conduct in this case *not* to be prosecuted and sentenced under the Anti-Arson Act.

Hence, in addition to unduly usurping the authority of Congress to both define and fix punishments for certain proscribed activities, the current indictment stands in opposition to established and enduring canons of statutory interpretation.

IV. Prosecutorial Discretion

With limited exception, the general proposition is that when an act violates more than one criminal statute, the prosecution has the discretion to choose whether to indict a defendant and choose between several specific statutes under which to indict. *See United States v. Batchelder*, 442 U.S. 114 (1979). In *Batchelder*, the Supreme Court held that, “This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against

any class of defendants.” *Id.* at 124. However, the Court’s conclusion in that case is distinguishable from the instant case. *Batchelder* did not involve a general and specific statute but rather two statutes which proscribed, in almost identical terms, the conduct for which the defendant was convicted. *Id.* at 117. *See also, United States v. Afflerbach*, 754 F.2d 866, 871-872 (10th Cir. 1985) (McKay, J., dissenting). Thus, in its ruling, the Court addressed the question of whether a prosecutor had the discretion to proceed under either section of the Omnibus Act, as opposed to the instant case where Congress specifically enacted a statute to address the precise criminal activity the government alleges, and the government ignored this statute to proceed under another which permits capital punishment.⁵

Regardless of this general rule, prosecutorial discretion cannot be permitted to intrude on the powers afforded to the legislature, namely to criminalize particular punishment and decide when certain conduct should be *death eligible*. As the Supreme

⁵ In *United States v. Beer*, 518 F.2d 168, 172 (5th Cir. 1975), the court recognized the “rule of construction that a specific statute controls over a general one,” but did not reverse the conviction under the general statute on that ground. In *United States v. Fern*, 696 F.2d 1269, 1273-1274 (11th Cir. 1983), the circuit again noted that it “expressed a preference for prosecution under specific statutes,” but declined to reverse on that ground finding that “[m]any statutes in the Criminal Code overlap, and the Government may elect the provision under which it wishes to proceed.” However, in *United States v. Tomeny*, 144 F.3d 749 (11th Cir. 1998), the court looked to whether the language of the statutes demonstrates Congressional intent that the specific preempts the general, and if not, whether the legislative history shows “clear and manifest” evidence of such Congressional intent. Here, the purpose of the FACE Act was “to protect and promote the public safety and health and activities affecting interstate commerce by establishing Federal criminal penalties threatening, obstructive and destructive conduct that is intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services.” *See*, Section 2, Pub. L. 103-259.

Court has so often recognized, “[t]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding need for reliability in the determination that death is the appropriate punishment in a specific case.” *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). *See also, Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) (“The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability”). In evaluating the possible imposition of the death penalty, the Supreme Court has held since *Furman*, “It would seem to be incontestable that the death penalty inflicted on one defendant is ‘unusual’ if it discriminates against him by reason of his race, religion, wealth, social position or class, or if it is imposed under a procedure that gives room for the play of such prejudices.” *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring), *overruled for other reasons, Gregg v. Georgia*, 428 U.S. 153 (1976). *See also, Godfrey v. Georgia*, 440 U.S. 420, 428 (1980) (“This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty”). While a prosecutor may generally have discretion to choose between statutes as per *Batchelder*, this is unequivocally not analogous in a capital case. When Congress has specifically considered a particular criminal activity and decided that it is not death eligible, as the Congress did with the passage of the FACE Act, it is a grave abuse of

prosecutorial discretion to ignore this Congressional mandate and seek the death penalty in spite of Congress's intention, as the prosecution has done in this case. Furthermore, the current indictment fails the Supreme Court's standard that there must not be a "procedure that gives room for the play" of prejudices. *Furman*, 408 U.S. at 242 (Douglas, J., concurring). If the government can simply choose to indict under the non-specific Anti-Arson Act and seek the death penalty when it chooses, while indicting under the FACE Act when it chooses not to seek death, this reflects a procedure that clearly allows the play of prejudices to enter, e.g. the sex, race, national origin, profession or purported beliefs of the defendant or the victim.

Conclusion

It is requested that this Court dismiss Count One of the indictment and/or strike the death notice and restrict sentencing provisions, should Mr. Rudolph be convicted, to those provided under the FACE Act.

Dated: September 20, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 20 day of September, 2004 a copy of the foregoing was served upon the following by facsimile and by pacing a copy of same in the United States mail, postage prepaid and properly addressed:

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